

UNHCR comments on the draft Law amending the Law on Aliens

I. Introduction

The United Nations High Commissioner for Refugees (UNHCR) Representation in Bosnia and Herzegovina would like to thank the working group for drafting the amendments to the Law on Aliens¹ and for the opportunity to provide its comments on the draft Law on amendments to the Law on Aliens (hereinafter the draft Law), which was officially shared with UNHCR on 20 April 2022. The draft law is also available at e-consultations² as of 15 April 2022.

UNHCR offers these comments as the agency entrusted by the United Nations 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.³ 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."⁴ UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention")⁵ 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 provision is included in Article II of the 1967 Protocol relating to the Status of Refugees ("the 1967 Protocol").⁶

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 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection ("UNHCR Handbook").⁷ UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

¹ Bosnia and Herzegovina: *Law on Aliens [Bosnia and Herzegovina]*, OG 88-2015, 17 November 2015, available at: <https://www.refworld.org/docid/58b575dc4.html>.

² [Plan zakonodavnih aktivnosti \(ekonsultacije.gov.ba\)](https://www.ekonsultacije.gov.ba)

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

⁴ *Ibid.*, para. 8(a).

⁵ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the Convention".

⁶ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <https://www.refworld.org/docid/3ae6b3ae4.html>. UNHCR's supervisory responsibility has also been reflected in EU law, including by way of general reference to the 1951 Convention in Article 78 (1) of the Treaty on the Functioning of the EU.

⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, available at: <https://www.refworld.org/docid/5cb474b27.html>

The following sections, thus, include observations related to various aspects of the draft Law and issues identified as missing in the Law on Aliens, which have not been addressed through the offered draft Law. UNHCR stands ready to offer additional clarifications as considered useful and to continue the dialogue with the working group and the Ministry of Security to further improve the draft Law, with the involvement of other relevant stakeholders.

II. General Observations

UNHCR highly appreciates the continuous and systematic efforts of the relevant state agencies, the Council of Ministers and Parliament of Bosnia and Herzegovina at enhancing the national legislation, including legal provisions relating to refugee protection. UNHCR, therefore, welcomes improvements that have been introduced in the draft Law. Among the most noticeable improvements, UNHCR would like to appreciate the introduction of amendments to the provision on non-refoulement in Article 57 of the draft Law harmonizing it with the Law on Asylum and international as well as EU standards.

While The draft Law is generally in line with international refugee and human rights standards, some of the provisions outlined below would warrant further improvements with a view to strengthen these key provisions and, thus, reinforce legal certainty and effectiveness. The objective of these comments is, therefore, to assist the authorities of Bosnia and Herzegovina in adopting legislation which is fully compliant with international refugee and human rights standards, as well as sufficiently clear to facilitate its implementation.

UNHCR further notes with appreciation efforts of Bosnia and Herzegovina to align its draft amendments to the Law on Aliens with selected EU acquis.

III. Specific Observations

a. Permanent residence of persons granted refugee and subsidiary protection status

Article 80, paragraph (1) b) of the Law on Aliens explicitly excludes the stay of persons granted international protection as a ground for permanent residence in Bosnia and Herzegovina regardless of duration of their stay. While persons recognized as refugees, could still achieve durable solutions through naturalization on the basis of five years continuous stay in Bosnia and Herzegovina, even without obtaining permanent residence permit, this is not the case for persons granted subsidiary protection. For persons granted subsidiary protection, the inability to obtain a permanent residence in Bosnia and Herzegovina, regardless of duration of stay, prevents them from finding durable solutions in the country. The draft Article 41 of the Draft Law amends Article 80 of the Law on Aliens but it does not address this relevant and important issue.

The timely grant of a secure legal status and residency rights are essential factors in the integration process.⁸ As a general rule, UNHCR welcomes approximation of rights between refugees and beneficiaries of different statuses as “distinctions between beneficiaries of international protection are often neither necessary nor objectively justified in terms of flight experience and protection needs, [and] UNHCR considers that there is no reason to expect the protection needs of subsidiary protection

⁸ UNHCR, Executive Committee of the High Commissioner’s Programme, *Conclusion on Local Integration No. 104 (LVI) - 2005*, 7 October 2005, No. 104 (LVI), available at: <https://www.refworld.org/docid/4357a91b2.html>. In para. (j). UNHCR Executive Committee calls on States with developed asylum systems to support refugees’ ability to integrate “through the timely grant of a secure legal status and residency rights, and/or to facilitate naturalization”

beneficiaries to be of a different nature or shorter duration than the need for protection as refugees.”⁹ UNHCR wishes to note that the protection needs of beneficiaries of subsidiary protection are often of equal duration to those of refugees, and return to the home country is not a likely option for most such persons.

UNHCR proposes that foreigners who have been granted international protection (refugee status or subsidiary protection) are considered eligible to apply for permanent residence on the basis of five years of uninterrupted stay in BiH and thus to remove them from the categories of foreigners listed under Article 80 paragraph 1 of the Law on Aliens. Moreover, enabling persons granted subsidiary protection to access permanent residence would ensure implementation of pledges made by Bosnia and Herzegovina at the Global Refugee Forum in December 2019.¹⁰

In order to further facilitate this option, UNHCR also proposes that Article 40 of the draft Law amending Article 79 of the Law on Aliens specifically exempts refugees and persons granted subsidiary protection from the requirement to have a valid travel document, which is impossible for persons granted subsidiary protection to obtain. Persons granted subsidiary protection are not entitled to travel documents, nor are they able to provide a proof from the country of origin indicating that the person was not convicted for a crime or that no criminal proceedings are pending against the person in the country of origin in the last six months from the day of submission of the request for permanent residence. These requirements cannot be reasonably expected from refugees and persons granted subsidiary protection given that they are unable to avail themselves of the protection of their countries of origin. Furthermore, UNHCR proposes that refugees and persons granted subsidiary protection are exempted from the requirement to possess regular and sufficient income. UNHCR, therefore, proposes that exemption from the requirements from Article 79 is included in a new paragraph number (6) in the draft Article 40 amending Article 79 of the Law on Aliens.

UNHCR proposes changes to draft Article 41 amending article 80, paragraph (1) item b) by deleting the words “international protection or” as follows:

- (1) Alien shall not be granted permanent residence if he/she resided for the last five years in BiH on the grounds of:
- b) application for asylum and awaiting a decision on his/her status;

UNHCR proposes changes to draft Article 40 amending Article 79, paragraph (1), item a) and incorporating a new paragraph (6) as follows:

- (1) Permanent residence may be granted to an alien provided that he/she:
- a) uninterruptedly resides on the territory of BiH on the basis of the temporary residence permit or on the basis of recognized refugee status or subsidiary protection for at least five years prior to submitting the application for issuance of a permanent residence permit:

⁹ UNHCR, *UNHCR Comments on the European Commission Proposal for a Qualification Regulation – COM (2016) 466*, February 2018, available at: pp. 33, available at: <https://www.refworld.org/docid/5a7835f24.html>

¹⁰ “By end 2022, BiH shall initiate amendments within the legal frameworks in order to obtain conditions to enable unhindered access of persons granted subsidiary protection to travel document, family reunification and permanent residence to support their local integration”, [Bosnia and Herzegovina - ACSG \(acsg-portal.org\)](https://www.acsg-portal.org/)

(6) foreigner residing in BiH on the basis of recognized refugee status or subsidiary protection is exempted from the obligation of obtaining of proofs from paragraph (1) items b), c) and g) of this Article.

b. Family reunification for persons granted refugee and subsidiary protection status

Persons granted subsidiary protection are not entitled to family reunification with close family members regardless of duration of their stay in Bosnia and Herzegovina. Article 50 (1) b) of the Law on Aliens does not envisage temporary residence for close family members of persons granted subsidiary protection on the basis of family reunification unlike it does for family reunification of recognised refugees with close family member. The draft Article 25 amending Article 50 of the Law on Aliens does not address this issue. Considering that the humanitarian needs of persons benefiting from subsidiary protection are not different from those of Convention refugees, their right to family life as enshrined in human rights law does not justify treating these two categories of persons differently as regards their entitlement to family reunification.¹¹

UNHCR proposes that family reunification is provided for persons granted subsidiary protection in line with the practice in a number of European states that issue residence permits to beneficiaries of subsidiary protection with three and more years of validity.¹² UNHCR, further, proposes that beneficiaries of international protection (refugees and persons granted subsidiary protection) are exempted from immigration requirements to facilitate their family reunification, taking into consideration best practices in Europe and EU legislation. Exempting refugees from income, accommodation and health insurance requirements is considered a best practice in Europe and EU legislation also provides for such favourable conditions.¹³ While EU legislation on family reunification does not apply specifically to beneficiaries of subsidiary protection, in practice a number of EU Member States provide the same favourable conditions as for refugees.¹⁴

In order to enable the right to family life of persons granted subsidiary protection, UNHCR proposes to extend the scope of categories entitled to temporary residence based on family reunification in BiH to include close family members of persons granted subsidiary protection in BiH by adding them in

¹¹ UN Committee on the Rights of the Child (CRC), *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 01 September 2005, CRC/GC/2005/6, available at: <http://www.refworld.org/docid/42dd174b4.html>. CRC, *Joint General Comment No. 23 (2017) on State obligations regarding the human rights of children in the context of international migration on countries of origin, transit, destination and return*, CRC/C/GC/23, 16 November 2017, available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f23&Lang=en

¹² For example, Ireland, Bulgaria and Slovenia grant residence permits to subsidiary protection beneficiaries for three years whilst Hungary, Latvia, the Netherlands and the United Kingdom grant such beneficiaries residence permits for a duration of four years or more. See European Commission, *Report on the application of 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*, 16 June 2010, COM(2010)314 final, section 5.5.7 available at <https://www.refworld.org/pdfid/4c1f141a2.pdf>

¹³ European Union: Council of the European Union, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC, available at: <https://www.refworld.org/docid/3f8bb4a10.html>

¹⁴ European Union: European Commission, *Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification*, 3 April 2014, COM/2014/0210 final, available at: <https://www.refworld.org/docid/583d7d0b7.html>

the draft Article 23 (1) b) as a category of persons whose close family members can get temporary residence in Bosnia and Herzegovina on the basis of family reunification.

Additionally, there is a need to include close family members of the persons granted subsidiary protection in the definition of close family members in the draft Article 25 amending Article 50 (4)a) along with close family members of refugees.

The draft Article 25 (3) items a) and b) requires that a foreigner who reunites with family members has secured accommodation, permanent income, or possession of sufficient means to support person he or she is requesting reunification with and to have health insurance for himself and the family member. In order to facilitate conditions for family reunification for refugees and persons granted subsidiary protection, UNHCR proposes including a new paragraph (10) in draft Article 25 in order to exempt foreigners with granted refugee status or status of subsidiary protection from securing conditions from article 50 paragraph (3) items a) and b).

UNHCR proposes changes to the draft Article 25 amending Article 50, paragraph (1) item b), paragraph (3) item a) and b), paragraph (4) item a), and incorporating new paragraph (10), as follows:

UNHCR suggests rephrasing Article 50, paragraph (1) item b) to include holders of subsidiary protection, as follows:

(1) Temporary residence on the grounds of family reunification may be granted to close family members of:

b) The foreigner holding a permanent residence permit in BiH, the foreigner with granted temporary residence in BiH as the Blue Card holder, the foreigner with granted temporary residence in BiH having a solid chance of having permanent residence granted in BiH, the foreigner with recognized refugee status or the foreigner granted with the status of subsidiary protection.

UNHCR proposes to remove persons granted refugee status from the immigration requirements by amending Article 50, paragraph (3), item a) and b), as follows:

(3) Temporary residence referred to in paragraph (1) herein may be granted to a foreigner arriving in BiH for the purpose of family reunification upon his/her request and under the requirements laid down in Article 49 (General Requirements for Granting Temporary Residence) of this Law, if he/she is:

a) A BiH citizen, a foreigner holding temporary residence permit in BiH has secured accommodation for himself/herself and family members for whom he/she is requesting a residence permit on the grounds of family reunification, and has a permanent source of income, or is in the possession of sufficient means of subsistence in order to support the applicants for whom he/she is seeking family reunification in BiH, and

b) A foreigner holding a BiH temporary residence permit who possesses health insurance for both himself/herself and the family members applying for residence permit on the grounds of family reunification.

In Article 50, paragraph (4), item a), UNHCR proposes to include holders of subsidiary protection and amend it as follows:

(4) For the purpose of this Law, close family members shall refer to:

a) Spouse or common law partner of a BiH citizen or a foreigner holding a temporary residence permit in BiH or a foreigner with recognized refugee status, or subsidiary protection, provided that the marriage or common law marriage is legally valid in BiH pursuant to Article 6 (*Definitions*), points l) and m) herein.

UNHCR recommends including a new paragraph (10) under Article 25 in order to exempt foreigners with granted refugee status or status of subsidiary protection from securing conditions of Article 50 paragraph (3) items a) and b), as follows:

(10) Foreigners granted refugee status or subsidiary protection are exempted from securing conditions outlined in Article 50 paragraph (3) items a) and b).

c. Restriction of movement and detention of minors

Article 6 of the draft Law which aims to amend Article 14 of the Law on Aliens, introduces additional paragraphs, providing grounds for detention of foreigners for the purpose of establishing identity. Through newly introduced paragraph (5) in Article 6 of the draft Law, amending Article 14 of the Law on Aliens, the Service for Foreigners Affair (SFA) is authorised to detain a foreigner for maximum 48 hours if needed, to establish his identity, or circumstances of illegal crossing of the border, or legality of his stay in BiH and if there is danger that the foreigner may escape. Further, Article 6 paragraph (6) of the draft Law envisages extension of this restriction of freedom of movement/detention for additional 24 hours, if detention in the Immigration Centre would not be economically justified due to geographical distance and if it is expected that the relevant facts could be established within this deadline. Article 6 paragraph (8) of the draft Law envisages that the SFA will inform the Centre for social welfare and the diplomatic-consular representation of the state whose citizenship the child possesses in the case of keeping the unaccompanied and separated child.

Article 123 (3) of the Law on Aliens prescribes detention of families with children and unaccompanied children “as a measure of last resort and for the shortest period of time”. Administrative detention for foreigners takes place in the Immigration Centre, where a separate building is dedicated to families and single women. UNHCR recommends to cease the administrative detention of migrant and asylum-seeker children by using alternative care arrangements in order to fulfil its obligations under Article 22, 27 and 37 of the Convention on the Rights of the Child and in light of the Committee’s General Comments Nos. 6, 13, 22 and 23. As stated in UNHCR’s Global Strategy Beyond Detention 2014-2019¹⁵ and UNHCR’s position regarding the detention of refugee and migrant children in the migration context,¹⁶ the best interest of the child shall be a primary consideration in all measures affecting them

¹⁵ UN High Commissioner for Refugees (UNHCR), *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees, 2014-2019*, 2014, available at: <https://www.refworld.org/docid/536b564d4.html>

¹⁶ UNHCR, *UNHCR’s position regarding the detention of refugee and migrant children in the migration context*, January 2017, available at: <https://www.refworld.org/docid/5885c2434.html>

and liberty should always be the preferred solution to detention. Children should not be detained for immigration related purposes, regardless of their legal status or that of their parents, and detention is never in their best interest. Appropriate care arrangements need to be in place to ensure adequate reception of children and their families. The child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family.¹⁷

Furthermore, any kind of child immigration detention should be forbidden by law and such prohibition should be fully implemented in practice.¹⁸

In UNHCR's view, detention of asylum-seekers should not be used by default or mandatorily for all arrivals, but rather remain a measure of last resort.¹⁹ Where detention is applied for a minimal period for legitimate purpose, it needs to be provided for by law, based on an individual decision, be strictly necessary and proportional, timebound and regularly reviewed.²⁰ UNHCR would like to recall that detention should not apply to children, as it is never in their best interest²¹ and alternatives to detention are generally preferable particularly for families and children.²²

UNHCR proposes to change draft Article 6 paragraph (8) in a way that the draft text is deleted and replaced with the wording stipulating that minor foreigner shall not be detained. In case of a foreigner unaccompanied minor, the responsible centre for social welfare shall be immediately informed,

¹⁷ Ibid, 24; see also UN Special Rapporteur on Torture, *Thematic Report on torture and ill-treatment of children deprived of their liberty*, 5 March 2015 (A/HRC/28/68), paragraph 80 available at: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx>

¹⁸ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, available at: <https://www.refworld.org/docid/5a12942a2b.html>

¹⁹ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <https://www.refworld.org/docid/503489533b8.html>. This approach is also supported by ExCom which underlined that '(...) in view of the hardship which it involves, detention should normally be avoided.' ExCom Conclusion No. 44 (XXXVIII), 1986, para. (b), supra, note 40, available at: <http://www.unhcr.org/4aa764389.pdf>. See also UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Ilias and Ahmed v. Hungary (Application No. 47287/15) before the Grand Chamber of the European Court of Human Rights*, 8 January 2018, para. 3.1.4 and following, available at: <https://www.refworld.org/docid/5dd6bb634.html>. See also Articles 8(2), (3)(a) and (4) and FMS (Joined cases C-924/19 PPU et C-925/19 PPU), paras. 250, 258, 259, 262, 264, and 266.

²⁰ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4, available at: <https://www.refworld.org/docid/503489533b8.html>; UNHCR, *Practical considerations for fair and fast border procedures and solidarity in the European Union*, 15 October 2020, page 2, <https://www.refworld.org/docid/5f8838974.html>.

²¹ UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, para. 9, available at: <https://www.refworld.org/docid/5885c2434.html>; UNHCR, *Guidelines on Detention*, Guideline 9.2, UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of I.A. v. Hungary (Application No. 38297/17) before the European Court of Human Rights*, 22 January 2018, 38297/17, paras. 3.3.3, available at: <https://www.refworld.org/docid/5a9d68ae4.html>. See also Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW) and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 10, available at: <https://www.refworld.org/docid/5a12942a2b.html>.

²² Ibid: UNHCR, *Practical considerations for fair and fast border procedures and solidarity in the European Union*, 15 October 2020, page 2, <https://www.refworld.org/docid/5f8838974.html>.

appoint a guardian who takes over and escorts the foreigner unaccompanied minor to an adequate facility.

UNHCR also proposes to amend Article 123 (3) of the Law on Aliens prohibiting detention of children and providing for alternatives to immigration detention.

UNHCR recommends amending paragraph (8) of Article 6 of the draft Law amending Article 14 of the Law on Aliens in a way that the draft text is deleted and replaced with the following wording:

(8) The provisions of Paragraphs (5), (6) and (7) of this article, shall not apply to minors, including unaccompanied minors. In case of an unaccompanied minor, the responsible centre for social welfare shall be immediately informed, who shall appoint a guardian , identify alternatives to detention and place the unaccompanied minor to the adequate facility suitable for accommodation of unaccompanied minors.

UNHCR also suggests that draft Article 66 amending Article 123 (3) of the Law on Aliens is amended as follows:

(3) Families with minors shall not be detained in the Immigration Centre. Alternatives to detention shall be considered in each individual case including regular reporting to the nearest Field Office of the Service for Foreigners' Affairs.

d. Refusal of entry at the border (Article 11) and imposing expulsion measure (Article 55 paragraph 3) through summary proceeding

Proposed Article 11 of the draft Law, which amends Article 25 of the Law on Aliens, introduces refusal of entry decision with respect to a foreigner through summary proceedings without offering any hearing unless the person is unaccompanied minor. The existing text of Article 25 of the Law on Aliens does not refer to provision of referral of a foreigner to the national asylum system if s/he expresses intention to seek asylum following entry refusal. In UNHCR's view people who are denied entry to the territory, particularly those expressing intention to seek asylum, should be informed of the reasons and provided an opportunity to manifest their reasons of departure from the country of origin and appeal the decision of refusal of entry within reasonable timeframe until which the decision on refusal of entry shall have suspensive effects.

Article 55 paragraph (3) of the draft Law amending Article 106 of the Law on Aliens (reasons for imposing an expulsion measure) introduces possibility of issuance of expulsion measure in a summary proceeding for a foreigner who entered BiH illegally, has attempted to or violated the regulations on state border crossing while exiting BiH; has an annulled or cancelled visa and cancelled residence and failed to depart BiH within specified period provided for voluntary departure by the Law on Aliens; and when the person's identity cannot be established and the legality of the person's stay cannot be proved.

UNHCR observes that the wording of the paragraph (3) contradicts with paragraph (2) of the same Article, which obliges the Service for Foreigners' Affairs "to review all evidence and establish all circumstances and facts relevant for the decision with due regard, [...] in determining whether to impose measure of expulsion from BiH [...]."

States are responsible for ensuring protection from refoulement to all persons who are within its jurisdiction, including at national frontiers, as soon as a person presents him or herself at the border claiming to be at risk or fearing return to his or her country of origin or any other country. The principle of non-refoulement as provided for in Article 33(1) of the 1951 Convention also applies to persons who meet the eligibility criteria set out in Article 1 of the 1951 Convention but have not had their refugee status formally recognized.²³ This is of particular relevance to asylum-seekers as they may be refugees, asylum-seekers should not be returned or expelled pending a final determination of their status.²⁴

Refusal of entry needs to comply with the “right to asylum and to international protection.”²⁵ The importance of establishing and ensuring access consistent with the 1951 Convention and the 1967 Protocol for all asylum-seekers to fair and efficient procedures for the determination of refugee status in order to ensure that refugees and other persons eligible for protection under international or national law are identified and granted protection is reiterated by the UNHCR Executive Committee.²⁶

Ground for imposing an expulsion measure through summary proceedings for illegal entry runs contrary to the protection envisaged by Article 31(1) of the 1951 Convention that calls for avoiding penalization on account of irregular entry or irregular presence, provided the other conditions for exemption are present.²⁷

UNHCR also considers that acceleration through summary proceedings should not be used as a measure to curtail the right of access to effective remedy of the affected individuals without taking into account the specific situation of such individuals. Where a person arriving on the territory of the Bosnia and Herzegovina manifests the intention for seeking international protection, s/he should benefit from the provisions of Article 109 (the principle of non-refoulement), Article 110 (proceedings in case of invoking protection) and Article 111 (non-application of sanctions for illegal entry into BiH) of the Law on Aliens.

In the absence of interpretation, introducing summary proceedings without offering opportunity to be heard may affect access to asylum at the border for foreigners who may intend to express intention to apply for asylum. In order to give effect to their international legal obligations, including the right to seek asylum and the principle of non-refoulement, States have a duty vis-à-vis persons who have

²³ See UNHCR, Executive Committee Conclusion No. 6 (XXVIII) – 1977 on Non-refoulement, at para. (c), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c43ac>; Conclusion No. 79 (XLVII) – 1996 on International Protection, at para. (j), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c430>; and Conclusion No. 81 (XLVIII) – 1997 on International Protection, at para. (i), available at: <https://www.refworld.org/docid/3ae68c690.html>

²⁴ See, for example, UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures) (hereinafter: “Asylum Processes”), EC/GC/01/12, 31 May 2001, at paras. 4, 8, 13 and 50(c), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3b36f2fca>. See also E. Lauterpacht and D. Bethlehem, at paras. 87–99, available at: <https://www.refworld.org/docid/470a33af0.html>

²⁵ Article 14, paragraph 1 of the Schengen Border Code ([Regulation \(EU\) 2016/764 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders \(Schengen Borders Code\) \(europa.eu\)](https://eur-lex.europa.eu/eli/reg/2016/764/oj))

²⁶ Executive Committee of the High Commissioner’s Programme, *General Conclusion on International Protection No. 71 (XLIV)* - 1993, 8 October 1993, No. 71 (XLIV), available at: <https://www.refworld.org/docid/3ae68c6814.html>

²⁷ Article 31(1) of the 1951 Refugee Convention provides:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

arrived at their borders, to make independent inquiries as to the persons' need for international protection and to ensure they are not at risk of refoulement. If such a risk exists, the State is precluded from denying entry or forcibly removing the individual concerned.²⁸

UNHCR, thus, recommends that individuals who receive decision on refusal of entry, and those who are subject to expulsion procedures, are provided with opportunity to be heard and have access to effective legal remedy against the decision as such enabling identification of those who may have international protection needs and seek to apply for asylum in BiH.

UNHCR, therefore, suggests amending Article 11 paragraph (3) amending Article 25 of the Law on Aliens, as follows:

In Article 25 (**Proceedings and Consequences of Entry Refusal**), paragraph (3), the following words shall be added after the words: "refusal of entry": "shall be issued in a manner prescribed under paragraph (5) of Article 25 of this Law and allow for a hearing in front of relevant competent authorities with suspensive effects. Foreigners who express intention to seek asylum after having been served with entry refusal decision, shall be able to enjoy the protection of provision of Articles 109, 110 and 111 of the Law on Aliens."

UNHCR, further, suggests amending Article 55 paragraph (3) amending Article 106 of the Law on Aliens, as follows:

In Article 106 (**Imposing of expulsion measure**), paragraph (3), shall read as follows:

"In cases referred to in paragraph (1), points a), c), d), e) and n) an expulsion measure may only be imposed after allowing for a hearing in front of relevant competent authorities with suspensive effects. Foreigners who express intention to seek asylum at the expulsion procedure, shall be able to enjoy the protection of provision of Articles 109, 110 and 111 of the Law on Aliens."

Conclusion

In the context of consultations on the draft Law on Amendments to the Law on Aliens, UNHCR would like to reiterate the need to review aspects of the draft Law on Amendments to the Law on Aliens with a view to ensure nexus between asylum and immigration in compliance with international refugee and human rights law and EU standards. UNHCR trusts that the relevant state authorities, the Council of Ministers of Bosnia and Herzegovina and the Parliament of Bosnia and Herzegovina will give due consideration to UNHCR's comments and recommendations. UNHCR remains committed to supporting the authorities of Bosnia and Herzegovina and remains available to provide further technical support, expertise, and necessary clarifications.

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²⁸ [UNHCR, Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response, 16 March 2020, available at: https://www.refworld.org/docid/5e7132834.html](https://www.refworld.org/docid/5e7132834.html)