



**Submission by the Office of the United Nations High Commissioner for Refugees
in the case of *R.A. and Others v. Poland* (Appl. No. 42120/21)
before the European Court of Human Rights**

1. Introduction*

1.1. UNHCR has been entrusted by the UN General Assembly 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 UNHCR welcomes the opportunity to intervene as a third party in this case, following leave granted by the European Court of Human Rights ('the Court') by its letter of 10 February 2022.

1.2. In this submission, UNHCR outlines the domestic legislative framework and practice in Poland concerning the treatment of asylum-seekers at its border with Belarus (Part 2). The submission then provides UNHCR's interpretation of the relevant principles of international and European law governing this situation (Part 3), before outlining its position on Afghanistan (Part 4).

2. The legislative framework and practice regarding the treatment of asylum-seekers at the Polish border with Belarus

2.1. Legislative framework

2.1.1. As a result of a political crisis unfolding at the Polish-Belarusian border in the summer 2021,³ on 20 August 2021, the Minister of the Interior and Administration amended the Regulation on temporary suspension or restriction of border traffic at certain border crossing points ('MoI Regulation').⁴

2.1.2. The MoI Regulation created a list of categories of foreigners permitted to cross the border. It does not mention persons in need of and seeking international protection. It also added a new provision which states that a person who is not listed in the mentioned categories of foreigners should immediately leave Polish territory (section 2a of the MoI Regulation). The new provision also states that a person found at a Polish border crossing at which border traffic has been suspended (i.e. a closed border crossing at which no border checks are performed and no entries are permitted), or a person outside of the border crossing into Polish territory, shall be returned to the state border (section 2b of the MoI Regulation).

2.1.3. In addition to the amended MoI Regulation, the Polish government drafted legislation to amend the *Act on Foreigners* and the *Act on Granting Protection to Foreigners*.⁵ The rationale for these amendments, as outlined in the Explanatory Memorandum, was, *inter alia*, to 'de-formalize' border

* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly (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.unhcr.org/refworld/docid/3ae6b3628.html, para. 1.

² *Ibid.*, para. 8(a) and Article 35 of the *1951 Convention relating to the Status of Refugees* ('1951 Convention') and Article II of the *1967 Protocol Relating to the Status of Refugees*: www.unhcr.org/4ec262df9.pdf.

³ For a detailed overview of the legislative framework prior to the introduction of these changes see *Submission by the Office of UNHCR in the case of D.A. and Others v. Poland* (Appl. No. 51246/17) before the European Court of Human Rights, 5 February 2018: www.refworld.org/docid/5a9d6e414.html, section 2.2.

⁴ Regulation of the Minister for Interior and Administration of 13 March 2020 on temporary suspension or restriction of border traffic at certain border crossing points, as amended on 20 August 2021, <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210001536/O/D20211536.pdf>, and <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000435>.

⁵ Act on Foreigners of the Republic of Poland of 12 December 2013, as amended, Dz. U. 2013 poz. 1650; Act on Granting Protection to Foreigners on the Territory of the Republic of Poland, 13 June 2003, Dz. U. 2003 Nr 128 poz. 1176.

procedures in order to accelerate returns, prohibit re-entry into Poland, and protect Polish residents from potential terrorist threats.⁶

2.1.4. The amendments to the *Act on Foreigners* and the *Act on Granting Protection to Foreigners*, were swiftly passed by the Polish Parliament on 14 October 2021, and came into force on 26 October 2021. They significantly restrict access to asylum and drew sharp criticism from international, European and national organizations.⁷ According to the new provisions, persons apprehended crossing the border irregularly are prevented from entry into Polish territory and issued a return order with a prohibition of entry from 6 months to 3 years regardless of their international protection needs. This order can be appealed but has immediate effect (Article 303b of the *Act on Foreigners*). The amendments also provide that the Head of the Office for Foreigners may disregard the application for asylum filed by a person intercepted crossing irregularly, unless the foreigner i) arrived directly from a territory in which their life or liberty was under threat of persecution, ii) presented credible causes for the illegal entry into the territory of the Republic of Poland and iii) filed an application for granting international protection immediately upon crossing the border (Article 33, para. 1a of the *Act on Granting Protection to Foreigners*). In essence, this makes the right to seek asylum conditional and dependent on the justification of irregular crossing.

2.1.5. In addition, on 2 September 2021, the Polish President issued a Regulation declaring a 30-day state of emergency in parts of the Podlaskie and Lubelskie voivodeships, at the request of the Council of Ministers.⁸ On 1 October 2021, the state of emergency was extended by 60 days.⁹ Among others, the Regulation introduced a prohibition to stay within the area covered by the state of emergency, as well as a limitation of access to public information concerning the activities undertaken within the area covered by the state of emergency related to the protection of state borders and the prevention of ‘illegal migration’. Among the categories of persons and organizations who are allowed to enter the emergency zone, it is noteworthy that the Regulation does not list NGOs, medical volunteers, or humanitarian organizations, including UNHCR. On 30 November 2021, the President of Poland signed the newly amended *Act on the Protection of the State Border*, which enables the Ministry of Interior to introduce a temporary ban on staying in a specific area in the border zone adjacent to the state border with Belarus.¹⁰ On this basis, the Minister of Interior issued a corresponding Regulation on the same day,¹¹ valid for the period from 1 December 2021 to 1 March 2022.

2.2. The relevant practice

2.2.1. In practice, UNHCR has noted an increase in reports of denial of access to the territory and asylum procedures by persons who expressed an intention to seek asylum. This has been particularly evident in the summer of 2021 and in the area along the border with Belarus, in Podlaskie and Lubelskie voivodeships. UNHCR’s observations are based on visits near the border, direct testimony recorded on

⁶ See draft law, <https://orka.sejm.gov.pl/Druki9ka.nsf/0/66CB4F4C2F85334EC12587420031E720/%24File/1507.pdf>.

⁷ Among others, see *UNHCR observations on the draft law amending the Act on Foreigners and the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (UD265)*, 16 September 2021 (‘UNHCR Comments on Poland’): <https://www.refworld.org/docid/61434b484.html>; OSCE, *Urgent Opinion on Draft Amendments*, 10 September 2021, https://www.osce.org/files/f/documents/3/3/498252_0.pdf; CoE Commissioner for Human Rights (‘CoE CHR’), *Commissioner calls for immediate access of international and national human rights actors and media to Poland’s border with Belarus to end human suffering and violations of human rights*, 19 November 2021, <https://www.coe.int/en/web/commissioner/-/commissioner-calls-for-immediate-access-of-international-and-national-human-rights-actors-and-media-to-poland-s-border-with-belarus-in-order-to-end-hu>; CCBE, *CCBE Statement on the situation at the EU border with Belarus*, 15 December 2021, https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/MIGRATION/MIG_Statement/EN_MIG_20211215_C_CBE-Statement-on-Situation-at-the-EU-border-with-Belarus.pdf, p. 3; Polish Ombudsman, *Letter by the Polish Ombudsman to the Polish Minister of Interior*, 25 August 2021, <https://bip.brpo.gov.pl/sites/default/files/Wyst%C4%85pienie%20RPO%20do%20MSWiA%2025.08.2021.pdf>; Polish Helsinki Foundation for Human Rights, *Comments on the Bill Amending the Polish Acts*, 6 September 2021, <https://www.hfhr.pl/wp-content/uploads/2021/09/draft-law-comments-eng-FINAL.pdf>.

⁸ Regulation of the President of the Republic of Poland of 2 September 2021 on declaration of a state of emergency in parts of the Podlaskie Voivodeship and in parts of the Lubelskie Voivodeship: <https://dziennikustaw.gov.pl/D2021000161201.pdf>.

⁹ Regulation of the President of the Republic of Poland of 1 October 2021 on the extension of the state of emergency introduced in the area of part of the Podlaskie Voivodeship and part of the Lubelskie Voivodeship: <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210001788/O/D20211788.pdf>.

¹⁰ See: <https://tvpworld.com/57209787/president-signs-amendment-to-act-on-protection-of-state-border>.

¹¹ Regulation of the Minister for Interior and Administration of 30 November 2021 on the introduction of a temporary ban on staying in a specific area in the border area adjacent to the state border with the Republic of Belarus, Dz.U. 2021 poz. 2193.

both sides of the border (from persons who managed to enter Poland, as well as persons who were ‘pushed back’ or denied entry and presented at UNHCR’s office in Minsk) and reports from other organizations present in the area, including the Polish Commissioner for Human Rights. Estimates of ‘pushbacks’ are difficult to assess as official statistics are not sufficiently detailed. In addition, Polish authorities have been denying all humanitarian and international organizations, including UNHCR, access to the area covered by the emergency zone established in September 2021. However, since August 2021, the Polish Border Guard has been reporting daily via Twitter on ‘prevented attempts to illegally cross the border’ (i.e. people either apprehended on the territory of Poland and returned across the border line, or prevented entry into Poland). Between August 2021 and 31 December 2021, the Polish Border Guard reported 39,670 such prevented entries.¹² This demonstrates a clear and systematic practice of non-entry for persons who have entered or attempted to enter Poland irregularly, especially from Belarus, which routinely involves violent pushbacks, in some cases despite an initial admission to Polish territory for medical purposes.¹³

2.2.2. UNHCR is aware of individuals who had been pushed back several times and only managed to lodge an asylum claim in the presence of representatives of civil society organizations, the Polish Commissioner for Human Rights, media, or politicians, often supported by interim measures issued by this Court. From 1 August to 31 December 2021, 4,600 foreigners have applied for international protection for the first time in Poland. This number includes 1,000 Afghan nationals evacuated from Afghanistan by the Polish government and 1,290 Belarusian nationals, admitted for humanitarian reasons. Since August 2021, UNHCR and its partner organization have received hundreds of distress calls regarding a total of approximately 700 persons. The majority of these persons are families with children from Afghanistan, Syria, Yemen and Iraq, many of whom declared that they had crossed the border into Poland and were attempting to seek asylum in Poland but had been pushed back to Belarus by Polish Border Guards/Polish authorities before being able to access the asylum procedure.

2.2.3. In this context, on 21 September 2021, UNHCR and IOM expressed their shock and dismay about the deaths of four individuals near the Belarus-Poland border. They further expressed their growing concern regarding reports of pushbacks at the border, and that groups of people had become stranded for weeks, unable to access any form of assistance, asylum or basic services. ‘Many were left in dire situations, exposed to the elements, suffering from hypothermia. Some were rescued from swamps.’¹⁴ In an additional press release of 22 October 2021, UNHCR observed that:

‘[a]mong those stranded at the border are people with international protection needs, including 32 Afghan women, men and children. They have been left in limbo at the border between Poland and Belarus since mid-August in dire conditions and are unable to access asylum and any form of assistance on either side. They do not have proper shelter or protection from the elements, and no secure source of food or water.’¹⁵

UNHCR further stated that 16 persons among the above-mentioned group made another attempt to cross into Poland but were apprehended by the Polish Border Guards or other Polish authorities and denied the opportunity to apply for asylum. They were also denied access to legal assistance, despite having previously provided lawyers at the border with written powers of attorney to represent them in applying for asylum in Poland. This group was subsequently pushed back by the Polish Border Guard across the border to Belarus, within the span of a few hours. Moreover, UNHCR stated that it has so far not been granted access to meet with the group from the Polish side – despite repeated requests – and could only access them a few times from the Belarusian side to deliver life-saving aid. UNHCR considered the fact that their intention to seek asylum while in Poland had been ignored to constitute ‘a clear violation of international refugee law and international human rights law.’¹⁶

¹² See: https://twitter.com/Straz_Graniczna/status/1478717305928491009.

¹³ See, for example, <https://www.aljazeera.com/features/2021/11/15/belarus-poland-border-people-are-dying-in-the-forest>, <https://www.theguardian.com/world/video/2021/oct/22/freezing-to-death-the-migrants-left-to-die-on-the-poland-belarus-border-video?fbclid=IwAR2IrDYw1U2ieGNOqIOD32hdKynlY4AAqKcdJK0jFXsZLw41fGbwad7-Kys>, <https://grupagranica.pl/files/Grupa-Granica-Report-Humanitarian-crisis-at-the-Polish-Belarusian-border.pdf>, <https://www.hrw.org/report/2021/11/24/die-here-or-go-poland/belarus-and-polands-shared-responsibility-border-abuses>.

¹⁴ UNHCR and IOM, Press release of 21 September 2021: <https://www.unhcr.org/news/press/2021/9/6149dec74/unhcr-iom-shocked-dismayed-deaths-near-belarus-poland-border.html>.

¹⁵ UNHCR, Press release of 22 October 2021: <https://www.unhcr.org/news/press/2021/10/6172af254/unhcr-urges-states-end-stalemate-belarus-eu-border-avoid-further-loss-life.html>.

¹⁶ *Ibid.*

2.2.4. In the official statement on this incident, the Polish Border Guard noted that the 16 Afghans were returned to the border in accordance with the amended MoI Regulation (see above para. 2.1.2.), which had been applied to this group stranded in Usnarz Górny since August 2021. This confirms that the amended MoI Regulation is used to restrict access to asylum, which was also highlighted in the Polish Ombudsman’s letter to the Ministry of Interior.¹⁷ Similar information has reached the UNHCR Representation in Poland.

2.2.5. In a further press release of 12 November 2021, UNHCR and IOM warned that ‘[t]he makeshift camp at the border with no adequate shelter, food, water and medical care in freezing temperatures is not a safe and suitable place for people and could lead to further loss of life.’¹⁸

3. Relevant principles of international and European refugee and human rights law

3.1. The right to seek asylum and the principle of *non-refoulement*

3.1.1. Under international law, states have the sovereign power to regulate the entry of foreigners. However, international law also provides that measures to this effect may not prevent foreigners from seeking and enjoying asylum from persecution.¹⁹ The unconditional right to asylum is affirmed in the Charter of Fundamental Rights of the European Union and is implemented in part by States’ obligations to provide international protection to refugees in accordance with the *1951 Convention relating to the Status of Refugees* (‘1951 Convention’) and its 1967 Protocol.²⁰ Central to the right to asylum is the principle of *non-refoulement*. The obligation of States not to expel or return a person to territories where their life or freedom would be threatened is the cornerstone of international refugee law, most prominently expressed in Article 33(1) of the 1951 Convention.²¹ The principle of *non-refoulement* constitutes an essential binding and non-derogable component of international refugee protection which has been restated in international and regional human rights instruments and courts.²² It is a norm of customary international law and is consequently binding for all States.²³

3.1.2. The prohibition of *refoulement* applies to any form of forcible removal, including deportation, expulsion, informal transfers, pushback practices and non-admission at the border.²⁴ States are responsible for ensuring protection from *refoulement* wherever a State exercises jurisdiction, including at national frontiers. The prohibition of *refoulement* applies not only with respect to return to the individual’s country of origin but also to forcible removal to any other – third – country where a person has reason to fear persecution, serious human rights violations or other serious harm, or from where he or she risks being sent to his or her country of origin (indirect or chain *refoulement*).²⁵ UNHCR underlines that the

¹⁷ In this letter, the Ombudsman underlined that the information received by his Office showed that the Polish Border Guard is applying the Regulation to persons who would like to seek asylum in Poland: see note 7 above.

¹⁸ UNHCR and IOM, Press release of 12 November 2021: <https://www.unhcr.org/news/press/2021/11/618e20c34/iom-unhcr-provide-emergency-aid-asylum-seekers-migrants-belarus-poland.html>. See also, CoE CHR, note 7 above, and <https://www.msf.org/msf-leaves-polish-border-after-being-blocked-assisting-migrants-and-refugees>.

¹⁹ Article 14 of the *Universal Declaration of Human Rights* provides that ‘[e]veryone has the right to seek and to enjoy in other countries asylum from persecution’.

²⁰ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 18: www.refworld.org/docid/3ae6b3b70.html (‘EU Charter of Fundamental Rights’), referring to the right to asylum to be guaranteed with due respect to the 1951 Convention and EU law.

²¹ ‘No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’: Article 33(1), 1951 Convention.

²² Including Articles 6 and 7 *International Covenant on Civil and Political Rights*; Article 3 *Convention Against Torture*; Article 22(8) 1969 *American Convention on Human Rights*; Article 5 *Banjul Charter*; Articles 2 and 3 *ECHR*; Article 19(2) *EU Charter of Fundamental Rights*.

²³ The fundamental and non-derogable character of the principle of *non-refoulement* has also been reaffirmed by the Executive Committee of the High Commissioner’s Programme (‘ExCom’) in numerous Conclusions: UNHCR, *Conclusions on International Protection Adopted by the Executive Committee of the UNHCR Programme 1975 – 2017 (Conclusion No. 1 – 114)*, October 2017: www.refworld.org/docid/5a2ead6b4.html. See also, *Submission by the UNHCR in the case of S.S. and Others. v. Italy (Appl. No. 21660/18) before the ECtHR*, 14 November 2019: www.refworld.org/docid/5dcebff54.html, para. 3.1.2., and sources cited therein.

²⁴ 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, <https://www.refworld.org/docid/45f17a1a4.html>, para. 7.

²⁵ For a recent restatement of the Court’s general principle that ‘chain *refoulement*’ is prohibited, see ECtHR, *D.A. and Others v. Poland*, Appl. No. 51246/17, 8 July 2021, www.refworld.org/cases.ECHR.60fae2984.html, para. 58 and ECtHR, *M.K. and Others*

responsibility of a State to protect a person from *refoulement* is engaged wherever its conduct exposes that person to a risk of being subject to persecution or ill-treatment in another country, in particular if the person has expressed a fear of such nature, or the individual circumstances or characteristics of the person or group to which she belongs indicates a risk of which the State ought to be aware.²⁶

3.1.3. There is no single correct formula or phrase for how this fear or desire to seek asylum needs to be conveyed. The absence of an explicit and articulated request for asylum does not absolve the concerned State of its *non-refoulement* obligation. In the words of this Court, a State is ‘not exempt from complying with its obligations under Article 3 of the Convention because the applicants failed to ask for asylum.’²⁷ In order to give effect to their international legal obligations, States have a duty to make independent inquiries as to the persons’ need for international protection and to ensure they are not at risk of *refoulement*. If such a risk exists, the State is precluded from denying entry or forcibly removing the individual concerned.²⁸

3.1.4. Under EU law, both primary and secondary law protect the principle of *non-refoulement* and the right to asylum.²⁹ As this Court has held, both the Schengen Borders Code and the EU Asylum Procedures Directive (APD) ‘clearly embrace the principle of *non-refoulement*’ and ‘are clearly aimed at providing all asylum-seekers effective access to the proper procedure’.³⁰ The Schengen Borders Code explicitly states that it applies without prejudice to ‘the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*’.³¹ The APD and case law of the Court of Justice of the European Union (CJEU) also affirm that *non-refoulement* and access to the procedure do not require a formal asylum request.³²

3.1.5. This Court has ruled recently that Poland’s ‘wider state policy of refusing entry to foreigners coming from Belarus’ has violated, *inter alia*, Article 3 ECHR.³³ In its judgment in *M.K. and Others v. Poland*, it held that Poland’s failure to examine the applicants’ asylum claims exposed them to a real risk of being subjected to inhuman or degrading treatment, as well as torture. Moreover, given the risk of chain *refoulement* in Belarus, the Court held that Poland had knowingly exposed the applicants to treatment prohibited by Article 3 ECHR. This was further confirmed in the Court’s judgment in *D.A. and Others v. Poland* where the Court came to the same conclusions.

3.1.6. Further, in September 2021, the Parliamentary Assembly of the Council of Europe adopted a resolution calling on the authorities of Poland to *inter alia* ‘provide access to asylum procedures to all

v. Poland, Appl. Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020, <https://hudoc.echr.coe.int/eng/?i=001-203840>, para. 171, and sources cited there (ECtHR, *M.S.S. v. Belgium and Greece* (GC), 30696/0921 January 2011: www.refworld.org/cases/ECHR_4d39bc7f2.html, paras 286, 298 and 321; ECtHR, *T.I. v. The United Kingdom*, 43844/98, 7 March 2000, <http://www.refworld.org/docid/3ae6b6dfc.html>, p. 15). See also UNHCR interventions in *D.A. and Others v. Poland*, note 3 above, para. 3.1.7. and in *N.D. and N.T. v. Spain*, 15 November 2015, www.refworld.org/docid/59d3a81f4.html, para. 3.1.4.

²⁶ See UNHCR’s oral intervention before the ECtHR Hearing of the case *Hirsi and Others v. Italy*, www.refworld.org/pdfid/4e0356d42.pdf, p. 4. See also, UNHCR’s oral intervention before the ECtHR Grand Chamber hearing in the case of *N.D. and N.T. v. Spain*, 26 September 2018, www.refworld.org/docid/5bb3873b4.html, p. 6.

²⁷ ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. No. 27765/09, 23 February 2012, www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4f4507942, para. 157; ECtHR, *Sharifi and Others v. Italy and Greece*, Appl. No. 16643/09, 21 October 2014, www.refworld.org/cases/ECHR_544617ad4.html.

²⁸ 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; UNHCR intervention in *D.A. and Others v. Poland*, note 3 above, para. 3.1.7., and sources cited there.

²⁹ See, in particular, Article 18 and 19(2) of the EU Charter of Fundamental Rights, Articles 9(3), 28(2), 35(b), 38(1)(c), 39(4) 41(1) Asylum Procedures Directive (Directive 2013/32/EU); and Recital 36 and Articles 3(b), 4 Schengen Borders Code (Regulation 2016/399).

³⁰ ECtHR, *D.A. and Others v. Poland*, note 25 above, para. 65.

³¹ Art 3(b) Schengen Borders Code. When applying the Code, Member States must also fully comply with EU law, including the EU Charter of Fundamental Rights, international law, including the 1951 Convention and ‘obligations related to access to international protection, in particular the principle of *non-refoulement*’, see Article 4 Schengen Borders Code.

³² Rather, border authorities must provide applicants with the relevant information as to where and how asylum applications may be lodged, see Articles 2(b), 6, 8 Asylum Procedures Directive; CJEU, *Ministerio Fiscal*, C-36/20 PPU, 25 June 2022, paras 76-77; CJEU, *Commission v. Hungary*, C-808/18, 17 December 2020, para. 97 (the making of an application requires ‘no administrative formalities whatsoever’).

³³ ECtHR, *M.K. and Others v. Poland*, note 25 above, paras 184-186, 208-209; ECtHR, *D.A. and Others v. Poland*, note 25 above, paras 81-84.

those seeking international protection’ and to ‘refrain from *refoulements* to Belarus and provide the necessary safeguards to ensure the human rights of those seeking entry to their territory.’³⁴

3.1.7. In UNHCR’s view, the Polish authorities have routinely failed to adhere to the standards set out above at the Polish-Belarusian border. In light of the current situation, which has significantly deteriorated since the Court’s last assessment in *M.K. and Others v. Poland* and *D.A. and Others v. Poland*, UNHCR considers Poland’s current legal framework and practice of non-admission and removal is at variance with international and European law.

3.1.8. In the current Covid-19 context, UNHCR also considers it important to recall that *non-refoulement* cannot be derogated from even in times of emergency.³⁵ Neither the 1951 Convention nor EU asylum law provide a legal basis for the suspension of the reception of asylum applications. While States have a sovereign right to manage and control their borders, this prerogative is subject to international legal obligations which States are required to respect in good faith. Under the ECHR, while Article 15 allows derogations from certain rights in exceptional circumstances, it explicitly precludes derogations from Articles 2 and 3 ECHR, including the principle of *non-refoulement*.

3.2. Material conditions at the border

3.2.1. To fulfil the rights enshrined in the 1951 Convention, in line with their international human rights law obligations,³⁶ States must provide an adequate standard of living to all foreigners within their jurisdiction, including asylum-seekers.³⁷ This includes the provision of food, clothing and accommodation to those asylum-seekers who are unable to secure them.³⁸ As UNHCR’s Executive Committee (‘ExCom’) has stressed, ‘it is important that the various reception measures respect human dignity and applicable international human rights law and standards’.³⁹ ExCom further recommended that asylum-seekers should have access to assistance ‘so that their basic support needs, including food, clothing, accommodation, and medical care [...] are met’.⁴⁰

3.2.2. If applicants are faced with a situation of serious deprivation incompatible with human dignity, caused by the State or met with official indifference, this may violate Articles 2 and 3 ECHR.⁴¹ Recalling that asylum-seekers are ‘member[s] of a particularly underprivileged and vulnerable population group in

³⁴ Council of Europe, Parliamentary Assembly of the Council of Europe, Resolution 2404 (2021) *Instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus*, 30 September 2021, paras 11.1-11.2: <https://pace.coe.int/en/files/29537/html>. See also Committee on Migration, Refugees and Displaced Persons, Anne-Mari Virolainen, *Explanatory Memorandum*, 29 September 2021, <https://pace.coe.int/en/files/29493/html>, para. 68 which states: ‘Access to territory and asylum procedures should be granted without exception to those who wish to apply for asylum. Individual assessments of the situation of each asylum seeker should be undertaken prior to any removal from European territory. Adequate reception conditions, medical assistance and unhindered access for organisations providing humanitarian assistance and legal aid also need to be ensured.’

³⁵ Article 42(1) of the 1951 Convention and Article VII(1) of the 1967 Protocol, list Article 33 as one of the provisions of the 1951 Convention to which no reservations are permitted. See, UNHCR, Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees, 16 January 2002, HCR/MMSP/2001/09, para. 4, <http://www.unhcr.org/refworld/docid/3d60f5557.html>. 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*, note 28 above.

³⁶ Article 25, UNGA, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), www.refworld.org/docid/3ae6b3712c.html; Article 11, UNGA, *International Covenant on Economic, Social and Cultural Rights*: 16 December 1966, <https://www.refworld.org/docid/3ae6b36c0.html>; *International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200, www.refworld.org/docid/3b00f47924.html.

³⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *Duties of States towards refugees and migrants under the International Covenant on Economic, Social and Cultural Rights*, 13 March 2017, E/C.12/2017/1, paras 3 and 9, www.refworld.org/docid/5bbe0bc04.html. UNHCR, *Submission by UNHCR in the case of N.E. and Others v. Greece (Appl. No. 8716/20) before the ECtHR*, 11 November 2020, www.refworld.org/docid/5fc763394.html, paras 2.1.ff.

³⁸ UNHCR, *Reception of asylum-seekers, including standards of treatment, in the context of individual asylum systems*, 4 September 2001, www.refworld.org/pdfid/3bfa81864.pdf, para. 3.

³⁹ UNHCR ExCom, *Conclusion on reception of asylum-seekers in the context of individual asylum systems No. 93 (LIII) – 2002*, www.refworld.org/docid/3dafdd344.html, para. (b)(i).

⁴⁰ *Ibid.*, ExCom No. 93, para. (b)(ii).

⁴¹ ECtHR, *M.S.S. v. Belgium and Greece*, note 25 above, paras 222-233.

need of special protection’,⁴² this Court has found violations *inter alia* where a State failed to provide decent reception conditions owing to notably poor sanitation conditions and lack of access to the most basic services;⁴³ where an applicant was forced to live in a park ‘in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live’;⁴⁴ and where a State was aware of the dire situation of asylum-seekers, but failed to provide adequate reception, resulting in the applicant not having any reasonable prospect of seeing his or her situation improve.⁴⁵ In finding these violations, the Court recalled the absolute character of Article 3 ECHR and emphasized that difficulties States may face due to an influx of migrants cannot absolve them of their obligations.⁴⁶ As the European Committee for Social Rights has held, the right to shelter is also closely connected to the right to life.⁴⁷ In *CEC v. the Netherlands*, the Committee recalled, with regard to migrants in an irregular situation, that ‘[a]ll persons without resources [...] have a legally recognized right to the satisfaction of basic human material need (food, clothing, shelter) in situations of emergency.’⁴⁸ The Committee held further that ‘access to food, water, as well as to such basic amenities as a safe place to sleep and clothes fulfilling the minimum requirements for survival are necessary for the basic subsistence of any human being’.⁴⁹

3.2.3. Under EU law, European Member States are equally obliged to ensure an ‘adequate standard of living’ for asylum applicants ‘which guarantees their subsistence and protects their physical and mental health’.⁵⁰ The fundamental right to dignity must in all cases be protected.⁵¹ This has also been consistently upheld by the CJEU, which has repeatedly ruled that ‘asylum-seeker may not [...] be deprived – even for a temporary period of time [...] – of the protection of the minimum standards laid down by that [Reception Conditions] directive’.⁵² The CJEU also emphasized the crucial link between access to the procedure and reception conditions: Member States must register their requests for protection ‘as soon as possible’, in order for them to ‘benefit from the material reception conditions and health care’.⁵³

3.2.4. It is UNHCR’s view that Poland failed to ensure respect for the above guarantees under international and European law.

3.3. Collective expulsions

3.3.1. In order to give effect to their international legal obligations, including the right to asylum and the principle of *non-refoulement*, States have a duty vis-à-vis persons who have arrived at their border or on their territory and are prevented entry, to make independent inquiries as to the persons’ need for

⁴² See, *inter alia*, ECtHR, *M.S.S. v. Belgium and Greece*, note 25 above, para. 251; ECtHR, *Tarakhel v. Switzerland*, Appl. No. 29217/12, 4 November 2014, www.refworld.org/cases/ECHR.5458abfd4.html, para. 118; ECtHR, *N.H. et Autres c. France*, Appl. No. 28820/13, 2 July 2020, www.refworld.org/cases/ECHR.5f0455264.htm, para. 162. This protection is even more crucial in the case of children ‘in view of their specific needs and their extreme vulnerability’, see *Tarakhel v. Switzerland*, paras 118-119, and UNHCR, *Submission in the case of International Commission of Jurists and European Council for Refugees and Exiles v. Greece before the European Committee of Social Rights*, 9 August 2019, www.refworld.org/docid/5d9745494.html, para. 3.4.4.

⁴³ ECtHR, *M.S.S. v. Belgium and Greece*, note 25 above.

⁴⁴ *Ibid.*, para. 25.

⁴⁵ ECtHR, *V.M. and others v. Belgium*, Appl. No. 60125/11, 7 July 2015, <https://hudoc.echr.coe.int/eng?i=001-156243>.

⁴⁶ Among others, see ECtHR, *Khlaifia and Others v. Italy*, Appl. No. 16483/12, 15 December 2016, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-170054%22%5D%7D>, para. 184; ECtHR, *J.R. v. Greece*, Appl. No. 22696/16, 25 January 2018, <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-180319%22%5D%7D>, para. 137; ECtHR, *M.S.S. v. Belgium and Greece*, note 25 above, para. 223; ECtHR, *Hirsi Jamaa and Others v. Italy*, note 27 above, para. 122.

⁴⁷ ECSR, *Conference of European Churches (CEC) v. the Netherlands* (decisions on the merits), Complaint No. 90/2013, 10 November 2014, www.refworld.org/cases/COEECSR.54e363534.html, para. 137. ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, 20 October 2009, www.refworld.org/cases/COEECSR.4b9e37ea2.html, para. 47. See also UNHCR Submission in *N.E. and Others v. Greece*, note 37 above, para. 2.1.4.

⁴⁸ ECSR, *CEC v. the Netherlands*, note 47 above, para. 108.

⁴⁹ *Ibid.*, para. 122. See also CoE CHR, note 7 above on the alarming risks to life at the Polish-Belarusian border.

⁵⁰ Article 17(2) Reception Conditions Directive (Directive 2013/33/EU).

⁵¹ Recitals 9, 11 and 35, Articles 18(2)(a) and 20(5) Reception Conditions Directive.

⁵² CJEU, *Cimade and GISTI*, C-179/11, 27 September 2012, <http://curia.europa.eu/juris/liste.jsf?language=en&parties=cimade>, para. 56; CJEU, *Saciri and Others*, C-79/13, 27 February 2014, <http://curia.europa.eu/juris/liste.jsf?language=en&T.F&num=C-79/13>, para. 35; CJEU, *Zubair Haqbin*, C-233/18, 12 November 2019, <http://curia.europa.eu/juris/liste.jsf?num=C233%252F18&language=en>, para. 56. The Court relied on Article 1 EU Charter of Fundamental Rights, according to which human dignity is inviolable and must be respected and protected. Respect for human dignity is also at the very heart of the ECHR, and closely linked to the prohibition inhuman or degrading treatment as enshrined in its Article 3, see ECtHR, *N.H. et Autres c. France*, note 42 above, para. 156.

⁵³ CJEU, *Ministerio Fiscal*, note 32 above, paras 71ff, 79, 83.

international protection and to ensure they are not at risk of *refoulement* and are able to seek asylum.⁵⁴ This is the case particularly when States know, or could reasonably be expected to know, the risks which arise when persons are returned.⁵⁵ When a State is presented with a person seeking asylum at its borders, it is required to provide admission at least on a temporary basis to allow the person to request asylum and examine the claim, as the right to seek asylum and the *non-refoulement* principle would otherwise be rendered meaningless. Similarly, this Court has considered that in the absence of appropriate arrangements to process asylum applications, ‘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’.⁵⁶ A practice of pushing back persons who may be in need of international protection without proper inquiries in their individual cases, and without taking into account the individual circumstances, rights and needs of each individual is at variance with international and European law, including Article 4 Protocol 4 ECHR.⁵⁷

3.3.2. In *N.D. and N.T. v. Spain*, the Grand Chamber of this Court emphasized, ‘like UNHCR, the link between the scope of Article 4 of Protocol No. 4 [...] and that of the Geneva Convention and of the principle of *non-refoulement*’ and concluded that border controls may not render inoperative or ineffective Article 3 or Article 4 Protocol No. 4 ECHR.⁵⁸ The Court recalled, that ‘non-admission’ of refugees is to be equated in substance with their ‘return (*refoulement*)’ and that such non-admission does not release a State from its *non-refoulement* obligations.⁵⁹ It adopted a broad interpretation of ‘expulsion’ within the meaning of Article 4 Protocol 4 ECHR.⁶⁰ ‘hot returns’ at the Spanish enclaves in Morocco fell under this term in the same way as removals to a thin strip of ‘no man’s land’ on the external side of a State’s border fence.⁶¹

3.3.3. Under Article 4 Protocol 4 ECHR, the Court requires States to make available ‘genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border’.⁶² These procedures must allow all persons who face persecution to apply for protection, under conditions which ensure that their application is processed lawfully.⁶³ In *Shahzad v. Hungary*, where the only possibility to enter a State legally was located forty kilometers away and where access was moreover limited, the Court ruled that there were no ‘genuine and effective means of legal entry’.⁶⁴ Criteria that the Court found particularly relevant when finding a violation of Article 4 Protocol 4 ECHR were, apart from the lack of an individual identification procedure,⁶⁵ the fact that the removing officials ‘were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers’.⁶⁶

3.3.4. Under EU law, Member States have stringent obligations towards persons arriving at their borders. The CJEU has repeatedly emphasized that the ‘very objective’ of the APD is to ensure ‘effective, easy and

⁵⁴ The ‘duty of independent inquiry’ has been recognized by various courts: ECtHR, *Hirsi Jamaa and Others v. Italy*, note 27 above, paras 146-148; ECtHR, *M.S.S. v. Belgium and Greece*, note 25 above, paras 286, 298, 315, 321 and 359; *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, United Kingdom: House of Lords, 9 December 2004, para. 26, 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), Hong Kong: Court of Final Appeal, 25 March 2013, paras 56, 64, www.refworld.org/docid/515010a52.html. See also APD, note 29 above, Article 6(1), 3rd indent.

⁵⁵ ECtHR, *Hirsi Jamaa and Others v. Italy*, para. 157, and ECtHR, *Sharifi and Others v. Italy and Greece*, both note 27 above.

⁵⁶ ECtHR, *N.D. and N.T. v. Spain*, GC, Appl. Nos. 8675/15 and 8697/15, 13 February 2020, www.refworld.org/cases.ECHR.5e4691d54.html, para. 209.

⁵⁷ UNHCR Submission in *N.D. and N.T. v. Spain*, note 25 above, para. 4.1.

⁵⁸ ECtHR, *N.D. and N.T. v. Spain*, note 56 above, para. 171.

⁵⁹ ECtHR, *N.D. and N.T. v. Spain*, note 56 above, paras 186-187, recalling the Court’s earlier case law in *Hirsi Jamaa and Others, Sharifi and Others and Khlaifia and Others*, notes 27 and 46 above.

⁶⁰ According to the Court’s case law, the term refers to any forcible removal of an alien from a State’s territory, irrespective of the lawfulness of the person’s stay, the length he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker or his or her conduct crossing the border, see ECtHR, *N.D. and N.T. v. Spain*, note 56 above, para. 185, and previous case law quoted there.

⁶¹ ECtHR, *Shahzad v. Hungary*, Appl. No. 12625/17, 8 July 2021, www.refworld.org/cases.ECHR.60fae4824.html, paras 45-52.

⁶² ECtHR, *N.D. and N.T. v. Spain*, note 56 above, para. 209.

⁶³ *Ibid.*

⁶⁴ ECtHR, *Shahzad v. Hungary*, note 61 above, paras 60-65.

⁶⁵ See, among others, ECtHR, *Hirsi Jamaa and Others v. Italy* and *Sharifi and Others v. Italy and Greece*, both note 27 above; ECtHR, *M.K. and Others v. Poland*, and ECtHR, *D.A. and Others v. Poland*, both note 25 above; ECtHR, *Shahzad v. Hungary*, note 61 above.

⁶⁶ ECtHR, *Hirsi Jamaa and Others v. Italy*, note 27 above, para. 185.

rapid access' to the asylum procedure.⁶⁷ It adds that the APD's aim is 'to facilitate the making of [asylum] applications' by requiring Member States to provide persons arriving at the border 'with information on the possibility of making such an application, where there are indications that he or she may wish to make an application of that sort.'⁶⁸ An applicant enjoys the status of an applicant from the moment s/he expresses such a wish, without this requiring 'any administrative formalities whatsoever'.⁶⁹

3.3.5. Regarding the situation at the Polish-Belarusian border, this Court has already found that Poland had violated of Article 4 Protocol 4 ECHR by failing to provide asylum-seekers access to the procedure. In the two recent judgments on this issue, the Court rejected Poland's submission that the applicants had not expressed any fear of safety and could therefore not be considered asylum-seekers, and instead attached more weight to the applicants' version of the events as it was corroborated by a large number of independent reports. It held that these reports indicated 'a systemic practice of misrepresenting' asylum-seekers' statements by Polish border guards, and a lack of a proper investigation procedure, confirmed also by the Polish Supreme Administrative Court, domestic administrative courts, UNHCR's submission in *D.A. and Others v. Poland*, and the statement of the then Minister of the Interior and Administration.⁷⁰ In sum, the Court determined that there was a 'wider state policy of refusing entry to foreigners coming from Belarus, regardless of whether they were clearly economic migrants or whether they expressed a fear of persecution in their countries of origin.'⁷¹ In UNHCR's view, the situation at the Polish-Belarusian border has further deteriorated since the delivery of these judgments and continues to be at variance with international and European law (see section 2.2. above).

3.4. Effective remedies

3.4.1. UNHCR's position is that a practice of arbitrarily rejecting asylum-seekers' claims at the border, without an effective remedy, is a violation of Article 13 ECHR. A remedy in the context of an Article 3 ECHR claim must have automatic suspensive effect, be examined with rigorous scrutiny, and be effective in law and practice due to the irreversible nature of the harm that might occur.⁷²

3.4.2. In the context of the recent legislative amendments, UNHCR has expressed its concern over the lack of automatic suspensive effect of appeals.⁷³ This may undermine the right to an effective remedy and may lead to instances of *refoulement*, contrary to international and European law.⁷⁴ UNHCR has been particularly concerned that, at no stage of the procedure, the law guarantees the foreigner's right to legal aid. In practice, even where lawyers have managed to access their clients and obtained powers of attorneys or authorizations to represent them, such authorizations have routinely been ignored by Poland. This is in stark contrast with EU law, which requires that foreigners shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance when exercising the right to an effective remedy.⁷⁵ In this respect, UNHCR underlines that the right to legal aid is an essential component of the right to an effective remedy under EU Law.⁷⁶ In UNHCR's view, this safeguard is even more important when asylum is requested at the border because of the particular vulnerability of asylum-seekers in this context, where procedures take place outside public scrutiny and in often rudimentary conditions (as in this case, in the open, in the forest, after applicants have spent several days or weeks in degrading conditions, which often leaves them scared and disoriented).⁷⁷

⁶⁷ CJEU, *Commission v. Hungary*, note 32 above, para. 104, CJEU, *Ministerio Fiscal*, note 32 above, para. 82.

⁶⁸ CJEU, *Commission v. Hungary*, note 32 above, para. 105.

⁶⁹ CJEU, *Commission v. Hungary*, note 32 above, para. 97, CJEU, *Ministerio Fiscal*, note 32 above, paras 92-94.

⁷⁰ ECtHR, *M.K. and Others v. Poland*, note 25 above, paras 174, 208-209, ECtHR, *D.A. and Others v. Poland*, note 25 above, para. 60.

⁷¹ ECtHR, *M.K. and Others v. Poland*, note 25 above, para. 208 and ECtHR, *D.A. and Others v. Poland*, note 25 above, para. 83.

⁷² ECtHR, *M.S.S. v. Belgium and Greece*, note 25 above, paras 290-293; ECtHR, *Gebremedhin [Gaberamadhien] c. France*, 25389/05, 26 April 2007, <https://www.refworld.org/pdfid/46441fa02.pdf>, para. 66; ECtHR, *De Souza Ribeiro v. France*, Application No. 22689/07, 13 December 2012, <https://www.refworld.org/pdfid/511cf0a22.pdf>, para. 95.

⁷³ UNHCR Comments on Poland, note 7 above, paras 23-25.

⁷⁴ Article 33 of the 1951 Geneva Convention, Articles 4, 19 and 47 of the EU Charter of Fundamental Rights and Articles 3 and 13 of the ECHR, see UNHCR Comments on Poland, note 7 above, para. 23.

⁷⁵ Article 13(3) and Article 13(4) Return Directive (Directive 2008/115/EC).

⁷⁶ *Ibid.*, and Article 47 of the Charter of Fundamental Rights of the European Union.

⁷⁷ UNHCR intervention in *D.A. and Others v. Poland*, note 3 above, para. 3.2.5. and *Submission by UNHCR in the Case of Malevanaya & Sadyrkulov v. Ukraine (Appl. No. 18603/12)*, 15 July 2013, www.refworld.org/docid/51e515794.html, para. 3.1.8.

3.4.3. Similarly, this Court has repeatedly held that, ‘in view of the importance that the Court attaches to Article 3 of the Convention and the irreversible nature of the damage that may result if a risk of torture or ill-treatment materialises’, the effectiveness of a remedy ‘imperatively requires’ an independent and rigorous scrutiny.⁷⁸ In particular, the Court has repeatedly confirmed that in the context of an Article 3 or Article 4 of Protocol No. 4 ECHR claim, ‘a remedy will only be effective if it has automatic suspensive effect’.⁷⁹ The CJEU has also clarified that in respect of return and removal decisions, the right to an effective remedy and the principle of *non-refoulement* require automatic suspensory effect before at least one judicial body.⁸⁰

3.4.4. As is clear from Poland’s August 2021 legislative amendments and the Court’s recent findings,⁸¹ these requirements are not currently in place at the Polish-Belarusian border. Consequently, it is UNHCR’s view that, both in law and in practice, Poland is currently not complying with Article 13, in conjunction with Article 3 and Article 4 Protocol 4 ECHR.

4. UNHCR’s position on Afghanistan

4.1. UNHCR wishes to recall that the situation in Afghanistan remains fluid and uncertain. In August 2021, UNHCR called on all States to allow civilians fleeing Afghanistan access to their territories and to ensure respect for the principle of *non-refoulement* at all times. Accordingly, all claims of nationals and former habitual residents of Afghanistan seeking international protection should be processed in fair and efficient procedures in accordance with international and regional refugee law.⁸²

4.2. As the situation in Afghanistan is volatile and may remain uncertain for some time to come, coupled with an unfolding humanitarian emergency in the country, UNHCR has also called on States to suspend the forcible return of Afghans, including those who have had their asylum claims rejected. A moratorium on forced returns to Afghanistan would need to stay in place until the situation in the country has stabilized, pending an assessment of when the changed situation in the country would permit return in safety and dignity.⁸³

5. Conclusion

5.1. UNHCR considers that the systematic denial of asylum-seekers’ access to the territory and to asylum procedures at the Polish-Belarusian border, which is not only current Polish State practice but authorized by Polish law, is at variance with international refugee law and international and European human rights law. Non-admission at the border which results in exposing asylum-seekers to a risk of *refoulement*; the wholly inadequate material conditions near the border that have cost lives; and expulsions without any individual assessment and without providing for an effective remedy, are at variance with Articles 2, 3, 13 ECHR and Article 4 Protocol 4 ECHR.

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In the same vein, this Court has recognised that persons seeking asylum at the border might face particular difficulties, see ECtHR, *Gebremedhin v. France*, Appl. No. 25389/05, 26 April 2007, www.refworld.org/cases/ECHR.45d5c3642.html, para. 59; ECtHR, *M.K. and Others v. Poland*, note 25 above, paras 174-175, 206 [lack of a real possibility to submit asylum claim; impossibility to meet with lawyers even when the lawyers were present at the border checkpoint]; ECtHR, *Amuur v. France*, Appl. No. 19776/92, 25 June 1996, www.refworld.org/cases/ECHR.3ac6b76710.html, para. 43. See also, CoE CHR, note 7 above, on the harmful consequences that the ban to access border zones has on the monitoring work of international organizations and civil society.

⁷⁸ ECtHR, *M.K. and Others v. Poland*, note 25 above, para. 143.

⁷⁹ ECtHR, *D.A. and Others v. Poland*, para. 38, and ECtHR, *M.K. and Others v. Poland*, para. 143, both note 25 above.

⁸⁰ CJEU, *Gnandi*, C-181/16, 19 June 2018, <https://curia.europa.eu/juris/liste.jsf?language=en&jur=C.T.F&num=c-181/16>, para. 58.

⁸¹ ECtHR, *M.K. and Others v. Poland*, paras 147, 219 and 220 and ECtHR, *D.A. and Others v. Poland*, paras 40, 89 and 90, both note 25 above.

⁸² UNHCR *Position on Returns to Afghanistan*, August 2021, www.refworld.org/docid/611a4c5c4.html, para. 3.

⁸³ *Ibid.*, para. 7.