

UNHCR Observations on the Law Proposal amending the Obligation to Leave and Prohibition on Entry Act, the Law Enforcement Act and the Act on Granting International Protection to Aliens

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (hereafter “RRNE”) is grateful to the Estonian Ministry of the Interior for the invitation to submit its observations on a Draft Law proposing to amend the Obligation to Leave and Prohibition on Entry Act, the Law Enforcement Act and the Act on Granting International Protection to Aliens (*Väljasõidukohustuse ja sissesõidukeelu seaduse, korrakaitseaduse ja välismaalasele rahvusvahelise kaitse andmise seaduse muutmise seadus*, hereinafter – “the Draft Law”).
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’s supervisory responsibility is also formally recognized under European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (TFEU)⁶, as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy”. Likewise, secondary EU legislation explicitly refers to UNHCR’s mandated responsibilities. For instance, Article 29 of the recast Asylum Procedures Directive⁷ states that Member States shall allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva

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

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 European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L. 326/47-326/390; 26.10.2012, available at: <http://www.refworld.org/docid/52303e8d4.html>.

⁷ 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, (hereinafter – “recast Asylum Procedures Directive”), available at: <http://www.refworld.org/docid/51d29b224.html>.

Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure”.

4. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereafter “UNHCR Handbook”) and subsequent Guidelines on International Protection.⁸ UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

II. The Draft Law

5. UNHCR understands that the Estonian Ministry of the Interior has elaborated the present Draft Law in order to transpose Article 18 of the EU Return Directive⁹ (the Return Directive) into Estonian legislation. Pursuant to this provision, states are allowed to derogate from the obligation to detain migrants only in a specialized detention facility in “emergency situations,” i.e. the situations in which “an exceptionally large number of third-country nationals to be returned places an unforeseen heavy burden on the capacity of the detention facilities” of a Member State.
6. The Explanatory Note to the Draft Law further provides that the aim of the law proposal is to ensure similar treatment of asylum-seekers and irregular migrants in the provision of accommodation and other services during an emergency situation.¹⁰ As a result, if the Draft Law were to be adopted, all of the exceptions allowing Estonia to derogate from its obligations under the Return Directive in time of emergency may be equally applicable to asylum-seekers. According to the Explanatory Note, such derogations would include: (i) an extended period of administrative detention without authorization by the court; (ii) a possibility to use prisons and police stations as places of detention, (iii) a possibility to limit the rights to privacy and family unity in arranging accommodation of detained families, and (iv) a possibility to reduce reception conditions to be provided for individuals.
7. UNHCR further notes that the same Draft Law proposes to incorporate a number of other amendments in the Act on Granting International Protection to Aliens (AGIPA),¹¹ including, inter alia, three amendments concerning the application of the Safe Country of Origin concept, also one amendment introducing a new alternative to detention of asylum-seekers.

III. General Considerations

8. UNHCR first wishes to recall that under international law, the recourse to administrative detention should remain strictly limited, as it constitutes an exception to the right to liberty and security, which extends to

⁸ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, (hereafter UNHCR Guidelines on Detention), available at: <http://www.refworld.org/docid/4f33c8d92.html>.

⁹ European Union: Council of the European Union, *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals*, 16 December 2008, OJ L. 348/98-348/107; 16.12.2008, 2008/115/EC, <http://www.refworld.org/docid/496c641098.html>.

¹⁰ See pages 1 and 20 of the Explanatory Note.

¹¹ The Act on Granting International Protection to Aliens (2005), available in English at: <https://www.riigiteataja.ee/en/eli/518122017008/consolide>.

non-nationals, regardless of their residence status. So while detention in the migration context is not wholly prohibited under international and regional law, it may be allowed only on limited grounds and provided specific safeguards are in place. Detention should, in other words, remain the exception rather than the rule. In particular, asylum-seekers, refugees and stateless persons face a heightened risk of arbitrary detention and specific international guarantees exist to protect them,¹² and to uphold their right to access asylum procedures and related due process standards. As noted in UNHCR's Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, the right to seek asylum, together with the non-penalization for irregular entry and the rights to liberty and security of the person and freedom of movement mean that the detention of asylum-seekers should be a measure of last resort.¹³

9. These principles of international human rights and refugee law are reflected in the Return Directive. Thus, Recital 2 of the preamble to the Return Directive states that it pursues the establishment of an effective removal and repatriation policy, based on common standards, for persons to be returned in a humane manner and with full respect for their fundamental rights and their dignity. As is apparent from both its title and Article 1, in order to meet this objective, this Directive establishes 'common standards and procedures' which must be applied by each Member State for returning illegally staying third-country nationals.¹⁴ More specifically, Recital 9 of the Return Directive provides "a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as asylum seeker has entered into force."
10. The Court of Justice of the European Union (CJEU) has accordingly ruled that an asylum-seeker has the right to remain in the territory of the Member State at least until her/his application has been rejected at first instance, and cannot therefore be considered to be 'illegally staying' within the meaning of the Return Directive.¹⁵ It is therefore apparent that the legal status and entitlements of asylum-seekers significantly differ from the status of illegally staying third country nationals since they are subject to distinct legal standards.¹⁶
11. It follows from the foregoing considerations that the Return Directive, including Article 18, does not apply to third-country nationals who have applied for international protection until a final negative decision on their application or on their right to stay has been issued. For this reason, the scope and conditions of the derogations from reception conditions which are to be accorded to asylum-seekers shall be compatible with the recast Reception Conditions Directive,¹⁷ which lays down standards for the reception of applicants for international protection in the EU Member States, including Estonia.
12. In relation to reception conditions, UNHCR notes that the CJEU has concluded that the general scheme and purpose of the Reception Conditions Directive¹⁸ and the observance of fundamental rights, in

¹² See Art. 31 of the Refugee Convention; UNHCR Guidelines on Detention, Guideline 7.

¹³ UNHCR Guidelines on Detention, Guideline 2, para. 14.

¹⁴ See Case C-61/11 *PPU El Dridi* [2011] ECR I-3015, paras. 31 and 32.

¹⁵ See Case C-534/11 *Arslan* [2013], para. 48, in which the CJEU holds that "it is clearly apparent from the wording, scheme and purpose of Directives 2005/85 and 2008/115 that an asylum-seeker, independently of the granting of such a [residence] permit, has the right to remain in the territory of the Member State concerned at least until his application has been rejected at first instance, and cannot therefore be considered to be 'illegally staying' within the meaning of Directive 2008/115, which relates to his removal from that territory."

¹⁶ See Case C-357/09 *PPU Kadzoev* [2009] ECR I-11189, para 45.

¹⁷ European Union: Council of the European Union, *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)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: <http://www.refworld.org/docid/51d29db54.html>.

¹⁸ European Union: Council of the European Union, *Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States*, 6 February 2003, OJ L. 31/18-31/25; 6.2.2003, 2003/9/EC, available at: <http://www.refworld.org/docid/3ddcfda14.html>.

particular the requirements of Article 1 of the EU Charter of Fundamental Rights, under which human dignity must be respected and protected, preclude the asylum-seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive.¹⁹ Therefore, regardless of the number of new arrivals and any situation of emergency, the aim of the recast Reception Conditions Directive is **to provide the same reception conditions to all asylum-seekers as in a normal situation.**

13. In UNHCR's view, there are other alternative tools to addressing reception capacity constraints in situations of large numbers of arrivals, such as the centralization of the asylum process and related services.²⁰ This could apply to cases where a high presumption of inclusion applies or with very low overall protection rates, and where the caseload or profiles are sufficiently homogenous. Against this context, *UNHCR's Better Protecting Refugees in Europe and Globally* recommends that the European Union adopts accelerated procedures in order to guarantee quick access to international protection for those who need it, and help facilitate return of those who do not. Such procedures would also constitute an important alternative to meet the concerns currently addressed through mandatory admissibility procedures that have been proposed at EU level.²¹
14. **In light of the above, UNHCR recommends reviewing the Explanatory Note and the Draft Law, in order to bring these documents in line with the foregoing considerations.**

IV. Specific observations

4.1 Safe country of origin concept

15. The Draft Law introduce several amendments providing that the Estonian Police and Border Guard Board (PBGB)²² will draw up a list of safe countries of origin. The list is supposed to be regularly reviewed at least once a year and it shall be produced on the basis of relevant and up to date country of origin information.
16. UNHCR notes that the designation of a third country as safe country of origin allows Estonia to accelerate and/or conduct the examination of applications for international protection lodged by asylum-seekers who have the citizenship of this third country at the border or in transit zones. This can therefore be an effective tool for addressing situations when large numbers of asylum applications are lodged by nationals of third countries for whom there is a presumption that they do not qualify for international protection.
17. UNHCR further notes that a country may be considered as a safe country of origin under the conditions prescribed by Articles 36 and 37 as well as in Annex I of the recast Asylum Procedures Directive. Several

¹⁹ Case C-179/11, *CIMADE, GISTI v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, 27/09/2012, para 56.

²⁰ UN High Commissioner for Refugees (UNHCR), *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, available at: <http://www.refworld.org/docid/5b589eef4.html>.

²¹ UN High Commissioner for Refugees (UNHCR), *Better Protecting Refugees in the EU and Globally: UNHCR's proposals to rebuild trust through better management, partnership and solidarity*, December 2016, available at: <http://www.refworld.org/docid/58385d4e4.html>.

²² The national competent determining authority.

Member States have designated²³ at national level certain third countries as safe countries of origin, in accordance with this Directive.

18. UNHCR understands that Section 9(5) AGIPA requires that the safety of the country of origin needs to be assessed on an individual basis. In addition, where an applicant shows that there are valid reasons to consider the country not to be safe in his or her particular circumstances, the designation of the country as safe can no longer be considered relevant for them.
19. UNHCR is concerned, however, that Section 9(5) AGIPA fails to provide for the right of the asylum-seeker to be informed that their country of origin is considered safe until they are notified of the decision rejecting their application. Thus, in effect, the first and only opportunity to challenge the presumption of safety would be at the appeal stage, and with no guarantee that it will have suspensive effect. In UNHCR's opinion, there must be an opportunity for the asylum-seeker to rebut the presumption of safety both in law and practice.²⁴ This entails a **prior notification of the intention** to designate a country as safe.
20. **Therefore, UNHCR strongly recommends that Section 9(5) AGIPA explicitly specify that during the asylum interview an asylum-seeker is to be notified that their country of origin is considered safe and provided with the possibility to rebut the presumption of safety.**
21. Using the present opportunity, UNHCR also wishes to reiterate²⁵ its previous recommendation concerning Section 9(7) AGIPA, which provides that the PBGB can designate as safe a part of the country of origin. In UNHCR's opinion, Section 9(7) AGIPA is not compliant with Article 37 of the recast Asylum Procedures Directive, which allows Member States to designate **only the entire country** of origin as safe, but not a part of it.
22. Currently, Section 9(7) AGIPA incorporates the elements of two different legal concepts: the *safe country of origin* and the *internal flight or relocation alternative*. In UNHCR's view, it is necessary to clearly distinguish these two concepts in national legislation. While the *safe country of origin* concept is to be applied as a procedural management and admissibility tool for e.g. channeling asylum application into accelerated procedure²⁶, the concept of *internal flight or relocation alternative* is to be used in the context of examination of asylum application on its merits in the refugee status determination procedure²⁷.

4.2. Extension of period of administrative detention

23. The Draft Law proposes to extend the duration of administrative detention which does not require Court approval from current 48hrs to up to 7 calendar days in an emergency situation. The proposed amendment

²³ European Migration Network (2018). *Safe Countries of Origin - EMN Inform*. Brussels: European Migration Network. Available at: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_inform_safe_country_of_origin_final_en_1.pdf.

²⁴ UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection* (COM(2009)554, 21 October 2009), August 2010, p. 31, (UNHCR comments on the recast Asylum Procedures Directive), available at: <http://www.refworld.org/docid/4c63ebd32.html>.

²⁵ UN High Commissioner for Refugees (UNHCR), *Comments by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the revised Law Proposal amending the Act on Granting International Protection to Aliens and other related laws (draft law 81 SE)*, March 2016, paras 12-14, available at: <http://www.refworld.org/docid/5829b4e44.html>.

²⁶ UNHCR comments on the recast Asylum Procedures Directive, p. 35, see *supra* fn. 24 and UN High Commissioner for Refugees (UNHCR), *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status (Council Document 14203/04, Asile 64, of 9 November 2004)*, 10 February 2005, pp. 40-41, available at: <http://www.refworld.org/docid/42492b302.html>.

²⁷ See UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, available at: <http://www.refworld.org/docid/3f2791a44.html>.

requires also that such detention *shall be in a full compliance with the legal grounds for detention which are prescribed by Section 36¹ (2) AGIPA and in line with the principles provided in Section 36¹ (1) AGIPA.*²⁸

24. UNHCR would like to recall that seeking asylum is not an unlawful act.²⁹ The 1951 Refugee Convention provides that asylum-seekers shall not be penalized for their illegal entry or stay. In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorization. The position of asylum-seekers may thus differ fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry. They may, for example, be unable to obtain the necessary documentation in advance of their flight because of their fear of persecution and/or the urgency of their departure. These factors, as well as the fact that asylum-seekers have often experienced traumatic events, need to be taken into account in determining any restrictions on freedom of movement based on irregular entry or presence.³⁰
25. Also, as mentioned above, Recital 9 of the preamble to the Return Directive provides that a third-country national who has applied for asylum in a Member State should not be regarded as staying illegally on the territory of that Member State until a negative decision on the application, or a decision ending his or her right of stay as an asylum-seeker has entered into force. The purpose of immigration detention of 'a third-country national who is the subject of return procedures' under Article 15 (1) of the Return Directive is 'to prepare the return and/or carry out the removal process'. Unlike the purpose of detention of illegally staying immigrants under the Return Directive, detention of asylum-seekers under the recast Reception Conditions Directive **serves a different aim, as provided under Article 8.3**. According to the principle of *non-refoulement*, asylum-seekers cannot be subject to the return procedure.
26. It should be noted that Article 7(1) of the recast Reception Conditions Directive lays down the principle that asylum-seekers may move freely within the territory of the host Member State or within an area assigned to them by that Member State. Furthermore, under Article 8(1) of the same directive, Member States cannot hold a person in detention for the sole reason that he is an applicant for asylum and, in accordance with Article 9(3), where detention is ordered by administrative authorities (PBGB in Estonia), Member States shall provide for a **speedy judicial review** of the lawfulness of detention.³¹
27. Finally, the European Court of Human Rights (ECtHR) has repeatedly pointed out that treatment which is inflicted without the intention of humiliating or degrading the victim, and which stems, for example, from objective difficulties **related to an influx of migrants**, may entail a violation of Article 3 ECHR.³² Therefore, any measures on deprivation of liberty of asylum-seekers and on conditions of such detention **must respect human dignity and the principle of non-discrimination**, regardless of the number of new arrivals and any situation of emergency that might arise in a given State. The purpose of detention may only be justified to protect public order, and not, for example, to facilitate administrative expediency. In this context, UNHCR wishes to recall that, according to the UN Human Rights Committee³³, administrative

²⁸ Section 36¹(1) AGIPA provides: *An asylum-seeker may be detained ... if the efficient application of the surveillance measures (alternatives to detention) is impossible. The detention shall be in accordance with the principle of proportionality and upon detention the essential circumstances related to the applicant for international protection shall be taken account of in every single case.*

²⁹ UNHCR Guidelines on Detention, Guideline 1, para 11.

³⁰ *Ibid.*

³¹ See Case C-601/15 PPU J.N. [2016]; *Arslan*, para. 44 et seq.

³² *Khlaifia and Others v. Italy*, Application no. 16483/12, Council of Europe: European Court of Human Rights, 15 December 2016, para. 184, available at: <http://www.refworld.org/cases,ECHR,58529aa04.html>. See also *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para. 223, available at: <http://www.refworld.org/cases,ECHR,4d39bc7f2.html>.

³³ See UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, available at: <http://www.refworld.org/docid/45139acfc.html>.

expediency is not a legitimate purpose for detention in light of the serious consequences it has for a human being.

28. In view of the aforementioned standards and principles, UNHCR considers that the extension of period of administrative detention that would apply in the emergency situation like a 'mass influx of migrants' may not be necessary, reasonable and proportionate, or contribute to the 'speediness' of the judicial review. **Therefore, UNHCR recommends retaining the current standard of judicial review of detention beyond the initial 48 hours.**
29. The further examination of the proposed amendments concerning the detention of asylum-seekers in emergency situations indicates that the Draft Law does not provide for specific safeguards in relation to children. UNHCR's position is that children should not be detained for immigration related purposes, irrespective of their legal/ migratory status or that of their parents and detention is never in their best interests. Appropriate care arrangements and community-based programs need to be in place to ensure adequate reception of children and their families, especially in the situation of emergency.³⁴
30. **Therefore, UNHCR recommends amending the Draft Law with a provision prohibiting the detention of children and instead providing for appropriate care arrangements and alternatives to detention to be applied since detention in immigration context would never be in the best interest of a child.**
31. UNHCR notes that simultaneously with the proposal to extend the period of administrative detention, the Draft Law foresees introduction of a new alternative to detention of asylum-seekers – a specialized counselling service – in Section 29(1) AGIPA (*surveillance measures*). The consideration of alternatives to detention – from reporting requirements to structured community supervision and/or case management programmes – is part of an overall assessment of the necessity, reasonableness and proportionality of detention. Such consideration ensures that detention of asylum-seekers is a measure of last, rather than first, resort. **Accordingly, UNHCR welcomes the proposed amendment to Section 29(1) AGIPA.**

4.3. Use of prisons for immigration detention

32. The Draft Law proposes to allow the detention of asylum-seekers in other than the specialized immigration detention centres facilities like prisons or police stations during the emergency situations. In UNHCR's view, the use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided.³⁵ Also, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has repeatedly³⁶ concluded that prisons and police stations are not suitable places in which to detain someone who is neither suspected nor convicted of a criminal offence. Consequently, the period of time spent by immigration detainees in such establishments should be kept to the absolute minimum (i.e. less than 24 hours).
33. UNHCR acknowledges that the above requirement may create logistical difficulties for States facing a situation of emergency. UNHCR notes, however, that it is important that the principle of separate facilities in general be observed.³⁷ This requirement, which reflects the specific legal status and situation of asylum-

³⁴ UN High Commissioner for Refugees (UNHCR), *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, available at: <http://www.refworld.org/docid/5885c2434.html>.

³⁵ UNHCR Guidelines on Detention, Guideline 8, para 48.

³⁶ The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Factsheet, March 2017, CPT/Inf(2017)3, available at: <https://rm.coe.int/16806fbf12>.

³⁷ UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and the Council laying down standards for the reception of asylum-seekers*, July 2012, (COM (2011) 320 final, 1 June 2011), p.10, available at: <http://www.refworld.org/docid/500560852.html>.

seekers, was recognized, *inter alia*, by the ECtHR in *Saadi v. the United Kingdom*.³⁸ If asylum-seekers are exceptionally held in such facilities, the conditions of their detention should ensure humane treatment with respect for the inherent dignity of the person. The detention in such facilities shall not undermine the ability of asylum-seekers to pursue and to substantiate their asylum claim.

34. **UNHCR therefore recommends considering to remove from the Draft Law the provision authorizing the use of other than the specialized immigration detention centres facilities during the emergency situations. As a minimum, the Draft Law needs to be amended with a provision stipulating that the conditions of detention in other than the immigration detention centre facilities shall meet the requirements as provided in Sections 36³ and Section 36⁴ AGIPA.**

4.4. Accommodation of families in case of detention

35. The Draft Law proposes to allow separate accommodation of detained family members in situations *when it is justified by the necessity to protect rights of other persons, also people health, public order or state security*. UNHCR notes that Article 11 (4) of the recast Reception Conditions Directive requires from Member States to provide detained families **separate accommodation** guaranteeing adequate privacy. The only exception to this general rule is a situation when an asylum-seeker is detained at a border-crossing point or in a transit zone.³⁹
36. UNHCR would like to reiterate that in case of families with children their detention for immigration related purposes will never be in line with the best interests of the child. Children should never be criminalized or subject to punitive measures because of their parents' migration status. Alternatives to detention should be explored, preferably through family-based alternative care options or other suitable alternative care arrangements as determined by the competent childcare authorities.⁴⁰
37. Therefore, regardless of the number of new asylum arrivals and any situation of emergency, the detained families who seek international protection are eligible to separate accommodation guaranteeing their adequate privacy. **Accordingly, the Draft Law is incompatible with the recast Reception Conditions Directive and needs to be amended. The proposed new Section 36⁵ (7) AGIPA needs to be revoked.**

4.5. Reducing reception conditions

38. The Draft Law proposes to ensure a certain set of reception conditions (services) to asylum-seekers during the situation of emergency. These conditions include: (i) accommodation and food; (ii) access to emergency health care; (iii) information about rights and obligations; (iv) interpretation for carrying out asylum-related procedures; (v) supply of essential clothing and other necessities and toiletries if necessary; (vi) external communication and meetings in the amount which is available during the emergency situation; and (vii) state legal aid.
39. UNHCR notes that the proposed set of services to be provided to asylum-seekers during the situation of emergency significantly differs from those reception conditions which are currently guaranteed by the AGIPA for asylum-seekers. For example, the Draft Law foresees neither the access to education for children, nor the support and necessary assistance for asylum-seekers with special needs in the proposed

³⁸ *Saadi v the United Kingdom*, Application no. 13229/03, Council of Europe: European Court of Human Rights, 29 January 2008, para 74, available at: <http://www.unhcr.org/refworld/docid/47a074302.html>.

³⁹ See Article 11(6) of the recast Reception Conditions Directive.

⁴⁰ UNHCR's position regarding the detention of refugee and migrant children in the migration context (2017), p.2. See *supra* fn. 34.

set of services. In UNHCR`s view, both aforementioned conditions need to be accorded to asylum-seekers even in the situation of emergency.⁴¹

40. Therefore, UNHCR recommends to amend the Draft Law with provisions guaranteeing the right to education and special support for vulnerable asylum-seekers.

41. In general, UNHCR is of the view that the proposed limitations of material reception standards, as it is currently provided in the Draft Law, do not meet the requirements under international law and Article 18 (9) recast Reception Conditions Directive. Instead of temporary and exceptional character of limitations, the Draft Law suggests to institutionalize the deprivation of rights and lower standards of treatment for reception of asylum-seekers for the entire period of emergency. Noteworthy is that in *Saciri v. Belgium*⁴² the CJEU ruled that the saturation of the reception network would not be a justification for any derogation from meeting an adequate standard of living as set forth in the recast RCD. The principle of an adequate standard of living principle thus is the norm, which Member States, including Estonia, need to guarantee in all circumstances and these are understood to be higher than "basic needs". In that regard, it is also necessary to bear in mind that, if the Member States are not in a position to grant the material reception conditions in kind, the recast RCD leaves them the possibility of opting to grant the material reception conditions in the form of financial allowances. Those allowances must, however, be sufficient to meet the basic needs of asylum-seekers, including a dignified standard of living, and must be adequate for their health.

UNHCR Regional Representation for Northern Europe

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⁴¹ The right to education is primarily protected by the 1951 Refugee Convention (Article 22), International Covenant on Economic, Social and Cultural Rights (Article 13), and the Convention on the Rights of the Child (Article 28). In regard to asylum-seekers with special needs, Article 21 of the recast Reception Conditions Directive specifically underscores the duty of Member States to ensure an adequate standard of living for vulnerable applicants.

⁴² Case C-79/13, *Selver Saciri and others v. Belgium*, 27/02/2014.