



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response

This paper sets out key legal considerations, based on international refugee and human rights law, on access to territory for persons seeking international protection in the context of measures taken by States to restrict the entry of non-nationals for the protection of public health in response to the COVID-19 pandemic. It reconfirms that while States may put in place measures which may include a health screening or testing of persons seeking international protection upon entry and/or putting them in quarantine, such measures may not result in denying them an effective opportunity to seek asylum or result in *refoulement*.

1. Under international law, States have the sovereign power to regulate the entry of non-nationals. However, international law also provides that measures to this effect may not prevent them from seeking asylum from persecution.ⁱ
2. Central to the right to seek asylum is the principle of non-*refoulement*,ⁱⁱ which prohibits, without discrimination,ⁱⁱⁱ any State conduct leading to the 'return in any manner whatsoever' to an unsafe foreign territory, including rejection at the frontier or non-admission to the territory.^{iv}
3. States are responsible for ensuring protection from *refoulement* to all persons who are within its jurisdiction, including at national frontiers,^v 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. There is no single correct formula or phrase for how this fear or desire to seek asylum needs to be conveyed in order to benefit from the principle of *non-refoulement*.^{vi} In order to give effect to their international legal obligations, including the right to seek asylum and the principle of non-*refoulement*, States have a duty *vis-à-vis* persons who have arrived at their borders, to make independent inquiries as to the persons' need for international protection and to ensure they are not at risk of *refoulement*.^{vii} If such a risk exists, the State is precluded from denying entry or forcibly removing the individual concerned.^{viii}
4. At the outset, persons seeking international protection must have access to relevant information in a language they understand and the ability to make a formal asylum claim with the competent authority. Further, persons seeking international protection must be given the opportunity to contact UNHCR. Simultaneously, pursuant to its mandate,^{ix} UNHCR should be given the possibility, subject to the reasonable application of protective public health

measures taken by the authorities, to contact and visit such persons to assess and supervise their well-being and provide assistance when needed.^x

5. States are entitled to take measures to ascertain and manage risks to public health, including risks that could arise in connection with non-nationals arriving at their border. Such measures must be non-discriminatory as well as necessary, proportionate and reasonable to the aim of protecting public health. In response to the COVID-19 pandemic States have, or are considering putting in place public health measures such as the screening of travellers on arrival and the use of quarantine for persons who have been identified as suffering from the disease or who may have been exposed to the virus. Such efforts, multilateral or national, are directed at containing this infectious disease and preventing its spread.

6. However, imposing a blanket measure to preclude the admission of refugees or asylum-seekers, or of those of a particular nationality or nationalities, without evidence of a health risk and without measures to protect against refoulement, would be discriminatory and would not meet international standards, in particular as linked to the principle of non-refoulement. In case health risks are identified in the case of individual or a group of refugees or asylum-seekers, other measures could be taken, such as testing and/or quarantine, which would enable authorities to manage the arrival of asylum-seekers in a safe manner, while respecting the principle of non-refoulement. Denial of access to territory without safeguards to protect against refoulement cannot be justified on the grounds of any health risk.

7. Reasonable measures to ascertain and manage risks to public health that could arise in connection with people arriving from other countries could include temporary limitations on movement for a limited period. Such restrictions must however be in accordance with the law, necessary for the legitimate purpose of managing the identified health risk, proportionate, and subject to regular review. Where such restrictions amount to detention, that detention must not be arbitrary or discriminatory, must be in accordance with and authorized by law in accordance with applicable procedural safeguards, for a limited time period and otherwise in line with international standards.^{xi} Health concerns do not justify the systematic use of immigration detention against individuals or groups of asylum-seekers or refugees.

8. While such public health measures may not specifically target persons seeking international protection, they may have far-reaching consequences for such persons. States' measures to protect public health may affect persons seeking international protection. While such measures may include a health screening or testing of persons seeking international protection upon entry and/or putting them in quarantine, such measures may not result in denying them an effective opportunity to seek asylum or result in refoulement. Not only would this be at variance with international law, it could send the persons into "orbit" in search of a State willing to receive them and as such may contribute to the further spread of the disease.

ⁱ 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: Organization of American States, *American Declaration on the Rights and Duties of Man*, 2 May 1948, Article XXVII, www.unhcr.org/refworld/docid/3ae6b3710.html, referring to the right to seek and receive asylum. Organization of American States, *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969, Article 22(7), www.unhcr.org/refworld/docid/3ae6b36510.html, referring to the right to seek and be granted asylum. *African Charter on Human and Peoples' Rights* ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 12(3), www.refworld.org/docid/3ae6b3630.html referring to the right to seek and obtain asylum. European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 18, www.refworld.org/docid/3ae6b3b70.html (EU Charter of Fundamental Rights), referring to the right to asylum to be guaranteed with due respect to the 1951 Convention and EU law.

ⁱⁱ The principle of *non-refoulement* prohibits states from expelling or returning a refugee in any manner whatsoever to a territory where she or he would be at risk of threats to life or freedom. The principle of *non-refoulement* is most prominently expressed in Article 33 of the 1951 Convention relating to the Status of Refugees (*Convention Relating to the Status of Refugees* (28 July 1951) 189 UNTS 137), having been recognized as a norm of customary international law. *Non-refoulement* obligations are also codified in regional refugee law instruments, see: Organization of American States, *American Convention on Human Rights*, note 2 above, Article 22(8) and 1984 Cartagena Declaration, note 5 above, Conclusion III.5, reiterating the importance of the principle of *non-refoulement* and the need for acknowledging and observing it as a rule of *jus cogens*. *Non-refoulement* obligations are also enshrined in international and regional human rights law, see for an overview: 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, Part B, www.refworld.org/docid/45f17a1a4.html, in which reference is made to various human rights law instruments, including the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, Articles 6 and 7; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85, Article 3; 1969 American Convention on Human Rights, note 2 above, Article 22(8); Banjul Charter, note 2 above, Article 5; *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Articles 2 and 3. See also: EU Charter of Fundamental Rights, note 2 above, Article 19(2).

ⁱⁱⁱ According to the 1951 Convention relating to the Status of Refugees, note 3 above, Article 3, '[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'.

^{iv} ExCom Conclusion No. 6 (XXVIII), 1977, para. (c); 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).

^v 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. 9 and 20, www.unhcr.org/refworld/docid/45f17a1a4.html. The principle of *non-refoulement* also applies extraterritorially, i.e. wherever the state in question is acting outside its territory and has effective control over the person, see: UNHCR, *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, www.refworld.org/docid/4e0356d42.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*, 26 January 2007, paras. 24, 26, 32-43, 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, www.unhcr.org/refworld/docid/4b97778d2.html. UNHCR, *UNHCR Submissions to the Inter-American Court of Human Rights in the framework of request for an Advisory Opinion on Migrant Children presented by MERCOSUR*, 17 February 2012, para. 2(4), www.refworld.org/docid/4f4c959f2.html. UN Human Rights Committee General Comment No. 31, Nature of the General Legal Obligations imposed on States parties to the Covenant, CCPR/C/21/Rev.1/Add.13, para. 10, www.refworld.org/docid/478b26ae2.html. See also: *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, paras. 109 to 113, www.refworld.org/cases_ICJ_414ad9a719.html, considering that states are bound to fulfil their international human rights obligations wherever they exercise jurisdiction. *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, Inter-American Court of Human Rights (IACrTHR), 19 August 2014, para. 61, www.refworld.org/cases_IACRTHR_54129c854.html.

^{vi} UN High Commissioner for Refugees (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)*, 15 July 2013, www.refworld.org/docid/51e515794.html, para. 3.1.4; UNHCR, *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, www.refworld.org/docid/4e0356d42.html.

^{vii} UNHCR, *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, paras. 74-75, www.refworld.org/docid/510a74ce2.html. The "duty of independent inquiry" has been recognized by various courts: *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, paras. 146-148, www.refworld.org/docid/4f4507942.html; *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, paras. 286,298,315,321,359, www.refworld.org/docid/4d39bc7f2.html; *Regina v. Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others*, [2004] UKHL 55, United Kingdom: House of Lords (Judicial Committee), 9 December 2004, para. 26, www.refworld.org/docid/41c17ebf4.html; *Final Appeal Nos 18, 19 & 20 of 2011 (Civil) between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents) and United Nations High Commissioner for Refugees (Intervener)*, Hong Kong: Court of Final Appeal, 25 March 2013, paras. 56, 64, www.refworld.org/docid/515010a52.html. 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 (recast), 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, www.refworld.org/docid/51d29b224.html, Article 6(1), 3rd indent: 'Member States shall ensure that those other authorities which are likely to receive applications for international protection such as the police, border guards, immigration authorities and personnel of detention facilities have the relevant information and that their personnel receive the necessary level of training which is appropriate to their tasks and responsibilities and instructions to inform applicants as to where and how applications for international protection may be lodged.'

^{viii} UNHCR, Note on Non-Refoulement (EC/SCP/2), 1977, para. 22.

^{ix} UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: www.refworld.org/docid/3ae6b3628.html. UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office*, October 2013, www.refworld.org/docid/5268c9474.html.

^x ExCom Conclusion No. 22 (XXXII), 1981, para. III. EXCOM Conclusion No. 33 (XXXV), 1984, para. (h). EXCOM Conclusion No. 72 (XLIV), 1993, at para (b). EXCOM Conclusion No. 73 (XLIV), 1993, at para. (b) (iii). EXCOM Conclusion No. 79 (XLVII), 1996, at para. (p). See also UNHCR, *Note on the Mandate of the High Commissioner for Refugees and his Office*, October 2013, p. 7, www.refworld.org/docid/5268c9474.html, setting out UNHCR's mandate.

^{xi} UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, www.refworld.org/docid/503489533b8.html.