



UNHCR Provisional Comments and Recommendations
On the Draft Amendments to the Law on Asylum and Refugees

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to provide its comments to the proposed amendments to the Bulgarian Law on Asylum and Refugees (LAR).
2. UNHCR has been formally mandated by the United Nations General Assembly to provide international protection to refugees and, together with governments, to seek solutions to the problem of refugees. Paragraph 8(a) of its Statute and the Preamble of the 1951 Convention relating to the Status of Refugees¹ (“the 1951 Convention”) confer responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees, whereas Article 35(1) of the 1951 Convention enjoins States Parties to cooperate with UNHCR in the exercise of its functions. UNHCR’s supervisory responsibility has been reflected in European Union (EU) law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (‘TFEU’), as well as in Declaration 17 to the Treaty of Amsterdam, which provides that ‘consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy’. The Government of the Republic of Bulgaria has agreed to uphold international refugee protection standards and to cooperate with UNHCR in the exercise of its functions and duty.
3. Pursuant to its supervisory responsibility, UNHCR would like to submit these provisional comments and recommendations on the draft amendments to the Bulgarian Law on Asylum and Refugees (LAR). **UNHCR will provide final and more detailed comments on the LAR at a later stage.**
4. UNHCR welcomes and support the efforts made by the Government of Bulgaria to revise its asylum system through the transposition of the European Union Directive 2011/95/EU² (“the Qualification Directive”) and Directive 2013/33/EU (“the Reception Conditions Directive”). This is an opportunity to ensure that the Bulgarian Asylum system is fully consistent with its obligations under International Law and in particular with the 1951 Convention. In this framework, UNHCR would like to highlight that some of existing provisions or proposed amendments could, or should, be modified to guarantee full respect of international and EU standards. The most important are reported below.

I . Protection from refoulement and strict application of exceptions to non-refoulement

5. UNHCR would first like to recall that the Qualification Directive - explicitly mentioned in the its recitals 1 to 6 - aims at creating a Common European Asylum System based on a full and inclusive application of the 1951 Convention. This includes the principle of non-refoulement established in Article 33 (1) of the 1951 Convention. This principle constitutes the cornerstone of the international refugee law.
6. The only exception to this fundamental principle of non-refoulement is set out in Article 33 (2) of the 1951 Convention, which provides for the removal of a refugee to any country where s/he would be at risk of persecution if they pose a danger to the security of the host State or, having been convicted of a particularly serious crime, a danger to the community of the host State and should be applied restrictively. Therefore, UNHCR strongly encourages the Bulgarian authorities to amend the provisions of the LAR in such a manner that they are compatible with the international legal refugee framework as enshrined in the 1951 Convention and its 1967 Protocol.

¹ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

² Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, [OJ L 337 20.12.2011, p. 0009](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0099), repealing Directive 2004/83/EC [2001/0207\(CNS\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32004L0207).

7. Under international refugee law, States may expel a refugee only under certain limited circumstances, which are exhaustively defined in Articles 32 and 33(2) of the 1951 Convention. Article 32 of the 1951 Convention permits the expulsion of a refugee who is lawfully on the territory on grounds of national security or public order, subject to strict procedural safeguards. As an exception to the principle of non-refoulement provided for under Article 33(1) of the 1951 Convention, the expulsion or any other form of removal of a refugee to a country where he or she would be at risk of persecution may only be permitted in the circumstances explicitly provided for in Article 33(2) of the 1951 Convention.
8. Articles 32 and 33 are closely linked. The existence of the non-refoulement obligation as set out in Article 33, which applies to refugees regardless of whether or not they are lawfully within the territory of the host State, was the basis on which States' delegates discussed the scope of the duty of the expulsion provisions in Article 32.
9. Both provisions are exceptions to general protection principles and should therefore be applied restrictively. An individualized determination that the criteria set out in the relevant provision are met is required in each case. Moreover, a decision to expel a refugee must be reached in a procedure which observes due process of law. It should also be noted that the application of Article 32 or Article 33(2) of the 1951 Convention does not deprive the individual concerned of his or her refugee status.
10. UNHCR advises that it is preferable to incorporate the language of Article 33(2) of the 1951 Convention in the proposed amended Article 4 of the LAR. Legislation should specify that these exceptions should only be applied as an extreme measure in restrictively defined situations where there are (i) "reasonable grounds for regarding the refugee to be a danger to the security of the country" or (ii) "who having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."
11. UNHCR further notes that Article 33(2) of the 1951 Convention provides for exceptions to the principle of non-refoulement only under international refugee law – it does not permit the removal of a person if this would constitute a breach of host State's non-refoulement obligations under international human rights law such as Article 7 of the International Covenant on Civil and Political Rights, Article 19 (2) of the European Union Charter on Fundamental Rights, Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Article 3 of the European Convention on Human Rights. UNHCR expresses concern that the current wording of Article 4 (4) is too broad, as it suggests that persons falling within the scope of the exceptions provided for in Article 33(2) of the 1951 Convention would also lose protection against refoulement under international human rights law.

UNHCR recommends that the provisions in Article 4(3) and (4) be brought into line with international refugee and human rights law.

UNHCR recommends that Article 4(3) be amended to distinguish between protection against *refoulement* under international refugee law and human rights law, respectively: “*An alien who has entered the Republic of Bulgaria to seek protection or who has been granted protection may not be returned to the territory of a country*

i) where his/her life or freedom is threatened due to his/her race, religion, nationality, membership of a specific social group or political opinion and/or belief, or

ii) or where he/she faces a threat of torture or other forms of cruel, inhuman or degrading treatment or punishment.”

UNHCR further recommends that Article 4 (4) be amended to reflect the language of the 1951 Convention, by specifying that the exceptions provided for in this provision only apply with regard to *non-refoulement* protection under international refugee law: “*The rights under paragraph (3)(i) may not be enjoyed by an alien who has been granted protection and for whom there are reasonable grounds for regarding s/he as a danger to the security of the country in which s/he is, or who, having been convicted by final judgment of a particularly serious crime, constitutes a danger to the community of that country.*”

12. Article 4(4) does not, in its current form, reflect the provisions contained in Article 32 of the 1951 Convention concerning expulsion. A reference to expulsion is, however, contained in Article 67(1) and (3). UNHCR is concerned that Article 67(3) is at variance with Article 32 of the 1951 Convention. Article 32 (2) clearly indicates that: “*The expulsion of a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before a competent authority or a person or persons specially designated by the competent authority*”³.

UNHCR recommends that Article 67 (3) be amended to reflect the language of Article 32 (2) of the 1951 Convention and ensure that fundamental procedural safeguards are specified. UNHCR also recommends that a new paragraph be introduced in the amended Article 4 of the LAR incorporating Article 32 of the 1951 Convention, to ensure that the conditions and procedural safeguards for the expulsion of a refugee lawfully staying in the territory of Bulgaria to a third country are explicitly reflected in national implementing legislation.

II . Grounds for exclusion, cessation, cancellation and revocation

13. UNHCR would like, first, to recall that clear distinction should be made between exclusion from refugee status and withdrawal of protection (cessation, cancellation, revocation).
14. The grounds for exclusion enumerated in Article 1D, 1E and 1F of the 1951 Convention are exhaustive and UNHCR recommends, therefore, that the exact wording of the exclusion clauses of the 1951 Convention be retained.

³ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

15. The primary purpose of Article 1F is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts. It is strongly recommended that the Government of Bulgaria consult UNHCR's 'Guidelines on International Protection on Application of the Exclusion Clauses: Article F of the 1951 Convention'⁴ when interpreting and applying the exclusion clauses.

16. A person who has been recognized as a refugee may lose that status only if certain conditions are met. Withdrawal of international protection includes three forms: cessation; cancellation and revocation which should also be clearly distinguished in terms of grounds and consequences. The following three categories of withdrawal of refugee status need to be distinguished and attention be paid to ensure that they are not confused in domestic legislation:

(i) **Cessation**: the ending of refugee status pursuant to Article 1C of the 1951 Convention because international protection is no longer necessary or justified on the basis of certain voluntary acts of the individual concerned or a fundamental change in the situation prevailing in the country of origin. Cessation has effect for the future (ex nunc).

(ii) **Cancellation**: a decision to invalidate a refugee status recognition which should not have been granted in the first place. Cancellation affects determinations that have become final, that is, they are no longer subject to appeal or review. It has the effect of rendering refugee status null and void from the date of the initial determination (ab initio or ex tunc).

(iii) **Revocation**: withdrawal of refugee status in situations where a person engages in conduct which comes within the scope of Article 1F (a) or 1F(c) of the 1951 Convention.

17. Given the close linkages between refugee status and subsidiary protection, UNHCR recommends that the above considerations should be taken into account with regard to those provisions of LAR which incorporate Articles 16 and 17 of the Qualification Directive.

18. In respect to the various amendments and supplements of Article 12 of the LAR, UNHCR is concerned by the proposed inclusion of additional grounds for exclusion, in particular, the new provisions of Article 12 (1), item 6 and 7, and (2), item 4.

It is UNHCR's position that the criteria for exclusion from complementary / subsidiary forms of protection should be the same as laid down in Article 1 F of the 1951 Convention as there is no reason to apply a more stringent approach.

- Article 12, (1), [a] of the Qualification Directive interpreted in the light of Article 1D of the 1951 Convention

⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at: <http://www.refworld.org/docid/3f5857684.html>

19. In transposing Article 12 (1) [a] of the Qualification Directive, UNHCR recalls that the purpose of Article 1D of the 1951 Convention is to prevent from overlapping competencies between UNHCR and any other organ or agency of the United Nations, and ensuring the continuity of protection and assistance of such refugees as necessary. In today's context, this excludes from the benefits of the 1951 Convention those Palestinians who are refugees as a result of the 1948 or 1967 Arab-Israeli conflicts, and who are receiving protection or assistance from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).
20. Reasons not to return may be a danger of persecution or other serious protection related problems or his/her inability to return, for example, because the authorities of the country concerned refuse readmission. Hence the automatic inclusion clause in paragraph 2 of Article 1D of the 1951 Convention provided that such as a person cannot be returned to UNRWA's area of operations. Reasons not to return may be a danger of persecution or other serious protection related problems or his/her inability to return, for example, because the authorities of the country concerned refuse readmission.

UNHCR recommends that the amended Article 12 (1), point 4 of the LAR be modified in order to reflect adequately the wording used by the Article 1D of the 1951 Convention.

- Article 12, (1), [b] of the Qualification Directive interpreted in the light of Article 1E of the 1951 Convention

21. While transposing the Article (1), 12 [a] of the Qualification Directive, UNHCR recalls, in line with its *UNHCR Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees*, that this provision of the 1951 Convention applies only to cases where the person is currently recognized by the country concerned as having these "rights and obligations". If the country granted such rights in the past but is no longer willing to do so, Article 1E does not apply. Similarly, Article 1E does not apply to the claims of individuals for whom the potential for such enjoyment of right exists, but who have never resided in that country.

In such context UNHCR recommends that Article 12 (1), point 5 of the LAR be amended to reflect the language of Article 1E of the 1951 Convention to include: "to whom the competent authorities in the country of his/her permanent residence recognise the rights and duties attached to the possession of the nationality of that country."

- Article 14, (4-6), of the Qualification Directive interpreted in the light of combined Articles 1F and 33 (2) of the 1951 Convention
22. UNHCR advises that the Article 14, (4) of The Qualification Directive departs from the framework of the 1951 Convention by adding exclusion grounds which are not foreseen in international refugee law, but rather based on the wording of Article 33 (2) of the 1951 Convention.
23. The exclusion clauses provided by Article 1F serve a different purpose to Article 33 (2). The rationale of Article 1F which exhaustively enumerates the grounds for exclusion based on the

criminal conduct of the applicant is twofold. *Firstly*, certain acts are so grave that they render their perpetrators underserving of international protection. *Secondly*, the refugee protection framework should not stand in the way of prosecution of serious criminals. By contrast, Article 33 (2) deals with the treatment of refugees and defines the circumstances under which they could nonetheless be refoulé. It aims at protecting the safety of the country of refugee or of the community. The provision hinges on the assessment that the refugees in question is a danger to the national security of the country or, having been convicted by a final judgement of a particularly serious crime, poses a danger to the community. Article 33 (2) was not conceived as a ground for terminating the refugee status. Assimilating the exception to the *non-refoulement* principles permitted under Article 33(2) to the exclusion clauses of Article 1F would therefore be incompatible with the 1951 Refugee Convention. Furthermore, it may lead to an incorrect interpretation of both 1951 Refugee Convention provisions.

UNHCR strongly recommends that the amended Article 12 (1), items 6 and 7 of the LAR, be deleted because these new amendments establish additional grounds for exclusion of refugee status. To that end, UNHCR underlines that the Article 14, (4-6), of the Qualification Directive is an optional provision which is left to discretion of the Member States to transpose.

III . Access to procedures

24. UNHCR would like to point out that prompt access to asylum procedure is a paramount guarantee to ensure compliance with international law. A serious issue exists as regards persons who apply for international protection while in detention in Bulgaria. While there is an obligation for all state authorities to immediately forward an application for international protection to the State Agency for Refugees (SAR), in practice this leaves the alien at the discretion of officials who, in many cases forward the applications to SAR with a considerable delay. In order to avoid these delays and provide asylum seekers in detention prompt access to procedures,

UNHCR proposes that a new Paragraph 3 should supplement Article 58 LAR allowing aliens to apply via a legal representative and by post/fax and/or e-mail.⁵

UNHCR would strongly recommend Article 58 be amended as follows:

A new paragraph 2 is introduced:

(2) The procedure for granting protection starts with the application for international protection.

UNHCR recommends the following wording of Art. 61 Paragraph 2:

(2) Immediately after the foreigner applies for international protection, State Agency for Refugees registers the application and sets up a personal file of the applicant

25. After the amendments in June 2007, a person needs to be physically present in SAR in order to apply for protection, be registered and begin to de facto benefit from the principle of *non-refoulement* (Article 58(3) LAR). Proceedings are initiated with the registration of the person him/herself in the SAR. In most cases, application and registration happen in the same day.

⁵ See for instance para 6, N High Commissioner for Refugees (UNHCR), UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009), August 2010, available at: <http://www.refworld.org/docid/4c63ebd32.html>

However, if the applicant is detained and his/her personal presence in the SAR depends on circumstances outside of his/her will, there is a period varying from two weeks to sometimes more than six months after the initial application is filed before another state authority, during which the status of the alien is not clear and during which *refoulement* cases may occur.

26. In this framework, UNHCR notes that Article 6 of the Recast Asylum Procedure Directive 2013/32/EU⁶ requires Member States to ensure that if the application for international protection is made to authorities that are not competent for the registration of such application, Member states must ensure that the registration takes place no longer than 6 working days after the registration is made.

In this context, UNHCR would strongly recommend Article 58 (4) be amended as follow to correctly reflect the requirement of the Recast Asylum Procedure Directive: “*Where the application referred to in paragraph (3) is filed with another government authority, the latter must forward it to the State Agency for Refugees. The State Agency for Refugees shall take immediate actions and shall register the application within no later than three working days if the application was submitted before an official of the Chief Directorate Border Police and within no later than 6 working days if the application was made before official of Directorate Migration or other government authority.*”

IV . Detention grounds: applications from ‘pre-removal detention’

27. Proposed Article 45b, (1), item 3, establishes as a ground for detention the fact that the third country national applies from ‘pre-removal’ detention “*and there are serious ground to believe that the application has been lodged merely in order to delay or frustrate the enforcement*” of a return decision.
28. Detention for clearly abusive cases must be regulated by proportionality considerations and must weigh the various interests at play. Detention in this case can be applied only if the application is determined to be clearly abusive. In addition the person detained should be entitled to the appropriate procedural guarantees⁷. In this framework, UNHCR is seriously concerned that the proposed text is not in conformity with Article 8 (3) (d) of the Recast Reception Conditions Directive⁸ requiring that the burden of the proof to demonstrate that the claim is abusive lies with the Member State.
29. The Recast Reception Conditions Directive allows the detention only if “the **Member State concerned can substantiate** on the basis of **objective criteria**, including that **he or she already had the opportunity to access the asylum procedure**, that there are reasonable grounds to believe that he or she is making the application for international protection merely in order to delay or frustrate the enforcement of the return decision”.

⁶ European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, L 180/96 , available at: <http://www.refworld.org/docid/51d29db54.html>

⁷ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, (hereinafter: Detention Guidelines) 2012, available at: <http://www.refworld.org/docid/503489533b8.html>, para. 23.

⁸ European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, L 180/96 , available at: <http://www.refworld.org/docid/51d29db54.html>

30. In the context of the asylum procedure in Bulgaria, if Article 8 (3)(d) of the Recast Reception Conditions Directive is not transposed correctly and proposed Article 45b, (1), item 3 is retained, this would lead to the detention of almost all asylum seekers due to the imposition of compulsory detention return for persons that have been apprehended crossing irregularly the border.

UNHCR strongly recommends amending proposed Article 45b, (1), item 3 LAR according to the requirements of Article 8 (3) (d) of the Recast Reception Conditions Directive.

V . Speedy Judicial review of the lawfulness of detention

31. New article 45(b) provides for the detention of asylum-seekers; and Article 45(d) regulates the periodic review of detention . The proposed text of art. 84(1) regulates the judicial review of the initial decision to place an asylum seeker in a closed centre.
32. It is UNHCR's view that asylum-seekers in detention should be brought promptly before a judicial or independent authority to have the detention decision reviewed. This review should ideally be automatic, and take place in the first instance within 24-48 hours of the initial decision to hold the asylum-seeker. Following the initial review of detention, regular periodic reviews of the necessity for the continuation of detention before a court or an independent body must be in place, which the asylum-seeker and his/her representative would have the right to attend. Good practice indicates that following an initial judicial confirmation of the right to detain, review would take place every seven days until the one month mark and thereafter every month until the maximum period set by law is reached⁹.
33. The guarantees for asylum-seekers in detention similarly provided in Article 9 (3) of the Reception Conditions Directive that where detention is ordered by administrative authorities, Member States shall provide for a speedy judicial review of the lawfulness of detention to be conducted ex officio and/or at the request of the applicant.
34. In UNHCR's view, the proposed amendments do not reflect these guarantees

UNHCR strongly recommends that the proposed Article 45 (d) is modified to ensure that judicial review of the lawfulness of detention takes place within 24-48 hours of the issuance of the decision under Art. 45c, para 1.

35. UNHCR takes note that according to new Article 45f (1), children seeking asylum/international protection may be detained as a measure of last resort and after it has been established that other less coercive measures cannot be applied effectively. Such accommodation shall be for the shortest period of time .
36. Considering all applicable standards and guiding principles regarding the protection of children, in particular the best interest of the child, UNHCR believes that children should in

⁹ UNHCR Detention Guidelines, 2012, Guideline 7 para. 47 (iii) and (iv).

principle not be detained at all. As a general rule, unaccompanied or separated children should not be detained¹⁰.

37. Overall an ethic of care – and not enforcement – needs to govern interactions with asylum-seeking children, including children in families, with the best interests of the child a primary consideration. The extreme vulnerability of a child takes precedence over the status of an “illegal alien”¹¹.

With regard to Article 45(f) para.3, UNHCR strongly suggest reviewing this provision, in light of the above considerations as well as because it creates a less favorable legal standard than the one established in Article 44, paragraph 9 of the Law for the Foreigners in the Republic of Bulgaria to unaccompanied immigrant children with irregular status, whose detention is explicitly prohibited.
UNHCR recommends that Article 45(f) (3) be amended to explicitly prohibit the placement of unaccompanied children in closed centres.

- Other restrictions on the freedom of movement of asylum seekers
38. Concerning Art. 30, para. 1, item, 7, UNHCR notes the overly restrictive character of this provision which stands in contrast to the fundamental rights of liberty and security of person and freedom of movement as expressed in all major international and European human rights instruments as well as the Recast of the Reception Conditions Directive (Article 7 (1)), which allows for the possibility of establishing areas in which movement is allowed rather than such in which entrance is forbidden.

UNHCR recommends that asylum seekers are granted the right to free movement on the entire territory of Bulgaria. Exceptions need to respect relevant and applicable human rights instruments.

VI . Information on procedures for challenging the detention order and to request free legal assistance

39. UNHCR supports the requirement of proposed Article 45 (c) (3) requiring that the detention decision should be in writing, specifying in fact and in law the grounds for detention. However, UNHCR notes that, according to the proposed amendment, the decision does not mention that detained applicants should also be informed of the procedures laid down in national law for challenging the detention order, as well as of the possibility to request free legal assistance and representation.

UNHCR recommends that Article 45 (c) (3) is modified to ensure that the detention order includes information on procedures for challenging the detention order and to request free legal assistance.

¹⁰ UNHCR Detention Guidelines, 2012, Guideline 9.2, para. 51 and 54.

¹¹ UNHCR Detention Guidelines, 2012, Guideline 9.2, para. 52 with reference to *Muskhadzhiyeva and others v. Belgium* (2010), ECtHR, App. No. 41442/07.

VII . Right to remain a the territory for subsequent applicants

40. UNHCR notes with concern that the proposed new paragraph 8 of Art. 29 might bring to the deprivation from the right to stay of the territory of asylum seekers who have submitted subsequent applications. UNHCR recommends that when an exception to the right of the applicant to remain at the territory is made, a safeguard shall be provided that the return decision will not lead to direct or indirect refoulement. Effective remedy with a suspensive effect or at least the opportunity to request it before the court, including the possibility to remain on the territory while the court makes a decision on the suspensive effect should also be provided for in the LAR

UNHCR recommends modifying proposed Article 29, paragraph 8 to ensure that, in accordance with the requirements of Article 41 (1) of the Recast Asylum Procedure Directive, an exception from the right to remain on the territory can be made only where the determining authority considers that a return decision will not lead to direct or indirect refoulement in violation of that Member State's international and EU obligations..

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