



**Submission by the Office of the United Nations High Commissioner for Refugees
in the case of *H.Q. v. Hungary* (Application no. 46084/21)
before the European Court of Human Rights**

1. Introduction*

1.1. The Office of the United Nations High Commissioner for Refugees ('UNHCR') has been entrusted by the General Assembly of the United Nations with the mandate to provide international protection to refugees and, together with governments, seek solutions for them.¹ UNHCR is also responsible for supervising the application of international conventions for the protection of refugees.² The Office welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') by its letter of 30 January 2023.

1.2. In this submission, UNHCR outlines the domestic legislative framework and practice regarding access to asylum in Hungary (Part 2) and provides its authoritative interpretation of the relevant principles of international and European law on protection from *refoulement*, access to asylum procedures and the right to an effective remedy (Part 3).

2. The legislative framework and practice on access to asylum in Hungary

2.1. Legislative framework: access to territory

2.1.1. In September 2015, the Hungarian government declared a '*crisis situation caused by mass immigration*'³ and introduced legislation authorizing the prevention of entry, interception, and automatic removal of all third-country nationals staying irregularly, including those seeking asylum.⁴ In March 2017, the declaration of a situation of crisis was extended to the entire Hungarian territory. It is currently in force until 7 September 2023, following further extensions approved by government decree, most recently on 21 February 2023.⁵

* This submission does not constitute a waiver, expressed or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UNGA, *Convention on the privileges and immunities of the United Nations*, 13 February 1946: www.refworld.org/docid/3ae6b3902.html.

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

² *Ibid.* para. 8(a); Article 35, *Convention relating to the status of refugees*, 28 July 1951, UNTS, vol. 189: www.refworld.org/docid/3be01b964.html, p. 137; Article II, *Protocol relating to the status of refugees*, 31 January 1967, UNTS, vol. 606: www.refworld.org/docid/3ae6b3ae4.html, p. 267.

³ According to Section 80/A (1) Asylum Act, the existence of a '*crisis situation caused by mass immigration*' can be declared if:
(a) the number of those arriving in Hungary and seeking recognition exceeds (1) five hundred people a day as a month's average, or (2) seven hundred and fifty people per day as the average of two subsequent weeks, or (3) eight hundred people per day as a week's average;
(b) the number of people staying in the transit zone in Hungary - not considering those contributing to taking care of the foreigners - exceeds (1) one thousand people per day as a month's average, or (2) one thousand five hundred people per day as the average of two subsequent weeks, or (3) one thousand six hundred people per day as a week's average.
(c) In addition to the cases specified in paragraphs (a) and (b), if any circumstance related to the migration situation occurs that (1) directly endangers the protection of the border of Hungary as set out in Article 2 (2) of the Schengen Borders Code, (2) directly endangers the public security, public order or public health in a 60 m wide zone of the territory of Hungary measured from the border of Hungary as set out in Article 2 (2) of the Schengen Borders Code and the border mark or in any settlement in Hungary, in particular the outbreak of unrest or the occurrence of violent acts in the reception center or another facility used for accommodating foreigners located within or in the outskirts of the settlement concerned'.

⁴ See Section 5(1b) of Act LXXXIX of 2007 ('State Border Act'), as amended by Section 11 of Act XX of 2017. The text of the State Border Act is available in Hungarian at: <https://njt.hu/jogszabaly/2007-89-00-00>.

⁵ See Government Decree 46/2023 of 21 February 2023, amending Government Decree 41/2016 of 9 March 2016: <https://magyarkozlony.hu/dokumentumok/f5201f225a4c8f2248f29b3736588588c0e08cf7/megtekintes>. See also Section 11 of Act XX of 2017, introducing Section 5(1b) of the State Borders Act, effective 28 March 2017 and Government Decree No. 333/2022 (IX.6.).

2.1.2. UNHCR has expressed serious concerns about these legislative amendments and their implementation, underlining that such provisions deny access to territory and asylum procedures to people who may be in need of international protection.⁶

2.1.3. In September 2022, the Committee of Ministers of the Council of Europe supervising the execution of the Court's judgment in *Ilias and Ahmed*⁷ reiterated its call on the Hungarian authorities to terminate the summary removal of asylum-seekers to Serbia. More specifically, the Committee called on national authorities to intensify their efforts in reforming the asylum system in order to afford effective access to means of legal entry in line with Hungary's international obligations.⁸

2.1.4. On 12 November 2021, the European Commission referred Hungary to the Court of Justice of the European Union ('CJEU') for non-compliance with the *European Commission v. Hungary* (C-808/18) judgment,⁹ in which the Grand Chamber of the CJEU found that Hungary failed to fulfil its obligations under EU law, as national legislation on the removal of third-country nationals was not in line with the common rules on return procedures and the related guarantees and safeguards.¹⁰ The referral by the European Commission is still pending, but it should be noted that since the delivery of the judgment in December 2020 until end-February 2023, more than 241,000 forced removals of third-country nationals were carried out by the Hungarian authorities.¹¹

2.2. Legislative framework: access to asylum procedures

2.2.1. The right to seek asylum and protection from *refoulement* is enshrined in the *Fundamental Act of Hungary*,¹² and fundamental rules for regulating asylum are laid down in Act LXXX of 2007 ('Asylum Act').¹³

⁶ See, for example, *UNHCR concerned by Hungary's latest measures affecting access to asylum*, 10 March 2021: www.unhcr.org/news/press/2021/3/6048976e4/unhcr-concerned-hungarys-latest-measures-affecting-access-asylum.html; UNHCR, *Access to asylum further at stake in Hungary*, 29 June 2020: www.unhcr.org/news/press/2020/6/5efa0f914/access-asylum-further-stake-hungary-unhcr.html; UNHCR, *Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016*, May 2016: www.refworld.org/docid/57319d514.html. See also, UNHCR, *Written observations in the case of A.H. v National Directorate-General/or Aliens Policing (11.K.706.750/2020) before the Budapest Capital Regional Court*, 25 November 2020: www.refworld.org/docid/6047394c4.html.

⁷ ECtHR, Grand Chamber, *Ilias and Ahmed v. Hungary*, Application no. 47287/15, 21 November 2019: <https://hudoc.echr.coe.int/eng/?i=001-198760>.

⁸ Committee of Ministers of the Council of Europe, *1443rd meeting, 20-22 September 2022 (DH), H46-11 Ilias and Ahmed group v. Hungary (Application No. 47287/15), Supervision of the execution of the European Court's judgments*, 22 September 2022: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a82aee, and *1419th meeting, 30 November - 2 December 2021 (DH), H46-17 Ilias and Ahmed v. Hungary (Application No. 47287/15) Supervision of the execution of the European Court's judgments*, 2 December 2021: https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a4ac53. See also, UNHCR, *Recommendations concerning the execution of the judgments of the European Court of Human Rights in the cases of Ilias and Ahmed v. Hungary and Shahzad v. Hungary*, 31 August 2022: www.refworld.org/docid/6329a2bd4.html, and Council of Europe Commissioner for Human Rights, *Submission in the case of Ilias and Ahmed v. Hungary grouped with Shahzad v. Hungary*, 12 August 2022: <https://rm.coe.int/submission-by-the-council-of-europe-commissioner-for-human-rights-unde/1680a7a4d0>.

⁹ CJEU, Grand Chamber, *European Commission v. Hungary* (C-808/18), 17 December 2020: <https://curia.europa.eu/juris/liste.jsf?num=C-808/18>.

¹⁰ For more information on the pending case of *Commission v. Hungary* (C-123/22): <https://curia.europa.eu/juris/liste.jsf?num=C-123/22>, see the press release of the European Commission, according to which, '[a]s of today, Hungary has not addressed several aspects of the judgment. In particular, Hungary has not taken the measures necessary to ensure effective access to the asylum procedure. Hungary has also not clarified the conditions pertaining to the right to remain on the territory in case of an appeal in an asylum procedure, in the event where there is no crisis situation caused by mass immigration' (European Commission, *Commission refers Hungary to the Court of Justice of the European Union over its failure to comply with Court judgment*, 12 November 2021: https://ec.europa.eu/commission/presscorner/detail/EN/IP_21_5801).

¹¹ See daily statistical information published by the National Police Headquarters of the Hungarian Police, available at: <https://www.police.hu/hu/hirek-es-informaciok/hatarinfo/illegalis-migracio-alakulasa>. See also monthly summary report of November 2022, published by the National Headquarters of the Hungarian Police General Situation Report on Border Management 2022. I-XI, available at: https://www.police.hu/sites/default/files/HatarrendeszetSK%202022_11_.pdf.

¹² Article XIV (3) and (4) of the *Fundamental Act of Hungary*, 25 April 2011, available in Hungarian: <https://njt.hu/jogszabaly/2011-4301-02-00>.

¹³ See, in particular, Sections 32/D (1) and (2), 35 (1)(a), 45 and 47(1) of the Asylum Act, available in Hungarian: <https://njt.hu/jogszabaly/2007-80-00-00>.

2.2.2. On 27 May 2020, the government introduced various restrictions to access to asylum in the form of a decree later converted into Act LVIII of 2020 ('Transitional Act'),¹⁴ which reinforces existing legislation that provides for the immediate removal from the territory of any person who crosses the border unlawfully and indicates an intent to seek asylum. Under the applicable national law, no legal remedy against such a removal measure is available.¹⁵ The Transitional Act, in effect from 18 June 2020 until 31 December 2023, introduced special provisions derogating from the Asylum Act governing the procedure for applying for asylum.¹⁶

2.2.3. As a general rule,¹⁷ asylum-seekers are now required to express their intent to seek international protection at the Hungarian embassy in a designated third country, namely in Serbia or Ukraine,¹⁸ before they are able to access asylum procedures in Hungary.¹⁹ As a consequence, most foreigners within the territory are summarily denied the possibility of submitting an asylum application and are instead directed to travel to either Serbia or Ukraine, regardless of whether they have a legal right to enter those countries. Those present within the territory and wishing to seek asylum in Hungary are obliged to first leave the territory before being able to seek access to the asylum procedure.

2.2.4. Once in Serbia or Ukraine, asylum-seekers are required to first submit a so-called 'statement of intent' for the purpose of applying for international protection. The Transitional Act does not set out the criteria nor a clear process for deciding on the statement of intent. It may either result in a recommendation by the asylum authority to the embassy to issue a single travel document authorizing entry into Hungary for the purpose of submitting the asylum application or a recommendation not to do so. Applicants who were authorized to enter Hungary to lodge their asylum applications may exercise their rights provided under the Asylum Act only from the moment they formally lodge the asylum application in Hungary.²⁰

2.2.5. According to the Hungarian government, the statement of intent procedure was introduced as a measure to contain COVID-19.²¹ However, UNHCR notes that the Transitional Act appears to impose a blanket measure denying access to procedures and admission of asylum-seekers without evidence of a health risk. UNHCR has repeatedly expressed its concerns regarding the Transitional Act in comments to the Government, highlighting that the procedure is not in conformity with the right to seek asylum and exposes asylum-seekers to a risk of direct or indirect *refoulement*, contrary to international refugee and human rights law, as well as EU law.²²

¹⁴ Government Decree No. 233/2020 (V. 26.) and Minister of Interior Decree No. 15/2020 (V. 26.), later converted into Act LVIII of 2020 on the transitional rules and epidemiological preparedness related to the cessation of the state of danger. The text of the Transitional Act is available in Hungarian at: <https://njt.hu/jogszabaly/2020-58-00-00>.

¹⁵ According to Section 271(2) of the Transitional Act, *'the police shall direct the foreigner who had crossed the border of Hungary in an illegal manner to the Hungarian embassy located in the neighboring country from which they had crossed the border, if he/she indicated the intention to submit an asylum application'*.

¹⁶ Pursuant to Section 267 of the Act *'the asylum authority shall process applications for asylum by 31 December 2023, subject to derogations as set out in this sub-chapter'*. Further, Section 270(1) of the Transitional Act prescribes that *'asylum applications – with the exception of Section 271 - may only be lodged following the procedures described in Sections 268 and 269'*.

¹⁷ Section 271(1) of the Transitional Act provides that three categories of persons are exempted from the embassy procedure: (1) recognized beneficiaries of subsidiary protection staying in Hungary; (2) family members of recognized refugees or beneficiaries of subsidiary protection who are staying in Hungary at the time of submission of the asylum application; (3) any person who is subject to a coercive measure, measure or penalty affecting his or her personal liberty, except for those who have crossed the state border of Hungary in an illegal manner.

¹⁸ Government Decree No. 292/2020 (VI. 17.).

¹⁹ See Sections 267 and 268 of the Transitional Act. See also Section 1 of Government Decree No. 292/2020 (VI. 17.) according to which *'the statement of intent to lodge an asylum application may be submitted within the territory of diplomatic representations of Hungary, as defined under point a) of Section 3 (1) of Act LXXIII of 2016 on Foreign Representations and Permanent Foreign Service, operating on the territory of non-EU Member States having borders with Hungary'*.

²⁰ See Section 268 (4)-(5) and 270 (4) of the Transitional Act.

²¹ See the justification in the Transitional Act: *'those arriving from outside of the country's borders under uncontrolled conditions pose an outstanding risk of infection in the country during the epidemic caused by COVID-19. The transit zone proved to be suitable for preventing the spread of the infection [...] Following the judgment of the Court of Justice of the European Union of 14 May 2020 [...] it became necessary to empty the transit zones. In order to further prevent the spread of the epidemic, a new procedure was introduced on the rules of the asylum procedure with Government Decree No. 233/2020. In order to prepare for possible further waves of the epidemic, the established regulations should be maintained during the transitional period following the end of the state of danger'*.

²² See, for instance, UNHCR, *Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger*, June 2020: www.refworld.org/docid/5ef5c0614.html, as well as UNHCR, *Written observations in the case of A.H.*, note 6 above. See also, 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: www.refworld.org/docid/5e7132834.html, which restates that, while States may adopt measures which may include a health screening or testing of asylum-seekers upon entry and putting them in quarantine, such measures may not result in denying them an effective opportunity to seek asylum or result in *refoulement*.

2.2.6. In July 2021, the European Commission referred Hungary to the CJEU, arguing that the new embassy procedure is in breach of EU law, as it precludes third-country nationals on Hungarian territory from applying for asylum. The Commission further considered that addressing the COVID-19 pandemic cannot justify such a rule.²³

2.3. The relevant practice: access to territory

2.3.1. Based on national legislation, third-country nationals intercepted anywhere within the territory of the country for having entered or stayed irregularly are subject to automatic removal through the border fence with Serbia.²⁴ Individuals that are subject to removal receive a leaflet from the Hungarian police which informs them of their expulsion from the territory in line with applicable national law. The leaflet also provides information on the right to submit a complaint to the police or the Commissioner for Fundamental Rights, in case the individual was subject to coercive measures, as well as on the statement of intent mechanism.²⁵ The authorities then implement the removal through the border fence.

2.3.2. Automatic removals apply also to those who entered Hungary from countries other than Serbia and apply regardless of whether the individual has ever been in Serbia before or otherwise meets the conditions for entry and stay applicable in that country. Persons arriving at the Budapest Airport and expressing their wish to seek asylum are also subject to automatic removal to Serbia. This practice is implemented outside of the framework of the EU-Serbia readmission agreement.²⁶

2.3.3. Persons subject to automatic removals do not have access to effective remedies against the removal measure neither in law nor in practice. Removals through the border fence with Serbia are implemented without the provision of an individual removal decision. No formal assessment is undertaken by the authorities on the potential risks of *refoulement*. Removals are not preceded by any screening or registration. UNHCR and its partners observed first-hand that persons are subject to automatic removal without any individualized assessment of their circumstances or specific needs, including unaccompanied and separated children.²⁷

2.3.4. In practice, automatic removals take place through the gates of the border fence erected along the Hungarian-Serbian border to a narrow strip of land on the external side of that fence, from where removed persons have no choice but to leave Hungarian territory.²⁸ Such removals have been characterized by the Court as expulsions within the meaning of Article 4 of Protocol No. 4 ECHR in the *Shahzad* judgment.²⁹ UNHCR notes

²³ For more information on the pending case *Commission v. Hungary* (C-823/21), <https://curia.europa.eu/juris/liste.jsf?grec=fr&td=%3BALL&language=en&num=C-823/21&jur=C>, see the press release of the European Commission: ‘Article 6 of the Asylum Procedures Directive requires Member States to ensure that non-EU nationals and stateless persons located in their territory, including at their borders, are able to exercise in an effective manner the right to apply for international protection. According to the requirement in Hungarian law, before being able to apply for international protection in Hungary, non-EU nationals must first make a declaration of intent stating their wish to apply for asylum at a Hungarian Embassy outside the European Union and be issued with a special entry permit for that purpose. The Commission considers that this requirement is an unlawful restriction to access the asylum procedure and is contrary to the Asylum Procedures Directive, read in light of the Charter of Fundamental Rights, as it precludes persons who are on Hungary’s territory, including at the border, from applying for international protection there. The Commission also considers that addressing the COVID-19 pandemic, which is the stated objective of the Hungarian law, cannot justify such a rule’ (Commission refers Hungary to the Court of Justice of the European Union for unlawfully restricting access to the asylum procedure, 15 July 2021: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3424).

²⁴ Section 5(1b) of Act LXXXIX of 2007.

²⁵ In *Shahzad*, the Court found that this complaint mechanism does not constitute an effective remedy within the meaning of Article 13 ECHR. In particular, the Court noted that ‘the Government mentioned [...] that persons being removed pursuant to section 5(1a) of the State Borders Act were informed of their right to, inter alia, complain against the police measure [...]. However, they did not indicate the legal basis for such a complaint, let alone submit any domestic case-law in this regard. In view of the foregoing, the Court finds that they failed to illustrate the effectiveness of the remedy [...]. The Court further notes that the Government did not refer to any other remedy the applicant could have used to complain about his removal from Hungary and that no remedy appears to be provided for by law.’ ECtHR, *Shahzad v. Hungary*, Application 12625/17, 8 October 2021: <https://hudoc.echr.coe.int/eng/?i=001-210853>, para. 78.

²⁶ To UNHCR’s knowledge, since 15 September 2015, Serbia has not readmitted third-country nationals from Hungary within the framework of the EU-Serbia readmission agreement, except for those holding valid travel or identity documents, or for those who are exempted from visa requirements.

²⁷ See UNHCR, *Recommendations on the execution of Ilias and Ahmed and Shahzad*, note 8 above, para. 17.

²⁸ See CJEU, Grand Chamber, *European Commission v. Hungary* (C-808/18), 17 December 2020: <https://curia.europa.eu/juris/liste.jsf?num=C-808/18>, paras 255-58.

²⁹ ECtHR, *Shahzad v. Hungary*, note 25 above, para. 49-52.

that the legal framework foreseeing such illegal practices has remained unchanged since then and that no legislative amendments were enacted to repeal relevant provisions under national law.³⁰

2.3.5. According to the National Headquarters of the Hungarian Police, from 5 July 2016 to 28 February 2023, the Police implemented more than 310,000 removals and prevented third-country nationals from entering the territory in more than 223,000 instances. In 2022 alone, it reported more than 159,000 automatic forced removals from Hungary to Serbia and more than 110,000 instances of third-country nationals prevented from entering the territory.³¹

2.4. The relevant practice: access to asylum procedure

2.4.1. As a general rule, asylum-seekers present on Hungarian territory cannot register their asylum applications. In the few cases in which they have managed to do so, their applications were rejected shortly afterwards by reference to the Transitional Act and without any in-merit assessment.³² Applicants whose claims were rejected are informed that pursuant to applicable national law they may submit a statement of intent at the Hungarian embassies in Belgrade or in Kyiv to be able to travel to Hungary and lodge an asylum application. However, in practice, access to the embassy asylum procedure is hindered by various obstacles.

2.4.2. First, those asylum applicants who attempt to reach Belgrade and obtain an appointment with the Hungarian embassy do not possess any legal status in Serbia, as they were forced to enter the territory in an irregular manner. Under Hungarian law, regardless of which stage of the procedure they are in, individuals submitting claims through the embassy procedure are not considered as asylum-seekers and do not enjoy the fundamental rights attached to such legal status. In practice, these persons find themselves in an irregular situation in Serbia and, while for the moment Serbian authorities appear to tolerate their stay, they are potentially exposed to a risk of direct and indirect *refoulement*.³³

2.4.3. Second, throughout the embassy procedure, Hungarian authorities do not provide any kind of material assistance to these individuals in relation to access to adequate housing, healthcare, and education.³⁴

2.4.4. Third, even though in theory authorities cannot reject a statement of intent that is ‘filled out fully and signed by the applicant’³⁵, practice shows otherwise. Applicants need to secure an appointment at the embassy in order to submit their statement of intent but there is no clear procedure on how this should be arranged. This has resulted in a significant lack of foreseeability: in several cases, applicants have waited over six months to get an appointment; in others, they have received a date within weeks. Moreover, both the request for an appointment and the statement of intent may only be submitted in Hungarian or English and no assistance from translators is available. Finally, except in cases where a remote interview is conducted, the asylum authority does not communicate directly with the applicants. In case of a recommendation to not issue a single-entry travel document, applicants merely receive an email from the embassy informing them that they are not granted authorization to enter Hungary for the purposes of submitting an asylum application. The email presents no reference number and does not contain any justification or information on potential further steps, including the possibility to appeal.³⁶

2.4.5. Hungarian courts have ruled in several cases that the absence of these basic procedural guarantees in the embassy procedure constitutes such a serious violation of procedural requirements that the administrative authority is required to conduct new proceedings and issue a sufficiently motivated decision.³⁷ However, so far, based on information available to UNHCR, none of those applicants who have challenged the recommendation

³⁰ See UNHCR, *Recommendations on the execution of Ilias and Ahmed and Shahzad*, note 8 above, para. 11.

³¹ See the report of the Hungarian Police: https://www.police.hu/sites/default/files/HatarrendeszetSK%202022_11_ENG.pdf.

³² UNHCR reports that applications were rejected under Section 32/F(1) b) of the Asylum Act: “[t]he asylum authority shall refuse an application by way of a ruling, without examination as to merits, if the application pertains to an objective that is manifestly impossible”.

³³ See UNHCR, *Written observations in the case of A.H.*, note 6 above, para. 13.

³⁴ *Ibid.*

³⁵ Section 1 (6) of Decree of the Ministry of the Interior 16/2020 (VI. 17.).

³⁶ Hungarian Helsinki Committee, *No access to asylum for 18 months. Hungary’s dysfunctional embassy system in theory and practice*, 15 December 2021: <https://helsinki.hu/en/wp-content/uploads/sites/2/2021/12/No-access-to-asylum-1.11.2021.pdf>, p. 3-4.

³⁷ *Ibid.*, p. 6

not to authorise entry before national courts have been granted authorization to enter Hungary to formally submit their asylum applications.

2.4.6. According to Eurostat, between June 2020 and November 2022, Hungary registered only 95 asylum applications. This is the lowest number among all EU Member States, amounting to 0,005% of all first-time applications registered in the European Union.³⁸

2.4.7. According to information available to UNHCR, between June 2020 and December 2022, even though hundreds of individuals requested an appointment at the Hungarian embassy in Belgrade for the purpose of submitting their statement of intent, only 97 individuals managed to submit such statement. Out of these, only 16 applicants were authorized to enter Hungary for the purpose of submitting their asylum applications. In other words, access to the Hungarian asylum procedure through the embassy procedure was impossible for the vast majority of applicants.³⁹

3. Relevant principles of international and European law on access to asylum

3.1. The principle of *non-refoulement*

3.1.1. The right to seek and enjoy asylum is a basic human right under Article 14(1) of the Universal Declaration of Human Rights and is supported by the legal framework of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol ('the 1951 Convention').⁴⁰ Central to the right to asylum is the principle of *non-refoulement*. The obligation of States not to expel or return ('*refouler*') individuals to territories where their life or freedom would be threatened is the cornerstone of international refugee law, most prominently expressed in Article 33 of the 1951 Convention, which prohibits States from expelling or returning refugees, in any manner whatsoever, to a territory where they would be at risk of threats to life or freedom. The principle of *non-refoulement* constitutes an essential binding component of international refugee protection.⁴¹

3.1.2. Given the declaratory nature of the recognition of refugee status, the prohibition of *refoulement* applies not only to recognized refugees, but also to asylum-seekers, whose status has not yet been determined.⁴² Asylum-seekers do not become refugees because of recognition but are recognized because they are refugees.⁴³

3.1.3. Beyond the 1951 Convention, the principle of *non-refoulement* forms part of international human rights law and prevents the removal of any individual to a real risk of torture, inhuman and degrading treatment or

³⁸ See *Asylum applicants by type of applicant, citizenship, age and sex - monthly data*, available on the Eurostat website: <https://ec.europa.eu/eurostat/en/>.

³⁹ Following the introduction of restrictive border management measures in September 2015, the number of registered asylum applications has dramatically decreased. In 2016, according to data provided to UNHCR by the National Directorate-General for Aliens Policing (NDGAP), the number of registered applications amounted to 29,432; in 2017 to 3,397; in 2018 to 671; and in 2019 to 500. As a result of additional restrictive measures introduced in May 2020, the number of registered applications decreased further and in 2020, it totaled 117; in 2021, 40; and in 2022, 46.

⁴⁰ UNGA, *Universal Declaration of Human Rights*, 10 December 1948: www.refworld.org/docid/3ae6b3712c.html.

⁴¹ See, *inter alia*, Executive Committee of the High Commissioner's Programme ('ExCom'), *Conclusion No. 6 (XXVIII)*, 12 October 1977: www.unhcr.org/excom/exconc/3ae68c43ac/non-refoulement.html, para. (c); ExCom, *Conclusion No. 25 (XXXIII)*, 20 October 1982: www.unhcr.org/excom/exconc/3ae68c434c/general-conclusion-international-protection.html, para. (b); ExCom, *Conclusion No. 65 (XLII)*, 11 October 1991: www.unhcr.org/excom/exconc/3ae68c404/general-conclusion-international-protection.html, para. (c); ExCom, *Conclusion No. 68 (XLIII)*, 9 October 1992: www.unhcr.org/excom/exconc/3ae68c6e1c/general-conclusion-international-protection.html, para. (f); ExCom, *Conclusion No. 81 (XLVIII)*, 17 October 1997: www.unhcr.org/excom/exconc/3ae68c690/general-conclusion-international-protection.html, para. (i); ExCom, *Conclusion No. 103 (LVI)*, 7 October 2005: www.unhcr.org/excom/exconc/43576e292/conclusion-provision-international-protection-including-complementary-forms.html, para. (m).

⁴² 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: www.refworld.org/docid/5cb474b27.html, para. 28. See also 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: www.refworld.org/docid/45f17a1a4.html, para. 6; ECtHR, Grand Chamber, *N.D. and N.T. v. Spain*, Application no. 8675/15 and 8697/15, 13 February 2020: <https://hudoc.echr.coe.int/eng/?i=001-201353>, para. 178.

⁴³ UNHCR, *Handbook*, note 42 above, para. 28. This has been confirmed by the well-established jurisprudence of the CJEU, e.g. CJEU, Second Chamber, *A. and S. v. Staatssecretaris van Veiligheid en Justitie* (C-550/16), 12 April 2018: <https://curia.europa.eu/juris/liste.jsf?num=C-550/16>, para. 53-54, and CJEU, Grand Chamber, *M and X*, X (Joined Cases C-391/16, C-77/17 and C-78/17), 14 May 2019: <https://curia.europa.eu/juris/liste.jsf?num=C-391/16>, para. 85. See also United Kingdom Supreme Court, *G v. G*, [2021] UKSC 9, 19 March 2021: www.refworld.org/cases.UK_SC.6061de2d4.html.

punishment. This is a norm of customary international law, which is binding for all States, and its absolute nature has been restated by international and regional human rights instruments and courts.⁴⁴

3.1.4. The prohibition against *refoulement* protects individuals not only from removal to their countries of origin but also to any other territory, where they have reason to fear persecution or other serious harm. At the same time, as restated by the Grand Chamber in the *Ilias and Ahmed* judgment, this norm ensures protection also from indirect (or chain) *refoulement*, i.e. the removal of individuals to a third country, where fundamental rights are not threatened *per se* but where no protection is available against onward transfer to a place of persecution or serious harm.⁴⁵

3.1.5. In light of this international legal framework, prior to implementing any removal measure, Hungarian authorities have a specific legal obligation to establish that the person they intend to expel from the national territory is not at risk of persecution, other serious harm, or onward removal to ill-treatment.⁴⁶ However, as outlined above, under the current legislation and practice, Hungary actively transfers individuals seeking international protection to Serbia, *de facto* requiring them to enter Serbia in an irregular manner and to reside illegally on the territory while attempting to access the embassy procedure. These persons find themselves in an irregular situation and could potentially be at risk of direct and indirect *refoulement*.

3.1.6. In UNHCR's view, the referral or active transfer of individuals potentially in need of international protection to an embassy procedure in a third country in the absence of any assessment on the risk of *refoulement* is at variance with international refugee and human rights law. It should also be recalled that the legal status of asylum-seekers, along with the attached rights, is not dependent on the formal submission or registration of the claim.⁴⁷

⁴⁴ For an overview of the principle of *non-refoulement* as a norm of customary law, see UNHCR, *Note on the principle of non-refoulement*, November 1997: www.refworld.org/docid/438c6d972.html; UNHCR, *Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees*, 16 January 2002: www.unhcr.org/protection/globalconsult/3c2306cc4/declaration-states-parties-1951-convention-and-or-its-1967-protocol-relating.html, para. 4; Elihu Lauterpacht, Daniel Bethlehem, *The scope and content of the principle of non-refoulement: opinion*, in Feller, Turk and Nicholson (eds.), *Refugee protection in international law: UNHCR's global consultations on international protection* (Cambridge University Press, 2003): www.refworld.org/docid/470a33af0.html, p. 163-164; Cathryn Costello, Michelle Foster, *Non-refoulement as custom and jus cogens? Putting the prohibition to the test*, 46 *Netherlands Yearbook of International Law*, 5 August 2016, p. 273-327. See also concurring opinion of Judge Pinto de Albuquerque in ECtHR, Grand Chamber, *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, 23 February 2012: <https://hudoc.echr.coe.int/eng?i=001-109231>. An explicit *non-refoulement* provision is contained in Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UNTS, vol. 1465, p. 85: www.refworld.org/docid/3ae6b3a94.html. Legal obligations under the 1966 International Covenant on Civil and Political Rights, UNTS, vol. 999, p. 171: www.refworld.org/docid/3ae6b3aa0.html, as interpreted by the United Nations Human Rights Committee ('CCPR'), also encompass the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. See CCPR, *General comment No. 20: Article 7*, 10 March 1992: www.refworld.org/docid/453883fb0.html, para. 9, and CCPR, *General comment No. 31 [80]: The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004: www.refworld.org/docid/478b26ae2.html, para. 12. The jurisprudence of this Court has held that *non-refoulement* is an inherent obligation under Article 3 ECHR, which 'prohibits in absolute terms torture and inhuman or degrading treatment or punishment irrespective of the circumstances and of the victim's conduct'. See ECtHR, Grand Chamber, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011: <https://hudoc.echr.coe.int/eng?i=001-103050>, para. 218. See also Article II(3) of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, UNTS, vol. 1001, p. 45: www.refworld.org/docid/3ae6b36018.html, and Section III(5) the 1984 Cartagena Declaration on Refugees: www.refworld.org/docid/3ae6b36ec.html.

⁴⁵ See, *inter alia*, ECtHR, *Ilias and Ahmed*, note 7 above, para. 128-138.

⁴⁶ See UNHCR, *Advisory opinion on extraterritorial application of non-refoulement obligations*, note 42 above; ExCom *Conclusion No. 6*, note 41 above, para. (c); ExCom, *Conclusion No. 81*, note 41 above, para. (i); ExCom, *Conclusion No. 79 (XLVII)*, 11 October 1996: www.unhcr.org/excom/exconc/3ae68c430/general-conclusion-international-protection.html, para. (j). See also, UNHCR, *Note on international protection*, 31 August 1993: www.refworld.org/docid/3ae68d5d10.html.

⁴⁷ See CJEU, Fourth Section, *Ministerio Fiscal v. V.L.* (C-36/20 PPU), 25 June 2020: <https://curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=c-36/20>, para. 63, 72, 79 and 93-94. See also CJEU, Grand Chamber, *F.M.S. and Others v. Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság* (C-924/19 PPU and C-925/19 PPU), 14 May 2020: <https://curia.europa.eu/juris/liste.jsf?num=C-924/19>, para. 192. In relation to Member States' legal obligation to examine asylum claims in compliance with the criteria of the Qualification Directive, see CJEU, Grand Chamber, *Ibrahim and Others v. Bundesrepublik Deutschland* (Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17), 19 March 2019: <https://curia.europa.eu/juris/liste.jsf?num=C-297/17>, para. 99.

3.1.7. These considerations are in line with the legal principles expressed by the Court in *Ilias and Ahmed* and recently restated in the case of *W.A. and Others v. Hungary*.⁴⁸ According to these judgments, under Article 3 of the European Convention on Human Rights ('ECHR'), national authorities should carry out an adequate assessment of the risk of ill-treatment before removing from their territory individuals seeking international protection in Hungary.⁴⁹ Failure to comply with this procedural obligation represents a violation of the absolute prohibition of ill-treatment enshrined in Article 3 ECHR.

3.2. The right to access a fair and efficient asylum procedure and the prohibition of collective expulsion

3.2.1. The 1951 Convention does not regulate the form that national asylum proceedings should take. At the same time, in order to give effect to the legal obligations enshrined in the Convention, refugees must be correctly identified and the primary responsibility for identifying and assessing international protection needs rests with the State where that protection is sought.⁵⁰ Therefore, national authorities need to grant asylum-seekers access to fair and efficient procedures without discrimination, as the right to seek asylum would otherwise be rendered meaningless.⁵¹

3.2.2. This was affirmed by this Court in *N.D. and N.T. v Spain*. The Grand Chamber highlighted that national authorities must ensure '*genuine and effective access to means of legal entry*' and allow those at risk of ill-treatment to submit an application for international protection. It ruled that:

*'[i]n the absence of appropriate arrangements, the resulting possibility for States to refuse entry to their territory is liable to render ineffective all the Convention provisions designed to protect individuals who face a genuine risk of persecution.'*⁵²

3.2.3. Following these legal principles, in the case of *Shahzad v. Hungary*, the Court found a violation of the prohibition of collective expulsion because the applicant did not have '*genuine and effective access to means of legal entry*'. In finding a violation of Article 4 of Protocol No. 4 ECHR, the Court particularly relied on the fact that access to the transit zones, which constituted the only possibility to legally enter Hungary, was limited in practice and that no formal procedure governing the admission was in place.⁵³

3.2.4. National rules hindering the submission of asylum applications within the national territory or at the border are also at odds with EU law. EU common rules on asylum procedures require that Member States provide asylum-seekers with an effective opportunity to lodge applications for international protection as soon as possible and to register those applications within set, short time frames. In the words of the CJEU:

*'Member States may require that applications for international protection be lodged in person and/or at a designated place. Nevertheless, [...] the Member States cannot exercise that option in such a manner as would, in practice, prevent third-country nationals, or some of them, from lodging an application [...] 'as soon as possible'. Any contrary interpretation would run counter to the objective [...] of ensuring effective, easy and rapid access to the procedure for granting international protection and would seriously undermine the practical effectiveness of the right to seek asylum.'*⁵⁴

⁴⁸ ECtHR, *W.A. and Others v. Hungary*, Application no. 64050/16, 15 December 2022: <https://hudoc.echr.coe.int/eng?i=001-221545>, para. 8-13

⁴⁹ See ECtHR, *Ilias and Ahmed*, note 7 above, paras 151-165; ECtHR, *M.K. and Others v. Poland*, Applications nos. 40503/17, 42902/17, 43643/17, 23 July 2020: <https://hudoc.echr.coe.int/eng?i=001-203840> and ECtHR, *D.A. and Others v. Poland*, Application no. 51246/17, 8 July 2021: <https://hudoc.echr.coe.int/fre?i=001-210855>.

⁵⁰ UNHCR, *Note on the 'externalization' of international protection*, 28 May 2021: www.refworld.org/docid/60b115604.html. See UNHCR, *Guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013: www.refworld.org/docid/51af82794.html; 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: www.refworld.org/docid/5acb33ad4.html, para. 4; UNHCR, *Guidance on responding to irregular onward movement of refugees and asylum-seekers*, September 2019: www.refworld.org/docid/5d8a255d4.html.

⁵¹ ExCom, *Conclusion No. 82 (XLVIII)*, 17 October 1997: www.unhcr.org/excom/exconc/3ae68c958/safeguarding-asylum.html, para. (d). See also UNHCR, *Advisory opinion on extraterritorial application of non-refoulement obligations*, note 42 above, para. 26-31.

⁵² ECtHR, *N.D. and N.T. v. Spain*, note 422 above, para. 209.

⁵³ ECtHR, *Shahzad v. Hungary*, note 25 above, para. 65. See also ECtHR, *N.D. and N.T. v. Spain*, note 42 above, para. 209.

⁵⁴ CJEU, First Chamber, *M.A. v. Valstybės sienos apsaugos tarnyba (C-72/22 PPU)*, 30 June 2022: <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-72/22&jur=C>, para. 65.

3.2.5. These legal considerations do not preclude national authorities from offering access to territory and asylum through their embassies. However, that possibility must complement and not undermine (or be presented as an alternative to) access to asylum procedures for individuals arriving at borders or seeking international protection within the territory. A mechanism pursuant to which a third-country national is summarily denied access to the asylum procedure and directed to an extraterritorial pre-entry procedure in a designated third country is not in line with the existing international and EU obligations.

3.2.6. Fundamental concerns regarding the effectiveness of access to asylum procedures are not only related to the requirement of expressing the intent to seek international protection at the Hungarian embassy in Serbia or Ukraine but also to the lack of crucial procedural safeguards that characterizes the pre-entry procedure at the embassy.

3.2.7. According to the case-law of this Court, applicants should have access to asylum procedures with effective procedural guarantees that protect asylum-seekers against arbitrary *refoulement*, including the existence of legal remedies.⁵⁵ Similar obligations are reflected in EU law and in the jurisprudence of the CJEU, which also require Member States to provide an effective opportunity to lodge an application ‘*as soon as possible*’ and to ensure the expeditious registration of the application.⁵⁶ In this respect, UNHCR has repeatedly underlined that fair and efficient asylum procedures must present a number of minimum safeguards, including the services of a competent interpreter and the authorization to remain in the country pending a decision on the asylum request.⁵⁷

3.2.8. In contrast with these legal obligations, the Transitional Act does not set out the criteria nor does it stipulate a clear process for deciding on the statement of intent. Moreover, as previously pointed out, Hungarian authorities do not provide asylum-seekers with any translation service for the submission of the statement of intent and negative decisions on the statement do not contain any justification or information on the possibility to appeal.

3.2.9. For all these reasons, in UNHCR’s view, the embassy procedure does not ensure an effective and genuine access to the asylum procedure in Hungary.⁵⁸ It both physically hinders access to asylum procedures for individuals arriving at borders or seeking international protection within the territory, and fundamentally lacks any safeguards and guarantees. This conclusion is confirmed by the above-mentioned quantitative data on the submission of statements of intent and authorizations issued to legally enter Hungary for submitting an asylum claim.

3.3. Effective remedies in *non-refoulement* cases

3.3.1. This Court has often reiterated that, given the importance of Article 3 ECHR and the irreparable nature of the harm likely to be caused, it is the duty of national authorities to conduct a thorough and rigorous assessment to dispel any doubt concerning the fact that an asylum claim was ill-founded.⁵⁹ In order to be effective, a legal remedy must be available in practice as well as in law. For this reason, in relation to Article 3 ECHR cases, the Grand Chamber has underlined that:

‘in view of the importance which the Court attaches to Article 3 of the Convention and the irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires

⁵⁵ ECtHR, Grand Chamber, *F.G. v. Sweden*, Application no. 43611/11: <https://hudoc.echr.coe.int/eng?i=001-161829>, para. 117.

⁵⁶ See Articles 13 and 18 Directive 2011/95/EU (‘Qualification Directive’) but also Chapter II of Directive 2013/32/EU (‘Asylum Procedures Directive’) and Directive 2013/33/EU (‘Reception conditions Directive’). See, in particular, CJEU, *Ministerio Fiscal v. V.L.*, note 47 above.

⁵⁷ ExCom, *Conclusion No. 8 (XXVIII)*, 12 October 1977: www.unhcr.org/excom/exconc/3ae68c6e4/determination-refugee-status.html, para. (e). Para. (e)(vii) specifies that applicants should be allowed to remain in the country pending appeal procedures.

⁵⁸ See UNHCR, *Position on Hungarian Act LVIII of 2020*, note 22 above.

⁵⁹ ECtHR, Second Section, *Singh and Others v. Belgium*, Application no. 33210/11, 2 October 2012: <https://hudoc.echr.coe.int/eng?i=001-113660>, para. 103; ECtHR, *M.S.S. v. Belgium and Greece*, note 44 above, paras 387-388: ‘*the Court reiterates that it is also established in its case law [...] that any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny*’; ECtHR, Fourth Section, *N.A. v. The United Kingdom*, Application no. 25904/07, 17 July 2008: <https://hudoc.echr.coe.int/fre?i=001-87458>, para. 111; ECtHR, Fourth Section, *Jabari v. Turkey*, Application no. 40035/98, 11 July 2000: <https://hudoc.echr.coe.int/eng?i=001-58900>, para. 50; ECtHR, *Hirsi Jamaa and Others v. Italy*, note 44 above, para. 200.

*close scrutiny by a national authority [...], independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 [...], as well as a particularly prompt response [...]; it also requires that the person concerned should have access to a remedy with automatic suspensive effect*⁶⁰

3.3.2. Similar considerations are valid also for the notion of an effective remedy in relation to cases raising potential violations of Article 4 of Protocol No. 4 ECHR.⁶¹ Where applicants had an arguable claim but had been prevented from applying for international protection without access to a legal remedy with automatic suspensive effect, the Court found a violation of Article 13 taken in conjunction with Article 4 of Protocol No. 4.⁶²

3.3.3. The legislation in force and the practice carried out by Hungarian authorities, as outlined above, contrast with these fundamental principles, as those who are referred or actively transferred to Serbia do not receive any expulsion order and do not have access, neither in law nor practice, to any effective remedy against removal measures.

4. Conclusion

4.1. The introduction of the embassy procedure as a primary entry point to the asylum procedure in Hungary has significantly modified the Hungarian legal framework on access to asylum. The new legal rules, together with existing legislative provisions, provide for the referral and active transfer to Serbia or Ukraine of those individuals who seek protection at the border or within the territory.⁶³ Asylum-seekers are required to submit a statement of intent at the Hungarian embassy in Belgrade or Kyiv, which is aimed at receiving an authorization to legally enter Hungary for the purpose of lodging an asylum application.

4.2. UNHCR recalls that, under international law, primary responsibility for identifying and assessing international protection needs, ensuring appropriate reception conditions and procedural standards during asylum procedures, rests with the State in which an asylum applicant arrives and seeks protection. States have a duty to make independent inquiries, as to the need for international protection of persons seeking asylum and provide them with access to fair and efficient asylum procedures.⁶⁴

4.3. In contrast with these principles, the current legislation and practice in Hungary results in the automatic removal of individuals potentially in need of international protection in the absence of any assessment on the risk of direct or indirect *refoulement*. Moreover, it summarily denies access to a fair and efficient asylum procedure, as demonstrated by the available quantitative data. Finally, it does not provide asylum-seekers subject to removal with an effective legal remedy.

4.4. For all these reasons, UNHCR submits that the embassy procedure introduced by Hungary is at variance with international and European refugee and human rights law, as well as with the jurisprudence of this Court.

UNHCR
17 March 2023

⁶⁰ ECtHR, *M.S.S. v. Belgium and Greece*, note 44 above, para. 293; ECtHR, *M.K. and Others v. Poland*, note 49 above, para. 143; ECtHR, *D.A. and Others v. Poland*, note 45 above, para. 38; ECtHR, *Čonka v. Belgium*, Application no. 51564/99, 5 February 2002: <https://hudoc.echr.coe.int/eng?i=001-60026>, para. 81-83; ECtHR, *Hirsi Jamaa and Others v. Italy*, note 44 above, para. 199.

⁶¹ *Ibid.*, *Čonka v. Belgium*, para. 79.

⁶² ECtHR, *M.K. and Others v. Poland*, note 499 above, paras 219-220; ECtHR, *D.A. and Others v. Poland*, note 499 above, paras 89-90; ECtHR, *Hirsi Jamaa and Others v. Italy*, note 444 above, paras 201-207; ECtHR, *Sharifi and Others v. Italy and Greece*, 21 October 2014, <https://hudoc.echr.coe.int/eng?i=001-147287>, paras 240-243.

⁶³ Section 5(1b) of Act LXXXIX of 2007 ('State Border Act'), note 4 above.

⁶⁴ UNHCR, *Note on 'externalization'*, note 50 above.