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3.1.2.1. Access during a state of emergency

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In 2023, several EU+ countries maintained their previously declared states of emergency to manage high numbers of arrivals. In the face of a remarkable increase in irregular arrivals, in April 2023 Italy also declared a state of emergency, initially for 6 months and renewed in October 2023 for another 6 months.280In addition, the Italian government reached a bilateral agreement with Albania to disembark and host up to 3,000 applicants on Albanian territory, pending the assessment of their asylum application.281

In a press briefing, the European Commission stated that it appeared that Italy intended to apply national legislation in a manner that ensures full respect of its obligations in terms of international law and the actions carried out outside of the territory of the Member State go beyond the scope of the EU asylum *acquis*.282 The European Commission further clarified that it is understood that the agreement will apply to migrants rescued in international waters by Italian vessels. UNHCR reiterated that the transfer agreement of asylum seekers and refugees must respect international refugee law.283 The Council of Europe's Commissioner for Human Rights reacted with concern, stating that the agreement "adds to [the] worrying European trend towards externalising asylum procedures".284Similar concerns were expressed by civil society organisations, particularly in relation to procedural guarantees, the risk of detention and reception conditions.285The Italian Parliament approved the law ratifying the Protocol on 15 February 2024.286The Constitutional Court of Albania ruled that the agreement between Italy and Albania does not harm the territorial integrity of Albania and the agreement may proceed for parliamentary approval.287

The CJEU delivered its judgment on Hungary's 'embassy procedure' (*see Asylum Report 2023 for the description*). The court ruled that Hungary failed to fulfil its obligations under Article 6 of the recast APD, limiting effective access to the asylum procedure when it introduced the requirement for persons seeking international protection to submit a declaration of intent in person in a Hungarian embassy. The procedure continued to be implemented in Hungary, despite the CJEU's ruling.

Related to transit zones which were in place from 2015 to 2020, in *S.S. and others v Hungary*, the ECtHR held that a country cannot deny entry to an asylum seeker or remove them – even if it is assumed that the person could enter the country through other means – without a proper

evaluation of the risks. The court found a violation of Article 3 of the ECHR because the national authority failed to examine whether the applicants would have access to an adequate asylum procedure when returned, in line with the principle of *non-refoulement*. In another case, the ECtHR ruled that Hungary had subjected an unaccompanied minor to a collective expulsion to Serbia in violation of the ECHR and had not provided effective remedies.

The Lithuanian Ministry of Internal Affairs submitted draft legislative amendments to the State Border Act to clarify that illegally crossing the border during a state of emergency does not constitute access to the territory.288 At the same time, the ministry submitted draft amendments to the Law on the Legal Status of Foreigners, allowing applications for asylum irrespective of whether a third-country national entered the territory legally or illegally.289

Despite calls by the Council of Europe's Commissioner for Human Rights to reject draft amendments to the Law on the State Border and Protection,290the Lithuanian parliament adopted the amendments which allow border guards to return migrants who cross into Lithuanian territory irregularly during a state of emergency.291Civil society organisations continued to criticise the authorities and initiated proceedings before the ECtHR to challenge denials of access to the procedure and instances of *refoulement*.292The Seimas Controller also found concerns about the way foreigners were held by the State Border Guard Service (SBGS) at border checkpoints without being immediately provided with the minimum standards required by law.293In the context of a third-party intervention294in the communicated case of *COCG and others v Lithuania*,295the civil society organisation Human Rights Monitoring Institute, citing monitoring data collected by the Lithuanian Red Cross Society,296stated to the ECtHR that effective access to the asylum procedure was hindered in Lithuania and that persons seeking asylum at international border checkpoints faced serious obstacles.297

In Latvia, the parliament approved legislative bills that amended the State Border Law and the State Border Guard Law, building on Order No 518 of the Cabinet of Ministers on the Declaration of an Emergency Situation, which was adopted in 2021. The law provides the Cabinet of Ministers with the authority to declare a situation of emergency when it considers that there is a disproportionately high number of cases of illegal or attempted crossings of the state border. Prior to the adoption of the laws, UNHCR recommended that the proposed amendments "be revised to prevent collective expulsions and guarantee effective access to protection against refoulement by admission to the territory and individual assessments of personal circumstances and possible risks in accordance with international and EU legislation".298Following the parliament's adoption of the amendments to the State Border Law and the State Border Guard Law, UNHCR issued a statement to express concern that the changes effectively authorise pushbacks and may lead to individuals not being granted effective access to the territory and the right to seek asylum. The changes do not specify how an assessment should be conducted and the assessment would be undocumented.299The Ministry of the Interior and the State Border Guard have repeatedly emphasised that third-country nationals can apply for asylum at official border-crossing points. Nonetheless, a civil society organisation in Latvia criticised some practices (such as the use of sound canons) to deter persons from crossing the Belarusian-Latvian border, stating that this practically prohibits people from applying for asylum.300

The Polish Border Guard underlined that a foreigner who crosses an external border in violation of the law will receive a decision and an order to leave the territory. The authority noted the

primacy of the international protection procedure and highlighted that if the foreigner expresses the wish to apply for international protection, the Border Guard officer must acknowledge this intent and abandon all activities related to returning the person to the state border line, so that the application for international protection can be processed according to the law. The Border Guard underlined that domestic law does not allow a Border Guard officer not to acknowledge the intent to apply for international protection.

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