

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

I. Introduction

1. The UNHCR Representation for Northern Europe (hereafter “RNE”) is grateful to the Constitutional Committee of the *Riigikogu* for the invitation to submit its observations on the Draft Law proposing to amend the Obligation to Leave and Prohibition on Entry Act and the Act on Granting International Protection 110 SE (*Väljasõidukohustuse ja sissesõidukeelu seaduse ja välismaalasele rahvusvahelise kaitse andmise seaduse muutmise seadus 110 SE*, 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 Convention, to any competent authorities regarding individual applications for international protection at any stage of the procedure”.

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>.

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.
5. UNHCR was afforded an opportunity to submit its observations to the initial version of the Draft Law in 2018 during the consultations by the Ministry of the Interior.⁹ UNHCR notes that its observations were referred to in the documentation accompanying the present Draft Law and that several of recommendations were incorporated and reflected in the present Draft Law. Nevertheless, we would like to reiterate several principles and draw the attention of the *Riigikogu* members to several issues that remain of concern and which may raise issues of compliance with international human rights and refugee law framework. These observations are based on the latest version of the Draft Law as of first reading in the *Riigikogu*.

II. The Draft Law

6. 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 Directive¹⁰ (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.
7. 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.¹¹ 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 administrative detention authorized by the court based on the lack of capacity by the Police and Border Guards Board to carry out the required procedures (N.B. without having regard to necessity and proportionality requirements); (ii) a possibility to use police stations as places of detention, (iii) a possibility to limit the rights to privacy and family unity in arranging accommodation of detained families, (iv) a possibility to reduce reception conditions to be provided for individuals and (v) a possibility to derogate from the regular procedure for delivery of procedural documents and decisions.
8. 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),¹² including, inter alia, amendments

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 UN High Commissioner for Refugees (UNHCR), *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*, 12 November 2018, available at: <https://www.refworld.org/docid/5c66ceb77.html>.

¹⁰ 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>.

¹¹ See pages 1 and 17-18 of the Explanatory Note.

¹² The Act on Granting International Protection to Aliens (2005), available in English at: <https://www.riigiteataja.ee/en/eli/518122017008/consolide>.

concerning the application of the Safe Country of Origin concept and introducing a new alternative to detention of asylum-seekers.

III. General Considerations

9. From the outset, UNHCR wishes to recall that in matters concerning derogations from human rights in time of public emergency, the international and the European human rights legal framework clearly sets specific and strict requirements. These requirements include an official proclamation of a public emergency that “threatens the life of a nation”, that derogations should not be inconsistent with other international obligations and that derogations should be proportionally strictly required by the exigencies of the situation (i.e. other means less restrictive of the rights should be first considered), including in terms of duration, geographical coverage and material scope, that derogations must be applied in a non-discriminatory manner and that such derogations must be notified to the United Nations Secretary General and the Secretary General of the Council of Europe.¹³ Therefore, all the measures proposed in the Draft Law have to undergo a review as to whether they are in line with international obligations.
10. Furthermore, UNHCR wishes to note the distinct standards of treatment as well as legal frameworks applicable to irregularly staying third-country nationals and asylum-seekers. According to the Explanatory Note to the Draft Law, the measures planned to be introduced in the case of a large influx are justified by the relevant provisions of the Return Directive and same measures are to be extended to applicants for international protection. As it is apparent from both its title and Articles 1 and 2(1), the Return 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.”
11. 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 follows, 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 In other words, 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.
12. For these reasons, 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

¹³ For more details see UN Human Rights Committee (HRC), *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, available at: <https://www.refworld.org/docid/453883fd1f.html> and European Court of Human Rights, *Guide on Article 15 of the European Convention on Human Rights, “Derogation in time of emergency”* updated on 31 December 2019, available at https://www.echr.coe.int/Documents/Guide_Art_15_ENG.pdf.

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>.

lays down standards for the reception of applicants for international protection, including detention in the European Union Member States (EU MS).

13. 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 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 whether it is a situation of emergency, the aim of the recast Reception Conditions Directive is to provide all asylum-seekers the reception conditions that meet requirements of the Charter of Fundamental Rights of the European Union (CFREU), the European Convention on Human Rights (ECHR) as well as other international human rights instruments.
14. In UNHCR's view, there are other alternative measures to addressing reception capacity constraints in situations of large numbers of asylum-seekers' arrivals, such as the centralization of the reception and 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 the EU and Globally*²¹ recommends that the European Union and its Member States adopt simplified and 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.
15. We wish to also recall that the 2001 Directive on temporary protection²² which was transposed through provisions of Section 5 of the AGIPA, also provides a potential response for situations of large influx of displaced persons in need of international protection. Temporary protection/stay arrangements do constitute one of the pragmatic 'tools' for international protection, complementary to the international refugee protection regime, being used at times to fill the gaps in the national response systems and capacity and providing immediate protection from refoulement and basic minimum treatment.²³

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>.

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 European Union: Council of the European Union, Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof, 7 August 2001, OJ L.212/12-212/23; 7.8.2001, 2001/55/EC, available at: <https://www.refworld.org/docid/3ddcee2e4.html>.

²³ UN High Commissioner for Refugees (UNHCR), *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, available at: <https://www.refworld.org/docid/52fba2404.html>.

IV. Specific observations

4.1 Safe country of origin concept

16. The Draft Law introduces several amendments providing that the Estonian Police and Border Guard Board (PBGB)²⁴ 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.
17. UNHCR notes that the designation of a third country as safe country of origin would allow Estonia to accelerate and/or conduct the examination of applications for international protection lodged by asylum-seekers who have the citizenship of this 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 countries of safe origin for whom there is a presumption that they do not qualify for international protection.
18. 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 Member States have designated²⁵ at national level certain third countries as safe countries of origin, in accordance with this Directive.
19. 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.
20. UNHCR is concerned, however, that Section 9(5) AGIPA fails to provide for the right of the asylum-seeker to be specifically 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, which also follows from the relevant ECJEU jurisprudence i.e. the right to be heard²⁶, there must be an opportunity for the asylum-seeker to rebut the presumption of safety both in law and practice before the adoption of any decision that does not grant the protection requested.²⁷ This entails that an applicant is informed about the intention to consider the concept of the safe country of origin in his/her case in advance e.g. during lodging of the application and/or substantive interview.
21. **UNHCR strongly recommends that Section 9(5) AGIPA explicitly specify that during the asylum interview an asylum-seeker is to be specifically informed that their country of origin is considered safe and provided with the possibility to rebut the presumption of safety.**
22. Using the present opportunity, UNHCR also wishes to reiterate²⁸ 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

²⁴ The national competent determining authority.

²⁵ 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.

²⁶ UN High Commissioner for Refugees (UNHCR), *UNHCR Manual on the Case Law of the European Regional Courts*, June 2015, 1st edition, page 96 available at: <https://www.refworld.org/docid/558803c44.html>.

²⁷ 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>.

²⁸ 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>.

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.

23. 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 tool for e.g. channeling asylum application into accelerated procedure²⁹, 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 procedure³⁰. Also, Article 8 of the recast Qualification Directive³¹ refers internal flight or relocation alternative and not the safe country of origin.

4.2. Extension of period of administrative detention

24. UNHCR welcomes that the Draft Law in its current version re-introduced the judicial review of ordering detention for 7 calendar days in an emergency situation. The proposed amendment retained the requirement 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*.³² However, the current wording of the Draft Law seem to suggest that the judicial review will be limited to acknowledging the "emergency situation and the inability of the Police and Border Guard Board to carry out the required procedures".
25. UNHCR would like to recall that seeking asylum is not an unlawful act.³³ 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.³⁴
26. 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

²⁹ 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>.

³⁰ 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>.

³¹ 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)*, 20 December 2011, OJ L 337/9-337/26; 20.12.2011, 2011/95/EU, available at: <https://www.refworld.org/docid/4f197df02.html>

³² 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.*

³³ UNHCR Guidelines on Detention, Guideline 1, para 11.

³⁴ *Ibid.*

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.

27. 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.³⁵
28. UNHCR wishes also 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 non-nationals, regardless of their residence status. While detention in the migration context is not prohibited under international and European law, it may be allowed only on limited grounds and provided specific safeguards are in place. Article 5 (Right to liberty and security) of ECHR and Article 6 (Right to liberty and security) of the CFREU provides substantive safeguards against arbitrary detention requiring that detention can only be resorted to when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose, as well as only after alternatives to detention are considered.³⁶ In particular, asylum-seekers, refugees and stateless persons face a heightened risk of arbitrary detention and specific international guarantees exist to protect them,³⁷ 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.³⁸
29. 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.³⁹ 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 Committee⁴⁰, administrative expediency is not a legitimate purpose for detention in light of the serious consequences it has for a human being.
30. **UNHCR recommends amending the draft law to retain a judicial review of detention that takes into consideration all safeguards under the international law, considering that the proposed wording of the Draft Law may lead to situations of arbitrary detention as it falls short of necessity and proportionality requirements.**

³⁵ See Case C-601/15 *PPU J.N.* [2016]; *Arslan*, para. 44 et seq.

³⁶ UNHCR Guidelines on Detention, Guideline 4.1 - 4.3.

³⁷ See Art. 31 of the Refugee Convention; UNHCR Guidelines on Detention, Guideline 7.

³⁸ UNHCR Guidelines on Detention, Guideline 2, para. 14.

³⁹ *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>.

⁴⁰ 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>.

31. As noted in UNHCR Comments on the initial Draft Law⁴¹, the proposed amendments do not provide for specific safeguards in relation to children. The 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.⁴² According to international standards⁴³ detention of children for immigration purposes falls short of legitimate purpose and therefore is never in the best interest of the child.
32. **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.**
33. UNHCR notes that the present Draft Law retained the 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 programs – 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. Delivery of documents

34. The proposed new subsections 4 and 5 of Section 31 of the Draft Law state that in an emergency situation and if the asylum seeker's whereabouts in Estonia are not known to the Police and Border Guard Board, the administrative act is considered delivered and in force if its heading and the number of the application is published on the website of the administrative body. The same applies for all other procedural documents.
35. Articles 22 and 23 of the recast Asylum Procedures Directive provide that the decisions on applications on asylum are to be in writing and, in case of rejection, include reasons in fact and in law. The Directive also includes a number of procedural guarantees with the aim to enable asylum seekers to exercise effective remedies. Asylum seekers must be informed of the procedure to follow and time frame in a language they understand or may reasonably be supposed to understand; receive the services of an interpreter, whenever necessary; be allowed to communicate with UNHCR or with organisations providing legal advice; be given access to the evidence used to take a decision on their application; be given notice of the decision within a reasonable time; and be informed of the decision in a language they understand or may reasonably be supposed to understand. This includes the right to be given notice of the decision either personally or through a legal adviser or counsellor.
36. Furthermore, the right to an effective remedy, as guaranteed by basic human rights standards, i.e. Article 13 of ECHR and Article 47 of the Charter of Fundamental Rights, as well as the Estonian Constitution

⁴¹ UNHCR Comments, available at: <https://www.refworld.org/docid/59ae9e5e4.htm>

⁴² 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>.

⁴³ UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005 (CRC/GC/2005/6) – paragraph 61, available at: <https://www.refworld.org/docid/42dd174b4.html> and UN Committee on the Rights of the Child (CRC), Report on the 2012 Day of General Discussion: The rights of all children in the context of international migration – paragraph 78, available at: <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>; UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, 16 November 2017, CMW/C/GC/4- CRC/C/GC/23, available at: <https://www.refworld.org/docid/5a12942a2b.html>.

requires that the remedy is accessible and sufficient to ensure an effective judicial protection. Considering that the deadline to appeal an asylum decision is only 10 days, the publication of a decision online that includes only a number of the application and the heading of the decision cannot be reasonably considered as being delivered to the asylum seeker. It should be taken into consideration that there might be also constraints on the availability of state legal aid in an emergency situation.

37. UNHCR would like to draw the attention of the *Riigikogu* to the already existing possibilities to deliver documents and decisions when a person's current whereabouts are not known. There is a provision in the current AGIPA that allows to consider documents delivered when these are delivered to the reception centre where the person is staying.⁴⁴ In emergency situations a similar approach could be taken with temporary accommodation or last known residence of a person.
38. **UNHCR recommends to modify the proposed additions of subsection 4 and 5 to Section 31 AGIPA so that the publication of information on the website is additional to and not a replacement of already existing methods of delivery of decisions and procedural documents.**

4.4. Use of facilities other than specialized centres for immigration detention

39. UNHCR welcomes that the current Draft Law does not allow placing persons for immigration detention in prisons. However, the Draft Law leaves the possibility to allow detention of asylum-seekers in other than the specialized immigration detention centres facilities like police stations.
40. As pointed in previous UNHCR comments, the use of facilities designed or operated as prisons or jails, should be avoided.⁴⁵ Also, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has repeatedly⁴⁶ 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).
41. 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.⁴⁷ This requirement, which reflects the specific legal status and situation of asylum-seekers, was recognized, *inter alia*, by the ECtHR in *Saadi v. the United Kingdom* which states that conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country".⁴⁸ The detention in such facilities shall not undermine the ability of asylum-seekers to pursue and to substantiate their asylum claim.
42. **UNHCR therefore recommends considering to include a provision stipulating that the conditions of detention facilities other than the immigration detention centre shall meet the requirements as provided in Sections 36³ and Section 36⁴ AGIPA.**

⁴⁴ Section 31 AGIPA.

⁴⁵ UNHCR Guidelines on Detention, Guideline 8, para 48.

⁴⁶ 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>.

⁴⁷ 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>.

⁴⁸ *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>.

4.5. Accommodation of families in case of detention

43. The proposed wording of Section 36⁵ (9) AGIPA allows 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*. It also provides that families would be kept together “at the first opportunity” and that the privacy of the family would be granted “to the largest possible extent”. 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.⁴⁹ UNHCR considers that the proposed wording appears to allow for unlimited state discretion to limit the right to family and private life, which raises issues under Article 8 of ECHR and Article 7 of the of CFREU and relevant principles established in the ECHR and CJEU, in particular that any interference with the right must pursue a legitimate aim, be necessary in a democratic society and proportionate to the legitimate aim pursued.⁵⁰
44. UNHCR would like to reiterate that in case of families with children, detention of children 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.⁵¹
45. **Accordingly, UNHCR recommends to bring the provisions of the Section 36⁵ (9) AGIPA in line with the recast Reception Conditions Directive and international standards governing derogations from human rights.**

4.6. Reducing reception conditions

46. 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.
47. 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 does not foresee the support and necessary assistance for asylum-seekers with special needs. Furthermore, the Reception Directive provides that education for minors should not be delayed more than three months from the date of lodging the application for international protection. In UNHCR’s view, both aforementioned conditions need to be accorded to asylum-seekers even in the situation of emergency.⁵²
48. **Therefore, UNHCR reiterates its recommendation to amend the Draft Law with provisions guaranteeing the right to education and special support for vulnerable asylum-seekers.**

⁴⁹ See Article 11(6) of the recast Reception Conditions Directive.

⁵⁰ Council of Europe: European Court of Human Rights, *Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life*, 31 December 2016, available at: <https://www.refworld.org/docid/5a016ebe4.html>.

⁵¹ UNHCR's position regarding the detention of refugee and migrant children in the migration context (2017), p.2. See *supra* fn. 34.

⁵² 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.

49. 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. Noteworthy is that in *Saciri v. Belgium*⁵³ 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 Representation for Northern Europe

Stockholm, 30 January 2020

⁵³ Case C-79/13, *Selver Saciri and others v. Belgium*, 27/02/2014.