

Recommendation by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the Draft Law amending the Penal Code and the Aliens Act

1. The UNHCR Regional Representation for Northern Europe (UNHCR RRNE) became aware about the initiative of the Government of Estonia to amend the Penal Code and the Aliens Act of the Republic of Estonia (*Karistusseadustiku ja välismaalaste seaduse muutmise seadus 385 SE*, hereinafter – Draft Law), submitted to the Parliament on 07 February 2017 and would like to present the following observations.
2. As the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, seek permanent solutions to the problems of refugees,¹ UNHCR has a direct interest in law and policy proposals in the field of asylum. According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”² UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention³ and in Article II of the 1967 Protocol relating to the Status of Refugees⁴ (hereafter collectively referred to as the “1951 Convention”).⁵
3. UNHCR understands that the Government of Estonia has submitted the present Draft Law in order to bring the national legislation in line with the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter – Istanbul Convention).⁶ UNHCR considers the Istanbul Convention as an important instrument for protecting women and girls from violence because it is the first time that gender-related persecution is explicitly mentioned in an international treaty. Moreover, the Istanbul Convention underlines that gender-based violence should be recognized as a violation of human rights, but also as a form of persecution within the meaning of the 1951 Convention relating to the Status of Refugees, to which Estonia is a Party since 1997.
4. In UNHCR’s view, the examination of the Draft Law by the Parliament provides an excellent opportunity for Estonia to develop a national policy framework for preventing and responding to gender-based violence against women and girls in Estonia, including persons of concern to UNHCR. Many asylum claims presented by women involve fear or experience of gender-based violence. Also, the refugee women and girls may also face gender-based or domestic violence in the countries of asylum and thus it is

¹ UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V), available at: <http://www.refworld.org/docid/3ae6b3628.html> (hereafter “UNHCR Statute”).

² *Ibid.*, para. 8(a).

³ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>.

⁴ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>.

⁵ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

⁶ Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, November 2014, ISBN 978-92-871-7990-6, available at: <http://www.refworld.org/docid/548165c94.html>.

important to ensure necessary safeguards for preventing the violence against women and girls, also for protecting the victims and prosecuting the perpetrators.⁷

5. UNHCR understands that the proposed Draft Law is based on the outcomes of the inter-ministerial discussions in relation to the Concept Note, which was prepared by the Estonian Ministry of Justice in November 2015 (*Karistusseadustiku ja korrakaitseaduse muutmise seaduse eelnõu väljatöötamise kavatsus, 24.11.2015*, hereinafter – the Concept Note). UNHCR has submitted its observations on the Concept Note to the Ministry of Justice in April 2016.⁸
6. As the agency entrusted by the United Nations General Assembly with the mandate to supervise the application of international conventions for the protection of refugees and propose amendments thereto,⁹ UNHCR would like to use the present initiative of the Government of Estonia to amend the Penal Code for reiterating its recommendation¹⁰ addressing the issue of penalization of asylum-seekers.
7. UNHCR notes that current text of the Penal Code contains no provisions implementing obligations of the Republic of Estonia under Article 31 of the 1951 Refugee Convention. The latter requires that States should take the necessary steps to ensure that asylum-seekers and refugees are not subject to any penalties on account of their illegal entry or stay. Specifically, States should ensure that asylum-seekers and refugees benefiting from this provision are promptly identified, that no proceedings or penalties for illegal entry or presence are applied pending the expeditious determination of claims to refugee status and asylum, and that the relevant criteria are interpreted in light of the applicable international law and standards, as well as regional instruments such as the Reception Conditions Directive.¹¹
8. In UNHCR's view, the effective implementation of the obligation under Article 31 of the 1951 Convention requires concrete steps at the national level. In light of experience and in view of the nature of the obligation laid down in Article 31, UNHCR recommends **amending the Estonian Penal Code with a safeguard clause or a provision ensuring that persons exercising the right to seek international protection (asylum) are exempted from any criminal liability for illegal entry or stay in accordance with Article 31 of the 1951 Convention and relevant EU Asylum *acquis* provisions as well as Article 18 of the EU Charter of Human Rights.**

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⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, available at: <http://www.refworld.org/docid/3d36f1c64.html>

⁸ UN High Commissioner for Refugees (UNHCR), *Observations by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the Concept Note of the Estonian Ministry of Justice from 24 November 2015 for the elaboration of a law proposal amending the Penal Code and the Law Enforcement Act*, April 2016, available at: <http://www.refworld.org/docid/58232dcc4.html>.

⁹ UN General Assembly, *UNHCR Statute*, see para 8a.

¹⁰ UNHCR, *Observations on the Concept Note*, see paras 17-20.

¹¹ See Articles 8 – 9 of the *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, as well as the related UNHCR comments on these articles in UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, pages 15-26, available at: <http://www.refworld.org/docid/5541d4f24.html>.