

## UNHCR observations on the draft Amendments to the State Borders Act and Other Related Acts of the Republic of Estonia (577 SE)

### I. Introduction

1. The Representation of the United Nations High Commissioner for Refugees (UNHCR) for the Nordic and Baltic Countries would like to submit these observations and concern the draft Amendments to the State Borders Act and Other Related Acts of the Republic of Estonia (577 SE) (the draft Amendments). The draft Amendments were sent by the Government of Estonia to the *Riigikogu* (the Parliament of the Republic of Estonia) on 6 April 2022 in a fast-track procedure.<sup>1</sup> UNHCR is grateful to the Constitutional Committee of the *Riigikogu* for the opportunity to submit comments during an accelerated legislative procedure.
2. UNHCR has a direct interest in law proposals in the field of asylum, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.<sup>2</sup> Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,<sup>3</sup> whereas the 1951 Convention relating to the Status of Refugees<sup>4</sup> and its 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as "*the 1951 Convention*") oblige States to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR's duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol (Article 35 of the 1951 Convention and Article II of the 1967 Protocol).<sup>5</sup>
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 in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection (UNHCR Handbook).<sup>6</sup> UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

<sup>1</sup> *Draft Amendments to the State Border Act and Other Related Acts*, 12 April 2022, available in Estonian at: <https://www.riigikogu.ee/download/44548a9a-a2b8-4cd6-8202-150342b80222>.

<sup>2</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <https://www.refworld.org/docid/3ae6b3628.html> ("the Statute").

<sup>3</sup> *Ibid.*, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR's supervisory function to one or other specific international refugee convention. UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, UNHCR's supervisory responsibility, October 2002, available at: <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

<sup>4</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Geneva Convention, UNHCR has the "duty of supervising the application of the provisions of the Convention".

<sup>5</sup> UNHCR's supervisory responsibility has also been reflected in EU law, including by way of general reference to the 1951 Convention in Article 78 (1) of the Treaty on the Functioning of the EU.

<sup>6</sup> 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, available at: <https://www.refworld.org/docid/5cb474b27.html>.

## II. General remarks

4. The draft Amendments propose new provisions and changes to the existing legislation concerning border management, asylum, legal aid, and expulsion. The proposed amendments also establish certain standards of treatment and procedural safeguards for the return of individuals who are intercepted after having crossed the border irregularly, and criteria for admission of their asylum applications in the context of a mass influx situation.
5. UNHCR acknowledges that increasing arrivals of refugees and migrants may present a range of challenges for a receiving country, particularly when reception and asylum capacity is overwhelmed. UNHCR has advocated for a wide range of models of asylum processing to ensure the fair and efficient treatment of international protection claims amidst capacity constraints.<sup>7</sup>
6. In UNHCR's view, these challenges can be overcome through the implementation of accelerated and/or simplified procedures<sup>8</sup> and protection-sensitive border procedures that maintain procedural safeguards and adhere to international and EU law, including the principle of non-refoulement, are possible.<sup>9</sup>
7. UNHCR regrets that the draft Amendments lay down rules that may restrict the possibility for persons apprehended in the border area to seek asylum in Estonia. It is crucial to stress that the right to seek and enjoy asylum does not depend on the mode of arrival of an asylum-seeker to a country. In some cases, asylum-seekers simply do not have a choice but to flee without valid travel documents and enter the country without prior authorization of the authorities.<sup>10</sup>
8. UNHCR understands that the proposed measures will be implemented only under exceptional circumstances. However, as emphasised in UNHCR's observations related to similar legal acts adopted in Latvia, Lithuania and Poland,<sup>11</sup> the fundamental right to seek asylum and the non-derogable principle of *non-refoulement* should be observed also in times of emergency. UNHCR's position is that a State, which is presented with an asylum request at its borders, is required to

<sup>7</sup> UNHCR, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, available at: <https://www.refworld.org/docid/5b589eef4.htm>.

<sup>8</sup> *Ibid.*

<sup>9</sup> UNHCR, *Practical considerations for fair and fast border procedures and solidarity in the European Union*, 15 October 2020, available at: <https://www.refworld.org/docid/5f8838974.html>.

<sup>10</sup> UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General*, 3 January 1950, E/AC.32/2, comment to paragraph 2 of then-draft Article 24, <http://www.refworld.org/docid/3ae68c280.html>, stating: "[a] refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum." UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, p. 213, <https://www.refworld.org/docid/519b1fb54.html>.

<sup>11</sup> UNHCR, *UNHCR observations on the Order of the Cabinet of Ministers of the Republic of Latvia on the Declaration of Emergency Situation (No 518)*, 13 October 2021, available at: <https://www.refworld.org/docid/61767bea4.html>; UNHCR, *UNHCR observations on draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No 21-29207)*, 27 September 2021, available at: <https://www.refworld.org/docid/615322844.html>; UNHCR, *UNHCR legal observations on the amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No XIV-506)*, 28 July 2021, available at: <https://www.refworld.org/docid/610d26971a1.html>; and UNHCR, *UNHCR observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265)*, 16 September 2021, available at: <https://www.refworld.org/docid/61434b484.html>.

provide admission at least on a temporary basis to examine the asylum claim, as the right to seek asylum and the *non-refoulement* principle would otherwise be rendered meaningless.<sup>12</sup>

9. Furthermore, guaranteeing the effective participation of the applicant in all the stages of the asylum procedure and ensuring access to effective remedy remain central to refugee protection.<sup>13</sup> Substantial modifications in the asylum procedure to adapt it to emerging needs requires a thorough analysis of existing capacities, gaps and required resources (human, technical and financial) to ensure efficiencies, and avoid creating additional bottlenecks.<sup>14</sup>
10. UNHCR stands ready to engage in further consultations with the *Riigikogu*, the Government, and the Ministry of the Interior of Estonia to provide technical assistance and ensure that the draft Amendments are in full compliance with Estonian obligations deriving from international refugee law, the EU Charter of Fundamental Rights of the European Union (the EU Charter),<sup>15</sup> and the European asylum acquis.

### III. Specific observations

#### *The right to seek asylum is not dependent on the mode of entry (§ 9<sup>10</sup>(6))*

11. The proposed amendment introduced by § 9<sup>10</sup>(6) of the State Borders Act stipulates that in the event of mass immigration and a threat to public order or national security, the Police and Border Guard Board (PBGB) may refuse to accept applications for international protection if the alien was able to submit the application at the location designated by the PBGB but, nevertheless, decided to cross the external border irregularly.
12. UNHCR regrets that the draft Amendments significantly restrict the possibility to seek asylum for persons intercepted at the border areas and who have entered irregularly. UNHCR considers that the procedure introduced by the draft Amendments exposes asylum-seekers to a risk of refoulement, contrary to international refugee, human rights and EU law. UNHCR stresses that the right to seek and enjoy asylum does not depend on the regularity of arrival of an asylum-seeker to a country, as asylum-seekers are often forced to arrive at or enter a territory without prior authorization.<sup>16</sup>
13. Article 31(1) of the 1951 Geneva Convention prohibits the imposition of penalties on refugees who have come directly from territories where their life or freedom is threatened, present themselves without delay to authorities and show good cause for their unauthorized entry or presence. These penalties are never to be interpreted in a manner that entails a deprivation of the right to seek and enjoy asylum or the protection against refoulement as foreseen in the 1951 Convention.

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<sup>12</sup> *Ibid.* 9, page 1.

<sup>13</sup> *Ibid.* 7, Chapter 5.

<sup>14</sup> *Ibid.* 7, Chapter 4.

<sup>15</sup> European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: [www.refworld.org/docid/3ae6b3b70.html](http://www.refworld.org/docid/3ae6b3b70.html).

<sup>16</sup> UNHCR, *UNHCR observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265)*, para 10, 16 September 2021, available at: <https://www.refworld.org/docid/61434b484.html>.

14. The requirements set forth for asylum-seekers and refugees to benefit from the protection under Article 31(1) are to be interpreted cautiously. Refugees may first gain entry into the state, including without authorization, before approaching authorities to claim international protection. A person may be circumventing border control requirements and physical barriers at frontiers for fear of being rejected or pushed back at the border, due to lack information or knowledge on relevant procedures for claiming asylum on entry; and/ or because of being subjected to undue pressure by a third party.<sup>17</sup>
15. In view of the above, **UNHCR recommends** that the draft Amendments introduce the possibility of applying for asylum for persons intercepted crossing the border irregularly and/or staying irregularly in the territory of Estonia, regardless of their mode of entry and in full compliance with the principle of *non-refoulement*.

*The right to seek asylum and protection against refoulement require admission into the territory, at least on temporary basis, and individual assessment of the persons' asylum claim (§ 9<sup>10</sup> 1-3 of the State Borders Act)*

16. The proposed amendment, § 9<sup>10</sup>(1) to the State Borders Act, provides that the PBGB may return aliens to the country that they have entered Estonia from, without issuing a substantiated decision to refuse entry. Such returns are subject to the following conditions: (1) there is an emergency caused by mass immigration; (2) the alien has crossed the external border in an irregular manner; (3) this is necessary to protect public order or ensure national security, and (4) it was possible for the alien to enter Estonia through designated border crossing points open for applying for asylum. While the Explanatory Memorandum to the draft Amendments is silent about the definition of a mass influx situation, the document explains that a threat to public order or national security may arise, in particular, when aliens cross the external border using violence or disregarding the orders of a border guard.<sup>18</sup>
17. Under international law, states have the sovereign power to regulate the entry of foreigners. However, international law also provides that measures to this effect may not prevent foreigners from seeking and enjoying asylum from persecution.<sup>19</sup> While a mere asylum request at the border area does not entail a right to be granted asylum in a preferred State, in order to meet the *non-refoulement* obligations under the 1951 Convention, States are required to grant individuals seeking asylum access to their territory and to fair and efficient procedures, before taking action to effect their removal.<sup>20</sup>
18. The unconditional right to asylum is affirmed in the EU Charter and is implemented in part by States' obligations to provide international protection to refugees in

<sup>17</sup> G S Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, June 2003, p. 217, [www.refworld.org/docid/470a33b10.html](http://www.refworld.org/docid/470a33b10.html).

<sup>18</sup> The Government of Estonia, *Explanatory memorandum to the draft Law on Amendments to the State Borders Act and Other Related Acts*, 6 April 2022, page 5, available in Estonian at: <https://www.riigikogu.ee/download/2e7f185c-e0d4-477e-9247-0e35295cdf6a>.

<sup>19</sup> Article 14 of the Universal Declaration of Human Rights provides that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution'.

<sup>20</sup> UNHCR, *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, available at: <https://www.refworld.org/docid/5ef5c0614.html>.

accordance with the 1951 Convention and its 1967 Protocol.<sup>21</sup> Central to the right to asylum is the principle of *non-refoulement*. The obligation of States not to expel or return a person to territories where their life or freedom would be threatened is the cornerstone of international refugee law, most prominently expressed in Article 33(1) of the 1951 Convention.<sup>22</sup> The principle of *non-refoulement* constitutes an essential binding and non-derogable component of international refugee protection which has been restated in international and regional human rights instruments and courts.<sup>23</sup> It is a norm of customary international law and is consequently binding for all States.<sup>24</sup>

19. The prohibition of *refoulement* applies to any form of forcible removal, including deportation, expulsion, informal transfers, pushback practices and non-admission at the border.<sup>25</sup> States are responsible for ensuring protection from *refoulement* wherever a State exercises jurisdiction, including at national frontiers.<sup>26</sup> The prohibition of *refoulement* applies not only with respect to return to the individual's country of origin but also 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*).<sup>27</sup>
20. UNHCR underlines that the responsibility of a State to protect a person from *refoulement* is engaged wherever its conduct exposes that person to a risk of being subject to persecution or ill-treatment in another country. In particular, if the person has expressed a fear of such nature, or the individual circumstances or characteristics of the person or group to which she belongs indicate a risk of which the State ought to be aware.<sup>28</sup>

<sup>21</sup> *Ibid.* 15, Article 18 referring to the right to asylum to be guaranteed with due respect to the 1951 Convention and EU law.

<sup>22</sup> 'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.' Article 33(1), 1951 Convention.

<sup>23</sup> Including Articles 6 and 7 International Covenant on Civil and Political Rights; Article 3 Convention Against Torture; Article 22(8) 1969 American Convention on Human Rights; Article 5 Banjul Charter; Articles 2 and 3 ECHR; Article 19(2) EU Charter of Fundamental Rights.

<sup>24</sup> The fundamental and non-derogable character of the principle of *non-refoulement* has also been reaffirmed by the Executive Committee of the High Commissioner's Programme ('ExCom') in numerous Conclusions: UNHCR, *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017* (Conclusion No. 1 – 114), October 2017: [www.refworld.org/docid/5a2ead6b4.html](http://www.refworld.org/docid/5a2ead6b4.html). See also, Submission by the UNHCR in the case of *S.S. and Others. v. Italy* (Appl. No. 21660/18) before the ECtHR, 14 November 2019: [www.refworld.org/docid/5dcebff54.html](http://www.refworld.org/docid/5dcebff54.html), para. 3.1.2., and sources cited therein.

<sup>25</sup> 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: <https://www.refworld.org/docid/45f17a1a4.html>, para. 7.

<sup>26</sup> *Ibid.*, para. 24.

<sup>27</sup> For a recent restatement of the ECtHR's general principle that 'chain refoulement' is prohibited, see ECtHR, *D.A. and Others v. Poland*, Appl. No. 51246/17, 8 July 2021, [www.refworld.org/cases,ECHR,60fae2984.html](http://www.refworld.org/cases,ECHR,60fae2984.html), para. 58 and ECtHR, *M.K. and Others v. Poland*, Appl. Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020, <https://hudoc.echr.coe.int/eng/?i=001-203840>, para. 171, and sources cited there (ECtHR, *M.S.S. v. Belgium and Greece* (GC), 30696/0921 January 2011: [www.refworld.org/cases,ECHR,4d39bc7f2.html](http://www.refworld.org/cases,ECHR,4d39bc7f2.html), paras 286, 298 and 321; ECtHR, *T.I. v. The United Kingdom*, 43844/98, 7 March 2000, <http://www.refworld.org/docid/3ae6b6dfc.html>, p. 15). See also UNHCR interventions in *D.A. and Others v. Poland*, 5 February 2018, <https://www.refworld.org/docid/5a9d6e414.html>, para. 3.1.7. and in *N.D. and N.T. v. Spain*, 15 November 2015, [www.refworld.org/docid/59d3a81f4.html](http://www.refworld.org/docid/59d3a81f4.html), para. 3.1.4.

<sup>28</sup> See UNHCR's oral intervention before the ECtHR Hearing of the case *Hirsi and Others v. Italy*, [www.refworld.org/pdfid/4e0356d42.pdf](http://www.refworld.org/pdfid/4e0356d42.pdf), p. 4. See also, UNHCR's oral intervention before the ECtHR Grand Chamber hearing in the case of *N.D. and N.T. v. Spain*, 26 September 2018, [www.refworld.org/docid/5bb3873b4.html](http://www.refworld.org/docid/5bb3873b4.html), p. 6.



21. There is no single correct formula or phrase for how this fear or desire to seek asylum needs to be conveyed. The absence of an explicit and articulated request for asylum does not absolve the concerned State of its *non-refoulement* obligation. In the words of this Court, a State is “*not exempt from complying with its obligations under Article 3 ECHR because the applicants failed to ask for asylum.*”<sup>29</sup> In order to give effect to their international legal obligations, States have a duty to make independent inquiries as to the persons’ need for international protection and to ensure they are not at risk of *refoulement*. If such a risk exists, the State is precluded from denying entry or forcibly removing the individual concerned.<sup>30</sup>
22. Under EU law, both primary and secondary law protect the principle of *non-refoulement* and the right to asylum.<sup>31</sup> As the European Court of Human Rights (ECtHR) has held, both the Schengen Borders Code and the EU Asylum Procedures Directive (APD) “*clearly embrace the principle of non-refoulement*” and “*are clearly aimed at providing all asylum-seekers effective access to the proper procedure.*”<sup>32</sup> The Schengen Borders Code explicitly states that it applies without prejudice to “*the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.*”<sup>33</sup> The APD and case law of the Court of Justice of the European Union (CJEU) also affirm that *non-refoulement* and access to the procedure do not require a formal asylum request.<sup>34</sup>
23. UNHCR also considers it important to recall that *non-refoulement* cannot be derogated from even in times of emergency.<sup>35</sup> Neither the 1951 Convention nor EU asylum law provide a legal basis for the suspension of the reception of asylum applications. While States have a sovereign right to manage and control their borders, this prerogative is subject to international legal obligations which States are required to respect in good faith. Under the ECHR, while Article 15 allows derogations from certain rights in exceptional circumstances, it explicitly precludes derogations from Articles 2 and 3 ECHR, including the principle of *non-refoulement*.

<sup>29</sup> ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, 23 February 2012, [www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4f4507942](http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4f4507942), para. 157; ECtHR, *Sharifi and Others v. Italy and Greece*, Appl. No. 16643/09, 21 October 2014, [www.refworld.org/cases,ECHR,544617ad4.html](http://www.refworld.org/cases,ECHR,544617ad4.html).

<sup>30</sup> 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, [www.refworld.org/docid/5e7132834.html](http://www.refworld.org/docid/5e7132834.html); UNHCR intervention in *D.A. and Others v. Poland*, note 27 above, para. 3.1.7., and sources cited there.

<sup>31</sup> See, in particular, Article 18 and 19(2) of the EU Charter of Fundamental Rights, Articles 9(3), 28(2), 35(b), 38(1)(c), 39(4), 41(1) Asylum Procedures Directive (Directive 2013/32/EU); and Recital 36 and Articles 3(b), 4 Schengen Borders Code (Regulation 2016/399).

<sup>32</sup> ECtHR, *D.A. and Others v. Poland*, note 27 above, para. 65.

<sup>33</sup> Art 3(b) Schengen Borders Code. When applying the Code, Member States must also fully comply with EU law, including the EU Charter of Fundamental Rights, international law, including the 1951 Convention and ‘obligations related to access to international protection, in particular the principle of *non-refoulement*’, see Article 4 Schengen Borders Code.

<sup>34</sup> Rather, border authorities must provide applicants with the relevant information as to where and how asylum applications may be lodged, see Articles 2(b), 6, 8 Asylum Procedures Directive; CJEU, *Ministerio Fiscal*, C-36/20 PPU, 25 June 2020, paras 76-77; CJEU, *Commission v. Hungary*, C-808/18, 17 December 2020, para. 97 (the making of an application requires ‘no administrative formalities whatsoever’).

<sup>35</sup> Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. See, 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>. See also, UNHCR, *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, note 25 above.

24. **UNHCR therefore recommends** that Estonia guarantees admission to its territory and asylum procedures to any person who seeks asylum at their borders and that return decisions are taken in full compliance with the principle of *non-refoulement* under Article 33 of the 1951 Convention and Article 3 ECHR.

*The prohibition of collective expulsion (§ 9<sup>10</sup> of the State Borders Act)*

25. The draft Amendments do not provide for individual assessments nor for guarantees that prohibit the collective expulsion. However, as also noted in the Explanatory Memorandum, Article 4 of Protocol No 4 ECHR prohibits the collective expulsion of aliens. The aim is to ensure that any expulsion is based on an individual decision and requires States to take an expulsion measure only after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group.<sup>36</sup>
26. Under Article 4 Protocol 4 ECHR, the ECtHR requires States to make available “*genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border.*”<sup>37</sup> These procedures must allow all persons who face persecution to apply for protection, under conditions which ensure that their application is processed lawfully.<sup>38</sup>
27. As mentioned above, in order to give effect to their international legal obligations, including the right to asylum and the principle of *non-refoulement*, States have a duty *vis-à-vis* persons, who have arrived at their border or on their territory and are prevented entry, to make independent inquiries as to the persons’ need for international protection and to ensure they are not at risk of *refoulement* and are able to seek asylum.<sup>39</sup> This is the case particularly when States know, or could reasonably be expected to know, the risks which arise when persons are returned.<sup>40</sup>
28. The ECtHR has considered that in the absence of appropriate arrangements to process asylum applications, “*the resulting possibility for States to refuse entry to their territory is liable to render ineffective all the ECHR provisions designed to protect individuals who face a genuine risk of persecution.*”<sup>41</sup> A practice of pushing back persons who may be in need of international protection without proper inquiries in their individual cases, and without taking into account the individual

<sup>36</sup> *Ibid.* 14, page 5-6; see also ECtHR, *Becker v. Denmark*, No. 701175, Decision of 3 October 1975. (p.235). Notably, each person concerned must have been given the opportunity to put arguments against their expulsion to the competent authorities on an individual basis, ECtHR, *Vedran Andric v. Sweden*, Appl. no. 45917/99, 23 February 1999, available at: <http://www.refworld.org/docid/3ae6b7048.html>.

<sup>37</sup> ECtHR, *N.D. and N.T. v. Spain*, Appl. Nos. 8675/15 and 8697/15, 13 February 2020, [www.refworld.org/cases/ECHR,5e4691d54.html](http://www.refworld.org/cases/ECHR,5e4691d54.html), para. 209.

<sup>38</sup> *Ibid.*

<sup>39</sup> The ‘duty of independent inquiry’ has been recognized by various courts: ECtHR, *Hirsi Jamaa and Others v. Italy*, note 24 above, paras 146-148; ECtHR, *M.S.S. v. Belgium and Greece*, note 22 above, paras 286, 298, 315, 321 and 359; *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, United Kingdom: House of Lords, 9 December 2004, para. 26, [www.refworld.org/docid/41c17ebf4.html](http://www.refworld.org/docid/41c17ebf4.html); Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents), Hong Kong: Court of Final Appeal, 25 March 2013, paras 56, 64, [www.refworld.org/docid/515010a52.html](http://www.refworld.org/docid/515010a52.html); see also APD, Article 6(1), 3rd indent.

<sup>40</sup> ECtHR, *Hirsi Jamaa and Others v. Italy*, para. 157, and ECtHR, *Sharifi and Others v. Italy and Greece*.

<sup>41</sup> *Ibid.* 37, para. 209.

circumstances, rights and needs of each individual is at variance with international and European law, including Article 4 Protocol 4 ECHR.<sup>42</sup>

29. In *N.D. and N.T. v. Spain*, the Grand Chamber of the ECtHR emphasized, like UNHCR, that “*the domestic rules governing border controls may not render inoperative or ineffective the rights guaranteed by the Convention and the Protocols thereto, and in particular by Article 3 of the Convention and Article 4 of Protocol No. 4.*”<sup>43</sup> The ECtHR also observed “*that the prohibition of refoulement includes the protection of asylum-seekers in cases of both non-admission and rejection at the border (...).*” The Court continues, “*(...) that the sole fact that a State refuses to admit to its territory an alien who is within its jurisdiction does not release that State from its obligations towards the person concerned arising out of the prohibition of refoulement of refugees.*”<sup>44</sup> The ECtHR further reiterates that the term “*expulsion*” is to be interpreted “*(...) in the generic meaning in current use (“to drive away from a place”), as referring to any forcible removal of an alien from a State’s territory, irrespective of the lawfulness of the person’s stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border.*”<sup>45</sup>
30. In *Shahzad v. Hungary*, where the only possibility to enter a State legally was located forty kilometers away and where access was moreover limited, the Court ruled that there were no “*genuine and effective means of legal entry.*”<sup>46</sup> Criteria that the Court found particularly relevant when finding a violation of Article 4 Protocol 4 ECHR were, apart from the lack of an individual identification procedure,<sup>47</sup> the fact that the removing officials “*were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers.*”<sup>48</sup>
31. Under EU law, Member States have stringent obligations towards persons arriving at their borders. The CJEU has repeatedly emphasized that the “*very objective*” of the APD is to ensure “*effective, easy and rapid access*” to the asylum procedure.<sup>49</sup> It adds that the APD’s aim is “*to facilitate the making of [asylum] applications*” by requiring Member States to provide persons arriving at the border “*with information on the possibility of making such an application, where there are*

<sup>42</sup> UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the cases of N.D. and N.T. v. Spain (Appl. Nos 8675/15 and 8697/15) before the European Court of Human Rights*, 15 November 2015, 8675/15 and 8697/15, part 4.1., available at: <https://www.refworld.org/docid/59d3a81f4.html>.

<sup>43</sup> ECtHR, *N.D. and N.T. v. Spain*, note 37 above, para. 171; see also UNHCR, *Supplementary observations by the Office of the United Nations High Commissioner for Refugees in the case of N.D. and N.T. v Spain before the Grand Chamber of the European Court of Human Rights*, 5 April 2018, 8675/15 and 8697/15, available at: <https://www.refworld.org/docid/5b92533f4.html>; UNHCR, *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 (Application Nos. 8675/15 and 8697/15)*, 26 September 2018, available at: <https://www.refworld.org/docid/5e2b15684.html>; and UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the cases of N.D. and N.T. v. Spain (Appl. Nos 8675/15 and 8697/15) before the European Court of Human Rights*, 15 November 2015, 8675/15 and 8697/15, available at: <https://www.refworld.org/docid/59d3a81f4.html>.

<sup>44</sup> *Ibid.* 37, paras 178 and 181.

<sup>45</sup> *Ibid.* 37, para. 185.

<sup>46</sup> ECtHR, *Shahzad v. Hungary*, note 46 above, paras 60-65.

<sup>47</sup> See, among others, ECtHR, *Hirsi Jamaa and Others v. Italy* and *Sharifi and Others v. Italy and Greece*, both note 24 above; ECtHR, *M.K. and Others v. Poland*, and ECtHR, *D.A. and Others v. Poland*, both note 27 above; ECtHR, *Shahzad v. Hungary*, note 46 above.

<sup>48</sup> ECtHR, *Hirsi Jamaa and Others v. Italy*, note 24 above, para. 185.

<sup>49</sup> CJEU, *Commission v. Hungary*, C-808/18, 17 December 2020, para. 104, CJEU, *Ministerio Fiscal*, C-36/20 PPU, 25 June 2020, note 29 above, para. 82.



*indications that he or she may wish to make an application of that sort.*<sup>50</sup> An applicant enjoys the status of an applicant from the moment they express such a wish, without this requiring “*any administrative formalities whatsoever.*”<sup>51</sup>

32. **UNHCR recommends** that Estonia considers the establishment of efficient asylum processing modalities at the border areas to ensure access to territory for those in need of international protection. These could include (a) frontloading of the asylum system by improving registration and screening; (b) enhancing triaging with a view to referring applications to simplified and accelerated procedures, depending on profile and background; and (c) return of those finally determined not to have any international protection needs.

*Access to territory on a humanitarian basis should not undermine the right to seek asylum (§ 9<sup>10</sup> (5) of the State Borders Act)*

33. According to proposed Article 9<sup>10</sup> (5) of the State Border Act, the PBGB may admit third country nationals who have crossed the border irregularly on humanitarian grounds, such as health considerations, or to take into account the special needs of vulnerable persons.<sup>52</sup>
34. The right to seek asylum should not be conflated with the prerogative of a State to grant humanitarian entry. States may decide to allow prolonged stay solely for compassionate reasons, such as age, medical condition, or family connections. These cases must be clearly distinguished from cases where international protection needs and an obligation to respect the fundamental principle of *non-refoulement* are present, and which are, thus, of direct concern to UNHCR.
35. The criteria for refugee status in the 1951 Convention are to be interpreted in such a manner that individuals, who fulfil the refugee definition, are so recognized and protected under that instrument. Measures to provide complementary protection should be implemented in a manner that strengthens, rather than undermines, the existing global refugee protection regime.<sup>53</sup>
36. In EU law, there is also a clear distinction between the protection granted to asylum-seekers and refugees in line with the EU asylum acquis, and the protection extended to persons not in need of international protection on humanitarian grounds.<sup>54</sup> The CJEU has also confirmed that if a person fulfils the criteria set out in the refugee and/or subsidiary protection definition, there is no discretion for the State not to grant international protection.<sup>55</sup> In addition, as soon as a request for protection is made at the borders, this request must be registered within maximum six working

<sup>50</sup> CJEU, *Commission v. Hungary*, note 49 above, para. 105.

<sup>51</sup> CJEU, *Commission v. Hungary*, note 49 above, para. 97, CJEU, *Ministerio Fiscal*, note 49 above, paras 92-94.

<sup>52</sup> *Ibid.* 14, page 6.

<sup>53</sup> UNHCR, *Complementary Forms of Protection*, EC/GC/01/18, 4 September 2001, <https://www.unhcr.org/3b95d7174.pdf>.

<sup>54</sup> The Qualification Directive (Directive 2011/95/EU) states that “*third-country nationals or stateless persons who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds fall outside the scope of this Directive.*” (Recital 15 QD); see also the CJEU case of C-638/16 PPU, paras. 44 and 51.

<sup>55</sup> Article 13 and 18 Qualification Directive (Directive 2011/95/EU) and judgments of 24 June 2015, H. T., C-373/13, EU:C:2015:413, paragraph 63, and of 12 April 2018, A and S, C-550/16, EU:C:2018:248, paragraphs 52 and 54). (Joined Cases C-391/16, C-77/17 and C-78/17, para. 89).

days, and Member States have an obligation to facilitate access to the asylum procedure.<sup>56</sup>

37. **UNHCR recommends** that Estonia refrains from introducing changes to the asylum system which would make access to international protection conditional on criteria which are not linked to the refugee definition set by the 1951 Geneva Convention.
38. **UNHCR encourages** Estonia to ensure that additional measures for admission of vulnerable persons not in need of international protection are not established in a manner that is in detriment of the national asylum system.

*Access to effective remedy with suspensive effect and legal aid (§ 9<sup>10</sup>(4) of the State Borders Act and (§ 6<sup>6</sup> of the Obligation to Leave and Prohibition on Entry Act)*

39. According to the proposed amendment specified in § 9<sup>10</sup>(4) of the State Borders Act, an appeal to the expulsion order issued by the PBGB immediately after interception at the border does not entail automatic suspension of the decision and does not require admission into the territory.
40. The lack of automatic suspensive effect of the appeal may undermine access to an effective remedy and lead to a violation of the principle of *non-refoulement* contrary to Article 33 of the 1951 Convention, Article 4, 19 and 47 of the EU Charter and Article 3 and 13 ECHR.
41. A remedy in the context of an Article 3 ECHR claim must have automatic suspensive effect, be examined with rigorous scrutiny, and be effective in law and practice due to the irreversible nature of the harm that might occur.<sup>57</sup>
42. The ECtHR has repeatedly held that, “*in view of the importance that the Court attaches to Article 3 ECHR and the irreversible nature of the damage that may result if a risk of torture or ill-treatment materialises,*” the effectiveness of a remedy “*imperatively requires*” an independent and rigorous scrutiny.<sup>58</sup> In particular, the Court has repeatedly confirmed that in the context of an Article 3 or Article 4 of Protocol No. 4 ECHR claim, “*a remedy will only be effective if it has automatic suspensive effect.*”<sup>59</sup> The CJEU has also clarified that in respect of return and removal decisions, the right to an effective remedy and the principle of *non-refoulement* require automatic suspensory effect before at least one judicial body.<sup>60</sup>
43. UNHCR underlines that the right to legal aid is an essential component of the right to an effective remedy under EU law.<sup>61</sup> In UNHCR’s view, this safeguard is even more important when asylum is requested at the border because of the particular

<sup>56</sup> C-36/20 PPU, para. 63 and 76.

<sup>57</sup> ECtHR, *M.S.S. v. Belgium and Greece*, note 22 above, paras 290-293; ECtHR, *Gebremedhin [Gaberamadhién] c. France*, 25389/05, 26 April 2007, <https://www.refworld.org/pdfid/46441fa02.pdf>, para. 66; ECtHR, *De Souza Ribeiro v. France*, Application No. 22689/07, 13 December 2012, <https://www.refworld.org/pdfid/511cf0a22.pdf>, para. 95.

<sup>58</sup> ECtHR, *M.K. and Others v. Poland*, note 27 above, para. 143.

<sup>59</sup> ECtHR, *D.A. and Others v. Poland*, para. 38, and ECtHR, *M.K. and Others v. Poland*, para. 143, both note 27 above.

<sup>60</sup> CJEU, *Gnandi*, C-181/16, 19 June 2018, <https://curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=c-181/16>, para. 58.

<sup>61</sup> *Ibid.* and Article 47 of the Charter of Fundamental Rights of the European Union.

vulnerability of asylum-seekers in this context, where procedures take place outside public scrutiny and in often rudimentary conditions (as in this case, in the open, in the forest, after applicants have spent several days or weeks in degrading conditions, which often leaves them scared and disoriented).<sup>62</sup>

44. **UNHCR recommends** that automatic suspensive effect be granted during the judicial review as a general rule, with derogations only on exceptional basis for subsequent applications, or in the case of manifestly unfounded or abusive claims. In those cases, guarantees for the applicant to request suspensive effect before a Court should be foreseen.<sup>63</sup>

## Conclusion

UNHCR hopes that the *Riigikogu* and relevant authorities will give due consideration to these observations during the upcoming discussion. UNHCR is available to provide all the necessary technical support and expertise to ensure that the adopted adjustments to the national asylum would help the asylum authorities to manage the current situation through a fair and efficient border and asylum process.

**UNHCR**  
**23 May 2022**

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<sup>62</sup> UNHCR intervention in *D.A. and Others v. Poland*, note 22 above, para. 3.2.5. and *Submission by UNHCR in the Case of Malevanaya & Sadyrkulov v. Ukraine (Appl. No. 18603/12)*, 15 July 2013, [www.refworld.org/docid/51e515794.html](http://www.refworld.org/docid/51e515794.html), para. 3.1.8. In the same vein, this Court has recognized that persons seeking asylum at the border might face particular difficulties, see ECtHR, *Gebremedhin v. France*, Appl. No. 25389/05, 26 April 2007, [www.refworld.org/cases/ECHR,45d5c3642.html](http://www.refworld.org/cases/ECHR,45d5c3642.html), para. 59; ECtHR, *M.K. and Others v. Poland*, note 27 above, paras 174-175, 206 [*lack of a real possibility to submit asylum claim; impossibility to meet with lawyers even when the lawyers were present at the border checkpoint*]; ECtHR, *Amuur v. France*, Appl. No. 19776/92, 25 June 1996, [www.refworld.org/cases/ECHR,3ae6b76710.html](http://www.refworld.org/cases/ECHR,3ae6b76710.html), para. 43.

<sup>63</sup> UNHCR, *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 67, available at: <https://www.refworld.org/docid/5cb597a27.html>.