



**Submission by the Office of the United Nations High Commissioner for Refugees
in the case of *Iman Tashaeva v. Poland*
before the Regional Administrative Court in Warsaw**

1. Introduction*

1.1. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for the problem of refugees.¹ Moreover, UNHCR is responsible for supervising the application of international conventions for the protection of refugees.² Pursuant to Section 25 of the Law on Administrative Court Procedures and given its mandate and recognized expertise, UNHCR requested leave to intervene as a third party before the Regional Administrative Court in Warsaw ('the Court') in the case of *Iman Tashaeva v. Poland* as it raises important legal issues regarding the *non-refoulement* of asylum-seekers.

1.2. In this submission, UNHCR provides its interpretation of the relevant principles of international refugee and human rights law governing these issues in order to assist the assessment of the Court.

2. Principles of international refugee and human rights law regarding *non-refoulement* of asylum-seekers at the border of asylum-seekers

2.1. The right to seek and enjoy asylum, derives from Article 14(1) of the Universal Declaration of Human Rights, and is supported in particular by the legal framework of the 1951 Convention and its 1967 Protocol, to which Poland is a State party. Central to the realization of the right to seek asylum is the obligation of States not to expel or return (*refouler*) a person to territories where his or her life or freedom would be threatened. *Non-refoulement* is a cardinal protection principle, most prominently expressed in Article 33 of the 1951 Convention and recognized as a norm of customary international law.³ The non-refoulement obligation is also restated in international and European human rights law.⁴

* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, <http://www.refworld.org/docid/3ae6b3902.html>.

¹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1, <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

² *Ibid.* para. 8(a).

³ See, in particular, UNHCR, Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09, para. 4, <http://www.unhcr.org/refworld/docid/3d60f5557.html>; ExCom Conclusions No. 15(XXX) – 1979, (b); 17 (XXXI) – 1980 (b); 25 (XXXIII) – 1982, (b); 68 (XLIII) – 1992, (f). See also, Concurring Opinion of Judge Pinto de Albuquerque in European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, p. 67, <http://www.unhcr.org/refworld/docid/4f4507942.html>; UNHCR, Note on the Principle of Non-Refoulement, November 1997, <http://www.unhcr.org/refworld/docid/438c6d972.html>; and UNHCR, The Scope and Content of the Principle of Non-Refoulement (Opinion) [Global Consultations on International Protection/Second Track], 20 June 2001, paras. 193-253, <http://www.unhcr.org/refworld/docid/3b3702b15.html>.

⁴ More specifically, States are bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life, or torture or other cruel, inhuman or degrading treatment or punishment. See also the jurisprudence of the ECtHR which has held that *non-refoulement* is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment, including, in particular, the Court's judgment in *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, para. 114, <http://www.refworld.org/docid/4f4507942.html>.

2.2. Importantly, given that a person is a refugee within the meaning of the 1951 Convention as soon as s/he fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature.⁵ It follows that the prohibition of refoulement applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined.⁶

2.3. The prohibition on non-refoulement applies wherever a State exercises jurisdiction.⁷ Consequently, States have a duty to establish, prior to implementing any removal measure, including at the border, that persons under their jurisdiction are not at risk of such harm covered by the prohibition on refoulement.⁸ If such a risk exists, the State is precluded from forcibly removing the persons concerned, and shall not deny their entry or admission, but shall ensure protection from refoulement.⁹ The Executive Committee of the High Commissioner's Programme (ExCom) has confirmed that the obligation includes a duty not to reject an asylum-seeker at the frontier.¹⁰ Moreover, there is no single correct formula or phrase for how the fear of persecution needs to be expressed.¹¹ States have a duty to inquire into the reasons an individual seeks to enter the territory and to keep the situation in the possible State of return under deliberative review, in order to conform to that obligation.¹²

2.4. Furthermore, the prohibition on refoulement applies not only with respect to return to the country of origin but also with regard 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

⁵ UNHCR Handbook, para. 28. See also, Executive Committee of the High Commissioner's Programme (ExCom), Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 79 (XLVII), 1996, para. (j); ExCom Conclusion No. 81 (XLVII), 1997, para. (i), <http://www.unhcr.org/pages/49e6e6dd6.html>. See also, Note on International Protection (submitted by the High Commissioner), A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>; 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, January 2007, paras. 26-31, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

⁶ *Ibid.*.

⁷ See, e.g., UN Human Rights Committee General Comment No. 31, Nature of the General Legal Obligations imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para. 10, <http://www.refworld.org/docid/478b26ae2.html>; Inter-American Court of Human Rights, Advisory Opinion OC-21/14, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, 19 August 2014, para. 61, <http://www.refworld.org/docid/54129c854.html>; 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, paras. 24, 26, 32-43, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>; UNHCR, Submission by UNHCR in the case of Hirsi and Others v. Italy, March 2010, paras. 4(1)(1)-4(2)(3), <http://www.unhcr.org/refworld/docid/4b97778d2.html>. UNHCR, Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR, 17 February 2012, para. 2(4), <http://www.refworld.org/docid/4f4c959f2.html>.

⁸ ExCom Conclusion No. 6 (XXVIII), 1977, para. (c), reaffirming the fundamental importance of the observance of the principle of non-refoulement at the border.

⁹ *Ibid.*. See also, ExCom Conclusion No. 22 (XXXII), 1981, para. II.A.2; ExCom Conclusion No. 81 (XLVIII), 1997, para. (h); ExCom Conclusion No. 82 (XLVIII), 1997, para. (d)(ii); ExCom Conclusion No. 85 (XLIX), 1998, para. (q); ExCom No. 99 (LV), 2004, para. (l).

¹⁰ *Ibid.*.

¹¹ The European Court of Human Rights has held that the failure of people to expressly apply for or request asylum does not relieve a State from its obligations under the ECHR. See, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, 23 February 2012, para. 133, <http://www.refworld.org/docid/4f4507942.html>.

¹² ECtHR, *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, para. 359, <http://www.refworld.org/docid/4d39bc7f2.html>. See also, Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and UNHCR (Intervener), Hong Kong: Court of Final Appeal, 25 March 2013, paras. 56 and 64, <http://www.refworld.org/docid/515010a52.html>; UNHCR, Intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents), 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, paras. 74 and 75, <http://www.refworld.org/docid/510a74ce2.html>.

sent to his or her country of origin (indirect or chain refoulement).¹³ Under the obligation of non-refoulement, States have a duty to establish, prior to implementing any removal measure that the person whom they intend to remove from their territory or jurisdiction is not at risk of such harm covered by the prohibition on refoulement.

2.5. While the 1951 Convention does not indicate what type of procedures are to be adopted to ensure a proper inquiry is made, it is accepted that, as a general rule, in order to give effect to their obligations under the 1951 Convention, including the prohibition on refoulement, refugees have to be identified.¹⁴ Furthermore, according to ExCom, asylum procedures should satisfy a number of basic requirements, aimed at allowing an individual assessment of an asylum application by a competent authority.¹⁵ The State is required to consider, in good faith and with due diligence, the individual circumstances of the person concerned.

2.6. ExCom recommends in particular that:

- The competent official (...) to whom the applicant addresses himself at the border (...) should have clear instructions for dealing with cases which might be within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.
- The applicant should receive the necessary guidance as to the procedure to be followed.
- The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR.
- The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority (...).¹⁶

2.7. These safeguards are particularly important when asylum is requested at the border, because of the particular vulnerability of asylum-seekers in this context, which is essentially a procedure outside public scrutiny. Given that decisions taken on whether to admit someone to the asylum procedure in this context are made within very tight time frames, the possibility of an inaccurate decision can be higher. It is therefore essential that appropriate safeguards and support be in place.¹⁷

2.8. The ECtHR has held that the prohibition of refoulement under Article 3 in conjunction with Article 13 ECHR includes the obligation of the returning State to provide effective guarantees to protect the applicant against refoulement, be it direct or indirect, to the country from which s/he has fled.

2.9. Of particular relevance in the present case, the Court held that the exercise of the right to an effective remedy enshrined in Article 13 ECHR must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State. Article 13 requires ‘independent and rigorous scrutiny’ of any complaint made by a person in such a situation, where ‘there exist substantial grounds for fearing a real risk of treatment contrary to Article 3’ and secondly, ‘the possibility of suspending the implementation of the

¹³ The prohibition of indirect or ‘chain refoulement’ has been recognized by the Court in its decision *T.I. v. The United Kingdom*, Appl. No. 43844/98, 7 March 2000, page 15, <http://www.refworld.org/docid/3ae6b6dfc.html> and reiterated in *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, 22 September 2009, paras. 88-89, <http://www.refworld.org/docid/4ab8a1a42.html> and in *M.S.S. v. Belgium and Greece*, Appl. no. 30696/09, 21 January 2011, paras. 286, 298 and 321, <http://www.refworld.org/docid/4d39bc7f2.html>.

¹⁴ UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, para. 189, <http://www.unhcr.org/3d58e13b4.html>.

¹⁵ ExCom Conclusion No. 8 (XXVIII) 1977, para. (e); ExCom Conclusion No. 30 (XXXIV) 1983, paras. (e)-(i).

¹⁶ *Ibid.*.

¹⁷ UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, paras. 21-23, <http://www.refworld.org/docid/3b36f2fca.html>.

measure impugned.’ The Court also recognized that the haste with which a removal is carried out might render the available remedies ineffective in practice and therefore inaccessible.

2.10. Furthermore, while the guarantees under Article 13 are only applicable to persons with an arguable claim pursuant to one of the other relevant rights in the ECHR, the Court held that the person concerned should have an effective opportunity to make such a claim, notably in terms of material conditions, access to information, legal assistance and interpretation. The Court also recognized that the absence of these safeguards undermines the quality of the submission and consequently the quality of the examination by the authorities.

2.11. In addition to the ECHR and the 1951 Convention, the Charter of Fundamental Rights of the European Union, applicable to Poland, provides a number of important rules: Article 4 prohibits torture and inhuman or degrading treatment, Article 18 provides for the right to asylum, Article 19 prohibits collective expulsions and Article 47 provides for the right to an effective remedy.¹⁸ Furthermore, the Asylum Procedures Directive (recast) provides for a series of important principles and guarantees in order to ensure effective access to the asylum procedure, including at the border.¹⁹

UNHCR
13 February 2017

¹⁸ European Union: Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1, <http://www.refworld.org/docid/50ed4f582.html>.

¹⁹ These principles and guarantees are stipulated in Chapter II (basic principles and guarantees) of the 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, <http://www.refworld.org/docid/51d29b224.html>.