

UNHCR Comments on the Draft Law of Ukraine on Amendment of Certain Laws of Ukraine on the Protection of the State Border of Ukraine,

I. Introduction

A Draft Law “On Amendment of Certain Laws of Ukraine on the Protection of the State Border of Ukraine”, was registered with the Parliament of Ukraine on June 19, 2022, under No. 7475 (hereinafter Draft Amendments) as an initiative of several Members of Parliament. It was adopted in the first reading on 20 September 2022 and returned for the review of the Parliamentarian Committee on the State Security, Defense, and Intelligence and preparation of submission for the second reading and final voting of the Parliament.

The Explanatory Note to the Draft Amendments¹ dated 14 June 2022 provides that it was prepared with the aim to further develop and improve the national system of defence and protection of the state borders and ensure proper follow up of violations of the legislation on state border protection. Among other provisions, the new amendments (i) simplify the procedure for forced expulsion from Ukraine of irregular migrants apprehended by the State Border Guard Service and (ii) seek to prevent misuse of the asylum procedure by persons who have been banned from entering Ukraine or who may represent a risk to state security.

UNHCR partner, “Right to Protection”, has already submitted comments to the drafters of the law on 3 October 2022, expressing their concerns regarding some provisions of this draft law which may affect the situation of refugees, asylum seekers and stateless persons in Ukraine.

Considering the particular impact of these Draft Amendments on the *Law on Refugees and Persons in Need of Complementary of Temporary Protection* (the Law on Refugees), UNHCR is submitting the present comments recalling relevant international refugee law and standards of refugee protection.

UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problems of refugees.² Under its Statute, UNHCR fulfils its international protection mandate by, inter alia, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto”.³ UNHCR’s supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees (the 1951 Convention)⁴ according to

¹ Explanatory Note to the Law of Ukraine on Amendment of Certain Laws of Ukraine on the Protection of the State Border of Ukraine, <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1350606>

² See Statute of the Office of the United Nations High Commissioner for Refugees, UN General Assembly Resolution 428(V), Annex, UN Doc. A/1775, para.1, available at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html> (“Statute”)

³ Ibid, para. 8(a)

⁴ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

which State parties undertake to “co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention”. The same commitment is included in Article II of the 1967 Protocol relating to the Status of Refugees (the 1967 Protocol).⁵

II. Access to asylum at the border

Based on the Comparative Table to the Draft Amendments⁶, Article 5 paragraph 2 of the Law on Refugees which regulates the procedure of application for asylum should be complemented by new provisions introduced by the Draft Amendments.⁷ These new provisions introduce grounds for non-admission to the territory and non-admission to the asylum procedure of protection applications made at the border in a number of circumstances, namely:

- When the concerned person has received an *entry ban* by an authorized body
- When the concerned person has reached Ukraine from a country where his/her life and freedom are not in danger

Additionally, the Draft Amendments provide that access to the asylum procedure is also denied:

- When the concerned person irregularly attempts or crosses the border of Ukraine to a third country, while martial law is in force
- When the concerned person is sent back to Ukraine based on a readmission agreement, while martial law is in force⁸

These new provisions do not foresee an examination of individual circumstances of the concerned individuals and the possibility to appeal decisions not to allow access to the territory or/and to the asylum procedure.

⁵ UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>

⁶ Comparative Table to the Draft Law on Amendment of Certain Laws of Ukraine on the Protection of the State Border of Ukraine, as of 15 August 2022, <https://itd.rada.gov.ua/billInfo/Bills/pubFile/1437347>

⁷ The Draft Law provides the following amendments to Art. 5 of the Refugee Law:

"The State Border Guard Service of Ukraine do not accept applications for recognition as a refugee or a person in need of complementary protection, and do not allow foreigners and stateless persons into the territory of Ukraine, in respect of whom an authorized body has made a decision to prohibit entry into Ukraine, or in the event that the applicant crosses the state the border of Ukraine directly from the territory of the state in which he is not in danger of life or freedom, as well as applications are not accepted if submitted by foreigners or stateless persons during martial law and during an attempt or after illegally crossing the state border from Ukraine to other states, or returned to Ukraine in accordance with the international treaty on readmission."

⁸ UNHCR would like to point out that these two provisions of the Draft Amendments lack clarity. It would be important to clarify whether the martial law is a ground in itself for denying access to the asylum procedure or is only foreseen as a context for the irregular attempt to cross the border and for the readmission. Given the title and purpose of the draft legislation, UNHCR's understanding is that martial law is not a ground in itself, but is rather foreseen as a context for the irregular attempt to cross the border and for the readmission.

Therefore, for their implementation not to be at variance with the principle of *non-refoulement*, safeguards are needed to ensure Ukraine is not forcing people at their borders to return to a country where they are at risk of persecution or other forms of serious harm. Such safeguards would consist of ensuring that individuals finding themselves in such circumstances have the possibility to raise protection considerations in all the four situations foreseen by the amendments to Article 5 of the Law on Refugees. These safeguards are needed to uphold Ukraine's *non-refoulement* obligations under the 1951 Refugee Convention, as well as various human rights instruments, particularly the European Convention on Human Rights, and its jurisprudence related to Article 3. Finally, these safeguards are needed to align Ukraine's legal framework with the Common European Asylum System and the interpretative jurisprudence of the Court of Justice of the European Union (CJEU). In a recent judgement, the CJEU held that Article 6 and Article 7(1) of the 2013 Asylum Procedure Directive are to be interpreted as precluding legislation of a Member State under which, in the event of a declaration of *martial law* or of a state of emergency or in the event of a declaration of an emergency due to a mass influx of aliens, illegally staying third-country nationals are effectively deprived of the opportunity of access the procedure in which applications for international protection are examined.⁹

Risks of misuse of the asylum procedure in the circumstances foreseen by the Draft Amendments can be obviated by fair and efficient asylum procedures rather than by precluding access to the territory or to the asylum procedure altogether.

- ***When the concerned person has received an entry ban by an authorized body***

Ukrainian legislation¹⁰ envisages a wide range of circumstances in which an individual can receive an entry ban from an official of the State Border Guard Service. The list of grounds for such decision includes the following situations: the foreigner has submitted false information and/or used forged documents or forged visa; (ii) the foreigner violated the rules of border crossing and/or was detained during the attempt of irregular crossing; the foreigner did not comply with the decisions of the state authorities of Ukraine during a previous stay in Ukraine; if the foreigner irregularly entered/exited the temporarily occupied territory of Ukraine or the area of the anti-terrorist operation; in the interest of ensuring the national security of Ukraine.¹¹

While the applicable legislation provides that the entry ban can be appealed, the Draft Amendments foresee that access to the asylum procedure and therefore possibility to raise protection considerations against return would not be possible.

⁹ Judgment of the Court (First Chamber) of 30 June 2022, *M.A. v Valstybės sienos apsaugos tarnyba*, <https://curia.europa.eu/juris/document/document.jsf?jsessionid=3910C4DB5042A9D07B1EB106B98492CB?text=&docid=261930&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3573316>

¹⁰ <https://zakon.rada.gov.ua/laws/show/z1564-11#Text>

¹¹ The imposition of an entry ban violates the obligation of Ukraine to not penalize people seeking international protection for having entered the country by using false information, forged documents or otherwise entered Ukraine irregularly. In situations where the person has come directly from a territory where their life or freedom was threatened, they present themselves without delay to the authorities of Ukraine and show good cause for their illegal entry or presence, an entry ban on such grounds would violate Article 31(1) of the 1951 Refugee Convention. However, even in situations where Article 31(1) does not apply, such entry bans would be unlawful under international law as they would undermine the right to seek and enjoy asylum by denying access to territory and to an asylum procedure.

- ***When the concerned person reaches Ukraine from a country where his/her life and freedom are not in danger***

Refugees may be returned or transferred to a state where they had found, could have found or, pursuant to a formal agreement, can find international protection. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol do not prohibit such return or transfer. According to relevant conclusions of UNHCR's Executive Committee, where refugees and asylum-seekers move in an irregular manner from a country where they have already found protection, they may be returned to that country. Application of the concept of first country of asylum requires an individual assessment by Ukraine of whether the refugee will be readmitted to the said country, granted lawful stay there, and be accorded standards of treatment commensurate with the 1951 Convention and its 1967 Protocol and international human rights standards, including – but not limited to – protection from refoulement. The 'safe third country concept' has been applied in cases where a person could have or can find protection in a third state. Prior to transfer, it is important, in keeping with relevant international law standards, to individually assess whether the third state will ensure readmission, grant access to the asylum procedure, accord the person standards of treatment commensurate with the 1951 Convention, including protection from refoulement and lawful stay.¹²

- ***When the concerned person irregularly attempts or crosses the border of Ukraine to a third country and when the concerned person is sent back to Ukraine based on a readmission agreement, while martial law is in force***

The 1951 Convention provides in Article 9 for the possibility to adopt provisional measures in certain situations, such as war or other grave and exceptional circumstances.¹³ The amendments introduced by the Draft Law appear to relate to such situations as there is a reference to 'martial law', which has been declared in Ukraine since the start of the armed conflict on 24 February 2022.

For such derogations to be compatible with the 1951 Convention, it needs to be assessed against the criteria set out in Article 9, namely that the measure is *essential* to protect national security and that continuance of such measures is necessary for national security in relations to *a particular* person. Article

¹² UN High Commissioner for Refugees (UNHCR), *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, available at: <https://www.refworld.org/docid/5acb33ad4.html>, see also UN High Commissioner for Refugees (UNHCR), *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, September 2019, available at: <https://www.refworld.org/docid/5d8a255d4.html>, paragraph 22.

¹³ See Article 8 (exemption from exceptional measures) which provides:

With regard to exceptional measures which may be taken against the person, property or interests of nationals of a foreign State, the Contracting States shall not apply such measures to a refugee who is formally a national of the said State solely on account of such nationality. Contracting States which, under their legislation, are prevented from applying the general principle expressed in this article, shall, in appropriate cases, grant exemptions in favour of such refugees.

And Article 9 (provisional measures)

*Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers **to be essential to the national security in the case of a particular person**, pending a determination by the Contracting State that that person is in fact a refugee and that **the continuance of such measures is necessary in his case in the interests of national security.***

9 does not include examples of what measures could be adopted and gives States some margin of appreciation in this regard as it refers to measures which *it considers* to be essential.

However, the *travaux préparatoires* suggests that the provisional measures relate to a refugee's freedom of movement, possession of certain electronic equipment and confiscation of property.¹⁴ The language of Article 9 of the 1951 Convention does not therefore support the idea that derogation in exceptional circumstances is permissible to *all* of the rights of the Convention, including the right to apply for international protection.¹⁵

Importantly, any provisional or derogatory measure a State takes in time of war or other grave and exceptional circumstances affecting the country must also be in line with *non-refoulement* obligations as outlined above.

III. Recommendations

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 Rights¹⁶, and is supported by the legal framework of the 1951 Convention to which Ukraine is a State Party. UNHCR recognizes that States have the legitimate right to control their borders, particularly in exceptional circumstances. However, they should do so in a manner which is consistent with their obligations under international law, including the principle of *non-refoulement* and respect for the right to seek asylum. This is further supported by international and European jurisprudence.¹⁷

The provisions introduced by the Draft Amendments as currently drafted, if applied to persons in need of international protection, may not be in line with international and European standards, in particular those that protect against refoulement.

UNHCR hopes that these observations will be given due consideration in the upcoming discussion in the Parliament. UNHCR is available to provide all the necessary technical support and expertise and ensure that the adopted adjustments to the national asylum would help the asylum authorities manage the current situation through a fair and efficient asylum procedures.

**UNHCR,
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¹⁴ UN High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, p. 48 and Seq. Available at: <https://www.refworld.org/docid/53e1dd114.html>

¹⁵ See *Temporary Protection, Derogation and the 1951 Refugee Convention*, Alice Edwards, in particular p. 28 and Seq. https://law.unimelb.edu.au/_data/assets/pdf_file/0005/1687379/Edwards.pdf

¹⁶ UNGA, Universal Declaration of Human Rights, ('UDHR') 10 December 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.

¹⁷ European Court of Human Rights, Grand Chamber judgment N.D. and N.T. v. Spain, 13 February 2020, available at: <http://hudoc.echr.coe.int/eng-press?i=003-6638738-8816756>, paras. 168-171. See also 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>