



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME



## SEMINAR

### **European Convention on Human Rights and international refugee law compliant procedures at state borders Jurisprudence of the European Court of Human Rights and measures taken in the context of the execution of judgments**

Opening remarks by Philippe Leclerc,  
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#### **1. Introduction**

- Appreciate Registry of the European Court of Human Rights and colleagues in UNHCR's Representation to European Institutions in Strasbourg for organizing this event which promises to be very interesting. I'm happy to provide some opening remarks from UNHCR's perspective.
- UNHCR has a long history of working with judicial counterparts across Europe and supporting them in their challenging task of adjudicating the claims of some of the most vulnerable in our society.
- A task which is further complicated by the situation across the continent where issues of asylum and migration become increasingly politicized and divisive in nature.
- There is a growing perception of a situation of mass influx towards Europe which is unmanageable and which, as a result, requires widespread derogations from ordinary rules – derogations that sometimes go to the core of rule of law and effective judicial protection.
- The EU Pact on Migration and Asylum represents a significant step forward in trying to ensure a more coherent, coordinated and effective EU response to migration and asylum. The Pact, if implemented in a protection-sensitive manner, with sufficient safeguards has the potential to ensure that people seeking international protection can access territory and asylum in the EU.
- However, some of the new rules pose challenges for refugees and states alike – for example, on border procedures, judicial guarantees, and detention. Some of the new rules will also be hard to implement, given their complexity and given the tensions they raise with certain domestic rules.
- The judiciary will play a crucial role here. Not only will it be tasked to interpret and make sense of the new rules, but also to apply them in line with higher ranking fundamental rights guarantees. The 1951 UN Convention relating to the status of refugees, the EU's Charter of Fundamental Rights, and the European Convention on Human Rights provide crucial limitations and must be respected.

- UNHCR is a frequent intervener before both the European Court of Human Rights and the Court of Justice of the European Union and also many domestic courts, and we assure you that we will continue to engage, both formally and informally.

## **2. Key areas of concern**

### *a. Access to territory in cases of mass influx*

- Mixed movements of refugees and migrants continue to pose challenges to states across Europe and often put human lives at risk. Security concerns often dominate discussions particularly during crises, with some States viewing mass cross-border movements as threats to sovereignty. Mass cross-border displacement can tempt them to deny entry and access to asylum. If systems are ill-prepared, reception and asylum capacity may quickly be overwhelmed.

- Let me be clear, however, that States have a responsibility to protect refugees, which aligns with their broader interests. By integrating protection into border management and setting up fair and efficient asylum procedures, States can effectively manage crises and uphold their obligations to refugee populations, fostering a more stable and secure environment for all. It is also fundamental for UNHCR that States, including the judiciary, ensure that asylum legal regimes properly function and respond to the needs of persons in need of international protection in the context of mixed flows and that those found not in need of international protection are either dealt with other procedures or returned to their country of origin or of habitual residence.

- From a normative standpoint, security considerations and international refugee law are not opposites. On the contrary, UNHCR's experience shows that security and protection complement each other. International refugee law reflects this. The 1951 Refugee Convention protects the rights of those fleeing persecution while at the same time taking full account of the security interests of States and host communities. For example, where a refugee is found to pose a security risk, their status does not preclude the State from taking appropriate and lawful measures, which may include restrictions on freedom of movement, including detention. The 1951 Convention also includes provisions which permit expulsion on grounds of national security or public order under certain circumstances.

- States as well as UNHCR have grappled with the complexities of providing adequate protection in situations of mass influxes, which complicate border management, requiring swift adaptations to ensure adequate protection and support for arriving asylum-seekers. However, such adaptations must guarantee access to asylum, ensure that protection remains effective and remain within the boundaries established under international law.

- Every individual seeking international protection has the right to be admitted to safe territory and to receive protection from refoulement which is the cornerstone of international refugee law. It applies in all situations of people on the move, including in situations of crisis. This principle is reflected, among others, in the EU Pact on Migration and Asylum. Even in a situation of crisis or force majeure, individuals arriving in EU Member States cannot be refused access to territory or asylum procedures.

- While provisional measures may be lawfully adopted in an emergency situation, access to the territory and human rights protection, including the principle of non-refoulement, must always be guaranteed. Importantly, as a crisis subsides, clear procedures and criteria should be established to swiftly enable the removal of any exceptional crisis measures that may have prevented a State's asylum system from functioning effectively.

- It is thus essential that an emergency is not misused to put in place longer-term measures that limit access to asylum procedures, but rather to allow for a normalization of procedures once the crisis has come to an end.
- Recently, we have seen some excellent judicial rulings in this regard: For example, the EU's Court of Justice has delivered a series of key judgments which made clear that a system that (i) does not consistently admit asylum seekers, (ii) keeps them in prolonged detention, or (iii) requires them to seek entry permission via embassies outside of the country, is not compatible with EU law. This ruling included emergency situations, such as recently invoked by Lithuania. The CJEU has also imposed heavy fines where Member States do not comply with judgements.
- Turning to this Court, the European Court of Human Rights, it is also longstanding jurisprudence that States cannot invoke problems with managing migration flows as justification to derogate from their ECHR obligations. In particular, this Court has made it clear in a series of judgments that, even when faced with large-scale arrivals, States must provide genuine and effective access to means of legal entry, in particular border procedures.

#### *b. Instrumentalization*

- The term 'instrumentalization' has been used, including in some national and supra-national legislation, to describe movements of persons which are forced, encouraged or facilitated with the aim of disrupting essential State functions.
- UNHCR has repeatedly condemned the so-called 'instrumentalization' of refugees 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 concept of 'instrumentalization' does not provide a basis for a general derogation from asylum, refugee protection and human rights norms.
- When faced with instances of 'instrumentalization', all States along the travel route must uphold international refugee and human rights law. This includes the right to seek asylum from persecution, access to fair asylum procedures, the principle of non-refoulement, and the right to voluntary return. Specifically, States cannot reject individuals at the border without conducting an individual assessment of their international protection needs.
- To meet such obligations, States must maintain a legal framework that ensures fair and effective procedures at the borders that: (1) allow all individuals fearing persecution to apply for international protection; (2) enable early identification of those with specific needs and vulnerabilities; (3) Implement an enhanced triage system to expedite manifestly founded applications and simplify the processing of those that are clearly unfounded; (4) ensure the return of individuals determined not to require protection.
- Further, States should: (1) enhance national capacity to assist, register, and screen arrivals, distinguishing categories and identifying potential security risks; (2) expedite the consideration of asylum applications with potential exclusion issues by specialized officers; (3) Regulate the use of movement restrictions, including alternatives to detention, when necessary and proportionate, allowing minimal detention periods only when less coercive measures are insufficient; (4) Any derogation from refugees' human rights must follow a declared state of emergency in line with international law, ensuring non-refoulement is upheld.
- UNHCR issued recent guidance relating to situations of instrumentalization Legal considerations on asylum and non-refoulement in the context of 'instrumentalization' | Refworld.

*c. Pushbacks and positive practices – fair and fast, border procedures etc.*

- The increasing frequency of expulsions and pushbacks of refugees and asylum-seekers at Europe’s land and sea borders is alarming. To quote UNHCR’s former AHC-P, “respecting human lives and refugee rights is not a choice, it is a legal and moral obligation”.
- Effective border management can be achieved while upholding the rights of refugees and ensuring their protection. States must have a toolbox of asylum case processing and policy options quickly available, including those that can be implemented at or near borders. Depending on the profiles and characteristics of the individuals, these options could include simplified procedures and accelerated case processing. Depending on the context, these modalities can be incorporated into border procedures, while ensuring access to asylum and due process is observed.
- States should consider ‘border procedures’ that 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 founded or unfounded to simplified and accelerated procedures.
- Note that, in an effort to establish fair and efficient asylum procedures, States may institute an admissibility stage to determine whether an asylum-seeker 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, however, 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.

*d. Externalization*

- UNHCR estimates the number of forcibly displaced people (both internally displaced and refugees) worldwide to have exceeded 140 million as we speak, a record high, while the majority of the world’s refugees continues to be hosted by low and middle-income countries.
- In this context, UNHCR continues to oppose approaches which seek to shift responsibilities to third countries rather than share them. Such practices can jeopardize the safety and rights of those in need of international protection.
- Judicial decisions on this are incoming. For example, the UK Court of Appeal struck down the UK-Rwanda transfer arrangement concluding that the proposed transfer of asylum-seekers from the UK to Rwanda would breach international and UK law; the CJEU and the Budapest-Capital Regional Court ruled that the Hungarian embassy asylum system is contrary to the right to asylum.
- UNHCR is exploring viable approaches to counter externalization and practices that undermine territorial asylum, ensuring they align with international legal standards. This includes regional cooperative arrangements that address large movements, identify protection needs and facilitate return of persons not in need of protection through collaboration among States. These regional cooperative arrangements, however, should not be understood as alternatives to “national processing”. Rather they should be conceived as part of a comprehensive route-based strategy, which proposes concrete measures that States and other stakeholders can implement with the support of UNHCR and IOM to address mixed movements more effectively.

- UNHCR-IOM's Route Based Approach seeks to, foster collaboration among states and organizations to ensure protection and solutions along routes—rather than relying solely on border interventions—with a view to saving lives, providing alternatives to dangerous journeys, and supporting States in strengthening asylum capacity to manage mixed movements effectively. This includes also building the conditions for asylum systems not to be unnecessarily hampered by unfounded claims as well as facilitating returns in safety and dignity.

### **3. Conclusion**

- The Court's extensive involvement in asylum cases highlights the concerning fact that many asylum-seekers, refugees and other forcibly displaced people consider - and unfortunately often rightly so -that their rights are not adequately respected.
- In the context I have described, and despite changing political winds, the judiciary will continue to play a most critical role of ensuring fair proceedings and upholding fundamental rights for refugees and asylum seekers.
- For UNHCR, it's not an option to leave the judiciary alone here. In the words of the UN SG, and previous High Commissioner for Refugees, "engagement with the judiciary, at national and regional levels, is a central part of my Office's work".
- We see this as a core part of our protection mandate and intervene in various ways, depending on the context: court interventions, where possible; sharing of country-of-origin information; trainings; case law updates; or supporting events such as this.
- Your role is now more crucial than ever and we consider events like this one essential to strengthen judicial dialogue in Europe, to contribute to a community of judges that shares expertise and supports each other, also across borders.
- Let us continue to build, to defend, a European asylum system that is fair and efficient and that protects all those who flee conflict and persecution.