Executive Summary

1. The intensive period of simultaneous legislative and administrative reforms introduced in the last 18 months has potential to improve the quality of asylum in Ukraine. However, that potential remains as yet unrealized. While these reforms have brought some advances (such as the introduction of complementary protection), overall the reforms have been poorly sequenced and inadequately financed, resulting in haphazard implementation. The negative impact on UNHCR’s persons of concern is considerable: At various times, asylum-seekers have been unable to file applications or have had imposed on them various extra-legal conditions for making an application; decision-making on refugee status has proceeded at a fitful pace; asylum-seekers already in the procedure have been asked to re-apply to the newly created State Migration Service, creating a new backlog of cases; the system fails to provide adequate protection against refoulement; and local integration remains an illusory goal. Existing systems do not meet basic requirements of refugee management, such as reception, registration, fair adjudication and local integration. Ukraine falls short of international and European standards for providing protection. As a result, asylum-seekers and even refugees turn to smuggling and trafficking networks in an effort to move to a country providing effective protection. Consequently, UNHCR’s opinion is that asylum-seekers and refugees should not be returned to Ukraine from third countries, especially under readmission agreements.

2. Ukraine is a middle-income country in Europe with a population of some 46 mn. On average, about 1,500 persons apply for asylum each year, and these applicants are scattered amongst various medium-sized cities. Overall, the demands of the asylum system in Ukraine are modest. With political will, a stable and professional administrative authority, and a reasonable allocation of financial resources, Ukraine can fully meet international and European standards in the area of asylum.

Asylum-seekers and refugees in Ukraine

3. Over recent years, Ukraine usually has had an average of 1,500 asylum applicants per year. However, the number of applications in 2011 was considerably lower, with 890 applicants; the recognition rate in 2011 was 15%, with 133 persons receiving refugee status out of 868 decisions taken. In the first four months of 2012, 845 persons applied for asylum, with the biggest countries of origin being Afghanistan, Somalia, Syria and Kyrgyzstan. The significant increase in asylum applicants this year relates to the fact that in 2011, State Migration Service (SMS) offices did not function properly for nearly half the year, preventing many individuals from applying for international protection. This backlog of individuals has now begun to apply for asylum.

4. Among the 2,676 refugees in Ukraine, 54% come from Afghanistan. The remaining portion of the population is quite diverse, including refugees from CIS countries, Africa and the Middle East. There are more than 100 refugees from the following countries: Armenia, Azerbaijan and the Russian Federation.

Intensive Period of Legislative and Administrative Reforms in the Area of Asylum

5. On 22 November 2010, in the context of the 14th European Union-Ukraine summit, the European Union shared its Action Plan on Visa Liberalization with Ukraine. This plan has had a significant impact on the tempo of legislative and administrative reform related to the asylum system in Ukraine, as it has mobilized the political will to change migration policy. The Action Plan calls for various improvements in the asylum system in Ukraine as a condition for the introduction of visa-free travel between Ukraine and the countries of the European Union, namely:
1st phase (legislative and policy framework):
Adoption of legislation in the area of asylum in line with international standards (1951 Geneva Convention with New York Protocol) and EU standards, providing grounds for international protection (including subsidiary forms of protection), procedural rules on examination of applications for international protection, as well as rights of asylum seekers and refugees.

2nd phase (benchmarks for effective implementation):
Effective implementation of asylum legislation, including provision of adequate infrastructure (including reception centres) and strengthening of responsible bodies, in particular in the area of asylum procedures, reception of asylum seekers and protection of their rights (including documentation of asylum seekers and refugees in order to ensure effective access to their rights), as well as integration of refugees.

6. While this extra stimulus for reform has yielded some fruits, and may help to bring about a strong, protection-oriented asylum system in the future, the impact continues to be problematic: The protection conditions for refugees and asylum-seekers have deteriorated, increasing the numbers of persons who are rendered destitute, in need of material assistance or urgent resettlement to third countries.

Impact of Legislative Reforms
7. Legislative initiatives taken in recent months are not well coordinated and appear to have been drafted hastily in an effort to comply with the Action Plan. Some of these legislative developments may eventually have a positive impact on UNHCR’s persons of concern. For example, free legal aid for asylum-seekers is being phased in gradually over the next six years, and the new state migration policy includes rights-based language aiming at the protection of persons in mixed migration flows. Other elements are problematic and have already had a negative impact in practice: For example, the term of detention for illegal stay on the territory was increased from 6 to 12 months, putting asylum-seekers—who are frequently undocumented due to administrative gaps, not their own fault—at risk of lengthy detention. This has already resulted in hunger strikes and other protest actions at the detention facilities. Also, a regulation of the Council of Ministers (#667 of 22 June 2011) excludes asylum-seekers from receiving free medical assistance. A new law on legal assistance makes it harder for asylum-seekers to obtain legal representation: They have to notarize an agreement with a lawyer, which many cannot do as they lack identity documents, or to seek legal representation through a licensed advocate, which is more expensive.

8. On 28 July 2011, President Yanukovych signed the law On Refugees and Persons in Need of Complementary or Temporary Protection in Ukraine (No. 3671-VI). The new law makes some strides toward meeting international and EU standards for asylum. These positive developments include:

- The law introduces complementary protection for persons who cannot return to their country of origin because of a fear of the death penalty, torture, or inhuman or degrading treatment.

- The introduction of a unified asylum-seeker certificate, replacing the previous system of four different asylum-seeker certificates representing different stages of the asylum procedure, will help ensure that asylum seekers remain documented throughout the period that their asylum claim is under consideration.

- The law stipulates that minor children are recognized as refugees simultaneously with their parents. This will enhance the protection of family unity.

9. However, UNHCR has also noted a number of points in which the new law falls short of international and European Union standards. These include:
a. **Narrow definition of complementary protection.** The new law extends complementary protection to persons who cannot be returned to their country of origin in respect of international human rights treaties, particularly Art. 3 of the ECHR and Art. 3 of the Convention against Torture. However, it does not provide for complementary protection to persons who left their country owing to serious and indiscriminate threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order. As a result of the draft law’s narrow definition, some people needing international protection—particularly persons fleeing armed conflict—may not be eligible for such protection in Ukraine. No one has been granted complementary protection to date.

b. **Wide scope to reject asylum applications at preliminary stage of consideration.** The new law continues to create broad scope for the authorities to reject asylum applications at a preliminary stage of consideration. An application can be rejected before a thorough assessment of the case if the case is deemed not to meet the refugee definition/definition of complementary protection. The system contains an inescapably circular logic: Asylum seekers have to prove their case in order to have an opportunity to present their case in full. As a result of this restriction, many persons are not admitted into the asylum procedure at all and must turn to the overloaded courts for relief. In 2010-2011, 45% of cases were rejected at this preliminary stage, and thus denied access to a full status determination procedure. As a result, asylum seekers cannot access the asylum procedure in Ukraine and have to seek protection elsewhere with UNHCR processing significant numbers for resettlement to EU member states.

c. **Unrealistically short time limits for appeal.** Asylum applicants who receive a negative decision have only five working days to appeal. This period is too short. According to European standards, in practical terms, the applicant must have sufficient time and facilities in order to undertake all the steps required to exercise the right of appeal. The difficulty of filing an appeal is aggravated by the absence of legal aid.

10. While some of the gaps and inconsistencies have been addressed through the implementing instructions, it will be necessary to introduce amendments to the law as soon as possible to correct existing flaws. UNHCR provided a list of suggested amendments to the Ministry of Interior, but they were largely ignored. As a next step, the gaps were raised with the Presidential Administration where UNHCR’s comments remain under study; it is not clear when and if they will be transmitted to the Verkhovna Rada.

11. Furthermore, UNHCR is concerned about the draft legislation currently before parliament to harmonize other legislative acts with the refugee law. If this process of legislative harmonization were done thoroughly, asylum seekers would enjoy reasonable reception conditions and recognized refugees and persons in need of complementary protection would have the social and economic rights necessary for successful local integration. However, the Ukrainian authorities have thus far adopted a minimalist approach to this exercise in legislative harmonization, proposing changes to 25 laws rather than the 39 suggested by UNHCR. If the harmonization act is adopted in its current format, asylum seekers will continue to be consigned to destitution: They will have no right to work or to receive temporary accommodation or social assistance. Since charitable gifts beyond a mere token level are taxable and asylum seekers will be unable to receive a personal taxation code, for some it will even be illegal to receive charitable assistance from NGOs.

12. Important sub-legislative acts remain pending. For example, relevant line ministries have not yet approved an inter-ministerial instruction on the reception of unaccompanied minor asylum seekers. Given the lack of legal framework and bureaucratic wrangling, the authorities do not appoint a legal representative for children, who are left in a dangerous limbo: They cannot apply for asylum without a legal representative; they are not admitted to children’s shelters or temporary accommodation centres; and they are shuffled endlessly from one agency to another. Though the Ministry of Health has no established procedures for conducting medical age assessment in this context, the authorities regularly
take the initiative to conduct this according to doubtful criteria, and the problem is frequently solved when minors are deemed to be of age.

13. Overall, in the process of drafting laws and implementing regulations, insufficient consideration is given to international and European standards.

Disruptive Administrative Reforms

14. The latest administrative reform of the asylum system launched in December 2010 has brought much disruption, and the State Migration Service has been slow to take up its full responsibilities. The process of “liquidating” the former central asylum authority started in December 2010 and lasted for a full year, during which staff members were dismissed and sometimes re-hired. Files were transferred or made temporarily inaccessible. Anomalous institutional arrangements had a negative impact on the protection of asylum-seekers throughout 2011. For example, as the offices in the regions were closed for various periods, many persons were unable to register their asylum applications or have their documents extended, putting them at risk of fines and detention. Also, during these closures, the asylum authority did not appear in pending court cases, so court hearings on asylum were frequently postponed, thus creating backlogs of cases and further delaying asylum decisions. Many asylum-seekers found themselves compelled to depart in an irregular manner in order to find protection.

15. The administrative reforms are not yet complete. The internal structure of the State Migration Service continues to undergo revision. For example, the Department for Refugees’ and Foreigners’ Affairs was restructured in spring 2012 and given additional responsibilities, now covering a wide range of responsibilities, including, among others, refugee status determination, administrative detention of migrants, residence permits for foreigners, and readmission agreements. Restructuring has usually been linked to a change of the leadership at the top of the State Migration Service: there have been three heads of the service since its establishment 18 months ago. Both at the central and regional levels, vacant staff positions remain unfilled, so capacity to process cases is limited. As of mid-June, the State Migration Service has reported that it has just processed its first batch of cases for consideration of refugee status/complementary protection; hundreds of cases remain pending.

16. UNHCR is particularly concerned that the Department for Refugees’ and Foreigners’ Affairs does not have sufficient autonomy. EU standards note that a ‘determining authority’ (i.e., the administrative body responsible for taking decisions on international protection) should be civilian, with power of signature and budget, and autonomy to decide who is a refugee and who is not. Only suitably qualified and trained personnel should be entrusted with making decisions about international protection. Under the current arrangements, the Department for Refugees’ and Foreigners’ Affairs lacks the key attributes of a ‘determining authority.’ It does not have budgetary control or the power of signature; a decision on refugee status/complementary protection must be counter-signed by multiple officials who are outside of the Department. Under these conditions, decision-making related to refugee status and protection is likely to be influenced by migration concerns, including about the control of irregular migration, for which the State Migration Service is also responsible.

17. If administrative reforms are to succeed, a commensurate allocation of financial resources is required. Ukraine is committing insufficient funds to the asylum system to fulfill its responsibilities as signatory to the 1951 Refugee Convention. The State Migration Service has been unable to provide UNHCR with a full picture of the resources allocated to refugee protection in 2012, as their budget structure does not provide a breakdown of the funding for asylum issues. However, the State Migration Service did inform UNHCR that it had received inadequate funds for providing food at the temporary accommodation centres. It reports having received absolutely no funds for country-of-origin information, local integration, or capital repairs to the existing temporary accommodation centres that were constructed with international funds. While there is for the first time an allocation of resources for interpretation, so far there is no mechanism for hiring interpreters. Many funds provided in the past by the international community have been squandered.
18. The inadequate funding is linked to other problems in the public administration of the asylum system. If interpreters are not paid through the budget, they ask asylum-seekers for money. Poorly-paid employees may be tempted to do the same. Without a budget to train asylum officials or provide them with country-of-origin information, the quality of decision-making will remain low and open to corruptive practices. Another complication is that the processes of decision-making are highly centralized and opaque: A positive decision on refugee status/complementary protection requires some nine signatures. The prosecutor’s office scrutinizes positive decisions, frequently appealing against them. Characterized by scant financial resources, inadequate training of staff, weak delegated authority, and intense central control, the public administration of asylum does not create conditions for an analytical and individualized approach to decision-making, which is necessary for fair and accurate determination of an individual’s protection needs. **Meaningful reform of the asylum system will require a commitment of resources and expertise to successfully complete the administrative reforms in line with international and European Union standards.**

UNHCR’s Main Protection Concerns

19. **UNHCR is denied unfettered access to persons of concern** in detention centres, international airports and other locations where asylum seekers are deprived of their liberty. In particular, UNHCR is concerned that the State Border Guard Service frequently holds individuals detained on charges of attempted illegal border-crossing “under investigation” for several days, denying them access both to UNHCR and legal counsel. The overall supervisory role of UNHCR, in accordance to article 35 of the 1951 Refugee Convention, is not fully understood and acknowledged by government authorities.

20. **Asylum-seekers at borders are not guaranteed access to the territory.** In the first half of 2012, the European Court of Human Rights issued interim measures under Rule 39 in two cases where the Ukrainian authorities were denying asylum-seekers access to the territory. While in one case, the asylum-seekers were admitted to the territory and the asylum system, the other case resulted in the asylum-seekers’ removal to a third country, in apparent violation of the interim measures of the court.

21. **Detention of asylum-seekers is expanding.** Frustrated with the paralyzed asylum system and lack of reception conditions in Ukraine, asylum-seekers increasingly attempt to cross Ukraine’s western border. If they are caught, they face twelve months in detention for purposes of deportation. UNHCR has frequently pointed out that this is illogical: If the asylum-seeker’s case is under consideration, s/he cannot be deported according to the provisions of international and Ukrainian law. If an individual cannot be deported, there is no rationale to detain him/her for the purposes of deportation. Despite administrative and judicial appeals in this regard, this practice of detention continues. Currently, 77% of the foreigners under administrative detention are asylum-seekers.

22. **Judicial practice in asylum matters is still developing** due to lack of experience and awareness of international norms. The jurisprudence of the European Court of Human Rights is not applied adequately by national courts. For example, Ukrainian courts continue to issue detention and deportation orders to persons from Somalia, despite the fact that the European Court has ruled that deportations through Mogadishu would constitute a violation of Article 3 (with very limited exceptions) and that Ukraine has no practical means of removing Somalis.

23. Through its efforts, UNHCR can mitigate protection risks faced by asylum-seekers and refugees in Ukraine, but it cannot eliminate them. To protect asylum-seekers against destitution in light of Ukraine’s limited reception capacity and asylum-seekers’ lack of social and economic rights, UNHCR provides financial assistance to the most vulnerable asylum-seekers. In 2011, a total of $362,110 was distributed as direct assistance to asylum-seekers. Furthermore, when protection problems place asylum-seekers in situations of intolerable risk, UNHCR conducts refugee status determination under its mandate and refers such individuals for resettlement to third countries. In 2011, UNHCR submitted 125 refugees facing serious protection risks for resettlement, including to EU countries.
Conclusions

24. **UNHCR remains concerned that ten years after having acceded to the 1951 Refugee Convention, Ukraine’s asylum system remains dysfunctional in spite of efforts to build capacity in past years.** This approach has failed to produce tangible dividends, and asylum-seekers are often more disadvantaged than ordinary migrants. Over the past 15 years, UNHCR alone has provided some 30 million USD for capacity-building in the field of asylum and migration. Frequent administrative reforms and personnel changes have inhibited the government’s ability to build sustainable systems and absorb allocated resources. Despite the impetus provided by the Visa Liberalization Action Plan, UNHCR remains concerned with the absence of political will to build an asylum system meeting international and European standards. If Ukraine continues along this trajectory, it may lose the confidence of the donor community in the area of asylum.

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