

UNHCR observations on the Draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No XIVP-2385)¹ and the Draft Amendments to the Law of the Republic of Lithuania on the State Border and its Protection (No XIVP-2383)²

I. Introduction

1. The United Nations High Commissioner for Refugees (UNHCR) Representation for the Nordic and Baltic Countries would like to use the opportunity to provide its observations on the draft amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No XIVP-2385) (hereinafter – the draft Amendments to the Aliens Law) and the draft Amendments to the Law of the Republic of Lithuania on the State Border and its Protection (No XIVP-2383) (hereinafter – the draft Amendments to the State Border Law).
2. UNHCR has a direct interest in legislative 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.³ Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,⁴ whereas the 1951 Convention relating to the Status of Refugees⁵ 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).⁶
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”).⁷ UNHCR also fulfils its supervisory responsibility by

¹ Government of the Republic of Lithuania, Resolution No 21 of 11 January 2023, *Draft Law of the Republic of Lithuania amending articles 67, 140⁸ and 140¹² and repealing articles 140¹¹ and 140¹⁷ of Law No IX-2206 on the Legal Status of Aliens*, available at: <https://bit.ly/3YxeAjM>.

² Government of the Republic of Lithuania, Resolution of No 20 of 11 January 2023, *Draft Law of the Republic of Lithuania amending sections I and III and articles 4, 10, 16, 18, 23 and 26 of Law No VIII-1666 on the State Border and Protection Thereof and its supplementation with Article 231 and a new Section IX*, available at: <https://bit.ly/3JhK3SC>.

³ 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”).

⁴ *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.

⁵ 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”.

⁶ 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.

⁷ 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>.

providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

General remarks

4. On 11 January 2023, the Government of the Republic of Lithuania approved the draft Amendments to the State Border Law and the draft Amendments to the Aliens Law. Both bills are currently pending adoption by the Seimas (Parliament) of the Republic of Lithuania.
5. According to their Explanatory Note,⁸ the draft Amendments to the Aliens Law have been developed to implement the judgement of the Court of Justice of the European Union (hereinafter – CJEU) of 30 June 2022 in case C-72/22 PPU *M.A. v Valstybės sienos apsaugos tarnyba* (hereinafter – case C-72/22 PPU). This bill, therefore, aims at bringing the Aliens Law in conformity with the Asylum Procedures Directive (2013/32/EU)⁹ and the Reception Conditions Directive (2013/33/EU).¹⁰
6. UNHCR notes with appreciation that the draft Amendments to the Aliens Law reinstate the obligation to provide the most favorable possibilities (*kuo palankesnės galimybės*) for foreigners present on the territory of Lithuania to lodge an asylum application with the Migration Department or the State Border Guard Service (SBGS), regardless of their mode of entry and in full compliance with the principle of *non-refoulement*. It is also important that the proposed amendments will remove irregular border crossing from among possible grounds for detention of asylum-seekers.
7. UNHCR acknowledges that the purpose of the draft Amendments to the State Border Law is to address practical challenges SBGS faces in ensuring effective protection and control of the state border, preventing abuse of border management and asylum systems, and effectively managing mixed migration flows.¹¹ However, UNHCR is concerned that the draft Amendments to the State Border Law continue to provide for the possibility of refusing entry into the territory of the Republic of Lithuania of individuals crossing the border irregularly who may be in need of international protection, while an emergency is in effect.
8. In UNHCR’s view, both bills are directly relevant to the protection of refugees and require alignment with international and regional refugee and human rights law. It is important also to reiterate that efficient border procedures that maintain legal and

⁸ Government of the Republic of Lithuania (Government of Lithuania), *Explanatory Note Accompanying the draft Amendments to the Law of the Republic of Lithuania on Legal Status of Aliens (No XIVP-2385)*, available at: <https://bit.ly/3SS0Z5v>.

⁹ 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: <https://www.refworld.org/docid/51d29b224.html>.

¹⁰ European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: <https://www.refworld.org/docid/51d29db54.html>.

¹¹ Government of Lithuania, *Explanatory Note Accompanying the draft Amendments to the Law of the Republic of Lithuania on the State Border and its Protection (No XIVP-2383)*, page 2, available at: <https://bit.ly/3KXThF0>.

procedural safeguards and adhere to international and EU law, including the principle of *non-refoulement*, are possible.¹²

9. UNHCR stands ready to engage in further consultations with the Lithuanian authorities and provide technical assistance to ensure that the draft Amendments are in full accordance with Lithuania's 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.

II. Specific observations

The right to seek asylum is not dependent on the mode of arrival

10. UNHCR welcomes that the proposed amendments to the Aliens Law (Article 140¹²(1), in conjunction with current Article 140¹¹ of the Aliens Law, provide for admission to the territory of Lithuania and access to asylum procedures for any person who seeks asylum at the border or in detention, regardless of their mode of entry and in full compliance with the principle of *non-refoulement*.
11. At the same time, proposed Article 4(13) of the State Border Law provides that in the event of an emergency caused by mass arrival at the border, and in order to preserve national security and public order, the Government of Lithuania may adopt a decision that foreigners who intend to cross or have crossed the state border outside border crossing points or in violation of the established border crossing procedure shall not be admitted into the territory of Lithuania. The proposed Article requires that such provisions are applied in respect of foreigners on an individual basis and allows for exceptions where foreigners are fleeing military aggression or persecution or should be admitted on humanitarian grounds. In addition, the draft provision stipulates that foreigners who have crossed the state border outside border crossing points or in violation of border crossing procedures and are present in the border zone, are not deemed to be on the territory of Lithuania, but on the basis of an individual needs assessment, shall receive any required urgent medical or humanitarian assistance.¹³

¹² UNHCR, *Practical considerations for fair and fast border procedures and solidarity in the European Union*, 15 October 2020, page 1, available at: <https://www.refworld.org/docid/5f8838974.html>.

¹³ Article 2(2) of the draft Amendments to the State Border Law, to supplement Article 4 with paragraph 13: Article 4(13):

"In the event of a declaration of an emergency due to a mass influx of aliens, and with a view to safeguarding the national security and public order of the Republic of Lithuania, the Government [...] may adopt a decision that aliens who intend to cross or have crossed the state border in locations other than those specifically designated for that purpose or in violation of the established border crossing procedure in locations specifically designated for that purpose shall not be admitted (neįleidžiami) into the territory of the Republic of Lithuania (this provision shall be applied individually in respect of each such alien and shall not be applied in cases where it is intended to ensure access to the territory of the Republic of Lithuania for aliens fleeing military aggression or persecution or where it is intended to ensure access to the territory of the Republic of Lithuania for humanitarian purposes). Aliens who have crossed the state border in locations other than those specifically designated for the purpose or in violation of the established border crossing procedure in locations specifically designated for the purpose and are present in the border zone (pasienio ruožas) are not deemed to be on the territory of the Republic of Lithuania. With respect to aliens who are not admitted into the territory of the Republic of Lithuania, an assessment of assistance needs shall be conducted and, where assistance needs are established, the aliens concerned shall receive the required urgent medical or humanitarian assistance. The Commander of the State Border Guard Service shall approve the procedure for the implementation of the Government decision referred to in the present paragraph and assessment of assistance needs."

12. UNHCR considers that the draft Amendments to the Aliens Law may be undermined by the proposed amendments to the State Border Law. In UNHCR’s view, the proposed provision introduces a special procedure to be applied in an emergency caused by mass arrival at the border, which will authorize border guards to refuse admission to the territory of persons who have entered irregularly. Considering the manner in which similar provisions are implemented at present,¹⁴ the proposed wording implies that persons who may be in need of international protection will be at risk of pushback practices.
13. The procedures envisaged by Article 4(13) are yet to be defined separately. UNHCR notes that all individuals expressing a wish to seek international protection must be admitted to territory and referred to asylum procedures, without further prior confirmation or assessment of the fact that they are ‘*fleeing military aggression*’ or ‘*persecution*’. Furthermore, UNHCR wishes to emphasize that individual procedures should be supported by important procedural safeguards to ensure effective and fast access of asylum-seekers to the asylum procedure and the examination of asylum claims.

Non-refoulement is a fundamental non-derogable principle of international refugee protection

14. The Explanatory Note accompanying the draft Amendments to the State Border Law *inter alia* maintains that proposed Article 4(13) is compatible with Article 4 of Protocol No 4 to the European Convention on Human Rights (hereinafter – ECHR), as interpreted by the European Court of Human Rights (hereinafter – ECtHR) in cases *N.D. and N.T. v. Spain*¹⁵ and *A.A. and Others v. North Macedonia*.¹⁶ In the note, it is also emphasized that Article 15 of ECHR permits derogations in time of war or other public emergency while Article 33(2) of the 1951 Convention provides for an exception to the principle of *non-refoulement* “*where there are reasonable grounds for regarding refugees a danger to the security of the country in which they are.*”¹⁷
15. In this respect, UNHCR would like to reiterate that the principle of *non-refoulement* constitutes an essential and non-derogable component of international refugee protection as provided in the 1951 Convention and in international and regional human rights instruments and international customary law and restated in jurisprudence.¹⁸ The prohibition of *refoulement* applies to any form of forcible removal, including deportation, expulsion, informal transfers, pushback practices

¹⁴ Government of Lithuania, *Resolution No XIV-1789 of 14 March 2023 of the Seimas of the Republic of Lithuania on the Declaration of a State of Emergency*, Article 2(1)(2), available at: <https://bit.ly/3Jm3D0i>; and Decision of the Minister of the Interior – Head of the Emergency Operations No 10V-20 of 2 August 2021, available at: <https://bit.ly/3YHJeqZ>.

¹⁵ Council of Europe: European Court of Human Rights (ECtHR), *N.D. and N.T. v. Spain (Applications nos. 8675/15 and 8697/15) (Grand Chamber)*, ECLI: CE: ECHR:2020:0213JUD000867515, 13 February 2020, available at: <https://www.refworld.org/cases,ECHR,5e4691d54.html>.

¹⁶ ECtHR, *A.A. and Others v. North Macedonia*, Nos. 55798/16, 55808/16, 55817/16, 55820/16 and 55823/16, 5 April 2022, available at: <https://bit.ly/3L73Fu2>.

¹⁷ Government of Lithuania, *Explanatory Note to the draft Amendments to the State Border Law*, point 2.6.

¹⁸ UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of R.A. and Others v. Poland (Appl. No. 42120/21) before the European Court of Human Rights*, February 2022, available at: <https://www.refworld.org/docid/621ccfde4.html>.

and non-admission at the border.¹⁹ It 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*).²⁰

16. UNHCR also considers it important to recall that *non-refoulement* cannot be derogated from even in times of emergency or in situations where a third country instrumentalizes irregular migratory flows.²¹ Neither Article 33(2) of 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*.²² Upholding the principle of *non-refoulement* requires allowing an asylum-seeker who has entered Lithuania irregularly to remain at least on a temporary basis to have their asylum application examined, as the right to seek asylum and the *non-refoulement* principle would otherwise be rendered meaningless.²³

Non-refoulement obligations apply in all situations where the State exercises jurisdiction

17. UNHCR further notes that pursuant to proposed Article 4(13) of the State Border Law, persons who arrive irregularly and are present in the border zone (*pasienio ruožas*) are not deemed to be on the territory of Lithuania. In this respect, UNHCR wishes to underline that irrespective of any legal fiction of non-entry, States remain bound by their obligations under the 1951 Convention, international human rights instruments, and the EU Charter of Fundamental Rights.²⁴ In particular, the prohibition of *refoulement* applies wherever a state exercises jurisdiction, including at the border.²⁵ It follows that asylum-seekers present in the border zone must enjoy full access to rights and guarantees conferred on them by international refugee and human rights law and EU asylum legislation. This includes the right to remain on the territory pending the examination of their asylum applications.
18. UNHCR is concerned that the draft Amendments to the State Border Law establish a fiction of non-entry, which may prevent asylum-seekers from exercising the right to seek asylum and lodging asylum applications with the State Border Guard Service on the territory of Lithuania, as provided for in proposed Article 140¹² of the Aliens Law. This guarantee may, therefore, become meaningless, as the persons concerned would be subjected to pushback practices in the first place, which may, consequently, lead to violation of the principle of *non-refoulement*. UNHCR

¹⁹ 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, para. 7, available at <https://www.refworld.org/docid/45f17a1a4.html>.

²⁰ UNHCR, "UNHCR's submission in the case of *R.A. and Others v. Poland*," para. 3.1.2.

²¹ UNHCR, *UNHCR's Recommendations for the Swedish and Spanish Presidencies of the Council of the European Union (EU)*, January 2023, page 8, available at: <https://www.refworld.org/docid/63bd99904.html>.

²² UNHCR, "UNHCR's submission in the case of *R.A. and Others v. Poland*," para. 3.1.8.

²³ UNHCR, "Practical considerations for fair and fast border procedures," page 1.

²⁴ UNHCR, "UNHCR's Recommendations for the Swedish and Spanish Presidencies," page 7-8.

²⁵ UNHCR, "UNHCR's submission in the case of *R.A. and Others v. Poland*," para. 3.1.5.

suggests considering instead the establishment of protection-sensitive border procedures that maintain legal and procedural safeguards and adhere to international and EU law, including the principle of *non-refoulement*.²⁶

19. In view of the above, UNHCR recommends that proposed Article 4(13) of the State Border Law be revised to ensure its consistency with proposed Article 140¹² of the Aliens Law and to guarantee that all persons in need of international protection can apply for asylum without any delay, in accordance with international, EU and national refugee legislation.

Non-penalization for irregular border crossing and detention safeguards during border procedures

20. UNHCR commends that in accordance with UNHCR's recommendations²⁷ and CJEU decision in case C-72/22 PPU,²⁸ the draft Amendments to the Aliens Law propose removing irregular crossing of the border from the list of grounds for detention of asylum-seekers. At the same time, UNHCR notes with concern that the draft Amendments to the Aliens Law still retain the emergency provisions, which allow for the placement of asylum-seekers in closed accommodation sites without granting them the right to move freely within the territory of Lithuania.²⁹ Pursuant to Article 140⁸(5) of the Aliens Law, if emergency provisions apply, asylum-seekers are required to stay in closed accommodation sites for up to 6 months.
21. In this regard, UNHCR wishes to refer to case C-72/22 PPU, where the CJEU emphasized that while the mandatory stay of asylum-seekers in closed accommodation sites is not formally considered detention under Lithuanian law, such a stay does amount to detention within the meaning of Article 2(h) of the Reception Conditions Directive, notably because the person concerned "*could not go beyond the centre's perimeter without authorization or unaccompanied.*"³⁰
22. In UNHCR's previous comments on the emergency provisions of the Aliens Law, UNHCR likewise underlined that the movement restrictions foreseen in emergency provisions governing the border procedure amount to detention. It concluded that "*the intensity and length of the movement restrictions foreseen in the draft Amendments, coupled with the limited safeguards available are at variance with*

²⁶ UNHCR, "Practical considerations for fair and fast border procedures," page 2.

²⁷ 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, paras 26-29, available at: <https://www.refworld.org/docid/610d26971a1.html>.

²⁸ Court of Justice of the European Union (CJEU), *M.A. v Valstybės sienos apsaugos tarnyba, Request for a preliminary ruling from the Lietuvos vyriausybės administracinis teismas, Case C-72/22 PPU*, ECLI:EU:C:2022:505, 30 June 2022, para. 84, available at: <https://www.refworld.org/cases,ECJ,62d03bce4.html>.

²⁹ Proposed Article 140⁸(3):

"Until a decision to admit an asylum applicant into the Republic of Lithuania has been taken, asylum applicants who have applied for asylum at border crossing points, transit zones or following an illegal border crossing shall be temporarily accommodated by the State Border Guard Service at border crossing points, in transit zones, at the State Border Guard Service, the Refugee Reception Centre or any other accommodation centres, accommodation places, accommodation premises, temporary housing or other places suitable for the purpose, without granting them the right to move freely within the territory of the Republic of Lithuania [...]"

³⁰ CJEU, "*M.A. v Valstybės sienos apsaugos tarnyba, Case C-72/22 PPU*," paras 40–42.

international law and are likely to create unnecessary inefficiencies and hurdles in the asylum procedures.”³¹

23. UNHCR, therefore, recommends considering a revision of Article 140⁸ of the Aliens Law with a view to bringing it in conformity with international and EU law and standards. To that end, Article 140⁸ of the Aliens Law should include requisite procedural safeguards, such as individual assessments, necessity and proportionality requirements, alternatives to detention, a maximum four-week time limit for mandatory stays in closed accommodation sites, and access to legal aid and judicial review.

UNHCR, 20 March 2023

³¹ 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, para. 26, available at: <https://www.refworld.org/docid/615322844.html>.