



**Written observations by the Office of the
United Nations High Commissioner for Refugees in the case of
A.H. v National Directorate-General for Aliens Policing (11.K.706.750/2020)
before the Budapest Capital Regional Court**

I. Introduction¹

1. The Office of the United Nations High Commissioner for Refugees (“UNHCR”) welcomes the opportunity to intervene in this case, as granted by the Budapest Capital Regional Court (“the Court”) in its interim decision dated 2 November 2020.
2. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problems of refugees.² According to its Statute, UNHCR fulfils its mandate inter alia by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees; supervising their application and proposing amendments thereto[.]”³ This supervisory responsibility is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees (collectively referred to as the “1951 Convention”).⁴
3. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included notably in the UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (“UNHCR Handbook”)⁵ and subsequent Guidelines on International Protection.⁶
4. UNHCR also provides information and advice on a regular basis to decision-makers and courts of law concerning the interpretation and application of the provisions in the 1951

¹ This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, Convention on the Privileges and Immunities of the United Nations, 13 February 1946, www.refworld.org/docid/3ae6b3902.html.

² UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), www.refworld.org/docid/3ae6b3628.html, (“UNHCR Statute”).

³ *Ibid.*, paragraph 8(a).

⁴ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the [1951] Convention”. UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, www.unhcr.org/refworld/docid/3be01b964.html.

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

⁶ The Guidelines on International Protection complement the UNHCR Handbook (see note 5 above) and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

Convention and has a history of third-party interventions in many national and regional jurisdictions. The Office is often approached directly by courts or other interested parties to obtain UNHCR's "unique and unrivalled expertise"⁷ on particular legal issues pertaining to its mandate. UNHCR has, for example, regularly been granted intervener status by the European Court of Human Rights ("ECtHR") and has appeared as a third party before the Court of Justice of the European Union ("CJEU"). UNHCR has also intervened before various domestic courts in Europe and elsewhere, such as the Supreme Court and former House of Lords of the United Kingdom, the German Federal Constitutional Court, the Supreme Court of Norway, the Dutch Council of State, the Regional Court in Warsaw, the US Supreme Court, the Supreme Court of Canada as well as the Constitutional Court of Hungary.

5. Further to its supervisory responsibility, in this submission, UNHCR addresses the domestic legislative framework and practice in Hungary regarding applications for international protection (Part II); and provides UNHCR's interpretation of the relevant principles of international refugee and human rights law regarding access to fair and efficient asylum procedures within the territory (Part III); protection against direct or indirect refoulement (Part IV); and access to fair and efficient asylum procedures and protection from refoulement in the specific context of COVID-19 responses (Part V). Consistent with its practice in other cases and its role as a third party, UNHCR will neither address nor comment on the specific merits of the applicant's case.

II. The legislative framework regarding access to territory and asylum in Hungary

6. The present case concerns the application of domestic rules regulating access to the asylum procedure in Hungary and to protection from refoulement, with significant implications for Hungary's compliance with its obligations under international refugee and EU asylum law in relation to such.
7. The right to seek asylum and protection from refoulement is enshrined in the *Fundamental Act of Hungary*,⁸ while fundamental rules for regulating asylum are laid down in *Act LXXX of 2007 on Asylum* ("Asylum Act")⁹ and related regulations.
8. However, *Act LVIII of 2020 on the transitional rules and epidemiological preparedness related to the cessation of the state of danger* ("the Act"), in force as of 18 June 2020,¹⁰ introduced special provisions derogating from the otherwise applicable provisions of the Asylum Act governing the procedure for applying for asylum in Hungary.¹¹

⁷ *R (on the application of EM (Eritrea)) v. Secretary of State for the Home Department*, [2014] UKSC 12, United Kingdom: Supreme Court, 19 February 2014, www.refworld.org/pdfid/5304d1354.pdf, para. 72.

⁸ Article XIV (3), (4) of the *Fundamental Act of Hungary* (25 April 2011).

⁹ See, in particular, Sections 32/D (1), (2), 35 (1)(a), 45, 47 (1) of the *Asylum Act*.

¹⁰ See Issue 144 of 17 June, 2020 of the National Gazette in Hungarian language at:

<https://magyarkozlony.hu/dokumentumok/b18d1fb3c742aa2bd183b15a32fe4425e603f2c2/megtekintes>.

¹¹ Pursuant to Section 267 of the Act "the asylum authority shall process applications for asylum by 31 December 2020, subject to derogations as set out in this sub-chapter." Further, Section 270(1) of the Act prescribes that "Asylum applications – with the exception of Section 271 - may only be lodged following the procedures described in Sections 268 and 269."

9. Pursuant to the Act a new procedure is in place, in effect until 31 December 2020,¹² requiring individuals seeking international protection, as a general rule, to express their intent to seek asylum at the Hungarian Embassy in a designated third country (namely Serbia and Ukraine), before they are able to access asylum procedures in Hungary, and only if the asylum authority recommends that the Embassy issue a single travel document authorizing their entry to Hungary for the purpose of formally submitting their asylum application.¹³ The Act only exempts three specific categories of persons from this procedure.¹⁴
10. UNHCR observes that the Act not only requires persons seeking international protection within the territory of Hungary to leave the territory in order to first submit a statement of intent at the Hungarian Embassy in a designated third country (or risk facing detention and deportation), it also precludes persons arriving at the border and seeking international protection from entering Hungarian territory unless they have received a travel document authorizing entry onto territory (as elaborated above), as a pre-condition to access the asylum procedure. UNHCR recalls that summary rejection at the border of asylum applicants is at variance with Hungary's obligations under international law.
11. The legal questions raised in the present case concern the application of these special derogatory provisions of the Act. UNHCR has set out its concerns regarding this Act in comments to the Government dated 23 June 2020, highlighting that the procedure introduced under the Act is not in conformity with the right to seek asylum, and exposes asylum-seekers to a risk of direct or indirect refoulement, contrary to international refugee, human rights and EU law.¹⁵

III. Principles of international refugee and human rights law regarding access to a fair and efficient asylum procedure and protection against refoulement

12. UNHCR recalls that the right to seek and enjoy asylum is a basic human right under Article 14(1) of the *Universal Declaration of Human Rights*,¹⁶ and is supported by the legal framework of the 1951 Convention to which Hungary is a State party. The right to asylum

¹² On 30 October 2020, the Ministry of Interior confirmed at the Thematic Asylum and Migration Working Group meeting that the Government will initiate the extension of its validity period until 30 June 2021.

¹³ See Sections 267 and 268 of the Act; see also Section 1 of Government Decree No. 292/2020 (VI. 17.) according to which 'the statement of intent to lodge an asylum application may be submitted within the territory of diplomatic representations of Hungary, as defined under point a) of Section 3 (1) of Act LXXIII of 2016 on Foreign Representations and Permanent Foreign Service, operating on the territory of non-EU Member States having borders with Hungary'.

¹⁴ The three categories of persons who are exempted from the new procedure are:

- 1) Recognized beneficiaries of subsidiary protection staying in Hungary;
- 2) Family members – within the meaning of the Asylum Act – of recognized refugees or beneficiaries of subsidiary protection who are staying in Hungary at the time of submission of the asylum application;
- 3) Any person who is subject to a coercive measure, measure or penalty affecting his or her personal liberty, except for those who have crossed the state border of Hungary in an illegal manner: (Sub-section 271(1) of the Act).

¹⁵ UNHCR, *Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger*, June 2020, www.refworld.org/docid/5ef5c0614.html.

¹⁶ UNGA, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), www.refworld.org/docid/3ae6b3712c.html.

is also provided for in Article 18 of the *Charter of Fundamental Rights of the European Union*.¹⁷

Access to a fair and efficient asylum procedure

13. The Act establishes a process whereby persons within the territory (save for three specific exceptions)¹⁸ are summarily denied the possibility of submitting an asylum application, and are instead directed to travel to a designated third country, i.e. either Serbia or Ukraine, regardless of whether they have a legal right to enter those countries, where they are required to first initiate a 'statement of intent' procedure at the Hungarian embassy in one of those two countries.¹⁹ Thus, those present within the territory and wishing to seek asylum in Hungary are obliged to first leave the territory before even being able to seek access to the asylum procedure.
14. While the 1951 Convention does not stipulate the specific form that national asylum procedures must take, implementation of the protections it affords to refugees requires that States grant applicants for asylum timely access to fair and efficient procedures and that they be protected against any State measures that would be contrary to those obligations.²⁰ UNHCR has therefore consistently emphasized that fair and efficient procedures are an essential element in the full and inclusive application of the Convention.
15. The Executive Committee of the High Commissioner's Programme functions as a subsidiary organ of the United Nations General Assembly and has both executive and advisory functions; the latter includes issuing Conclusions on International Protection (referred to as "ExCom Conclusions"). ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee (which includes Hungary)²¹ and can therefore be considered as reflecting their understanding of legal standards regarding international protection. As such, ExCom, reflecting its Member States' views, recognized the importance of the need for all asylum-seekers to have access to fair and efficient procedures as an essential precondition of international refugee protection.²²
16. UNHCR underlines that the primary responsibility to determine international protection needs and, where required, to provide international protection lies with the State in which

¹⁷ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 18, which provides that '[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees: www.refworld.org/docid/3ae6b3b70.html. The right to seek asylum has also been recognized in other regional instruments such as the *American Convention on Human Rights* (Article 22 (7)); the *American Declaration of the Rights and Duties of Man* (Article XXVII); and the *African Charter on Human and Peoples' Rights* (Article 12.3).

¹⁸ See note 14 above for the three exceptions.

¹⁹ The Act does not set out the criteria nor does it stipulate a clear process for deciding on the statement of intent. The statement of intent application either results in a 'recommendation' by the asylum authority to the embassy to issue a single travel document authorizing entry into Hungary for the purpose of formally submitting the asylum application in Hungary or a recommendation not to do so. This recommendation is to be concluded in 60 days.

²⁰ ExCom Conclusion No. 82 (XLVIII) 1997, para. (d) (ii). See further 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*, January 2007, paras. 26-31, www.unhcr.org/refworld/docid/45f17a1a4.html.

²¹ Hungary has been a member the Executive Committee since 1993: <https://www.unhcr.org/excom/announce/40112e984/excom-membership-date-admission-members.html>.

²² ExCom Conclusion No. 81 (XLVIII) 1997, para. (h); ExCom Conclusion No. 82 (XLVIII) 1997 para. (d)(iii); ExCom Conclusion No. 85 (XLIX), 1998, para. (q). See also, UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 5: www.refworld.org/docid/3b36f2fca.html.

asylum is sought. UNHCR considers that claims to international protection should ordinarily be processed by and in the territory of the State in which they have arrived, and sought asylum, or which otherwise exercises jurisdiction over them.²³

17. ExCom has further recognised that asylum procedures must include a number of minimum safeguards, including *inter alia*, the following:
- ‘The competent official (...) to whom the applicant addresses himself (...) in the territory of a Contracting States should have clear instructions for dealing with cases which might be within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority;
 - There should be a clearly identified authority – wherever possible a single central authority – with responsibility for examining requests for refugee status and taking a decision in the first instance;
 - The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR;
 - If the applicant is not recognized, he should be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system;
 - The applicant should be *permitted to remain in the country pending a decision* on his initial request by the competent authority (...).²⁴ [emphasis added]
18. These basic requirements of an asylum procedure are also reflected in the case law of the European Court of Human Rights (ECtHR)²⁵ and in EU law. The right to asylum enshrined in Article 18 of the *Charter of Fundamental Rights of the European Union* entails an obligation on the part of Member States to ensure that an asylum-seeker (i) has access to and can enjoy a fair and efficient examination of his or her asylum claim and/or an effective remedy in the receiving state, (ii) is treated in accordance with adequate reception conditions and (iii) is granted asylum in the form of refugee status or subsidiary protection status when the criteria are met. It requires compliance not only with the substantive provisions of the 1951 Convention, but also with the substantive and procedural standards

²³ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para 1: www.refworld.org/docid/51af82794.html. See also, UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, para. 2: www.refworld.org/docid/5acb33ad4.html and UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, September 2019, para. 7: www.refworld.org/docid/5d8a255d4.html.

²⁴ ExCom Conclusion No. 8 (1977), para. (e)(i), (ii), (iv), (vi), (vii). Paragraph (e)(vii) further indicates that an applicant should be permitted to remain in the country pending relevant appeal processes.

²⁵ The ECtHR has repeatedly held that in order to be effective “the remedy required by Article 13 must be available in practice as well as in law.” See ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, para. 290. While the ECtHR preconditions the applicability of guarantees under Article 13 ECHR on the existence of an arguable claim, the Court has held that the person concerned shall have an effective opportunity to make such a claim, notably in terms of material conditions, access to information, legal assistance and interpretation. See ECtHR, *Hirsi Jamaa and Others v. Italy*, supra note 3, paras 202 and 204. See also ECtHR, *M.S.S. v. Belgium and Greece*, Application, para. 304.

contained in relevant secondary EU law instruments²⁶ such as the EU Asylum Procedures Directive (“APD”) and the Reception Conditions Directive (“RCD”) amongst others.²⁷

19. Chapter II of the APD sets out the basic principles and guarantees applicable to the asylum procedure and prescribes specific obligations for the Member States to ensure access to the asylum procedure, *inter alia*, by requiring that they provide an effective opportunity to lodge an application as soon as possible following the expression of intention to seek asylum (‘making of the application’),²⁸ that they ensure the expeditious registration of the asylum application,²⁹ and that they guarantee the right to remain in the Member State pending the examination of the application.³⁰ Further, the EU Reception Conditions Directive prescribes standards for the reception of applicants for international protection.³¹
20. UNHCR acknowledges that States may decide to facilitate access to territory and asylum through protected entry procedures at Embassies.³² However, any such pathway must complement and not undermine or be presented as an alternative to access to asylum procedures for asylum-seekers already in the country, or seeking international protection at the border. A mechanism pursuant to which an applicant is summarily denied access to the asylum procedure and instead directed to a *sui generis* extraterritorial pre-screening procedure in a designated third country, is not in line with international or EU law. Moreover, while the APD allows States to require applicants to lodge their applications in person and/or at a designated place, rules which deny persons the possibility to submit an asylum application at borders or in the country, and instead require them to travel to Serbia or Ukraine, prejudice the applicant’s ‘effective opportunity’ to lodge their application.³³

²⁶ *UNHCR intervention before the CJEU in the cases of N.S. v. Secretary of State for the Home Department in United Kingdom and M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland*, 1 February 2011, C-411/10 and C-493/10, para. 30: www.refworld.org/docid/4d493e822.html.

²⁷ 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, OJ L 180, 29.6.2013, p. 60–95.

²⁸ See Article 2(b) of Directive 2013/32/EU.

²⁹ See Article 6 of Directive 2013/32/EU. Similarly, ExCom Conclusion No. 91 (2001), para. (g), requests that States take ‘all necessary measures to register and document refugees and asylum-seekers on their territory as quickly as possible upon their arrival (...)’.

³⁰ See Article 9 of Directive 2013/32/EU. The CJEU has recalled that the aim of the Directive is to ensure that access to asylum procedures are effective and as easy as possible and Member States are therefore under an obligation to ensure that asylum-seekers can lodge their asylum applications as quickly as possible. Further, to ensure that asylum-seekers may enjoy all rights that the EU asylum law entitled to, Member States must register asylum claims as quickly as possible. Lastly, the status of an applicant, along with the rights and obligations this entails, is neither dependent on the registration nor on the formal lodging of the claim. See CJEU, *Ministerio Fiscal*, C-36/20 PPU, para. 63, 72, 79, 93–94. For applicants’ ‘right [...] to qualify as a beneficiary of international protection, provided that the conditions required by EU law are met’, see also CJEU, *F.M.S. and Others*, Joined Cases C-924/19 PPU and C-925/19 PPU, para. 192, and for Member States’ obligation to examine asylum applications in compliance with the criteria of the Qualification Directive, see CJEU, *Ibrahim and Others*, Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17, para. 99.

³¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, OJ L 180, 29.6.2013, p. 96–116.

³² On the notion of ‘protected entry procedures’ see: UNHCR, *From ‘protective passports’ to protected entry procedures? The legacy of Raoul Wallenberg in the contemporary asylum debate*, 1 December 2003, Working Paper No. 99: www.refworld.org/docid/4ff2acca2.html.

³³ See Article 6 (2) and (3) of Directive 2013/32/EU.

21. As stated above, the primary responsibility to provide protection rests with the State where asylum is sought.³⁴ In UNHCR's view, this new requirement of declaring an intent to seek asylum at a Hungarian Embassy in a designated third country effectively denies asylum-seekers access to a fair and efficient asylum procedure and is inconsistent with Hungary's international legal obligations.³⁵
22. Lastly, in addition to the unlawfulness of summary denial of access to the asylum procedure on the basis of referral to the extraterritorial 'statement of intent' requirement under applicable domestic law, the implementation of this procedure itself raises fundamental concerns regarding the possibility of a substantive assessment of the likely merits of a claim without appropriate procedural guarantees including importantly, access to remedies, as required by international and EU law.³⁶

IV. *The non-refoulement obligation*

23. Referring or directing asylum-seekers to travel to Serbia or the Ukraine, to seek permission to (re)enter for the purposes of having access to the asylum procedure raises concerns regarding Hungary's obligations to ensure protection from direct and indirect refoulement,³⁷ notably where, should the applicant fail to do so, he or she would become liable to deportation from Hungary (to their country of origin or a third country), without any prior assessment of their claim to international protection.
24. UNHCR recalls that the principle of non-refoulement³⁸ is the cornerstone of international refugee law, codified in Article 33(1) of the 1951 Convention³⁹ and constitutes a binding and non-derogable component of international refugee protection which has also been

³⁴ On 30 October 2020, the European Commission announced the opening of an infringement procedure against Hungary on the incorrect application of EU asylum legislation. The Commission considers that the new asylum procedures set out in the Act introduced in response to the coronavirus pandemic are in breach of EU law. In particular, the European Commission considers that it is an unlawful restriction to access to the asylum procedure that is contrary to the Asylum Procedures Directive, read in light of the Charter of Fundamental Rights of the European Union, as it precludes persons who are on Hungary's territory, including at the border, from applying for international protection there. See European Commission: October infringements package: key decisions, 30 October 2020: https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687

³⁵ UNHCR, *Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger*, June 2020, para. 2, note 15 above.

³⁶ *Ibid.*

³⁷ The prohibition of refoulement applies not only with respect to return to the country of origin (direct refoulement) but also to removals to any other third country where a person has reason to fear persecution, serious human rights violations or other serious harm, or from where he or she risks being sent to his or her country of origin (indirect refoulement). See UN High Commissioner for Refugees (UNHCR), *Note on Non-Refoulement* (EC/SCP/2), 1977, para. 4, <http://www.unhcr.org/excom/scip/3ae68ccd10/note-nonrefoulement-submitted-high-commissioner.html>; See UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of D.A. and others v. Poland (application no. 51246/17) before the European Court of Human Rights*, 5 February 2018, 51246/17, para. 3.1.6: www.refworld.org/docid/5a9d6e414.html. See further section 2 of UNHCR *Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger*, June 2020, note 15 above.

³⁸ The obligation of States not to "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where [their] life or freedom would be threatened ..." Article 33(1), 1951 Convention.

³⁹ There are only two explicit exceptions to the application of the principle of non-refoulement stipulated in Article 33(2) of the 1951 Convention. However, neither is relevant for these submissions.

enshrined in international and European human rights law.⁴⁰ It is a norm of customary international law, and is consequently binding for all States. The fundamental and non-derogable character of the principle of non-refoulement has also been reaffirmed by ExCom in numerous conclusions.⁴¹

25. In addition to refugees who have already been formally recognized as such, the prohibition of refoulement under international refugee law also applies to asylum-seekers whose status has not yet been determined, as the determination of refugee status is declaratory under international law.⁴²
26. UNHCR recalls that the non-refoulement obligation is applicable wherever a State exercises jurisdiction and that under the 1951 Convention, a declaration by an asylum-seeker of their intention to seek protection⁴³ engages that State's responsibility, notably to ensure protection against direct or indirect refoulement, where required, from the moment they in any way make that intention known.⁴⁴
27. UNHCR further recalls that the prohibition of refoulement also applies not only with regard to removal to or non-admission from countries of origin, but also with regard to any other country or territory where a person has reason to fear persecution, serious human rights violations or other serious harm, or from where he or she risks being sent to a place of persecution or serious harm, including his or her country of origin (indirect or chain refoulement).

⁴⁰ ExCom Conclusions Nos. 6 (1977), para. (c); No. 79 (1996), para. (j); No. 81 (1997), para. (i): www.unhcr.org/pages/49e6e6dd6.html. See also, Note on International Protection, A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, www.refworld.org/docid/3ae68d5d10.html. See further UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of D.A. and others v. Poland (application no. 51246/17) before the European Court of Human Rights*, 5 February 2018, 51246/17, para. 3.1.4, in particular footnotes 29-31, www.refworld.org/docid/5a9d6e414.html; Article 19 of the EU Charter of Fundamental Rights; See further UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, note 20 above, paras 26-31.

⁴¹ See, for example, ExCom Conclusion No. 6, para. (c): reaffirming "the fundamental humanitarian principle of non-refoulement has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States."; Conclusion No. 25, para. (b): reaffirming "the importance of the basic principles of international protection and in particular the principle of non-refoulement which was progressively acquiring the character of a peremptory rule of international law"; Conclusion No. 65, para. (c): emphasizing "the primary importance of non-refoulement and asylum as cardinal principles of refugee protection..."; Conclusion No. 68, para. (f): reaffirming "the primary importance of the principles of non-refoulement and asylum as basic to refugee protection"; No. 81, para. (i): recognizing "the fundamental importance of the principle of nonrefoulement"; No. 103, para. (m): calling upon States "to respect the fundamental principle of non-refoulement".

⁴² UNHCR, *Handbook*, note 5 above, para. 28. The principle of non-refoulement is of particular relevance to asylum-seekers. As such persons may be refugees, it is an established principle of international refugee law that they should not be returned or expelled pending a final determination of their status. See UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, note 20 above, para. 6.

⁴³ There is no single correct formula or phrase for how the fear of persecution needs to be expressed. States have a duty to inquire into the reasons an individual seeks to enter the territory and to keep the situation in the possible State of return under deliberative review, in order to conform with that obligation. See, ECtHR, *Hirsi Jamaa and Others v. Italy*, 23 February 2012, para. 133, <http://www.refworld.org/docid/4f4507942.html>, where the Court held that the failure of people to expressly apply or request for asylum does not relieve a State from its obligations under the ECHR. See further, UNHCR's oral intervention in the case of *Hirsi Jamaa and Others v. Italy*, 22 June 2011, Application No. 27765/09: www.refworld.org/docid/4e0356d42.html. See also, UNHCR's oral intervention before the European Court of Human Rights Grand Chamber hearing in the case of *N.D. and N.T. v. Spain*, 26 September 2018, p. 6: <http://www.refworld.org/docid/5bb3873b4.html>.

⁴⁴ Without prejudice to other circumstances in which State responsibilities under international refugee law are engaged.

28. To comply with their non-refoulement obligations, States have a duty to establish, prior to implementing any removal measure that the person whom they intend to remove from their territory or jurisdiction is not at risk of persecution, serious human rights violations or other serious harm or onward removal to same.⁴⁵
29. Accordingly, in UNHCR's view, the introduction of a preliminary requirement to access the asylum procedure through its Embassies for asylum-seekers arriving at the border or already in Hungary and requiring them to depart in order to initiate the asylum procedure from a third country, effectively denies them access to the asylum procedures and to protection which is at variance with Hungary's international legal obligations and may expose asylum-seekers to a risk of refoulement.⁴⁶

V. Legal Considerations on access to territory and procedures in the context of COVID-19

30. The new mechanism introduced by the Act, which derogates from the Asylum Act by conditioning access to the asylum procedure (with limited exceptions), on permission to (re)enter granted following the extraterritorial 'statement of intent' process, was, according to the justification attached to the Act, introduced as a measure to contain the COVID-19 outbreak, "to further prevent the spread of the epidemic" and "to prepare for possible further waves of the epidemic",⁴⁷
31. UNHCR recalls that States are entitled to take measures to ascertain and manage risks to public health, including risks that could arise in connection with persons arriving at their border. However, such measures must be non-discriminatory as well as necessary, proportionate and reasonable to the aim of protecting public health.⁴⁸
32. Imposing a blanket measure denying access to procedures or precluding the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against refoulement, would be discriminatory and would not meet international standards. Summary denials of access to territory without safeguards to protect against direct or indirect refoulement cannot be justified on the grounds of any health risk.⁴⁹

⁴⁵ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations*, note 20 above, para. 22. See also, note 40 above.

⁴⁶ UNHCR, *Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger*, June 2020, note 15 above.

⁴⁷ See justification attached to the Act: "Those arriving from outside of the country's borders under uncontrolled conditions pose an outstanding risk of infection in the country during the epidemic caused by COVID-19. The transit zone proved to be suitable for preventing the spread of the infection [...] Following the judgment of the Court of Justice of the European Union of 14 May 2020 [...] it became necessary to empty the transit zones. In order to further prevent the spread of the epidemic, a new procedure was introduced on the rules of the asylum procedure with Government Decree No. 233/2020. In order to prepare for possible further waves of the epidemic, the established regulations should be maintained during the transitional period following the end of the state of danger." UNHCR notes that requiring applicants to leave the territory to a designated third country to first express their intention to seek asylum at the Hungarian embassy in that country and subsequently allowing those granted or otherwise holding authorization to re-enter the country for the purposes of formally submitting the asylum application is an apparent contradiction with the pronounced objective of the Act which is to prevent the spread of the virus.

⁴⁸ UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, 16 March 2020, para. 5: www.refworld.org/docid/5e7132834.html.

⁴⁹ *Ibid.*, para. 6.

33. UNHCR emphasizes that neither the 1951 Convention nor EU asylum law provides any legal basis for the suspension of access to the asylum procedures and protection against refoulement.⁵⁰ In the context of the latter, the CJEU has indicated that Article 72 of the Treaty on the Functioning of the European Union (TFEU), as a derogatory provision, is to be interpreted strictly and does not allow for automatic departure from EU law but requires Member States to prove that it is necessary to have recourse to that derogation.⁵¹
34. Further, within the framework of the 1951 Convention, the principle of non-refoulement constitutes an essential and non-derogable component of international refugee protection. The central importance of the obligation not to return a refugee, directly or indirectly, to a risk of persecution is reflected in Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, which list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted.
35. In light of the above, UNHCR submits that States' measures to protect public health may include a health screening or testing of persons seeking international protection upon entry and/or placing them in quarantine, however, such measures may not result in denying them an effective opportunity to seek asylum or result in refoulement.⁵²

Conclusion

36. The mechanism introduced by the Act, whereby with limited exceptions, asylum-seekers arriving or present in Hungary are summarily denied access to the asylum procedure and required instead to first travel to a designated third country and undertake the 'statement of intent' procedure there, is not in conformity with Hungary's obligations under international refugee and human rights law, nor with EU law. It denies asylum-seekers the right to access a fair and efficient asylum-procedure and may result in a risk of direct or indirect refoulement in contravention of international refugee and human rights law and EU law.
37. UNHCR notes that the applicant has requested a referral to the CJEU for a preliminary ruling to be made on the issue of whether it is permissible under Article 72 of TFEU for Member States to derogate from their obligations under secondary EU law instruments (including the Asylum Procedures Directive and the Reception Conditions Directive) on the grounds of a public health emergency. UNHCR requests an opportunity to submit a further statement on this issue if the motion is upheld and this would be of assistance to the Court.

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⁵⁰ UNHCR statement on the situation at the Turkey-EU border, 2 March 2020: www.unhcr.org/news/press/2020/3/5e5d08ad4/unhcr-statement-situation-turkey-eu-border.html.

⁵¹ See Joined Cases C-715/17, C-718/17 and C-719/17, C-715/17, *Commission v Poland* (Temporary mechanism for the relocation of applicants for international protection), ECLI:EU:C:2020:257, para. 152: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=224882&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=12170357>.

⁵² UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, note 49 above, para. 8.