



**UNHCR**

United Nations High Commissioner for Refugees  
Haut Commissariat des Nations Unies pour les réfugiés

**Comments by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the Law Proposal Prop. 2015/16:67 concerning particular measures in situation of serious threat to the public order or the internal security of the country (*Särskilda åtgärder vid allvarlig fara för den allmänna ordningen eller den inre säkerheten i landet*).**

**I. Introduction**

1. The UNHCR Regional Representation for Northern Europe (RRNE) is hereby submitting comments to the Law Proposal Prop. 2015/16:67, which was presented to the Parliament on 9 December 2015 (hereafter “Law Proposal”). UNHCR was not provided with the opportunity to comment on the draft Law Proposal, which was circulated for comments earlier in December, but would like to take the opportunity to present the Government with its comments, in view of the agency’s mandate.
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> According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”.<sup>2</sup> 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 Relating to the Status of Refugees (hereafter ‘1951 Convention’). Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereafter “UNHCR Handbook”) and subsequent Guidelines on International Protection.<sup>3</sup>

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<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: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628> (hereafter “UNHCR Statute”).

<sup>2</sup> *Ibid.*, paragraph 8(a).

<sup>3</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

This supervisory responsibility is reiterated in Article 35 of the 1951 Convention, and in Article II of the 1967 Protocol relating to the Status of Refugees.<sup>4</sup>

3. UNHCR's supervisory responsibility has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union ("TFEU"),<sup>5</sup> as well as in Declaration 17 to the Treaty of Amsterdam, which provides that "*consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy*".<sup>6</sup>

## II. The Proposal

4. UNHCR notes that Law Proposal Prop. 2015/16:67 aims to provide the Government, or the authority which the Government designates, with the authority to introduce particular measures in situations where a serious threat to the public order or the internal security of the country has been identified. According to the Law Proposal, in such situations, the Government would be authorized to issue instructions about control of identity documents on public transport carriers to Sweden from another Schengen country. The Government would further be authorized to issue instructions about supervision of such controls, as well as introduce pecuniary penalties for failure to comply with the instructions about control of identity.
5. The Law Proposal is not explicit on how these measures should be carried out in practice, instead the Law Proposal authorizes the Government to regulate the detailed implementation of the proposed law through the issuance of Government ordinances or other instructions as appropriate.
6. In the Law Proposal, the Government explains that the reason behind the proposal is that due to the large influx of asylum seekers to Sweden in recent months, the Swedish society has been exposed to such serious strain on its functionality, that there is a serious threat to public order and security, and the internal security of the country. Therefore, there is a need to adopt temporary measures to address this threat.
7. The Government maintains in the Law Proposal that the proposed measures shall not be carried out in contravention of Sweden's obligations under EU law and the 1951 Convention. UNHCR welcomes the explicit reference to the 1951 Convention. However, the Government also states that it should be possible to take such measures, even if they will have the effect of preventing would be asylum-seekers from entering Sweden. The Government elaborates that the EU common asylum policy is based on the idea that an asylum-seeker shall apply for

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<sup>4</sup> According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the 1951 Convention".

<sup>5</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

<sup>6</sup> European Union, *Declaration on Article 73k of the Treaty establishing the European Community*, OJ C 340/134 of 10.11.1997, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17: EN:HTML>.

asylum in the first safe country. Consequently, the proposal would not be in breach of the right to asylum, the implication being that the person would have the possibility to apply for asylum in a safe country before arriving in Sweden.

8. While not detailed in the Law Proposal, UNHCR understands that the implementation of the proposed measures, will, in effect, impose an obligation on all persons wishing to enter Sweden, including those wishing to seek asylum, to be in possession of valid travel documents. UNHCR further understands that the measures would impose carrier sanctions on public transport companies for failure to control that every passenger is in possession of valid travel documents and the right to enter Sweden. While not specifically stated in the Law Proposal, UNHCR understands that implementation of these measures will mean that persons will not be allowed to board trains, busses and ferries heading for Sweden unless they are in possession of a valid travel document and visa for Sweden, even if they express an intention to apply for asylum in Sweden.
9. UNHCR understands the challenges on the Swedish society, which have brought about these proposals, and fully shares the Swedish Government's position that there must be a more fair and equal distribution of asylum-seekers among the European States, not least in the Nordic region. It is in this context that UNHCR submits its comments on the Law Proposal as outlined below.

### III. Observations

10. The Schengen Borders Code allows for the temporary introduction of border controls at internal borders as a last resort, if there is a serious threat to public policy or internal security, in accordance with its Articles 24, 25 and 26.<sup>7</sup> However, the control at the internal borders should not affect the rights of refugees and persons requesting international protection, as, according to the Code, the refusal of entry applies "without prejudice to the application of special provisions concerning the right to asylum and to international obligations".<sup>8</sup>
11. Sanctions against transport companies for carrying undocumented or inadequately documented persons have been introduced by many European States since the 1980s. UNHCR, at the time, acknowledged that States have a legitimate interest in controlling irregular migration and a right to do so through various measures, including visa requirements, airport screening and sanctions imposed on airlines and other group carriers for transporting irregular migrants.<sup>9</sup> However, if States have recourse to carrier sanctions they should be implemented in a manner, which is consistent with international human rights and refugee protection principles, notably Article 14 of the Universal Declaration of

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<sup>7</sup> European Union: Council of the European Union, *Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, 15 March 2006, OJ L. 105/1-105/32; 13.4.2006, (EC) No 562/2006, available at: <http://www.refworld.org/docid/47dfb0525.html>.

<sup>8</sup> Schengen Borders Code, Article 13 in conjunction with Article 28. See also Articles 3b, 5(1) and 5(4)c.

<sup>9</sup> UNHCR, *UNHCR Position: Visa Requirements and Carrier Sanctions*, September 1995, available at: <http://www.refworld.org/docid/3ae6b33a10.html>.

Human Rights<sup>10</sup> and in a way which is in keeping with the intention of Articles 31 and 33 of the 1951 Convention. Hence, the fundamental concern which UNHCR has consistently voiced on this issue refers to the danger that measures such as carrier sanctions, aimed at curbing irregular migration, may prevent individuals in need of international protection from entering and seeking asylum in prospective countries.

12. To ensure access to territory and asylum procedures, carrier sanctions should not apply to asylum-seekers who by the nature of having fled their countries of origin, sometimes in haste, may lack the necessary ID and travel documents. By requiring a refugee to obtain proper travel documentation before fleeing his or her country to seek asylum in another country, States overlook the very problems which give rise to the need for refugee protection and, in effect, deny the possibility of asylum to some refugees. This would be inconsistent with Article 31 of the Convention, which provides that refugees should not be penalised for irregular entry.<sup>11</sup> The “coming directly” requirement of Article 31 does not refer to refugees who have merely transited through other countries, only those who have stopped and obtained protection in another State already.
13. It needs also to be stressed that airlines and other carrier personnel are not authorised by international law to either make asylum determinations on behalf of States or to assume immigration control responsibilities. They are neither qualified to identify cases which might come within the purview of international refugee instruments, nor inclined -- in light of penalties on their corporate employer -- to permit transport of those to whom the State might otherwise extend protection. UNHCR is thus of the view that the proposed introduction of carrier sanctions within the internal borders of the Schengen area unduly attempts to shift the responsibility for border management from the authorities competent to the transport companies.
14. UNHCR agrees that while everyone has the right to seek asylum from persecution, there is no unfettered right to choose one’s country of asylum.<sup>12</sup> The intentions of an asylum-seeker, however, ought to be taken into account to the extent possible.<sup>13</sup> The 1951 Convention gives States a degree of flexibility to insist that asylum-seekers make their asylum applications in the first safe country of asylum they arrive to, however, there is no absolute rule that they must always apply in a safe first country of asylum.

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

<sup>11</sup> Article 31(1) of the 1951 Convention provides that “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

<sup>12</sup> UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(a), available at: <http://www.refworld.org/docid/51af82794.html>.

<sup>13</sup> UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>, para. 11; UNHCR Executive Committee Conclusion No. 15 (XXX) (Refugees without an Asylum Country) (1979), paras. (h)(iii) and (h)(iv).

15. The European Union Dublin III Regulation<sup>14</sup> establishes criteria and mechanisms for determining which Member State is responsible for examining an application for international protection. One of its founding principles is the principle of the first country of asylum. The national asylum system accordingly provides for a procedure for determining which country within the EU is responsible for examining an asylum application and for the transfer of applicants to the country determined to be responsible.
16. UNHCR would like reiterate the importance of adhering to the Dublin system as the established manner for allocating responsibility within the EU for the examination of applications for international protection. In this respect, UNHCR wishes to draw the attention to the EU Asylum Procedures Directive (recast),<sup>15</sup> which contains provisions for conducting admissibility procedures at the border in due compliance with procedural guarantees, including the right to remain.<sup>16</sup> UNHCR thus appeals to Sweden to not resort to mechanisms such as border controls and carrier sanctions as a way to shift the responsibility to other countries through which the asylum-seeker may have passed. In order to exercise their right to seek asylum, asylum-seekers need to have access to territory and for these procedures to be fair and efficient.
17. In summary, in UNHCR's view, the introduction of internal border controls, ID checks coupled with carrier sanctions could have the effect of preventing individuals from exercising the right to seek asylum. Such measures risk being inconsistent with the obligations of Member States according to the Schengen Border Code and other international obligations, including the Universal Declaration of Human Rights, the 1951 Convention and regional instruments such as the EU Charter of Fundamental Human Rights<sup>17</sup> and the Asylum Procedures Directive (recast). While acknowledging the challenges currently faced in Europe in establishing a functioning distribution key, including operational hotspots, and that the Dublin system is not fully working the way it is foreseen, UNHCR urges the Government of Sweden, as a leading country in Europe in upholding the right to asylum, to adhere to existing mechanisms and to not contribute to the further erosion of the Common European Asylum System.

## **UNHCR Regional Representation for Northern Europe**

10 December 2015

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<sup>14</sup> European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU) No 604/2013, available at: <http://www.refworld.org/docid/51d298f04.html>.

<sup>15</sup> European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, available at: <http://www.refworld.org/docid/51d29b224.html>.

<sup>16</sup> *Ibid.*, Article 43.

<sup>17</sup> European Union: *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html>, Article 18.