

UNHCR observations on draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No 21-29207)

I. Introduction

1. The United Nations High Commissioner for Refugees (UNHCR) Representation for the Nordic and Baltic Countries highly appreciates and welcomes the opportunity to provide our legal observations to the draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No 21-29207; hereinafter – the draft Amendments and the Aliens Law).
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.¹ Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,² whereas the 1951 Convention relating to the Status of Refugees³ 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 (Article 35 of the 1951 Convention and Article II of the 1967 Protocol).⁴
3. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection (“UNHCR Handbook”).⁵ 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.

¹ 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”).

² 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.

³ 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”.

⁴ 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.

⁵ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, April 2019, HCR/IP/4/ENG/REV. 4, available at: <https://www.refworld.org/docid/5cb474b27.html>.

II. General remarks

4. On 26 August 2021, the Ministry of the Interior published the new draft Amendments,⁶ which complement previous amendments to the same law undertaken in fast-track procedures in July and August 2021. The draft Amendments aim at regulating the functioning of the asylum system, including access, availability of procedural safeguards and reception standards in exceptional situations, namely “*when a state of war, a state of emergency or an emergency due to a mass influx of aliens is declared.*”
5. UNHCR shared with the Lithuanian government its observations to the amendments of the Law of Lithuania on Legal Status of Aliens (No XIV-506) on 28 July 2021.⁷ Those observations and recommendations remain valid and, therefore, should be regarded as an integral part of this legal commentary.
6. The current draft Amendments risk to further erode the integrity of the asylum system in Lithuania and are clearly at variance with international and European standards, notably vis-à-vis the right to seek asylum and access asylum procedures, detention safeguards during border procedures and the associated rights of asylum-seekers in Lithuania.
7. UNHCR highlights that the asylum system needs to be practical, fair and efficient, and delivering swift and clear results. When there is an asylum request at the border, it is required under international law to provide admission at least on a temporary basis to examine the claim, as the right to seek asylum and the non-refoulement principle would otherwise be rendered meaningless.⁸ UNHCR wishes to reiterate once more that the right to seek and enjoy asylum is a fundamental human right and that the responsibilities of the State to protect against refoulement cannot be derogated from in times of emergency.⁹
8. UNHCR stands ready to engage in further consultations with the Lithuanian authorities and provide technical assistance to ensure that the draft Amendments to the Aliens Law are in full accordance with Lithuania obligations deriving from international refugee law, the Charter of Fundamental Rights of the European Union, and the European asylum acquis, which is binding and remains applicable to the current situation.

III. Specific observations

The right to seek asylum does not discriminate based on the mode of arrival (Article 140⁹ and 140¹⁰)

9. Article 140⁹ and 140¹⁰ of the draft Amendments limit the right to seek asylum during times of emergency, to persons who have entered or stayed in the territory

⁶ Teikimas “Dėl Lietuvos Respublikos įstatymo „Dėl užsieniečių teisinės padėties“ projekto derinimo”, No 1D-4903, 2021-08-26, available at: <https://bit.ly/3thiPSF>.

⁷ UN High Commissioner for Refugees (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>.

⁸ UN High Commissioner for Refugees (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>.

⁹ UN High Commissioner for Refugees (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, <https://www.refworld.org/docid/5e7132834.html>; and ECRE, *Derogating from EU Asylum Law in the Name of “Emergencies”: the Legal Limits under EU Law*, June 2020, available at: https://www.ecre.org/wp-content/uploads/2020/06/LN_6-final.pdf.

of Lithuania regularly. This exception extends to persons who attempt to cross the border irregularly as well as those in detention as a consequence of their irregular border crossing.¹⁰ As a consequence, and during the period covered by the emergency declaration, asylum requests will only be considered when asylum-seekers approach an official border checking point to manifest their intention to seek asylum.

10. An exception to this rule is foreseen in article 140¹⁰ (2), which allows the authorities to receive asylum applications in case of vulnerable persons and when deemed appropriate in accordance with other individual circumstances, which are not well-defined in this provision.
11. 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. The draft Amendments create two categories of refugees and penalize all persons crossing the border irregularly. 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.¹¹
12. UNHCR recalls that the right to seek and enjoy asylum is a basic human right under Article 14(1) of the Universal Declaration of Human Rights,¹² and is supported by the legal framework of the 1951 Convention to which Lithuania is a State Party. The right to asylum is also provided for in Article 18 of the Charter of Fundamental Rights of the European Union. This imperative provision of primary EU law is further addressed in detail in the Asylum Procedures Directive (APD) (2013/32/ES), notably its Article 3, 6 and 7 guarantees to each individual the right to apply for asylum within the territory, including at the border, and impose an obligation on Member States to register and process such applications regardless of the manner in which the applicant has entered the country.
13. Article 31 of the 1951 Convention recognizes that in exercising the right to seek asylum, refugees are often compelled to arrive, enter or stay in a territory without authorization or documents, or with documentation which is insufficient, false or obtained by fraudulent means.¹³ Travelling without fulfilling relevant travel and immigration requirements, including for example, visa requirements or registration procedures for legally exiting one country and entering another, is often an

¹⁰ Similar provisions are currently set out in the recently revised Article 67 of the Aliens Law which was amended on 10 August 2021.

¹¹ UN High Commissioner for Refugees (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>.

¹² UNGA, Universal Declaration of Human Rights, ('UDHR') 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>.

¹³ EXCOM Conclusion No. 58 (XL) 1989, para. (a). UN Ad Hoc Committee on Refugees and Stateless Persons, *Comité spécial pour les réfugiés et les apatrides, Deuxième session, Projet de rapport du Comité spécial de l'apatridie et des problèmes connexes, Lake Success, New York, 16 janvier au février 1950*, 15 February 1950, E/AC.32/L.38, comment to paragraph 1 of then-draft Article 26, <http://www.refworld.org/docid/3ae68c264.html>: 'Le réfugié dont le départ du pays d'origine est généralement une évasion, est rarement en état de se conformer aux conditions requises pour pénétrer régulièrement (possession d'un passeport national et d'un visa national) dans le pays de refuge. Il serait conforme à la notion d'asile de ne pas imposer de sanctions pénales au réfugié qui, fuyant les persécutions, traverse clandestinement la frontière, mais se présente aussitôt que possible aux autorités du pays d'asile, et est reconnu comme réfugié de bonne foi'. *R v. Asfaw*, [2008] UKHL 31, United Kingdom: House of Lords (Judicial Committee), 21 May 2008, para. 9, http://www.refworld.org/cases.GBR_HL.4835401f2.html. *Mahamad Arwah Abdi and Another v Minister of Home Affairs and others*, Case No: 734/2010, South Africa: Supreme Court of Appeal, 15 February 2011, para. 22, <http://www.refworld.org/cases.SASCA.50239bb62.html>.

unavoidable reality for refugees who seek to invoke the international protection afforded to them under the 1951 Convention.¹⁴

14. Furthermore, Article 31(1) of the 1951 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 and applied 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 Convention¹⁵.
15. In view of the above, UNHCR recommends that the amendments provide for admission to its territory and access to asylum procedures to any person who seeks asylum at the border and in detention, regardless of their mode of entry and in full compliance with the principle of non-refoulement.

The protection against refoulement cannot be derogated in times of emergency (Article 140⁷)

16. As indicated in the Explanatory Note, the draft Amendments have been prepared to respond to potential situations of emergency and/or mass influx. If an emergency declaration is passed, substantial restrictions on the right to seek asylum, and the protection against unlawful detention are foreseen in the current proposal.
17. UNHCR wishes to acknowledge that certain rights can be lawfully limited in times of war or other public emergency threatening the life of the nation, as foreseen in article 15 of the European Convention on Human Rights (ECHR). However, imposing a blanket measure to preclude the admission of refugees or asylum-seekers without measures to protect against refoulement would not meet international standards, even in times of emergency. States have a duty vis-à-vis persons who have arrived at their borders, 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.¹⁶
18. As the CJEU held, an EU Member State cannot unilaterally determine the scope of emergency measures without any oversight by the EU institutions.¹⁷ It is therefore for the Member State to prove that it is *necessary* to derogate from a specific rule in order to maintain law and order or internal security, in addition to proving the proportionality and adequacy of the measure. Importantly, States remain in any case

¹⁴ 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>.

¹⁵ 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, <https://www.refworld.org/docid/61434b484.html>

¹⁶ UN High Commissioner for Refugees (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, available at: <https://www.refworld.org/docid/5e7132834.html>.

¹⁷ *Commission v. Hungary* (C-808/18), para. 2016.

bound by non-derogable fundamental rights as foreseen in the EU Charter of Fundamental Rights and the European Convention on Human Rights, most notably, articles 2, 3 and 13 on the protection against refoulement and access to effective remedy for persons at risk of return.¹⁸

19. UNHCR also notes that EU asylum law already makes provision for a situation in which a large number of simultaneous arrivals make it difficult for Member States to comply with their obligations. In such a situation, MS may register claims within 10, rather than 6 working days, and they may decide within 15, rather than the ordinary 6 months (Articles 6(5) and 31(3)(b) APD). There is no possibility in EU law, however, to suspend registration of asylum claims or to return persons at the border without an adequate and complete examination of their claim, irrespective of whether they crossed regularly or not.¹⁹
20. UNHCR recommends that the right to seek asylum and the protection against refoulement are duly considered including in times of emergencies.

Detention safeguards during border procedures (Article 140⁸(4) and (6))

21. Pursuant to proposed Article 140⁸ (4) and (6), persons who have applied for asylum at border crossing points or in transit zones shall not enjoy freedom of movement within the territory of Lithuania. They are required to stay at temporary accommodation places²⁰ until a decision on their return or expulsion has been executed or until another decision on their legal status has been taken. If no decision is taken, they are required to stay in the temporary accommodation place for the entire duration of the emergency period and for 28 days thereafter. On 2 July 2021, the Government declared an “extraordinary situation” in Lithuania due to a “mass influx” of refugees and migrants. The current national legislation does not contain any indication on duration of these emergency measures.²¹
22. These measures amount detention. UNHCR notes that there is no requirement to issue formal detention orders, and the authorities are not required to undertake assessments based on individual circumstances. Thus, the necessity, proportionality and adequacy of the use of detention are not going to be considered for a particular individual or family. No exemptions are foreseen for vulnerable persons, including children.
23. In addition, the proposed provision does not specify the maximum time limit and does not contain any reference to the possibility for administrative or judicial review of the detention measure during this period. If analyzed together with the amendments adopted in July 2021, and based on the current practice, asylum-seekers are likely to be kept in closed facilities for the entire duration of their asylum procedures.

¹⁸ ECRE, *Derogating from EU Asylum Law in the Name of “Emergencies”: the Legal Limits under EU Law*, June 2020, available at: https://www.ecre.org/wp-content/uploads/2020/06/LN_6-final.pdf.

¹⁹ To the contrary, lack of documents or the use of forged documents, cannot even automatically lead to border or accelerated procedures (Recital 21 APD). All the more, it cannot lead to a complete suspension of procedures.

²⁰ Border-crossing points, transit zones, reception centers, or other accommodation places/premises.

²¹ Government of the Republic of Lithuania, *Resolution No 517 of the Government of the Republic of Lithuania of 2 July 2021 On the Declaration of the Extraordinary situation and the Appointment of the State Commander of National Emergency Operations*, 2 July 2021, TAR, 30/07/2021, No15235, available at: <https://bit.ly/3taBHCL>; Seimas of the Republic of Lithuania (Parliament), *Law on Civil Protection of the Republic of Lithuania*, 31 December 1998 (consolidated version 1 September 2021), available at: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.69957/asr>.

24. In UNHCR's view, detention of asylum-seekers should not be used by default or mandatorily for all arrivals, but rather remain a measure of last resort.²² Minimal periods in detention are permissible at the outset to carry out initial identity and security checks in cases where identity is undetermined or disputed, or there are indications of security risks. For cases likely to be manifestly unfounded, detention may be legitimate for up to four weeks from the lodging of the asylum claim with the applicable safeguards as established by the CJEU and the ECtHR.²³
25. As stressed in UNHCR's previous legal observations, if detention is applied for a legitimate purpose, it needs to be based on an individual decision, be strictly necessary and proportional, timebound and regularly reviewed. Detention should never apply to children and alternatives to detention, are generally preferable and possible in border procedures.²⁴ The current proposal does not foresee the guarantees that would make detention of asylum-seekers lawful and is considered therefore at variance with Lithuania international and national obligations.
26. In UNHCR's view, the intensity and length of the movement restrictions foreseen in the draft Amendments, coupled with the limited safeguards available are at variance with international law and are likely to create unnecessary inefficiencies and hurdles in the asylum procedures.

Access to Effective Legal Remedy (Article 140¹⁷⁻²¹)

27. The draft Amendments provide for two instances of appeal, including administrative and judicial review (Article 140¹⁷⁻²¹). The timelines for appeal are reduced to 7 days, and the administrative decision does not have automatic suspensive effect and can therefore, be immediately executed.
28. The short deadlines for appeal of negative decisions²⁵ coupled with challenges regarding access to legal aid²⁶ and the absence of automatic suspensive effect of the decision, may undermine access to an effective remedy and potentially 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 of Fundamental Rights and Article 3 and 13 of the ECHR.²⁷

²² UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, page 13, available at: <https://www.refworld.org/docid/503489533b8.html>.

²³ UN High Commissioner for Refugees (UNHCR), *Practical considerations for fair and fast border procedures and solidarity in the European Union*, 15 October 2020, page 2, available at: <https://www.refworld.org/docid/5f8838974.html>.

²⁴ UNHCR, *Practical considerations for fair and fast border procedures and solidarity in the European Union*, 15 October 2020, page 2, <https://www.refworld.org/docid/5f8838974.html>; UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <https://www.refworld.org/docid/503489533b8.html>.

²⁵ UN High Commissioner for Refugees (UNHCR), UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation, April 2019, COM (2016) 467, pages 18-19, available at: <https://www.refworld.org/docid/5cb597a27.html>.

²⁶ The Court of Justice of the EU confirmed the importance of the right to legal aid under Article 47 Charter of Fundamental Rights in Case C-279/09, DEB, para 36, noting that it corresponds to Art 6 ECHR and refers to the Airey v Ireland case which notes that legal aid should be provided where it would be otherwise impossible to ensure an effective remedy. Conka v. Belgium, 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002, para. 44, available at: <https://www.refworld.org/cases,ECHR,3e71fdb4.html>; M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para. 301, available at: <https://www.refworld.org/cases,ECHR,4d39bc7f2.html>.

²⁷ Court of Justice of the EU, Case C-181/16, Gnandi, para 56. See also European Court of Human Rights, for example, Gebremedhin [Gaberamadhien] c. France, 25389/05, 26 April 2007, para. 66, K.R.S. against the United Kingdom, Application No. 32733/08, 2 December 2008; or Conka v. Belgium, 51564/99, February 2002. For UNHCR's detailed position see UNHCR, UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation, April 2019, COM (2016) 467, page 19, available at: <https://www.refworld.org/docid/5cb597a27.html>.

29. UNHCR recommends that automatic suspensive effect is granted during the appeal 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, as in case of judicial review following a rejection on appeal, guarantees for the applicant to request suspensive effect before a Court should be foreseen and for the Court to grant suspensive effect *ex officio*. In addition, the period for appeal should be expanded to 15 days and access to qualified legal aid should be guaranteed in law and in practice.

IV. Conclusion

30. UNHCR is deeply concerned by the increasing tendency to deny the right to seek asylum for persons crossing irregularly, and on the basis of emergency considerations, with considerable restrictions on access to territory and procedures implemented in practice and law in Lithuania.
31. Asylum-seekers should only be detained as a last resort, and alternatives to detention are to be considered, particularly for families and children. Imposing unlimited periods of detention to all persons granted access to territory in Lithuania, regardless of their individual circumstances, without an assessment of adequacy, proportionality and reasonableness and/or the possibility of judicial review, is at variance with Lithuania's international obligations.
32. UNHCR wishes to reiterate the recommendations published on 28 July concerning applicable safeguards for the implementation border procedures, including on access to legal and psycho-social aid, effective remedy and with particular focus on the protection that should be made available for specific groups, namely unaccompanied children and survivors of trauma (Articles 140¹¹⁻¹² of the draft Amendments).
33. While acknowledging the legitimate interest of the State to control its borders, this should always be done in a protection sensitive manner, and in accordance with international and European standards. UNHCR would like to reiterate that we stand ready to support the establishment of fair and fast border procedures to help alleviate the pressure at the Lithuanian borders, while ensuring that protection is afforded to those in need.
34. UNHCR encourages the Government of Lithuania, the Parliament, the Judiciary, and all relevant state agencies to make use of these comments to ensure more effective and efficient responses for persons in need of international protection in case of emergencies and in the spirit of the Global Compact on Refugees. UNHCR stands ready to further support efforts in this regard.

UNHCR, 27 September 2021