



Key Points for Consideration on Bosnia and Herzegovina's Draft Asylum Law:
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UNHCR Office for Bosnia and Herzegovina
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Introduction

1. The Office of the United Nations High Commissioner for Refugees (UNHCR) welcomes the opportunity to comment on the draft of the new Asylum Law (Draft Law) of Bosnia and Herzegovina (BiH) that will replace the existing asylum provisions in the Law on the Movement and Stay of Aliens and Asylum (LMSAA). The Draft Law is being elaborated in line with the 2012-2015 Migration and Asylum Policy and will regulate BiH's international obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (hereinafter CSR51). UNHCR notes that the LMSAA, which currently governs asylum in BiH, already meets many of the international standards set out in CSR51 and would like to express our appreciation for the government's efforts to bring its asylum law into even greater conformity with international standards.
2. UNHCR offers these comments as the Agency entrusted by the UN General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees. As set forth in its Statute, UNHCR fulfills its international protection mandate by, inter alia, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."¹ UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention according to which State parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in

¹ Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (V), 14 December 1950, at 8(a).

particular facilitate its duty of supervising the application of the provisions of the Convention”. The same commitment is included in Article II of the 1967 Protocol.

3. UNHCR commends the government for provisions in the Draft Law that further strengthen the rights of refugees and asylum-seekers in BiH, such as the recognition of the right to work for asylum-seekers (Art. 74 (1) e) and the right of an asylum-seeker and his or her authorized representative to have access to the minutes of the asylum interview (Art. 38 (6)). These are important developments that demonstrate BiH’s commitment to providing a high standard of international protection and human rights for refugees and asylum-seekers. We hope that the comments and recommendations offered here, on a number of key issues of importance to UNHCR, will provide a valuable contribution to the elaboration of asylum legislation in compliance with international standards and practice, which will fully correspond to BiH’s commitment to respecting international refugee law and other human rights standards. We hope to have opportunities to present and discuss further views in the near future.

I. Article 2 of the Draft Law – Definitions

Asylum-Seeker

4. While CSR51 does not contain a definition of “asylum-seeker,” UNHCR considers an asylum-seeker to be “someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated.”² There is no requirement that a formal application be made in order for a person to be considered an asylum-seeker. Article 2(c) of the Draft Law defines an asylum-seeker as “an alien or a stateless person who has lodged an asylum application upon which no enforceable decision has been made in accordance with the law.” This definition could lead to persons who have asked for asylum, but have not yet lodged an application, being denied rights while they are awaiting the opportunity to lodge an official application for asylum.
5. There will necessarily be a period between the expression of an intention to seek asylum and the formal application for international protection. During this period if a person who has expressed an intent to claim asylum but not yet lodged a formal application for asylum is not considered an asylum-seeker under the laws of BiH he or she will not receive the rights and benefits of an

² For example see “[Protecting Refugees and the Role of UNHCR](http://unhcr.org.au/unhcr/images/protecting%20Refugees%20and%20the%20Role%20of%20UNHCR.pdf)”, (UNHCR 2011) p. 6.
<http://unhcr.org.au/unhcr/images/protecting%20Refugees%20and%20the%20Role%20of%20UNHCR.pdf>

asylum-seeker, such as the right to health care, education and, most importantly, protection against *refoulement*.

6. A preferable definition is found in Article 5(g) of the LMSAA, which provides that:

[A]n applicant for international protection is an alien who can be considered as someone who is requesting refugee status or subsidiary protection in BiH, until a decision regarding his/her request is made in accordance with this Law.
7. The definition in the LMSAA correctly recognizes that a person is an asylum-seeker even before lodging an official application for asylum. As a result of this definition, asylum-seekers in BiH have access to rights from the time that they claim asylum, rather than the time they lodge a formal application.
8. UNHCR recommends maintaining the definition as it currently appears in the LMSAA in order to ensure that asylum-seekers rights are respected from the moment a person expresses intent to seek asylum. This change should also be incorporated into Article 14(1) pertaining to the provision of information to asylum-seekers and Article 15(2) pertaining to the asylum-seeker's right, at all stages of the procedure, to communicate with UNHCR and other organizations working on the issue of asylum.

Refugee

9. The Draft Law defines a refugee as “an alien or a stateless person who is recognized as such by the Ministry, in accordance with the *1951 Convention relating to the Status of Refugees* and the *1967 Protocol relating to the Status of Refugees* and this Law.” This formulation requires a person to be recognized as a refugee in order to be considered a refugee, which is not in compliance with the CSR51 definition of refugee.
10. CSR51 defines a refugee as any 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.”³

³ CSR51 Art. 1A(2)

- 11.** Under international law, a person is a refugee as soon as that person meets the criteria of the refugee definition in CSR51. No recognition of that status is required. As noted in paragraph 28 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.⁴

- 12.** UNHCR recommends that the definition of a refugee contained in CSR51 be used in the Draft Law and that a separate definition for “recognized refugee” be added that is defined as someone who has been recognized as a refugee by the competent authorities.

Particular Social Group (PSG)

- 13.** UNHCR welcomes the inclusion of a definition for PSG in the Draft Law. PSG is an important, though not always well-understood, ground for an asylum claim. Various jurisdictions have proposed definitions of PSG that UNHCR has reviewed and assessed in order to arrive at a definition of PSG that captures the best practices in the available jurisprudence on this subject.

- 14.** UNHCR Guidelines provide the following definition for PSG:

A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.⁵

⁴ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paragraph 28, <http://www.unhcr.org/3d58e13b4.html>

⁵ “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UNHCR Guidelines on International Protection, May 2002. <http://www.unhcr.org/3d58de2da.html>

15. The definition provided in Article 2 (aa) of the Draft Law is similar to the UNHCR language but differs in an important respect. The definition of PSG in the Draft Law appears to require that a person demonstrate *both* that they are a member of a social group by virtue of a shared characteristic *and* that they are perceived as a member of a social group by society. The UNHCR definition allows for a social group based on a common characteristic *or* due to being perceived as such by society. Thus, the Draft Law definition of PSG would be more difficult to demonstrate than the UNHCR definition and would fail to include some asylum-seekers in need of international protection. UNHCR, therefore, recommends that the Draft Law incorporate the definition of PSG articulated in UNHCR's Guidelines.

II. Article 12 of the Draft Law – Family Reunification

16. The importance of the family and the right to family life is widely recognized in international human rights law. The Universal Declaration of Human Rights states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”⁶ This position is restated in various human rights documents including the International Covenant on Civil and Political Rights⁷ and the International Covenant on Economic, Social and Cultural Rights.⁸

17. The United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons unanimously adopted a recommendation on the principle of unity of the family in which they noted that family unity is an essential right of the refugee that is constantly threatened, and that governments should take the necessary measures to protect⁹ while ensuring that “the rights granted to a refugee are extended to members of his family.”¹⁰

18. Article 12(1) of the Draft Law provides that “[a] refugee or an alien under subsidiary protection is eligible for family reunification with his/her family members ... provided that the family members of the person with recognized status are present in BiH.”

19. UNHCR welcomes the inclusion of persons with subsidiary protection into the category of persons with a right to family reunification, but is concerned that the right to family reunification is limited to those family members who are present in BiH. Many refugees are forced to flee leaving family members behind. Others are separated during flight. Given the fundamental right of

⁶ Universal Declaration of Human Rights, Article 16(3)

⁷ International Convention on Civil and Political Rights, Article 23(1)

⁸ International Covenant on Economic, Social and Cultural Rights, Article 10(1)

⁹ CSR51 IV(B) “Principle of Unity of the Family”

¹⁰ Ibid.

family unity, family members outside of BiH should also be included in those eligible for family reunification.

20. The Executive Committee has addressed the importance of family unity for refugees in a number of its conclusions, and has been clear that the right to family unity should not be limited to family members already in the country of asylum, but should also apply to family members in other countries as well, including those left behind in the country of origin. For example, the Executive Committee has noted that “in keeping with the fundamental principles of family unity, members of refugee families should be given every opportunity to be reunited by being allowed to leave their country of origin.”¹¹ In addition, the Executive Committee has also called upon states to “facilitate the admission to their territory of at least the spouse and minor or dependent children of any person to whom temporary refuge or durable asylum has been granted.”¹²

21. Given the fundamental importance of family unity and its recognition as an essential right of refugees, UNHCR recommends that the language in Article 12(1) of the Draft Law “provided that family members of the person with recognized status are present in BiH”, limiting family unity to members of the family already in BiH be eliminated.

III. Article 26 of the Draft Law – *Sur Place* Claims

22. Article 26 (2) of the Draft Law provides that a *sur place* claim for international protection may be based on “activities of the asylum-seeker after leaving the country of origin, *if it is established that they represent the expression and continuation of his/her convictions and orientations he had in the country of origin*” [emphasis added]. The qualification that the convictions and orientations that cause a *sur place* asylum-seeker to have a well-founded fear of persecution must be a continuation of those he or she had in the country of origin in order to sustain an asylum claim is not supported by international refugee law.

23. The UNHCR Handbook provides that:

A person may become a refugee “*sur place*” as a result of his own actions, such as associating with refugees already recognized, or

¹¹ Ibid.

¹² Executive Committee Conclusion, No. 15 (XXX) – 1979

expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities.¹³

24. A *sur place* claim should be assessed as any other claim. If the asylum-seeker meets the refugee definition, he or she should be recognized as a refugee regardless of whether the beliefs or characteristics that make him or her a refugee existed in the country of origin. UNHCR, therefore, recommends that the phrase “if it is established that they represent the expression and continuation of his/her convictions and orientations he had in the country of origin” be deleted from Article 26(2).

Conclusion

UNHCR appreciates the opportunity to share some of our key observations and recommendations on the Draft Law. While we have not addressed all issues of interest to us, we have tried to provide useful input on those that we consider a priority. We hope to share our views further at upcoming events and as future opportunities arise to discuss the drafting of the law.

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UNHCR Sarajevo

¹³ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees Para 96.