

## UNHCR observations on the Order of the Cabinet of Ministers of the Republic of Latvia on the Declaration of Emergency Situation (No 518)

### I. Introduction

1. The Representation of the United Nations High Commissioner for Refugees (“UNHCR”) for the Nordic and Baltic Countries hereby provide its observations on the Order No 518 of the Cabinet of Ministers of the Republic of Latvia on the Declaration of Emergency Situation (hereinafter - the Order).
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>1</sup> Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,<sup>2</sup> whereas the 1951 Convention relating to the Status of Refugees<sup>3</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 (Article 35 of the 1951 Convention and Article II of the 1967 Protocol).<sup>4</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>5</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.

### II. General remarks

4. The Order was adopted on 10 August 2021 to address the sudden spike in the number of refugees and migrants arriving in irregular manner from Belarus to Latvia.<sup>6</sup> UNHCR notes that the Order does not introduce a permanent change to the asylum system in Latvia, but is temporary in nature, restricted to a specific

<sup>1</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>2</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>3</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>4</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>5</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>.

<sup>6</sup> Cabinet of the Ministers of the Republic of Latvia, *Order No 518 of the Cabinet of Ministers of the Republic of Latvia on the Declaration of Emergency Situation*, 10 August 2021, available at: <https://likumi.lv/ta/en/en/id/325266>.

geographical area, and was adopted to address the current situation at the border with Belarus.<sup>7</sup>

5. UNHCR has shared with the Latvian Government its initial observations to the Order in the letter dated 17 August 2021. The present Observations have been prepared with a view to elaborate on our initial comments. UNHCR provides these observations with the understanding that the Government is right now considering whether there is a need for an extension of the emergency.
6. UNHCR acknowledges the challenges faced by Latvia with respect to the situation at the border with Belarus, which have put great pressure on reception and asylum systems and shares the concerns of the Government about the dangers of politicizing asylum and migration. However, in UNHCR's view, the fundamental right to seek asylum and the non-derogable principle of non-refoulement should be observed also in times of emergency.
7. UNHCR considers that with strong collaboration and a joint commitment to uphold fundamental principles of refugee protection, the situation can be managed in a rights-based manner and in accordance with international law, humanitarian standards, and European human rights law and refugee protection. In this regard, UNHCR is ready to have further technical consultations with all relevant actors in Latvia and support the Government to find proper solution that people in need of international protection provided with effective access to asylum<sup>8</sup> and their asylum applications are considered through fair and fast asylum procedures.<sup>9</sup>

### III. Specific observations

#### *The protection against refoulement and the right to seek asylum cannot be derogated in times of emergency*

8. The Order precludes the possibility of seeking asylum for persons who attempt and/or succeed to cross the border irregularly and foresees that the State Border Guards, the National Armed Forces, and the State Police shall order the person to return to the country from which they have crossed and use all means at their disposal for that purpose. The right to seek asylum and the protection against refoulement, are therefore temporarily derogated in the four territories where the emergency declaration applies.<sup>10</sup>
9. While States have a sovereign right to manage and control their borders, and to define the rights of individuals to enter and stay, this prerogative is subject to international legal obligations, which States are required to respect in good faith by ensuring that national legislation, policies and practices are consistent with international law.<sup>11</sup>

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<sup>7</sup> The Declaration of Emergency introduces a three-month validity period for the emergency from 11 August to 10 November 2021 and specifies the four administrative territories for which the emergency has been declared, namely Ludza, Krāslava, Augšdaugava municipalities and the city of Daugavpils; available at: <https://bit.ly/3lvULJK>.

<sup>8</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>9</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.html>.

<sup>10</sup> Ibid 7.

<sup>11</sup> UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, September 2019, available at: <https://www.refworld.org/docid/5d8a255d4.html>.

10. UNHCR acknowledges that while in exceptional circumstances, certain rights may be derogated pursuant to Article 15 of the European Convention on Human Rights (ECHR),<sup>12</sup> this provision precludes derogations from the principle of non-refoulement enshrined in Article 2 and 3 of this Convention.<sup>13</sup> The European Court of Human Rights (ECtHR) has reiterated that States are in principle free to control the entry, residence and expulsion of aliens, however, this cannot justify a State's having recourse to practices which are not compatible with its obligations under the Convention.<sup>14</sup>
11. Moreover, the core of the 1951 Convention is the obligation of States to safeguard the principle of non-refoulement. Set out in Article 33 of the 1951 Convention, States have the obligation not to return or a expel "*in any manner whatsoever*" persons in need of international protection to any country where they face persecution or a reasonable possibility of serious harm.<sup>15</sup>
12. The expression "*in any manner whatsoever*" indicates that the concept of refoulement must be construed expansively. This is so because one of the foundational goals of international refugee law is to ensure that refugees who have sought safety abroad are not returned to a country in which they may face the very persecution, torture and/or the serious mistreatment that they escaped their home country to avoid.<sup>16</sup>
13. It is essential to recall that the fundamental right to seek and enjoy asylum is enshrined in Article 14(1) of the Universal Declaration of Human Rights<sup>17</sup> and further inherent in the 1951 Convention to which Latvia 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 (EU Charter) and further addressed in Article 3, 6 and 7 of the Asylum Procedures Directive (2013/32/ES) guaranteeing to each individual the right to apply for asylum within the territory, including at the border, and imposing an obligation on Member States to register and process such applications regardless of the manner in which the applicant has entered the country.
14. In view of the above, UNHCR's position is that a State which is presented with an asylum request at its borders is required to 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>18</sup>

<sup>12</sup> As of 12 October 2021, Latvia has not submitted a notification of the derogation to the Secretary General of the Council of Europe.

<sup>13</sup> European Court of Human Rights (ECtHR), *Guide on Article 15 of the European Convention on Human Rights*, updated on 30 April 2021, available at: [https://www.echr.coe.int/documents/Guide\\_Art\\_15\\_ENG.pdf](https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf).

<sup>14</sup> See ECtHR, *Georgia v Russia (I) Hirsi Jamaa and Others*, § 179, and *Sharifi and Others* § 224; European Court of Human Rights (ECtHR), *Grand Chamber judgment N.D. and N.T. v. Spain*, 13 February 2020, para. 209 and 232, available at: <https://bit.ly/2YkPwnj>.

<sup>15</sup> UN High Commissioner for Refugees (UNHCR), *Brief of the United Nations High Commissioner for Refugees before the Supreme Court of the United States in the case CHAD F. WOLF, ACTING SECRETARY OF HOMELAND SECURITY, et al., PETITIONERS, v. INNOVATION LAW LAB, et al., RESPONDENTS.*, 22 January 2021, No. 19-1212, <https://www.refworld.org/docid/600cdeb94.html>.

<sup>16</sup> UNHCR Executive Committee (ExCom), *Non-Refoulement*, No. 6 (XXVIII), U.N. Doc. No. 12A A/32/12/Add.1 (Oct. 12, 1977); UNHCR ExCom., *General Conclusion on International Protection*, No. 79 (XLVII), U.N. Doc. A/AC.96/878 (Oct. 11, 1996).

<sup>17</sup> UNGA, *Universal Declaration of Human Rights*, ('UDHR') 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>.

<sup>18</sup> *Ibid* 8, page 1-2; 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>. In *M.A. and others v. Lithuania*, the ECtHR found that "State jurisdiction over immigration and border control naturally implies State liability for any human rights violations occurring during the

Additionally, there is no possibility in EU law, 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.<sup>19</sup>

15. 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.<sup>20</sup>
16. In view of the above, UNHCR recommends that Latvia provides admission to its territory and access to asylum procedures for those willing to seek asylum at their borders, with full respect to the principle of non-refoulement, including in times of emergency.

### *The right to seek asylum does not discriminate based on the mode of arrival*

17. The Order explicitly specifies in its part six, that asylum applications from persons crossing irregularly should not be accepted by border guards and other authorities located in the four administrative territories. There is no exception foreseen in the order to this provision.
18. 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<sup>21</sup>.
19. 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.<sup>22</sup>

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performance of this control".<sup>[60]</sup> In other words, recognition of a State's jurisdiction at its borders goes hand-in-hand with the applicability of human-rights treaties, which includes "affirmative measures to guarantee that individuals subject to their jurisdiction can exercise and enjoy [their] rights".<sup>[61]</sup> § 19, available at: <http://hudoc.echr.coe.int/eng?i=001-188267>.

<sup>19</sup> The Asylum Procedures Directive (Directive 2013/32/EU) requires Member States to register every application made on their territory, including at the border or in transit zones, within 3 days (and maximum 10 days in the case of a large number of simultaneous applications), see Article 6 APD. Once made, the examination of the application must be concluded as soon as possible, without prejudice to an 'adequate and complete examination' see Recital 18 and Article 31(2) APD as well as settled CJEU case law (see e.g. the cases of C-36/20 PPU, para. 74; C-921/19, para. 48; C-556/17, para. 53; or C-585/16, para. 109). Irregular arrival is not a ground for suspension of registration.

<sup>20</sup> 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>.

<sup>21</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)*, 16 September 2021, <https://www.refworld.org/docid/61434b484.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, <https://www.refworld.org/docid/615322844.html>.

<sup>22</sup> 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](http://www.refworld.org/cases.GBR_HL.4835401f2.html). *Mahamad Arwah Abdi and Another v Minister of Home Affairs and*

20. 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 unavoidable reality for refugees who seek to invoke the international protection afforded to them under the 1951 Convention.<sup>23</sup>
21. In view of the above, UNHCR recommends that the Order is amended so that individuals crossing irregularly and expressing intention to seek asylum are granted admission to Latvian territory and access to asylum procedures regardless of their mode of entry and in full compliance with the principle of non-refoulement.

*The prerogative of the State to grant access on humanitarian basis should not undermine the right to seek asylum*

22. UNHCR wishes to acknowledge that some 44 persons have been exceptionally granted access to territory since 11 August 2021.<sup>24</sup> Their admission has, however, been agreed upon on exceptional and humanitarian basis, and they have not been allowed to apply for asylum.
23. 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.
24. 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>25</sup>
25. 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>26</sup> The Court of Justice of the European Union (“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

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others, Case No: 734/2010, South Africa: Supreme Court of Appeal, 15 February 2011, para. 22, <http://www.refworld.org/cases,SASCA,50239bb62.html>.

<sup>23</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>24</sup> LSM.LV Public broadcasting of Latvia, *Six detained for illegally crossing Latvia-Belarus border*, 12 October 2021, available at: <https://bit.ly/30rfyWF>.

<sup>25</sup> *UNHCR - Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, EC/50/SC/CRP.18.

<sup>26</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.

protection.<sup>27</sup> In addition, as soon as a request for protection is made at the borders, this request must be registered within maximum six working days, and Member States have an obligation to facilitate access to the asylum procedure.<sup>28</sup>

### *The indiscriminate use of force to deter arrivals shall be avoided*

26. The Order introduces a specific provision whereby the State Border Guard, the National Army, and the Police are authorized to use *all means and procedures*, including physical force, to prevent persons from crossing the border in an irregular manner.<sup>29</sup> There is no reference in the Order to the use of force as last resort when it is justified, necessary and proportionate.
27. Excessive use of force in areas that fall under the scope of EU law may result in violations of Article 2 and 3 of the ECHR, and Article 1 and 4 of the EU Charter. Under the ECHR, use of force is allowed only as a last resort, if it is necessary, proportionate and justified to achieve a legitimate aim.<sup>30</sup> States are obliged to protect people against loss of life and inhuman treatment or punishment. This includes protection from disproportionate violence.<sup>31</sup>
28. The ECtHR has also indicated that States have positive obligations to protect individuals at the borders against loss of life or serious injury, including from third parties or from themselves, as well as to provide access to medical services. These obligations encompass a duty to ensure that the legal framework and existing administrative procedures foresee provisions to prevent offences, sanctions to deter them, and allow for prompt and independent investigation in case of allegations of serious harm perpetrated by State actors.<sup>32</sup>
29. UNHCR would like to stress that States shall refrain from using violence against asylum-seekers for the sole reason of irregular crossing, despite of their international and humanitarian needs, and to prevent and/or deter their arrival into the Latvian territory. UNHCR further recommends that the Order is amended so that considerations of necessity and proportionality in the context of managing mixed movements are foreseen.

## **IV. Conclusion**

30. UNHCR strongly encourages the Cabinet of Ministers and the Ministry of the Interior to give due consideration to these observations and amend the Order accordingly. UNHCR stands ready to engage in constructive dialogue and remains at your disposal to offer expertise and support in order to address the current situation, in line with international law and refugee protection standards.

### ***UNHCR, 13 October 2021***

<sup>27</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).

<sup>28</sup> C-36/20 PPU, para. 63 and 76.

<sup>29</sup> Ibid 7.

<sup>30</sup> ECtHR, *McCann and Others v. the United Kingdom [GC]*, No. 18984/91, 27 September 1995, para. 149, [European Database of Asylum Law \(asylumlawdatabase.eu\)](https://www.echr.coe.int/eng?i=001-203840).

<sup>31</sup> Fundamental Rights Agency (FRA), *Migration: Fundamental rights issues at land borders (europa.eu)*, 2020.

<sup>32</sup> ECtHR, *Osman v. the United Kingdom*, No. 23452/94, 28 October 1998; ECtHR, *Mastromatteo v. Italy [GC]*, No. 37703/97, 24 October 2002, paras. 72–73; ECtHR, *Finogenov and Others v. Russia*, Nos. 18299/03 and 27311/03, 20 December 2011, para. 209, available at: [https://www.echr.coe.int/documents/handbook\\_asylum\\_eng.pdf](https://www.echr.coe.int/documents/handbook_asylum_eng.pdf); and *M.K. and others v. Poland*, see § 183-184; available at: <http://hudoc.echr.coe.int/eng?i=001-203840>.