

Observations by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the Draft Law Proposal of 05 December 2014 amending the Act on Granting International Protection to Aliens

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (UNHCR RRNE) is grateful to the Estonian Ministry of the Interior for the invitation to provide comments on the draft law proposal (hereinafter – “Law Proposal”) transposing the recast Asylum Procedures Directive¹, recast Reception Conditions Directive² and certain provisions from the recast Qualification Directive³. UNHCR recognizes that this invitation is extended in line with the Office’s supervisory responsibility⁴ and the fruitful cooperation the UNHCR RRNE has enjoyed with the Government of Estonia and its institutions over the years. Given the length and substantial nature of the Law Proposal and the limited time frame for submission of comments, UNHCR has unfortunately not been able to reflect and comment on the Law Proposal in the detail it deserves. UNHCR RRNE may therefore submit additional observations on the Law Proposal once it (a revised version) is submitted to the Parliament for consideration. UNHCR RRNE would also welcome an opportunity to discuss the transposition of the recast Directives with the Ministry of the Interior and relevant institutions, prior to submission of the Law Proposal to the Parliament.

¹ 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)* (hereinafter - *recast Asylum Procedures Directive* or *recast APD*), 29 June 2013, L 180/60, available at: <http://www.refworld.org/docid/51d29b224.html>.

² 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)* (hereinafter - *recast Reception Conditions Directive* or *recast RCD*), 29 June 2013, L 180/96, available at: <http://www.refworld.org/docid/51d29db54.html>

³ European Union: Council of the European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, (hereinafter - *recast Qualification Directive* or *recast QD*), 20 December 2011, OJ L 337; December 2011, pp 9-26, available at: <http://www.refworld.org/docid/4f197df02.html>.

⁴ UNHCR’s supervisory responsibility, to monitor and support State Parties in their application of the 1951 Convention related to the Status of Refugees and related standards is set out in its Statute, Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees. UNHCR’s supervisory responsibility has also been reflected in 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”)⁴, 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”⁴. Secondary EU legislation also emphasizes the role of UNHCR. For instance, Article 29 of the recast Asylum Procedures Directive states that Member States shall allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure”.

2. UNHCR welcomes the efforts by the Government of Estonia to bring its asylum system in compliance with international standards and the second generation of the EU asylum legislation. When fully transposed into the national legal framework, and implemented in practice, Estonia will strengthen conditions for a good quality, fair and efficient asylum system in line with the EU Charter and relevant refugee and human rights law standards
3. Compared with the current text of the Act on Granting International Protection to Aliens (“AGIPA”), UNHCR notes a number of important changes and improvements in the Law Proposal, such as the introduction of a procedure to prioritise processing of applicants with special needs and manifestly-founded cases, the incorporation of the principle of best interests of the child at all stages of the refugee status determination procedure (Item 21 of Article 1 of the draft Law Proposal), the extension of special procedural guarantees to all asylum-seeking children irrespective of the fact whether they are accompanied or not, the inclusion of parents and guardians of asylum-seeking children into the definition of “family members”, and the introduction of the obligation to identify applicants with special needs *as soon as possible* after submission of the asylum application for all Estonian administrative institutions and persons who deal with an asylum-seeker (new Article 15¹). These are among the changes which will lead to a strengthening of the Estonian legal framework for international protection especially as regards the safeguarding of special reception and procedural needs of vulnerable applicants.
4. Also, during its review, UNHCR has noted a number of provisions in the Law Proposal which appear not to be in line with international standards as set forth in the Charter of Fundamental Rights of the EU and relevant recitals of EU primary law⁵. UNHCR would like to take this opportunity to share the following observations in respect of specific provisions in the law proposal.

II. Observations

Article 1(5) of the Law Proposal: The determining authority

5. According to the Law Proposal, Article 3 of the AGIPA will be amended with a new section 4, which provides that “*the Police and Border Guard Board shall register and examine applications for international protection*”. The explanatory note to the Law Proposal explains that the proposed provision is based on Articles 2(f) and 4(1) of the recast APD, which require Member States to designate, for all procedures at first instance, a *single determining authority*.
6. According to the present practice in Estonia, the asylum decision-making function/ competence is divided between two structural units of the Police and Border Guard Board - the *Aliens Division of the Citizenship and Migration Department* (hereinafter – “CMD”) and the *Border Guard Department* (hereinafter – “BGD”). The Aliens Division of the CMD includes staff of the earlier disbanded *International Protection Division* of the CMD and its task is examination, *inter alia*, of asylum applications lodged inside the territory, also granting, extension and revocation of identification documents, residence and

⁵ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html>

work permits for all aliens, including beneficiaries of international protection. In general, the Aliens Division of the CMD is the governmental institution which constitutes the single determining authority in light of Article 4(1) of the recast APD. At the same time, the task of the BGD personnel is to register asylum applications lodged in the border area or at the border-crossing points by persons who have no legal grounds for residence in Estonia, including persons who are transferred to Estonia on the basis of Dublin III Regulation⁶. Also, the BGD personnel are authorized to reject asylum applications lodged at the border in the accelerated procedure.

7. UNHCR notes that such a decision-making competence of the BGD is not in a compliance with the recast APD requirements, as it does not meet the criteria of a single determining authority. Although some Estonian border guards have participated in the trainings on how to conduct personal interviews and examine asylum applications, the majority of them still do not have sufficient competence to undertake legal analysis of asylum applications. The lack of comprehensive assessments of international protection needs at the border-crossing points puts persons in need of international protection at risk of *refoulement* contrary to the 1951 Convention. Moreover, placing border guards in the role of decision-makers may undermine the perception of confidentiality and impartiality of asylum procedures which is crucial for creating the conditions conducive to the full disclosure of facts by applicants during the personal interview. UNHCR recommends that the examination of asylum applications and thus responsibility for assessing *non-refoulement* obligations on an individual basis is accorded solely to the Aliens Division of the CMD under the Police and Border Guard Board.

Recommendation: UNHCR recommends amending the proposed Article 3(4) of the AGIPA to ensure that only the Aliens Division of the Citizenship and Migration Department of the Police and Border Guard Board is authorized to examine and take decisions on applications for international protection.

Article 1(9) of the Law Proposal: *Safe Third Country* definition

8. According to the Law Proposal, Article 8(2) of the AGIPA will be amended with a new Item 5, which establishes an additional criterion for determining the safe third country as follows: “*there is no risk of serious harm as provided in Article 4(3) of the present act for an alien*”. UNHCR notes that the explanatory note to the Law Proposal acknowledges that the introduction of this additional criterion is based on Article 38(1b) of the recast APD. UNHCR welcomes the bringing of the “safe third country” notion provided in the AGIPA in line with the recast APD. In case of adoption, the formulation in Article 8(2) of the criteria to be applied when considering a safe third country will be in compliance with the formulation in Article 38(1) of the recast APD.

⁶ European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person* (recast), 29 June 2013, OJ L 180/31-180/59; 29.6.2013, (EU)No 604/2013, available at: <http://www.refworld.org/docid/51d298f04.html>

9. UNHCR is concerned however that the rules contained in Article 38(2) of the recast APD have not been properly transposed in the Law Proposal. These include Article 38(2b) of the recast APD requiring Member States to adopt in the national legislation the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant⁷. Such methodology shall include case-by-case consideration of the safety of the country for a particular applicant and/or national designation of countries considered to be generally safe. Neither the Law Proposal transposes Article 38(3b) of the recast APD requiring Member States to provide the applicant with a document informing the authorities of the third country, *in the language of that country*, that the application has not been examined in substance.
10. UNHCR notes with satisfaction that the current text of the AGIPA (section 1 of Article 9) already contains a rule requiring a connection (meaningful link) between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country. This is also a mandatory requirement under Article 38(2a) of the recast APD. In this regard, UNHCR would like to recall its position⁸ that transit alone is not a “sufficient” connection or a meaningful link in the light of Article 38(2a) of the recast APD unless there is a formal agreement for the allocation of responsibility for determining refugee status between countries with comparable asylum systems and standards⁹. Transit is often the result of fortuitous circumstances and does not necessarily imply the existence of any meaningful link or connection. Therefore, UNHCR would like to suggest when transposing the requirements laid down in Article 38 of the recast APD in to the AGIPA to explicitly refer to Recital 44 of the directive highlighting that “...where the applicant, due to a sufficient connection to a third country as defined by national law, can reasonably be expected to seek international protection in that third country, (...)”.

Recommendations:

UNHCR recommends amending the AGIPA with additional provisions establishing a methodology by which the Police and Border Guard Board satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant.

UNHCR also recommends amending the AGIPA with provisions stipulating the duty for the Police and Border Guard Board to provide the applicants with a document as described in Article 38(3b) of the recast APD.

⁷ Currently, the AGIPA only clarifies the competent national authority which may determine a safe third country – see for details Article 9(6) of the AGIPA. Available in English at: <https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/503072014004/consolide>

⁸ 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, pages 33-35, available at: <http://www.refworld.org/docid/4c63ebd32.html>

⁹ See more details: UN High Commissioner for Refugees (UNHCR), *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, available at: <http://www.refworld.org/docid/51af82794.html>

Finally, UNHCR recommends amending the formulation provided in Article 9(1) of the AGIPA, to ensure its compliance with Recital 44 of the recast APD.

Article 1(10) of the Law Proposal: designation of safe country of origin

11. According to the Law Proposal, Article 9(7) of the AGIPA will be modified as follows:

“If a person (applicant) can safely and legally travel to a part of a country, s/he gains admittance to that part of the country and s/he can reasonably be expected to settle there, it is possible to designate this part of the country of origin as safe, following the requirements provided in sections 3-5 of the present article”.

12. UNHCR notes with concern that the proposed modification is not in accordance with Article 37 of the recast APD, which allows Member States to designate only the entire country of origin as safe, but not a part of it. Likewise, the current wording of Article 9(7) is not compliant with the recast APD, as it foresees a possibility to designate a part of the country of origin or third country *as safe*.
13. UNHCR would like also to note that the proposed modification¹⁰ incorporates the elements of two different legal concepts: the *safe country of origin* and the *internal flight or relocation alternative*. In view of UNHCR, it is necessary to distinguish these two concepts in the national legislation. While the *safe country of origin* concept is a presumption that certain countries can be designated as generally safe for their nationals and is to be applied as a procedural tool to accelerate examination of an application in very carefully circumscribed situations¹¹, the concept of *internal flight or relocation alternative* can only arise in the context of an assessment of the application for international protection on its merits; it cannot be used to deny access to refugee status determination procedures. A consideration of internal flight or relocation necessitates regard for the personal circumstances of the individual claimant and the conditions in the country for which the internal flight or relocation alternative is proposed¹².

Recommendation: UNHCR recommends revoking both the proposed new modification as well as the current Article 9(7) of the AGIPA.

14. With regard to national designation of countries as safe countries of origin, Articles 36 and 37 of the recast APD define the criteria to be applied, and the circumstances and sources of information to be taken into account. The recast APD does not prescribe the authority responsible for the national designation of third countries as safe countries of origin, nor the modalities for national designation. However, the use of the term ‘national designation’, and the

¹⁰ According to the explanatory note to the Law Proposal, the proposed modification of Article 9(7) of the AGIPA is based on Article 8 of the recast QD, which outlines criteria for application of the internal protection, also known as “*internal flight or relocation alternative*”.

¹¹ UN High Commissioner for Refugees (UNHCR), *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, page 65, available at: <http://www.refworld.org/docid/4bab55752.html>

¹² 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, see Item 4. Available at: <http://www.refworld.org/docid/3f2791a44.html>

requirement to notify the Commission of countries which have been nationally designated, suggests a formal act of designation which is executed independently of and prior to its application in the examination of any particular individual application. In this regard UNHCR notes that Article 9(6) of the current AGIPA specifies only the body which is entitled to take a decision on national designation of a safe country of origin. There is no, however, any provision in the AGIPA which would require the adoption of a transparent and formal act of national designation as foreseen by Article 37 of the recast APD.

Recommendation: UNHCR recommends amending the AGIPA with a provision specifying a duty of the Police and Border Guard Board to adopt a formal act with the list of countries which are nationally designated as safe countries of origin.

Article 1(15) of the Law Proposal: Obligation to apply “without delay”

15. According to the Law Proposal, Article 14(1) of the AGIPA will be modified as follows:

“An application for international protection shall be submitted to the Police and Border Guard Board without delay upon arrival to Estonia. The application shall be registered without delay, but no later than within three working days.”

16. UNHCR notes that similarly with the proposed provision, also the present wording of Article 14(1) of the AGIPA requires applying for asylum *without delay* [emphasis added] upon arrival to Estonia. In view of UNHCR, this requirement is not consistent with international refugee law or the EU legislation. Although asylum-seekers (including persons who may have international protection needs but are intending to seek asylum elsewhere or at a later date, and those who have not yet had an effective opportunity to seek asylum) do not have an unfettered right to choose their country of asylum, there is also no obligation that they shall seek asylum at the first effective opportunity¹³. Additionally, the fact that a person chooses not (or not yet) to apply for asylum in a particular country does not mean that they are not a refugee to whom international obligations and UNHCR’s mandate apply¹⁴.

17. In this context it must also be stressed that the principle of *non-refoulement*¹⁵ is not conditional upon recognized refugee status or an express asylum

¹³ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, para 3(i), see *supra* footnote 8. See also UNHCR, *Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, <http://www.refworld.org/docid/3fe9981e4.html>, para. 11; and UNHCR Executive Committee (“ExCom”) Conclusion No. 15 (XXX) – 1979, *Refugees without an Asylum Country*, <http://www.refworld.org/docid/3ae68c960.html>, paras (h)(iii) and (h)(iv).

¹⁴ This reflects the principle that recognised refugee status is declaratory rather than constitutive: “a person is a refugee within the meaning of the 1951 Convention as soon as s/he fulfils the criteria contained in the definition... S/he does not become a refugee because of recognition, but is recognized because s/he is a refugee.” 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/IP/4/ENG/REV. 3, <http://www.refworld.org/docid/4f33c8d92.html>, para 28.

¹⁵ Whether under the 1951 Refugee Convention, international human rights law, or customary international law.

application¹⁶. Rather, it is engaged “wherever there is conduct [for instance, during border checks, “pushbacks” or forced removals] exposing [an] individual to a risk of being subject to persecution or ill-treatment in another country.”¹⁷ Accordingly, “the absence of an explicit and articulated request for asylum does not absolve the concerned state of its *non-refoulement* obligation.”¹⁸

18. Neither, the EU recast APD exempts a State from the duty to carry out a mandatory check on possible *refoulement*: according to the last indent of Article 41(1) recast APD, Member States may make an exception from the right to remain in the country “*only where the determining authority considers that a return decision will not lead to direct or indirect refoulement in violation of that Member State’s international and Union obligations*”. Moreover, pursuant to Article 46(8) recast APD, Member States shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory. Likewise, the EU asylum legislation does not require applying for asylum “without delay upon arrival”, and instead calls for facilitation of access to the procedure by persons who has made an application for international protection¹⁹.
19. UNHCR notes with satisfaction that the proposed new Article 14(1) of the AGIPA introduces a new obligation to register asylum applications within a specific time frame. The proposed modification lacks, however, an indication on what action shall trigger the obligation of the Police and Border Guard Board to register asylum application. According to Article 6(1) of the recast APD, the “*registration*” shall take place no later than three working days after the application is “*made*”. In other words, the “*registration*” shall start as soon as a person has expressed his/her wish to apply for international protection. UNHCR understands that the rationale behind the registration is to give more effectiveness to the “*making*”. UNHCR stresses that the “*registration*” mentioned in Article 6 of the recast APD does not refer to the registration of fingerprints or other requested by the Eurodac Regulation²⁰. If that was the case,

¹⁶ The independence of the *non-refoulement* principle from formal refugee status has been affirmed by ExCom in Conclusion No. 6 (XXVIII) – 1977 at para (c), and Conclusion No. 82 (XLVIII) – 1997 at para (d)(i). See also UNHCR, *Summary Conclusions: The Principle of Non-Refoulement*, June 2003, <http://www.refworld.org/docid/470a33b00.html>, para 3; and Lauterpacht and Bethlehem, ‘The Scope and Content of the Principle of Non-Refoulement: Opinion’ in UNHCR, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, 2003, <http://www.refworld.org/docid/4bed15822.html>, especially pp 115 – 119.

¹⁷ UNHCR, *Oral intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy*, 22 June 2011, Application no. 27765/09, <http://www.refworld.org/docid/4e0356d42.html>, p 4.

¹⁸ UN High Commissioner for Refugees (UNHCR), *UNHCR intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents)*, 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, para 74, available at: <http://www.refworld.org/docid/510a74ce2.html>

¹⁹ See Article 6(2) of the recast APD.

²⁰ European Union: Council of the European Union, *Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice* (recast), 29 June 2013, L 180/1, available at:

the legislator would have made it clear by means of a cross reference. The registration mentioned above does not necessarily need to be a digital registration or a registration in a central national online database. In UNHCR's view, the above implies that the registration of an asylum claim is not necessary to trigger the responsibility of the Member State vis-à-vis the applicant for international protection. This obligation to register the applicant in a set time limit aims to secure the "making" of the application with a view to enhance effective access to asylum procedure for persons seeking international protection. This registration obligation seeks to give an effectiveness to the "making" since rights guaranteed by the EU Community Law requires "a procedural system which is easily accessible"²¹.

20. In UNHCR's view, protection from persecution implies that asylum-seekers and refugees should be granted access to refugee status determination procedures for the proper assessment of their claims, in accordance with certain standards and safeguards. This presupposes that s/he first granted access to safety and provide protection from *refoulement*, including non-rejection at the border and protection against indirect *refoulement*. While building upon the basic procedural guarantees to be respected in refugee status determination procedures, the Executive Committee in its conclusion No. 8 and UNHCR recommended the following: "*The competent official, to whom the applicant addresses himself at the border or in the territory of a Contracting State, should have clear instructions for dealing with cases which might fall within the purview of the relevant international instruments. He or she is required to act in accordance with the principle of non-refoulement and to refer such cases to a higher authority.*" The same Executive Conclusion further recommends: "*The applicant should receive the necessary guidance as to the procedure to be followed.*"²²
21. Along the same lines, the right to receive information and counselling on the procedures to be followed is a precondition for persons to exercise the right to asylum as enshrined by Article 18 of the EU Charter of Fundamental Rights and accordingly reflected in Article 8 of the recast APD. UNHCR wishes to stress that this is a requirement in the recast APD, which needs to be implemented effectively. UNHCR further recommends that Estonia also introduces into the AGIPA a possibility for legal representatives to lodge applications on behalf of asylum-seekers who do not have the possibility to do so (e.g. people kept in criminal prison and/or unable for medical reasons), in line with Article 6(4) of the recast APD.²³

<http://www.refworld.org/docid/51d296724.html>; European Union: Council of the European Union, Council Regulation (EC) No 2725/2000 of 11 December 2000 Concerning the Establishment of 'Eurodac' for the Comparison of Fingerprints for the Effective Application of the Dublin Convention, 11 December 2000, OJ L 316; 15 December 2000, pp.1-10, available at: <http://www.refworld.org/docid/3f4e40434.html>

²¹ Case C-327/02 – the Court of Justice of the European Union, 16 November 2004, paras 26-27:

²² UNHCR Executive Committee, Determination of Refugee Status, No. 8 (XXVIII) (1977).

²³ See 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, chapter 6, available at: <http://www.refworld.org/docid/4c63ebd32.html>.

Recommendations:

UNHCR recommends removing the words “without delay upon arrival to Estonia” from the text of the proposed new wording of Article 14(1) of the AGIPA.

Also, UNHCR recommends replacing “without delay” with the words “as soon as a person has expressed his/her wish to apply for international protection” in the second sentence of the proposed new Article 14(1) of the AGIPA, to bring the provision in line with Article 6(1) of the recast APD.

UNHCR further recommends introducing in the AGIPA the possibility for legal representatives to lodge applications on behalf of applicants who do not have the possibility to do so.

Article 1(21) of the Law Proposal: Asylum-seeking children

22. According to the Law Proposal, Article 17 of the AGIPA will be substantially modified and will stipulate the specifications of application proceedings involving both accompanied and unaccompanied children, including provisions, related to the process of appointing a representative for unaccompanied children seeking asylum. As was mentioned before, UNHCR is pleased with the initiative by the Estonian Government to introduce the principle of the best interests of the child at all stages of the asylum procedure and for all children irrespective of whether they are accompanied or not. This is in compliance with Article 3(1) of the UN Convention on the Rights of the Child²⁴.
23. UNHCR notes that section 9 of the proposed Article 17 of the AGIPA provides that an unaccompanied child shall be appointed a representative (*esindaja*) in asylum procedures unless the child will reach the age of majority before a decision is taken by the Police and Border Guard Board. Section 10 of the proposed Article 17 further specifies that as a representative could act either “*an individual or organization that are trustworthy or have necessary knowledge and skills to represent an unaccompanied child*”. UNHCR notes that these requirements for appointing the representative are not in a full compliance with the recast APD. Pursuant to Article 25(1), “*organisations or individuals whose interests conflict or could potentially conflict with those of the unaccompanied minor shall not be eligible to become representatives*”. It is, therefore, necessary to introduce an additional safeguard into the AGIPA since only when there is no conflict of interests a representative can truly act in the best interests of the child.
24. In UNHCR’s view, in asylum procedures an independent and qualified guardian or representative shall be appointed **immediately** and free of charge upon arrival

²⁴ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, (hereinafter – “CRC”), available at: <http://www.refworld.org/docid/3ae6b38f0.html>. Article 3(1) of the CRC provides that “*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*”.

of the child at the border²⁵. Because of their vulnerability, unaccompanied children seeking asylum should not be refused access to the territory and their claim should always be considered under the normal refugee determination procedure and not in accelerated procedures. Additionally, children who are the principal applicants in an asylum procedure are also entitled to a legal representative²⁶. Both, the guardian and the legal representative should be properly trained and receive continuous training and should support the child throughout the procedure and act in the child's best interests.

25. In UNHCR's view, the rights to legal assistance and representation are essential safeguards, especially in complex European asylum and migration procedures. Asylum-seeking children are often unable to articulate cogently the elements relevant to an asylum claim without the assistance of a qualified counselor, as they are not sufficiently familiar with the precise grounds for the recognition of refugee status and the legal system of a foreign country. Quality legal assistance and representation is, moreover, in the interest of States, as it can help to ensure that international protection needs are identified accurately and early. The efficiency of first instance procedures is thereby improved²⁷.
26. General Comment No. 6 of the Committee on the Rights of the Child requires that states appoint a guardian or adviser as soon as the unaccompanied or separated child is identified. The Committee further stipulates that the guardian should be involved in all actions taken in regard to the child. It specifically mentions the importance of the participation of the guardian in asylum proceedings, the identification of durable solutions, and the education and care arrangements for the child, and also for the guardian to have the necessary expertise and authority for these functions. A similar requirement is envisaged in Article 25(1) of the recast APD which provides that the representative of the unaccompanied child shall have the necessary expertise in the field of childcare as well as the ability to perform his/her duties in accordance with the principle of the best interests of the child.
27. If in some areas the guardian does not have the necessary expertise, supplementary measures, including the appointment of an adviser or legal representative, should be secured. Moreover, the Committee on the Rights of the Child requires that state-parties have review mechanisms in place to monitor the quality of the guardians to ensure that the best interests of the child are being represented, and to prevent abuse²⁸. UNHCR strongly supports this provision as due to their young age, dependency and relative immaturity, children should

²⁵ UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 33, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>. See also UN High Commissioner for Refugees, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, (Guidelines on Refugee Children), February 1997, paras 4.2 and 5.7, available at: <http://www.unhcr.org/refworld/docid/3ae6b3360.html>.

²⁶ CRC *General Comment No. 6 (2005)*, para. 36.

²⁷ UN High Commissioner for Refugees, *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, Comment on Article 13. Available at: <http://www.unhcr.org/refworld/docid/42492b302.html>.

²⁸ CRC *General Comment No. 6 (2005)*.

enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims²⁹.

Recommendations:

UNHCR recommends amending Article 17(9) of the AGIPA with a provision requiring to appoint an independent representative for the unaccompanied child “as soon as s/he is identified”. UNHCR further recommends amending Article 17(10) of the AGIPA to ensure that the interests of the appointed representatives are not in a conflict or could potentially conflict with those of the unaccompanied child.

Also, UNHCR recommends amending Article 17 of the AGIPA to ensure that unaccompanied children are entitled to a qualified free legal representative who could be either a state legal aid provider (*riigi õigusabi osutaja*) or another person who has a higher education, necessary skills to perform as a legal representative and who has received an appropriate training.

UNHCR therefore recommends amending Article 17 of the AGIPA with a provision establishing additional requirements for the representatives of children, including but not only, that representatives should have knowledge of the relevant provisions of the Estonian asylum legislation, as well as, receive training on basic concepts like “best interest of the child”, confidentiality, tracing, the refugee definition etc.

Article 1(30) of the Law Proposal: Actors of National Protection

28. UNHCR notes that the Law Proposal suggest to introduce a new Article 19¹ in the AGIPA. The wording of the proposed new Article 19¹ corresponds to Article 7 of the recast QD. The amendments stipulate that the protection must be effective and durable, specify who can provide such protection, and that actors of protection must be willing and able to enforce the rule of law. Reference is also made to “effective and durable” protection. UNHCR welcomes the proposed amendment, which is intended to meet the standards of the 1951 Convention. In particular, UNHCR appreciates that “willingness to protect” is not sufficient in the absence of the “ability to protect”.
29. In UNHCR`s opinion, non-state actors in principle should not be considered as actors of protection. Parties and organizations, including international organizations, do not have the attributes of a State and do not have the same obligations under international law. In practice, this means that their ability to enforce the rule of law is limited, and thus their ability to render protection. Hence, an international body does not qualify as capable of providing protection.

²⁹ UN High Commissioner for Refugees, *UNHCR comments on the European Commission’s Amended Proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast) COM (2011) 319 final*, January 2012, (“UNHCR comments on the amended recast APD”), para 17, available at: <http://www.unhcr.org/refworld/docid/4f3281762.html>. See also UN High Commissioner for Refugees, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, para 65, available at: <http://www.unhcr.org/refworld/docid/4b2f4f6d2.html>.

It is neither realistic nor practical to equate the protection generally provided by States with the exercise of a limited administrative authority and control over a territory by international organizations. Moreover, the Court of Justice of the European Union in *Abdulla*³⁰ stresses the importance of access to protection³¹.

Recommendation: UNHCR recommends deletion of the reference to international organizations in the proposed new Article 19¹.

Article 1(31) of the Law Proposal: Unfounded and manifestly unfounded applications

30. According to the Law Proposal, Article 20 of the AGIPA will be amended to provide a definition of unfounded and manifestly unfounded applications. The proposed amendments in Article 20 correspond to Article 32 of the recast APD. UNHCR recalls in the Executive Committee Conclusions No. 30 (XXXIV)³² of 1983 that only “clearly abusive” (i.e. clearly fraudulent) or “manifestly unfounded” (i.e. unrelated to the criteria for the granting of international protection) applications can be channeled into an accelerated procedure. National procedures for the determination of international protection needs may include special provisions for dealing expeditiously with applications which are considered to be so obviously without foundation so as not to merit a full examination at every level of the procedures limited to clearly abusive or manifestly unfounded claims. Making obviously improbable representations, which contradict sufficiently verified country of origin information, does not necessarily imply that the asylum claim is clearly abusive, fraudulent or unfounded.³³ UNHCR points out that, in line with the UNHCR Handbook (paragraph 196) the duty to ascertain and evaluate all the relevant facts should be considered a joint responsibility of the applicant and the examiner. This also applies generally, including in cases where there are inconsistencies or contradictions, where an applicant’s story appears unlikely, or insufficiently substantiated. An attempt should be made to resolve inconsistencies and contradictions, although minor inconsistencies or contradictions on issues irrelevant to the substance of the claim should not affect the credibility of the applicant. In particular, trauma and mental illness, feelings of insecurity, or language problems may result in apparent contradictions or insufficient substantiation of claims. If the applicant has made a genuine effort to substantiate his or her claim and cooperate with the authorities in seeking to obtain available evidence, and if the examiner is consequently satisfied as to the

³⁰ *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Union: European Court of Justice, 2 March 2010, at: <http://www.unhcr.org/refworld/docid/4b8e6ea22.html>.

³¹ 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 for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)*, 29 July 2010, p. 5 – 6, available at: <http://www.refworld.org/docid/4c503db52.html>.

³² UN High Commissioner for Refugees, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983, available at: <http://www.unhcr.org/refworld/docid/3ae68c6118.html>

³³ See *UNHCR comments on the amended recast APD*, para 21, see *supra* footnote 29.

applicant's general credibility, the applicant should be given the benefit of doubt.³⁴

Recommendation: UNHCR would thus recommend that the criteria in Item 4 of Article 20(2) of the AGIPA, referring to “...if the explanations and statements of the applicant are inconsistent ... or improbable...” be omitted; alternatively, UNHCR recommends that the criteria be reformulated to read “if the explanations and statements presented are clearly false or obviously improbable”.

31. UNHCR welcomes the proposed amendment to Article 20(1) of the AGIPA which provides that “*If, based on the available information, it is crystal-clear that the applicant does not meet the criteria for granting international protection as provided in the recast Qualification Directive, the application may be considered as manifestly unfounded*”. This amendment shows the understanding that the designation of an application as manifestly unfounded and the grounds for rejection of a claim, are two separate stages in the asylum procedure. The combined reading of Article 32(1) with Article 32(2) of the recast APD will ensure that an application is only rejected when the applicant is determined to neither qualify for refugee status nor for subsidiary protection under the QD.
32. UNHCR notes that the proposed new Article 20(3) of the AGIPA foresees the possibility to examine the manifestly unfounded applications in accelerated procedure, including at the border. As was already mentioned earlier in Item 7 of the present observations and in line with UNHCR's research project on the application of key provisions of the APD in selected Member States³⁵, UNHCR does not consider that the role of single determining authority should be performed by the police, border officials or other law enforcement authorities. In general, the police or border guards are not trained, equipped or resourced to conduct the personal interview and examine applications for international protection.
33. UNHCR considers it also necessary to ensure that personnel who examine applications and take decisions on international protection, including in accelerated procedure, receive initial and follow-up training³⁶. This would address some of the problematic issues identified by UNHCR's research such as, for instance, the fact that three Member States surveyed do not require interviewers to hold specific qualifications in refugee and/or human rights law or to have relevant experience, and do not provide compulsory training for them after recruitment³⁷. This is also a requirement under Article 4(3) of the recast

³⁴ 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, page 30, available at: <http://www.refworld.org/docid/42492b302.html>

³⁵ UNHCR, *Improving Asylum Procedures*, see *supra* footnote 11.

³⁶ UNHCR, *Promotion and Dissemination of Refugee Law*, para. 4, 1988, No. 51 (XXXIX) - 1988, at: <http://www.unhcr.org/refworld/docid/3ae68c4378.html>; UNHCR, *General Conclusion on International Protection*, para. o), 12 October 1987, No. 46 (XXXVIII) - 1987, at: <http://www.unhcr.org/refworld/docid/3ae68c95c.html>.

³⁷ UNHCR, *Improving Asylum Procedures*, part 2, section 5, see *supra* footnote 11.

APD, which require Member States to ensure that personnel of the determining authority are properly trained.

UNHCR thus strongly recommends amending the proposed Article 20(3) of the AGIPA to ensure that only employees of the Aliens Division of the CMD under the Police and Border Guard Board are assigned the decision-making responsibility in the accelerated and border procedures.

Article 1(33) of the Law Proposal: Subsequent applications

34. UNHCR re-affirms the position that subsequent applications can be subjected to a preliminary examination, to determine whether new elements have arisen which would warrant an examination of the substance of the claim. However, UNHCR recalls that such preliminary examination is justified only if the previous claim was considered fully on the merit. Consequently, UNHCR considers it inappropriate to treat claims as subsequent applications if they are submitted following a rejection based on an explicit withdrawal of an earlier claim. In such cases, UNHCR instead encourages national legislation to provide for the resumption or re-opening of the asylum procedure. In this connection, and more specifically in the context of implicitly withdrawn claims, UNHCR notes with satisfaction the introduction of an obligation in Article 28(1) of the recast APD that implicitly withdrawn claims can be rejected only after an adequate analysis of their merits in line with Article 4 of the Qualification Directive. In this framework, UNHCR observes that only implicitly withdrawn claims rejected after an adequate analysis of the substance can be considered as subsequent applications and channeled (along with other subsequent applications defined by Article 2(q) of the recast APD) into preliminary examination to establish if new elements or findings have arisen. UNHCR reiterates its position³⁸ that an explicitly withdrawn claim should be considered as a subsequent application – and in this case subject to an inadmissibility procedure – only if it is rejected after an analysis on its merits; or if the obligation to inform the applicant of the consequences of withdrawal is properly applied under Article 12(1a) of the recast APD.

UNHCR thus recommends the introduction of a further safeguard in the AGIPA, to ensure that an asylum application which was rejected without an analysis on its merits shall not be considered a subsequent application.

UNHCR Regional Representation for Northern Europe
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³⁸ See *UNHCR comments on the amended recast APD*, para 22, see *supra* footnote 29.