



Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *O.M. & D.S. v. Ukraine* (Application No. 18603/12)

1. Introduction*

1.1 The Office of the United Nations High Commissioner for Refugees (“UNHCR”) submits this written intervention as a third party in the case of *O.M. & S.M. v. Ukraine* (Application No.18603/12) pursuant to letter of 12 June 2013 from the European Court of Human Rights (“the Court”). In making this submission, UNHCR will address a number of legal issues relating to obligations under international refugee and human rights law regarding *non-refoulement*, and the related right of access to fair and efficient asylum procedures, including at the border. It is UNHCR’s position that the Ukrainian practice of routinely denying people access to the asylum procedure at the border, in particular in airport transit zones, is at variance with the right to seek asylum and the prohibition on *refoulement* as guaranteed in international refugee and human rights law.

1.2 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 for the problem of refugees.¹ Paragraph 8(a) of its Statute and the Preamble of the 1951 Convention relating to the Status of Refugees (“the 1951 Convention”)² confer responsibility upon UNHCR to supervise the application of international conventions for the protection of refugees, whereas Article 35(1) of the 1951 Convention obliges States Parties to cooperate with UNHCR in the exercise of its functions, including in particular to facilitate its duty of supervising the application of the provisions of the 1951 Convention.

1.3 In the exercise of its mandate, UNHCR regularly carries out its functions through partners and in cooperation with a wide range of actors. UNHCR’s authority to do so is derived from the Office’s Statute.³ On the basis of implementing agreements, UNHCR supports governmental and non-governmental organizations that perform *inter alia* specific social and legal services to help refugees. This is the case in many countries, including Ukraine. While these agreements establish general guidelines and procedures, they do not affect the capacity of the parties to work autonomously in representing the specific interests of individual asylum-seekers and refugees. In particular, UNHCR does not interfere with the independent legal advice provided to individual asylum-seekers and refugees by such partners.

1.4 Part 2 of these submissions addresses the severe difficulties facing asylum-seekers in transit zones in Ukraine’s airport seeking to gain access to the asylum procedure, with a particular focus on the risk of *refoulement* this entails. Part 3 deals with UNHCR’s interpretation of the relevant principles of international refugee and human rights law governing the obligation of *non-refoulement* of asylum-seekers at the border and the relevant case law of the Court in this regard.

2. The situation in Ukraine

2.1. Overview of the treatment of asylum-seekers at the border in Ukraine

2.1.1 Because asylum-seekers arriving at the border, particularly at international airports, lack opportunities to draw attention to their situation – being kept out of sight with no or limited access to legal services or UNHCR, it is difficult to estimate the scale of the problem of access to asylum in

*This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognized principles of international law.

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1, <http://www.unhcr.org/refworld/docid/3b00f0715c.html>.

² UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, vol. 189, p. 137, <http://www.unhcr.org/refworld/docid/3be01b964.html>.

³ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 10, <http://www.unhcr.org/refworld/docid/3b00f0715c.html>.

Ukraine.⁴ UNHCR is concerned by instances of *refoulement* because of non-admission of asylum-seekers to the territory and the removal of asylum-seekers to countries outside any legal framework. This concern is evidenced by the fact that according to available data, in 2011, the State Border Guard Service referred for asylum processing only two asylum applications received at Boryspil International Airport. In 2012, the State Border Guard Service referred only five asylum applications received at border entry points. In all five of the 2012 cases, UNHCR received information about the asylum-seekers' arrival and advocated with the authorities for their access to the asylum procedure; three of the asylum-seekers were stowaways who received access only as a result of the Court's interim measures under Rule 39. The very small numbers of persons admitted to the asylum procedure, as well as the fact that their access appears to be dependent on interventions by external actors, including UNHCR, raise serious concerns about the effectiveness of access to asylum at the borders.⁵

2.1.2 In its discussion of access to Ukrainian territory in its comprehensive report on Ukraine's asylum system⁶, UNHCR noted⁷:

„During the same period [i.e., 2012], the SBGS [State Border Guard Service] denied 16,272 persons access to the territory, and while most were undoubtedly refused entry for valid reasons, this number includes some individuals from refugee-producing countries such as Syria who require enhanced attention to meet their protection needs. So far, despite some progress noted, the SBGS still needs to adopt procedures on protection-sensitive screening of persons entering the country; thus, the SBGS has limited capacity in identifying persons with international protection needs, as well as other vulnerable persons, such as victims of trafficking, among the flow of migrants and to prevent their *refoulement*.⁸“

2.1.3 Various observers have also expressed serious concerns about the treatment of asylum-seekers arriving at the border in Ukraine. In its 2010 report, Human Rights Watch noted:

„A serious obstruction to the functioning of the asylum system has been the failure of Border Guard officials to forward applications submitted by detained asylum-seekers to the Regional Migration Service. It does not appear to Human Rights Watch that a pre-screening system is taking place through which the SBGS makes an eligibility determination prior to the RMS [Regional Migration Service] performing that function. Rather, this appears to be a highly informal, ad hoc practice involving many Border Guard officials who either don't bother forwarding applications submitted to them or actively block asylum-seekers from lodging claims.⁹“

2.1.4 Further, asylum-seekers arriving at the border may face detention. In its 2011 report, the Council of Europe's Committee for the Prevention of Torture (CPT) stated:

⁴ Along with other organizations, UNHCR has monitored a number of situations that are indicative: i) “In May an Afghan family requesting asylum in the country was denied entry at Boryspil Airport.” US State Department, *2010 Human Rights Report*, Ukraine, 8 April 2011, <http://www.state.gov/j/drl/rls/hrrpt/2010/eur/154456.htm>; ii) “On 31 August, six nationals of the Democratic Republic of the Congo (DRC) arrived at Boryspil airport, but were not allowed to leave the airport and were deported to the DRC via Dubai on 2 September. Reportedly, one of them was beaten when he tried to claim asylum; his claim was ignored and he was then drugged to make him sleep. According to the State Border Guard Service, the DRC nationals were not allowed to enter Ukraine because they had less than €1,000 each.” Amnesty International, *Ukraine - Amnesty International Report 2010*, <http://www.amnesty.org/en/region/ukraine/report-2010>; iii) “[O]n Wednesday a family of eight from Afghanistan with four children, aged from three to nine, flew into the Boryspil Airport in Kyiv. They informed border guards that they wished to seek asylum in Ukraine; however the Ukrainian border guards did not accept their applications and left them in the airport in the transit zone.” Ukrainian Helsinki Group, *Human rights defenders stop deportation of eight Afghan asylum seekers*, 20 November 2009, <http://helsinki.org.ua/index.php?id=1258714704>.

⁵ UNHCR observes that many asylum-seekers are unable to find protection in Ukraine due to the shortcomings of the asylum system and therefore are compelled to travel onwards in search of international protection; therefore, it is unsurprising that the vast majority of persons applying at Ukraine's international borders are those who apply after an irregular attempt at exiting Ukraine toward European countries with better established asylum systems.

⁶ This document is attached to the submission for further reference. See UNHCR, *Ukraine as a country of asylum: Observations on the situation of asylum-seekers and refugees in Ukraine*, July 2013, www.refworld.org.

⁷ *Ibid.*, para. 26.

⁸ For more on protection-sensitive screening, see *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, January 2007, Rev. 1, <http://www.unhcr.org/refworld/docid/45b0c09b2.html>.

⁹ Human Rights Watch, *Buffeted in the Borderland: The Treatment of Migrants and Asylum Seekers in Ukraine*, December 2010, pp. 35-36, <http://www.hrw.org/sites/default/files/reports/ukraine1210WebVersion.pdf>.

„It is noteworthy that some detained foreign nationals were kept in Border Service facilities for prolonged periods of time: stays of up to 24 days were noted at the Boryspil Airport SP and stays of up to two months at the Chernigiv PTT. The CPT reiterates its recommendation that steps be taken to ensure that the legal provisions governing detention by the State Border Service are fully respected in practice.“¹⁰

2.1.5 The Ukrainian Parliament Commissioner for Human Rights himself also expressed serious concerns about some actions of the border guards in the international zone of the Boryspil Airport, that „violate Ukraine's commitments made under the international agreements, including the Convention on the Rights of the Child of 1989, the Convention on the Status of Refugees of 1951, the Protocol on Refugees of 1967, the Convention on Human Rights and Fundamental Freedoms of 1950.“¹¹ In this report, the Commissioner particularly refers to the situation of Afghan asylum-seekers, including children, who were detained in the transit zone of the airport, denied access to the asylum procedure and deported to the United Arab Emirates despite the Court's imposition of Rule 39 interim measures.

2.1.6 As indicated above, asylum-seekers arriving at the border in Ukraine, in particular in international transit zones at the airports, can be prohibited from entering Ukraine and from seeking asylum. They are denied basic procedural safeguards and access to effective remedies, and find themselves in substandard conditions of detention. Accordingly, UNHCR remains seriously concerned that the Ukrainian authorities routinely do not allow persons in need of international protection access to fair and efficient asylum procedures nor do they conduct a close and rigorous scrutiny of these individuals' asylum requests. For the above-outlined reasons, as well as further details documented in UNHCR's Ukraine report,¹² asylum-seekers attempting to seek protection in Ukraine may be at risk either of direct or indirect *refoulement* in violation of relevant existing international and European law standards.¹³

2.2 Legislative framework and practice in Ukraine regarding the treatment of asylum-seekers at the border¹⁴

2.2.1 Article 5(2) of the Law on Refugees and Persons in Need of Complementary, Temporary Protection provides explicitly that persons arriving at the border may apply for asylum, regardless of whether they hold valid travel documents. The State Border Guard Service is obliged to transfer individuals who seek asylum upon arrival at the border without valid travel documentation to the migration service authority within 24 hours of their having provided an explanation of the circumstances of their arrival.¹⁵ Furthermore, Article 9(1) of the Law on the Legal Status of Foreigners specifically exempts asylum-seekers from the requirement to enter Ukraine with a passport and any required visas.¹⁶ In addition, Article 8(2) of the Law on Border Control states that even if persons do not fulfill the usual conditions for entry into the country, „this does not prevent the possibility of reviewing the question, in the manner established by law, of giving him asylum or recognizing him as a refugee or person in need of complementary protection.“¹⁷ While the wording of the latter provision is ambiguous, taken together with the relevant provisions in the Law on Refugees and Persons in Need of Complementary, Temporary

¹⁰ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *Report to the Ukrainian Government on the visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 9 to 21 September 2009*, CPT/Inf (2011) 29, 23 November 2011, p. 30, <http://www.cpt.coe.int/documents/ukr/2011-29-inf-eng.pdf>.

¹¹ The Ukrainian Parliament Commissioner for Human Rights, *State of Observance and Protection of the rights of the child in Ukraine*, 2010, p. 148, http://www.unicef.org/ukraine/State_Report_on_Rights_of_the_Child_Ombudsman.pdf.

¹² UNHCR, *Ukraine as a country of asylum: Observations on the situation of asylum-seekers and refugees in Ukraine*, p. 27.

¹³ See below Section 3.

¹⁴ While there have been some changes since then, this part addresses only the relevant legislative framework in force at the time of the deportation of the applicants.

¹⁵ *Law on Refugees and Persons in Need of Complementary, Temporary Protection*, No. 3671-VI, 8 July 2011, Art. 5(2). <http://zakon1.rada.gov.ua/laws/show/3671-17>. An unofficial English translation of the law is available at <http://www.refworld.org/docid/51cd36464.html>.

¹⁶ *Law on the Legal Status of Foreigners and Stateless Persons*, No. 3773-VI, 22 September 2011, Art. 9(1), <http://zakon1.rada.gov.ua/laws/show/3773-17>.

¹⁷ *Law on Border Control*, No. 1710-VI, 5 November 2009, Art. 8(2) (This article was amended via Law No. 5290-VI of 18 September 2012, clarifying that persons can apply for complementary protection at the border), <http://zakon2.rada.gov.ua/laws/show/1710-17%20>

Protection (Article 5(2)) and the Law on the Legal Status of Foreigners (Article 9(1)), Ukrainian legislation provides for people arriving at the border to apply for asylum even without valid documents.

2.2.2 Despite these provisions in Ukrainian law, there are a number of impediments to exercising the right to seek asylum and to protection from *refoulement*.

2.2.3 First, in practice, asylum-seekers may be subjected to restrictions on entry pursuant to both the Law on Border Control and the Law on the Legal Status of Foreigners, despite the above-mentioned explicit exemptions for asylum-seekers.¹⁸ Article 8(1) of the Law on Border Control provides for a *prohibition of entry* to the country if an individual violates the border procedures, including for such reasons as absence of a valid passport; absence of a visa, if required; failure to confirm the purpose of planned stay; failure to prove the availability of sufficient financial resources for the period of planned stay.¹⁹ And on the basis of Article 13(1) of the Law on the Legal Status of Foreigners an *entry ban* is imposed by the law-enforcement authorities if the entry of the individual is contrary to national security or public order; if necessary for the protection of public health or other interests of persons living in Ukraine; if a person gave false information about himself or presented fake documents; if the passport or visa is fake or does not conform to usual standards; if the person violated the rules of the border area, or customs control; or the person failed to comply with a court order or other responsibilities during a previous stay in Ukraine.²⁰ It has been observed that officials apply these grounds to foreigners at the border.²¹ As a result, it is UNHCR's experience that persons in need of international protection are often denied entry in practice, and therefore the opportunity to apply for asylum at Ukraine's international borders.

2.2.4 This practice is also contrary to a relevant Cabinet of Minister's Resolution stating that the State Border Guard Service should not enforce entry bans if „their implementation would lead to a violation of law or human rights.“²² While this resolution makes no specific reference to the principle of *non-refoulement* or the right to seek asylum, an explicit prohibition of *refoulement* is stipulated in Article 31 of the Law on the Legal Status of Foreigners.²³

2.2.5 Second, in UNHCR's view, neither the *prohibition of entry* nor the *entry ban* can be challenged through a remedy that is effective. Given the practical impediments in guaranteeing persons access to the asylum procedure at border-crossing points, the Ukrainian authorities' record of past restrictive practices and the inherent vulnerability of asylum-seekers stranded in transit zones, it is of fundamental importance that effective remedies be available in practice to allow asylum-seekers to challenge the prohibition of entry and gain access to protection against *refoulement*. Under the law, the State Border Guard Service is obliged to issue a written decision regarding the *prohibition of entry* including the basis for that decision,²⁴ and the individual can file an appeal against that decision. However, this remedy cannot be

¹⁸ See above para. 2.2.1.

¹⁹ *Law on Border Control*, No. 1710-VI, 05 November 2009, Art. 8, <http://zakon2.rada.gov.ua/laws/show/1710-17%20>.

²⁰ *Law on the Legal Status of Foreigners and Stateless Persons*, No. 3773-VI, 22 November 2011, Art. 13(1), <http://zakon1.rada.gov.ua/laws/show/3773-17>. Entry bans are further regulated in several instructions issued by law enforcement authorities: *On confirmation of the Instruction on the order for taking decisions on entry bans of foreigners and stateless persons by the State Border Guard Service of Ukraine*, Instruction No. 946, 5 December 2011, para 2.1, <http://zakon1.rada.gov.ua/laws/show/z1564-11>; *On confirmation of the instruction on the order of taking decisions on entry bans to Ukraine of foreigners and stateless persons by the State Security Service of Ukraine*, Instruction No. 344, 1 June 2009, para. 2, <http://zakon2.rada.gov.ua/laws/show/z0785-09>; *On confirmation of the instruction on the order of taking decisions on entry bans to Ukraine of foreigners and stateless persons by the Ministry of Interior of Ukraine*, Instruction No. 410, 7 July 2011, para. 1, <http://zakon2.rada.gov.ua/laws/show/z0934-11%20>.

²¹ Ukrainian Helsinki Human Rights Union, *Human Rights in Ukraine – 2011, 2012*, pp. 283-285.

²² *On confirmation of the resolution on the order for issuing and implementation of orders given by law enforcement and investigatory organs to the State Border Guard Service regarding persons who are crossing the State border of Ukraine*, Resolution No. 35, 22 January 2001, [in force until 25 April 2013], para. 12, <http://zakon2.rada.gov.ua/laws/show/35-2001-rr>. Note that the updated version of this resolution contains identical wording regarding the human rights exception. See Cabinet of Ministers Resolution No. 280, 17 April 2013, para. 14, <http://zakon2.rada.gov.ua/laws/show/280-2013-rr>.

²³ *Law on the Legal Status of Foreigners and Stateless Persons*, No. 3773-VI, 22 September 2011, Art. 31, <http://zakon1.rada.gov.ua/laws/show/3773-17>.

²⁴ *Law on Border Control*, No. 1710-VI, 5 November 2009, Art. 14(1), <http://zakon2.rada.gov.ua/laws/show/1710-17%20>. The form of such decisions is regulated by the Order of the State Border Guard Service of Ukraine On confirming the form of decisions on rejection in crossing the state border of Ukraine, No. 967, 14.12.2010, <http://zakon2.rada.gov.ua/laws/show/z0031-11>.

considered effective either in law or practice because it has no suspensive effect²⁵ and there are no provisions guaranteeing its speedy examination. Further, the *entry ban* can be imposed by various State authorities, including the Ministry of Interior, State Border Guard Service, and State Security Service, without informing, in writing, the individual of this decision or the reasons behind it.²⁶ The authorities are only required to provide information about the reasons and the available remedy orally. Only when the individual requests them will written explanations of the reasons for the *entry ban* be given; however, it is not clear whether such “explanations” would constitute a decision capable of being appealed.²⁷ Moreover, the relevant legislative provisions relating to the remedy against an *entry ban* decision remain unclear, as in the current redaction, the relevant instructions refer back to the procedures for appealing against the *prohibition of entry*, which as outlined above, is in UNHCR’s view ineffective.²⁸

2.2.6 Third, a further serious impediment is that access to neither a lawyer nor an interpreter is available in law or practice, while submission of the appeal to the court against the *prohibition of entry* must be in writing in the official State language, i.e. Ukrainian, or in some regions in other designated languages (e.g. Russian). Also, the most basic facilities necessary to correspond with the domestic court by mail are absent. In addition, despite the fact that UNHCR’s agreement with the Government of Ukraine provides for UNHCR’s access to persons of concern, irrespective of where they are, in reality the authorities do not extend this to the airport transit zones, including when UNHCR makes a formal request to have access in individual cases, for example when UNHCR is informed of the arrival of an asylum-seeker, as in the present case before the Court.²⁹ UNHCR’s access to asylum-seekers is also guaranteed by Article 13(1) of the Refugee Law, according to which an asylum-seeker in Ukraine has the right to correspond confidentially with UNHCR and to be visited by UNHCR officers. However, this right of access to UNHCR is only available after his/her asylum application is taken into substantive consideration, i.e. after having successfully passed the initial 15-day period of consideration on admissibility.

2.2.7 The present case is illustrative of some of the systemic problems at the border. In this case, the State Migration Service of Ukraine informed UNHCR that the principal applicant had arrived at Boryspil International Airport and was in the transit zone. UNHCR’s formal request to have access to her was, however, refused by the State Border Guard Service. All further attempts to have access to the principal applicant, including the dispatch of a UNHCR international staff member to the airport as well as

²⁵Law on Border Control, No. 1710-VI, 5 November 2009, Art. 14(3) <http://zakon2.rada.gov.ua/laws/show/1710-17%20>.

²⁶ On confirming the order of action of authorized persons of the State Border Guard Service in case of identifying at the entry points of the State border of Ukraine persons regarding whom there is an authorization of the law enforcement and investigatory organs, and the order of cooperation of organs of state border control with law enforcement and investigatory organs, Instruction No. 412, 9 June 2011, para. 14, <http://zakon2.rada.gov.ua/laws/show/z0972-11>. Law on the Responsibility of Carriers while Conducting Transport of International Passengers, Article 1 stipulates that the carrier is released from responsibility envisaged by this article, including payment of fines, only if it can prove that the documents provided by the passenger before the international transportation gave the carrier sufficient reasons to consider that the passenger held documents necessary for entrance to the State of destination or transit. The fact that a passenger has applied for asylum does not release the carrier from responsibility to pay fines applicable for having transported a passenger without valid documents for entry into Ukraine. Law 2920-III, 10 January 2002, <http://zakon2.rada.gov.ua/laws/show/2920-14/ed20121018>.

²⁷ On confirmation of the resolution on the order for issuing and implementation of orders given by law enforcement and investigatory organs to the State Border Guard Service regarding persons who are crossing the State border of Ukraine, Resolution No. 35, 22 January 2001, [in force until 25 April 2013], para. 17. <http://zakon2.rada.gov.ua/laws/show/35-2001-rr>. The updated version of this resolution provides for written decisions to be issued in some instances (i.e. if as per Articles 5(2)-5(3) of the resolution, the entry ban was imposed pursuant to a court order or to the person being in a search list), but not in other situations (e.g. there is an entry ban for a specific period of time under Article 5(1)); no provisions are made for requesting and receiving a written decision regarding prohibition of entry in such circumstances. See Cabinet of Ministers Resolution No. 280, 17 April 2013, para. 20, <http://zakon2.rada.gov.ua/laws/show/280-2013-rr>.

²⁸ The resolution in force at the time of the case in question, and until 25 April 2013, made no explicit provisions for how an entry ban could be appealed. In the updated version of the resolution, para. 20 refers back to Article 14 of the Law on Border Control, which relates to prohibition of entry. See Cabinet of Ministers Resolution No. 280, 17 April 2013, para. 20, <http://zakon2.rada.gov.ua/laws/show/280-2013-rr>.

²⁹Agreement between the United Nations High Commissioner for Refugees and the Government of Ukraine, 23 September 1996, Art. 3(4), http://unhcr.org.ua/attachments/article/226/country%20agrm_1996.pdf [in English], http://zakon4.rada.gov.ua/laws/show/995_078 [in Ukrainian on the government website]. While in theory, the authorities have assured UNHCR that access can be arranged upon request, in practice the arrangement has not proven workable, as the formal approach to filing requests and receiving approvals in writing to high-level officials is time-consuming, and individuals are removed before access can be arranged.

multiple phone calls to the State Border Guard Service and to other relevant authorities, were unsuccessful, and UNHCR was ultimately denied access to her.

2.2.8 Finally, the situation of persons seeking asylum at the airport is compounded by the fact that they are subject to *de facto* detention in the transit zone,³⁰ with no specific rights set out in law. UNHCR is concerned also about the material conditions in the transit zone at the airport. While Boryspil International Airport has a detention facility with appropriate conditions (e.g. showers, beds, food and medical care), individuals who are prohibited entry cannot be placed in the detention facility since it is considered to be inside the State borders of Ukraine. Such individuals are left in the transit zone for the period it takes to remove them. As such individuals are not subject to a formal detention order or regime, Ukrainian law does not specify their rights or the conditions of their detention, or provide any remedy to challenge this detention. Persons do not have a right to use a telephone to contact a legal representative or family member (payphones are now rare), maintaining them in a state of isolation and exacerbating their vulnerability. Furthermore, the material conditions for persons in airport transit zones are only adequate for short-term stay. The chairs are designed for sitting, not sleeping; the restrooms do not contain shower facilities; food is exclusively available from vendors at inflated prices. Transit zones are not intended to be used as places of *de facto* detention. This situation is likely to have an acute impact on persons with specific needs or vulnerabilities, including parents with young children, like the applicant in this case.³¹ These conditions of profound vulnerability undermine further their ability to seek and enjoy asylum.

2.2.9 Overall, the lack of procedural safeguards has resulted in several persons that UNHCR has been informed of, or is aware of, being stranded in the transit area at the airport,³² as discussed above,³³ and other cases of persons being removed from the territory prior to access to asylum.

3. Relevant principles of international and European law

3.1 *The non-refoulement obligation and access to asylum procedures under international refugee and human rights law*

3.1.1 The right to seek and enjoy asylum is supported by the legal framework including the 1951 Convention and its 1967 Protocol, to which Ukraine is a State party, and derives from Article 14(1) of the Universal Declaration of Human Rights 1948.³⁴ Central to the realization of the right to seek asylum is the obligation of States not to expel or return (*refouler*) a person to territories where his or her life or freedom would be threatened. *Non-refoulement* is a cardinal protection principle, most prominently expressed in Article 33 of the 1951 Convention and recognized as a norm of customary international law.³⁵ Article 33(1) prohibits States from expelling or returning a refugee in any manner whatsoever, to a territory where s/he would be at risk of threats to life or freedom.³⁶

³⁰ Persons who are denied entry to the territory must remain in the transit zone until their removal (*Law on the Legal Status of Foreigners and Stateless Persons*, No. 3773-VI, 22 September 2011, Art. 14, <http://zakon1.rada.gov.ua/laws/show/3773-17>). On this form of detention in international zones at airports see UNHCR, *UNHCR Detention Guidelines*, 2012, para. 7, <http://www.refworld.org/pdfid/503489533b8.pdf>.

³¹ The situation of children in the transit zone was commented on by Ukraine's Parliamentary Commissioner for Human Rights as follows, "During the meeting, the Afghans said that they had spent three days in the transit area with no proper conditions for long stays: there were no beds and no conditions for personal hygiene. All that time they had no food, which is totally unacceptable, especially for children." Ukrainian Parliament Commissioner for Human Rights, *State of Observance and Protection of the rights of the child in Ukraine*, 2010, p. 147, http://www.unicef.org/ukraine/State_Report_on_Rights_of_the_Child_Ombudsman.pdf

³² For examples, see *ibid.*, pp. 285-286. See also the article on Afghan parents with a one-year-old child stranded at the airport for three days in 2011, <http://www.kyivpost.ua/ukraine/article/privet-iz-borispolya-inostrancev-zaderzhivayut-i-diskriminirut-pogranichniki-30206.html>. In 2009, a Palestinian stayed for six months in the transit zone, sleeping on chairs and washing himself in the public restroom, see *Palestinian who does not wish to return has settled at Boryspil Airport*, 9 April 2009, <http://novynar.com.ua/politics/62961>

³³ See above Section 2.1.

³⁴ Article 14(1) provides that "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

³⁵ Concurring Opinion of Judge Pinto de Albuquerque in European Court of Human Rights, *Hirsi Jamaa and Others, Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, , 23 February 2012, p. 42, <http://www.unhcr.org/refworld/docid/4f4507942.html>. See also, UNHCR, *UNHCR Note on the Principle of Non-Refoulement*, November 1997, available at: <http://www.unhcr.org/refworld/docid/438c6d972.html>; UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, para. 4, <http://www.unhcr.org/refworld/docid/3d60f5557.html>; and UNHCR, *The Scope and Content of the Principle of Non-*

3.1.2 Importantly, given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature. It follows that the prohibition of *refoulement* applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined.³⁷ Accordingly, States are obliged not to return or expel an asylum-seeker pending a final determination of his or her status.

3.1.3 *Non-refoulement* obligations have also been established under international and European human rights law. More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life,³⁸ or torture³⁹ or other cruel, inhuman or degrading treatment or punishment.⁴⁰

3.1.4 In UNHCR's view, the responsibility of a State to protect a person from *refoulement* is engaged as soon as a person presents him- or herself at the border claiming to be at risk or fearing return to his or her country of origin or any other country. However, there is no single correct formula or phrase for how this fear needs to be expressed.⁴¹

3.1.5 The *non-refoulement* obligation is applicable wherever a State exercises jurisdiction,⁴² including at the border.⁴³ Consequently, States shall not reject asylum-seekers and refugees at the border or deny

Refoulement (Opinion) [Global Consultations on International Protection/Second Track], 20 June 2001, paras. 193-253, <http://www.unhcr.org/refworld/docid/3b3702b15.html>.

³⁶ UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy*, 29 March 2011, Application No. 27765/09, para. 4(1)(1), <http://www.refworld.org/docid/4d92d2c22.html>.

³⁷ Executive Committee of the High Commissioner's Programme (ExCom), Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 79 (XLVII), 1996, para. (j); ExCom Conclusion No. 81 (XLVII), 1997, para. (i), <http://www.unhcr.org/pages/49e6e6dd6.html>. See also, *Note on International Protection (submitted by the High Commissioner)*, A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>; 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, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

³⁸ The right to life is guaranteed under Article 6 of the 1966 Covenant on Civil and Political Rights (ICCPR) (999 U.N.T.S. 171, entered into force 23 March 1976) and, for example, Article 2 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 005, 213 U.N.T.S. 222, entered into force 3 September 1953 (ECHR); Article 4 of the American Convention on Human Rights; Article 4 of the African (Banjul) Charter on Human and People's Rights, 21 I.L.M. 58 (1982), entered into force 21 October 1986 (Banjul Charter)

³⁹ An explicit *non-refoulement* provision is contained in Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 U.N.T.S. 85, entered into force 26 June 1987) which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

⁴⁰ Obligations under the ICCPR as interpreted by the Human Rights Committee, also encompass the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 (right to life) and 7 (right to be free from torture or other cruel, inhuman or degrading treatment or punishment) of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed, thereby recognizing that the relevant provisions of the ICCPR entail the prohibition of indirect *refoulement*. With regard to the scope of the obligations under Article 7 of the ICCPR, see Human Rights Committee in its *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, U.N. Doc. HRI/ GEN/1/Rev.7, para. 9 ("States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*"); and *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12. Similarly, in its *General Comment No. 6 (2005) on the Treatment of unaccompanied and separated children outside their country of origin*, U.N. Doc. CRC/GC/2005/6, 1 September 2005, the Committee on the Rights of the Child stated that States party to the Convention on the Rights of the Child "[...] shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under Articles 6 [right to life] and 37 [right to be free from torture or other cruel, inhuman or degrading treatment or punishment and right not to be arbitrarily deprived of liberty] of the Convention." (para. 27). See also the jurisprudence of this Court, which has held that *non-refoulement* is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment, including, in particular, the Court's judgment in *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 114, <http://www.refworld.org/docid/4f4507942.html>.

⁴¹ UNHCR, *UNHCR's oral intervention at the European Court of Human Rights - Hearing of the case Hirsi and Others v. Italy*, 22 June 2011, Application No. 27765/09, <http://www.refworld.org/docid/4e0356d42.html>.

⁴² UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, paras. 24, 26, 32-43, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>; UNHCR, *Submission by the Office of the United Nations High*

them entry or admission, but shall allow them access to the territory for the purpose of refugee status determination.⁴⁴ Denying access could result in a breach of the *non-refoulement* obligation or could throw the person into “orbit” in search of a State willing to receive him or her.

3.1.6 Furthermore, the prohibition on *refoulement* applies not only with respect to return to the country of origin but also with regard to forcible removal 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 or chain *refoulement*).⁴⁵ Under the obligations of *non-refoulement*, 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 such harms covered by the prohibition on *refoulement*. If such a risk exists, the State is precluded from forcibly removing the individual concerned.⁴⁶ UNHCR also considers that the removing State must assess, prior to the removal and subject to procedural safeguards, the appropriateness of the removal for each person individually.⁴⁷ In order to be compatible with international law, the removing State must ensure that the third country will treat the person in line with internationally accepted standards,⁴⁸ will ensure protection against *refoulement* and will allow the person to seek and enjoy asylum.⁴⁹ The duty to ensure that conditions in the third country meet these requirements rests on the removing State. Even if the third State is a party to the 1951 Convention or other relevant human rights instruments, it cannot be assumed that such protections are in place.⁵⁰ This assessment by the removing State is required irrespective of which third country is envisaged or whether or not the asylum-seeker has expressed an additional fear of being further *refouled* from that third country. Not expressing such fear does not relieve the State of the above-mentioned responsibilities.

3.1.7 While the 1951 Convention does not govern the asylum procedure *per se*, it is accepted that, as a general rule, in order to give effect to their obligations under the 1951 Convention, including the prohibition on *refoulement*, States will need to admit asylum-seekers to their territory and grant them access to fair and efficient procedures, without discrimination.⁵¹ Furthermore, according to the Executive Committee of the High Commissioner’s Programme (ExCom), the asylum procedures in question entail a

Commissioner for Refugees in the case of Hirsi and Others v. Italy, March 2010, paras. 4(1)(1)-4(2)(3), <http://www.unhcr.org/refworld/docid/4b97778d2.html>. UNHCR, *UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR*, 17 February 2012, para. 2(4), <http://www.refworld.org/docid/4f4c959f2.html>.

⁴³ UNHCR, *Note on the Principle of Non-Refoulement*, part E. 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, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>. ExCom Conclusion No. 6 (XXVIII) 1977, para. (c).

⁴⁴ ExCom Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 14 (XXX), 1979, para. (a); ExCom Conclusion No. 22 (XXXII), 1981, para. II.A.2; ExCom Conclusion No. 81 (XLVIII), 1997, para. (h); ExCom Conclusion No. 82 (XLVIII), 1997, para. (d)(ii); ExCom Conclusion No. 85 (XLIX), 1998, para. (q).

⁴⁵ UNHCR, *Note on Non-Refoulement* (EC/SCP/2), 1977, para. 4.

⁴⁶ *Ibid.*, para. 22.

⁴⁷ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, paras. 3(v) and (vi), <http://www.refworld.org/docid/51af82794.html>.

⁴⁸ This includes: (i) that the person will be admitted to the proposed receiving State; (ii) will be protected against *refoulement*; (iii) will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection; (iv) will be treated in accordance with accepted international standards (for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; persons with specific needs are identified and assisted; and, (v) if recognized as being in need of international protection, will be able to enjoy asylum and/or access to a durable solution. See UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, paras. 3(v) and (vi), <http://www.refworld.org/docid/51af82794.html>. Also, ExCom Conclusion No. 8 (XXVIII), 1977; UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, <http://www.unhcr.org/refworld/docid/3b36f2fca.html>. ExCom Conclusion No. 85 (XLIX), 1998, para. (aa); ExCom Conclusion No. 58 (XL), 1989, para. (f); UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, <http://www.unhcr.org/refworld/docid/3fe9981e4.html>. UNHCR, *T.I. and the United Kingdom. Submission by the United Nations High Commissioner for Refugees*, 4 February 2000, Application No. 43844/98, para. 14, <http://www.refworld.org/docid/42f7737c4.html>.

⁴⁹ ExCom Conclusion No. 85 (XLIX), 1998, para. (aa).

⁵⁰ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(viii), <http://www.refworld.org/docid/51af82794.html>.

⁵¹ ExCom Conclusion No. 82 (XLVIII) 1997, para. (d) (iii).

number of minimum safeguards. The ExCom recommended in particular the following, which were clearly lacking in the present case and, more generally, in the asylum procedure at the border in Ukraine:

- „The competent official (...) to whom the applicant addresses himself at the border (...) 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.
- The applicant should receive the necessary guidance as to the procedure to be followed.
- 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.
- The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority (...).⁵²

3.1.8 These safeguards are particularly important when asylum is requested at the border, including in international zones at airports, because of the particular vulnerability of asylum-seekers in this context, which is essentially a procedure outside public scrutiny. First, being detained at the border can hinder their ability to express or argue their claim for international protection.⁵³ Second, the reception and procedural arrangements at the border often lack certain fundamental safeguards, as outlined above in respect of Ukraine.⁵⁴ Third, given that decisions taken on whether to admit someone to the asylum procedure in this context are made within very tight time frames, the possibility of an inaccurate decision can be higher. It is therefore essential that appropriate safeguards and support be in place.⁵⁵

3.2 The right to an effective remedy under Articles 3 and 13 ECHR

3.2.1 The principles outlined above regarding the scope and related procedural safeguards of the *non-refoulement* obligation in international refugee and human rights law in their application to asylum-seekers at the border⁵⁶ are reflected in the case law of this Court.⁵⁷ Furthermore, this Court has already taken into consideration a State's international obligations, including under international refugee law, when assessing its compliance with the ECHR in a number of cases. In particular, in the case of *Hirsi Jamaa and Others v. Italy*, the Court took into account a State's *non-refoulement* obligation under international law in the context of its finding that there had been a violation of Article 13 in conjunction with Article 3 ECHR.⁵⁸

3.2.2 In a case particularly relevant to the facts presently before the Court, *Amuur v. France*, this Court held that the ECHR was applicable to asylum-seekers in international zones at airports.⁵⁹

3.2.3 The Court further held that combined with Article 13 ECHR, the prohibition of *refoulement* under Article 3 includes the obligation of the returning State to provide effective guarantees to protect the applicant against *refoulement*, be it direct or indirect, to the country from which he or she has fled.⁶⁰

3.2.4 Of particular relevance in the present case, the Court held that the exercise of the right to an effective remedy enshrined in Article 13 ECHR must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.⁶¹ Article 13 requires “independent and rigorous scrutiny” of any complaint made by a person in such a situation, where “there exist substantial grounds for fearing a real risk of treatment contrary to Article 3” and secondly, “the possibility of suspending the

⁵² ExCom Conclusion No. 8 (XXVIII) 1977, para. 53(6); ExCom Conclusion No. 30 (XXXIV) 1983, para. 97(2).

⁵³ UNHCR, *Detention Guidelines*, para. 7, <http://www.unhcr.org/505b10ee9.html>.

⁵⁴ See above paras. 2.2.5-2.2.8.

⁵⁵ UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras. 21-23, <http://www.refworld.org/docid/3b36f2fca.html>.

⁵⁶ See above section 3.1.

⁵⁷ See below paras. 3.2.2-3.2.5.

⁵⁸ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 134, <http://www.unhcr.org/refworld/docid/4f4507942.html>.

⁵⁹ European Court of Human Rights, *Amuur v. France*, Application No. 19776/92, 25 June 1996, para. 52, <http://www.refworld.org/docid/3ae6b76710.html>.

⁶⁰ European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011, para. 286, <http://www.refworld.org/docid/4d39bc7f2.html>.

⁶¹ *Ibid.*, para. 290.

implementation of the measure impugned.”⁶² The Court also recognized that the haste with which a removal is carried out might render the available remedies ineffective in practice and therefore inaccessible.⁶³ Furthermore, while the guarantees under Article 13 are only applicable to persons with an arguable claim pursuant to one of the other relevant rights in the ECHR, the Court held that the person concerned should have an effective opportunity to make such claim, notably in terms of material conditions, access to information,⁶⁴ legal assistance and interpretation.⁶⁵ The Court also recognized that the absence of these safeguards undermines the quality of the submission and consequently the quality of the examination by the authorities.⁶⁶

3.2.5 Finally, the Court has made a number of important findings in relation to persons seeking asylum at the border, including in airports’ transit zones. Firstly, the Court has recognized that in this context asylum-seekers might face particular difficulties.⁶⁷ Furthermore, the Court held that, „above all,“ the confinement of persons in international zones „must not deprive (them) of the right to gain effective access to the procedure for determining refugee status.“⁶⁸

4. Conclusion

4.1 UNHCR considers that the Ukrainian authorities’ practice of routinely rejecting asylum-seekers at the border without proper screening and other procedures, and thus denying them access to a fair and efficient asylum procedure, in particular in international zones of airports, may result in *refoulement*, direct and/or indirect, and does not provide asylum-seekers with an effective remedy. It is thus at variance with the relevant standards of international refugee and human rights law, and the Court’s own jurisprudence.

UNHCR
15 July 2013

⁶² European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 198, <http://www.unhcr.org/refworld/docid/4f4507942.html>. European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011, para. 293, <http://www.refworld.org/docid/4d39bc7f2.html>.

⁶³ European Court of Human Rights, *De Souza Ribeiro v. France*, Application No. 22689/07, 13 December 2012, para. 95, <http://www.refworld.org/docid/511cf0a22.html>.

⁶⁴ In its *Hirsi* judgment, the Court reiterated „the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.“ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 204, <http://www.unhcr.org/refworld/docid/4f4507942.html>. See also European Court of Human Rights, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011, para. 304, <http://www.refworld.org/docid/4d39bc7f2.html>.

⁶⁵ European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 202, <http://www.unhcr.org/refworld/docid/4f4507942.html>

⁶⁶ European Court of Human Rights, *I.M. v. France*, Application No. 9152/09, 2 February 2012, para. 155, <http://www.refworld.org/docid/4f2932442.html>.

⁶⁷ European Court of Human Rights, *Gebremedhin v. France*, Application No. 25389/05, 26 April 2007, para. 59, <http://www.refworld.org/docid/46441fa02.html>.

⁶⁸ European Court of Human Rights, *Amuur v. France*, Application No. 19776/92, 25 June 1996, para. 43, <http://www.refworld.org/docid/3ae6b76710.html>.