



**Law proposal transposing into Portuguese legislation
EU Qualification Directive (2004/83/EC) and
Asylum Procedures Directive (2005/85/EC)**

- *UNHCR Observations* -

Rome and Geneva, November 2007

Introduction

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the invitation extended by the Minister of Internal Affairs to review and submit comments on the Law proposal transposing into Portuguese legislation two particularly important EU Directives: Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (“Qualification Directive”) and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (“Asylum Procedures Directive”).
2. UNHCR agrees with the European Commission that further harmonisation of Member States’ asylum systems will contribute to the process of strengthening the international protection framework, by reaffirming and where necessary complementing the 1951 Convention, streamlining asylum procedures, and achieving more uniformity in refugee status.
3. UNHCR considers it its statutory responsibility to foster a common understanding of the effective international protection in the European context, based on the full and inclusive application of the *1951 Convention relating to the Status of Refugees* (“the 1951 Convention”) and established principles of international refugee, human rights and humanitarian law.
4. UNHCR is very grateful that the Portuguese Refugee Council undertook the task of translating the Law proposal in English. As there may be differences in the use of terminology in the Portuguese and English, UNHCR would welcome, in cooperation with the Council, to have meetings with the Portuguese authorities, to elaborate on the comments below.

Overall assessment of the Portuguese Law proposal

5. Improvements

UNHCR is generally pleased with the orientation of many of the key provisions of the Law proposal:

- In particular, UNHCR welcomes the fact that the proposed legislation seeks to consolidate, in one comprehensive Asylum Law, all important aspects of international protection, including reception standards for asylum-seekers, the definition of beneficiaries of international protection, procedures for the identification of those beneficiaries, the content of international protection and rules pertaining to the apportionment of responsibility for providing protection within the European Union.
- UNHCR appreciates the establishment of a “single asylum procedure” for claims under the 1951 Convention and subsidiary protection. From UNHCR’s perspective, a single procedure presents a number of advantages, most importantly: (a) it allows a

holistic examination of protection needs, which often emanate from a complex combination of factors; (b) it is more cost-effective than a system of two separate procedures with separate decision-making bodies; (c) it minimizes delay in the status determination process and this is in the interest of the State and asylum-seekers alike; and (d) it ensures consistent decision-making. Within the single procedure, UNHCR and the European Commission recommend a hierarchical system for determination of asylum claims whereby the first determination is always made in relation to qualification for refugee status under the 1951 Convention and only if that fails, the criteria for subsidiary protection are examined.

- Furthermore the Law proposal includes a suspensive effect of appeals against negative decisions, albeit this remains to be clarified at the admissibility stage of the asylum procedure. In UNHCR's view, withholding of deportations until a final adjudication of an asylum application is a fundamental guarantee, given the potentially devastating consequences of an erroneous determination, at the admissibility of substantive procedure.
- The relationship between asylum and extradition is now sufficiently well regulated in that granting of asylum shall hinder the pursuance of extradition requests grounded on the facts on which basis the asylum is granted.
- UNHCR welcomes the establishment of a subsidiary protection for beneficiaries, ensuring a standard of treatment and providing protection of their basic rights on almost at the same level as for individuals granted refugee status under the 1951 Convention. UNHCR's long-standing position is that there should be no differential treatment between Convention refugees and others determined to be in need of international protection in one form or another. in relation with the enjoyment of civil, economic and social rights.
- UNHCR is equally pleased to notice the inclusion in the new Law proposal to grant work rights to most categories of asylum-seekers, which the Office considers as helpful to promote sustainable integration.
- Moreover, UNHCR also commends the intention to maintain the previous Law's generous provisions with regard to UNHCR's and the Portuguese Refugee Council's consultative participation in the status determination procedure.
- Finally, UNHCR appreciates the provisions of Art. 91 of the Law proposal, prescribing the Law's interpretation in harmony with the 1951 Convention as well as the European Convention on Human Rights.

6. Key Concerns

Nevertheless, UNHCR feels obliged to highlight a number of key concerns, which shall be explained under "Specific Comments" below:

- Firstly, UNHCR notes that that some definitions in the Law proposal differ from those embodied in relevant international instruments and that some draft Articles are

not in line with principles of international refugee law, for instance, those relating to the personal scope of the legislation or to exclusion from international protection. Moreover, some Articles are below the minimum standards stipulated by the EU Directives which is an absolute minimum.

- Secondly, the proposed legislation maintains the current Asylum Law's two-tier procedures for the identification of protection needs, notably the admissibility procedure and the substantive determination procedure (cf. Chapter 3 of the Law proposal). UNHCR is concerned that this structure may prevent a full assessment of the merits of claims made by various categories of asylum-seekers. The Law proposal's structure, as it stands, may also conflict with provisions of the Asylum Procedures Directive, which limits an admissibility assessment to certain scenarios as set out in its Article 25 (2).
- Moreover, UNHCR finds the provision for the special border asylum procedures of concern as it provides for mandatory detention at border facilities, extremely short time limits and lesser procedural safeguards. UNHCR believes that there is no valid justification for restrictions in the requirements of due process of law in asylum cases submitted at the border to be less than for those submitted within the territory. The accelerated assessment and decision of border cases also does not lend itself to a full, fair and comprehensive assessment of each asylum-seekers' claim.
- Furthermore, the Law proposal unduly expands the 1951 Convention's exclusion clauses in Art. 9 and confounds them with exception to *non-refoulement* set out in Article 33(2) of the 1951 Convention. According to Article 19 of the Law proposal, exclusion assessments are to be made at the admissibility stage before a substantive assessment of inclusion criteria has taken place. UNHCR would like to stress that the exclusion clauses of in Art. 1 F of the 1951 Convention are exhaustive and should not be expanded. The exclusion clause is to be examined during the substantive part of the asylum procedure, given the far-reaching consequences of its application and the need to balance it against the asylum-seeker's persecution claim,.
- Finally, Article 13 of the Law proposal maintains a 15-day time-limit for a person to claim asylum in Portugal, whereas UNHCR considers that strict time limits for lodging asylum claims serve no useful purpose, as under a State's *non-refoulement* obligation a full examination of a person's protection claim remains necessary despite such limits. Asylum-seekers may also have valid reasons for delayed submissions of their asylum applications; this may for example be the case for traumatized asylum-seekers or for those not having information about the existing procedures.

Specific comments

While acknowledging Portugal's serious efforts to introduce more effective international protection standards in the Law proposal, the following observations focus solely on those aspects that UNHCR believes require clarification or amendments in order to ensure full conformity with international standards. The observations follow the structure of the Law proposal. For ease of reference, provisions subject to UNHCR comments have been copied into the text as follows:

Article 2

Definitions

UNHCR Comment: UNHCR considers it helpful for national legislation to restate key provisions of applicable international refugee law, such as the definition of “refugee” according to the 1951 Convention. It is therefore recommended to introduce the following sub-paragraph before Art. (2) (f)):

- () In accordance with the 1951 Convention relating to the Status of Refugees, a refugee is a person who owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
- () Applicant for international protection or asylum-seeker is a person who has submitted a claim for refugee status or an “application for international protection”, as defined in recitals (p) and (q) and claims to be a refugee or being in need of subsidiary protection.

Articles 2(1)(f) and 2(1)(g)

«Subsidiary protection status» shall mean the recognition by the competent Portuguese authorities of a third country national or a stateless person as a person eligible for the granting of a residence permit on humanitarian grounds;

«Refugee status» shall mean the recognition by the competent Portuguese authorities of a third country national or a stateless person as a refugee and authorized as such to remain in the Portuguese territory;

UNHCR Comment: The provisions in these Articles and many others that follow restrict access to international protection to only “third country nationals” and stateless persons. Although the term “third country nationals” has been adopted from European instruments, UNHCR recommends the use of a wider definition which extends international protection to all non-citizens of the host country, which includes nationals of other EU countries. It should not be excluded *a priori* that an individual could have a well-founded fear of persecution or risk serious harm in his or her country, however great that country’s overall respect for human rights and the rule of law. Besides, the scope of the refugee definition embodied in the 1951 Convention and its 1967 Protocol cannot be reserved from, by virtue of Article 42 of the Convention; nor can it be restricted on grounds of nationality given the non-discrimination rule enshrined in Article 3 of the Convention.

Article 2(1)(h)

«Group» shall mean a particular social group which has a distinct identity in the relevant country and is perceived as being different by the surrounding society, in so far as its members share:

- (i) an innate characteristic, or a common background that cannot be changed, or
- (ii) a characteristic or belief that is so fundamental to the identity or conscience that its members should not be forced to renounce to it;

UNHCR Comment: UNHCR recommends that the term to be defined is “social group” and not “group” or that preferably, these terms are instead elaborated on in accompanying guidelines on the interpretation of the refugee definition.

Article 2(1)(i)

«Family members» shall mean, in so far as the family already existed in the country of origin, the following members of the asylum-seeker’s family who are present in the Portuguese territory as a consequence of the application for asylum:

- (i) the spouse, or the person with whom the applicant is confirmedly cohabiting, whether of the opposite or of the same gender, in similar conditions as those of the spouses;
- (ii) the minor or disabled children of the couple, or the children of the applicant’s spouse or stable partner, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock, as well as the adopted children, in pursuance of the Portuguese law;
- (iii) other close relatives who depend on the support of the asylum applicant at the date of departure from their country of origin.

UNHCR Comment: UNHCR is of the view that respect for family unity should not be made conditional on the family having been established before flight from the country of origin. Families which have been established during flight or upon arrival in the asylum State also need to be taken into account. With reference to the UNHCR Executive Committee Conclusion No. 24 (XXXII) paragraph 5 and No. 88 (L) paragraph (b)(ii), UNHCR recommends the application of liberal criteria in identifying those family members who can be admitted, with a view to promoting the unity of the family.

Article 2(1)(j)

«Unaccompanied minor» shall mean a person below the age of eighteen who arrives in the Portuguese territory unaccompanied by an adult responsible for him or her whether by law or by custom, and for as long as he or she is not effectively taken into the care of such a person; it includes a minor who is left unaccompanied after he or she has entered the Portuguese territory;

UNHCR Comment: UNHCR would prefer use of the term “child” instead of “minor” in line with the terminology of the *Convention on the Rights of the Child*. Also, UNHCR would like to draw attention to the distinction between “unaccompanied children” and “separated children”. The term “unaccompanied children” refers to children who have been separated from both parents and other relatives and are not cared for by an adult who, by law or custom, is responsible for doing so. The term “separated children,” on the other hand, includes children who are separated from both of their parents or their previous legal or customary guardian. They may have been accompanied by other relatives or adults who are not able, suitable or willing to assume responsibility for the child’s care. UNHCR therefore suggests the use of both terms in the legislation.

Article 2(1)(n)

«Safe country of origin» shall mean the country of nationality or habitual residence of the applicant, in relation to which the applicant has not invoked any serious reason by which it may be considered unsafe, in what concerns the applicant's personal circumstances for his or her recognition as refugee;

UNHCR Comment: UNHCR acknowledges that applications for asylum may be made by persons originating from countries in which there is, in general terms, no serious risk of persecution or other harm. UNHCR does not, in principle, object to the use of the so-called “safe country of origin” notion as a procedural tool for prioritized treatment of such applications in carefully and clearly circumscribed situations. UNHCR is, however, concerned that the definition of “safe country of origin” as contained in this Article places the burden of proof entirely on the asylum applicant, who is required to submit evidence that his or her country of origin is not safe in his or her individual circumstances.

It is, furthermore, of concern to UNHCR that the present draft legislation proposes in its Article 19(3)(e) that asylum applications lodged by individuals coming from presumed “safe countries of origin” be considered almost automatically as inadmissible. This position is inconsistent not only with the guidance provided by the Executive Committee of UNHCR¹, but also with the EU Asylum Procedures Directive.² As noted earlier, the whole approach to admissibility as taken in the present draft legislation requires revisiting (see more detailed UNHCR comments on Chapter III, Section I, Articles 10-23).

Article 2(1)(o)

«Safe third country» shall mean the country in which the asylum-seeker's has remained or transited before his or her arrival to Portugal; where his or her life or freedom is confirmedly not threatened; which respects the principle of *non-refoulement* and the right not to be subjected to torture or cruel, inhuman or degrading treatment; and in which the applicant may request the refugee status and, being granted such a status, receive protection, in pursuance of the provisions of the Geneva Convention;

UNHCR Comment: By adopting the concept of “safe third country”, the State in which a refugee claim is lodged declares itself not to be responsible for considering that claim and instead attributes presumptive responsibility to another State. In UNHCR's view, such a policy has no basis in international refugee law and, therefore, should rather be based on multilateral agreements which better ensure access to effective protection for asylum applicants. A transfer of responsibility for asylum-seekers should be envisaged only between States with comparable protection systems and on the basis of an agreement which clearly outlines their respective responsibilities. See additional comments on Article 20(e).

¹ See Conclusion No. 30 (XXXIV) of 1983 on the Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum, paragraph (e), which “...recognized the substantive character of a decision that an application for refugee status is manifestly unfounded or abusive.”

² The list of inadmissible cases enumerated in Article 25 of the Asylum Procedures Directive does not include applications from “safe countries of origin”.

Articles 2(1)(p) and 2(q)

(p) «Application» or «application for asylum» shall mean an application lodged by a third country national or a stateless person which can be understood as a request for international protection addressed to the Portuguese authorities, under the Geneva Convention or other subsidiary regime of international protection prescribed in the law;

(q)«Application for international protection» shall mean a request for protection made by a third country national or a stateless person, addressed to the Portuguese authorities, and through which it can be understood that the applicant intends to benefit from the refugee or subsidiary protection status and does not explicitly request another form of protection;

UNHCR Comment: UNHCR recommends that these two articles be merged into one as “application for international protection” UNHCR further recommends adding to the Article the following provision: “All applications for international protection will first be assessed on the basis of the refugee definition contained in the 1951 Convention and, only if this is not fulfilled, on the basis of the criteria for subsidiary protection.” This way, it can be ensured that subsidiary protection is indeed complementary and additional to refugee protection under the 1951 Convention, and not a substitute.

Article 2(1)(r)

«Withdrawal of refugee status» shall mean the decision by a competent authority to revoke, end or refuse to renew the refugee status of a person;

UNHCR Comment: There is a need to clearly differentiate between three distinct legal concepts which seem to not be clear enough in this Article and other provisions of the Law proposal: cessation, cancellation and revocation. Cessation, which is set out in Article 1C of the 1951 Convention, refers to the termination of refugee status when international protection is no longer necessary or justified. Cancellation is about invalidating a decision by which a person’s refugee status was previously recognized when it has subsequently been ascertained that the person should never have been recognized as a refugee in the first place; for example, it was later established that the refugee status was obtained by a misrepresentation of material facts or that evidence justifying the person’s exclusion from international protection has become known. Revocation concerns the withdrawal of refugee status in situations where a person properly determined to be a refugee subsequently engages in conduct which brings him or her within the scope of Article 1 F(a) or 1 F(c) of the 1951 Convention.

Article 2(1)(u)

«First asylum country» shall mean the country in which the applicant has been recognised as a refugee and may still benefit of such protection, or enjoy sufficient protection, including the principle of *non-refoulement*;

UNHCR Comment: In UNHCR’s view, two conditions must be met for a country to be considered “first country of asylum.” First, the person must have already found effective protection in that country by way of acquiring either refugee status or other form of complementary protection. And secondly, the country formally agrees to readmit the person and continue to make effective protection available to him or her. The availability of “sufficient protection” as suggested in Article 2(1)(u) is not, in UNHCR’s view, a proper characterization of first country of asylum. UNHCR would recommend that reference be made to “effective protection” instead and that some specific benchmarks be elaborated for objectively and consistently determining the effectiveness of the protection available in any first country of asylum.

Article 2(1)(z)

«Religion» shall mean the holding of theistic, non-theistic and atheistic beliefs, the participation in or abstention from formal worship in private or in public, either alone or in community with others, or other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious beliefs;

UNHCR Comment: A refugee claim based on fear of persecution for reasons of religion may also include freedom to change one’s religion or belief.

Article 2(1)(cc)

«Retention» shall mean any measure which doesn’t constitute detention and which deprives the applicant of his or her freedom of movement.

UNHCR Comment: By international standards “retention” is a form of detention as it consists of confinement. It should be noted that according to the jurisprudence of the European Court of Human Rights any confinement in a restricted area, whatever the motivation, is considered to be detention.³ UNHCR therefore suggests reviewing the need for a separate concept of “retention” in this context.

³ See, for example, European Court of Human Rights, *Amuur v. France*, 00019776/92, 1996-1 – III, no. 11, 25 June 1996.

Article 2(2)(b)

Gender related aspects may be considered a common characteristic, although they shall not by themselves alone create a presumption for the qualification as a group.

UNHCR Comment: UNHCR would like to qualify with the suggestion in Article 2(2)(b) that gender-related aspects do not by themselves alone create a presumption for the qualification as a particular social group in the sense of the 1951 Convention in that gender is a clear example of a social subset of persons who are defined by innate and immutable characteristics and who are frequently subject to differentiated treatment and standards. Courts and administrative bodies in a number of jurisdictions have found that women, for example, can constitute a particular social group within the meaning of Article 1 A(2) of the 1951 Convention. This does not mean that all women in the society qualify for refugee status.

A claimant must demonstrate a well-founded fear of being persecuted based on her membership in the particular social group.

UNHCR would also suggest that provisions be made for age-related refugee claims. The range of potential refugee claims where age is a relevant factor is broad, including forcible or under-age recruitment into military service, (forced) child marriage, female genital mutilation, child trafficking, or child pornography or abuse. Some claims that are age-related may also include a gender element and compound the vulnerability of the claimant.

Article 3

Granting of right to asylum

Right to asylum shall be guaranteed to aliens and stateless persons, victims of persecution or severely threatened of persecution as a result of activity performed in the country of nationality or of habitual residence in favour of democracy, social and national liberation, peace among peoples, freedom and human rights.

2 – Right to asylum shall also be granted to any third country nationals or stateless persons who, having a well-founded fear of being persecuted on grounds of their race, religion, nationality, political opinion or membership of a particular social group, are unable to or, owing to such fear, unwilling to return to their country of nationality or habitual residence.

3 – Asylum shall only be granted to a third country person who has more than one nationality when the reasons referred to in the previous paragraphs apply to all countries of his or her nationality.

4 – For the purposes of paragraph 2 of the present article, it is irrelevant whether the third country national effectively shows evidence of the characteristic relating to his or her race, nationality, social or political group, as long as such characteristic is attributed to him or her by the actor of the persecution

UNHCR Comment: In line with what has been proposed under Article 2 under its heading, Article 3 (2) should read: “Right to asylum shall also be granted to any third country nationals or stateless persons who are refugees”. There would be no need to repeat the refugee definition in case it is given under Article 2 (Definitions).

Article 4

Effects of the granting of asylum

In pursuance of article 3, the granting of asylum shall endow the beneficiary with refugee status, in accordance with the present Law, without prejudice to the provisions established in any treaties or international conventions of which Portugal be a party or adheres to.

UNHCR Comment: This Article provides that "...the granting of asylum shall endow the beneficiary with refugee status..." Given the declaratory nature of refugee status, the article should rather be formulated the other way round. The person determined to be a refugee and thus granted refugee status will enjoy asylum or, preferably international protection, meaning the set of civil, economic, political and social rights and benefits deriving from the 1951 Convention, international and regional human rights instruments and applicable national legislation. Reformulating Article 4 in this sense could add to conceptual clarity.

Article 5

Acts of Persecution

1 – For the purposes of article 3, the acts of persecution susceptible to ground the right to asylum must be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, or be an accumulation of various actions, which by their number or repetition affect a third country national or stateless person in a similar manner as that which results from a serious violation of fundamental rights.

2 – The acts of persecution qualified in paragraph 1 may take the following forms:

- (a) acts of physical or mental violence, including acts of sexual violence;
- (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
- (c) prosecution or punishment which is disproportionate or discriminatory;
- (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
- (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts susceptible of causing the exclusion of the refugee status as set out in subparagraphs (b), (c) and (d) of article 9;
- (f) acts of a gender-specific or child-specific nature.

UNHCR Comment: UNHCR considers that for persecution to be used as a meaningful standard for determining access to international protection, it should be a broad and flexible concept adaptable and responsive to any new situations and means employed to inflict harm on individuals and groups. It is most probably for this reason that the concept of persecution was left undefined in the 1951 Convention in order to give decision-makers broad latitude in determining whether a particular act or measure in a given factual situation fits the meaning of persecution in the sense of the refugee definition. It is, furthermore, UNHCR's view that persecution cannot and should not be defined solely on the basis of serious or severe human rights violations. Severe measures of discrimination may amount to persecution if they lead to consequences of a substantially prejudicial nature for the person concerned.

UNHCR also wishes to point out that war and violence are often used as instruments of persecution; they are frequently the means chosen by the persecutors to repress or eliminate specific groups by reasons of their ethnicity, religion or other affiliations. It should also be kept in mind that the concept of persecution under the 1951 Convention does not imply a "singling out" of or an "individually targeting" of the applicant for refugee status. Once it is shown that the person is a victim or potential victim of a serious harm amounting to persecution, it is irrelevant for the purposes of international refugee protection how many others risk the same or similar measures. UNHCR would urge that the above elements be adequately reflected in Article 5 or alternatively Article 5 be deleted as not essential.

Article 6

Actors of persecution

1 – Actors of persecution shall include:

- (a) the State;
- (b) parties or organisations controlling the State or a substantial part of the State's territory;
- (c) non-State actors, if it can be demonstrated that the actors mentioned in subparagraphs (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution, in pursuance of the following paragraph 2.

2 – For the purposes of subparagraph (c) of paragraph 1 of the present article, it shall be considered that protection is generally provided when the actors mentioned in subparagraphs (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution, namely by implementing an effective legal system for the detection, prosecution and punishment of such acts. The applicant shall have access to such protection.

UNHCR Comment: This Article includes provisions which seem to equate national protection provided by States with control over territory by some quasi-State entities and international organizations. There are indeed situations where quasi-State authorities control parts of a country's territory. There have also been cases of an international organization exercising a certain administrative authority and control over territory on a transitional or temporary basis (e.g. Kosovo, East Timor).

Control and authority exercised by quasi-State entities or international organizations cannot be interpreted to substitute for the full range of measures and actions normally attributed to the exercise of State sovereignty. Under international law, neither non-State actors nor international organizations have the attributes of a State and thus the ability to effectively enforce the rule of law. UNHCR recommends that that portion of Article 6 which touches on protection by non-State actors, including international organizations, be deleted.

Article 7

Subsidiary protection

1 – Residence permit shall be granted on humanitarian grounds to aliens and stateless persons to whom the provisions defined under article 3 are not applicable and who are impeded or feel unable to return to their country of nationality or habitual residence due to the risk of suffering severe harm.

2 – For the purposes of the above paragraph, severe harm shall consist of:

- (a) death penalty or execution;
- (b) torture, inhuman or degrading treatment, or punishment of an applicant in the country of origin;
- (c) serious and individual threat against the life or person of an applicant resulting from indiscriminate violence in situations of international or internal armed conflict.

3 – The provisions established under article 6 shall be applicable.

UNHCR Comment: UNHCR strongly supports and welcomes the creation of a legal obligation to grant subsidiary protection to those at risk of serious harm for reasons and in circumstances not necessarily covered by the 1951 Convention. As noted above, it is important that measures to provide subsidiary protection are implemented with the objective of strengthening, not undermining, the existing global refugee protection regime. This presupposes that individuals who fulfill its criteria are granted 1951 Convention refugee status, rather than being accorded subsidiary protection. Subsidiary protection should only come into play after a negative refugee status determination is made in relation to the 1951 Convention.

One aspect of Article 7 that is cause for serious concern to UNHCR is the requirement in Article 7(2)(c) to show “individual” threat of serious harm in order to qualify for subsidiary protection. This imposes, in effect, a higher standard of proof for persons fleeing situations of generalized violence and armed conflict which are characterized precisely by the indiscriminate and unpredictable nature of the risks civilians may face. Another aspect of concern with Article 7(2)(c) is its apparent restriction of the harm qualifying for subsidiary protection to situations of “international or internal armed conflict.” In UNHCR’s view, there could be no valid justification for not extending subsidiary protection to any persons fleeing indiscriminate violence and gross human rights violations more generally.

Article 8

Protection sur place

1 – A well-founded fear of being persecuted, in pursuance of article 3, or a real risk of suffering severe harm, in pursuance of the previous article, may be grounded on events or activities in which the applicant was engaged after he or she left the country of nationality or former habitual residence, in particular if it is proven that the activities which ground the asylum application constitute the expression and continuation of convictions or orientations held in that country.

2 – The terms of the above article shall not be applied if fear or risk is grounded on circumstances which the applicant has created by his own decision after leaving the country of nationality or former habitual residence, for the sole purpose of unduly benefiting from refugee or subsidiary protection status.

UNHCR Comment: International protection needs may arise *sur place* not only because of the actions or behaviour of the refugee applicant subsequent to his or her departure from the country of origin, but also due to new circumstances arising in the person’s country of origin. UNHCR would therefore recommend that Article 8 be amended to fully and clearly capture both of these situations.

Article 8(2) deals with the question of so-called “self-serving” asylum claims. UNHCR acknowledges that there may be instances where an individual outside his or her country of origin who would otherwise not have a well-founded fear of persecution acts for the sole purpose of “manufacturing” an asylum claim. UNHCR appreciates that States face difficulty in assessing the validity of such claims and agrees with States that the practice should be discouraged. It would be preferable, however, to address difficult evidentiary and credibility questions by appropriate credibility assessments. In UNHCR’s view, such an analysis does not require an assessment of whether the asylum-seeker acted in “bad faith” but rather, as in every case, whether the requirements for granting refugee status or subsidiary protection are in fact fulfilled taking into account all the relevant facts surrounding the claim. There is no logical or empirical connection between the well-foundedness of the fear of being persecuted or of suffering serious harm, and the fact that the person may have acted in a manner designed to create a refugee claim in a self-serving manner.

Article 9

Exclusion from and refusal of asylum and subsidiary protection

1 – A third country national or stateless person shall not be entitled to asylum or subsidiary protection when he or she:

- (a) has performed acts contrary to the fundamental interests or the sovereignty of Portugal;
- (b) has committed crimes against peace, war crimes or crimes against humanity, as defined under the international instruments drawn up to make provision in respect of such crimes;
- (c) has committed felonious common law crimes, even if committed with an allegedly political objective, punishable by imprisonment superior to three years;
- (d) has performed acts contrary to the purposes and principles of the United Nations;
- (e) has committed felonious common law crimes of non-political nature before entering the Portuguese territory;
- (f) benefits from protection or assistance provided by organs or agencies of the United Nations in the country of nationality or former habitual residence, has seen his or her situation reach a final decision in accordance with the applicable resolutions adopted by the General Assembly of the United Nations;
- (g) benefits from such a status in the country of former habitual residence or has a treatment equivalent to the nationals of that same country.

2 – Subparagraphs (a) to (e) of paragraph 1 of the present article apply to persons who have instigated or otherwise participated in the commission of the crimes or acts mentioned therein.

3 – The reasons for exclusion prescribed in subparagraphs (a) to (e) of paragraph 1 of the present article, may only be invoked if the third country national or stateless person has effectively been convicted by the crimes and acts therein referred, or if there is serious and duly founded suspicion of their practice.

4 – Asylum or subsidiary protection may be refused whenever the granting of such a status results in danger or well-founded threat to the internal or external security or public order of the Portuguese State.

UNHCR Comment: The 1951 Convention contains, in Articles 1D, 1E and 1F, provisions whereby persons otherwise having the character of refugees as defined in Article 1A of the Convention are excluded from refugee status. Such persons fall into three groups: The first group consists of persons already receiving United Nations protection or assistance (Article 1D); the second group deals with persons who are not considered to be in need of international protection (Article 1E); and the third group concerns persons who are not considered to be deserving of international protection (Article 1F). The 1951 Convention thus enumerates the grounds for exclusion from refugee status exhaustively, and no other ground may be adduced by way of analogy to justify the denial of refugee status to a person who otherwise meets the definitional requirement of Article 1A of the Convention.

The provisions of Article 9 of the Law proposal are problematic on a number of accounts. Firstly and most significantly, they run the risk of introducing substantive expansion to the exclusion clauses of the 1951 Convention, although the Convention does not permit any such modification to be made by a State Party. This is particularly the case with the proposed expansion of the exclusion clauses in Articles 9(1)(a), 9(1)(c) and 9(4) of the draft legislation by adding the provision of Article 33(2) of the 1951 Convention (exceptions to the *non-refoulement* principle).

UNHCR wishes to stress that under the 1951 Convention, the exclusion clauses of Article 1F and the *non-refoulement* exception set out in Article 33(2) serve different purposes. The Convention's exclusion clauses of Article 1F are motivated by the severity of crimes committed in the past by an individual, rendering him or her undeserving of refugee status.

By contrast, Article 33(2) of the Convention deals with the treatment of persons already recognized as refugees and defines the circumstances under which they could nonetheless be *refouled*.

Article 33(2), which aims to protect the safety of the country of refuge or of the community, denies, in very exceptional circumstances, the benefits of the *non-refoulement* rule to persons who are refugees within the meaning of Article 1A of the 1951 Convention. It hinges on the assessment that the refugee in question is a danger to the national security of the country or, having been convicted by a final judgment of a particularly serious crime, poses a danger to the community. It should however be noted that the interdiction of expulsion for persons at risk of torture or inhumane treatment is non-derogable, i.e. there can be no exceptions in accordance with Article 3 of the UN Convention against Torture and the European Convention on Human Rights and Fundamental Freedoms.

Secondly, Article 9 presents some wording problems which, if not corrected, may lead to a misinterpretation of the 1951 Convention. This is the case in particular with Articles 9(1)(f) and 9(1)(g), which relate to the 1951 Convention's Articles 1D and 1E respectively. UNHCR would urge that the wording of these provisions of the Law proposal be amended in order to duly reflect the exact text of Article 1D and 1E.

Chapter III, Section I: Admissibility of asylum applications

General comments on this chapter:

Lack of a distinction between, on the one hand, admissibility procedures, which do not go into the substance of the asylum application and, on the other hand, procedures that deal with the substantive elements of the application has in the past affected refugee protection in Portugal's asylum system. UNHCR has consistently maintained that the State with which and in whose jurisdiction an asylum claim is lodged should deal with the substance of that claim in all cases, except where another State formally assumes responsibility for doing so.

Although presented as admissibility procedures, the assessment proposed (Article 18) pertains to the substance of the asylum claim. Furthermore, virtually all of the situations enumerated in Article 19 necessarily require a substantive examination and are not therefore questions of admissibility. The admissibility procedures envisaged by the proposed legislation need to be brought in line with international refugee law principles and with the Asylum Procedures Directive.

The State under whose jurisdiction an asylum claim is lodged has the responsibility to deal with the substance of that claim in all cases, except where another State assumes responsibility for doing so. If no State assumes responsibility for an asylum-seeker, the person faces at best indefinite orbit between national jurisdictions, and at worst *refoulement*. At the admissibility stage, therefore, what could usefully be decided is whether an asylum claim should be considered in substance in the country where it has been submitted, or whether the applicant should be sent to another country that has accepted responsibility for considering his or her claim. The Asylum Procedures Directive sets out a limitative list in its Article 25 of situations where Member States may consider an application for asylum as inadmissible, whereas the present chapter of the Law proposal, in particular its article 19 enlarge the admissibility concept and preempt elements of the substantive procedure, whose inclusion in the text under the heading of "admissibility" gives rise to serious concern (please see also the specific comments under the respective Articles).

Article 11

Right to remain in the Portuguese territory

1 – Asylum applicants shall be allowed to remain in the Portuguese territory, for the sole purpose of the procedure for the granting of asylum, until a decision on the admissibility of the application is reached.

2 – The referred right to remain shall not constitute an entitlement to a residence permit.

UNHCR Comment: UNHCR suggests that Article 11 be amended to provide that asylum applicants have the right to remain on the Portuguese territory until a final decision is taken on the application.

Article 12

Effects of the asylum application over infringements related to the entrance in the country

- 1 – The submission of the asylum application shall hinder the knowledge of any action or criminal process brought against the applicant and his or her family on the grounds of irregular entrance into Portuguese territory.
- 2 – The procedures or process shall be archived in case asylum is granted and it is proven that the corresponding infringement has been determined by the same facts that grounded the asylum granting.
- 3 – For the purposes of the above paragraphs, the asylum application and the decision thereon shall be reported by the Aliens and Borders Service to the authority where the procedure or process is running within two work days.

UNHCR Comment: UNHCR welcomes the fact this provision essentially incorporates into domestic law Article 31 of the 1951 Convention, which recognizes that there are good reasons justifying a refugee's unauthorized entry or presence in an asylum country.

Article 13

Application lodgement

- 1 – The alien or stateless person who enters into Portuguese territory with the purpose of obtaining asylum shall lodge his or her application in the Aliens and Borders Service or any police authority within 15 days, either orally (with subsequent production of a written official document) or in writing.
- 2 – In case the applicant is a resident in the country, such period shall run from the date when the facts on which the application is grounded occurred or came to the applicant's knowledge on.
- 3 – Any police authority who receives the application referred to in paragraph 1 of the present article shall remit it to the Aliens and Borders Service within 48 hours.
- 4 – The applicant may lodge an application on behalf of the persons for whom he is responsible, whether minors or adults, and the application shall, in this case, be preceded of a previous explicit consent of those persons, otherwise it shall be considered inadmissible.
- 5 – The minor applicant may lodge an application on his or her behalf.

UNHCR Comment: In UNHCR's view, formal time-limits for submitting an asylum application may result in *refoulement*. Failure to apply for asylum promptly may be an element in the consideration of the credibility of a claim. However, it should never be the sole reason for rejecting an application. In UNHCR's experience, valid reasons may delay the filing of an asylum claim and this could include, for instance, illness, trauma, lack of access to information about the means to apply, or misinformation. UNHCR wishes to point out that any imposition of mandatory time-limits for submitting an asylum application is also inconsistent with Article 8 of the Asylum Procedures Directive.

Article 15(2)

Content of the application

1 – The applicant shall report all the necessary elements in order to justify the asylum application, namely:

- (a) identification of the applicant and members of his or her family;
- (b) nationality, country or countries, previous place or places of residence;
- (c) previous asylum applications;
- (d) description of circumstances or facts on which the asylum is grounded.

2 – The applicant shall also present, along with the asylum application, his or her identification and travel documents and all available elements of proof, taking into account that the number of witnesses shall not exceed ten.

UNHCR Comment: The requirement of documentation should not be too strictly applied. In many cases, persons fleeing from persecution will have arrived without any personal documents. Requiring refugees to always obtain proper travel documentation before fleeing their country of origin is in fact ignoring the very problems which give rise to the need for international protection.

Article 16

Statements

1 – Before the pronouncement of the decision on the admissibility of the asylum application, the applicant shall have the right to rendering statements under conditions which guarantee confidentiality and allow him or her to describe the circumstances on which the respective application is grounded.

2 – The rendering of statements is to be taken individually, except when the presence of members of the applicant's family is considered necessary for an adequate assessment of the situation.

3 – For the purposes of the previous numbers, The Aliens and Borders Service shall notify the applicant for the rendering of statements within *five days*, immediately after the reception of the asylum application, and shall inform the United Nations High Commissioner for Refugees and the Portuguese Refugee Council of the fact.

4 – If the application is lodged by a minor or disabled person, it shall be incumbent on the Aliens and Borders Service to report the situation to the Portuguese Refugee Council for representative purposes.

5 – The rendering of statements may be omitted only if there are prior conditions based on the available elements of proof for the admissibility of the application, or if the applicant has already provided the essential information for the referred evaluation by other mean.

UNHCR Comment: In some cases, the right to a personal interview may only be effective if qualified, impartial interpreters are made available. UNHCR recommends that this should be provided for in the Law proposal.

With regard to child asylum-seekers, UNHCR is concerned that admissibility, border or accelerated procedures generally do not provide for sufficient flexibility and time to take the situation of separated/unaccompanied children into account. Furthermore, the personnel conducting these procedures will often not be specially qualified to deal with children's asylum claims. This holds true especially for procedures conducted by a different authority from the one normally responsible for asylum requests, such as the border police. Claims of separated/unaccompanied children should therefore be examined in a regular procedure and should be exempt from application of the safe third country concept, or treatment in accelerated or border procedures. Entry should be granted in cases of claims submitted at the border, although age assessments could be undertaken prior to entry, in as much as this does not create unreasonable delays.

Article 18

Assessment

1 – In the assessment of the admissibility of each asylum application, the Aliens and Borders Service shall be responsible for the examination of all pertinent elements, in particular of the applicant's statements rendered in pursuance of the previous articles and of all the information rendered by the applicant in pursuance of article 15.

2 – In the assessment of the application, the Aliens and Borders Service shall take into consideration:

- (a) the pertinent facts concerning the country of origin at the time of taking a decision on the application, including constitutional regulations and other fundamental legislation, as well as the manner in which they are applied;
- (b) the individual position and personal circumstances of the applicant, so as to assess, on grounds of the personal situation, if he or she has suffered or may suffer serious persecution;
- (c) the activities performed by the applicant since the departure from the country of origin, in order to infer whether these have had the sole or main purpose of creating the necessary conditions to request international protection and if such activities, in case of return to that country, put him or her at risk of suffering serious persecution or harm;
- (d) whether the applicant could reasonably be expected to avail him or herself of the protection of another country where he or she could assert citizenship.

3 – The fact that an applicant has already been subjected to persecution or severe harm, or direct threats of such persecution or such harm, shall be a serious indication of the applicant's well-founded fear of persecution or real risk of suffering severe harm, unless there are good reasons to consider that such persecution or severe harm have ceased and will not be repeated.

4 – The statements of the applicant shall be supported by documentary evidence or other evidence admitted by law, unless the following conditions are cumulatively met:

- (a) the applicant has made a genuine effort to substantiate his or her application;
- (b) the applicant has presented all relevant elements available and has given a satisfactory explanation regarding any lack of other relevant elements;

- (c) the applicant's statements are found to be coherent, plausible and non-contradictory with available relevant information to the applicant's case;
- (d) the applicant has requested international protection at the earliest possible time, unless he or she can prove good reason for not having one so;
- (e) the applicant's general credibility has been established;

UNHCR Comment: As noted above, the nature of the assessment proposed in this Article is entirely about assessment of the substance of the claim, and not admissibility questions.

Article 19

Inadmissible applications

1 – The application shall be considered as inadmissible if, during the proceedings prescribed in the present Law, some of the causes mentioned in article 9 are found to be obvious.

With reference to comments on article 9, persons for whom there is serious reason to believe that exclusion clauses may apply should benefit from a full substantive assessment of their cases.

2 – The application shall also be considered as inadmissible when it is obvious that it does not comply with any of the criteria defined by the Geneva Convention and the New York Protocol, taking into account that:

- (a) the applicant's statements are unfounded, incoherent, unlikely or contradictory;
- (b) the application is deceitful or constitutes an abusive usage of the asylum process;
- (c) the application has been formulated with sole dilatory purposes in order to impede or delay the application of a previous or eminent decision of expulsion;

UNHCR Comment: According to the Asylum Procedures Directive, States may choose to introduce *accelerated or prioritized procedures* for the scenarios described in subparagraphs (a) to (c) (cf. Articles 23-24 of the Asylum Procedures Directive). Under no circumstances, may such cases be considered as *inadmissible* and thus deprived of a full substantive assessment.

With regard to the categories to which paragraph (2) refers, UNHCR is concerned, that the Law proposal permits prioritization or acceleration in a wide range of cases. In line with UNHCR Executive Committee Conclusion No. 30 (XXXIV) of 1983, only cases that are 'clearly abusive', (i.e. clearly fraudulent), or 'manifestly unfounded', (i.e. not related to the grounds for granting international protection), should be considered for distinct treatment in an *accelerated* procedure.

Specifically with regard to paragraph (2) (a) UNHCR is concerned that it is formulated very broadly. UNHCR would like to emphasize that the duty to ascertain and evaluate all the relevant facts should be considered a joint responsibility of the applicant and the examiner. This applies in general as well as in cases where there are inconsistencies or contradictions, where an applicant's story appears unlikely, or insufficiently substantiated.

Article 19 (2)(d)

The application comprises the situations mentioned in article 1^o-F of the Geneva Convention;

UNHCR Comment: An assessment for exclusion can only be made after a full assessment where the applicant is deemed to qualify for refugee status. Moreover, such assessments cannot realistically be made within the short deadlines of the admissibility procedure. However, the present provision also seems superfluous and should be deleted, as the situation the paragraph describes is already covered by Art. 9.

Article 19 (2)(e)

The application has been lodged beyond the closing dates prescribed in article 13 without due justification;

UNHCR Comment: With reference to the comments on Article 13 above, UNHCR considers strict time limits to be contrary to the 1951 Convention, since they may induce *refoulement*.

Article 19 (3)

The asylum application shall not be admissible when lodged by:

- (a) an applicant who has been subjected to decision of expulsion from the Portuguese territory;

UNHCR Comment: Previous expulsion from the country cannot as such warrant the automatic inadmissibility of a subsequent asylum claim. The applicant may have, for instance, suffered persecution in his or her country of origin after the expulsion took place, and thus be entitled to a substantive assessment of his or her claim in case he or she returns.

Article 19 (3)(b) to (d)

- (b) an applicant who has previously lodged an asylum application on grounds previously considered inadmissible and does not report new relevant facts regarding his or her specific circumstances or situation in the country of origin;
- (c) an applicant to whom the refugee status has already been recognised in other State and who may still benefit from such protection, or enjoys therein sufficient protection, including the benefit of the *non-refoulement* principle, as long as he or she can be readmitted in that country;
- (d) an applicant who can benefit from an alternative internal escape, considering there is not a well-founded fear of being persecuted in part of the country of origin, though there may be technical obstacles to his or her return;

UNHCR Comment: As stated in Article 8 of the Qualification Directive, the assessment of “internal flight alternative” belongs to the substantive assessment of a claim and cannot be advanced at the admissibility stage. If Portugal intends to introduce language related to this concept in the substantive part of its procedure, it is suggested to follow the text of the Qualification Directive.

Article 19 (3)(e)

An applicant whose origin is a safe country, or a first asylum country, or has the possibility of addressing to a safe third country;

UNHCR Comment: From all cases enumerated in Art. 19 only the “first country of asylum” and the “safe third country” concepts may be retained to be addressed in an admissibility procedure (see also Art. 25 of the Procedures Directive).

However, UNHCR considers the “safe third country” concept as being particularly problematic. In UNHCR’s understanding, the defining feature of a “safe third country” is whether the person already has such meaningful connection or close links with that country as to create fair and reasonable expectations that he or she could request and, if the criteria are met, obtain asylum there. A hypothetical possibility that the person could have sought asylum from a country that he or she has sojourned or transited through does not in itself qualify a country as a “safe third country.” Ultimately, a decision as to whether to deny access to the substantive refugee status determination procedure turns essentially on what will result in fact were the refugee applicant to be returned to another country deemed “safe.” UNHCR maintains that it could not accept the designation of a country as a “safe third country,” even with regard to a particular individual, if that country has not ratified the 1951 Convention and/or the 1967 Protocol. In addition, further attention should also be given to Art. 27 of the Procedures Directive.

Article 19 (4)(b)

4 – For the purposes of subparagraph a) of paragraph 2, it shall be considered that there is evidence of the application being clearly fraudulent or constituting an abusive usage of the asylum process, when the applicant:

- (a) bases and justifies the asylum application upon evidence emerging from false or forged documents, when questioned about them declares their authenticity, with bad faith has deliberately rendered false statements related to the object of the application or has destroyed documents which attest his or her identity;
- (b) deliberately omits previous asylum application(s) lodged in Portugal, in other or several countries, possibly using a false identity.

5 – For the purposes of subparagraph (c) of paragraph 2 of the present article, the Aliens and Borders Service shall proceed to the preliminary assessment of the subsequent application, in pursuance of article 23.

6 – The application shall also be considered inadmissible when submitted by the applicant on behalf of adult persons of whom he or she is in charge of without their explicit consent regarding the part which concerns them.

...

Articles 21

Effects of the application refusal

- 1 – The decision refusing the application shall be notified to the applicant within 48 hours, mentioning that he or she shall leave the country within 10 days, being otherwise subjected to immediate expulsion after the termination of the referred closing date.
- 2 – If the applicant does not comply with the provisions of the above paragraph, the expulsion will be immediately executed, as soon as his or her location is known, irrespective of any other procedure.
- 3 – The referred notification shall be accompanied of information on the rights of the applicant, for the purposes of the following article.

Article 22

Appeal

The decision pronounced by National Director of the Aliens and Borders Service shall be susceptible to judicial review before the administrative courts within 8 days.

UNHCR Comment: The provisions of the Law proposal on legal remedies against negative admissibility decisions do not explicitly mention the suspensive nature of appeals. Withholding of deportation until a final decision is reached on an asylum application is a fundamental guarantee, given the potentially devastating consequences of an erroneous determination. This requirement must be seen in the light of the absolute respect that the principle of *non-refoulement* commands. UNHCR therefore insists that the principle of suspensive effect of appeals against negative decisions on asylum must apply regardless of whether such decisions are taken in an admissibility procedure for determining safe third country, first country of asylum or Dublin Regulation returns, or in a substantive refugee status determination procedure. This is also in line with the case law of the European Court of Human Rights on *effective* appeal procedures.⁴

Articles 24-27

Section II

Applications lodged at Border Offices

Article 24

Special regime

- 1 – The admissibility of asylum applications lodged at border offices by aliens who do not comply with the necessary legal requirements for entry in Portuguese territory, shall be subjected to the regime prescribed in the previous articles along with the modifications of the present section.

⁴ See, for example, the recent judgment in *Gebremedhin v. France* (25389/05), where the Court found that “[g]iven the importance which the Court attached to Article 32 of the Convention and the irreversible nature of the harm that might occur if the risk of torture or ill-treatment materialized, it was a requirement of Article 13 that the persons concerned should have access to a remedy with automatic suspensive effect.”

2 – The employees who receive asylum applicants at border offices shall have adequate training and adequate knowledge of the relevant rules applicable within the scope of asylum and refugee law.

Article 25

Assessment and decision on application

1 – The Aliens and Borders Service shall immediately report any lodgements of asylum applications referred to in the above article to the representative of the United Nations High Commissioner for Refugees and the Portuguese Refugee Council, who may pronounce a decision within 48 hours and interview the applicant, if necessary.

2 – Within the referred period, the applicant shall be informed of his or her rights and obligations and render statements which constitute, for all purposes, a previous hearing of the interested.

3 – The rendering of statements referred to in the previous paragraph is correspondingly applicable to articles 16 and 17.

4 – The National Director of the Aliens and Borders Service shall pronounce a grounded decision of refusal or admission of the application within a maximum of five days, though never prior to the closing date mentioned in paragraph 1.

5 – The decision prescribed in the above paragraph shall be notified to the applicant along with information on his or her rights of appeal, and shall also be reported to the representative of the United Nations High Commissioner for Refugees and the Portuguese Refugee Council.

Article 26

Appeal

1 – The decision pronounced by the National Director of the Aliens and Borders Service shall be susceptible to judicial review before the administrative courts within 72 hours.

Article 27

Effects of application and decision

1 – The applicant shall remain in the port or airport international area while waiting for a notification of the decision pronounced by the National Director of the Aliens and Borders Service or the competent court. Here shall be applied the procedures and further guarantees prescribed in article 4 of Law no. 34/94 of 14 September.

2 – The decision on the refusal of the application shall determine the return of the applicant to the point where the journey initiated or, if this is not possible, to the State where the respective travel document has been issued, or to any other place where the applicant may be admitted, such as a safe third country.

3 – The decision on the admission of the application, or the expiring of the closing dates prescribed in paragraph 4 of article 25 without the notification of the admissibility refusal, shall determine the entry of the applicant into Portuguese territory, thus

following the fact-finding process of asylum procedures, in pursuance of the following articles.

UNHCR Comment: Specific border asylum procedures often bear the risk of low quality decisions, with an inherent risk of *refoulement*. The confined environment at the border is generally not conducive to a full and fair examination of the asylum application. Reduced procedural safeguards such as short deadlines for the assessment of asylum applications, lack of access to proper legal counseling make it difficult for the asylum authorities to come to a sound decision on the asylum application. In addition, the Law proposal provides for appeals to be formulated within a very short deadline, while their suspensive effect is not specifically assured (cf. Art 26 – see also UNHCR comments on Art. 11 and 22 of the Law proposal).

UNHCR has consistently maintained that there is no valid justification for the requirements of due process of law in asylum cases submitted at the border (including air and sea ports) to be less than for those submitted within the territory. Rather, the principle of non-discrimination requires that all asylum seekers, irrespective of whether they apply at these locations or inside the country, benefit from the same principles and guarantees. The existence of more restrictive border procedures may lead to a situation in which many asylum seekers may feel compelled to use illegal means to enter the territory in order to be assured of higher standards.

In implementing specific border asylum procedures, it should also be noted that according to the jurisprudence of the European Court of Human Rights any confinement in a restricted area, whatever the motivation, is considered to be detention.⁵ As freedom from arbitrary detention is a fundamental human right, the necessity of detention should be established in each individual case, and should be for the shortest possible period.⁶

In view of the above, UNHCR urges Portugal to reconsider the necessity for a special border asylum procedure in the Law proposal. Should the concept be maintained, UNHCR strongly recommends that specific safeguards be included to avoid erroneous decisions. More specifically, UNHCR proposes that the border procedure be restricted to cases which can be decided quickly because they are manifestly founded, manifestly unfounded or

clearly abusive⁷. This restriction would ensure that more complex cases are allowed entry to the territory and access to the regular asylum procedure where their claims can be properly addressed, while at the same time serving the purpose of a specific border procedure, i.e. deterring clearly undeserving claims. UNHCR stands ready to provide more concrete advice as to how appropriate protection safeguards can be included into the border procedure, giving due account to migration control and security concerns, while at the same time upholding Portugal's obligation to provide international protection to those in need of it.

Proper legal counseling must be ensured, and reception conditions at the confined place at the border should be able to provide necessary services and address the specific needs, inter alia, of women and children and the respect of family unity.

⁵ See, for example, European Court of Human Rights, *Amuur v. France*, 00019776/92, 1996-III, no. 11, 25 June 1996.

⁶ Conclusion No. 44 (XXXVII) adopted by the UNHCR Executive Committee in 1986. The Executive Committee stressed that "in view of the hardship which it involves, detention should normally be avoided."

⁷ Conclusion No. 30 (XXXIV) adopted by the UNHCR Executive Committee in 1983.

In particular, vulnerable persons, such as unaccompanied and separated children, the elderly, the sick and traumatized, should be exempted from border procedures and admitted to enter the territory of Portugal in order to follow the regular procedure without delay.

Given the potentially far-reaching consequences of erroneous decisions, it is a good State practice to grant UNHCR (and /or the Portuguese Refugee Council) a right to object to negative decisions in the border procedure and request their referral to the procedure in country⁸.

Article 29

Fact-finding process

- 1 – The Aliens and Borders Service shall proceed to the requested diligences and shall investigate every fact whose knowledge is convenient for a fair and quick decision. The fact-finding process of asylum procedures shall be due to the Aliens and Borders Service.
- 2 – The fact-finding process shall take place within 60 days, extendable for an equivalent period whenever necessary.
- 3 – Throughout the fact-finding process of asylum procedures, the Aliens and Borders Service shall, if necessary, require the opinion of experts on certain specific questions, in particular of medical or cultural nature.
- 4 – In the course of fact-finding process, a representative of the United Nations High Commissioner for Refugees or the Portuguese Refugee Council may add to the process any reports or information on the respective country of origin and obtain information on the course of the proceedings.
- 5 – The persons implicated in the asylum proceedings shall keep professional secret regarding any information to which they have access in the course of their functions.

UNHCR Comment: Refugee status determination is, or should be, a process of inquiry led by qualified, trained and impartial decision-makers. UNHCR attaches, therefore, great importance to a carefully managed programme of professional development to enhance the

knowledge and skills of the interviewers and decision-makers in the various aspects of administrative and refugee law, as well as questions of procedures, proper use of interpreters and cross-cultural communication. The planning, organization and delivery of such professional development programmes should, in UNHCR's view, be provided for in the present legislation.

Principled decision-making highly depends on good information. Decision-makers should have access to comprehensive, accurate, objective and up-to-date sources of information both on conditions in the country of origin and applicant-specific information specific to the applicant. Country of origin information relied upon by the decision-maker in determining refugee status should be disclosed to the asylum applicant and his or her legal adviser/counselor, and should further be subject to the scrutiny of the review/appeal bodies.

⁸ This is for example the case in Spain, Austria and Switzerland.

Article 30

Decision

- 1 – After the fact-finding process, the Aliens and Borders Service shall formulate a grounded proposal granting or refusing asylum.
- 2 – The representative of the United Nations High Commissioner for Refugees and the Portuguese Refugee Council shall be informed of the above mentioned proposal and may, if desired, render observations on its contents within 5 days.
- 3 – The applicant shall be notified of the contents of the proposal and may submit his or her point of view thereon within 5 days.
- 4 – If the applicant or the referred authorities render observations on the proposal, the project shall be remitted to the National Director of the Aliens and Borders Service, who shall reappraise it in the light of the new elements and submit a grounded proposal to the Minister of Internal Affairs within 10 days.
- 5 – The Minister of Internal Affairs shall decide within 8 days from the date of submission referred to in the above paragraph.
- 6 – In pursuance of the above paragraphs, the Aliens and Borders Service shall notify the applicant of this decision, mention the right referred to in the following article and report it to the representative of the United Nations High Commissioner for Refugees and to the Portuguese Refugee Council.

UNHCR Comment: Article 30 refers, in paragraph 6, to the duty of the Aliens and Borders Service to “notify” the asylum applicant of the decision taken on his or her claim. There is a need for some precision. The Law should clearly provide that (i) asylum applicants shall receive decisions on their application in writing; (ii) in cases of negative decisions, the applicants concerned shall be provided with detailed written reasons showing that the decision-maker has taken into account all material facts, assessed credibility properly, identified and interpreted the relevant law and applied the law to the established facts judiciously; and (iii) failed applicants shall receive, together with their reasoned decision, written information on the rules and procedures for challenging the unfavorable decision.

Article 32

Effects of asylum refusal

- 1 – In case of asylum refusal, the applicant shall be allowed to remain in the Portuguese territory for a transitory period, which shall not exceed 30 days.
- 2 – The applicant shall be subjected to the legislation concerning aliens from the closing date prescribed in the above paragraph on.

UNHCR Comment: UNHCR understands the “asylum refusal” in the context of this Article to mean refusal in the final stage of the refugee status determination procedure, which may be the appeal stage. To avoid any possible confusion, UNHCR recommends that this be explicitly stated and that the terminology of application for international protection is used throughout the text instead of asylum.

Article 35

Request for resettlement

1 – The requests for resettlement of refugees under the mandate of the United Nations High Commissioner for Refugees shall be submitted to the Minister of Internal Affairs, who may request a report to the Aliens and Borders Service.

2 – The report on the requests mentioned in the above paragraph shall be issued within 8 days.

3 – The Minister of Internal Affairs shall decide on the acceptance of the resettlement request within 15 days.

UNHCR Comment: UNHCR welcomes Portugal's commitment to support UNHCR's work in protection delivery and the search for durable solutions for refugees with a resettlement programme as provided for in the Resolution No. 110/2007 of the Council of Ministers adopted on 12 July 2007. UNHCR stands ready to continue to assist the competent authorities in establishing the necessary modalities for the implementation of the resettlement programme. This should, obviously, be done also in close co-operation with NGO partners which might be involved in the reception and integration of resettled refugees.

However, the status of refugees resettled to Portugal seems not sufficiently clarified in the current draft. Article 35 of the Law proposal doesn't make clear reference to the status of resettled refugees upon arrival in Portugal. UNHCR would encourage Portugal to automatically grant a status equivalent to refugees recognized under the national procedure to all resettled refugees upon arrival, which is in line with international practice. Most resettlement countries grant permanent residence permits to resettled refugees immediately upon arrival. UNHCR supports this good practice, which has proven to facilitate sustainable integration.

Article 41

Causes of withdrawal of the right to asylum

The right to asylum or subsidiary protection status shall cease if the beneficiary:

- (a) explicitly renounces to the referred status;
- (b) has performed forbidden acts or activities, pursuant to article 9;
- (c) has alleged false grounds for the asylum claim, or omitted facts which would have produced a negative decision had they been known at the time of granting;
- (d) has voluntarily re-availed him or herself of the protection of the country of his or her nationality;
- (e) having lost his or her nationality, has voluntarily re-acquired it;
- (f) has voluntarily acquired a new nationality, and enjoys the protection of the country of his or her nationality;
- (g) has voluntarily re-established him or herself in the country which he or she left or outside which he or she has remained owing to fear of persecution;
- (h) being a person who has no nationality he or she is, because the circumstances under which the right to asylum or subsidiary protection was granted have ceased to exist, able to return to the country of his or her former habitual residence;
- (i) has been expelled from the Portuguese territory by decision rendered by the competent court;

(j) has abandoned the Portuguese territory and settled in another country;

2 – The causes for the asylum withdrawal, pursuant to subparagraphs (h) and (i), shall only be applied when the Aliens and Borders Service, through a previous assessment, concludes that the change of circumstances in the State of nationality or habitual residence of the applicant is of such a significant and enduring nature that the refugee's fear of persecution or serious harm can no longer be regarded as well-founded.

3 – For the purposes of the previous paragraph, the Aliens and Borders Service shall report the result of the referred previous assessment to the United Nations High Commissioner for Refugees and the Portuguese Refugee Council, who may submit their point of view within eight days.

UNHCR Comment: This Article confounds exclusion, cancellation, cessation and other situations where refugee status may no longer be necessary or desired. As noted above under comments on Article 2(1)(r), cessation, cancellation and revocation are three distinct legal concepts that should be separated. It is essential that the legislation clearly differentiates between these concepts and their legal requirements.

As far as cessation of refugee status is concerned, it is advisable to use the text of Article 1C of the 1951 Convention. UNHCR notes, for example, that the cessation-related provisions enumerated in Article 41 of the Law proposal do not include paragraph 5 of Article 1C of the Convention and this should be corrected. UNHCR would also ask that consideration be given to including in the legislation the exception to general cessation of refugee status for persons refusing to avail themselves of the protection of their country of origin for "compelling reasons arising out of previous persecution" (as set out under both Articles 1C(5) and (6) of the 1951 Convention). This humanitarian exception is recognised to apply to refugees under Article 1 A (2) of the 1951 Convention and reflects a general humanitarian principle that is now well grounded in State practice. More generally, it is important that compelling reasons arising out of previous persecution be properly recognised even if a change of conditions in the country of origin has taken place at the time of decision-making.

Article 48

Witnesses

The number of witnesses appointed by any of the parts involved shall not exceed 10 persons.

UNHCR Comment: UNHCR recommends the deletion of this provision as there may be cases where naming a higher number of witnesses would be essential for a complete substantiation of the relevant facts by the applicant. Any issue of procedural economy could also be addressed through more flexible provisions to be included in the law's implementation.

Article 54

Non-refoulement

The expulsion of the asylum beneficiary, in pursuance of article 42, cannot result in his or her placement in the territory of a country where his or her freedom is endangered by any of the causes which, in accordance with article 1, may constitute ground for the granting of asylum or which violate in any other way the principle of *non-refoulement*, in accordance with the international obligations of the Portuguese State.

UNHCR Comments: UNHCR welcomes the reference to the principle of non-refoulement contained in Article 33 of the 1951 Convention, which has been confirmed as a customary norm of public international law, mandatory to all States. A reference should be made to the non-derogable Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which takes precedent over the 1951 Convention, which means that a person cannot be returned to a country where he/she would be subjected to torture or to inhumane or degrading treatment or punishment.

Proposed text for insertion after Article 1:

(1) A refugee shall not be expelled or returned in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(2) The benefit of the provision in paragraph (1) may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger for national security or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to public order.

(3) No one shall be returned, deported, extradited or expelled to a country where he or she would be subject to torture or inhuman or degrading treatment or punishment.

Article 57

Rights of the applicants

1 – Without prejudice to the provisions in pursuance of the following articles, asylum applicants shall benefit of the following guarantees:

- (a) immediate information or, when application has been lodged by other authority, within five days of application's registry, in a language that the applicant may reasonably be supposed to understand, on the rights and obligations relating to accommodation, in particular on:

UNHCR Comment: Article 57(1)(a) refers to the provision of information to asylum applicant in a language that he or she “may reasonably be assumed to understand.” UNHCR considers it necessary to provide information to every asylum-seeker in a language that he or she actually understands. Assumptions that a person speaks or understands the official language(s) of his or her country of origin may be incorrect.

Article 58

Obligations of the asylum applicant

Asylum applicants shall:

- (a) keep the Aliens and Borders Service informed on their current address and shall immediately notify any change of address;
- (b) appear before the Aliens and Borders Service twice monthly on the appointed weekday , otherwise the procedure shall be suspended without a convenient clarification of the applicant's situation;
- (c) report any change of address to the authority in charge of accommodation.

UNHCR Comment: Article 58(b) imposes on all asylum applicants a general reporting requirement, irrespective of whether or not the person entered or is present in the country legally. Such reporting requirements may constitute a viable alternative to detention of undocumented asylum-seekers arriving or present in the country. Such an alternative should be considered favourably, for example, instead of detaining asylum-seekers at border points and processing their asylum claims within special procedures with lesser safeguards as foreseen under Section II of the Law proposal. Where, however, an asylum-seeker has entered or is present in Portugal legally, it is not clear on what grounds he or she is required to regularly report to the Aliens and Border Service.

Article 61

Access to education

1 – Minor children of asylum applicants and asylum applicants who are minors, to whom a provisional residence permit has already been issued, shall be granted access to the education system under similar conditions as Portuguese nationals, for as long as their situation, as well as their parents', is not subject to alteration in what concerns the status that has been recognised to them.

UNHCR Comment: As stipulated by the Convention on the Rights of the Child, children should always have access to education, irrespective of their residency status.

Article 65

Forms of provision of material reception conditions

1 – Material reception conditions may take the following forms:

- (a) housing in kind;
- (b) food in kind;
- (c) monthly social assistance cash allowances for food, clothing, personal and transport expenses purposes;
- (d) monthly complementary allowance for housing purposes;
- (e) complementary allowance for personal and transport expenses purposes;

2 – Housing and food in kind may take the following forms:

- (a) premises similar to reception centres for asylum applicants, whenever the asylum application is lodged in border offices;

- (b) reception centres for asylum applicants or similar accommodation which guarantees an adequate standard of living;
- (c) private houses, flats, hotels or other premises adapted for the accommodation of applicants.

3 – The following forms of reception may be combined:

- (a) housing and food in kind plus the complementary allowance for personal and transport expenses;
- (b) housing in kind or complementary allowance for housing plus a social assistance cash allowance.

4 – In exceptional circumstances and for a fixed period, other modalities may be set for material reception conditions, which are different from those provided for in the above paragraphs when:

- (a) an initial assessment of the specific needs of the applicant is required;
- (b) material reception conditions, as provided for in paragraph 2, are not available within the geographical area where the applicant is present;
- (c) normally available accommodation capacities are temporarily exhausted;
- (d) the asylum-seeker is in detention or confined to a border post where premises similar to accommodation centres are not available.

UNHCR Comment: States have broad discretion to choose what forms and kinds of reception support they will offer to asylum-seekers. What is important is that the combined effect of these measures is evaluated to ensure that, at a minimum, the basic dignity and rights of asylum-seekers are protected and that their situation is, in all the circumstances, adequate for the country in which they have sought asylum.⁹

To the extent possible, the delivery of basic services to asylum-seekers should not be self-contained, but integrated into existing community services. This should be supplemented, as required, by targeted support structures that address the special needs of asylum-seekers (e.g. language training, orientation and cultural awareness programmes, social and legal counselling, community development, etc.)

Reception facilities at airports and any other border points should include all necessary assistance and the provision of basic necessities of life, including food, shelter and basic sanitary and health facilities. Even for a short stay, family unity and privacy should be respected.

Article 67

Supplementary guarantees in terms of housing

1 – The authority responsible for the granting of housing in kind shall ensure the applicants, in pursuance of paragraph 2 of article 65:

- (a) protection of their family life;
- (b) ensure, if appropriate, that minor children of applicants or applicants who are minors are accommodated with their parents or with an adult member of the family responsible for them whether by law or custom;

⁹ See also the general rule set out in Article 13(2) of the Council Directive laying down minimum standards for the reception of asylum-seekers (2003/9/EC), according to which reception conditions provided by the Member States must “ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence.”

(c) the possibility of communicating with their relatives or legal advisers, as well as with the representatives of the United Nations High Commissioner for Refugees and the Portuguese Refugee Council;

(d) take the adequate measures in order to prevent assault within the premises and accommodation centres referred to in paragraph 2 of article 65.

2 – The transference of asylum applicants from one accommodation premise to another shall only be made when it is considered necessary to the continuation of the procedures or to improve housing conditions.

3 – Applicants transferred under the provisions of the above article shall have the possibility of informing their legal advisers of such transference and of their new address.

4 – Legal advisers or counsellors of the asylum applicant, representatives of the United Nations High Commissioner for Refugees or of the Portuguese Refugee Council and other non-governmental organisations working in this domain, and recognised as such by the Portuguese State, shall be entitled to the right of access to reception centres and other accommodation premises, so as to assist asylum applicants. Access restrictions can only be established if duly grounded and when considered necessary for the security of reception centres, other premises and asylum applicants.

5 – The staff members working in reception centres shall receive appropriate training and shall be bound by the confidentiality principle concerning any information they may obtain in the course of their work.

UNHCR Comment: The Article doesn't raise any specific concerns and the specific access granted to Legal Advisors, UNHCR and the Portuguese Refugee Council is commendable. In general terms, UNHCR wishes to remark that accommodation provided in collective centres should be for the shortest possible duration. Housing asylum-seekers in collective centres during the initial months following their arrival has the advantage of facilitating efficient dissemination of information and the provision of advice and guidance. At later stages, however, private accommodation is often more suitable given the risk that prolonged periods of stay in collective centres could lead to marginalisation. Moreover, accommodation in collective centres should respect privacy and families should always be housed together even for short periods. Single men and women should be housed separately. The centres should allow for the respect of cultural and religious customs.

Article 68

Reduction and withdrawal of reception conditions

1 – Social assistance ceases with the final decision on the asylum application, irrespective of the interposition of the competent judicial recourse.

2 – The withdrawal of assistance, in pursuance of the above paragraph, shall not occur when, once assessed the socio-economic situation of the applicant, the maintenance of such assistance is considered necessary.

3 – The provided reception conditions may be totally or partially withdrawn when an asylum-seeker:

- a) abandons the place of residence determined by the competent authority without informing it, or, if requested, without its permission;
- b) abandons the place of residence without informing the authority responsible for accommodation;
- c) fails to comply with the obligation of appearance;

d) fails to comply with requests for information, or to appear for personal interviews when convoked;

e) has concealed financial resources and therefore unduly benefited from material reception conditions;

4 – If, after the withdrawal of the reception conditions, the applicant is traced or voluntarily reports to the competent authorities, such authorities shall reach a duly grounded decision, based on the reasons for the disappearance, as to the reinstatement or otherwise the granting of some or all of the reception conditions.

5 – Decisions on reduction and withdrawal of reception conditions referred to in paragraph 1 shall be taken individually, objectively and impartially and reasons shall be given.

6 – The decisions referred to in the above paragraph shall be grounded on the particular situation of the person concerned, especially with regard to vulnerable persons, taking into account the principle of proportionality.

7 – Reduction or withdrawal of benefits does not interfere with access to emergency medical care.

8 – The decisions referred in paragraph 3 are susceptible to appeal, in pursuance of article 71.

UNHCR Comment: UNHCR would urge that Article 68(1) be amended to ensure that reception assistance and support is provided to vulnerable asylum-seekers during their judicial appeal procedures. It would be incongruent if the provisions in Article 31 of the Law proposal guaranteeing suspensive effect of appeals against negative decisions were not coupled with treatment that ensures human dignity and integrity.

UNHCR would also urge a revision of Article 68(3), which allows for the withholding of all benefits (except emergency health care) from asylum-seekers who have not complied with reporting or other requirements. Clearly, the core content of human rights applies to everyone in all situations, including asylum-seekers who may have infringed certain regulations in relation to the processing of their asylum claims. Measures to reduce or withhold reception conditions may also affect the applicant's family members, including children, and may be inconsistent with the provisions of the Convention on the Rights of Child. It is essential to enable asylum-seekers to sustain themselves throughout the asylum process to respect for their basic rights and to ensure a fair and effective asylum procedure. Only when asylum-seekers do not have to worry about their basic necessities of life, can asylum procedures be conducted in a meaningful way.

Article 72

Rights and obligations

Beneficiaries of the refugee status are entitled to the rights and must comply with the obligations of aliens who are residing in Portugal, with particular respect for laws and regulations, and provisions regarding the maintenance of public order, without prejudice to the provisions laid down in this law, in Geneva Convention of 1951 and New York Protocol of 1967.

UNHCR Comment: This Article seems to present some drafting problems that need to be corrected. Beneficiaries of subsidiary protection are omitted probably inadvertently. Moreover, the Article appears to equate refugees with aliens resident in Portugal as regards their rights and obligations. UNHCR would suggest that the amendments to Article 72 include an explicit recognition of the pre-eminence of the rights of refugees as set by the 1951 Convention. In many respects, the Convention rights are the basics only and Contracting States are generally expected to provide a higher standard of treatment commensurate with their abilities. And as UNHCR has argued earlier, there should not be a difference between the rights enjoyed by refugees and those granted subsidiary protection.

Article 73

Information

Upon notification on the granting of asylum or subsidiary protection status, the Aliens and Borders Service shall inform the beneficiary of the rights and obligations resulting from such status, in a language that the applicant may reasonably be supposed to understand.

UNHCR Comment: UNHCR's comment on Article 57 is also valid for Article 73: information should be provided to every asylum-seeker in a language that he or she actually understands. Assumptions that a person speaks or understands the official language(s) of his or her country of origin may prove to be incorrect.

Article 74

Residence permits

1 – Beneficiaries of refugee status shall be granted a residence permit, which shall be valid for a period of five years and annually renewable until the referred closing date, unless compelling reasons of national security or public order otherwise require.

2 – Beneficiaries of subsidiary protection status shall be granted a residence permit for humanitarian reasons, which shall be valid for an initial period of two years and annually renewable for the maximum period of five years, and only after an assessment of the evolution of the situation in the country of origin.

UNHCR Comment: UNHCR wishes to point out that the provision in Article 74(1) relating to residence permits for refugees appears to need clarification. On the one hand, the residence permit is granted for a duration of five years, and on the other hand the permit is meant to be annually renewable “until the referred closing date”. Article 24(1) of the Qualification Directive provides that “...Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable...” Yet, according to the current formulation of Article 74(1) of the Law proposal, it appears that refugees would only get a yearly residence permit renewable possibly for a maximum of five years. The Asylum Procedures Directive's minimum standard should be raised rather than lowered.

UNHCR's position is that States should accord refugees permanent residency immediately upon determination of their refugee status and expedite their naturalization. This applies equally to beneficiaries of subsidiary protection, whose needs, hopes and aspirations are in many ways similar to those of refugees.

Invoking the “temporary nature of subsidiary protection” as a reason for not treating beneficiaries of subsidiary protection on equal footing with refugees does not seem to be a persuasive argument. The reality is that the need for subsidiary protection is often just as long-lasting as that for protection under the 1951 Convention. In recognition of that fact, UNHCR would recommend that the residence permit provided to beneficiaries of subsidiary protection be for the same duration as that for persons with refugee status. If a fundamental change of circumstances occurs in the country of origin of a beneficiary of subsidiary protection before the expiry of his or her residence permit, the cessation clauses of the 1951 Convention would in any case apply in the same vein as in the case of refugees.

Article 75

Maintaining family unity

1 – The effects of asylum or subsidiary protection shall be declared extensible to the beneficiary’s family members, in so far as they are present in the Portuguese territory, whenever the applicant requires it, in pursuance of the present law and in so far as it is compatible with the applicant’s personal judicial status.

2 – When the applicant is a minor under 18 years and requires it, such effects are declared extensible in similar conditions to his or her father, mother and minor siblings, in so far as the applicant is their sole support.

3 – The provisions defined under the above paragraphs do not apply when the family member is excluded from the refugee or subsidiary protection status or loses entitlement to it, pursuant to the present law.

UNHCR Comment: UNHCR recommends that a reference is made to family reunification for persons outside the country unless this is already covered by migration legislation.

Article 76

Travel documents

1 – The competent Portuguese authorities may issue to beneficiaries of refugee status, by request of the beneficiaries, travel documents in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside the Portuguese territory, unless compelling reasons of national security or public order otherwise require.

2 – The competent Portuguese authorities may issue, by request of the beneficiaries, to beneficiaries of subsidiary protection status who are unable to obtain a national passport, a Portuguese passport for foreigners for the purpose of travel outside the Portuguese territory, unless compelling reasons of national security or public order otherwise require.

3 – The due fee upon the issue of these documents shall be established by decree of the Minister of Internal Affairs.

UNHCR Comment: Article. 28 of the 1951 Convention confers on refugees the right to be issued with a refugee travel document. There is no discretion for State Parties to deny refugees this kind of a document apart from compelling reasons of national security and public order. Therefore UNHCR recommends the amendment of the wording in Article 76 (1) from “may issue” to “shall issue”.

Article 79

Social welfare

1 – Legal provisions on access to the social welfare public system and to the social allowance provided by the social welfare system shall be applied to beneficiaries of refugee and subsidiary protection status.

2 – Within the scope of the social welfare public system, the social assistance granted to beneficiaries of refugee and subsidiary protection status shall be limited to the allowances of the solidarity subsystem, which will be provided at the same levels and under the same eligibility conditions as nationals.

UNHCR Comment: UNHCR considers that beneficiaries of subsidiary protection should enjoy the same welfare benefits as refugees, as their international protection needs are normally not lesser than those of refugees and there are no obvious grounds for a distinction to be made between the two categories.

Article 82

Freedom of movement within Portuguese territory

The Portuguese State shall allow freedom of movement within its territory to beneficiaries of refugee and subsidiary protection status, under the same conditions as those provided for other third country nationals legally resident in Portugal.

UNHCR Comment: UNHCR understands that in line with Article 26 of the 1951 Convention and Article 2 of Protocol No. 4 to the European Convention on Human Rights and Fundamental Freedoms, the right to freedom of movement as provided for in Article 82 of the Law proposal also includes the right to choose one's place of residence.