

UNHCR observations regarding legislative amendments adopted in Hungary in June and July 2018

A. Introduction

1. On 28 June 2018, Act VI of 2018 on amending certain acts relating to measures to combat unlawful migration and the Seventh amendment to the Fundamental Act were promulgated in the National Gazette. Act XLI of 2018 on amending certain tax laws and related laws, including special tax on immigration, was promulgated in the National Gazette on 25 July 2018.

2. These legislative amendments were the latest in a series of laws and practices adopted from 2015 onwards which have progressively introduced restrictive measures that limit access to Hungary's territory and to the asylum procedure and deter asylum-seekers from applying for protection. UNHCR's earlier comments and recommendations remain valid.¹

3. UNHCR offers the observations below in its capacity as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees within its mandate. UNHCR is responsible for supervising international conventions for the protection of refugees under Article 8 of its Statute. States are obliged to cooperate with UNHCR in the exercise of its mandate as per Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol relating to the Status of Refugees, in particular by facilitating UNHCR's supervision of the application of the provisions of the 1951 Convention and 1967 Protocol. In addition, Article 18 of the Charter of Fundamental Rights of the European Union states that the right to asylum shall be guaranteed with due respect for the rules of the 1951 Convention and the 1967 Protocol.

B. Overview of legislative amendments affecting the situation of people of concern to UNHCR

4. Relevant provisions of Act VI of 2018

- The police competence is extended to cover asylum issues and prevention of 'unlawful migration' through amendments to Act XXXIV of 1994 on the Police (Police Act);²
- The police can prevent anyone who is under criminal proceedings for crossing the border unlawfully, damaging the border closure, obstructing the construction of the border closure, human smuggling, facilitating unauthorized residence, and facilitating unlawful migration from entering or order to leave the 8 km area from the external border line;³
- The asylum claim of an individual is inadmissible if he/she has transited through a country where he/she was not exposed to persecution or serious harm or if the country through which he/she entered to Hungary affords adequate level of protection. If the stay in that country was authorized on humanitarian grounds that will be interpreted as 'adequate protection';⁴
- The Minor Offences Act applies to anyone who is under criminal proceedings for the above-mentioned offences and stays unlawfully within the 8 km area of the external border line, in accordance with the State Borders Act;⁵

¹ UN High Commissioner for Refugees (UNHCR), *Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016*, May 2016, <http://www.refworld.org/docid/57319d514.html>.

² Amendment to point 10 of Section 1(2) of Act XXXIV of 1994 on the Police (Police Act).

³ Amendment to the Police Act, introducing new Chapter V.

⁴ Amendment to Section 51 (2) f of the Act LXXX of 2007 on Asylum (Asylum Act).

⁵ Amendment to Section 201(4) of Act II of 2012 on minor offences (Minor Offences Act).

- Under the Penal Code, crimes against public order including ‘facilitating, supporting unlawful migration’⁶ can be sanctioned with a prison sentence and in aggravated forms up to one year of imprisonment and banishment.

5. Relevant provisions under the Seventh Amendment to the Fundamental Act

- Exercising the rights and fulfilling the obligations deriving from EU law cannot limit the inalienable right of Hungary regarding its territorial integrity, its population, form of government and governmental organisation;
- The ‘constitutional self-identity of Hungary’ is reinforced;
- The ‘settlement’ of any foreign population is prohibited to protect Hungary’s national sovereignty;⁷
- Asylum is denied to individuals entering Hungary through a country in which they were not exposed to persecution or where the direct risk of persecution did not exist;⁸
- Police powers are extended to participation in the prevention of unlawful migration.

⁶ Introducing Section 353/A under the Act C of 2012 on the Penal Code (Penal Code). Facilitating unlawful migration:

(1) Anyone who conducts organizational activities

a) in order to allow the initiating of an asylum procedure in Hungary by a person who in their country of origin or in the country of their habitual residence or another country via which they had arrived, was not subjected to persecution for reasons of race, nationality, membership of a particular social group, religion or political opinion, or their fear of indirect persecution is not well-founded,

b) or in order for the person entering Hungary illegally or residing in Hungary illegally, to obtain a residence permit, if a more serious criminal offense is not committed, is punishable by confinement for the misdemeanour.

(2) Anyone who provides financial means for committing the criminal offence specified in Subsection (1), or who regularly carries out such organisational activities, is punishable by a term of imprisonment of up to one year.

(3) Those shall be punishable according to Subsection (2), who commit the criminal offence specified in Subsection (1)

a) for the purposes of financial gain

b) or providing support for more than one person

c) commits the criminal offence within an eight-kilometre area from the external borders of Hungary as specified in point 2 of article 2 of the Schengen Border Code or from the border signs.

(4) The punishment may be relieved without limits - and may be lifted in cases of special justification - against the perpetrator of the offence specified in Subsection (1) if the perpetrator reveals the circumstances of the offence before the indictment has been brought.

(5) For the purposes of Section 353/A, it shall be regarded as organisational activity especially if with the purpose specified in Subsection (1)

a) the person organises border monitoring at the external borderlines of Hungary as specified in point 2 of Article 2 of Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons in the territory of Hungary.

b) prepares or distributes information materials or commissions such activities,

c) builds or operates a network.

(2) Section 364 of Criminal Code shall be replaced by the following provision:

Banishment may also be imposed against perpetrators of human smuggling, illegal crossing of the border barrier, the obstruction of the construction work on the border barrier, the facilitation of illegal residence, the facilitation of illegal immigration and the organization of unlawful gambling.

⁷ Article XIV (1) of the Fundamental Act which stipulates that ‘no alien population shall be settled in Hungary. Any foreign citizen, excluding persons having the right of free movement and residence, shall be allowed to live in the territory of Hungary on the basis of his or her application individually evaluated by the Hungarian authorities. The fundamental rules of the preconditions of the submission and evaluation of the application shall be established by a cardinal Act’.

⁸ Article XIV (4) of the Fundamental Act which stipulates that ‘Hungary shall, upon request, grant asylum to non-Hungarian citizens being persecuted or having a well-founded fear of persecution in their native country or in the country of their usual residence for reasons of race, nationality, membership of a particular social group, religious or political belief, if they do not receive protection from their country of origin or from any other country. *Any non-Hungarian citizen arriving to the territory of Hungary through a country where he or she was not exposed to persecution or a direct risk of persecution shall not be entitled to asylum.*

(5) The fundamental rules of granting asylum are established by a cardinal Act’.

6. Provisions under Act XLI of 2018 introducing a special tax on immigration

- This law introduces a special 25% tax on funding for activities supporting immigration in Hungary, or on funding of an organisation based in Hungary that promotes immigration,⁹ with the purpose to ‘defend Hungary against illegal migration.’¹⁰ This tax does not affect foundations and organisations whose exemption is guaranteed by an international treaty or reciprocity.

C. General observations and cross cutting concerns

7. As regard the use of terminology, UNHCR observes that the aforementioned legislative amendments fail to draw the necessary distinction between the situation of refugees and asylum-seekers and that of other aliens. This may result in unlawfully restricting or denying asylum-seekers’ access to the asylum procedure and ultimately to international protection. Failing to draw this distinction is not in line with Hungary’s obligations under the 1951 Convention and its 1967 Protocol, to which Hungary is a State party. It is also at variance with the right to seek and enjoy asylum provided for under Article 14(1) of the Universal Declaration of Human Rights and the right to asylum under Article 18 of the Charter of Fundamental Rights of the European Union.

8. UNHCR observes that some of the newly introduced legal terms are not defined in domestic law (e.g. ‘settlement’/’*betelepítés*’ in the Fundamental Act, ‘unlawful migration’/’*jogellenes bevándorlás*’ under the Penal Code, ‘permanent relocation’/’*véglegesnek szánt áttelepülés*’ under Act XLI of 2018 introducing special tax on immigration), which is contrary to the general principle of legal certainty, which requires that the law must be certain, that is, clear and precise, and its legal implications foreseeable.¹¹

D. Observations relating to specific aspects of the legislation

a) Access to territory and the asylum procedure

9. Amendments to the Fundamental Act introduce a provision whereby individuals ‘*entering Hungary through a country in which they were not exposed to persecution or where the direct risk of persecution did not exist, are not entitled to asylum*’.¹² According to the explanatory note attached to the law, the objective of this provision is to emphasize that only those individuals who come directly to Hungary from a place

⁹ See Section 253 of Act XLI of 2018; pursuant to Section 253 (2) of the Act ‘immigration supporting activity is any programme, action or activity that is directly or indirectly aimed at promoting immigration (the permanent relocation of people from their country of residence to another country, excluding cases covered by subsection (1) of Section 1 of Act I of 2007 on the Admission and Residence of Persons with the Right of Free Movement and Residence), and is realised as part of:

a) carrying out media campaigns and media seminars and participating in such activities;

b) organising education;

c) building and operating networks or

d) propaganda activities that portray immigration in a positive light.’

¹⁰ See official press release by the Ministry of Finance of 20 June 2018, <http://www.kormany.hu/en/ministry-for-national-economy/news/organizations-assisting-immigration-to-pay-a-surcharge-in-hungary>.

¹¹ European Commission for Democracy through Law (“Venice Commission”), Report on the Rule of Law, adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011), para. 6,

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e). The principle of legal certainty may also be found implicitly under Article B (1) of the Fundamental Act of Hungary which sets out that ‘Hungary shall be an independent, democratic rule-of-law State.’ See, further, Court of Justice of the European Union (CJEU): ‘According to settled case-law of the Court, the principles of legal certainty and of the protection of legitimate expectations must be observed not only by the EU institutions, but also by Member States in the exercise of the powers conferred on them under EU directives (see, to that effect, inter alia, judgments in *Gemeente Leusden and Holin Groep*, C-487/01 and C-7/02, [EU:C:2004:263](https://eur-lex.europa.eu/eli/jc/2004/263), para. 57; in ‘*Goed Wonen*’, C-376/02, [EU:C:2005:251](https://eur-lex.europa.eu/eli/jc/2005/251), para. 32; and in *Elmeka NE*, C-181/04 to C-183/04, [EU:C:2006:563](https://eur-lex.europa.eu/eli/jc/2006/563), para. 31)’, in *Radu Florin Salomie, Nicolae Vasile Oltean v. Direcția Generală a Finanțelor Publice Cluj*, C-183/14, Judgment of 09 July 2015, [EU:C:2015:454](https://eur-lex.europa.eu/eli/jc/2015/454), para. 30.

¹² See *supra* note 8.

where they are being persecuted or having a well-founded fear of persecution according to the 1951 Convention are entitled to seek asylum in Hungary.

10. Furthermore, Section 7 of the amending Act VI of 2018 amends Section 51 (2) f of the Act LXXX of 2007 on Asylum (Asylum Act) introducing a new inadmissibility ground whereby the asylum application is deemed inadmissible *‘if the applicant arrived via a country where he/she is not subject to a risk of persecution as defined in Subsection (1) of Section 6 of the Asylum Act or to the risk of serious harm as defined in Subsection (1) of Section 12 of the Asylum Act or if adequate level of protection is provided in the country through which they had arrived to Hungary’*. The explanatory note attached to the law argues that in the above circumstances it is reasonable for the applicant to avail himself of the protection of that country, in line with Article 31(1) of the 1951 Convention *‘that protects only those who came directly from an area where their lives or their freedom were at risk’*. The note further adds that *‘adequate level of protection is ensured if the applicant has resided in the country on any grounds of residence (e.g. employment or humanitarian reasons)’*.

11. UNHCR first wishes to recall that in line with general state practice and international law, ensuring refugee protection and access to human rights for individual refugees is the responsibility of the state where the refugees are, or which otherwise has jurisdiction over them.¹³ This reflects the primary responsibility for protection of the state in which a person arrives and seeks international protection. That being said, according to relevant conclusions of UNHCR’s Executive Committee, refugees and asylums-seekers may be returned to a country where they have already found protection if relevant conditions are met, where they move in an irregular manner from that country.¹⁴ UNHCR has further recognized that refugees may be returned or transferred to a state where they had found, could have found or, pursuant to a formal agreement, can find international protection.¹⁵ It is therefore accepted that while their intentions ought to be taken into account,¹⁶ refugees do not have an unfettered right to choose their ‘asylum country.’¹⁷ At the same time, if it appears that a person, before requesting asylum, already had a connection or close links with another state, s/he may if it appears fair and reasonable be called upon first to request asylum from that state.¹⁸ Under EU Law, Article 38(2) a) of the Asylum Procedures Directive¹⁹ specifically requires that the application of the safe third country concept shall be subject to rules laid down in national law, including rules requiring a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country.

12. Secondly, UNHCR observes that since Hungary’s Asylum Act already included an inadmissibility ground based on the application of the safe third country notion,²⁰ whereby all countries along the so-called Balkan route as well as Turkey were considered as safe third countries,²¹ the rationale for introducing this provision is unclear. The new ground appears to merge the concepts of first country of asylum and safe third

¹³ See 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, <http://www.refworld.org/docid/5acb33ad4.html>.

¹⁴ EXCOM Conclusion No. 58 (XL) 1989, para. (f). See also 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, <http://www.refworld.org/docid/5acb33ad4.html>, para 2.

¹⁵ EXCOM Conclusion No. 58 (XL) 1989, para. (f).

¹⁶ EXCOM Conclusion No. 15 (XXX) 1979, para. (h) (iii).

¹⁷ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(i), <http://www.refworld.org/docid/51af82794.html>. UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers* (Lisbon Expert Roundtable, 9- 10 December 2002), February 2003, para. 11, <http://www.refworld.org/docid/3fe9981e4.html>.

¹⁸ EXCOM Conclusion No. 15 (XXX) 1979, para. (h) (iv).

¹⁹ 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 (Asylum Procedures Directive), OJ L 180, 29.6.2013, p. 60–95.

²⁰ See Sections 2 i), 51 (2) b) and 51/A of the Asylum Act.

²¹ See Government Decree 191/201574 establishing a national list of safe third countries as amended by Government Decree 63/2016 (III.31).

country, which are distinct concepts, each subject to specific requirements under international law and EU law.²²

13. UNHCR further notes that the adopted amendments fail to address the practice of the Immigration and Asylum Office (IAO) which does not meet UNHCR's standards in the context of decisions on return or transfer to safe third countries.²³ UNHCR has noted that safe third country information is not assessed against the facts and circumstances of the individual case and the safe country assessment falls short of international law standards.²⁴ While IAO decisions regularly refer to the readmission agreement between the EU and Serbia,²⁵ IAO does not effectively assess whether Serbia will readmit the individual concerned and whether all of the requirements provided under international law and EU law are met. This assessment should be conducted, because if a safe third country does not readmit the asylum-seeker, Hungary shall ensure access to an asylum procedure pursuant to Section 51/A of the Act on Asylum and in accordance with Article 38(4) of the Asylum Procedures Directive.

14. Thirdly, the newly introduced legal provision in the Asylum Act only requires an assessment as to whether there is an 'adequate level of protection' generally available in the given country(ies). The application of the *safe third country* concept, whereby a state may return asylum-seekers to a State where they had found or could have found international protection, requires an individualized assessment as to whether the asylum-seeker would be subject to adequate treatment in the given country. This encompasses:

- the granting of access to a fair and efficient procedure for determination of refugee status and other international protections needs;
- the granting of a permit to remain while a determination is made, and treatment in accordance with the 1951 Convention and international human rights standards, including – but not limited to – protection from *refoulement*,²⁶ looking not only at a state's international obligations but also its domestic laws and the actual practice of implementation;
- an assessment of the asylum-seeker's access to means of subsistence sufficient to maintain an adequate standard of living in the third state; and
- an assessment as to whether or not a person determined to be a refugee in the third state will be recognized as such and be granted lawful stay.²⁷

15. Similar requirements exist under EU law, which provides that Member States may only apply the concept if they are satisfied that the person will not be at risk of persecution, serious harm or *refoulement*, and the possibility exists to request and receive refugee status in accordance with the 1951 Convention.²⁸ The

²² See 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, paras. 3-4, <http://www.refworld.org/docid/5acb33ad4.html>; and Articles 35 and 38 of the Asylum Procedures Directive.

²³ See 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, para. 4, <http://www.refworld.org/docid/5acb33ad4.html>.

²⁴ See 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, <http://www.refworld.org/docid/5acb33ad4.html>.

²⁵ Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation, <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=11601>. The agreement was signed on 18 September 2007 and entered into force on 1 January 2008. A Protocol was concluded between Hungary and Serbia in December 2009 pursuant to Article 19 of the Agreement, see Government Decree 53/2010 (III. 11.) of 11 March 2010.

²⁶ See ExCom Conclusion No. 85 (XLIX) 1998, para. (aa). UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers* (Lisbon Expert Roundtable, 9- 10 December 2002), February 2003, para. 15, <http://www.refworld.org/docid/3fe9981e4.html>. UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras. 14 and 15, <http://www.refworld.org/docid/3b36f2fca.html>. UNHCR, *UNHCR Policy on Refugee Protection and Solutions in Urban Areas, September 2009*, paras. 153 and 154, <http://www.refworld.org/docid/4ab8e7f72.html>. UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(vi), <http://www.refworld.org/docid/51af82794.html>. UNHCR, *Considerations on the "Safe Third Country" Concept*, July 1996, <http://www.refworld.org/docid/3ae6b3268.html>.

²⁷ 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, <http://www.refworld.org/docid/5acb33ad4.html>.

²⁸ See Article 38(1) of the Asylum Procedures Directive.

application of the safe third country concept also requires an assessment as to whether that country will readmit the applicant.²⁹ If these safeguards are not met, the transfer cannot be carried out and the applicant has to be granted access to the asylum procedure in Hungary.

16. The obligation to verify that conditions in the third country meet these requirements, in practice, rests on the removing State. It is not enough to merely assume that an asylum-seeker would be treated in conformity with these standards – either because the receiving State is a party to the 1951 Convention or other refugee or human rights instruments, or on the basis of an ongoing arrangement or past practice.³⁰ This assessment by the removing State is required irrespective of which third country is envisaged, the fact that the third country is generally designated as safe, or whether or not the asylum-seeker has expressed an additional fear, including of being further *refouled* from that third country. At a minimum, persons seeking international protection must have the ability to make a formal asylum claim with the competent authority and have access to legal assistance and representation, to relevant information in a language they understand and to necessary facilities and services, including interpretation services.

17. Fourthly, in regard to procedural requirements, UNHCR notes that asylum applicants have three calendar days from the date of notification to rebut the presumption and provide evidence that in their individual case the above conditions were not met in the given country,³¹ and three calendar days to lodge an appeal against a rejection decision on the basis of the new inadmissibility ground in case of a ‘crisis situation due to mass immigration’.³² The judicial appeal against the administrative rejection decision issued on grounds of inadmissibility does not have automatic suspensive effect on the implementation of the combined rejection and expulsion decision.³³ However, the applicant may request the reviewing administrative court to order the suspension of the administrative decision under challenge.³⁴

18. These provisions do not provide adequate procedural safeguards in accordance with the right to an effective judicial remedy.³⁵ According to relevant international and regional standards and related case law, in order to be effective, an appeal against a return decision that may entail a risk of treatment contrary to Article 3 of the European Convention on Human Rights, must have automatic suspensive effect.³⁶ As the Court of Justice of the European Union (CJEU) recently held, when a State decides to return an applicant for international protection to a country where there are substantial grounds for believing that s/he will be exposed to a real risk of ill-treatment contrary to Article 18 of the Charter of Fundamental Rights of the European Union, read in conjunction with Article 33 of the 1951 Convention, or to Article 19(2) of the Charter, the right to an effective remedy provided for in Article 47 of the Charter requires that that applicant

²⁹ 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*, para. 4.

³⁰ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(viii), <http://www.refworld.org/docid/51af82794.html>.

³¹ Section 51 (12) of the Asylum Act.

³² Section 80/K of the Asylum Act.

³³ Section 53 (6) of the Asylum Act.

³⁴ Section 50 (2) a) of Act I of 2017 on administrative judicial procedural rules; See Section 53 (6) of the Asylum Act and Section 52(1) of Act I of 2017 on the Administrative Judicial Procedural Code

³⁵ For example, Article 46 of the Asylum Procedures Directive requires a remedy to be effective when Member States apply the safe third country concept.

³⁶ *Conka v. Belgium*, 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002, paras. 83-85, <http://www.refworld.org/cases,ECHR,3e71fdfb4.html>; *Gebremedhin [Gaberamadhien] v. France*, 25389/05, Council of Europe: European Court of Human Rights, 26 April 2007, para. 66, <http://www.refworld.org/cases,ECHR,46441fa02.html>; *M.S.S. v. Belgium and Greece*, 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para. 293 <http://www.refworld.org/cases,ECHR,4d39bc7f2.html>. See also UNHCR, *Statement on the right to an effective remedy in relation to accelerated asylum procedures, issued in the context of the preliminary ruling reference to the Court of Justice of the European Union from the Luxembourg Administrative Tribunal regarding the interpretation of Art. 39, Asylum Procedures Directive (APD); and Articles 6 and 13 ECHR*, para. 24, <http://www.refworld.org/pdfid/4bf67fa12.pdf>.

have available to her/him a remedy enabling automatic suspension of enforcement of the measure authorising her/his removal.³⁷

19. Concerning the applicable time limit to challenge the inadmissibility decision, a three-day time limit may not be regarded as reasonable for challenging a rejection decision, especially considering that only a one-instance judicial review is available for asylum applicants and that reviewing courts do not have the power to alter the administrative decision. Based on the jurisprudence of the CJEU, the period prescribed to lodge an appeal must be sufficient in practical terms to enable the applicant to prepare and bring an effective action.³⁸

20. In sum, asylum-seekers must be permitted to remain in the country pending a decision on the claim, including on its admissibility when applying a safe third country concept, and be given a reasonable time to appeal the decision.³⁹ These safeguards are particularly important when asylum is requested and/or sought at the border or in transit zones, because of the particular vulnerability of asylum-seekers in that context, which is often beyond public scrutiny.

21. By way of conclusion, UNHCR emphasizes that the effective implementation of Article 31 of the 1951 Convention, which prohibits the penalization of refugees for their illegal entry if they come directly from a territory where their life or freedom was threatened present themselves without delay and show good causes for their illegal entry or stay, requires that it applies to any person seeking international protection. Consequently, a person seeking international protection is presumed to benefit from the obligation not to impose penalties as stipulated under Article 31 until found not to be in need of international protection following a fair procedure.⁴⁰ The scope of Article 31 extends to the territory under a State's control, which would include border crossings. Article 31 is therefore aimed at reinforcing the rights contained in the 1951 Convention through safeguarding access to asylum and may not be construed to summarily reject asylum-seekers who have not arrived directly from their country of origin without a proper individual assessment of the availability of protection in first country of asylum or safe third country.⁴¹ Furthermore, the Asylum Procedures Directive provides for important principles and guarantees to ensure effective access to the asylum procedure, including at the border, such as the provision of information on the possibility to seek asylum and the related procedures, if necessary through interpretation,⁴² granting access to organisations and persons providing advice and counselling at the several stages of the procedure,⁴³ including free procedural

³⁷ See *Sadikou Gnandi v. État belge*, C-181/16, Judgment of 19 June 2018, [EU:C:2018:465](#), para. 54. The Court has reconfirmed this position in two subsequent judgments: *X v. Belastingdienst/Toelagen*, C-175-17, Judgment of 26 September 2018, [EU:C:2018:776](#), paras. 32-33; *X and Y v. Staatssecretaris van Veiligheid en Justitie*, C-180-17, Judgment of 26 September 2018, [EU:C:2018:775](#), paras. 28-29.

³⁸ See *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, C-69/10, Judgment of the Court (Second Chamber) of 28 July 2011, [EU:C:2011:524](#), paras. 66-68.

³⁹ ExCom Conclusion No. 8 (XXVIII), 1977, para. (e)(i), <http://www.unhcr.org/excom/exconc/3ae68c6e4/determination-refugee-status.html>. See also, ExCom Conclusion No. 81 (XLVIII), 1997, para. (h), <http://www.unhcr.org/excom/exconc/3ae68c690/general-conclusion-international-protection.html>; ExCom Conclusion No. 82 (XLVIII), 1997, para. (d)(ii) and (iii), <http://www.unhcr.org/excom/exconc/3ae68c958/safeguarding-asylum.html>; ExCom Conclusion No. 85 (XLIX), 1998, para. (q), <http://www.unhcr.org/excom/exconc/3ae68c6e30/conclusion-international-protection.html>. See also: UN General Assembly, *Recommended Principles and Guidelines on Human Rights at International Borders: Conference room paper*, 23 July 2014, A/69/CRP. 1, Guideline 7, para. 5, <http://www.refworld.org/docid/54b8f58b4.html>.

⁴⁰ 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. See ExCom Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 79 (XLVII), 1996, para. (j); and ExCom Conclusion No. 81 (XLVIII), 1997, para. (i), all of which are <http://www.refworld.org/docid/4b28bf1f2.html>. See also, *Note on International Protection*, A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, <http://www.refworld.org/docid/3ae68d5d10.html> and Cambridge University Press, *Summary Conclusions: Article 31 of the 1951 Convention*, June 2003, <http://www.refworld.org/docid/470a33b20.html>.

⁴¹ For an analysis of the phrase 'coming directly' in Article 31, see UNHCR, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, July 2017, PPLA/2017/01, <http://www.refworld.org/docid/59ad55c24.html>.

⁴² See Articles 8(1), 12(1) a) and 12(1) b) of the Asylum Procedures Directive.

⁴³ See Articles 8(2), 12(1) c) and 22 of the Asylum Procedures Directive.

and legal information at first instance⁴⁴ and free legal aid and representation in appeals procedures,⁴⁵ as well as granting a right to remain pending a first-instance decision.⁴⁶

b) Access by people of concern to individuals and organizations providing support services

22. Act VI of 2018 introduces several measures to sanction individuals and organizations supporting the arrival or stay of asylum applicants and refugees in Hungary.

23. These measures include amendments to the Penal Code introducing a standalone *criminal offence* against the public order entitled ‘facilitating, supporting unlawful migration’⁴⁷, and criminalizing, inter alia, ‘organized’ activities aiming at the initiation of an asylum procedure that can be sanctioned with detention and up to one year of imprisonment and banishment.

24. Amendments to Act XXXIV of 1994 on the Police (Police Act) introduced by Act VI of 2018 a so-called *border security restraining measure* requiring the police to prevent any person from entering the area eight kilometres from the external border and to order the person to leave that area against whom criminal proceedings have been initiated for certain criminal offences, including unlawful crossing or damaging of the border fence and facilitating or supporting unlawful migration.⁴⁸ Further, a new minor offence for staying unlawfully within the eight-kilometre area has been introduced.⁴⁹

25. While states have a legitimate interest to prevent and punish criminal activities,⁵⁰ UNHCR is concerned about the potential impact of the newly introduced *criminal offence* on lawful activities carried out by individuals and organisations providing support services to asylum-seekers and refugees which may restrict or even deny people in need of international protection access to essential support services such as legal and procedural information, legal assistance and representation.

26. Providing assistance to asylum-seekers cannot be made unlawful as it would undermine core international standards, namely, the right to seek asylum and the prohibition of *refoulement*. UNHCR’s Executive Committee has consistently reaffirmed that UNHCR must be granted access to asylum applicants and refugees in order to carry out its protection functions in an effective manner.⁵¹

27. The obligation of States to provide access for UNHCR and its partner organisations implementing projects for UNHCR to asylum applicants, including at the border and transit zones, is also expressly provided for under EU asylum law.⁵² Article 29(2) of the EU Asylum Procedures Directive specifically requires Member States to provide access to asylum applicants, including those in detention, at the border

⁴⁴ See Article 19 of the Asylum Procedures Directive.

⁴⁵ See Articles 20 and 21 of the Asylum Procedures Directive.

⁴⁶ See Article 9 of the Asylum Procedures Directive.

⁴⁷ See *supra* note 6.

⁴⁸ Crossing unlawfully, damaging the border fence, obstructing construction of the border fence, smuggling, facilitating unauthorized residence, and facilitating, supporting unlawful migration, see Section 46/F of the Police Act.

⁴⁹ See Section 46/F of the Police Act, Section 201(4) of Act II of 2012 on minor offences.

⁵⁰ In fact, the Penal Code already contains provisions that criminalize activities aimed at assisting migrants circumventing immigration laws, therefore it is unclear why such stringent measures were introduced. See, e.g., Articles. 353, 354, 355 of the Penal Code.

⁵¹ ExCom Conclusion No. 22 (XXXII), 1981, para. III, <http://www.unhcr.org/excom/exconc/3ae68c6e10/protection-asylum-seekers-situations-large-scale-influx.html>. ExCom Conclusion No. 33 (XXXV), 1984, para. (h), <http://www.unhcr.org/excom/exconc/3ae68c6e20/general-conclusion-international-protection.html>. ExCom Conclusion No. 72 (XLIV), 1993, at para (b), <http://www.unhcr.org/excom/exconc/3ae68c4314/personal-security-refugees.html>. ExCom Conclusion No. 73 (XLIV), 1993, at para. (b) (iii), <http://www.unhcr.org/excom/exconc/3ae68c6810/refugee-protection-sexual-violence.html>. ExCom Conclusion No. 79 (XLVII), 1996, at para. (p), <http://www.unhcr.org/excom/exconc/3ae68c430/general-conclusion-international-protection.html>. See also UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office*, October 2013, p. 7, <http://www.refworld.org/docid/5268c9474.html>, setting out UNHCR’s mandate.

⁵² See Articles 8, 12 (1) c), 29(2) and Recital 25 of the Asylum Procedures Directive and Article 10(3) of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Reception Conditions Directive), OJ L 180, 29.6.2013, p. 96–116.

and in the transit zones. Further, Article 8 (2) of the Asylum Procedures Directive requires Member States to provide effective access to applicants for organisations and persons providing advice and counselling to applicants present at border crossing points, including transit zones, at external borders. Limitations may be imposed only in exceptional circumstances, *‘where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible’*. There is no evidence in the current instance that such conditions are present and would justify these stringent restrictions. Article 6 of the EU Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence provides that the said decision *‘shall apply without prejudice to the protection afforded refugees and asylum seekers in accordance with international law on refugees or other international instruments relating to human rights, in particular Member States’ compliance with their international obligations pursuant to Articles 31 and 33 of the 1951 Convention relating to the status of refugees, as amended by the Protocol of New York of 1967.*⁵³ These legislative amendments are therefore at variance with applicable international and EU law. Furthermore, they may stigmatize civil society actors including humanitarian workers and human rights defenders.⁵⁴

28. In conclusion, UNHCR is concerned that asylum-seekers face serious challenges in accessing protection in Hungary in line with international and European standards, including because of the legislative amendments of June and July 2018. UNHCR considers that the right to seek asylum should not be hindered or applicants penalized through measures to prevent and deter irregular entry contrary to Article 31 of the 1951 Convention. UNHCR further considers that providing assistance to asylum-seekers cannot be made unlawful as it would undermine core international standards, namely, the right to seek asylum and the prohibition of *refoulement*.

⁵³ 2002/946/JHA: Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002F0946&from=EN>. A recent Commission document clarifies as well that the same principle applies to the provisions of the Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32002L0090&from=EN>, see Commission Staff Working Document Refit Evaluation of the EU legal framework against facilitation of unauthorised entry, transit and residence: the Facilitators Package (Directive 2002/90/EC and Framework Decision 2002/946/JHA), 22 March 2017, SWD (2017) 117 final, [http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0117/COM_SWD\(2017\)0117_EN.pdf](http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/swd/2017/0117/COM_SWD(2017)0117_EN.pdf).

⁵⁴ End of mission statement by Special Rapporteur on the situation of human rights defenders, Visit to Hungary 8 - 16 February 2016, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17048&LangID=E>.