

UNHCR Comments and Observations on the draft law amending the Act on Granting Protection to Foreigners in the territory of the Republic of Poland

I. Introduction

1. The Representation of the United Nations High Commissioner for Refugees (“UNHCR”) in the Republic of Poland welcomes the opportunity to provide observations on the “draft law amending the Act on Granting Protection to Foreigners in the territory of the Republic of Poland.”
2. UNHCR shares its comments and recommendations on the draft law amending the Act on Granting Protection to Foreigners in the territory of the Republic of Poland (hereafter referred to as “the Bill”) as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, seek permanent solutions to the problems of refugees.¹
3. Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,² whereas the 1951 Convention relating to the Status of Refugees³ and its 1967 Protocol (hereafter collectively referred to as the “1951 Convention”) oblige State Parties to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). This has also been reflected in European Union law, including by way of reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the EU.
4. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection.⁴ UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions for forcibly displaced and stateless persons.

II. Observations

5. It is evident that the Republic of Poland is managing a highly complex situation along the Belarussian border, which is driven, in part, by geopolitical dynamics and the instrumentalization of migrants and refugees, which UNHCR condemns.
6. UNHCR appreciates that the purpose of the Bill is to address practical challenges that the Government of Poland faces in ensuring control of the state border, preventing abuse of border management and asylum systems, and effectively managing mixed migration flows.⁵

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

² *Ibid.*, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR’s supervisory function to one or other specific international refugee convention. UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, *UNHCR’s supervisory responsibility*, October 2002, available at: <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189 <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.

⁴ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, available at: <https://www.refworld.org/policy/legalguidance/unhcr/2019/en/123881>

⁵ [Projekt ustawy o zmianie ustawy o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej - Kancelaria Prezesa Rady Ministrów - Portal Gov.pl](#)

7. UNHCR notes that the Bill proposes to place limitations, both geographically and in terms of time, upon the application of restrictions foreseen by the proposed legislation, including the right to claim asylum. However, while Poland has the sovereign power to control its borders and regulate the entry of non-nationals, due to the binding, universal and non-derogable nature of the principle of *non-refoulement*, UNHCR is concerned that the Bill may provide for the denial of access to the territory of some asylum-seekers without a prior examination of their international protection needs, which would be inconsistent with Poland's obligations under the 1951 Convention. The definition provided in the Bill of a situation which would justify the application of such restrictions is additionally broad and open to interpretation, potentially resulting in the use of measures that are at variance with Poland's obligations under international law.
8. While UNHCR appreciates the nuance with which the Bill has been drafted and welcomes the contemplation of humanitarian exemptions to restrictions, UNHCR is concerned that the Bill still provides for the possibility of refusing entry into the territory of the Republic of Poland of individuals who may be in need of international protection in the context of instrumentalization. The comments that follow explain these concerns in more detail but, importantly, also propose concrete adjustments to the text which are consistent with Poland's obligations under international and regional refugee law.
9. UNHCR notes that the proposed Bill appears to have been modelled on the Law on Temporary Measures enacted in Finland. In this respect, UNHCR would like to draw attention to our comments on the Finnish law.⁶

a. The principle of *non-refoulement* is binding, universal and non-derogable

10. The principle of *non-refoulement* applies in all situations of people on the move, including in the context of "instrumentalization," in case of increased numbers of arrivals and/or in view of national security concerns. The principle of *non-refoulement* under International Refugee Law establishes that refugees must not be removed to their country of origin, or any other place where they would be at risk of persecution, or from where they risk being sent to a place of persecution. It is additionally a non-derogable norm of customary international law.⁷
11. To ensure protection against *refoulement*, all State parties are required to ensure that persons seeking asylum have access to procedures which allow for the examination of their claims. Therefore, States must ensure access to asylum procedures in a protection-sensitive manner, including in times of emergency.⁸ Additionally, UNHCR wishes to underline that seeking asylum, including by irregular means, is not a criminal act.⁹
12. Exceptions to the prohibition of *refoulement* under International Refugee Law are permitted only in the limited circumstances provided for in Article 33(2) of the 1951 Convention where there are reasonable grounds for regarding individual refugees as a danger to the security of the country in which they are or, having been convicted by final judgment of a particularly

⁶ UNHCR Observations on the proposal to enact a law on temporary measures (Hallituksen esitys eduskunnalle laiksi väliaikaisista toimenpiteistä välineellistetyin maahantulon torjumiseksi), March 2026, https://www.refworld.org/legal/natlegcomments/unhcr/2024/en/147739?_gl=1*1qzd99k*_rup_ga*NTA1NTc0NjY0LjE2ODcxNDM3NDg.*_rup_ga_EVDQTJ4LjY0MTcyMTIxODk3MS4zNC4wLjE3MjE5MTg5NzEuNjAuMC4w

⁷ UNHCR, *Legal considerations on asylum and non-refoulement in the context of 'instrumentalization'*, 26 September 2024, available at: <https://www.refworld.org/policy/legalguidance/unhcr/2024/en/148736>.

⁸ UNHCR, *Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, COM (2016) 467, April 2019, available at: <https://www.refworld.org/legal/intlegcomments/unhcr/2019/en/122595>, p. 36.

⁹ UNHCR, *Guidelines on International Protection No. 14: Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/24/14, 23 September 2024, available at: <https://www.refworld.org/policy/legalguidance/unhcr/2024/en/148632>.

serious crime, constitute a danger to its community.¹⁰ The application of this provision requires an individualised assessment with adequate procedural safeguards and does not provide justification for denying access to the territory and to asylum procedures. Ultimately, States may not reject individuals at the border without an individual assessment of their international protection needs.

13. Furthermore, International and European Human Rights Law prohibits the removal of any person to a territory where there are substantial grounds for believing that she or he would face torture or cruel, inhuman or degrading treatment or punishment or other serious violations of human rights.¹¹ No derogation is possible from the principle of *non-refoulement* in times of war or other public emergencies threatening the life of the nation.¹² While in exceptional circumstances, certain rights may be derogated from pursuant to Article 15 of the European Convention on Human Rights (ECHR), this provision precludes derogations from the principle of *non-refoulement* enshrined in Articles 2 and 3 of this Convention.¹³ The European Court of Human Rights (ECtHR) has reiterated that States are in principle free to control the entry, residence and expulsion of aliens. However, this cannot justify a State having recourse to practices which are not compatible with its obligations under the Convention.¹⁴
14. The principle of *non-refoulement* is reinforced by the prohibition of collective expulsion. This prohibition applies also in the context of so-called “instrumentalization” and requires States to take expulsion measures only after, and on the basis of, a reasonable and objective examination of the particular circumstances of each individual.¹⁵ The European Court of Human Rights has ruled that in order to uphold the prohibition of collective expulsion, States must provide genuine and effective means of legal entry, particularly through border procedures.¹⁶
15. The Bill provides that asylum-seekers who meet certain criteria set out in Article 33b.2 would be admitted to Poland and allowed to submit an application for international protection on humanitarian grounds. Whilst UNHCR appreciates the intentions of the drafters, these proposed exceptions are not consistent with either the inclusion clauses contained in Article 1 or the principle of *non-refoulement* in Article 33(1) of the 1951 Convention — in other words, many individuals in need of international protection would still be excluded.
16. While UNHCR appreciates the attention afforded to vulnerable asylum-seekers in the Bill, which states that applications from unaccompanied children, pregnant women, and people requiring special treatment because of their age or health conditions may be accepted, there is no basis in international law for limiting the application of the principle of *non-refoulement* or access to asylum procedures for the purposes of determining international protection needs to people who exhibit specific vulnerabilities that are readily apparent. A strong man who does not appear vulnerable, for example, could be killed or tortured if he

¹⁰ *Supra. fn.6.*

¹¹ UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, Treaty Series, vol. 1465, p. 85, 10 December 1984, <https://www.refworld.org/legal/agreements/unga/1984/en/13941>, Article 3; UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations, Treaty Series, vol. 1465, p. 85, 10 December 1984, <https://www.refworld.org/legal/agreements/unga/1984/en/13941>, Article 7; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, ETS 5, 4 November 1950, <https://www.refworld.org/legal/agreements/coe/1950/en/18688>, Article 3.

¹² *Supra. fn.7.*

¹³ European Court of Human Rights (ECtHR), Guide on Article 15 of the European Convention on Human Rights, updated on 30 April 2021, available at: https://www.echr.coe.int/documents/Guide_Art_15_ENG.pdf.

¹⁴ See ECtHR, *Georgia v Russia (I)* Hirsi Jamaa and Others, § 179, and *Sharifi and Others* § 224; European Court of Human Rights (ECtHR), Grand Chamber judgment *N.D. and N.T. v. Spain*, 13 February 2020, para. 209 and 232, available at: <https://bit.ly/2YkPwni>.

¹⁵ Art.4, Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms other than Those Already Included in the Convention and in the First Protocol Thereto*, 16 September 1963: <https://www.refworld.org/legal/agreements/coe/1963/en/13904>.

¹⁶ ECtHR, Grand Chamber, *N.D. and N.T. v. Spain*, Nos. 8675/15 and 8697/15, 13 February 2020: hudoc.echr.coe.int/fre?i=001-201353

has a well-founded fear of persecution in his country of origin, but this is not immediately obvious and requires a more thorough legal assessment. The prohibition of *refoulement* applies to all people without discrimination, including refugees, asylum-seekers, and others in need of international protection or at real risk of serious harm if removed.

17. UNHCR notes that the draft Bill contemplates that when there are clear indications that a foreigner “is at risk of serious harm in the country from which the persons came,” he or she could be given access to the asylum procedure, irrespective of whether the person meets the vulnerability criteria above, if the Border Guards make that determination. UNHCR is concerned that the definition of roles and competencies set forth in the current text of the Bill are unclear (see Section d of this Memo below); that it is not clear whether the right to appeal would exist; and that it is not clear whether front-line Border Guards are adequately trained or have the requisite administrative and judicial competencies to carry out these functions. UNHCR strongly supports a robust vulnerability screening procedure which rapidly identifies persons with vulnerabilities and provides them with the additional support and access to the specialised services that they require. However, UNHCR notes that access to territory and asylum procedures are necessary pre-requisites for vulnerability screening to occur, as is envisaged under the Asylum Procedures Regulation and the EU Pact on Migration and Asylum.
18. UNHCR further notes that the EU Regulation 2024/1359 addressing situations of crisis and *force majeure* in the field of migration and asylum reaffirms that the derogations it provides for shall not affect the basic principles of the right to asylum and the principle of *non-refoulement*. EU law does not allow the suspension of access to asylum procedures in situations of crisis, instrumentalization or *force majeure*. The Regulation provides for a suspension of registration up to four weeks, amongst other measures. However, applicants shall be entitled to safeguards and guarantees, including in relation to reception conditions and asylum procedures, regardless of when the registration takes place.

b. States are obliged to give genuine and effective access to legal entry

19. According to the ECtHR, States have an obligation to provide effective and genuine access to legal entry, in particular to procedures for those who have arrived at the border. The Court has further found that “[t]hose means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3 of the Convention, under conditions which ensure that the application is processed in a manner consistent with the international norms.”¹⁷
20. While providing for temporal and geographic limitations to the restrictions at the border, neither the draft Bill nor its explanatory note specify any measures envisaged to ensure alternative and effective means of legal entry for asylum-seekers arriving at borders.
21. Denying an asylum-seeker access to territory at a closed land border point, in an area between States’ border facilities (“no man’s land”) or between official border points (at the “green border”) amounts to *refoulement* if the authorities fail to implement arrangements to ensure that the asylum-seeker can safely reach areas where asylum applications will be accepted without risk of *refoulement*. UNHCR notes that, as of December 2024, only one crossing point remains open between Poland and Belarus along a more than 400km long border, with reports of individuals approaching this border point and expressing their intention to claim asylum not being permitted entry to Poland in some instances.¹⁸

¹⁷ *Ibid.* See also ECtHR, Second Section, M.K. and Others v. Poland, App. Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020: <https://hudoc.echr.coe.int/fre?i=001-203840>; ECtHR, First Section, D.A. and Others v. Poland, App. No. 51246/17, 8 July 2021: <https://hudoc.echr.coe.int/fre?i=001-210855>; ECtHR, Fifth Section, O.M. and D.S. v. Ukraine, App. No. 18603/12, 15 September 2022: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-219197%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-219197%22]})

¹⁸ See media reports available at: oko.press/uciekli-przed-talibami-chca-legalnie-dostac-sie-do-polski and ty24.pl/lublin/terespol-kolejne-rodziny-wpuszczone-do-polski-na-przejsciu-jedna-za-pierwszym-razem-odeslano-na-bialorus-st8079733.

c. The right to family life and unity applies at all stages of displacement

22. According to Article 33c of the Bill, during the period of temporary suspension of the right to lodge an application for international protection, the provisions¹⁹ allowing an applicant to submit an application on behalf of their dependents or children will not apply. Since, the Bill does not explain the criteria for the assessment of vulnerabilities, UNHCR sees a risk that, for instance, children may be admitted while the parents or guardians of the child may be refused entry, leading to family separation at the border.
23. UNHCR wishes to recall that the right to family life and to family unity is enshrined in international human rights, and refugee law, and it applies to all individuals, including asylum-seekers and refugees, and throughout displacement, including at admission, in reception, where expulsion is threatened, and other stages. International law recognizes the family as the natural, fundamental group of society, and it ascribes to family units a right to protection by States.²⁰
24. Children enjoy special protection relating to their right to remain with their families. International law provides that children generally shall not be separated from their parents or other caretakers against their will, except if necessary for the best interests of the child. Given the gravity of the impact of separation, even if only temporary, separation should be a measure of last resort, and other reasonable efforts must be made first to attempt to address the situation.²¹

d. Asylum-seekers should not be rejected or denied admission without reference to the competent authorities

25. According to the draft legislation, the Polish Border Guards will be responsible for implementing decisions under the Bill. The role of the Border Guards, however, and how their duties relate to the established competencies of other authorities — including specialised units within the Ministry of Interior and Administration, like the Office for Foreigners, and competent judicial bodies — is not sufficiently detailed in the Bill.
26. As UNHCR interprets the text of the Bill, this would mean that front-line Border Guards are involved in making a wide range of important and complex assessments and decisions at or near the border, including whether the asylum-seeker meets the criteria of a foreigner to be allowed to submit an application for international protection despite the limitations as per Article 33b. This raises concerns about whether the Border Guards are sufficiently trained to carry out these tasks and, more fundamentally, whether they have the requisite competencies from an administrative and judicial perspective.
27. In line with EU standards, front-line authorities in charge of border and migration controls, such as border guards, are normally required to facilitate asylum-seekers' access to the

¹⁹ Articles 25, 27 and Articles 28 of the Act on Granting Protection to Foreigners in the territory of the Republic of Poland.

²⁰ UN General Assembly, Universal Declaration of Human Rights, 217 A (III), 10 December 1948, <https://www.refworld.org/legal/resolution/unga/1948/en/11563>, art. 16(3); UN General Assembly, International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966, <https://www.refworld.org/legal/agreements/unga/1966/en/17703>, art. 23(1); UN General Assembly, International Covenant on Economic, Social and Cultural Rights, United Nations, Treaty Series, vol. 993, p. 3, 16 December 1966, <https://www.refworld.org/legal/agreements/unga/1966/en/33423>, art. 10(1); UN Commission on Human Rights (46th sess. : 1990 : Geneva), Convention on the Rights of the Child., E/CN.4/RES/1990/74, UN Commission on Human Rights, 7 March 1990, <https://www.refworld.org/legal/resolution/unchr/1990/en/47325>, art. 3; U.N. G.A., UN General Assembly, Convention on the Rights of Persons with Disabilities, A/RES/61/106, Annex I, 13 December 2006, <https://www.refworld.org/legal/agreements/unga/2006/en/90142>, Annex I; Kate Jastram and Kathleen Newland, Family Unity and Refugee Protection, Cambridge University Press, June 2003, <https://www.refworld.org/reference/research/cup/2003/en/49731>. Related rights, such as the right not to be subject to arbitrary or unlawful interference with family (among other matters), are also protected in several of those instruments. See ICCPR, art. 17(1); CRC, art. 16; CMW, art. 14

²¹ See also UNHCR, 2021 UNHCR Best Interests Procedure Guidelines: Assessing and Determining the Best Interests of the Child, May 2021, <https://www.refworld.org/policy/opguidance/unhcr/2021/en/122648>

asylum procedure, by referring their cases to the central, specialized determining authorities.

28. At the same time, it is not clear how foreigners could access legal services or challenge adverse decisions taken by front-line Border Guards, which raises serious due process concerns.

III. Recommendations

29. UNHCR recalls that the 1951 Convention contains provisions which enable States to address security concerns, but by implementing fair and humane policies towards asylum-seekers and refugees which are in line with their obligations under international law.²²

30. As per UNHCR's recent guidance on asylum and *non-refoulement* in the context of instrumentalization²³ and in line with Poland's obligations vis-à-vis the implementation of the EU Pact on Migration and Asylum, UNHCR recommends setting up efficient asylum processing modalities at border areas, as part of a legal framework that provides refugees with fair and efficient procedures as well as effective guarantees, that:

- a. Allow all persons who fear persecution or other serious harm to apply for international protection.
- b. Provide for the early identification of individuals with specific needs and vulnerabilities.
- c. Include an enhanced system of triaging of applications, with a view to referring those that are manifestly unfounded to simplified and accelerated procedures, depending on profile and background, and to prioritize manifestly founded applications.²⁴
- d. Include measures in the application of Article 33c to prevent family separation at the border.
- e. Assign roles to the specialised agencies, such as the Office of Foreigners, to make or support complex assessments and decisions at or near the border, including whether the asylum-seeker meets the criteria of a foreigner to be allowed to submit an application for international protection despite the limitations as per Article 33b.

31. In UNHCR's view, the prompt, safe and dignified return of those who are determined to be not in need of international protection — and have no other basis for remaining in a host State — is essential to preserve the integrity of the asylum system. In this regard, UNHCR urges States to go beyond short-term reactions and instead adopt a comprehensive approach and cooperate with each other within a framework of international solidarity and cooperation.

32. UNHCR stands ready to support the Government of Poland in crafting legal, policy and operational approaches that address national security concerns while providing safeguards for persons forced to flee and in line with international law and regional refugee protection legislation.

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12 December 2024

²² *Supra.* fn 6, para. 18.

²³ *Supra.* fn 7

²⁴ UNHCR supports the goal of fair and efficient processing and supports the use of accelerated procedures for manifestly unfounded and manifestly well-founded claims provided that all due process guarantees are in place. Further guidance on accelerated procedures in the EU context can be gleaned from UNHCR's *Practical considerations for fair and fast border procedures and solidarity in the European Union*, 15 October 2020, available at: <https://www.refworld.org/policy/polrec/unhcr/2020/en/123361>, and UNHCR's *Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, available at: <https://www.refworld.org/policy/opguidance/unhcr/2018/en/121637>.