

## Legal considerations on asylum and non-refoulement in the context of 'instrumentalization'

### I. Introduction

1. The present legal considerations outline States' obligations under international refugee and human rights law in relation to admission to the territory of States and access to asylum in situations of so-called 'instrumentalization'. They underscore the importance of every person's right to seek asylum and be protected from refoulement in all situations. Where security concerns arise in relation to specific individuals, these considerations also outline measures that States may lawfully undertake, where appropriate and subject to relevant safeguards, to simplify and accelerate asylum procedures, in a manner consistent with international refugee and human rights law.

2. UNHCR has repeatedly condemned the so-called 'instrumentalization' of refugees<sup>1</sup> and recalls that refugees should not be sanctioned or considered as a security threat due solely to the fact that they are arriving or are seeking asylum as part of a so-called 'instrumentalized' movement. The term 'instrumentalization' has been used, including in some national and supra-national legislation,<sup>2</sup> to describe movements of persons which are forced, encouraged or facilitated with the aim of disrupting essential State functions. The concept of 'instrumentalization' does not provide a basis for a general derogation from asylum, refugee protection and human rights norms. Its use in this document does not imply its endorsement or adoption by UNHCR.

3. The forcing, encouraging or facilitating of movements of people to neighbouring or other countries creates grave risks and compounds the trauma and suffering of people on the move. This may include violations of their right to physical integrity, including by leaving them in situations of destitution. It can also drive further dangerous onward movements, expose people to potential exploitation, and can strain reception capacities in other States.

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<sup>1</sup> See, UNHCR, *Statement on Amendments of State Border Law of Lithuania*, 28 April 2023, [www.unhcr.org/neu/98669-unhcr-statement-on-amendments-of-state-border-law-of-lithuania.html](http://www.unhcr.org/neu/98669-unhcr-statement-on-amendments-of-state-border-law-of-lithuania.html); UNHCR, *Urges States to End Stalemate at Belarus-EU Border and Avoid Further Loss of Life*, 22 October 2021, [www.unhcr.org/news/news-releases/unhcr-urges-states-end-stalemate-belarus-eu-border-and-avoid-further-loss-life](http://www.unhcr.org/news/news-releases/unhcr-urges-states-end-stalemate-belarus-eu-border-and-avoid-further-loss-life); UNHCR, *Urges States to Protect Refugees' Rights, Not to Instrumentalize Their Plight*, 27 July 2021, [www.unhcr.org/news/news-releases/unhcr-urges-states-protect-refugees-rights-not-instrumentalize-their-plight](http://www.unhcr.org/news/news-releases/unhcr-urges-states-protect-refugees-rights-not-instrumentalize-their-plight).

<sup>2</sup> The European Union (EU) has defined "instrumentalization" in the EU's Crisis and Force Majeure Regulation, Article 1(4)(b) as: "[...] where a third country or a hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the external borders or to a Member State, with the aim of destabilising the Union or a Member State, and where such actions are liable to put at risk essential functions of a Member State, including the maintenance of law and order or the safeguard of its national security." EU, *Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 Addressing Situations of Crisis and Force Majeure in the Field of Migration and Asylum and Amending Regulation (EU) 2021/1147*, 32024R1359, 14 May 2024, [www.refworld.org/legal/reglegislation/council/2024/en/148015](http://www.refworld.org/legal/reglegislation/council/2024/en/148015). The Regulation reaffirms the significance of the principle of non-refoulement in its Recitals and does not allow Member States to deny access to territory and asylum procedures in such situations (see Article 11(10)). See also, Finland, *Lakiväliaikaisista toimenpiteistä välineellistetyn maahantulon torjumiseksi* ('Law on temporary measures to combat instrumentalized immigration'), No. 482/2024, 16 July 2024, [www.finlex.fi/fi/laki/alkup/2024/20240482](http://www.finlex.fi/fi/laki/alkup/2024/20240482), para. 3.

4. UNHCR recalls that all States along the travel routes of refugees, including States facilitating so-called ‘instrumentalized’ movements, must uphold international refugee and human rights law, including the right of people to seek and to enjoy asylum from persecution, which encompasses access to fair and efficient asylum procedures,<sup>3</sup> the principle of non-refoulement, as well as their right to return voluntarily to their own country.<sup>4</sup>

5. So-called ‘instrumentalized’ movements of people are often viewed from a security perspective, without sufficient acknowledgement of the human rights and humanitarian impacts of the phenomenon. Some States have introduced border closures and other measures that effectively bar people seeking asylum from accessing effective means of legal entry and access to asylum procedures. In some instances, it has been argued that international refugee and human rights law are qualified or inapplicable in such situations, and that the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* (‘1951 Convention’)<sup>5</sup> do not address so-called ‘instrumentalized’ movements.

6. UNHCR acknowledges the security-related challenges faced by States in some regions where onward and mixed movements occur. At the same time, UNHCR recalls that the grant of asylum is a peaceful and humanitarian act, which no State should consider unfriendly,<sup>6</sup> and that international refugee and human rights law are applicable in all circumstances, including in situations of so-called ‘instrumentalization’. As recognized by the UN General Assembly, the 1951 Convention remains the foundation of the international refugee protection regime,<sup>7</sup> which provides States with the appropriate tools to address any security concerns that may arise in all situations, including in the context of so-called ‘instrumentalized’ movements.

## II. Admission to the territory

7. The right of every individual seeking international protection to be admitted to safe territory and to receive protection from refoulement is the cornerstone of international refugee law. It applies in all situations of people on the move, including in the context of so-called ‘instrumentalization’, even in case of increased numbers of arrivals or perceived security concerns.

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<sup>3</sup> 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”. The right to seek and enjoy asylum is affirmed in various regional legal instruments: Article 22(7), Organization of American States (‘OAS’), *American Declaration on the Rights and Duties of Man*, 2 May 1948, [www.refworld.org/legal/resolution/iachr/1948/en/46669](http://www.refworld.org/legal/resolution/iachr/1948/en/46669), Article XXVII; OAS, *American Convention on Human Rights*, “*Pact of San Jose, Costa Rica*” (‘ACHR’), 22 November 1969, [www.refworld.org/legal/agreements/oas/1969/en/20081](http://www.refworld.org/legal/agreements/oas/1969/en/20081), referring to the right to seek and be granted asylum; Article 12(3), OAU, *African Charter on Human and Peoples’ Rights* (‘Banjul Charter’), 27 June 1981, CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982), [www.refworld.org/legal/agreements/oau/1981/en/17306](http://www.refworld.org/legal/agreements/oau/1981/en/17306); Article 18, EU, *Charter of Fundamental Rights of the European Union* (‘EU Charter of Fundamental Rights’), 26 October 2012, 2012/C 326/02, [www.refworld.org/legal/agreements/eu/2012/en/13901](http://www.refworld.org/legal/agreements/eu/2012/en/13901).

<sup>4</sup> Article 12, UN General Assembly, (‘UNGA’), *International Covenant on Civil and Political Rights*, (‘ICCPR’), United Nations, Treaty Series, vol. 999, p. 171, 16 December 1966, <https://www.refworld.org/legal/agreements/unga/1966/en/17703>.

<sup>5</sup> UNGA, *Convention Relating to the Status of Refugees*, 28 July 1951, U.N.T.S. Vol. 189, p. 137, [www.refworld.org/legal/agreements/unga/1951/en/39821](http://www.refworld.org/legal/agreements/unga/1951/en/39821) and UNGA, *Protocol Relating to the Status of Refugees*, 31 January 1967, U.N.T.S. Vol 606, p. 267, [www.refworld.org/legal/agreements/unga/1967/en/41400](http://www.refworld.org/legal/agreements/unga/1967/en/41400) (‘1951 Convention’).

<sup>6</sup> UNGA, *Declaration on Territorial Asylum*, 14 December 1967, A/RES/2312(XXII), [www.refworld.org/legal/resolution/unga/1967/en/10415](http://www.refworld.org/legal/resolution/unga/1967/en/10415), Preamble; Executive Committee of the High Commissioner’s Programme (‘ExCom’), *Conclusion No. 94 (LIII): Civilian and Humanitarian Character of Asylum*, 8 October 2002, [www.refworld.org/policy/exconcl/excom/2002/en/46718](http://www.refworld.org/policy/exconcl/excom/2002/en/46718), Preamble; Article II(2), Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* (‘1969 OAU Convention’), 10 September 1969, U.N.T.S. Vol. 1001, p. 45, [www.refworld.org/legal/agreements/oau/1969/en/13572](http://www.refworld.org/legal/agreements/oau/1969/en/13572).

<sup>7</sup> UNGA, *New York Declaration for Refugees and Migrants*, A/RES/71/1, 3 October 2016 [www.refworld.org/legal/resolution/unga/2016/en/112142](http://www.refworld.org/legal/resolution/unga/2016/en/112142), para. 65.

8. States must always respect the principle of non-refoulement under international refugee and human rights law. The principle constitutes an essential component of international refugee protection, most prominently expressed in Article 33 of the 1951 Convention. It is a non-derogable<sup>8</sup> norm of customary international law.<sup>9</sup> Article 33(1) of the 1951 Convention 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.<sup>10</sup> 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 individual refugees are determined to pose a threat to the security of the country or to its community.<sup>11</sup> The application of this provision requires an individualized assessment with adequate procedural safeguards. Article 33(2) does not provide justification for denying people seeking international protection access to the territory and to asylum procedures, nor does it alter the host State's non-refoulement obligations under international human rights law (see section IV).

9. Under international human rights law, States are prohibited from removing individuals to countries where there are substantial grounds for believing that they are at risk of being subject to torture or other cruel, inhuman or degrading treatment or punishment, or other serious violations of their human rights<sup>12</sup> or from where they could subsequently be removed to countries where they would be exposed to such risks.<sup>13</sup> The principle of non-refoulement under international human rights law applies without exceptions on any grounds, including concerns relating to public order or national security. Moreover, no derogation is possible from

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<sup>8</sup> The fundamental and non-derogable character of the principle of non-refoulement has been reaffirmed by ExCom in numerous Conclusions since 1977. See, ExCom Conclusions No. 25 (XXXIII) 1982, (b); No. 29 (XXXIV) 1983, para. (c); No. 50 (XXXIX) 1988, para. (g); No. 52 (XXXIX) 1988, para. (5); No. 55 (XL) 1989, para. (d); No. 62 (XLI) 1990, para. (a) (iii); No. 65 (XLII) 1991, para. (c); No. 68 (XLIII) 1992, para. (f); No. 71 (XLIV) 1993, para. (g); No. 74 (XLV) 1994, para. (g); No. 77 (XLVI) 1995, para. (a); No. 81 (XLVIII) 1997, para. (h); No. 82 (XLVIII) 1997, para. (d)(i); No. 85 (XLIX) 1998, para. (q); No. 91 (LII) 2001, para. (a); No. 94 (LIII) 2002, para. (c)(i); No. 99 (LV) 2004, para. (1); No. 103 (LVI) 2005, para. (m); and No. 108 (LIX) 2008, para. (a). See also, General Assembly resolutions A/RES/51/76, 12 February 1997, para. 3; A/RES/52/132, 12 December 1997, para. 12.

<sup>9</sup> UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, [www.refworld.org/policy/legalguidance/unhcr/1997/en/36258](http://www.refworld.org/policy/legalguidance/unhcr/1997/en/36258); E. Lauterpacht and D. Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion* ('The Scope and Content of Non-Refoulement'), June 2003, [www.refworld.org/reference/research/cup/2003/en/49371](http://www.refworld.org/reference/research/cup/2003/en/49371), pp. 140-163. See also, *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, 22 November 1984, [www.refworld.org/legal/resolution/mri/1984/en/64184](http://www.refworld.org/legal/resolution/mri/1984/en/64184), Conclusion III(5). The principle of non-refoulement has also been confirmed by the Inter-American Court of Human Rights ('IACtHR') in *Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, 19 August 2014, [www.refworld.org/jurisprudence/caselaw/iacrthr/2014/en/101499](http://www.refworld.org/jurisprudence/caselaw/iacrthr/2014/en/101499), para. 181. See also, Canada: Supreme Court, *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, 27 September 2023, [www.refworld.org/jurisprudence/caselaw/cansc/2023/en/124359](http://www.refworld.org/jurisprudence/caselaw/cansc/2023/en/124359), para. 108.

<sup>10</sup> See, European Court of Human Rights ('ECtHR'), *D.A. and Others v. Poland*, Application No. 51246/17, 8 July 2021, [www.refworld.org/jurisprudence/caselaw/echr/2021/en/123901](http://www.refworld.org/jurisprudence/caselaw/echr/2021/en/123901), para. 58; ECtHR, *M.K. and Others v. Poland*, Applications Nos. 40503/17, 42902/17 and 43643/17, 23 July 2020, [www.refworld.org/jurisprudence/caselaw/echr/2020/en/124164](http://www.refworld.org/jurisprudence/caselaw/echr/2020/en/124164), para. 171. See also, UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Cases of N.D. and N.T. v. Spain (Appl. Nos 8675/15 and 8697/15) Before the European Court of Human Rights*, 15 November 2015, [www.refworld.org/jurisprudence/amicus/unhcr/2015/en/123129](http://www.refworld.org/jurisprudence/amicus/unhcr/2015/en/123129), para. 3.1.4.

<sup>11</sup> Article 33(2) of the 1951 Convention: "The benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

<sup>12</sup> Explicit refoulement provisions are contained in Article 3 of the 1984 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and Article 16 of the *International Convention for the Protection of All Persons from Enforced Disappearance*. See also, UN Human Rights Committee, *General Comment No. 31 [80], The Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, regarding Articles 6 and 7 ICCPR, among other rights, encompassing non-refoulement obligations, 26 May 2004, CCPR/C/21/Rev.1/Add.13, [www.refworld.org/legal/general/hrc/2004/en/52451](http://www.refworld.org/legal/general/hrc/2004/en/52451), para. 12.

<sup>13</sup> See, ECtHR, *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, 23 February 2012, [www.refworld.org/jurisprudence/caselaw/echr/2012/en/85456](http://www.refworld.org/jurisprudence/caselaw/echr/2012/en/85456), para. 133; UNHCR, *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*, 5 February 2018, [www.refworld.org/jurisprudence/amicus/unhcr/2018/en/120596](http://www.refworld.org/jurisprudence/amicus/unhcr/2018/en/120596).

the principle of non-refoulement in times of war or other public emergencies threatening the life of the nation.<sup>14</sup>

10. The responsibility of all States, including States of transit, to protect a person from refoulement is engaged as soon as individuals present themselves at the border, or is otherwise under the jurisdiction of the State.<sup>15</sup> The obligation to respect the principle of non-refoulement is not conditional upon formal recognition of refugee status or an explicit asylum application.<sup>16</sup> Border procedures must allow all persons who fear persecution or other serious harm to apply for international protection, under conditions which ensure that their applications are processed lawfully.<sup>17</sup>

11. 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.<sup>18</sup>

### III. Access to asylum procedures

12. To give effect in good faith<sup>19</sup> to their obligations under the 1951 Convention and ensure protection from refoulement, all States parties, including those from which the so-called 'instrumentalized' movement originates, are required to ensure that persons seeking asylum have access to procedures which allow for the examination of their claims in a manner consistent with international refugee and human rights law.<sup>20</sup>

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<sup>14</sup> See, Article 4, ICCPR; Article 15, Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, ('ECHR') 4 November 1950, [www.refworld.org/legal/agreements/coe/1950/en/18688](http://www.refworld.org/legal/agreements/coe/1950/en/18688) ; Article 27, ACHR; Article 4, League of Arab States, *Arab Charter on Human Rights* ('ArCHR'), 2004, [www.refworld.org/legal/constinstr/las/2004/en/123762](http://www.refworld.org/legal/constinstr/las/2004/en/123762).

<sup>15</sup> Including in so-called "no man's land" at (land) borders and or in other areas within a State's territory that are declared for domestic purposes to have an exceptional or special "extraterritorial" or "excised" status such as particular border areas or remote locations. Under international law, these areas or zones fall within the territorial jurisdiction of the State. See, UNHCR, *Annex to UNHCR Note on the "Externalization" of International Protection: Policies and Practices Related to the Externalization of International Protection*, 28 May 2021, [www.refworld.org/policy/legalguidance/unhcr/2021/en/123811](http://www.refworld.org/policy/legalguidance/unhcr/2021/en/123811), para. 8; 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, [www.refworld.org/policy/legalguidance/unhcr/2007/en/40854](http://www.refworld.org/policy/legalguidance/unhcr/2007/en/40854), paras 24, 26, 32-43; UN Human Rights Committee, *General Comment No. 31*, note 12 above, para. 10.

<sup>16</sup> See, among others, ECtHR, *Hirsi Jamaa and Others v. Italy*, note 13 above, para 133; ECtHR, *Case of M.A. and Others v. Lithuania*, Application No. 59793/17, 11 December 2018, [www.refworld.org/jurisprudence/caselaw/echr/2018/en/122430](http://www.refworld.org/jurisprudence/caselaw/echr/2018/en/122430), paras 108-109; ECtHR, *D. v. Bulgaria*, Application No. 29447/17, 20 July 2021, <https://hudoc.echr.coe.int/eng/?i=001-211366>, paras 120-128.

<sup>17</sup> See, among others, ECtHR, *Case of N.D. and N.T. v. Spain*, Applications Nos. 8675/15 and 8697/15, 13 February 2020, [www.refworld.org/jurisprudence/caselaw/echr/2020/en/123134](http://www.refworld.org/jurisprudence/caselaw/echr/2020/en/123134), para. 209; IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic*, 24 October 2012, [www.refworld.org/es/jur/jur/corteidh/2012/es/132740](http://www.refworld.org/es/jur/jur/corteidh/2012/es/132740), para. 171.

<sup>18</sup> Article 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, [www.refworld.org/legal/agreements/coe/1963/en/13904](http://www.refworld.org/legal/agreements/coe/1963/en/13904); Article 12(5), Banjul Charter; Article 22(9), ACHR; Article 26(2), ArCHR; Article 22(1), UNGA, *International Convention for the Protection of the Rights of Migrant Workers and of the Members of Their Families*, 18 December 1990, [www.refworld.org/legal/agreements/unga/1990/en/27627](http://www.refworld.org/legal/agreements/unga/1990/en/27627). Although no express provision of the ICCPR prohibits collective expulsions, the Human Rights Committee has been clear that "laws or decisions providing for collective or mass expulsions" would entail a violation of Article 13 of the ICCPR: UN Human Rights Committee, *General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, [www.refworld.org/legal/general/hrc/1986/en/38724](http://www.refworld.org/legal/general/hrc/1986/en/38724), para. 10. See also, Article 19(1), EU Charter of Fundamental Rights. See, for jurisprudence on the prohibition of collective expulsion: IACtHR, *Case of Nadege Dorzema et al. v. Dominican Republic*, note 17 above, para. 171; ECtHR, *Hirsi Jamaa and Others v. Italy*, note 13 above, *Case of N.D. and N.T. v. Spain*, note 17 above; African Commission on Human and Peoples' Rights ('ACHPR'), *Institute for Human Rights and Development in Africa (on Behalf of Esmaila Connateh & 13 Others) v. Republic of Angola*, Communication No. 292/2004, May 2008, [www.refworld.org/jurisprudence/caselaw/achpr/2008/en/16771](http://www.refworld.org/jurisprudence/caselaw/achpr/2008/en/16771), para. 69; ACHPR, *Institute for Human Rights and Development in Africa (on Behalf of Sierra Leonean Refugees in Guinea) v. Guinea*, Communication No. 249/2002, December 2004, [www.refworld.org/jurisprudence/caselaw/achpr/2004/en/22018](http://www.refworld.org/jurisprudence/caselaw/achpr/2004/en/22018), Annex IV, p. 131, para. 69.

<sup>19</sup> Article 26, United Nations, *Vienna Convention on the Law of Treaties* (VCLT), 23 May 1969, U.N.T.S. Vol. 1155, p. 331, [www.refworld.org/legal/agreements/un/1969/en/73676](http://www.refworld.org/legal/agreements/un/1969/en/73676).

<sup>20</sup> ECtHR, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, 21 January 2011, [www.refworld.org/jurisprudence/caselaw/echr/2011/en/77079](http://www.refworld.org/jurisprudence/caselaw/echr/2011/en/77079), para. 359. See also, Hong Kong: Court of Final Appeal, *C et al.*,



13. It is generally recognized that “fair and efficient asylum procedures are an essential element in the full and inclusive application of the [1951] Convention.”<sup>21</sup> When facing mixed and/or onward movements of people, including in the context of so-called ‘instrumentalization’, States may consider setting up efficient asylum processing modalities at border areas, as part of a comprehensive legal framework which must provide asylum-seekers with fair procedures and effective guarantees.<sup>22</sup> Such ‘border procedures’ could include frontloading of the asylum procedures by effective registration; early identification of individuals with specific needs and vulnerabilities; enhancing triaging of applications, potentially 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; as well as returning individuals finally determined not to have any international protection needs.<sup>23</sup>

14. As part of a national legal framework that provides appropriate guarantees, States may institute an admissibility stage to determine whether the applicant has already found protection in another country, or whether responsibility for assessing the claim in substance may be assumed by a third country. The admissibility stage must still require an examination of the asylum-seeker’s individual circumstances with an effective opportunity to rebut any general presumption of safety in a third country.<sup>24</sup> In such situations, the removing State must ensure that the third country will treat the person in line with internationally accepted standards.<sup>25</sup>

15. Detention in the context of border procedures should remain an exceptional measure of last resort, used only when necessary and proportionate for such purposes, where less coercive measures cannot be applied, and it must be reviewed regularly. Its maximum duration should be limited to the shortest possible period and clearly stipulated in law.<sup>26</sup> Restrictions of

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v. *Director of Immigration*, 25 March 2013, [www.refworld.org/jurisprudence/caselaw/hkcfca/2013/en/91360](http://www.refworld.org/jurisprudence/caselaw/hkcfca/2013/en/91360), paras 56 and 64; UNHCR, *Intervention Before the Court of Final Appeal of the Hong Kong Special Administrative Region in the Case between C, et al and Director of Immigration, Secretary for Security*, 31 January 2013, [www.refworld.org/jurisprudence/amicus/unhcr/2013/en/90431](http://www.refworld.org/jurisprudence/amicus/unhcr/2013/en/90431), paras 74-75. ExCom has also underlined the obligation to provide persons seeking asylum access to fair and efficient procedures for determining status and protection needs, see: ExCom Conclusions No. 81 (XLVIII), 1997, para. (h); No. 82 (XLVIII), 1997, para. (d)(ii) and (iii); No. 85 (XLIX), 1998, para. (q). As Lauterpacht and Bethlehem state, “a denial of protection in the absence of a review of individual circumstances would be inconsistent with the prohibition of refoulement”, *The Scope and Content of Non-Refoulement*, note 9 above, para. 173.

<sup>21</sup> See UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (‘Fair and Efficient Asylum Procedures’)*, 31 May 2001, [www.refworld.org/policy/strategy/unhcr/2001/en/13248](http://www.refworld.org/policy/strategy/unhcr/2001/en/13248), para. 5.

<sup>22</sup> This would require comprehensive guarantees and safeguards such as those in the EU asylum *acquis*. See also detailed recommendations on fair procedures and effective guarantees in asylum border procedures in UNHCR, *Fair and Efficient Asylum Procedures*, note 21 above, and UNHCR, *Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, [www.refworld.org/policy/opguidance/unhcr/2018/en/121637](http://www.refworld.org/policy/opguidance/unhcr/2018/en/121637).

<sup>23</sup> See, UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, September 2019, [www.refworld.org/policy/legalguidance/unhcr/2019/en/123059](http://www.refworld.org/policy/legalguidance/unhcr/2019/en/123059); UNHCR, *Refugee Protection and Mixed Migration: A 10-Point Plan of Action, Rev. 1*, January 2007, [www.refworld.org/policy/strategy/unhcr/2007/en/115892](http://www.refworld.org/policy/strategy/unhcr/2007/en/115892); UNHCR, *Ten Point Plan in Action*, December 2016, [www.unhcr.org/what-we-do/protect-human-rights/asylum-and-migration/10-point-plan-action](http://www.unhcr.org/what-we-do/protect-human-rights/asylum-and-migration/10-point-plan-action); UNHCR, *Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, note 22 above.

<sup>24</sup> UNHCR, *Fair and Efficient Asylum Procedures*, note 21 above, paras 11-14.

<sup>25</sup> This includes: (i) that the person will be admitted to the proposed receiving state; (ii) will be protected from 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. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State. Where, however, it appears that persons, before requesting asylum, already have a connection or close links with another State, they may, if it appears fair and reasonable, be called upon first to request asylum from that State, provided the aforementioned safeguards are met. See, UNHCR, *Legal Considerations Regarding Access to Protection and a Connection Between the Refugee and the Third Country in the Context of Return or Transfer to Safe Third Countries*, April 2018, [www.refworld.org/policy/legalguidance/unhcr/2018/en/120729](http://www.refworld.org/policy/legalguidance/unhcr/2018/en/120729); UNHCR, *Guidance Note on Bilateral and/or Multilateral Transfer Arrangements of Asylum-seekers*, May 2013, [www.refworld.org/policy/legalguidance/unhcr/2013/en/16943](http://www.refworld.org/policy/legalguidance/unhcr/2013/en/16943), paras 3(v)-(vi); UNHCR, *Fair and Efficient Asylum Procedures*, note 21 above; ExCom Conclusions No. 85 (XLIX), 1998, para. (aa); No. 58 (XL), 1989, para. (f); No. 8 (XXVIII), 1977.

<sup>26</sup> UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, [www.refworld.org/policy/legalguidance/unhcr/2012/en/87776](http://www.refworld.org/policy/legalguidance/unhcr/2012/en/87776), Guidelines 4.2 and 6.

movement, including minimal periods in detention, are permissible at the outset of the border procedure for a limited initial period on grounds permitted under international refugee and human rights law.<sup>27</sup> During return proceedings, any use of detention can only be applied where it pursues a legitimate aim and has been determined to be necessary, reasonable and proportionate in each individual case. Children must not be detained for immigration-related purposes,<sup>28</sup> and States should instead consider resorting, if necessary, to non-custodial and community-based alternatives to detention.<sup>29</sup>

16. States must not impose penalties, including prohibitions on re-entry, on account of irregular entry or presence of persons who apply for asylum at the border or those who, coming directly from a territory where they are at risk of persecution, have presented themselves to the authorities without delay and showed good cause for their irregular entry.<sup>30</sup> Under no circumstances can a State prevent asylum-seekers or refugees who have arrived or are present without authorization from applying for asylum or accessing an asylum procedure, as a penalty for not coming directly, for failing to present themselves without delay to the authorities, or for not showing good cause for their irregular entry or presence.<sup>31</sup> Similarly, it is impermissible to impose a penalty in the form of procedural or other requirements or preconditions which would in practice prevent refugees from applying or accessing the asylum procedure.<sup>32</sup>

17. So-called 'instrumentalized' movements may sometimes involve a considerable number of people arriving within a short period of time at the international border of a State which has a limited absorption or response capacity, including situations where the capacity of individual asylum procedures is insufficient to deal with the assessment of asylum applications in such large numbers. In these situations, States may consider concluding arrangements with other States that enhance responsibility sharing and are consistent with the 'widest possible exercise of fundamental rights and freedoms' of refugees.<sup>33</sup> This could include, in the framework of the Global Compact on Refugees, activating a support platform,<sup>34</sup>

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<sup>27</sup> These are: (i) to carry out initial identity and security checks; (ii) for the purpose of recording, within the context of a preliminary interview with the individuals, elements of their claims to international protection which could not be obtained in the absence of detention; (iii) in connection with accelerated procedures for manifestly unfounded or clearly abusive claims; (iv) to prevent absconding and/or in cases of likelihood of non-cooperation; or (v) to protect national security. See, *ibid.*, Guideline 4.1.

<sup>28</sup> Articles 9(4) and 37, *Convention on the Rights of the Child* (20 November 1989) 1577 UNTS 3, [www.refworld.org/docid/3ae6b38f0.html](http://www.refworld.org/docid/3ae6b38f0.html). UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, [www.refworld.org/docid/5a903b514.html](http://www.refworld.org/docid/5a903b514.html), para. 11. UN Committee on the Rights of the Child and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, [www.refworld.org/docid/5a12942a2b.html](http://www.refworld.org/docid/5a12942a2b.html), paras 5, 7 and 10. IACtHR, *Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, OC-21/14, 19 August 2014, [www.refworld.org/cases,IACRTHR,54129c854.html](http://www.refworld.org/cases,IACRTHR,54129c854.html), para. 154. ECtHR, *R.K. et autres c. France*, Application No. 68264/14, 12 July 2016, [www.refworld.org/cases,ECHR,5784e8574.html](http://www.refworld.org/cases,ECHR,5784e8574.html), para. 88. UNHCR's position regarding the detention of refugee and migrant children in the migration context, January 2017, [www.refworld.org/docid/5885c2434.html](http://www.refworld.org/docid/5885c2434.html).

<sup>29</sup> See, UNGA, *Global Compact on Refugees*, A/RES/73/151, 2018, <https://www.refworld.org/legal/agreements/unga/2018/en/124198>, para 61; UNGA, *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195, 2019, <https://www.refworld.org/legal/resolution/unga/2019/en/147186>, Objective 13; UNGA, *New York Declaration for Refugees and Migrants*, 2016, A/RES/71/1, para. 33, [www.refworld.org/legal/resolution/unga/2016/en/112142](http://www.refworld.org/legal/resolution/unga/2016/en/112142). See also, UNHCR, *Unlocking rights: towards ending immigration detention for asylum-seekers and refugees*, September 2024, <https://www.refworld.org/policy/polrec/unhcr/2024/en/148655>.

<sup>30</sup> Article 31 of the 1951 Convention.

<sup>31</sup> 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, [www.refworld.org/policy/legalguidance/unhcr/2024/en/148632](http://www.refworld.org/policy/legalguidance/unhcr/2024/en/148632), paras 28 and 32.

<sup>32</sup> UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, note 23 above, para. 40.

<sup>33</sup> See, UNHCR, *Note on the "Externalization" of International Protection*, 28 May 2021, [www.refworld.org/policy/legalguidance/unhcr/2021/en/121534](http://www.refworld.org/policy/legalguidance/unhcr/2021/en/121534), para. 2.

<sup>34</sup> Global Compact on Refugees, note 29 above, paras 22-27.

resorting to regional or sub-regional cooperation,<sup>35</sup> and/or soliciting States and/or UNHCR to provide support in reception, processing and admission or for resettlement and complementary pathways.<sup>36</sup>

#### IV. Measures to address security challenges

18. There may be situations where States have concerns that specific individuals among those present on their territory, having arrived as part of a so-called ‘instrumentalized’ movement of people, may pose a threat to national security. Where this is the case, UNHCR recalls that the 1951 Convention contains provisions which enable States to address security concerns while at the same time implementing fair and humane policies towards asylum-seekers and refugees.<sup>37</sup>

19. When facing arrivals in the context of so-called ‘instrumentalization’, robust capacity to receive, assist, register and screen arrivals can safeguard security by enabling States to distinguish between different categories among the arrivals, as well as by allowing for the early identification of any people who may constitute a security risk.<sup>38</sup>

20. Article 9 of the 1951 Convention allows a State “in time of war or other grave and exceptional circumstances”<sup>39</sup> to take provisional measures, which may include restrictions on freedom of movement, including detention, followed by a screening process, or the seizure or prohibition of possession of items of the refugee’s property, such as electronic equipment.<sup>40</sup> These provisional measures may only be used where they are “essential to the national security in the case of a particular person, pending a determination [...] that the person is in fact a refugee and that the continuance of such measures is necessary in [the refugee’s] case in the interests of national security.”<sup>41</sup> Any provisional measure taken pursuant to Article 9 must be necessary and last only as long as necessary to determine that the person is effectively a refugee. Further, it may be maintained after the determination of refugee status only if – and as long as – it is necessary “in the interests of national security”<sup>42</sup> and proportionate to the threat to national security,<sup>43</sup> in light of the specific individual situation of the refugee. Because of their temporary nature, provisional measures cannot limit the application of the principle of non-refoulement nor the right to apply for international protection.<sup>44</sup>

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<sup>35</sup> *Ibid.*, paras 28-30.

<sup>36</sup> *Ibid.*, paras 52-63 and 90-96.

<sup>37</sup> See, UNHCR, *Addressing Security Concerns Without Undermining Refugee Protection - UNHCR's Perspective*, Rev.2, 17 December 2015, [www.refworld.org/policy/legalguidance/unhcr/2015/en/108434](http://www.refworld.org/policy/legalguidance/unhcr/2015/en/108434).

<sup>38</sup> *Ibid.*, para. 10.

<sup>39</sup> The term “in time of war” refers to situations of armed conflict, while “other grave and exceptional circumstances” covers “intermediate areas between war and national security.” Nehemiah Robinson, *Convention Relating to the Status of Refugees, Its History, Contents and Interpretation, A Commentary*, Institute of Jewish Affairs, World Jewish Congress, 1953, p. 80. See also, Professor Atle Grahl-Madsen, *Commentary of the Refugee Convention 1951 (Articles 2-11, 13-37)*, October 1997, [www.refworld.org/reference/research/unhcr/1997/en/72739](http://www.refworld.org/reference/research/unhcr/1997/en/72739), Article 9, para. 3, p. 43, which refers to situations “bordering on war”.

<sup>40</sup> This was the intention of the drafters of the 1951 Convention, see *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, [www.refworld.org/reference/research/unhcr/1990/en/100962](http://www.refworld.org/reference/research/unhcr/1990/en/100962), pp. 48-59; Robinson, *Commentary*, note 39 above, pp. 79-80. See also, Davy and Thorburn Stern, *Article 9 (Provisional Measures/Mesures Provisoires)*, in “The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary”, 2<sup>nd</sup> edition, ed. by Andreas Zimmermann and Terje Einarsen, with Franziska M. Herrmann, Oxford, 2024, p. 884.

<sup>41</sup> Article 9, 1951 Convention.

<sup>42</sup> *Ibid.* See, J. Hathaway, *The Rights of Refugees under International Law*, 2021, pp. 296, 301-303; Robinson, *Commentary*, note 39 above, p. 80.

<sup>43</sup> See, Davy and Thorburn Stern, note 40 above, p. 888 (Article 9, para. 48).

<sup>44</sup> See, *ibid.*, pp. 878-879 (Article 9, para. 25); Hathaway, note 42 above, pp. 296-297; A. Edwards, *Temporary Protection, Derogation and the 1951 Convention*, Melbourne Journal of International Law, Vol. 13, 2012, [https://law.unimelb.edu.au/\\_data/assets/pdf\\_file/0005/1687379/Edwards.pdf](https://law.unimelb.edu.au/_data/assets/pdf_file/0005/1687379/Edwards.pdf), pp. 2-41. See, UNHCR, *Comments on the Draft*

21. The refugee definition, properly applied, should lead to either non-inclusion or exclusion of those responsible for serious criminal acts.<sup>45</sup> Prioritized and expedited consideration, within the refugee status determination process, of asylum applications which raise potential exclusion issues by asylum officers with dedicated expertise can allow such considerations to be taken into account in an appropriate and efficient way.<sup>46</sup>

22. In case an individual refugee represents a security risk, Article 32 of the 1951 Convention permits States to expel the refugee on grounds of national security and public order to a country where they are not at risk of persecution.<sup>47</sup> Pursuant to Article 33(2), States parties to the 1951 Convention may exceptionally withdraw protection from refoulement under international refugee law from refugees if there are reasonable grounds for regarding them as a danger to the security of the country or if they, having been convicted by a final judgment of a particularly serious crime, constitute a danger to the community. Importantly, however, the person's refugee status remains in place and the principle of *non-refoulement* under international human rights law must be respected in all cases.<sup>48</sup>

## V. Conclusions and recommendations

23. When facing mixed and/or onward movements in the context of so-called 'instrumentalization', all States along the travel route of those on the move, including States facilitating so-called 'instrumentalized' movements, must uphold international refugee and human rights law, including the right to seek and to enjoy asylum from persecution, notably access to fair and efficient asylum procedures, the principle of non-refoulement, and the right of people to return voluntarily to their own country. In particular, States may not reject individuals at the border without an individual assessment of their international protection needs.

24. In such situations, States may consider:

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*Law of Ukraine on Amendment of Certain Laws of Ukraine on the Protection of the State Border of Ukraine*, November 2022, [www.refworld.org/legal/natlegcomments/unhcr/2022/en/123394](http://www.refworld.org/legal/natlegcomments/unhcr/2022/en/123394), p. 5. Even in situations in which Article 9 of the 1951 Convention is applied, any measure restricting human rights must respect the substantive and procedural requirements set under human rights treaties, including that such measures be limited to the extent strictly required by the exigencies of the situation, and that they must be necessary, proportionate and non-discriminatory. For more detail see, UN Human Rights Committee, *General Comment No. 29: Article 4: Derogations During a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, [www.refworld.org/legal/general/hrc/2001/en/30676](http://www.refworld.org/legal/general/hrc/2001/en/30676). See also, ECtHR, *Guide on Article 15 of the European Convention on Human Rights: Derogation in Time of Emergency*, 31 August 2023, [https://ks.echr.coe.int/documents/d/echr-ks/guide\\_art\\_15\\_eng](https://ks.echr.coe.int/documents/d/echr-ks/guide_art_15_eng), Section III; IACtHR, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*, Advisory Opinion OC-9/87, 6 October 1987, [www.corteidh.or.cr/docs/opiniones/seriea\\_09\\_ing.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_09_ing.pdf), paras 20-41; IACtHR, *Habeas corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights)*, Advisory Opinion OC-8/87, 30 January 1987, [www.refworld.org/jurisprudence/caselaw/iacrthr/1987/en/19320](http://www.refworld.org/jurisprudence/caselaw/iacrthr/1987/en/19320), paras 22-42.

<sup>45</sup> See, UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003, [www.refworld.org/policy/legalguidance/unhcr/2003/en/14733](http://www.refworld.org/policy/legalguidance/unhcr/2003/en/14733); UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, [www.refworld.org/policy/legalguidance/unhcr/2003/en/33331](http://www.refworld.org/policy/legalguidance/unhcr/2003/en/33331). While security considerations *per se* do not form part of the exclusion criteria in Article 1F of the 1951 Convention, its application to individuals involved in serious crimes may, depending on the circumstances, also have the effect of denying refugee status to persons who may pose a threat to the security of the host country or to its community.

<sup>46</sup> UNHCR, *Addressing Security Concerns Without Undermining Refugee Protection - UNHCR's Perspective*, note 37 above, para. 13.

<sup>47</sup> Article 32 of the 1951 Convention.

<sup>48</sup> For more detail on the criteria which must be met for Article 33(2) of the 1951 Convention to apply, see *The Scope and Content of Non-Refoulement*, note 9 above, paras 145–192. On the “danger to the security” exception, see UNHCR, *Intervention before the Supreme Court of Canada in the case of Manickavasagam Suresh and the Minister of Citizenship and Immigration, the Attorney General of Canada*, 8 March 2001, [www.refworld.org/jurisprudence/amicus/unhcr/2001/en/23298](http://www.refworld.org/jurisprudence/amicus/unhcr/2001/en/23298), Court of Justice of the European Union, *M and X, X, Joined Cases C-391/16, C-77/17 and C-78/17*, 14 May 2019, paras 94-96.



- a) 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, and 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. have 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; and
  - d. ensure the return of individuals finally determined not to have any international protection needs.
- b) Enhancing national capacity to receive, assist, register and screen arrivals to make distinctions between different categories among the arrivals as well as to allow for the early identification of people who may constitute a security risk;
- c) Undertaking prioritized and expedited consideration, within the refugee status determination process, of asylum applications which raise potential exclusion issues by asylum officers with dedicated expertise;
- d) Providing in law for the possibility to resort to restrictions of movement, including alternatives to detention, for the limited purposes allowed by international law and only when necessary and proportionate. This may include minimal periods in detention, only where less coercive measures cannot be applied;
- e) Any derogation from the human rights of refugees must be based on a declaration of state of emergency in line with international human rights law, including treaty provisions on derogations of rights in times of emergency, and must ensure respect to the principle of *non-refoulement*, from which no derogation is permitted; and
- f) Where an individual refugee is found to represent a security risk, after a rigorous analysis and subject to safeguards, States may be able to expel such a refugee on grounds of national security and public order in compliance with the principle of non-refoulement.

**UNHCR**

**26 September 2024**