UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

UNHCR COMMENTS AND RECOMMENDATIONS ON THE DRAFT LAW OF GEORGIA ON INTERNATIONAL PROTECTION

17 May 2016

I. Introduction

In accordance with its mandate responsibilities, the United Nations High Commissioner for Refugees (UNHCR) is pleased to share with the Parliament of Georgia its comments and recommendations regarding the proposed draft law on "International Protection" (hereinafter "draft law").

UNHCR offers these comments as the agency entrusted by the United Nations General Assembly (UNGA) with the responsibility for providing international protection to refugees, and for assisting governments in seeking permanent solutions to the problem of refugees.[1] 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".[2] UNHCR's supervisory responsibility under its Statute is reiterated in the preamble of the 1951 Convention relating to the Status of Refugees ("the 1951 Convention"), whereas Article 35 of the 1951 Convention obliges State parties 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").[3]

UNHCR's mandate encompasses individuals who meet the refugee criteria under the 1951 Convention and 1967 Protocol, but has been broadened through successive UNGA and UN Economic and Social Council resolutions to a variety of other situations of forced displacement resulting from conflict, indiscriminate violence or public disorder.[4] In light of this evolution, UNHCR's competence extends to individuals who are outside their country of origin or habitual residence and who are unable or unwilling to return there owing to serious threats to life, physical integrity or freedom resulting from indiscriminate violence or events seriously disturbing public order.[5]

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[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] UNTS No. 8791, Vol. 606, p. 267.
[4] UN High Commissioner for Refugees (UNHCR), *Providing International Protection Including Through Complementary Forms of Protection*, 2 June 2005, EC/55/SC/CRP.16, available at: http://www.refworld.org/docid/47fdfb49d.html; UN General Assembly, *Note on International Protection*, 7 September 1994, A/AC.96/830, paras. 8, 10-11, 31-32, available at: http://www.refworld.org/docid/3f0a935f2.html.
[5] This evolution reflects the development of broader definitions within regional instruments, including the Convention Governing the Specific Aspects of Refugee Problems in Africa [of the Organisation of African Unity (now African Union)], 10 September 1969, 1001 UNTS 45, at http://www.unhcr.org/refworld/docid/3ae6b36018.html; The European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26; 20.12.2011, 2011/95/EU, available at: http://www.refworld.org/docid/4f197df02.html.

UNHCR's supervisory responsibility is exercised in part by the issuance of legal interpretative guidelines on the meaning of provisions and terms contained in the 1951 Convention, as well as by providing comments on legislative and policy proposals affecting protection and durable solutions for refugees. UNHCR supervisory responsibility extends to Georgia, as it is party to both the 1951 Convention and its 1967 Protocol. In addition, there is an agreement between UNHCR and the Georgian Government signed on 11 September 1996, which provides for UNHCR support to Georgia in development of such legislation.[6]

Accordingly, in the spirit of cooperation and mutual understanding, we request that the Parliament of Georgia take into consideration these comments and suggestions before the draft law is adopted.

II. General Observations

UNHCR welcomes the fact that the proposed amendments are intended to:

- define terms and bring definitions in line with the 1951 Convention;
- specify general principles and strengthen procedural safeguards at all stages of the asylum procedure;
- strengthen the position of asylum-seekers, refugees and other persons in need of international protection and introduce special procedures for persons with specific needs;
- introduce temporary protection;
- establish procedures for cessation, cancellation and revocation of refugee and humanitarian status, as well as strong safeguards during suspension, discontinuation and reopening of asylum applications;
- elaborate rights and freedoms of asylum-seekers, refugees and other persons in need of international protection, providing them with more favourable protection; and
- specify responsibilities of relevant state agencies.

III. Comments regarding Remaining Concerns

UNHCR comments on remaining concerns relating to the current version of the draft law include:

A Main Concerns

1. Chapter II, Article 7, Exemption from Criminal Responsibility for Illegal Entry

UNHCR welcomes the inclusion of the principle of non-penalization for irregular entry, in line with Article 31(1) of the 1951 Convention. We note that a person who claims to be in need of international protection is presumptively entitled to receive the benefit of non-penalization until he is found not to be in need of international protection in a final decision following a fair procedure.

In order to further align the language with Article 31(1) of the 1951 Convention, UNHCR recommends extending this principle to individuals who are fleeing serious harm and indiscriminate violence, as defined in Articles 21 and 32(3) of this draft law. Finally, the phrase *"if there are no other offences in his action" and the reference on "acts related to sale of*

[6]UN High Commissioner for Refugees (UNHCR), *UNHCR's Role in Supervising International Protection Standards in the Context of its Mandate - Keynote Address by Volker Türk*, 20 May 2010, available at: http://www.refworld.org/docid/4bfb8c962.html.

forged official documents, seal, stamp or blank forms" are not drawn from the 1951 Convention and therefore UNHCR recommends removing it.

Therefore, UNHCR recommends revising the Article as follows:

Article 7. Exemption from criminal responsibility for illegal entry or presence

1. Alien or stateless person is exempted from criminal responsibility for the illegal entry to or presence on the territory of Georgia, including occupied territories, who entered the territory of Georgia directly from the territory where his life or freedom was threatened in the sense of Article 1 of 1951 Convention relating to the Status of Refugees **or in the sense of Articles 21 or 32(3) of this Law**, violating the rules of Law of Georgia on Occupied Territories, or for illegal crossing of the state border, or preparation, use or purchasing of forged identity card or other official documents, seal, stamp or blank, for keeping such documents for later use if he committed this crime, if he has fled to Georgia from the country where he was threatened in accordance with the Article 1 of 1951 Convention relating to the Status of Refugees **or in the sense of Articles 21 or 32(3) of this Law** and asks state authorities of Georgia for international protection.

2. In the circumstances listed under the first paragraph of this Article, alien or stateless person is exempted from criminal responsibility only if he addresses the state agencies of Georgia without delay and provides reasonable explanation on illegal entry or illegal stay on the territory of Georgia.

3. Alien or stateless person who has committed the act envisaged under the first paragraph of this Article due to being a victim of trafficking, before acquiring the status of a victim of trafficking is also exempted for the criminal responsibility.

2. Chapter II, Article 8 (2) Non-refoulement

UNHCR recommends bringing the wording of the *non-refoulement* provisions specifically concerning refugees into line with Article 33 of the 1951 Convention, using the exact wording of both clauses. In Article 8(2) of the draft law is the reference to *"serious"* as well as *"particularly serious"* crimes, and inclusion of "on the territory of Georgia"; these departures from the 1951 Convention language would alter the content of Article 33, and as such change the scope of the *non-refoulement* principle in a manner that would not be consistent with international refugee law. Application of the draft legislation as it stands may lead to instances of *refoulement*, a fundamental violation of international obligations.

UNHCR also emphasizes that the principle of *non-refoulement* of refugees overlaps - but is not coextensive - with other related protections in international law. Various international human rights instruments and (in some cases) customary international law prohibit *inter alia* expulsion to a risk of: torture; cruel, inhuman or degrading treatment or punishment; and arbitrary deprivation of life.[7] Therefore, the exceptions listed in Article 33(2) of the 1951 Convention should be understood to apply only to the *non-refoulement* of refugees, and not to the principle of *non-refoulement* as enshrined in international human rights law. The latter *non-refoulement*

[7] See: Article 3 of United Nations Convention against Torture or Other Cruel Inhuman or Degrading Treatment or Punishment; Articles 6 and 7 of the International Covenant on Civil and Political Rights ("ICCPR") and Articles 2 and 3 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). For full explanation, see: UN High Commissioner for Refugees (UNHCR, *UNHCR intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)*, 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, para. 15, available at: http://www.refworld.org/docid/510a74ce2.html.

provisions apply to all persons and are non-derogable and cannot be restricted. In other words, they are absolute.

Therefore, UNHCR recommends re-formulating the Article as follows:

Article 8. ***Non-refoulement***

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

2. The benefit of the present provision may not, however be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of Georgia or who, having been convicted by a final judgment of **a particularly serious crime**, constitutes a danger to the community of Georgia.

3. Article 17 Reasons for Denial of Refugee Status, same grounds are applied in Articles 20 and 22 of the draft law

UNHCR is concerned that the draft law stipulates grounds for denial of refugee status where an individual poses a threat to national security, territorial integrity and public order or is sentenced for commission of a serious crime in Georgia. National security concerns should be addressed within the framework of expulsion per Article 32 of the 1951 Convention, or an exception to the principle of *non-refoulement*, per Article 33(2) of the 1951 Convention. Neither provision foresees denial of refugee status.

Paragraph 2 of this Article does not require an assessment of effectiveness of protection in another country where refugee status is held, or elaborate how internal flight alternative is to be assessed, which may lead to denial of international protection and violation of *non-refoulement* principle. In addition, paragraph 2(e) of this Article should be brought in conformity with Article 1E of the 1951 Convention.

UNHCR recommends re-formulating Article 17 as follows:

1. Alien or stateless person shall be denied refugee status if:

a) he/she does not meet the criteria pursuant to Article 15(1) of this law;

2. Alien or stateless person may not be in need and shall be denied the refugee status if:

a) he has already been recognized as a refugee in a different country and does not have a well-founded fear of persecution as per Article 15 in that country;

b) he holds citizenship of two or more countries and is able to benefit from the protection of one of his countries; or

c) an internal flight alternative is available in the country of origin;

d) who does not qualify for international protection under Article 1(d) of the 1951 UN Convention on Status of Refugees;

e) who does not qualify for international protection under Article 1(e) of the 1951 UN Convention on Status of Refugees.

Given the close linkages between refugee status and complementary forms of protection, in so far as they cover persons under UNHCR's mandate, similar concerns as those expressed with regard to Article 17 of the draft law would apply. UNHCR notes, moreover, that Member States' obligations under international human rights law with regard to *non-refoulement* apply in such circumstances.

UNHCR recommends re-formulating Article 20 as follows:

1.	Humanitarian status shall not be granted if:
a)	a person does not meet the criteria specified in Article 19(1) of this Law;
b)	a person falls under one of the clauses pursuant to Article 17(2) and 18 of this Law.

UNHCR notes that temporary protection arrangements are pragmatic *"tools"* of international protection, reflected in States' commitment and practice of offering sanctuary to those fleeing humanitarian crises. Temporary protection is complementary to the international refugee protection regime, being used at times to fill gaps in that regime as well as in national response systems and capacity.[8] Denial of temporary protection does not as such establish a ground for declaring applications for refugee status or humanitarian status inadmissible.

Moreover, given the close linkages between refugee status and temporary protection, in so far as they cover persons under UNHCR's mandate, similar concerns as those expressed with regard to Article 17 of the draft text would apply. UNHCR notes, moreover, that States' obligations under international human rights law with regard to *non-refoulement* apply in such circumstances.

UNHCR recommends re-formulating Article 22 as follows:

Status of a person under temporary protection shall not be granted if:	
a)	a person does not meet the criteria pursuant to Article 21 of this Law;
b)	a person falls under one of the clauses pursuant to Article 17 (2) and 18 of this Law.

4. Article 19 (1) Criteria for Granting Humanitarian Status

UNHCR is concerned that paragraph 2 of Article 19, which included *"other proven humanitarian needs"* as a criterion for granting humanitarian status, has been removed from the draft law. Holistic reform of the refugee legislation should maintain best practice of prior legislation; reform should be an improvement of this, in order to strengthen the international protection and asylum system in Georgia. Humanitarian status was introduced in 2011 to the Law of Georgia on Refugee and Humanitarian Statuses and it has been subsequently successfully implemented. It has provided a strong protection tool and has not created difficulties in law or practice.

The initial version of this Article containing the clause on *"other proven humanitarian needs"* was discussed during the drafting process and did not raise any concerns from relevant state agencies and members of the Parliament of Georgia during our joint working meetings.

[8] UN High Commissioner for Refugees (UNHCR), Guidelines on Temporary Protection or Stay Arrangements, February 2014, available at: http://www.refworld.org/docid/52fba2404.html.

If this language is removed from the law, the many references to *"humanitarian status"* elsewhere in the text lack definition and are debased in value. UNHCR recommends to maintain this provision as indicative of the will of the Government of Georgia to provide a favourable protection regime to those who are in need, in good faith and in light of the object and purpose of the 1951 Convention.

Additionally, it is noted that elsewhere in Europe countries (e.g. Austria, Belgium, Bulgaria, Denmark, Finland, Germany, Slovakia, the United Kingdom) consider the following ground for complementary protection: family unity, health, protection of children, environmental disasters, general humanitarian clauses, practical impossibility of return and social integration.[9]

UNHCR recommends re-formulating Article 19 as follows:

1. Humanitarian status is granted to an alien or stateless person, who does not qualify as a refugee under Article 15, but in respect of whom there are reasons to believe that i) upon return to the country of origin, the person will face a real risk of suffering serious harm pursuant to Article 32(3) of this Law, or ii) for whom there are other proven humanitarian needs.

5. Chapter IV, Article 25 (5) Request for International Protection Submitted by a Person with Specific Needs

UNHCR understands possible constraints and difficulties with tracing family members of unaccompanied children. However, we recommend to put efforts and undertake tracing procedures in each case and suggest to delete *"when possible"* from the text.

Article 25 (5) would then read as follows:

5. The Ministry shall undertake efforts to trace the family members of unaccompanied minors as soon as possible with due regard for their best interests.

6. Chapter V. Article 29. Period for Review of Application for International Protection (in conjunction with Article 35)

UNHCR is concerned about timeframes set out in Article 29 that replicates Article 31 of the European Union (EU) Asylum Procedures Directive,[10] which has been a last minute amendment to the draft law and which has never been a subject of discussion during the previous meetings/workshops in which UNHCR has been involved during the drafting process.

The proposed amendments provide that the time-limit for the consideration of an application for international protection should not exceed 21 months from the day it was submitted, which exceeds the time limit set by the current Law of Georgia on Refugees and Humanitarian Statuses - one year. Implementation of the proposed timeframes will lead to asylum-seekers remaining in limbo for extended periods and high administrative costs, and will negatively affect self-reliance and local integration of persons under international protection.

[9] European Council on Refugees and Exiles, Complementary Protection in Europe, 29 July 2009, available at: http://www.refworld.org/docid/4a72c9a72.html.

[10] 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, 180/60 -180/95; 29.6.2013, 2013/32/EU, available at: http://www.refworld.org/docid/51d29b224.html.

UNHCR has provided comments on the EU Asylum Procedures Directive, where it was explicitly mentioned that *"overly lengthy procedures have been seen to present a "pull factor" where it would appear that certain categories of applicants claim international protection only in order to enjoy reception conditions for the time the determining authority takes to reach a decision. Quality decisions taken within a short timeframe are in the interest of Member States as they would reduce the costs of both of procedures and reception conditions. This is one of the arguments underlying the frontloading principle. A decision taken within a reasonable time is also in the interest of applicants, who would not be left in uncertainty for long periods".*[11] The argument is equally applicable in the context of Georgia.

In addition, it is unclear what is considered as *"a large number of third country nationals or stateless persons [that] simultaneously request international protection"*. In the absence of a clear definition, this concept could lead to unjustified prolongation of procedures, with associated costs and uncertainties for all concerned. Furthermore, the draft law provides two avenues for dealing with mass influxes, which are either granting temporary protection or providing refugee status under *prima facie* basis.

Article 29(3) provides that review of the application for international protection may be postponed when it is impossible to review it in the time limits set in paragraphs 1 and 2 of the Article, due to an ***uncertain situation in the country of origin*** which is temporary in nature. The position of UNHCR is that *"uncertainty"* is an inherent feature of most or all modern conflicts and other situations in which persecution and serious harm are prevalent. Asylum decision-makers are required in a large majority of cases to weigh the risk of future persecution or serious harm in situations that are dynamic. It is thus questionable whether such a provision is useful in the context of asylum procedures today, or can be reconciled with the obligation to provide protection to those who meet the legal criteria under European and international law.[12]

UNHCR recommends re-formulating Article 29 as follows:

Article 29. Period for Review of Application for International Protection

The competent official of the Ministry shall review the application under the regular procedures for international protection within 6 months. The Ministry may extend the timeframe for no more than 3 month, **in exceptional cases** and with **reasonable justification**, duly informing the asylum-seeker in writing by the means listed in Article 35(5).

7. Chapter VI. Article 50 (1) Grounds for Cessation of Refugee Status

Article 1C of the 1951 Convention specifies the exhaustive list of grounds for cessation of refugee status. Article 50(1) of the draft law expands grounds for cessation encompassing cases beyond those provided for in Article 1C of the 1951 Convention to situations where (h) a refugee applies with a personal statement to the Ministry for ceasing refugee status and (g) cannot be contacted as he has crossed the state border of Georgia, and (i) person is deceased. Special procedural safeguards should be established for implementation of cessation

[11] UN High Commissioner for Refugees (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: http://www.refworld.org/docid/4f3281762.html.

[12] *Ibid.* at page 25.

procedures[13], and incorporated into Article 53 of the draft law. UNHCR suggests that paragraphs (g), (h) and (i) are removed. If it is retained, UNHCR recommends that it be included in a new Article.

UNHCR recommends that Article 50(1) be re-formulated as follows:

1. Refugee status shall be ceased, if a person: a) has been granted citizenship of Georgia; or b) has voluntarily re-availed himself of the protection of the country of origin; or c) having lost his nationality, has voluntarily re-acquired it; or d) has acquired a new nationality, and enjoys the protection of the country of his new nationality; or e) has voluntarily re-established himself in the country which he left or outside of which he remained owing to fear of persecution; f) can no longer refuse to avail himself of the protection of the country of origin, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist;

8. Article 51 Grounds for Cessation of Humanitarian Status and Temporary Protection

Given the close linkages between refugee status, humanitarian status and temporary protection, similar considerations as set out with regard to Article 50(1) of the draft law apply with regard to the grounds for cessation of humanitarian status provided for in Article 51(1) of the draft text.

UNHCR notes that temporary protection ends when:

(i) it is determined – on the basis of an objective assessment based on clear indications – that the situation causing the displacement has ended, and voluntary return is reasonable and can be carried out in safety and dignity;
(ii) the temporary protection arrangement has been replaced by another form of protection, including transition to refugee status, as appropriate;
(iii) an individual has transitioned to an alternative status (including, for example, residency status, work visa, or another migration status); or
(iv) an individual has been admitted to a third State on a humanitarian basis or through resettlement.[14]

UNHCR therefore recommends that Article 51 be re-formulated as follows:

1.	Humanitarian status or temporary protection shall be ceased, if a person:
a)	has been granted citizenship of Georgia or permanent residence;

[13] UN High Commissioner for Refugees (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)*, 10 February 2003, HCR/GIP/03/03, available at: http://www.refworld.org/docid/3e50de6b4.html.
[14] UN High Commissioner for Refugees (UNHCR), Guidelines on Temporary Protection or Stay Arrangements, February 2014, available at: http://www.refworld.org/docid/52fba2404.html, at para. 25.

b) has acquired a new nationality, and enjoys the protection of the country of his new nationality;

c) has voluntarily re-established himself in the country which he left or outside of which he remained owing to fear of mass violation of human rights or significant breach of public order;

d) he can no longer, because the circumstances in connection with which he has been granted humanitarian status or temporary protection have ceased to exist, continue to refuse to avail himself of the protection of the country of origin;

e) was granted a refugee status;

2. Subparagraph "d" of paragraph one this Article does not apply to a person who was granted humanitarian status or temporary protection but who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of origin.

3. Cessation of a humanitarian or temporary protection status is a ground for cancellation of the temporary residence permit and travel passport which was granted to a person with humanitarian status and the ground for cancelation of temporary residence permit granted to a person under temporary protection.

9. Article 52 Grounds for Cancellation and Revocation of Humanitarian Status and Temporary Protection

Cancellation of refugee status is appropriate where it has been determined, in procedures offering adequate safeguards, that an individual should not have been recognized as a refugee because he or she did not meet the inclusion criteria of the refugee definition as set out in Article 1A(2) of the 1951 Convention, or where one of the exclusion clauses would have been applicable at the time of the initial recognition decision.[15]

Similarly, **cancellation of humanitarian status** would be justified if it is determined that the person who was granted such status did not meet the eligibility criteria at the time of that determination. If it is established that a person did not fall within the group of persons with regard to whom **temporary protection** was extended, a decision to extend the benefits of this form of international protection may also be invalidated, provide the determination is made in a procedure offering appropriate safeguards, and without resulting in a bar to admissibility of a claim for refugee status.

More generally, UNHCR notes that the current wording of Article 52(1) of the draft law restricts cancellation of international protection ending to situations in which the erroneous decision to grant such protection in the first place was "a result of substantial fraud". In UNHCR's view, the circumstances described in sub-paragraphs (a) and (b) of this Article refer to the conditions for re-opening a final decision to grant international refugee protection, rather than the substantive grounds for finding that the person was not eligible for such protection at the time of the initial decision. UNHCR recommends re-wording the provision to refer, in sub-paragraph 50(1)(a), to situations of cancellation of refugee status because the person concerned did not meet the inclusion criteria at the time of the initial determination, whereas sub-

[15]UN High Commissioner for Refugees (UNHCR), *Note on the Cancellation of Refugee Status*, 22 November 2004, available at: http://www.refworld.org/docid/41a5dfd94.html.

paragraphs 50(1)(b) and (c) would refer to cancellation on the grounds provided for in Article 1E and in Articles 1D and 1F, respectively.

As regards **revocation**, UNHCR notes that under international refugee law, refugee status which was correctly granted may be terminated only in the circumstances which justify cessation pursuant to Article 1C of the 1951 Convention, or if there are serious reasons for considering that the person concerned committed, or participated in the commission of, acts within the scope of Article 1F(a) or 1F(c) of the 1951 Convention, as these exclusion grounds are not subject to geographic or temporal restrictions. The circumstances referred to in Article 52(3) of the draft law may, under certain conditions, give rise to expulsion pursuant to Article 32 or Article 33(2) of the 1951 Convention. As noted in the comments to Article 17 of the draft law, however, these provisions do not foresee the ending of refugee status. It is further noted that these grounds do not allow for the withdrawal of protection against *refoulement* under applicable provisions of international human rights law. Thus, revocation of refugee status would be consistent with international refugee law only in the circumstances provided for in Article 18(1)(a) and (c) of the draft law.

As noted in the comments to Articles 20 and 22 of the draft law, UNHCR recommends a similar approach to the application of the exclusion criteria in cases concerning persons benefiting from **humanitarian status** or **temporary protection**.

In light of the above, UNHCR recommends re-formulating Article 52 of the draft law as follows:

Article 52

1. International protection shall be cancelled if the Ministry has established:

a) that the initial decision on granting the relevant form of international protection pursuant to Articles 15, 19 and 21 was incorrect as a result of substantial fraud because:

(i) the individual misrepresented or concealed material facts; or

(ii) new evidence arises revealing that the person ought not to have been provided international protection;

b) the person was not in need of international protection because he was recognized by the competent authorities of another country, in which he has taken residence, as having the rights and obligations attached to the possession of nationality of that country; or

c) the person was not eligible for international protection because one of the grounds provided for in Article 18 of this Law would have been applicable at the time of the initial decision;

3. International protection may be revoked if after being granted protection, it is established that the person falls within the scope of Article 18 of the Law.

10. Chapter IX. Article 66 Timeframe for Keeping Personal Data

UNHCR's understanding is that all individual files and materials are to be archived subsequent to a final positive determination, negative decision or a final decision on cessation, cancellation, revocation or closure of refugee, humanitarian and temporary protection in all cases. The draft law suggests that 25 years after the closure of the case, individual materials should be destroyed. UNHCR wishes to draw your attention to UN General Assembly

Guidelines for the Regulation of Computerized Personal Data Files[16]and UNHCR Policy on the Protection of Personal Data of Persons of Concern to UNHCR[17], which strongly recommend that all individual case files, whether open or closed, are considered permanent records, and must therefore be permanently retained.

Article 66 would then read as follows:

1. Personal data processed in accordance with this law will be considered permanent records, and will permanently retained.

B Other Suggestions

1. Article 3(l) Definition of Terms

UNHCR welcomes the incorporation of the best interests of the child as a general principle under Article 12 of the draft law. The principle is clearly defined and reiterates the commitment of Georgia to protect and promote the rights of all children falling within the scope of this draft law. However, it is unclear why the initial version of the draft law which included the definition of *"the best interests determination"* (hereinafter BID) was redrafted removing reference to the BID and leaving only *"the best interests of the child".* The previous definition provided the inclusive scope of the BID and was praised by UNHCR. It read as follows: *"official process in line with the 1989 United Nations Convention on the Rights of the Child to determine a child's best interests where an important decision affecting the child is being taken when implementing this Law".*

UNHCR considers that domestic child protection systems should have clear procedures for BID in place, which should be effectively applied in practice and include the following situations: (i) identification of the most appropriate durable solution for unaccompanied and separated refugee children; (ii) temporary care decisions for unaccompanied and separated children in certain exceptional circumstances; and (iii) decisions which may involve the separation of a child from parents against their will.[18] Thus, UNHCR recommends that the BID definition be re-instated in the draft law.

UNHCR recommends reformulating Article 3(l) as follows:

l. Best interest determination *– official process in line with the 1989 United Nations Convention on the Rights of the Child to determine a child's best interests where an important decision affecting the child is being taken when implementing this Law.*

2. Chapter I, Article 3(v)Definition of Terms: Voluntary Repatriation

UNHCR welcomes the emphasis on voluntariness in this definition of voluntary repatriation and suggests adding *"and informed"* to underline the need for refugees to have access to adequate information about conditions in the country of origin in order to made a free and

[16] UN General Assembly, *Guidelines for the Regulation of Computerized Personal Data Files*, 14 December 1990, available at: http://www.refworld.org/docid/3ddcafaac.html.
[17] UN High Commissioner for Refugees (UNHCR, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR*, May 2015, available at: http://www.refworld.org/docid/55643c1d4.html.
[18] UN High Commissioner for Refugees (UNHCR), *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at: http://www.refworld.org/docid/48480c342.html [accessed 18 March 2016];

informed choice about return.[19]The choice to return is not an easy one, especially after many years of displacement. Reliable and objective information on the situation in the country of origin is crucial. There is increasing resort to first-hand sources of information, including through *"go and see"* visits, or even "go and work" visits, without loss of refugee status.[20] Therefore, UNHCR recommends rewording as follows:

v) Voluntary Repatriation **-** voluntary **<u>and informed</u>** decision of person under international protection – free from physical, psychological or material coercion - to return to the country of origin in conditions of safety and dignity.

3. Chapter I, Article 3(z2) Definition of Terms: Unaccompanied and Separated Minor

UNHCR recommends that the definition of unaccompanied and separated minor be consistent with the definition used in the *Inter-Agency Guiding Principles on Unaccompanied and Separated Children.*[21] This guidance defines unaccompanied children as *"children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so."* Separated children are defined as "*those separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members."* In addition, it is recommended that the definition clarifies and defines who is considered to be a minor for the purposes of the law. The following should be added to the definition "*alien or stateless persons under the age of 18.*" Alternatively, a separate definition of the term *"minor"* should be added to the definition of terms in Article 3, as in the previous draft version of the law.

Therefore, UNHCR suggests reformulating the definition contained in Article 3(z2) as follows:

z2) Unaccompanied and separated minor– an unaccompanied minor is an alien or stateless person under the age of 18 and is a child who has been separated from both parents and other relatives and is not being cared for by an adult who, by law or custom, is responsible for doing so. A separated minor is a child separated from both parents, or from his/her previous legal or customary primary care-giver, but not necessarily from other relatives. Such persons, therefore, include minors accompanied by other adult family members.

4. Chapter I, Article 3 (z7) Definition of Terms: Single Parent

UNHCR suggests reformulating the definition in Article 3 (z7) to include the refugees, and other persons under international protection.

Single Parent – An asylum-seeker or a person under international protection with minor child or children.

5. Chapter II, Article 9, Detention

[19]UNHCR, *Legal Safety Issues in the Context of Voluntary Repatriation*, 7 June 2004, EC/54/SC/CRP.12, para. 4, available at: http://www.refworld.org/docid/4ae9acb3d.html

[20]UNHCR, *Global Consultations on International Protection/Third Track: Voluntary Repatriation*, 25 April 2002, EC/GC/02/5, para. 7, available at: http://www.refworld.org/docid/3d62695d4.html. See also, UNHCR Executive Committee Conclusion 18 (XXXI) of 1980 and Conclusion 40 (XXXVI) of 1985, both re-affirmed by Conclusion 74 (XLV) of 1994. Conclusion 85 (XLIX) is also relevant.

[21]Inter-Agency, *Inter-Agency Guiding Principles on Unaccompanied and Separated Children*, International Committee of the Red Cross, January 2004, available at: http://www.refworld.org/docid/4113abc14.html

UNHCR welcomes the provision that detention shall only be used as a last resort. However, UNHCR notes that this Article could be strengthened in several ways.[22]

First, in Article 9(1), UNHCR recommends guarding against arbitrariness by introducing necessity and proportionality tests and a requirement to consider alternatives to detention, in line with Guidelines 4.2 and 4.3 of UNHCR's Detention Guidelines. Decisions to detain must be based on a detailed and individualized assessment of the necessity to detain in light of a legitimate purpose. The principle of proportionality requires that a balance be struck between the importance of respecting the rights to liberty and security of the person and freedom of movement and the public policy objectives of limiting or denying these rights. Available alternatives to detention should be specified in legal regulations.

Regarding Article 9(2), UNHCR emphasizes that this list should be considered exhaustive and therefore recommends the insertion of the word "only." Concerning Article 9(2) (a), clear criteria need to be developed in order to assess the risk of absconding to avoid any arbitrary application of this ground.[23] Factors to balance in an overall assessment of the necessity of such detention could include, but are not limited to: a past history of cooperation or non-cooperation, past compliance with conditions of release or bail, family or community links or other support networks in the country of asylum, willingness of refusal to provide information about the basic elements of their claim or whether the claim is considered manifestly unfounded or abusive.[24] This ground should not apply for the duration of the asylum procedure nor for administrative convenience.

On Article 9(2) (b) and (c), UNHCR acknowledges that minimal periods in detention may be permissible to carry out initial identity and security checks in cases where identity is undetermined or in dispute.[25] At the same time, the detention must last only as long as reasonable efforts are being made to establish identity or to carry out the security checks, and within strict time limits established in law. Although Governments may need to detain an individual who presents a threat to national security, the detention must be necessary, proportionate to the threat, non-discriminatory, and subject to judicial oversight.[26] Inability to produce documentation should not automatically lead to an adverse security assessment.[27]

UNHCR also recommends including a paragraph providing for a specific maximum time limit on detention in order to prevent situations of indefinite detention. UNHCR's experience is that, without maximum periods, detention can become prolonged, and in some cases indefinite, particularly for stateless asylum-seekers.[28] The length of detention can render an otherwise lawful decision to detain disproportionate and, therefore, arbitrary.[29]

Decisions to detain should also be subject minimum procedural safeguards.[30] UNHCR recommends adding a new paragraph addressing these. In particular, in UNHCR's view,

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[22]See: UNHCR, *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, available at: http://www.refworld.org/docid/5541d4f24.html; UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: http://www.refworld.org/docid/503489533b8.html.

[23] In *A v Australia*, the UN Human Rights Committee clarified that assertions about a general risk of absconding cannot legitimise detention: *"[T]he burden of proof for the justification of detention lies with the State authority in the particular circumstances of each case; the burden of proof is not met on the basis of generalized claims that the individual may abscond if released", A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, http://www.refworld.org/docid/3ae6b71a0.html.

[24] UNHCR Detention Guidelines, Guideline 4.1.1, para. 22.

[25]UNHCR Detention Guidelines, Guideline 4.1.1, paras. 24 and 25.

[26] UNHCR Detention Guidelines, Guidelines 7.

[27] UNHCR Detention Guidelines, Guideline 4.1.3.

[28] UNHCR Detention Guidelines, Guideline 6.

[29]UNHCR Detention Guidelines, Guideline 6, para. 44.

[30]UNHCR Detention Guidelines, Guideline 7.

judicial review should ideally be automatic, and take place in the first instance within 24-48 hours of an initial decision to hold the asylum-seeker.[31] The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release. Further good practices indicate, following an initial judicial confirmation of the right to detain, review should take place every seven days up to one month, and thereafter every month until the maximum period set by law is reached.[32] In larger detention facilities, good practice would involve the holding of detention reviews at the detention facility, allowing for easy access of applicants to the hearings.[33]

UNHCR welcomes the provision that asylum-seekers be detained separately from other detainees and suggests specifically outlining additional standards regarding the conditions of detention, in line with UNHCR Detention Guideline No. 8.

UNHCR recommends adding a paragraph to address the situation of asylum-seekers with specific needs. Victims of torture and other serious physical, psychological or sexual violence as well as pregnant women and nursing mothers, who both have special needs, also need special attention and should generally not be detained.[34] Specific needs should be weighed in the assessment of the necessity to detain and consideration of alternatives to detention.[35] This would imply that an assessment of specific needs would be conducted systematically and take place prior to or as part of the decision whether or not to detain an asylum-seeker. Children, in particular unaccompanied or separated children, should in principle not be detained at all.[36] In accordance with international law and as an ethic of care – not enforcement – should guide all interactions with asylum-seeking children, UNHCR recommends to include a paragraph which recall that the principle of the best interests of the child shall be a primary consideration in all decisions affecting children, including asylum-seeking and refugee children.

In light of the above, UNHCR recommends re-formulating Article 9 as follows:

Article 9: Detention

1. Consistent with international refugee and human rights law and standards, detention of asylum-seekers shall normally be avoided and be a measure of last resort. Detention shall not be discriminatory and shall only be justified for a legitimate purpose and when it has been determined to be necessary, reasonable in all the circumstances, and proportionate in each individual case. Detention shall only be used if other less coercive alternative measures cannot be applied effectively.

2. An asylum-seeker may be detained only:

a) if there is a threat that he will abscond and\or will not cooperate with authorized official in such a way that would undermine the ability to determine those elements on which the application for international protection is based;

b) if identity of a person cannot be established;

[31] UNHCR, Detention Guidelines, Guideline 7.
[32] *Ibid*., , para. 47(iv).
[33] UNHCR, *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, p. 25, http://www.refworld.org/docid/5541d4f24.html
[34] UNHCR Detention Guidelines, Guidelines 9.1, 9.2 and 9.3. See also *Rahimi v. Greece*, No. 8687/08, European Court of Human Rights, 5 April 2011.
[35] UNHCR Detention Guidelines, Guideline 4.
[36] *Ibid*.,Guideline 9.1, 9.2 and 9.3.

c) if there are serious reasons to believe that person might be a threat to national security;

3. In cases of detention of asylum-seeker general rules for detention of an alien and placement him in the temporary accommodation center pursuant to Georgian legislation are used.

4. Asylum-seekers should not be held in detention for any longer than necessary; and where the grounds set out in Article 9(2) are no longer valid, the asylum-seeker should be released immediately.

5. If faced with the prospect of being detained, as well as during detention, asylum-seekers are entitled to the following minimum procedural guarantees:

a) be informed at the time of arrest or detention of the reasons for their detention, and their rights in connection with the order, including review procedures, in a language and in terms which they understand;

b) be informed of the right to legal counsel and offered free legal assistance on the same basis as Georgian nationals similarly situated;

c) be brought before a judicial or other independent authority within 48 hours of the initial decision to detain to have the decision reviewed;

d) have the right to challenge the lawfulness of detention before a court of law at any time, either personally or through a representative;

e) be immediately released in case the detention is determined to be unlawful, including during the reviews foreseen in paragraphs 5(c), (d), and (e); and

f) be given the right to access asylum procedures while in detention, have the right to contact and be contacted and visited by UNHCR or any organization working on behalf of UNHCR.

6. Detained asylum-seeker shall be placed separately from the general prison population detained on other grounds than immigration-related. Men and women should be segregated unless they are family members. Adults and minors shall be segregated unless they are family members. Family unity shall be maintained if there are no security grounds for their separation. Detained asylum-seekers shall be provided with appropriate medical treatment, adequate and appropriate food, basic necessities, the right to practice their religion, access to regular means of communication with relatives, friends, and international/non-governmental organizations, opportunity for physical exercise, information explaining the rules of the detention facilities and their rights and obligations in a language they understand, and a non-discriminatory complaints mechanism. All facilities where asylum-seekers are detained shall be open to regular monitoring by an independent national body, as well as by UNHCR.

7. Victims of torture and other serious physical, psychological or sexual violence as well as pregnant women and nursing mothers, should generally not be detained. In accordance with article 37 and of the Convention on the Rights of the Child, the detention of children shall be used only as a measure of last resort, for the shortest appropriate period of time. As a general rule, unaccompanied or separated children shall not be detained.

8. Procedure and rules of placement of the asylum-seeker at the temporary accommodation center of the Migration Department of the Ministry of Internal Affairs of Georgia is

regulated by the joint normative act of the Minister of Internal Affairs of Georgia and Minister of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia.

6. Chapter II, Article 13 (d) Benefit of the Doubt

UNHCR fully supports the inclusion of the provision on the benefit of the doubt, but does not recommend to include part d) as it creates unnecessary subjectivity and may potentially undermine protection in case of a delayed application for international protection.

UNHCR notes that this provision *replicates Article 4 (5) (d) of the EU Qualification Directive* UNHCR has underlined its concern that the phrase "at the earliest possible time" could be interpreted in a manner prejudicial to the rights of an asylum applicant.

UNHCR would like to recall that there may be limits to what the asylum-seeker is able to submit. Due consideration should be given to the circumstances of the case. Persons in need of international protection may arrive in asylum countries with the barest necessities, and without any documents. Moreover, it should be kept in mind that various circumstances such as, for example, trauma due to past experience, feelings of insecurity, or language problems, may result in a delay in the appropriate substantiation of the claim. In UNHCR's view, such circumstances should be taken into account and late submissions considered in substance, depending on the grounds for the delay and the merits of the claim.[37]

UNHCR recommends to remove Article 13(d).

7. Chapter IV, Article 24 Request for International Protection Made at the MIA [the Ministry of Internal Affairs] Agencies, Prosecutor's Office and at the Penitentiary Establishments of the Ministry of Corrections of Georgia

Regarding Article 24 (4), UNHCR's position is that in case of specific circumstances beyond the control of persons in extradition or expulsion detention hindering timely application for asylum, the timeframe should be extended for the period of the special circumstances and the 15-day deadline for an asylum application should begin from the moment the obstacle ceases. Where the obstacle arises after the person concerned has been duly notified of his right to file an application for asylum, UNHCR considers that it should have suspensive effect, and that the remainder of the 15-day period should only run from the time when the obstacle ceases to exist.

8. Chapter V. Article 46 (8) Family Reunification

UNHCR considers that reference to Article 17 should be removed. Family members need not have an individualized claim for asylum in order to enjoy international protection based on a derivative status, which is clearly defined by Article 3(t) of the draft law. Further, practically, it is not feasible to arrange refugee status determination procedures in the absence of family members where these persons are located outside of Georgia (inclusion of this requires the examiner to take a decision that they do not meet the refugee definition criteria).

[37] UNHCR, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)*, 29 July 2010, available at: http://www.refworld.org/docid/4c503db52.html.

Article 46(8) would then read as follows:

8. A person can be refused family reunification, if with regards to the family member, there are conditions stipulated under Article18 of this Law.

10. Chapter VI, Article 58. Rights of refugees or humanitarian status holders

UNHCR welcomes the incorporation into the draft law of the individual right of refugees to obtain a Convention travel document to ensure their travel outside Georgia. According to Article 28 of the 1951 Convention, travel outside the country of asylum may be restricted in case of compelling reasons of national security or public order. Refugees should not be prevented from a voluntary and informed decision to return to the country of origin.

UNHCR suggests reformulating the subparagraph 'i' as follows:

i) travel outside Georgia.

UNHCR Regional Office in the South Caucasus

(Armenia, Azerbaijan, Georgia)

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