UNHCR Comments on the Draft Law of Ukraine on
Granting Protection to Foreigners and Stateless Persons

I. Introduction

UNHCR would like to thank the State Migration Service of Ukraine (hereinafter SMS) for the opportunity to provide its comments on the draft Law on Granting Protection to Foreigners and Stateless Persons (hereinafter Law on Protection or draft law), which was officially shared with UNHCR on 8 October 2019. UNHCR particularly appreciates the initiative of the SMS to establish a technical working group including UNHCR, its legal partner Charitable Foundation "The Right to Protection" and the SMS. This enabled UNHCR to provide technical expertise and recommendations at an early stage of the drafting process. While the draft law is still pending a few modifications after the SMS received comments following its publication, UNHCR would like to submit these written comments as a final contribution to ensure that the draft law is fully in line with international refugee law and standards of refugee protection.

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 problems of refugees.[1] Under 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*".[2] 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)[3] 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 Refugees (the 1967 Protocol).[4]

The following sections include some general observations related to various aspects of the draft law, as well as detailed comments on a few specific draft provisions. UNHCR stands ready to offer

[1] See Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para.1, available at: http://www.unhcr.org/refworld/docid/ 3ae6b3628.html ("Statute")
[2] Ibid, para. 8(a)
[3] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: http://www.refworld.org/docid/3be01b964.html
[4] 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

additional clarifications as considered useful and to continue the dialogue with the SMS to further improve the draft law, with the involvement of other relevant stakeholders, as deemed appropriate.

II. General Observations

UNHCR welcomes the numerous improvements that have been introduced in the draft Law on Protection. Among the most noticeable improvements and new concepts introduced in the draft law, UNHCR would like to highlight the following: Article 1 § 1 of the draft law defines a number of terms, such as "**asylum-seeker**"[5] (Article 1 § 1 (45)) and "**country of origin information**" (Article 1 § 1 (16)); Article 6 establishes the **principle of family unity**, provides details on the family reunification procedure and outlines that the rights set out in this provision apply to both refugees and persons granted complementary protection; Article 28 extends the **appeal deadline** against the rejection of an asylum application from five days to **one month**, which should significantly contribute to the fairness of the asylum procedure. UNHCR also welcomes the new provision in Article 1 § 1 (5) of the draft law, which attributes to the "**certificate on the application for protection**" (asylum-seeker certificate) the status of an **identity document**. If adopted, this amendment would facilitate access of asylum-seekers to social rights and employment, promote self-reliance and support integration. The draft law also introduces detailed provisions on the applicable **standards in the refugee status determination (RSD) process** (Articles 15-17), among others authorizing the presence of a lawyer (**representative**) during the interview, obliging the SMS adjudicator to confront the applicant in case of contradictions and clarify all issues which are not fully clear during the interview, and ensuring that documentary evidence shall not be considered obligatory if the application fulfills other credibility indicators. UNHCR noted the following improvements in the area of **social rights of asylum-seekers and integration of persons granted protection**: Article 46 § 1 provides the right to work/entrepreneurship and access to free medical treatment; Article 48 lists integration measures to be implemented by the State, including language courses (learning Ukrainian as a foreign language), support in seeking employment, and financial assistance throughout an individual's integration program.

The draft law is generally in line with international refugee law and standards while some of the provisions outlined hereunder would warrant further improvements. The objective of these comments is therefore to assist the authorities of Ukraine in adopting legislation which is fully compliant with international refugee law and standards, as well as sufficiently clear to facilitate its implementation. In this regard, UNHCR would also like to indicate that the implementation of some of the new provisions, in particular those related to interpretation and integration measures, will require the allocation of sufficient human and financial resources, as well as close cooperation among various central and local authorities.

[5] The exact wording in Ukrainian is "protection-seeker". In the English version of this document UNHCR uses the term "asylum-seeker" rather than "protection-seeker" to maintain the globally recognized term with the same meaning.

UNHCR commends Ukraine's efforts to align its new Law on Protection with the EU asylum *acquis* and notes that the draft law includes provisions inspired by the EU acquis.[6] UNHCR has issued comments on the relevant EU directives and regulations at the time they were developed[7] and, where appropriate, references are made to those comments in the below specific observations.

III. Specific Observations

1. Asylum Procedure

a. Accelerated Procedure

According to Articles 12 and 13 of the draft law, there will be **two types of determination procedures** for granting refugee status or complementary protection: the **general procedure** lasting seven to 16 months (seven months with the possibility to extend up to nine additional months), as defined by Article 13 § 1, and the **accelerated procedure** to be conducted within 30 days, as per Article 13 § 3. The most important development is that the draft law removes the preliminary stages of the current procedure, namely for acceptance of the asylum application (one day) and admissibility to the asylum procedure (15 days).

The accelerated procedure **applies to claims that are manifestly unfounded or inadmissible**, as per Articles 12 to 14 of the draft law. Article 12 provides a list of the grounds defining manifestly unfounded and inadmissible claims.

While national procedures for determination of refugee status may usefully provide for dealing in an accelerated procedure with manifestly unfounded applications for refugee status or asylum, UNHCR recommends that only claims which are clearly abusive, clearly fraudulent or have no link to the 1951 Convention should be considered as "manifestly unfounded". The category of abusive or fraudulent claims involves those made by individuals who clearly do not need international protection, as well as claims involving deception or intent to mislead which generally denote bad faith on the part of the applicant. All these situations give rise to a presumption of unfoundedness and accelerated procedures can be put in place to test that assumption.[8]

---

[6] European Union: Council of the European Union *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, 2013/32/EU, available at: https://www.refworld.org/docid/51d29b224.html

[7] UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, available at: https://www.refworld.org/docid/4c63ebd32.html; as well as UNHCR, *UNHCR comments on the European Commission's Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final*, January 2012, available at: https://www.refworld.org/docid/4f3281762.html;

[8] *Fair and Fast: UNHCR Discussion Paper on Accelerated and Simplified Procedures in the European Union*, May 2018, available at: https://www.refworld.org/pdfid/5b589eef4.pdf; UNHCR, *UNHCR's Position on Manifestly*

Certain provisions of the draft law are broader than these standards. For instance, applications from asylum-seekers who may pose a threat to the national security, public order or health of the population of Ukraine are included in the list of claims that can be processed through an accelerated procedure (Article 12 § 3 (6)). This particular provision adds an exclusion ground to those foreseen by the 1951 Convention in Article 1 F, which are considered limitative and require a restrictive interpretation.[9] Moreover, the draft law also considers as manifestly unfounded applications that contain "inconsistent, obviously false or unlikely facts that significantly contradict the information in his/her country of origin" (Article 12 § 3 (4)). This definition is overly broad. UNHCR recommends that the notion of "clearly fraudulent" applies to situations where the applicant deliberately attempts to deceive the authorities determining refugee status. The mere fact of having made false statements to the authorities does not necessarily exclude a well-founded fear of persecution and vitiate the need for asylum, thus making the claim "clearly fraudulent". Only if the applicant makes what appear to be false allegations of a material or substantive nature relevant for the determination of his or her status could the claim be considered "clearly fraudulent".[10]

UNHCR recommends that article 12 § 3 be reviewed in light of UNHCR standards and rephrased to specify that an application shall be considered as manifestly unfounded only in situations where the application is clearly not related to the criteria for international protection or when it is clearly fraudulent or abusive.

The draft law (Article 12 § 3 (7)) states the accelerated procedure shall apply in cases where the applicant has failed to meet the standard of filing the application for protection without delay, as defined in Article 1 § 1 (12). Furthermore, according to Article 16 § 3 (4), the fact that an application was filed without delay shall be considered as a positive indicator when assessing a claim for which certain aspects are not substantiated by documentary or other evidence. Therefore, delay in applying for asylum is interpreted negatively as an element undermining the credibility of the applicant. In view of previously expressed concerns[11] with regard to the interpretation of this term in Ukrainian asylum practice, UNHCR would like to reiterate its position that a late application "does not preclude the credibility of the applicant's statements"[12] and should not increase the standard of proof for the applicant. "Due consideration should be given to any circumstances of the case that may lead to

Unfounded Applications for Asylum, 1 December 1992, 3 European Series 2, p. 397, available at: https://www.refworld.org/docid/3ae6b31d83.html

[9] *Ibid.*; the same concerns were also expressed by the UNHCR in its *Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467 (UNHCR 2019 APR Comments), p. 34-35, available at: https://www.refworld.org/docid/5cb597a27.html

[10] Ibid.

[11] See for example, UNHCR, *Ukraine as a country of asylum. Observations on the situation of asylum-seekers and refugees in Ukraine*, July 2013, p. 10, 13; available at: https://www.refworld.org/docid/51ee97344.html

[12] Similar concern was expressed by UNHCR with regard to the application of the "**at the earliest possible time**" criterion in its comments to the European Commission Proposal for a Qualification Regulation COM (2016) 466, February 2018, ('UNHCR 2018 QR Comments'), p. 9-10, available at: https://www.refworld.org/docid/5a7835f24.html

delays in applying for international protection or appropriately substantiating the claim, including trauma due to past experience, feelings of insecurity, or language problems."[13]

Article 17 § 5 of the draft law specifies that, apart from States, protection from persecution or serious harm can be provided by non-state actors, such as groups or organizations that control a considerable part of a State's territory. As such, this provision mirrors the relevant articles of the EU QD.[14] UNHCR expressed concerns in relation to such provisions indicating that generally national protection can be provided only by a State, and not by non-state actors. National protection provided by States cannot be equated with the activities of a non-state actor, which may exercise some level of *de facto* – but not *de jure* – control over the territory.[15] Such control is often temporary and without the range of functions and authority of a State. Importantly, such non-state entities are not parties to international human rights treaties, and some international bodies enjoy privileges and immunities (international organizations), making them unaccountable for their actions, contrary to States. Moreover, the ability of non-state actors to enforce the law is often very limited.

b. Grounds for Rejection

Article 19 of the draft law includes **grounds for the rejection of an application** for international protection which, in particular for § 1 (2) and (3), should be approached with the greatest caution as they are similar to the exceptions to the non-refoulement principle of Article 33 (2) of the 1951 Convention. Article 19, applicable at the inclusion phase, stipulates that a "*person may not be granted international protection if: […] 2) there are sufficient grounds to believe that the asylum-seeker poses a threat to the national security or public order of Ukraine; 3) the person has been convicted in the territory of Ukraine for committing a serious or particularly serious crime*."[16] In practice, Article 19 § 1 (2)(3) will lead the SMS to reject asylum applications without having considered the merits of the individual case, most importantly, whether an individual faces a well-founded fear of persecution in the country of origin. This creates a gap in protection: Persons with international protection needs would be rejected, even though they are refugees as per the refugee definition in Article 1 of the 1951 Convention.[17] These individuals are likely to remain in Ukraine, as they would enjoy protection against

[13] UNHCR, Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report, May 2013, available at: https://www.refworld.org/docid/519b1fb54.html;

[14] European Union: Council of the European Union, *QD*, Ibid., Article 7, available at: https://www.refworld.org/docid/4f197df02.html

[15] UNHCR 2018 QR Comments, *Ibid.*, p. 14, available at: https://www.refworld.org/docid/5a7835f24.html

[16] These provisions are partially based on EU legislation, on which UNHCR commented in 2018 (see UNHCR 2018 QR Comments, *Ibid.*, p. 22-23, available at: https://www.refworld.org/docid/5a7835f24.html)

[17] See recent judgment of the Court of Justice of the European Union of 14 May 2019, interpreting similar provisions of the 2011 Qualification Directive (QD) related to withdrawal or refusal of refugee status to individuals considered to constitute a danger to the security of the country or the community (Art. 14 § 4 to 6); *C-391/16, C-77/17 and C-78/17 M v Ministerstvo vnitra, X and X v Commissaire général aux réfugiés et aux apatrides , 19 May 2019*, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=214042&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=681759. The Court interpreted these particular provisions of the QD as meaning that while refugee status can be withdrawn or refused on these grounds, the concerned individual is still to be considered as a refugee benefiting from a minimum set of rights under international and EU Law, among which

return under human rights instruments, such as the European Convention on Human Rights and the Convention Against Torture. However, they would not have any clear legal status in Ukraine. UNHCR suggests to review this provision to bring it into conformity with the 1951 Convention, which makes a clear distinction between the refugee definition (Art 1) and the provisions related to non-refoulement and expulsion (Articles 32, 33).

Article 18 § 1 of the draft law provides the SMS with the option of **terminating (discontinuing) the examination** of an application for protection before a decision on the merits of the case. UNHCR acknowledges the need to take such decisions in the circumstances described in Article 18 § 1 (1-3), namely when the applicant has died, left the country or withdrawn an asylum application. However, the grounds for termination listed in paragraphs 4-6 (refusal to provide biometric data, to undergo a medical examination or to provide evidence and documents) are too broad and could lead to a risk of refoulement where the examination of an application is terminated without regard to the merits of the claim. For instance, an applicant's failure to comply with the obligation to provide the "details necessary for the examination of the application" may be due to reasons that are unrelated to the validity of the claim, for instance due to unclear information or a misunderstanding. UNHCR therefore cautions against the use of punitive measures for an applicant's non-compliance with these obligations. While asylum-seekers have certain duties throughout the procedure, the decision to terminate the examination should be restricted to carefully-circumscribed and well-defined grounds.Therefore, UNHCR recommends to add the following safeguard to Article 18 of the draft law to ensure that an applicant whose application has been discontinued (terminated) is not removed contrary to the principle of non-refoulement based on the information that is available to the authorities. This echoes a similar recommendation made to the European Union in the context of its proposal for an Asylum Procedures Regulation.[18]

c. Presidential Asylum

The draft law provides for a procedure for granting "**presidential asylum**"[19] based on the Constitution of Ukraine.[20] Article 1 § 1 (33) of the draft law defines the term "asylum" and Chapter III (Articles 29-37) describes the procedure for granting presidential asylum. While UNHCR is concerned that the terminology used in the aforementioned provisions could create confusion with the other forms of international protection, UNHCR recognizes that this form of asylum is based on specific Constitutional requirements and is different from the refugee definition in the 1951 Convention. UNHCR has reviewed this provision to analyze whether the procedure relating to presidential asylum could have a

the (absolute) prohibition of return to a country where there is a substantial risk of torture or other inhuman or degrading treatment or punishment.

[18] UNHCR 2019 APR Comments, Ibid., p. 4, 33, available at: https://www.refworld.org/docid/5cb597a27.html

[19] In order to distinguish between the globally accepted term "asylum", which is used as a synonym to the concept of international protection, for the purposes of this document UNHCR will use the term "*presidential asylum*" for the new procedure introduced by the Ukrainian draft law.

[20] "The President of Ukraine shall …. adopt decisions on granting the citizenship of Ukraine, termination of the citizenship of Ukraine, and on granting asylum in Ukraine", Article 106 (26), Constitution of Ukraine, 28 June 1996, available at: https://www.refworld.org/docid/44a280124.html

negative impact on the rights and obligations of asylum-seekers, refugees and persons granted complementary protection.

Describing the link between the two procedures, Article 31 of the draft law indicates that the State Migration Service (SMS) shall, with the written consent of the asylum-seeker expressed in his/her application for protection, address the request for presidential asylum to the President of Ukraine, if it has determined that granting him/her presidential asylum may serve the state interest of Ukraine. From that moment, the SMS will **suspend** its examination of the application for protection under the regular procedure, which will resume only in case the application for presidential asylum has been rejected.[21]

UNHCR welcomes this procedural mechanism and would urge that a full examination of the application be conducted after resumption of the regular procedure, ensuring in practice that a negative decision on presidential asylum would not have a negative impact on consideration of the application for refugee status or complementary protection.

2. Non-Refoulement

The draft law's Article 3 includes additional safeguards for ensuring **non-refoulement** in the context of asylum applications **at the border** (Article 3 § 2); these are in line with the related UNHCR position.[22] Article 3 stipulates that asylum-seekers are protected under this principle from the moment of the **request for protection,** which can be made orally or in writing as per Article 1 § 1 (11) of the draft law. However, while Article 3 § 4 transposes the provisions of Article 33 (2) of the 1951 Convention, which sets out the exceptions to the principle of non-*refoulement*, the exact wording of Article 33 (2) is not fully reflected. Article 3 § 4 of the draft law lowers the degree of gravity of the crime that can lead to the application of the exception, as it includes "serious crimes" and not only "particularly serious crimes". Given the fundamental character of the principle of non-*refoulement*, which constitutes the cornerstone of the international refugee protection regime, UNHCR recommends a literal transposition of this provision into national law.[23]

3. Border Procedure and Detention

The draft law introduces several new measures with a view to ensure access to the procedure at the border and from places of detention. As a general comment, UNHCR would like to refer to its Guidelines on Detention which set out the circumstances in which immigration detention of asylum-

[21] Article 18 § 5 (2), Articles 31-34.
[22] UNHCR, Advisory Opinion on the Extraterritorial Application of Non-*Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, para. 7, available at: https://www.refworld.org/docid/45f17a1a4.html
[23] *Ibid.;* UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: https://www.refworld.org/docid/438c6d972.html

seekers can be resorted to, as well as the safeguards which should apply.[24] More detailed comments on situations of detention at entry and exit points are provided below.

a. Applications for Protection at the Border (Exit) and Detention of Asylum-Seekers

UNHCR understands that Article 8 § 2 of the draft law concerns persons who have transited Ukraine and apply for asylum only when apprehended while attempting to leave Ukraine irregularly through the land border, as well as those who applied for asylum, but attempt to leave the country irregularly before completion of the asylum procedure. UNHCR is concerned that, in practice, the current wording of this provision may lead to the detention of anyone without documents who entered irregularly. In order to avoid any misunderstanding, UNHCR suggests specifying more explicitly the grounds for detention in this provision which applies only to irregular border crossings upon exit.

b. Applications for Protection at the Border (Entry) and Detention of Asylum-Seekers

Article 8 §§ 6 and 7 aims at regulating access to the asylum procedure upon entry into Ukraine, including at airports[25] or along the land border. However, UNHCR notes that the formulation of these provisions is not explicit enough to understand that they apply only to situations occurring at the formal border crossing points. It is also not clear in which cases detention will be resorted to in this context since Article 8 § 7 stipulates that "***If*** the State Border Guard Service of Ukraine takes a decision on detaining the person (…)" without indicating when and how this detention measure will be taken and ended. Currently, this provision lacks details on the specific elements of the asylum border procedure and on the modalities for the processing of such applications, including the safeguards and the circumstances which should not lead to detention. UNHCR recommends elaborating this further in line with its Guidelines on Detention. This concerns, *inter alia,* the duty to provide, upon entry into the territory, initial counselling by a representative of the SMS in a language that a person applying for asylum understands. This counselling should include information about the asylum procedure, the location of the detention facility, procedures for accessing free legal aid in detention (including in airport transit zones), and the right to appeal against the decision on detention.

c. Recording the Application for Protection at the Border and in Detention

[24] 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

[25] UNHCR has been strongly advocating with the SMS for the introduction of "airport procedures" in line with UN High Commissioner for Refugees (UNHCR), *Legal Considerations on State Responsibilities for Persons Seeking International Protection in Transit Areas or "International" Zones at Airports*, 17 January 2019, available at: https://www.refworld.org/docid/5c4730a44.html

UNHCR welcomes the clarification in the draft law that a person seeking asylum can do so by submitting an informal **request for protection**[26] or a **formal application for protection**. However, the draft law does not stipulate how an oral request expressed to a state border guard officer will be recorded in practice. To ensure an effective access to the asylum procedure, the relevant authorities (at the border and in detention facilities), who receive an oral or written request for protection, should provide the formal application (written) form, interpretation support if required, and the possibility to access legal counseling to prepare the application. In the same vein, UNHCR suggests removing the phrase "**if deemed necessary**" from the text of Articles 8 (§§ 4 and 6) and 9 (§§ 2 and 5) in relation to the obligation of the relevant state official to provide the application form.

Article 9 covers pre-trial detention facilities where persons who were arrested in the context of extradition procedures are kept, as well as migration detention (Migrants' Custody Centers – referred in the draft law as center of temporary stay of foreigners and stateless persons who stay unlawfully in Ukraine). It introduces special safeguards to ensure **access to protection from these detention** facilities. This is positive although the **timeframe for applying for protection is limited to 30** days from the moment when the foreigner/stateless person was informed about his/her right to apply for protection from detention. Upon expiry of this period, the application for protection will be considered inadmissible (Article 12 § 4 (5)) and assessed in the accelerated procedure. While this delay does not appear to be excessively short, UNHCR is concerned over the lack of details in the draft law regarding the initial notification of the right to apply for protection and how it will be recorded in practice. UNHCR understands that amendments to other legislation[27] will be necessary, but recommends that the current draft law includes an obligation for the authorities to notify persons who might wish to seek international protection about the right to seek asylum, in a language that they understand, and to provide information on the possibility to access legal counseling/assistance to prepare the application.

4. National Security and the Role of the Security Services in the Asylum Procedure

The draft law continues to foresee a role for the State Security Service of Ukraine (SSU) in various aspects of the asylum procedure:

- Articles 14 § 7 and 21 § 4 state that the SMS shall consult **law enforcement authorities, including the State Security Service,** to verify whether the individual would pose a risk to national security or public order or has committed a particularly serious crime before entering Ukraine. The SMS may also request information from the State Security Service, as well as other specified entities, to validate the authenticity of documents, in cases of doubt.

[26] A request for protection means "a verbal or written request of a foreigner or a stateless person in which a person expresses his/her desire to obtain protection in Ukraine" (Article 1 § 1 (11)).
[27] This concerns, first of all, the Code of Criminal Procedure as indicated in the transitional provisions at the end of the draft law. Similar amendments will need to be made to the relevant by-law to ensure that foreigners/stateless persons who are detained in migrants' detention centers are also duly notified about their right to request protection.

- According to Article 24 (in conjunction with Article 23), the SSU may initiate a procedure for the withdrawal of protection status, in particular with respect to persons who have been involved in actions threatening national security or public order or convicted for a particularly serious crime in Ukraine (Article 23 § 3). Article 53 § 6 of the draft law includes a new formulation according to which the SSU shall provide "**information** necessary for the consideration of applications for protection".

In the past, UNHCR has expressed concerns about the SMS's independence of decision-making in asylum cases, given the expansive role of the SSU in the asylum procedure.[28] In order to strengthen the SMS's independence and its ability to implement a fair asylum procedure, UNHCR recommends that the draft law states more clearly the specific circumstances in which the SMS shall file a request to the SSU, such as in cases where there are reasonable grounds to consider that the application raises issues relating to the exclusion clauses. The SSU does not necessarily need to be consulted on all applications for protection. Second, it is important to ensure that information provided by the SSU is advisory rather than prescriptive. To that end, UNHCR suggests specifying that the SMS shall subject information provided by the SSU to a thorough and rigorous assessment, alongside other elements of the individual claim. The draft law should also include guarantees allowing applicants whose claims are rejected or withdrawn on national security or public order grounds to challenge the information provided by the Security Services, either directly or through their attorney, and access effective legal remedies.

5. Circumstances Leading to Loss of Refugee Status (Cessation, Revocation and Cancellation).

Article 23 of the draft law provides for different grounds under which refugee or complementary protection status may be ended through cessation, revocation or cancellation. The circumstances in which protection can be ended according to § 1 of Article 23 correspond to those enshrined in the **cessation clauses of the 1951 Convention.** However, UNHCR notes that Article 23 § 1 (4) introduces a slightly different wording compared to Article 1 C (5) of the 1951 Convention, stipulating that protection status may cease if the circumstances under which a person was granted protection have ceased to exist or "*changed*". According to international refugee law, only fundamental changes in the country, which can be assumed to remove the basis of the fear of persecution are relevant in the context of cessation while "a mere – possibly transitory – change in the facts surrounding the individual refugee fear, which does not entail such major changes of circumstances, is not sufficient to make this clause applicable."[29] UNHCR therefore recommends reformulating this provision in line with the exact wording of Article 1 C (5) of the 1951 Convention.

[28] UNHCR, *Ukraine as a country of asylum*, Ibid., p.25.

[29] UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, February 2019, HCR/1P/4/ENG/REV. 4, ('UNHCR Handbook'), para. 135, available at: https://www.unhcr.org/publications/legal/3d58e13b4/handbook-proceduresrcriteria-determining-refugee-status-under-1951-convention.html

Furthermore, Article 23 § 1 (5) and § 1 (7) stipulates that cessation will apply to persons who were granted a residence permit in another country and also to persons who failed to re-register, in accordance with the procedure foreseen by Article 26 of the draft law, and for whom information has been obtained that they left the country. With respect to these points, UNHCR would like to highlight that "the grounds [for cessation] identified in the 1951 Convention are exhaustive; that is, no additional grounds would justify a conclusion that international protection is no longer required".[30] UNHCR recommends that the two additional grounds foreseen in Article 23 of the draft law could constitute a legitimate basis for "inactivation" or "closure" of the concerned individual's file in Ukraine rather than cessation in the sense of the 1951 Convention, coupled with the requirement to "reactivate" the file should the person return to Ukraine.

Article 26 of the draft law envisages a compulsory **re-registration** exercise during the renewal of certificates for refugee status and complementary protection. The description of the procedure in Article 26 suggests that this provision will establish a **mandatory status review**. According to this procedure, every five years, the SMS would check whether the criteria for refugee and complementary protection status continue to be met. Furthermore, the failure to undergo re-registration will constitute a ground for cessation (Article 23 § 1 (7)), despite the fact that **cessation of status must be subject to extensive legal safeguards**.[31] The general position of UNHCR is that refugees and others in need of international protection are entitled to a secure status. A careful approach to the application of the cessation clauses is necessary to provide refugees with the assurance that their status will not be subject to unnecessary reviews in light of temporary changes, not of a fundamental character, in the situation prevailing in their country of origin.[32] In addition, this re-registration process risks undermining integration. UNHCR has observed that the duration of residence permits has a considerable impact on refugees' attitudes. Status reviews are particularly likely to harm employment prospects. Finally, UNHCR expects the proposed reviews to place a heavy administrative burden on the State Migration Service. Therefore, UNHCR would like to recommend limiting the review foreseen by this article to a procedure for the renewal of documents, which is legitimate, and not a mandatory status review. While renewing documents, the State Migration Service could provide information related to integration and naturalization. [33]

6. Solutions

[30] UNHCR, *Guidelines on International Protection No. 3: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the 'Ceased Circumstances' Clauses)*, HCR/GIP/03/03, 10 February 2003, para 4, available at: https://www.unhcr.org/publications/legal/3e637a202/guidelines-internationalprotection-3-cessation-refugee-status-under-article.html; see also UNHCR, *Handbook*,Ibid., para. 116

[31] UNHCR 2018 QR Comments, Ibid., p. 26, available at: https://www.refworld.org/docid/5a7835f24.html.

[32] Executive Committee of the High Commissioner's Programme, *Cessation of Status No. 69 (XLIII) - 1992*, 9 October 1992, No. 69 (XLIII), available at: https://www.refworld.org/docid/3ae68c431c.html; UNHCR 2018 QR Comments, p. 25-26, available at: https://www.refworld.org/docid/5a7835f24.html

[33] UNHCR 2018 QR Comments, Ibid., pp. 25-28, available at: https://www.refworld.org/docid/5a7835f24.html

Under the current citizenship legislation, persons recognized as refugees in Ukraine qualify for naturalization after three years, while persons with the status of complementary protection cannot apply for naturalization, regardless of the length of their stay in Ukraine. An amendment of Ukrainian legislation to facilitate the naturalization of persons granted complementary protection after a reasonable period of time would help resolve and avoid protracted displacement of these individuals and be a crucial step towards finding solutions in line with the objectives of the Global Compact on Refugees. As a general rule, UNHCR welcomes approximation of rights of 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 beneficiaries to be of a different nature or shorter duration than the need for protection as refugees."[34] UNHCR stands ready to provide its technical support in developing the relevant amendments to the Citizenship Law if this step cannot be part of the text of the current draft law under its transitional provisions.

IV. Conclusions

UNHCR hopes that the State Migration Service and other relevant authorities of Ukraine will give due consideration to this additional/formal set of comments. UNHCR remains available to provide further technical support and expertise in order to ensure that this important legislative initiative leads to the adoption of a national asylum law that further improves the operation of the national asylum system and is fully in line with relevant international refugee law and standards.

UNHCR Kyiv,
January 2020

[34] Ibid., p.33.