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## Can a state limit the processing of asylum applications (evaluation of the provisions of the so-called Pushback Act)

### Obligation to process asylum applications

The obligation to process refugee applications arises from the Convention Relating to the Status of Refugees, EU law, case law of the European Court of Human Rights and a number of human rights treaties. The Universal Declaration of Human Rights explicitly states that every human being has the right to seek asylum (Art. 14 (1)), with the term *asylum* meaning a situation of seeking international protection.

According to the 1951 Convention Relating to the Status of Refugees ([the so-called Geneva Convention](#)), to which Poland has been a party since 1991, all states-parties are obliged to accept applications for international protection. The Convention does not provide for the possibility of its suspension. However, in time of war or other grave and extraordinary circumstances, states have the option to take provisional measures with respect to a particular person before declaring that person a refugee (Art. 9). These measures are, nevertheless, individual and do not affect the procedure for examining an application for international protection.

The obligation to process an application for international protection also results from EU law. The [Asylum Procedures Directive](#) (2013/32/EU) sets out the details of the functioning of the asylum system in the European Union and stipulates, for instance, that applicants for international protection must be allowed to remain in an EU member state for the entire procedure. Such a person should also be granted prior entry to the territory of a Member State if he/she expressed a wish to apply for international protection. The provisions of the [Schengen Borders Code](#) explicitly state that the issuance of refusals of entry to the territory of any EU state, shall in no way limit the provisions on the right to international protection (Art. 14 (1)). Like the Geneva Convention, the Asylum Procedures Directive also does not allow for an application not to be processed.

It is also important that the Asylum Procedures Directive distinguishes three steps of submitting an application for international protection (Art. 6 (1)-(3)). The first step is making an application, i.e. a declaration of a wish to apply for international protection. This is an informal step, expression of intention, which should unconditionally trigger subsequent steps of the procedure, including entry into the territory and prohibition of expulsion from it. The second step is registration of the application on the appropriate form. This is a formal step, carried out in Poland and in accordance with internal regulations at the relevant Border Guard checkpoint. The form is filled out by Border Guard officers. Collection of fingerprints from the applicants in order to identify them is a part of this procedure. Finally, the third step is lodging the application which means that it is formally registered in relevant national and EU IT systems (for more see [text by “Magdalena Póltorak”](#)).

The European Convention on Human Rights and its additional protocols do not contain an explicit obligation to receive and examine applications for international protection, but they do contain a prohibition on mass expulsion of aliens (Art. 4 of Protocol No. 4 to the European Convention on Human Rights). When examining complaints concerning this prohibition, the ECtHR refers to the obligation to receive and examine asylum applications submitted. The Court has already repeatedly found a violation of the Convention by Poland in connection with the failure to process applications for international protection submitted at the border with Belarus at Terespol (the cases of [M.K and Others](#) and [D.A. and Others v. Poland](#)).

## Provisions of the Pushback Act

The so-called [Pushback Act](#)<sup>1</sup> entered into force on 25 October 2021. With regard to persons seeking international protection, the Act allows the Head of the Office for Foreigners not to process the application of a person detained immediately after illegally crossing the border. This provision should be regarded as a breach of Poland's international obligations, which do not allow for the suspension of asylum procedures. Whether or not the border was crossed in compliance with the law has no bearing on the procedure for international protection. This follows directly from the provisions of the Geneva Convention, which stipulated from the outset that persons seeking protection may enter other countries illegally and recommends that penalties should not be applied to persons who are unlawfully present on the territory of a State party or who have crossed the border illegally (Art. 31 (1) of the Convention). The Convention specifies that such persons should come directly from the territory where they are in danger (on whether Belarus can be considered a safe country see [text by "Marcin Górski"](#)).

In theory, the amended provisions of the Pushback Act on granting protection to foreigners within the territory of the Republic of Poland have a similar wording. In order for a particular person's application not to be ignored, he/she must be arriving directly from the territory in which his/her life or freedom was threatened by persecution or in which there was a risk of serious harm. However, for this to happen, the legislature imposed an obligation on these applicants to present credible reasons for their illegal entry into the territory of Poland (newly added art. 33 (1a) of the Act on granting protection to aliens within the territory of the Republic of Poland). Meanwhile, it should be noted that persons arriving from Belarus are at risk of serious harm in that country and there is [evidence](#) that they are forced to enter the territory of Poland by Belarusian services, which use practices that could be considered as torture against them. Thus, they would meet the conditions under the Act, as they are unable to reach the border crossing point and apply for international protection there. The introduction of this exception in the Pushback Act therefore does not make the Act compatible with Art. 31 (1) of the Geneva Convention.

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1 Act of 14 October 2021 on amending the Act on foreigners and certain other acts, Journal of Laws. 2021, item 1918. The authors use the abbreviation Pushback Act in the text.