

UNHCR Observations on the proposed Law on International and Temporary Protection

I. INTRODUCTION

1. The UNHCR Regional Representation in Skopje is grateful to the Ministry of Internal Affairs for the invitation to express its views on the proposal of the Law on International and Temporary Protection, submitted for comments on January 31, 2018 (hereafter referred to as the Proposal).
2. UNHCR *offers these comments as the agency* entrusted by the United Nations General Assembly with the responsibility to provide international protection to refugees and other persons within its mandate, and together with Governments, to seek permanent solutions to the problem of refugees, as outlined in Paragraph 1 of UNHCR's Statute¹. As set forth in its Statute, UNHCR fulfils 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." UNHCR's supervisory responsibility is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees² *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 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 relating to the Status of Refugees³ (hereinafter collectively referred to as the "1951 Refugee Convention"). UNHCR also fulfills its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.
3. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Refugee Convention as well as by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.
4. The following comments are based on international protection standards set out in the 1951 Convention, in international human rights law, on Conclusions on International Protection of the UNHCR Executive Committee (hereafter "ExCom"), and on UNHCR guidelines.

¹ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>

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

³ UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>

II. GENERAL OBSERVATIONS

5. UNHCR welcomes the commitment of the Government to continue improving asylum legislation, to further align it with the international and regional standards. It is important that the process of harmonization of the international protection regime in the Country with the EU *acquis* continues, as a path towards full and inclusive application of the 1951 Convention.
6. We are pleased to note that the process of drafting the new Law on International and Temporary Protection has been inclusive, and that UNHCR had an opportunity to participate in the Working Group established for that purpose and contribute to the quality of the proposal. It is particularly important that the draft has been transparently made available for all interested actors on the web page of the Ministry of Interior, thus providing an opportunity for the civil society and other concerned stakeholders to express their observations.
7. UNHCR wishes to present several key observations regarding the proposal, while detailed annotated comments are enclosed.

III. SPECIFIC OBSERVATIONS

Safe country concepts

8. UNHCR is pleased to note that the concept of the “safe EU, NATO or EFTA member state third country”, as defined in the Article 10a of the present Law on Asylum and Temporary Protection, introduced through amendments to the law of April 2016, has been abandoned. This will represent a significant improvement of the international protection regime in the country, as the present provision does not provide an asylum-seeker coming from one of the EU, NATO or EFTA member states for an opportunity to challenge the application of the safe third country concept in his or her particular circumstances. Detailed observations about the concept of the safe third country as well as safe country of origin can be found in the annotated comments enclosed to this paper.

Definition of an asylum-seeker

9. UNHCR further welcomes the improved definition of an asylum-seeker/applicant, as defined by Article 2(6) and 4 of the Proposal, which includes a person who has expressed intention to seek asylum, in addition to a person who submitted an asylum application, which is the current solution in the Law on Asylum and Temporary Protection. The new provision should facilitate access to asylum and eliminate any possible lack of clarity among the first-contact officials.

Principle of family unity and family reunification

10. It is a generally agreed fact that the family is the fundamental unit of society entitled to protection by society and the State⁴ and it is thus important to further strengthen family protection in the domestic statute. UNHCR is happy to note that the Proposal includes a principle of family unity as a separate provision (Article 15). The institute of family reunification has been existing in the asylum system in the Country, since the adoption of the Law on Asylum and Temporary Protection as of 2003. Nevertheless, spelling out the principle of family unity in a separate provision further strengthens

⁴ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 16(3) available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>; See also UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 23(1), available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>

protection of family, which is a very positive step. Yet, UNHCR is concerned that the Article notes that a family member who would be excludable him/herself from refugee or subsidiary protection status is also excludable from the right to family unity. The right to family unity is universal and applies to everyone, as recognized in numerous international human rights treaties (see for example Article 16 of the Universal Declaration of Human Rights, Article 23 of the International Covenant on Civil and Political Rights, Article 8 of the ECHR). However, while generally advocating for a derivative status for family members, UNHCR recognizes that family members are excluded from obtaining refugee status or subsidiary protection on the basis of family reunification in case they would be excludable from obtaining refugee or subsidiary protection individually.

11. UNHCR notes that the scope of family reunification in the Proposal is limited to the right of family members to initiate their own asylum procedure. Generally, UNHCR's position is that family members should be granted the same status as the principal applicant (derivative status). While family members should have the right to seek asylum on their own, this should not be made a prerequisite for family reunification. UNHCR suggests to include a notion reflecting that family members who do not individually meet the criteria for international protection shall have a right to enjoy family reunification on other grounds and a reference to the Law on Foreigners.
12. UNHCR welcomes that the restrictive provision of Article 8 of the Law on Asylum and Temporary Protection, as amended in April 2016, which delays family reunification of both recognized refugees and persons under subsidiary protection for three years after being granted asylum, has been revised. We note with satisfaction that the proposed Article 16 (4) enables for family reunification of a person who is being granted refugee status without delays.
13. However, UNHCR is concerned that the provision of the same proposed Article 16 (4) still delays family reunification of persons being granted subsidiary protection, for two years following granting of such status. The right to family unity is one of the fundamental rights enshrined in the international protection regime⁵. Respect for the right to family unity requires not only that States refrain from actions which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated. Maintaining and facilitating family unity helps to ensure the physical care, protection, emotional well-being, and economic support of individual refugees and their communities⁶. Family reunification procedures for beneficiaries of international protection often take many months. These long delays add to a situation of further prolonged separation and affect the benefits of family reunification as an important element in rebuilding a new life. This is particularly important in the current context, whereby subsidiary protection is a predominant form of international protection granted in the country, and many of persons granted such protection are unaccompanied or separated children. Delay of family reunification for them constitute a breach of the principle of the best interest of the child - Article 3 of the Convention on the Rights of the Child (CRC) and the obligations under Article 10(1) of the CRC which requires States to deal with applications by a child or his or her parents for the purpose of family reunification "in a positive, humane and expeditious manner". UNHCR therefore strongly suggests

⁵ Although there is not a specific provision in the 1951 Refugee Convention and its 1967 Protocol, the strongly worded Recommendation in the Final Act of the Conference of Plenipotentiaries reaffirms the 'essential right' of family unity for refugees. Moreover, refugee law as a dynamic body of law, is informed by the broad object and purpose of the 1951 Convention and its 1967 Protocol, as well as by developments in related areas of international law, such as international human rights law and jurisprudence and international humanitarian law. In addition, Executive Committee Conclusions Nos. 1, 9, 24, 84, 85, and 88, each reaffirm States' obligations to take measures which respect family unity and family reunion.

⁶ Please see *Summary Conclusions: Family Unity – Expert roundtable organized by the UNHCR and the Graduate Institute of International Studies, Geneva, Switzerland, November 2001*, available at <http://www.refworld.org/docid/470a33bed.html>

that family reunification procedure for people under subsidiary protection to be exercised within a reasonable timeframe, and that the reunification should start early in the asylum procedure, latest immediately upon the decision of granting protection.

14. Furthermore, in UNHCR's view, the definition of family members needs to be inclusive for the purpose of family reunification. More detailed comments are found in the enclosed annotated comments.

Detention of asylum seekers

15. UNHCR is concerned that the Proposal introduces detention of asylum seeker as an option, without adequate legal and procedural safeguards for asylum-seekers. It is furthermore concerning that Article 63 and successive are unclear about the scope to which freedom of movement might be lawfully restricted and clearly confuses conditions or restrictions on freedom of movement with deprivation of liberty. It is essential to properly distinguish between their application to the individual case as the legal framework, international standards and safeguards applicable to either are different. We note with regret, as well, that the working group did not pay sufficient time to discussing this new legal institute in the national asylum system, allowing for deliberating in substance on all its important aspects. Deprivation of liberty represents a serious limitation of one of the basic human rights, and as established in international law it can only be resorted to exceptionally, as a measure of last resort, and when no other less coercive or intrusive measures are available to fulfil the legitimate purpose sought by its use. Furthermore, any deprivation of liberty (detention in the immigration context) needs to be followed by important guarantees and procedural safeguards, in line with the international standards. These include the requirement that any detention be both necessary and proportionate, which must be satisfied on an individual basis before resorting to detention; the recognition that detention is an exceptional measure that can only be justified for a legitimate purpose on explicitly defined grounds; the requirement to establish alternatives to detention; a stipulation that the period of detention be as short as possible; a right to speedy judicial review of the legality of detention; written information on reasons for detention and on procedures to challenge detention; and an obligation for written detention orders stating the factual and legal reasons justifying detention. Provisions on detention should also prescribe appropriate conditions in detention, including UNHCR access to detention facilities; and crucially, should limit the use of detention to exceptional circumstances for vulnerable persons and unaccompanied minors.
16. Article 26 of the 1951 Refugee Convention provides for the right to freedom of movement and choice of residence for refugees and asylum-seekers, regardless of whether they entered the territory with or without authorization (Article 31 of the 1951 Convention contains the principle of non-penalization for illegal entry or stay, provided that they present themselves to the authorities without delay and show good cause for their illegal entry or presence). Similarly, Article 12 (1) of the ICCPR provides for the right to liberty of movement and freedom to choose one's place of residence for those 'lawfully' within the territory of a State. UNHCR recognizes that there are circumstances, however, in which the freedom of movement or choice of residence of applicants for international protection may need to be restricted, subject to relevant safeguards under international law. Article 12 (3) ICCPR for instance allows restrictions where this is necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others.
17. UNHCR notes that the measures for "limitation of freedom of movement", as per the Article 64 (1) of the Proposal – prohibition of movement outside the Reception Centre for Asylum Seekers, as well as accommodation in the Reception Centre for Foreigners, constitute deprivation of liberty, in the sense

of international law⁷. Right to liberty of person is one of the fundamental human rights, protected under international law⁸, as well as under the national Constitution. Article 12 (2) of the Constitution provides that “*no one can be deprived of liberty, except by a court decision and in cases and procedures determined by law*”. The provisions of Articles 63 – 66 of the Proposal do not provide for adequate procedural guarantees, neither in terms of the competent authority to order deprivation of liberty, nor regarding the deadlines for appeal. There is also a lack of mandatory automatic review of the necessity for the continuation of the measure before a court.

18. UNHCR acknowledges the intention of the legislator to ensure detention is only imposed by exception, also referring to use of alternative measures before resorting to detention, as prescribed with the national legislation (Article 63, para. 1). However, UNHCR wishes to underline that for the purpose of ensuring legal certainty, the authorities should clearly set forth alternatives to detention, available and provided with the national legislation such as, for example, deposition or surrender of documents, reporting conditions, directed residence, provision of a guarantor/surety and release on bail, community supervision or alternative care arrangements⁹.
19. UNHCR suggests the provision of Articles 63 – 66 of the Proposal to be amended, so that the measures that constitute deprivation of liberty are followed by appropriate safeguards as per international law and the national Constitution. Annotated comments to the Proposal, enclosed to this paper, provide for a detailed elaboration of the reasoning and proposal for amendments of particular provisions.

Cooperation with UNHCR

20. UNHCR regrets to note that the provision of the Article 21 of the Proposal limits the obligation of the authorities to cooperate with UNHCR only from the moment of submitting of an application for granting asylum by the applicant. UNHCR as a protection agency, and entrusted on the basis of the 1951 Convention with a supervisory role, has the responsibility to ensure that all refugees are protected, starting from the right to access to the territory and the right to seek asylum. The High Commissioner’s supervisory responsibility is laid down explicitly in paragraph 8(a) of the Statute, in Articles 35 of the 1951 Convention and Article II of the 1967 Protocol, and requires the 148 states parties to one or both of these treaties to cooperate with the High Commissioner in the exercise of his supervisory¹⁰.
21. In order to be able to properly exercise its mandate, UNHCR would have to enjoy full cooperation of the national authorities, from the first moment persons potentially in need of international protection are identified in the country. As the Proposal recognizes that an asylum-seeker is considered an applicant from the moment s/he expresses intention to seek asylum, the asylum procedure effectively starts then. For this reason, limiting cooperation with UNHCR to only after a formal application has been submitted is at direct odds with UNHCR’s supervisory and protection role and the Статейк

⁷ Detention refers to deprivation of liberty or confinement in a closed space, which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities – UNHCR Detention Guidelines, para 5, available at <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>

⁸ “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR); “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law ... “ Article 5 of the European Convention on Human Rights and Fundamental Freedoms.

⁹ UNHCR Detention Guidelines, Guideline No. 4.3, paras 35 - 42, available at <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>

¹⁰ Please see the Note on the Mandate of the High Commissioners for Refugees and his Office, available at <http://www.unhcr.org/protection/basic/526a22cb6/mandate-high-commissioner-refugees-office.html>

international obligations. UNHCR further points out that the provision of the Article 13 of the current Law on Asylum and International Protection adequately reflects the obligation of the authorities to cooperate with UNHCR in all stages of the procedure for recognition of the right of asylum. The Government is invited to reconsider revising the provision of the Article 21 of the Proposal accordingly.

UNHCR Representation in Skopje

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