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## The position of CSOs regarding the prevention of violation of the rights of refugees during the martial law in Ukraine

### Formulation of the problem

The full-scale invasion of Ukraine by the Russian Federation and a year of aggressive war in Ukraine have further exacerbated the vulnerability of asylum seekers, refugees and persons in need of complementary protection in Ukraine. These persons are extremely vulnerable and de facto are in a legally uncertain situation when it is not safe to return to their country of origin, and their stay in Ukraine is complicated by their lack of documents, access to social and medical services, or even restrictions on free movement.

The armed aggression of the Russian Federation against Ukraine on February 24, 2022, led to mass displacement both inside the country and outside its borders. Through the granting of temporary protection in EU countries, citizens of Ukraine have received unprecedented solidarity and access to systems and services in all spheres of life. Within Ukraine, asylum seekers who fled conflicts or persecution do not have a safe home country to return to and do not have such support.

The current practice of implementing laws for the protection of persons in need of international protection in Ukraine does not offer effective access to the asylum procedure. Individuals who cannot apply for recognition as a refugee or person in need of complementary protection face fines, deportation or detention for "illegal stay". In addition, the recently adopted Law 2952-IX restricts the right to apply for protection at the border, thus violating the principle of non-refoulement under international law.

Asylum seekers and refugees face difficulties when trying to leave the territory of Ukraine in search of a safer place. Some of them cannot move freely within the country. Asylum seekers and refugees do not always have access to humanitarian aid from the state aimed at supporting war victims.<sup>1</sup>

Ukraine remains a party to the Convention Relating to the Status of Refugees of 1951 and its Protocol of 1967. In addition, Ukraine ratified the Geneva Convention relative to the Protection of Civilian Persons in Time of War, including the IV Geneva Convention of 1949. In accordance with Article 4 of the Association Agreement between Ukraine and the European Union 2014, Ukraine undertook to

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<sup>1</sup> See *Asylum Seekers and Refugees in Ukraine Addressing Protection Risks During Wartime* (2023, April 5). CF "The Right to Protection"

<https://r2p.org.ua/asylum-seekers-and-refugees-in-ukraine-addressing-protection-risks-during-wartime/?lang=en>

adhere to democratic principles, the rule of law and good governance, human rights and fundamental freedoms.

International law allows derogation from certain obligations during emergency situations (such as war), but derogation from one's obligations is allowed only to the extent that the urgency of the situation dictates, provided that such measures are not incompatible with their other obligations under international law and do not discriminate solely on the basis of race, colour, sex, language, religion or social origin.<sup>2</sup>

The primacy and importance of observing human rights is enshrined in Article 3 of the Constitution of Ukraine, which establishes that a person, his life and health, honour and dignity, inviolability and security are recognized as the highest social value in Ukraine, and the establishment and provision of human rights and freedoms is the main obligation of the state.

The full-scale aggression of the Russian Federation in Ukraine has become a challenge for the observance of human rights in Ukraine, however, even in the conditions of martial law, Ukraine must ensure dignified treatment of asylum seekers and refugees.

### **The obligation of the State to conduct a thorough examination of the applications of asylum seekers during wartime**

Article 15 of the European Convention on Human Rights of 1950 (hereinafter referred to as the Convention) allows the States - the Contracting Parties - to withdraw from their obligations under the Convention in Time of War. However, the provisions of Article 3 of the Convention, according to which no one may be subjected to torture or to inhuman or degrading treatment, are absolute and cannot be derogated from.

Although the Convention does not provide for the right to seek asylum, the expulsion of an alien may lead to a violation by the State of the requirements of Article 3 of the Convention if there are sufficient grounds to claim that the person will be at risk of being treated in violation of Article 3 of the Convention in the country of destination.

The Convention requires the State to independently and thoroughly consider any application by the asylum seeker as to whether there are good reasons to fear a real risk of treatment contrary to Article 3 of the Convention in the event of removal to the country of destination. The state is also obliged to provide a person with access to a means of legal protection, which automatically suspends the effect of a previous decision taken against him/her.<sup>3</sup>

The European Court of Human Rights (ECtHR) has already made a decision against Ukraine regarding the expulsion of a foreigner in violation of the Convention. In the recent case of *O.M. and D.S. v. Ukraine*, such a situation has been considered and found that the border control authorities had deported the applicant from Ukraine without considering her application for the need for international protection in connection with the alleged risk of ill-treatment in the Kyrgyz Republic. The ECtHR noted that since the applicant was not deported to the Kyrgyz Republic, but to a third country - Georgia - it is necessary to establish whether the state authorities of Ukraine carefully verified that the asylum procedure in Georgia provided sufficient guarantees to avoid her deportation, directly or

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<sup>2</sup> International Covenant on Civil and Political Rights, Art. 4

<sup>3</sup> *M.S.S. v. Belgium and Greece* [GC], § 293

indirectly, to the Republic of Kyrgyzstan and whether the authorities had properly assessed the risks the applicant might have faced in terms of Article 3 of the Convention.

Such an assessment should have been carried out by the state authorities of Ukraine on their own initiative, on the basis of all relevant and up-to-date information. The ECtHR came to the conclusion that in this case there is no evidence that the Ukrainian state authorities made any assessment of illegal treatment during the deportation of the applicant to Georgia. These considerations were sufficient for the ECtHR to establish that Ukraine did not fulfil its procedural obligation under Article 3 of the Convention to assess the alleged risks of being subjected to treatment contrary to Article 3 of the Convention before expelling the applicant from Ukraine. Thus, the ECtHR found that Article 3 of the Convention imposes a positive obligation on Ukraine to conduct an effective investigation of allegations of unlawful treatment, which may be relied upon by asylum seekers.

### **Recognized refugees are persons who benefit from protection under international humanitarian law**

The Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Fourth Geneva Convention, GCIV) imposes on States the obligation to ensure compliance with this Convention under all circumstances during an armed conflict. Fourth Geneva Convention is supplemented by Additional Protocol I (AP-1) of June 8, 1977. The persons protected by this Convention are those who at any time and under any circumstances find themselves, in the event of conflict or occupation, under the authority of a party to the conflict.<sup>4</sup> According to Article 73 of Additional Protocol I to the Geneva Conventions, persons who, before the start of hostilities, were considered refugees in accordance with the relevant international acts or with the national legislation of the state that granted asylum, are persons who benefit from protection in accordance with the meaning of Article IV under all circumstances and without any adverse distinction.

The parties to the armed conflict undertake to provide the civilian population, which is not adequately provided with the supplies, with relief actions which are humanitarian and impartial in character, conducted without any adverse distinction.<sup>5</sup>

Article IV of GCIV states that all protected persons who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so. The applications of such persons to leave shall be decided in accordance with regularly established procedures and the decision shall be taken as rapidly as possible.<sup>6</sup>

In general, international humanitarian law obliges Ukraine to ensure compliance with the principle of humanity, which establishes the equality of all people, and to direct protection to people in need of assistance without any distinction.

### **Provisional measures under the 1951 Refugee Convention do not remove the right to apply for protection**

Article 9 of the 1951 Convention provides for the possibility for a Contracting Party to take provisional measures in certain situations, such as war or other serious and exceptional circumstances. In order for such derogations from obligations (temporary measures) to comply with the norm of the

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<sup>4</sup> Art 4 GCIV

<sup>5</sup> Atr 70 AP-1

<sup>6</sup> Art 35 GCIV

1951 Convention, they must be evaluated according to the criteria set out in Article 9 itself, namely that the measures must be essential for the protection of national security, and that the further application of these measures are necessary for national security in relation to a specific person.

However, the preparatory materials for the 1951 Convention (travaux préparatoires) state that the provisional measures related to the refugee's freedom of movement, possession of certain electronic equipment and confiscation of property. The language of Article 9 of the 1951 Convention does not, therefore, support the idea that derogation in exceptional circumstances is permissible to all of the rights of the Convention, including the right to apply for international protection.<sup>7</sup>

Any provisional measures may be applied by Ukraine in compliance with the principle of non-refoulement and do not relieve the state of its obligation to consider cases of granting international protection on an individual basis.

### **Ukraine's obligation to harmonise its legislation with EU standards requiring individualised assessment of asylum applications**

Given Ukraine's status as a candidate for membership in the European Union, Ukraine must effectively implement the rules, standards and policies that fold EU *acquis*, including in the area of asylum. The situation with lack of access to international protection in Ukraine violates Article 41 of the EU Charter of Fundamental Rights 2000, which provides for the right of everyone to be heard before any individual measure that could affect them is taken. In accordance with Article 4 of the Qualification Directive, applications for international protection must always be examined and decided on an individual basis, in an objective and impartial manner.

The Court of Justice of the European Union has emphasised that the right to be heard also requires the authorities to pay due regard to the circumstances presented by the person concerned, to examine all relevant aspects of the individual case thoroughly and impartially and to give detailed reasons for their decision.

EU law provides for the possibility of derogation from international protection obligations in times of emergency. However, States must in any case conduct an individual case-by-case assessment before they can legitimately derogate from their obligations to provide protection on the grounds of emergency. In addition, Member States must fully comply with the non-derogable obligations set out in the ECtHR and which are consistent with the rights of the EU Charter of Fundamental Rights.

### **Civil society organisations draw attention to Ukraine's obligations under international law**

- The Ukrainian state authorities must strictly comply with Ukraine's obligations under international human rights treaties, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War and the 1977 Additional Protocols thereto, the 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto. We emphasise that in accordance with Article 9 of the Constitution of

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<sup>7</sup> UN High Commissioner for Refugees (UNHCR), UNHCR Comments on the Draft Law of Ukraine on Amendment of Certain Laws of Ukraine on the Protection of the State Border of Ukraine, November 2022, available at: <https://www.refworld.org/docid/639b185e4.html>

Ukraine, international treaties in force and ratified by the Verkhovna Rada of Ukraine are part of the national legislation of Ukraine.

- Given the European integration processes and Ukraine's candidacy for EU membership, and the need to preserve the principles and values of civil society in Ukraine, the Ukrainian authorities should effectively implement the rules, standards and policies that make up EU acquis in the field of international protection.
- We call on the Ukrainian authorities to maintain a dialogue with civil society organisations, academic communities, and experts engaged in the protection of refugees, ensure regular consultations with them and consider their recommendations when preparing or reviewing refugee-related decisions and policies.

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