Draft Act of 12 October 2016 amending the Aliens Act[1] of 22 May 2014

Recommendations by UNHCR

1. Introduction

On 12 October 2016, the Ministry of Interior of Slovenia issued the "Draft Act Amending the Aliens Act" [2] ("draft Act").

The Office of the United Nations High Commissioner for Refugees ("UNHCR") welcomes the opportunity to comment on the draft Act, which aims at revising the treatment of aliens who do not fulfil the conditions for entry at border crossings, and aliens who enter the Republic of Slovenia at places other than authorized crossing points, in the event of changed conditions in the area of migration, in order to protect public order and internal security of the Republic of Slovenia, and to transfer some tasks concerning the treatment of different categories of migrants to the government Office responsible for migrant care.

UNHCR offers these comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions for refugees[3]. Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees, whereas Article 35 of the 1951 Convention Relating to the Status of Refugees ("1951 Convention") and Article II of its 1967 Protocol Relating to the Status of Refugees ("1967 Protocol") oblige State Parties to the cooperate with UNHCR in the exercise of its mandate, in particular by facilitating UNHCRs duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol. In addition, Article 18 of the EU Charter of Fundamental Rights states that the right to asylum shall be guaranteed with due respect for the rules of the 1951 Convention and the 1967 Protocol.

2. Specific observations

2.1 Article 1 of the proposed amendment to Article 10 introducing new Article 10.b 1 and 2 of the Aliens Act

(1) If the National Assembly of the Republic of Slovenia adopts a decision under the second paragraph of the preceding Article, an alien who does not fulfil the conditions for entry shall not be allowed to enter by the police; an alien who illegally entered the Republic of Slovenia after the entry into force of this Decision and is illegally situated in an area where the measure under this Article is implemented, shall be escorted to the border and referred to the country from which they illegally entered.
(2) Notwithstanding the provisions of the act governing international protection, the police shall act in accordance with the preceding paragraph even where an alien, after the implementation of the decision of the National Assembly of the Republic of Slovenia from the second paragraph of the preceding Article, expresses its intention to submit an application for international protection, namely when an alien wants to enter the territory of the Republic of Slovenia illegally or has entered it illegally at places other than authorized crossing points of another Member State of the European Union, and is situated in the area where the measure from this Article is implemented.

[1] Official Gazette RS, no. 45/14 – official consolidated text, 90/14, 19/15 and 47/15 –ZZSDT.
[2] EVA 2016-1711-0007.
[3] UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: http://www.refworld.org/docid/3ae6b3628.html ("UNHCR Statute").

As will be elaborated below, the proposed amendment imposes restrictions on access to territory for persons in need of international protection that contravene Slovenia's obligations under International and EU law. While States have the sovereign power to regulate the entry of foreigners, such power is subject to limitations, namely in instances where it would lead to the violation of the right of non-refoulement and of the right to asylum.

Key observations in light of international refugee law

Principle of *non-refoulement*

1. The principle of *non-refoulement*[4] prohibits – without discrimination[5] – any State conduct leading to the 'return in any manner whatsoever', including rejection at the frontier or non-admission to a safe foreign territory.[6] The principle of *non-refoulement* applies wherever the state in question exercises jurisdiction[7] over a person requesting or in need of international protection, including at national frontiers,[8] as soon as a person presents him - or herself - at the border claiming to be at risk or fearing return to his or her country of origin or any other country. There is no single correct formula or phrase for how this fear or desire to seek asylum needs to be conveyed.[9]

2. To give effect to their obligations in good faith[10] under the 1951 Convention, including the prohibition against *refoulement*, and before taking action to remove or reject entry to the territory, States Parties are required to make independent inquiries as to the need for international protection of persons seeking asylum,[11] a duty recognized by a wide range of national and regional courts.[12] Courts, as well as EXCOM, have also underlined the obligation to provide

[4] The principle of *non-refoulement* is most prominently expressed in Article 33 of the 1951 Convention, prohibiting States from expelling or returning a refugee to a territory where she or he would be at risk of threats to life or freedom.

[5] According to the 1951 Convention relating to the Status of Refugees, Article 3, '[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'.

[6] ExCom Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 22 (XXXII), 1981, para. II.A.2; ExCom Conclusion No. 81 (XLVIII), 1997, para. (h); ExCom Conclusion No. 82 (XLVIII), 1997, para. (d)(ii); ExCom Conclusion No. 85 (XLIX), 1998, para. (q).

[7] UNHCR, UNHCR's oral intervention at the European Court of Human Rights - Hearing of the case Hirsi and Others v. Italy, 22 June 2011, Application No. 27765/09, http://www.refworld.org/docid/4e0356d42.html. UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007, paras. 24, 26, 32-43, http://www.unhcr.org/refworld/docid/45f17a1a4.html; UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the case of Hirsi and Others v. Italy, March 2010, paras. 4.1.1-4.2.3, http://www.unhcr.org/refworld/docid/4b97778d2.html. UNHCR, UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR, 17 February 2012, para. 2(4), http://www.refworld.org/docid/4f4c959f2.html. UN Human Rights Committee General Comment No. 31, Nature of the General Legal Obligations imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para. 10, http://www.refworld.org/docid/478b26ae2.html.

[8] UNHCR, Note on the Principle of Non-Refoulement, part E. UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, January 2007, paras. 26-31, http://www.unhcr.org/refworld/docid/45f17a1a4.html. ExCom Conclusion No. 6 (XXVIII) 1977, para. (c). See also, D. v. United Kingdom, 146/1996/767/964, Council of Europe: European Court of Human Rights, 2 May 1997, para. 48, http://www.refworld.org/docid/46deb3452.html. 8

[9] UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Malevanaya & Sadyrkulov v. Ukraine (Application No. 18603/12), 15 July 2013, para. 3.1.4, http://swigea56.hcrnet.ch/refworld/docid/51e515794.html; UNHCR, UNHCR's oral intervention at the European Court of Human Rights - Hearing of the case Hirsi and Others v. Italy, 22 June 2011, Application No. 27765/09, http://www.refworld.org/docid/4e0356d42.html.

[10] Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, Article 26.

[11] UNHCR, UNHCR intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents), 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of2011, at para. 74-75.

[12] Hirsi Jamaa and Others v. Italy, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, paras. 146-148, http://www.refworld.org/docid/4f4507942.html; M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, paras. 286,298,315,321,359, http://www.refworld.org/docid/4d39bc7f2.html; Regina v. Immigration Officer at Prague Airport and Another, Ex parte

persons seeking asylum access to fair and efficient procedures for determining status and protection needs.[13] Such procedures need to allow for an examination of the relevant elements of facts and law, including the application of the eligibility criteria of Article 1 of the 1951 Convention, in order to help a State determine who should benefit from refugee protection, and who should not.[14]

3. The principle of *non-refoulement* applies not only with respect to return to the country of origin but also with regard to forcible removal to any other (third) country where a person has reason to fear persecution, serious human rights violations or other serious harm, or from where he or she risks being sent to his or her country of origin (indirect or chain *refoulement*).[15]

4. Under the obligations of *non-refoulement*, States have a duty to establish, prior to implementing any non-admission or removal measure that the person whom they intend to deny entry to, or remove from, their territory or jurisdiction is not at risk of direct or indirect *refoulement*.[16] If such a risk exists, the State is precluded from denying entry or forcibly removing the individual concerned.[17] UNHCR also considers that the responsible State must assess, prior to the removal and subject to procedural safeguards, the appropriateness of the removal for each person individually.[18] In order to be compatible with international law, the responsible State must ensure that the third country will treat the person in line with internationally accepted standards, will ensure protection against *refoulement* and will allow the person to seek and enjoy asylum. The duty to ensure that conditions in the third country meet these requirements rests on the responsible State. Even if the third State is a party to the 1951 Convention or other relevant human rights instruments, it cannot be assumed that such protections are in place.[19]

5. Screening of asylum applications at the border is not prohibited and may, for example, be appropriate for manifestly unfounded applications or for determining the admissibility of applications, as long as a number of procedural safeguards are observed.[20] Further, notions such as 'safe country of origin', 'internal flight alternative' and 'safe third country' should be appropriately applied so as not to result in improper denial of access to asylum procedures or to violations of the principle of *non-refoulement*.[21]

European Roma Rights Centre and Others, [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004, para. 26, http://www.refworld.org/docid/41c17ebf4.html; Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and United Nations High Commissioner for Refugees (Intervener), Hong Kong: Court of Final Appeal, 25 March 2013, paras. 56, 64, http://www.refworld.org/docid/515010a52.html.

[13] ExCom Conclusion No. 81 (XLVIII), 1997, para. (h); ExCom Conclusion No. 82 (XLVIII), 1997, para. (d)(ii) and (iii); ExCom Conclusion No. 85 (XLIX), 1998, para. (q).

[14] UNHCR, B010 v. Minister of Public Safety and Emergency Preparedness: Factum of the Intervener (UNHCR), 2 February 2015, para. 13, http://www.refworld.org/docid/54d09bb44.html.

[15] UNHCR, Note on Non-Refoulement (EC/SCP/2), 1977, para. 4.

[16] See also, T.I. v. The United Kingdom, Appl. No. 43844/98, Council of Europe: European Court of Human Rights, 7 March 2000, http://www.refworld.org/docid/3ae6b6dfc.html, where the Court emphasized the independent responsibility of each State Party to the ECHR to ensure compliance with the obligation of *non-refoulement*.

[17] UNHCR, Note on Non-Refoulement (EC/SCP/2), 1977, para. 22.

[18] UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, paras. 3(v) and (vi), http://www.refworld.org/docid/51af82794.html.

[19] UN High Commissioner for Refugees (UNHCR), Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Malevanaya & Sadyrkulov v. Ukraine (Application No. 18603/12), 15 July 2013, para. 3.1.6, http://swigea56.hcrnet.ch/refworld/docid/51e515794.html.

[20] ExCom Conclusion No. 8 (XXVIII) 1977, para. (e); ExCom Conclusion No. 30 (XXXIV) 1983, para. (d) and (e). See also, UNHCR, Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures), 31 May 2001, EC/GC/01/12, paras. 21 to 23, http://www.refworld.org/docid/3b36f2fca.html. Screening at the border may also be appropriate for national security reasons, to screen out and separate fighters from civilians (see EXCOM Conclusion No. 94 (LIII), 2002, para. (c)).

[21] ExCom Conclusion No. 87 (L) 1999, para (j).

6. Large-scale influx of refugees is no justification for the closure of borders to those seeking or in need of protection, or imposition of barriers to their access to territory[22]. The principle of *non-refoulement* should be scrupulously observed, including in all situations of large-scale influx.[23] Refugees should be admitted to the State in which they seek refuge and if that State is unable to admit them on a durable basis, it should always admit them without discrimination at least on a temporary basis and provide them with protection.[24]

7. UNHCR acknowledges that States may seek to transfer responsibility for asylum claims pursuant to bilateral or multilateral agreements. As preconditions for such transfer, however, among others, the receiving State must have agreed to readmit the person, and afford him or her access to a fair and effective asylum procedure, to treatment in line with international standards, and to international protection where required.[25] Furthermore, the appropriateness of transfer must be assessed on an individual basis. If these conditions are not in place, such transfers should not take place.[26]

8. Consequently, States should not reject asylum-seekers and refugees at unauthorized border crossings, or expel them from their territory for not having passed through one of the authorized border crossings. Denying access to territory and asylum procedures in this way would be at variance with the right to seek asylum, may be discriminatory and could result in a breach of the *non-refoulement* obligation.[27]

Key observations in light of international human rights law

9. Article 14 of the Universal Declaration of Human Rights recognizes the right to seek and enjoy asylum from persecution and is widely regarded as having customary status. Article 3(1) of the UN Declaration on Territorial Asylum, unanimously adopted by the General Assembly in 1967, provides that "[n]o person referred in Article 1, paragraph 1[28], shall be subjected to measures such as rejection at the frontier, or if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any country where he may be subjected to persecution".

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22 As the ECtHR strongly emphasised in its A.C. and Others v. Spain judgment, despite the significant numbers of asylum-seekers the States concerned are under the obligation to organise its judicial system to comply with the right to an effective remedy in expulsion and asylum matters (para. 104), ECtHR: A.C. and Others v. Spain, Application No. 6528/11

[23] ExCom Conclusion No. 19 (XXXI), 1980, para. (a).

[24] ExCom Conclusion No. 22 (XXXII), 1981, para. II.A.1.

[25] UNHCR, Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, May 2013, Para 3(vi), available at: http://www.refworld.org/pdfid/51af82794.pdf. UNHCR moreover emphasises that 'arrangements should be aimed at enhancing burden- and responsibility-sharing and international/regional cooperation, and not be burden shifting. Such arrangements should ideally contribute to the enhancement of the overall protection space in the transferring State, the receiving State and/or the region as a whole' (para 3(iv)).

[26] Ibid, para 3(vii).

[27] It is well established in the case law of the European Court of Human Rights that 'expulsion, extradition or any other measure to remove an alien may give rise to an issue under Article 3, and hence engage the responsibility of the expelling State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country'. See Hirsi Jamaa and Others v. Italy, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, para 114. The ECtHR has also reiterated the importance of guaranteeing anyone subject to removal measures with 'the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints' (ibidem, para 204). See also, Coalition for Reform and Democracy and others v. Republic of Kenya and others, Petition No. 628 of 2014 consolidated with Petition No. 630 of 2014 and Petition No. 12 of 2015, Kenya: High Court, 23 February 2015, para. 427, http://www.refworld.org/docid/54ecbdef4.html, in which the Court ruled that capping the number of refugees allowed to stay in Kenya, which in effect means a numeric limit on the entry of asylum-seekers, would violate the principle of *non-refoulement*.

[28] Article 1 para. 1 of the Declaration provides that "Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States." Article 14 of the Universal Declaration of Human Rights provides that (1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

10. The measure envisaged in section 10.b (2) of the draft Act, namely to escort asylum-seekers to the border and refer them back to the country from which they came if they entered Slovenia at places other than authorized border crossing points, contravenes the right to seek asylum and may amount to unlawful return. The measure to not allow an asylum-seeker to enter illegally, as the draft Act provides, amounts to rejection at the frontier and as such would also violate international law.

11. Moreover, international human rights law contains an absolute prohibition against *refoulement* to a situation where there is risk of torture and other cruel, inhuman or degrading treatment or punishment. This includes *inter alia* Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [29] and Articles 6 and 7 of the International Covenant on Civil and Political Rights.[30] .

12. In situations of mass influx, it is likely that asylum-seekers are found in the territory moving together in groups. When asylum-seekers and/or other aliens are *collectively* driven away from the territory, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group, the measure is referred to as "collective expulsion".[31] Collective expulsions are prohibited under Article 4 of Protocol No. 4 to the European Convention on Human Rights.[32] The purpose of Article 4 of this Protocol is to prevent States from removing aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority.[33]

13. Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and 19(2) provides for an absolute prohibition of *refoulement* even in circumstances where the exceptions to *refoulement* under the 1951 Convention are considered to be applicable. Accordingly, the ECtHR continuously held, since its judgment in *Soering v. the United Kingdom*[34] and reaffirmed in subsequent jurisprudence, including, for example, in the case of *Saadi v. Italy*[35] that the prohibition of refoulement under Article 3 shall apply irrespective of the behaviour of the applicant.

14. Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that the "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority […]." The ECtHR has established extensive case law on the question of effective remedies. According to the ECtHR, "rigorous scrutiny" of an arguable claim is required because of the irreversible nature of the harm

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[29] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.refworld.org/docid/3ae6b3a94.html.

[30] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html.

[31] Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights Prohibition of collective expulsions of aliens. http://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf.

[32] Article 4 of Protocol No. 4 to the European Convention on Human Rights reads as follows: "Collective expulsion of aliens is prohibited."

[33] Guide on Article 4 of Protocol No. 4, para. 1, available at: http://www.echr.coe.int/Documents/Guide_Art_4_Protocol_4_ENG.pdf. See also: Conka v Belgium, para 63 and Khlaifia and Others v Italy, Appl. no. 16483/12, Council of Europe: European Court of Human Rights, 1 September 2015 (Chamber judgment – pending before the Grand Chamber), para 172 http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=55e5bf1c4&skip=0&query=khlaifia

[34] Soering v. The United Kingdom, 14038/88, Council of Europe: European Court of Human Rights, 7 July 1989, para. 88, at: http://www.unhcr.org/refworld/docid/3ae6b6fec.html

[35] Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: http://www.refworld.org/docid/47c6882e2.html.

that might occur, in case of a risk of *refoulement* contrary to Article 3 of the ECHR.[36] The remedy must be effective in practice as well as in law. It must take the form of a guarantee, and not a mere statement of intent or a practical arrangement,[37] and it must have automatic suspensive effect[38].

In asylum and deportation cases, the ECtHR has stressed "the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged [by the applicant] materialized"[39]. It has accordingly interpreted Article 13, in conjunction with Article 3 as well as with Article 4 Protocol no. 4, to require governments to suspend deportation proceedings pending "independent and rigorous scrutiny" of the applicant's claims.[40] Therefore, expulsion before a definitive decision on status may violate obligations under Articles 3 and 13 of ECHR[41].

Key observations in light of EU asylum law

The Right to seek asylum

15. According to Article 18 of the EU Charter of Fundamental Rights 'the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the Status of Refugees'.

16. The right to asylum is further elaborated upon in EU secondary legislation on asylum and involves a series of corresponding obligations for all the EU Member States, including the obligation to examine the asylum application[42] and to grant international protection to those in need.[43] Further, the recast EU Asylum Procedures Directive requires States to facilitate access to the procedure for granting and withdrawing international protection to people making an application in its territory, including at the border.[44]

17. When a person makes an asylum application, the Member State to which it was made must register the application no later than three working days after which it was made.[45] In case of simultaneous applications for international protection by a large number of people, EU Member States may extend the time limit for registering applications.[46]

18. The explanatory note to the draft Act provides that "*[t]he draft does not override the right of refuge, as the measure proposed relates solely to the persons who will enter the Republic of Slovenia from other Member States of the [EU] in which the same standards of the [CEAS] apply as in the Republic of Slovenia, and the Member States are safe countries of origin*." Pending the reform of CEAS including the current Dublin system, Slovenia is bound by the Dublin III Regulation to determine the Member State responsible for examining asylum applications lodged

[36] Jabari v. Turkey, Appl. No. 40035/98, ECtHR, 11 July 2000, para 50, at: http://www.unhcr.org/refworld/docid/3ae6b6dac.html.
[37] Conka v. Belgium, 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002, para 83, at: http://www.unhcr.org/refworld/docid/3e71fdfb4.html.
[38] Gebremedhin [Gaberamadhian] c. France, 25389/05, ECtHR, 10 October 2006, para 66, at: http://www.unhcr.org/refworld/docid/45d5c3642.html.
[39] See Čonka, para. 79, footnote 59; Jabari, para. 50, footnote 58;
[40] See Baysakov; Bahaddar v. the Netherlands, ECtHR 19 February 1998, Appl. No. 25894/94.
[41] See ECtHR, Jabari, footnote 58, and subsequent case-law, especially, ECtHR, Gebremedhin, footnote 60, para. 67
[42] Article 3(1) of the Dublin III Regulation.
[43] Articles 13 and 18 of the Qualification Directive (recast). See also, UNHCR, UNHCR intervention before the Court of Justice of the European Union in the cases of N.S. v. Secretary of State for the Home Department in United Kingdom and M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland, 1 February 2011, C-411/10 and C493/10, para. 14, http://www.refworld.org/docid/4d493e822.html.
[44] Articles 3(1) and 6(1) of the EU Asylum Procedures Directive (recast).
[45] Article 6(1) of the EU Asylum Procedures Directive (recast).
[46] Article 6(5) of the EU Asylum Procedures Directive (recast).

in one of the Member States.[47] Under the Dublin system, Member States shall examine any such application made by a third-country national or a stateless person who applies on the territory of any one of them, *including at the border* or in the transit zones. Moreover, EU law precludes the application of a conclusive presumption that all Member States observe the fundamental rights of the European Union.[48]

19. In the event of a large influx of asylum-seekers, Article 33(1) of the Dublin III Regulation provides for an early warning, preparedness and crisis management mechanism that may be triggered by either the Commission or the Member State. Pending the reform of the Dublin Regulation, this mechanism remains the option that the Republic of Slovenia may explore in the event of particular pressure being placed on its asylum system due to a large influx of asylum-seekers.

20. Further, EU law envisages that in the event of large numbers of third-country nationals arriving and lodging applications for international protection at a border or in a transit zone, border procedures may also be applied where and as long as third-country nationals are accommodated normally at locations in proximity to the border or transit zone.[49] Indeed, the Republic of Slovenia has transposed relevant provisions with regard to border procedures in its national law. Thus, one of the solutions to the challenges posed by a large influx of asylum-seekers may be found in operationalizing the already enacted border procedures under Article 43 of the International Protection Act, instead of by limiting access to the territory and access to the asylum procedure through the proposed amendments to the Aliens Act.

Procedural safeguards in the event of return

21. It is stated that the legal basis for return is to be found in the EU recast Asylum Procedures Directive (APD),[50] in particular in the concept of 'first country of asylum' and the concept of 'safe third country' through an admissibility procedure. Pursuant to Article 35 APD, the applicant shall be allowed to challenge the application of the first country of asylum concept in his or her particular circumstances. To that end, he or she is entitled to the following procedural safeguards that will have to be secured:

    - A personal interview on admissibility in accordance with Article 34(1) APD to allow him or her to be heard and present his or her views on the application of the first country of asylum concept to him/her;[51]

    - The right to an effective remedy before a court or tribunal against the inadmissibility decision in accordance with Article 46(1)(a)(ii) or (iii) and Article 46(6)(b) APD. This includes the court or tribunal's power to rule whether or not the applicant may remain on the territory of

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

[48] Court of Justice of the European Union, N.S. v. Secretary of State for the Home Department in United Kingdome and M.E. and Others v. Refugee Applications Commissioner and the Minister for Justice, Equality and Law Reform in Ireland, 1 February 2011, C-411/10 and C-493/10, available at: http://www.refworld.org/docid/4ef1ed702.html.

[49] Article 43 (3) of the EU Asylum Procedures Directive.

[50] European Union: Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU ("APD"), http://www.refworld.org/docid/51d29b224.html.

[51] UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions, March 2010, p. 290-291, http://www.refworld.org/docid/4c63e52d2.html. European Commission, Report on the Application of the Directive 2005/85/EC, COM(2010)465, 8 September 2010, p. 10.

the Member State, either upon the applicant's request or acting ex officio, pending the outcome of the remedy.[52]

- Applicants shall be given the opportunity to consult in an effective manner a legal adviser or other counselor (Article 22(1) APD).22 Such person must have access to the applicant for the purpose of consultation, including in closed areas such as detention facilities (Article 23(2) APD). Further, on appeal, the state must ensure free legal assistance and representation on the request of the applicant (Article 20(1) APD).

Key observations in light of Slovene national law

22. The right to asylum is provided for in Slovene national law. Article 48 of the Constitution provides that "[w]ithin the limits of the law, the right of asylum shall be recognized to foreign nationals and stateless persons who are subject to persecution for their commitment to human rights and fundamental freedoms."[53]
23. Although the Constitution confines the right of asylum to "*the limits of the law*", Article 8 of the Constitution makes it clear that Slovene national "[l]aws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia. Ratified and published treaties shall be applied directly." Therefore, the limitations to the right to asylum as proposed by the draft Act, are not only at variance with international law, but also contravene Slovene constitutional law.

Conclusion

EU Member States are not permitted, under international refugee law, European Human Rights Law or EU asylum law, to deny access to territory or to asylum procedures to asylum-seekers on the basis of requirements with regard to the place of entry into the territory. Purporting to do so is discriminatory unlawful and creates a risk of *refoulement* if it results – directly or indirectly – in exposure to persecution or inhuman or degrading treatment or punishment. To avoid discrimination and direct or indirect refoulement, EU Member States are required to assess such risks through the relevant procedures established under EU law. Moreover, it is at variance with the right to seek and enjoy asylum, and inconsistent with EU legal obligations to facilitate access to the asylum procedure for people in need of international protection. In doing so, EU Member States are choosing to limit the extent to which they will honour their obligations to refugees. Imposing requirements regarding the place of entry could prevent asylum-seekers and amount to a de facto or attempted shifting of responsibility to others contrary to the principle of international cooperation and responsibility-sharing recognized under EU[54] and international law. These principles were recently endorsed by world leaders through the adoption of the New York Declaration on Refugees and Migrants on 19 September 2016 for the institution of a humane, considered and comprehensive approach to tackle the realities of forced movement.

[52] UNHCR recalls that the remedy against an inadmissibility decision must have automatic suspensive effect in law and in practice, where the applicant has an arguable claim of a risk of ill-treatment upon return or of arbitrary deportation from the country of return in accordance with Art. 3 and 13 ECHR, See M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para. 293, http://www.refworld.org/docid/4d39bc7f2.html.

[53] Constitution of the Republic of Slovenia, Official Gazette of the Republic of Slovenia Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, 68/06, and 47/13.

[54] Article 67 (2) of the Treaty on the Functioning of the European Union (TFEU), as amended by the Lisbon Treaty, states that the Union shall: "…ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals."

24. UNHCR recommends that the Government of Slovenia reconsider the measure envisaged in section 10.b(2) of the draft Act and omit any reference to steps that amount to expulsion or prevention of entry of asylum-seekers.

2.2 Ad Article 1 of the proposed amendment to Article 10 introducing new Article 10.b 3 of the Aliens Act

(3) This Article shall not apply where a direct threat to the life of an alien exists, or where the health situation would obviously hamper the implementation of the measure from the first paragraph of this Article, or where it is estimated that aliens are unaccompanied minors, for whom it is assumed that they are no more than 14 years old.

25. The draft Act provides that the proposed measures restricting access to the territory and the asylum procedure do not apply when "*aliens [are] unaccompanied minors, for whom it is assumed that they are no more than 14 years old*." For the purpose of implementing the proposed measures, the age of minority would thus end at 14 years, rather than at the usual age of 18.

26. Article 1 of the Convention on the Rights of the Child ("CRC"), to which Slovenia is also a Party, defines children as "*every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier*." Although the Slovene Marriage and Family Relations Act does not contain an explicit definition of a minor, Article 117 (termination of parental rights) indirectly provides for a definition of the term majority: "*The parental right ceases with the majority of the child, that is, when the child reaches eighteen years of age, or if the child marries before reaching majority.* [55] Further, Article 2 (20) of the International Protection Act of Slovenia defines as a minor "*a third-country national or a stateless person below the age of 18*".

27. The age of majority in Slovene national law is thus in conformity with the Convention on the Rights of the Child, with majority being attained at the age of 18, and not at the age of 14.

Conclusion

28. UNHCR recommends bringing draft Article 10.b 3 in line with international standards as well as relevant provisions of Slovene national law which provide that majority is reached at the age of 18.

2.3 Ad Article 5 of the proposed amendment establishing a Migration Office

(1) The Government of the Republic of Slovenia shall establish the Office from the new fifth paragraph of Article 75 of the Act within one month from the enactment of this Act. The Office shall start to perform the tasks in accordance with this Act within three months of its establishment, by that time the Office tasks will be performed by the Ministry responsible for internal affairs.
(2) The Office shall take over the management of the existing asylum centre, its branches, integration houses and accommodation centres on the date of commencement of duties.

29. UNHCR welcomes the creation of a separate office specifically responsible for both the provision of reception conditions and integration process directly under the supervision of the Government. Because reception standards can impact a person's later success integrating into the society. UNHCR considers it vital that states ensure adequate conditions to asylum-seekers. UNHCR commends the Government of Slovenia for including the refugees in the general integration plans and policies.

[55] Marriage and Family Relations Act (MFRA), Official Gazette RS, No. 69/04.

30. This will provide the opportunity to link the reception and the integration phases in practice. Therefore, UNHCR recommends that the Government of Slovenia, when designing the reception and integration programmes, take into consideration the impact of conditions of reception of asylum-seekers and the length of asylum procedures on the integration of refugees into the broader society.

Conclusion

31. UNHCR considers that reception policies are more effective if they are guided by the potential longer term outcomes of the process including the integration of those persons who are ultimately recognised to be in need of international protection[56].

UNHCR Office in Slovenia
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[56] UN High Commissioner for Refugees (UNHCR), *Note on Integration of Refugees in the European Union*, paragraph 8, May 2007, available at: http://www.refworld.org/docid/463b24d52.html; UN High Commissioner for Refugees (UNHCR), *Better Protecting Refugees in the EU and Globally: UNHCR's proposals to rebuild trust through better management, partnership and solidarity*, December 2016, available at: http://www.refworld.org/docid/58385d4e4.html [accessed 8 December 2016]