

ANNEX H

Access to territory and asylum and the prohibition of refoulement

The act introduces a new procedure, in effect until 31 December 2020, requiring individuals, as a general rule, to express their intent to seek asylum at Hungarian Embassies located in neighbouring States not belonging to the EU as specified by a Governmental decree. The act only exempts three specific categories of persons from this procedure. Further, the act provides for the immediate removal from the territory of any person who crosses the border unlawfully and indicates an intent to seek asylum.

- UNHCR recalls that the right to seek and enjoy asylum is a basic human right under Article 14(1) of the Universal Declaration of Human Rights, and is supported by the legal framework of the 1951 Convention to which Hungary is a State Party. The right to asylum is also provided for in Article 18 of the Charter of Fundamental Rights of the European Union. UNHCR recognizes that States have the legitimate right to control their borders, in a manner which is consistent with their obligations under international law, including the principle of non-refoulement and respect for the right to seek and enjoy asylum. This is further supported by international and European jurisprudence. The European Court on Human Rights in the Grand Chamber judgment in *N.D. and N.T. v Spain* of February acknowledged the challenges facing European States in terms of immigration control, while also stressing “that the problems which States may encounter in managing migratory flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto.” (paras. 169-170) In particular, the Court emphasized that States are required to make available genuine and effective access to means of legal entry, notably for persons who arrive at the border. Hence, the Court concluded that “the domestic rules governing border controls may not render inoperative or ineffective the rights guaranteed by the Convention and the Protocols thereto, and in particular by Article 3 of the Convention and Article 4 of Protocol No. 4.” (para. 171).

- Effective access to territory is an essential pre-condition to effectively exercise the right to seek asylum. This does not preclude offering access to territory and asylum through protected entry procedures at Embassies. However, any such possibility must complement and not undermine or be presented as an alternative to access to asylum procedures for asylum-seekers arriving at borders or otherwise seeking international protection within the territory. UNHCR’s position is that a State which is presented with an asylum request at its borders is required to provide admission at least on a temporary basis to examine the claim, as the right to seek asylum and the non-refoulement principle would otherwise be rendered meaningless. Similarly, the European Court of Human Rights in the Grand Chamber judgment *N.D. and N.T. v Spain* emphasized that “(...) the effectiveness of Convention rights requires that (...) States make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border. Those means should allow all persons who face persecution to submit an application for protection (...). In the absence of appropriate arrangements, the resulting possibility for States to

refuse entry to their territory is liable to render ineffective all the Convention provisions designed to protect individuals who face a genuine risk of persecution.” (para. 209)

- UNHCR recalls that the principle of non-refoulement is a cardinal international protection principle, most prominently expressed in Article 33 of the 1951 Convention, recognized as a norm of customary international law, and even jus cogens, and also restated in international and European human rights law. In UNHCR’s view, this principle enjoys a wide scope of application due to its fundamental character. As such, UNHCR considers that the prohibition of refoulement applies wherever a State exercises jurisdiction, including in situations of non-admission or rejection at the border, on the high seas or on the territory of another State. In addition to refugees who have been recognized as such, the prohibition of refoulement also applies to asylum-seekers whose status has not yet been determined, as the determination of refugee status is declaratory at international law. Referencing UNHCR’s observations based on the conclusions of its Executive Committee on international protection pertaining to safeguarding asylum of 1997, the European Court of Human Rights in *N.D. and N.T. v Spain* confirmed “that the prohibition of refoulement includes the protection of asylum-seekers in cases of both non-admission and rejection at the border (...)” (para.178) The Court continues, “(...) that the sole fact that a State refuses to admit to its territory an alien who is within its jurisdiction does not release that State from its obligations towards the person concerned arising out of the prohibition of refoulement of refugees.” (para.181). The Court further reiterates that the term “expulsion” [for the purposes of the proscription under the European Convention on Human Rights law of collective expulsion, closely related to non-refoulement obligations] is to be interpreted “(...) in the generic meaning in current use (“to drive away from a place”), as referring to any forcible removal of an alien from a State’s territory, irrespective of the lawfulness of the person’s stay, the length of time he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker and his or her conduct when crossing the border.” (para. 185)