



**Submission by the Office of the United Nations High Commissioner for Refugees
in the case of *D.A. and others v. Poland* (application no. 51246/17)
before the European Court of Human Rights**

1. Introduction*

1.1. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions for refugees.¹ UNHCR is responsible for supervising the application of international conventions for the protection of refugees.² UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') in its letter of 15 January 2018.

1.2. In this submission, UNHCR addresses the domestic legislative framework and practice applicable to the treatment of asylum-seekers at the border in Poland (Part 2) and provides UNHCR's interpretation of the relevant principles of international refugee law and human rights law pertaining specifically to *non-refoulement* and access to a fair and efficient asylum procedure in this context (Part 3) to assist the Court.³

2. The legislative framework and practice regarding the treatment of asylum-seekers at the land border in Poland

2.1. The Polish Constitution and legislation regarding the treatment of asylum-seekers at the land border include protection standards in line with international refugee law and relevant human rights law. However, in practice, a significant number of asylum-seekers mostly at the Brest-Terespol border crossing point are arbitrarily deprived of access to a fair and efficient asylum procedure and returned to Belarus by the Polish Border Guards, acting *ultra vires*, in violation of national law and Poland's international and European legal obligations.

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

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

² *Ibid*, para. 8(a).

³ According to this Court, the ECHR should be interpreted 'in harmony with other rules of international law of which it forms part', particularly where such other rules are found in human rights treaties (which would include the 1951 Geneva Convention and the ICCPR); European Court of Human Rights (hereafter ECtHR), *Al-Adsani v. The United Kingdom*, 35763/97, 21 November 2001, para. 55; United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 31(3)(c), <http://www.refworld.org/docid/3ae6b3a10.html>; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 53, <http://www.refworld.org/docid/3ae6b3b04.html>. Furthermore, this Court has taken into consideration a State's international obligations, including under international refugee law, when assessing its compliance with the ECHR in a number of cases. In particular, in the case of *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012 this Court took into account a State's *non-refoulement* obligation under international law in the context of its finding that there had been a violation of Article 13 in conjunction with Article 3 ECHR (<http://www.refworld.org/docid/4f4507942.html>, para. 134).

2.2. Legislation regarding the treatment of asylum-seekers

2.2.1. The right to seek asylum is enshrined in Article 56 of *the Constitution of the Republic of Poland*⁴ while the *Act on granting protection to foreigners within the territory of the Republic of Poland*⁵ ('Law on Protection') and related regulations govern issues relating to international protection.

2.2.2. Pursuant to Articles 24(1) and 28(2)(2)(b) of the Law on Protection, the 'Border Guards' are the authority responsible for receiving, registering and transferring applications for asylum to the Head of the Office for Foreigners.⁶ Polish law does not provide for an asylum procedure at the border in Poland. The Border Guards have a clearly defined and limited mandate. They have no authority to refuse to register asylum applications.⁷ Further, a set of internal instructions for Border Guards on '*Allowing foreigners to enter the territory of the Republic of Poland to seek international protection*' provides that "if a foreigner expresses the will to lodge an application for international protection, but without substantiating the grounds, further inquiry is needed".⁸

2.2.3. According to Articles 23 and 38 of the Law on Protection, the Office for Foreigners, an administrative authority specialised in asylum, is exclusively responsible for examining (including admissibility grounds), granting, refusing, and withdrawing international protection through an accelerated or the regular procedure.⁹

2.2.4. Furthermore, pursuant to Article 28(2) of the Law on Protection, third country nationals lacking a valid visa but having expressed their intention to seek asylum are exempted from penalties for irregular entry.

2.2.5. By contrast, other third country nationals crossing the border irregularly but not claiming asylum are not entitled under the law to enter Poland and are subject to a decision on denial of entry pursuant to the Polish Code of Administrative Procedure. That decision may be challenged through a request for review made to the Commandant in Chief of the Border Guards.¹⁰ However, this remedy is not effective since it lacks automatic suspensive effect in law and other fundamental safeguards in practice as explained below (Part 2.3).

2.2.6. In light of the above, domestic legislation on asylum provides for the right of third country nationals expressing an intention to seek asylum to enter Polish territory, and to have their asylum application received, registered and transferred to the Head of the Office for Foreigners by the Border Guards, irrespective of whether they lack a valid visa or residence permit.

⁴ Republic of Poland, *The Constitution of the Republic of Poland* of 2 April 1997, (Journal of Laws, Dz.U. 1997, no 78, item 483) <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.html>.

⁵ Republic of Poland, *Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland* (Journal of Laws, Dz. U. 2003, No. 128, item 1176), as amended, <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20031281176/U/D20031176Lj.pdf>.

⁶ European Council on Refugees and Exiles, Asylum Information Database, *National Country Report: Poland*, 31 December 2016, pp. 18-33, <http://www.refworld.org/docid/58b98aee4.html>.

⁷ The Law on Protection is undergoing amendments, presently pending before Parliament, which may result in the introduction of several changes including the addition of border procedures.

⁸ Director and Council of the Foreigners' Authority of the Border Guard Headquarters, Internal instructions for Border Guards on '*Allowing foreigners to enter the territory of the Republic of Poland*', 8 January 2016. See relevant extracts in Association for Legal Intervention, *At the border Report on monitoring of access to the procedure for granting international protection at border crossings in Terespol, Medyka, and Warszawa-Okęcie Airport, Analyses, Reports, Evaluations N° 2/2016* (hereafter '*At the Border*'), p. 14 and Annex C on p. 114, <https://interwencjaprawna.pl/en/files/at-the-border.pdf>.

⁹ *Act of 13 June 2003*, (*supra* note 15), p. 14.

¹⁰ See Article 33 (2) of the Law on Protection which provides for the right to appeal against the decision to refuse entry.

2.3. The relevant practice

2.3.1. In practice, it is UNHCR's assessment that, despite expressing their intention to seek asylum (see paragraph 2.3.3 below), a significant number of third-country nationals have been denied the opportunity to apply for asylum by the Border Guards at the eastern border crossing points of Poland, in particular at Brest-Terespol, and have been arbitrarily returned to the neighbouring countries in 2016 and 2017. UNHCR's assessment is based on more than 550 documented cases during this period.¹¹

2.3.2. In 2016, the vast majority of asylum applications in Poland were made at the Terespol rail Border crossing with Belarus. Since mid-2016, UNHCR and others have observed a sharp increase in the number of foreigners stating that they were not allowed to enter the territory and apply for asylum in Poland, and more recently at other border crossing points such as the Medyka border crossing with Ukraine. Polish Border Guards¹² statistics for 2016 show that they refused entry on 72,528 occasions at the Belarus border compared to 17,376 in 2015. Statistics for the first three quarters of 2017 indicate that there were 23,462 entry refusals at Terespol.

2.3.3. The Polish authorities contend¹³ that the persons concerned did not express their intention to seek asylum or, if they did, only invoked economic reasons to enter Poland. However, UNHCR and numerous other reliable sources, all reported, based on field visits and interviews, that a significant number of foreigners reported that they did express their intention to seek asylum (some of them even documenting their claims with Rule 39 decisions by this Court)¹⁴ but were nevertheless denied having their application registered and transferred to the Head of the Office for Foreigners, and were summarily returned.¹⁵ At the material time UNHCR did not have access to the Terespol transit zone where pre-screening of asylum-seekers takes place. However, UNHCR received 182 phone calls during the period from 25 May 2016 to 1 September 2017 in which the persons concerned informed UNHCR that they had expressed an intention to seek asylum to the Border Guards but were nonetheless denied access to the procedure and summarily returned. UNHCR also received written statements, interventions and queries in respect of 96 cases during the period from March 2016 – September 2017 setting out the same allegations as the aforementioned phone calls. The same allegations were also outlined in 275 cases reported by UNHCR's partner in 2016 and 2017.

¹¹ See para. 2.3.3 below.

¹² <https://www.strazgraniczna.pl/pl/granica/statystyki-sg/2206.Statystyki-SG.html>. See also Frontex reports on refusals of entry, including by Poland: <http://frontex.europa.eu/publications/?c=risk-analysis>.

¹³ Maciej Orłowski, Statement by Polish Interior Minister Mariusz Błaszczak, w TVP Info straszy uchodźcami, myśląc pojęcia i fakty, Gazeta Wyborcza, April 2017, <http://wyborcza.pl/7,75398,21631484,mariusz-blaszczak-w-tvp-info-straszy-uchodzcamimiylac-pojecia.html>.

¹⁴ Including the complainants in this case. See also, Amnesty International, Poland: *EU Should Tackle Unsafe Returns to Belarus*, 5 July 2017, <https://www.amnesty.org/en/latest/news/2017/07/poland-eu-should-tackle-unsafe-returns-to-belarus/>; Polish Helsinki Foundation for Human Rights, *Border Guard ignores ECtHR measures again*, July 2017, <http://www.hfhr.pl/en/border-guard-ignores-ecthr-measures-again/>; Polish Helsinki Foundation for Human Rights, *Polish Border Guards Flout ECHR Ruling, Return Asylum Seeker to Belarus*, 22 June 2017, <https://www.liberties.eu/en/news/foreign-national-turned-away-at-the-polish-border-crossing-in-contravention-of-an-order-made-by-the-ecthr/12238>.

¹⁵ Hungarian Helsinki Committee, *Pushed Back at the Door: Denial of Access to Asylum in Eastern EU Member States*, 2017, <http://www.refworld.org/docid/5888b5234.html>; European Council on Refugees and Exiles, *Asylum Information Database, National Country Report : Poland*, 31 December 2016, <http://www.refworld.org/docid/58b98aee4.html>; Human Rights Watch, *Poland: Asylum Seekers Blocked at Border Ensure Procedure Access; Halt Summary Returns*, (hereafter 'HRW, Asylum Seekers Blocked'), 1 March 2017, <https://www.hrw.org/news/2017/03/01/poland-asylum-seekers-blocked-border>; Polish Commissioner for Human Rights, *Inspection of the railway border crossing in Terespol*, 21 September 2016, <https://www.rpo.gov.pl/en/content/inspection-railway-border-crossing-terespol>; Helsinki Foundation for Human Rights, *A Road To Nowhere: The account of a monitoring visit at the Brześć-Terespol border crossing between Poland and Belarus*, October 2016, <http://www.hfhr.pl/wp-content/uploads/2016/11/A-road-to-nowhere.-The-account-of-a-monitoring-visit-at-the-Brze%C5%9B%C4%87-Terespol-border-crossing-point-FINAL.pdf>.

2.3.4. These findings indicated that, in practice, the Border Guards are acting *ultra vires* and in violation of Polish law by refusing entry to persons who may be in need of international protection, instead of registering and transferring them to the competent authority as provided by Articles 24(1) and 28(2)(2)(b) of the Law on Protection.

2.3.5. Concerns regarding this illegal practice are aggravated by the lack of procedural safeguards at the border in the absence of a specific procedure in Polish law. UNHCR is aware of reports that “pre-screening interviews” of very short duration¹⁶ are conducted by the Border Guards “to assess whether or not a person’s reasons for entering Poland warrant protection”.¹⁷ Secondly, it has been reported that three interviews are conducted simultaneously in the same room, without any consideration for confidentiality and privacy requirements.¹⁸ Thirdly, the persons concerned lack basic information about their rights and available remedies. In the majority of cases, in addition to a denial-of-entry stamp on their passports, they receive a decision on denial of entry in Polish, with parts in Russian, stating that they have been refused entry due to the lack of a valid visa and that they have the right to appeal but do not receive interpretation in a language they can understand. The persons concerned are merely asked to sign the document but are not always provided a copy.¹⁹ Fourthly, as outlined above (Part 2.2.), the remedy to the Commandant in Chief of the Border Guards to challenge the decision on denial of entry lacks automatic suspensive effect and the persons concerned are expelled within hours following their arrival, rendering it clearly ineffective.²⁰

2.3.6. At the material time, neither UNHCR nor any Non-Governmental Organisations (NGOs) had access to the area at the Terespol border where the border control measures take place (i.e. the second line in the arrival hall of the train station).²¹ The only independent authority allowed to enter this area is the Polish Commissioner for Human Rights, who has limited resources and a broad mandate. The practice at the second line was therefore not subject to any regular monitoring.²²

3. Principles of international refugee and human rights law regarding *non-refoulement* and access to a fair and efficient asylum procedure at the border

3.1. The *non-refoulement* obligation

3.1.1. The right to seek and enjoy asylum is a basic human right under Article 14(1) of the *Universal Declaration of Human Rights*,²³ and is supported by the legal framework of the 1951 Refugee Convention

¹⁶ According to the Polish Commissioner for Human Rights ‘the duration of individual interviews was, on average, 1 to 4 minutes’. (*Supra* note 15)

¹⁷ According to HRW, “[s]uch determinations appear to be arbitrary and based on minimal and sometimes irrelevant information, often not extending beyond asking asylum-seekers why they do not have valid visas.” HRW, *Asylum Seekers Blocked*.

¹⁸ *Ibid.* See also, Polish Commissioner for Human Rights, *Inspection of the railway border crossing in Terespol*, 21 September 2016, (*supra* note 15) who stated that the interviews are easily overheard by others.

¹⁹ Association for Legal Intervention, *At the Border*, p. 83.

²⁰ HRW, *Asylum Seekers Blocked*.

²¹ At the material time UNHCR and NGOs could only observe from a distance through a glass wall from the upper gallery of the train station/border point. This seriously impedes UNHCR’s ability to exercise its supervisory responsibility under Article 35 of the 1951 Convention which provides that: “[t]he Contracting States undertake to cooperate with the Office of the United Nations High Commissioner for Refugees (...) in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention”.

²² ExCom Conclusion 108 stresses the importance of UNHCR’s access to asylum-seekers and refugees in order for the organization to carry out its protection functions: ExCom Conclusion No. 108, <http://www.refworld.org/docid/490885f1789.html>. Article 29 of the Asylum Procedures Directive (recast) provides for monitoring by UNHCR, including at border zones: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, <http://www.refworld.org/docid/51d29b224.html>.

²³ UNGA, *Universal Declaration of Human Rights*, 1948, 217 A (III), <http://www.refworld.org/docid/3ae6b3712c.html>.

and its 1967 Protocol, to which Poland is a State party. Seeking asylum is not, therefore, an unlawful act.²⁴

3.1.2. Central to the realization of the right to seek asylum is the obligation of States not to expel or return (*refouler*) a person to a territory where his or her life or freedom would be threatened. *Non-refoulement* is a cardinal protection principle, most prominently expressed in Article 33 of the 1951 Convention and recognized as a norm of customary international law.²⁵ Article 33(1) prohibits states from expelling or returning a refugee *in any manner whatsoever*, to a territory where s/he would be at risk of threats to life or freedom.²⁶

3.1.3. Importantly, given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is merely declaratory in nature.²⁷ It follows that the prohibition of *refoulement* applies to all refugees, including those who have not formally been recognized as such, and to asylum-seekers whose status has not yet been determined.²⁸

3.1.4. The principle of *non-refoulement* has also been established in international and European human rights law. More specifically, States are bound not to transfer any individual to another country if this would

²⁴ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (hereafter 'Guidelines on Detention'), 2012, Guideline 1, para. 11, <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>. As António Guterres, the UN Secretary General and former UN High Commissioner for Refugees said, "[i]t is not a crime to cross a border to seek asylum". <http://www.unhcr.org/news/press/2015/9/55f9a70a6/unhcr-urges-europe-change-course-refugee-crisis.html>.

²⁵ UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, <http://www.refworld.org/docid/437b6db64.html>; UNHCR *Note on the Principle of Non-Refoulement*, November 1997, <http://www.unhcr.org/refworld/docid/438c6d972.html>; UNHCR, *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, at para. 4, <http://www.unhcr.org/refworld/docid/3d60f5557.html> and UNHCR, *The Scope and Content of the Principle of Non-Refoulement (Opinion)* [Global Consultations on International Protection/Second Track], 20 June 2001, paras 193-253, <http://www.unhcr.org/refworld/docid/3b3702b15.html>. See also Concurring Opinion of Judge Pinto de Albuquerque in *Hirsi Jamaa and Others*, ECtHR, (*supra* note 3) p. 42.

²⁶ UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy*, 29 March 2011, Application No. 27765/09, para. 4(1)(1), <http://www.refworld.org/docid/4d92d2c22.html>.

²⁷ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, para. 28.

²⁸ Executive Committee of the High Commissioner's Programme (ExCom) was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions; the latter includes issuing Conclusions on International Protection - referred to as "ExCom Conclusions". ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 101 States are Members of the Executive Committee, including Hungary which has been a member since 1993. See, ExCom Conclusion No. 6 (XXVIII), 1977, para. (c), <http://www.unhcr.org/excom/exconc/3ae68c43ac/non-refoulement.html>; ExCom Conclusion No. 79 (XLVII), 1996, para. (j), <http://www.unhcr.org/excom/exconc/3ae68c430/general-conclusion-international-protection.html>; ExCom Conclusion No. 81 (XLVII), 1997, para. (i), <http://www.unhcr.org/excom/exconc/3ae68c690/general-conclusion-international-protection.html>. See also, *Note on International Protection (submitted by the High Commissioner)*, A/AC.96/815, ExCom Reports, 31 August 1993, para. 11, <http://www.unhcr.org/refworld/docid/3ae68d5d10.html>; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, paras. 26-31, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>.

result in exposing him or her to serious human rights violations, notably arbitrary deprivation of life,²⁹ or torture³⁰ or other cruel, inhuman or degrading treatment or punishment.³¹

3.1.5. The *non-refoulement* obligation is applicable wherever a State exercises jurisdiction,³² including at the border.³³ Consequently, States shall not reject asylum-seekers and refugees at the border or deny them entry or admission but shall allow them access to the territory for the purpose of refugee status determination.³⁴ Denying access may result in a breach of the *non-refoulement* obligation, as exemplified in the underlying case.

3.1.6. Furthermore, the prohibition of *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*).³⁵ Under the obligations of *non-refoulement*, States have a duty to establish, prior to implementing any removal measure that the person whom it intends to remove from its territory or jurisdiction is not at risk of persecution, serious human rights violations or other serious harm.

²⁹ The right to life is guaranteed under Article 6 of the 1966 Covenant on Civil and Political Rights (ICCPR), (999 U.N.T.S. 171); Article 2 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), ETS 005, 213 U.N.T.S. 222); Article 4 of the American Convention on Human Rights; and Article 4 of the African Charter on Human and People's Rights, 21 I.L.M. 58 (1982), (Banjul Charter).

³⁰ An explicit *non-refoulement* provision is contained in Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 U.N.T.S. 85) which prohibits the removal of a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

³¹ Obligations under the ICCPR as interpreted by the Human Rights Committee also encompass the obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by Articles 6 (right to life) and 7 (right to be free from torture or other cruel, inhuman or degrading treatment or punishment) of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed, thereby recognizing that the relevant provisions of the ICCPR entail the prohibition of indirect *refoulement*. With regard to the scope of the obligations under Article 7 of the ICCPR, see Human Rights Committee in its *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 10 March 1992, U.N. Doc. HRI/ GEN/1/Rev.7, para. 9 (“States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*”); and *General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 12. See also the jurisprudence of this Court, which has held that *non-refoulement* is an inherent obligation under Article 3 of the ECHR in cases where there is a real risk of exposure to torture, inhuman or degrading treatment or punishment, including, in particular, the Court's judgment in *Hirsi Jamaa and Others v. Italy*, (*supra* note 3, para. 114).

³² 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>.

³³ UNHCR, *Note on the Principle of Non-Refoulement*, part E, <http://www.refworld.org/docid/438c6d972.html>; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, January 2007, paras. 26-31, <http://www.unhcr.org/refworld/docid/45f17a1a4.html>; ExCom Conclusion No. 6 (XXVIII) 1977, para. (c).

³⁴ ExCom Conclusion No. 6 (XXVIII), 1977, para. (c); ExCom Conclusion No. 14 (XXX), 1979, para. (a); 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).

³⁵ UNHCR, *Note on Non-Refoulement (EC/SCP/2)*, 1977, para. 4, <http://www.unhcr.org/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>.

3.1.7. In UNHCR's view, the responsibility of a State to protect a person from *refoulement* is engaged 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. However, there is no single correct formula or phrase for how this fear needs to be expressed.³⁶ Even more significantly in the context of the present case, the obligation to respect the principle of *non-refoulement* is not conditional upon recognized refugee status or an express asylum application. Rather, it is engaged "wherever there is conduct [for instance, during border checks, 'push-backs' or forced removals] exposing an individual to a risk of being subject to persecution or ill-treatment in another country"³⁷, if the person has expressed a fear of such or the profile of the applicant or group indicates a risk of *refoulement* of which the State ought to be aware.³⁸ Contrary to the Polish authorities' claim, the absence of an explicit and articulated request for asylum does not absolve the concerned state of its *non-refoulement* obligation.³⁹ At a minimum, the State has a duty to inquire into the circumstances of the individual concerned, to ensure that it is fulfilling its *non-refoulement* obligations.⁴⁰ This is reflected in EU asylum law; of particular relevance for the present case are Articles 2(b) and 6 of the APD (recast). A combined reading of these two provisions indicates that asylum does not need to be formally requested for the person concerned to be entitled to access the asylum procedure and that border authorities must have the relevant information and necessary training to inform applicants as to where and how asylum applications may be lodged.⁴¹ The obligation is also reflected in this Court's case law, which unequivocally stated that a Contracting State is "not exempt from complying with its obligations under Article 3 of the Convention because the applicants failed to ask for asylum."⁴²

³⁶ 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>.

³⁷ *Ibid.*

³⁸ ECtHR, *Hirsi Jamaa and Others v. Italy*, (*supra* note 3).

³⁹ This is clearly not to say that the State concerned is under an unqualified duty to offer protection in circumstances where there is nothing in the profile of a person or group indicating a risk of *refoulement* of which that State ought not to be aware, or where the person has had an effective opportunity to disclose international protection needs or a fear of *refoulement* and has not done so or is uncooperative. What is required is that in circumstances where such a risk might reasonably be present the State undertake, prior to any removal, an independent inquiry into whether the person might be a refugee protected from *refoulement*. UNHCR intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents), 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, para. 74, <http://www.refworld.org/docid/510a74ce2.html>.

⁴⁰ *Ibid.*, para. 74.; UNHCR Submissions in the High Court of Australia in the case of *CPCF v Minister for Immigration and Border Protection and the Commonwealth of Australia*, 15 September 2014, NO S169 OF 2014, paras. 43-45, <http://www.refworld.org/docid/54169e8e4.html>.

⁴¹ The Charter of Fundamental Rights of the European Union, applicable to Poland, provides a number of important rules: Article 4 prohibits torture and inhuman or degrading treatment, Article 18 provides for the right to asylum, Article 19 prohibits collective expulsions and Article 47 provides for the right to an effective remedy; Council of the European Union, Charter of Fundamental Rights of the European Union (2007/C 303/01), 14 December 2007, C 303/1, <http://www.refworld.org/docid/50ed4f582.html>; These principles and guarantees are stipulated in Chapter II (basic principles and guarantees) of the European Union: Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (APD) (recast), 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, <http://www.refworld.org/docid/51d29b224.html>; Article 2(b) APD (recast) states: "application for international protection' or 'application' means a request made by a third- country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection outside the scope of Directive 2011/95/EU, that can be applied for separately" (emphasis added). Furthermore, the recast APD provides for a series of important principles and guarantees in order to ensure effective access to the asylum procedure, including at the border.

⁴² ECtHR, *Hirsi Jamaa and Others v. Italy*, (*supra* note 3, para. 157); ECtHR, *Sharifi and others v. Italy and Greece*, Application No. 16643/09, 21 October 2014.

3.1.8. UNHCR also considers, in line with this Court,⁴³ that the removing State must assess, prior to the removal and subject to procedural safeguards, the appropriateness of the removal for each person individually.⁴⁴ In order to be compatible with international and European law the removing State must ensure that the third country will treat the person in line with internationally accepted standards. This includes: (i) that the person will be admitted to the proposed receiving state; (ii) will be protected against refoulement; (iii) will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection; (iv) will be treated in accordance with accepted international standards (for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; persons with specific needs are identified and assisted; and, (v) if recognized as being in need of international protection, will be able to enjoy asylum and/or access to a durable solution.⁴⁵

3.1.9. The duty to ensure that conditions in the third country meet these requirements rests on the removing State. As consistently highlighted by this Court,⁴⁶ 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.⁴⁷ This assessment by the removing State is required irrespective of which third country is envisaged or whether or not the asylum-seeker has expressed an additional fear of being further *refouled* from that third country.⁴⁸

3.1.10. It is UNHCR's assessment that the Polish authorities have routinely failed to adhere to the procedural standards set out above at the Terespol border.

3.2. *The right to access a fair and efficient asylum procedure*

3.2.1. While the 1951 Convention does not govern the asylum procedure *per se*, it is accepted that, as a general rule, in order to give effect to the obligations under the 1951 Convention, including the prohibition on *refoulement*, refugees have to be identified. Thus, States will need to grant applicants for asylum access to fair and efficient procedures, including where relevant, admissibility procedures, without discrimination.⁴⁹ This is owing to the fact that the position of asylum-seekers may differ fundamentally from that of migrants in that they may not be in a position to comply with the legal formalities for entry.⁵⁰ The drafters of the 1951 Convention were aware of such difficulties and the Executive Committee of UNHCR (ExCom) has recognised “the importance (...) to make the necessary distinction between the situation of refugees and asylum-seekers, and that of other aliens.”⁵¹

⁴³ This Court has repeatedly held that its primary concern under Articles 3 and 13 in the context of an expulsion is to determine whether effective guarantees exist in the country of return to protect the applicant against arbitrary removal directly or indirectly back to his or her country of origin. See ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, para. 298.

⁴⁴ 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>.

⁴⁵ *Ibid.*, See also, ExCom Conclusion No. 8 (XXVIII), 1977; ExCom Conclusion No. 85 (XLIX), 1998, para. (aa); ExCom Conclusion No. 58 (XL), 1989, para. (f); and UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, <http://www.refworld.org/docid/3b36f2fca.html>.

⁴⁶ The Court held that while being party to international and regional refugee and human rights instruments is an important indicator as to whether the receiving State is safe, review of the actual practice of the State and its compliance with these instruments is an essential part of this assessment: ECtHR, *Hirsi Jamaa and Others v. Italy*, (*supra* note 3); ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011.

⁴⁷ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements (supra* note 44) para. 3(viii).

⁴⁸ 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), July 2013, para. 3.1.6.

⁴⁹ ExCom Conclusion No. 82 (XLVIII) 1997, para. (d)(iii).

⁵⁰ They may, for example, be unable to obtain the necessary documentation in advance of their flight because of their fear of persecution and/or the urgency of their departure. UNHCR, *Guidelines on Detention*, Guideline 1, para. 11.

⁵¹ ExCom Conclusion No. 44 (XXXVII), 1986, para. (d): <http://www.refworld.org/docid/3ae68c43c0.html>.

3.2.2. According to the ExCom, the asylum procedures in question must entail a number of minimum safeguards. ExCom recommended in particular the following, which are lacking, in practice, at the Terespol border in Poland:

- ‘The competent official (...) to whom the applicant addresses himself at the border (...) should have clear instructions for dealing with cases which might be within the purview of the relevant international instruments. He should be required to act in accordance with the principle of non-*refoulement* and to refer such cases to a higher authority;
- The applicant should receive the necessary guidance as to the procedure to be followed;
- The applicant should be given the necessary facilities, including the services of a competent interpreter, for submitting his case to the authorities concerned. Applicants should also be given the opportunity, of which they should be duly informed, to contact a representative of UNHCR;
- The applicant should be permitted to remain in the country pending a decision on his initial request by the competent authority (...).’⁵²

3.2.3. These minimum safeguards are also reflected in the case law of this Court under Articles 3 and 13 of the European Convention on Human Rights (ECHR). The Court has repeatedly held that in order to be effective “the remedy required by Article 13 must be available in practice as well as in law.”⁵³ Of particular relevance in the context of the summary deportations at the border in Poland, the Court has highlighted that to be effective under Article 13, a remedy against return that would entail a violation of article 3 must also have automatic suspensive effect⁵⁴ and that the haste with which a removal is carried out might render the available remedies ineffective.⁵⁵ Furthermore, while the guarantees under Article 13 are only applicable to persons with an arguable claim, the Court has held that the person concerned shall have an effective opportunity to make such a claim, notably in terms of material conditions, access to information,⁵⁶ legal assistance and interpretation.⁵⁷ Applying these principles to a situation comparable to that of the present case, the Court found that “the border-control procedure (...) did not provide adequate safeguards capable of protecting the first applicant from arbitrary removal.”⁵⁸

3.2.4. The above guarantees have also been reflected in the Court’s case law regarding the prohibition of collective expulsion under Articles 4 Protocol No. 4 and 13,⁵⁹ as illustrated in its judgments in the cases *Sharifi and others v. Italy and Greece*⁶⁰ and *Hirsi and Others v. Italy*.⁶¹ In the latter case, the Court found the remedies against the arbitrary push-backs ineffective, notably on account of the fact that “the personnel aboard the military ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers.”⁶²

⁵² ExCom Conclusion No. 8 (XXVIII) 1977, para. 53(6); ExCom Conclusion No. 30 (XXXIV) 1983, para. 97(2).

⁵³ ECtHR, *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, para. 290.

⁵⁴ ECtHR, *Gebremedhin [Gaberamadhien] c. France*, 25389/05, 26 April 2007, para. 66.

⁵⁵ ECtHR, *De Souza Ribeiro v. France*, Application No. 22689/07, 13 December 2012, para. 95.

⁵⁶ In its *Hirsi* judgment, the Court reiterated “the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints.” ECtHR, *Hirsi Jamaa and Others v. Italy*, (*supra* note 3, para. 204). See also ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011, para. 304.

⁵⁷ ECtHR, *Hirsi Jamaa and Others v. Italy*, (*supra* note 3, para. 202).

⁵⁸ ECtHR, *Kebe and others v. Ukraine*, Application No. 12552/12, 12 January 2017, para. 107.

⁵⁹ ECtHR, *Becker v. Denmark*, No. 701175, Decision of 3 October 1975. (p.235). Notably, each person concerned must have been given the opportunity to put arguments against their expulsion to the competent authorities on an individual basis, See also ECtHR, *Vedran Andric v. Sweden*, Appl. no. 45917/99, 23 February 1999.

⁶⁰ ECtHR, *Sharifi and others v. Italy and Greece*, Application No. 16643/09, 21 October 2014.

⁶¹ ECtHR, *Hirsi Jamaa and Others v. Italy*, (*supra* note 3, para. 185).

⁶² *Ibid.*

3.2.5. In UNHCR's view, these safeguards are even more important when asylum is requested at the border⁶³ because of the particular vulnerability of asylum-seekers in this context, who are subject to a procedure outside public scrutiny. In the same vein, this Court has recognised that persons seeking asylum at the border might face particular difficulties⁶⁴ and that this shall not deprive them of the right to gain effective access to the asylum procedure.⁶⁵ The Court of Justice of the EU has also underlined the need to assess the asylum claims "in all cases (...) with vigilance and care" since it relates to "the fundamental values of the Union."⁶⁶

3.3. *Non-penalisation of illegal entry*

3.3.1. The denial of entry of asylum seekers at the Terespol border in Poland, also raises an issue under Article 31 of the 1951 Convention. Article 31 provides for the non-penalisation of refugees on account of illegal entry or presence if they come directly from a territory where their life or freedom was threatened, present themselves without delay and show good cause for their illegal entry or presence. Furthermore, the material scope of Article 31 extends to the territory under a State's control, which includes border crossings.

3.3.2. The effective implementation of Article 31 requires that it applies to any person seeking international protection.⁶⁷ In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation. Regarding the material scope of Article 31, it is generally accepted that the term 'penalties' as referred to in this article is to be broadly understood⁶⁸ as including, disadvantages in the asylum procedure as a consequence of irregular entry or presence, particularly where procedural safeguards are not met.

4. Conclusion

4.1. UNHCR considers that the practice by Polish Border Guards of arbitrarily rejecting asylum-seekers at the Terespol land border and depriving them of access to a fair and efficient asylum procedure exposes them to a real risk of *refoulement*, direct and/or indirect, without any effective remedy, in violation of the relevant standards of international and European refugee and human rights law.

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⁶³ UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, paras. 21-23, <http://www.refworld.org/docid/3b36f2fca.html>.

⁶⁴ ECtHR, *Gebremedhin v. France*, Application No. 25389/05, 26 April 2007, para. 59.

⁶⁵ ECtHR, *Amuur v. France*, Application No. 19776/92, 25 June 1996, para. 43.

⁶⁶ Court of Justice of the European Union, *Abdulla and Others*, C-175/08, C-176/08, C-178/08 and C-179/08, para. 90.

⁶⁷ "That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt." *R. v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 All ER 520, 29 July, 1999, at 527. This was upheld in *R. v. Asfaw* [2008] UKHL31, at para 26.

⁶⁸ For an analysis of the scope of Article 31 see: Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, July 2017, PPLA/2017/01, <http://www.refworld.org/docid/59ad55c24.html>.