

Observations by the United Nations High Commissioner for Refugees (UNHCR) Regional Representation for Northern Europe on the Concept Note of the Estonian Ministry of Justice from 24 November 2015 for the elaboration of a law proposal amending the Penal Code and the Law Enforcement Act

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (UNHCR RRNE) is grateful to the Estonian Ministry of Justice for sharing a copy of its Concept Note on the elaboration of a law proposal amending the Penal Code and the Law Enforcement Law of the Republic of Estonia (*Karistusseadustiku ja korraüksuseaduse muutmise seaduse eelnõu väljatöötamise kavatsus, 24.11.2015*, hereinafter – the Concept Note).
2. UNHCR understands that the Estonian Ministry of Justice has elaborated the present Concept Note in order to bring the national legislation in line with the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter – Istanbul Convention).¹ Additionally, as provided in the introductory part of the Concept Note, the Ministry of Justice seeks to incorporate the standards of the EU Anti Trafficking Directive², and regulate issues related to the resettlement of refugees and relocation of asylum-seekers in the context of the EU Council decisions addressing the situation in the Mediterranean.
3. UNHCR has a direct interest in law proposals in the field of asylum 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 problem of refugees.³ 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[.]”.⁴ UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention and in Article II of the 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as the “1951 Convention”).⁵ UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in the 1951 Convention,⁶ as well as by providing comments on legislative and policy proposals impacting on the protection and durable solutions for refugees.

¹ Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, November 2014, ISBN 978-92-871-7990-6, available at: <http://www.refworld.org/docid/548165c94.html>.

² European Union: Council of the European Union, *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*, 15 April 2011, OJ L. 101/1-101/11; 15.4.2011, 2011/36/EU, available at: <http://www.refworld.org/docid/50ec1e172.html>.

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

⁴ *Ibid.*, para. 8(a).

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 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, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

4. 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 (hereafter "TFEU"),⁷ 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".⁸ Secondary EU legislation also emphasizes the role of UNHCR. For example, Recital 22 of the recast Qualification Directive⁹ states that consultations with UNHCR "may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention". Also, Article 29 of the recast Asylum Procedures Directive¹⁰ 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".
5. UNHCR's involvement with the issue of trafficking is twofold. Firstly, the Office has a responsibility to ensure that refugees and asylum-seekers do not fall victim to trafficking. Secondly, the Office has a responsibility to ensure that individuals who have been trafficked and who fear being subjected to persecution upon a return to their country of origin, or individuals who fear being trafficked and whose claim to international protection falls within the refugee definition contained in the 1951 Convention are afforded the corresponding international protection.¹¹
6. Furthermore, to assist decision-makers in the determination of claims based on gender, sexual orientation and gender identity UNHCR has developed guidance contained in the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention* (Reissued, Geneva, 2011)¹²; *UNHCR's Guidelines on International Protection No.1: Gender-Related Persecution*¹³; *UNHCR's Guidelines on International Protection No. 2: "Membership of a Particular Social Group"*¹⁴; *UNHCR's Guidelines on*

⁷ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

⁸ European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997, Declaration on Article 73k of the Treaty establishing the European Community, available at: <http://www.refworld.org/docid/51c009ec4.html>.

⁹ 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; December 2011, pp 9-26, available at: <http://www.refworld.org/docid/4f197df02.html>.

¹⁰ 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) (recast Asylum Procedures Directive or recast APD)*, 29 June 2013, L 180/60, available at: <http://www.refworld.org/docid/51d29b224.html>.

¹¹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006, HCR/GIP/06/07, available at: <http://www.refworld.org/docid/443679fa4.html>

¹² UN High Commissioner for Refugees (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, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

¹³ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, in particular paragraphs 2-3, 9, 15-18, 24, 27 and 36-37, available at: <http://www.refworld.org/docid/3d36f1c64.html>.

¹⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, available at: <http://www.refworld.org/docid/3d36f23f4.html>.

*International Protection No. 6: Religion-Based Refugee Claims*¹⁵, *UNHCR's Guidelines on international protection no. 8: Child Asylum Claims*¹⁶ and *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity*.¹⁷

II. General comments

7. UNHCR welcomes the priority given by the Estonian Ministry of Justice to the issue of violence against women in Estonia and supports the efforts made to prepare Estonia for ratification of the Istanbul Convention. UNHCR considers the Convention as an important instrument for protecting women and girls from violence because it is the first time that gender-related persecution is explicitly mentioned in an international treaty. The Convention moreover underlines that gender-based violence should be recognized as a violation of human rights, but also as a form of persecution within the meaning of the 1951 Convention, and a violation for which refugee status should be granted.
8. The elaboration of the Concept Note provides an excellent opportunity for Estonia to develop and establish a broad policy framework for preventing and responding to gender-based violence against women and girls in Estonia, including persons of concern to UNHCR. Many asylum claims presented by women involve fear or experience of gender-based violence including by non-state actors.
9. In a Dialogue with refugee women in Finland, they raised **domestic violence** as the single most important issue facing all refugee communities. They told UNHCR about the impact of domestic violence, and the factors which contribute to it, in particular men's feeling of losing their status in exile.¹⁸ In addition to domestic violence, refugee women and girls may experience more specific and less common forms of gender-based violence, including **female genital mutilation**,¹⁹ **forced marriages or crimes of 'honour'** at the hands of their families and/or communities.
10. Likewise, when accommodated in detention facilities or reception centres with limited privacy and close proximity to strangers, these women and girls are at heightened risk of becoming victims of violence at the hands of others accommodated in the same facilities, in particular when they are considered by members of their own communities not to conform with gender norms. Away from their support networks, and often in crisis situations, women forced to move may be even more vulnerable to various forms of violence by smugglers, detention facility personnel, border guards, police officers, asylum officials, and reception centre staff.

¹⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees*, 28 April 2004, HCR/GIP/04/06, in particular paragraph 34, available at: <http://www.refworld.org/docid/4090f9794.html>.

¹⁶ UN High Commissioner for Refugees (UNHCR), *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, in particular paragraphs 12, 22, 33, and 52, available at: <http://www.refworld.org/docid/4b2f4f6d2.html>.

¹⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/01, in particular paragraphs 62-66, available at: <http://www.refworld.org/docid/50348afc2.html>.

¹⁸ UN High Commissioner for Refugees (UNHCR), *Protectors, Providers, Survivors: A Dialogue with Refugee Women In Finland*, October 2011, p.28, available at: <http://www.unhcr.org/4ec3d7606.pdf>.

¹⁹ See UN High Commissioner for Refugees (UNHCR), *Too Much Pain: Female Genital Mutilation & Asylum in the European Union - A Statistical Overview*, February 2013, available at: <http://www.refworld.org/docid/512c72ec2.html>.

11. Since some victims or potential victims of trafficking may fall within the definition of a refugee contained in Article 1A(2) of the 1951 Convention and may therefore be entitled to international refugee protection, the Concept Note provides a conducive environment for reviewing and, if necessary, amending the national asylum legislation with appropriate standards and procedural safeguards addressing the needs of victims of trafficking.
12. UNHCR wishes to add that refugees and asylum-seekers may be particularly at risk of falling victim to trafficking due to the vulnerable and volatile situations they often face. During Estonia's 1st cycle of the Universal Periodic Review (UPR) in February 2011, several States recommended Estonia to continue stepping up its efforts to combat trafficking, paying special attention to its victims.²⁰ UNHCR supports these recommendations and urges the Estonian Ministry of Justice to continue these efforts in cooperation with other relevant national stakeholders, including the Ministry of the Interior.
13. In particular, UNHCR would advise Estonia to develop standard operating procedures facilitating the prompt identification and referral of victims of trafficking to the asylum system, when appropriate. Moreover, refugee status determination procedures should be improved to ensure that asylum claims of victims of trafficking are fairly and appropriately examined. UNHCR's *Guidelines on Victims of Trafficking* provide useful guidance on the adjudication of asylum applications submitted by victims or potential victims of trafficking.²¹ Additionally, specialized programmes and policies to protect and support victims who cannot return to their countries of origin should be adopted.
14. In UNHCR's view, currently the Concept Note lacks a separate section, which would address the issues related to asylum-seeking and refugee women as described in previous paragraphs. The incorporation of such a section into the Concept Note will enable the Ministry of Justice as well as other relevant Estonian state institutions, i.e., the Ministry of the Interior, Ministry of Social Affairs, the Prosecutor General Office and the Police and Border Guard Board to ensure that the heightened vulnerabilities of asylum-seeking/refugee women and girls are specifically reflected in Estonian domestic policy and law.
15. The ratification of the Istanbul Convention by Estonia may also entail legislative changes in the *Act on Granting International Protection to Aliens* (AGIPA) since the convention has dedicated three articles (59-61) to the specific situation of refugee women and girls. For example, Article 60 of the Istanbul Convention requires from States Parties to ensure a gender-sensitive interpretation of each of the 1951 Refugee Convention grounds. Moreover, States Parties to the Convention shall ensure that gender-based violence against women is recognized as a form of persecution within the meaning of Article 1 A (2) of 1951 Refugee Convention as well as a form of serious harm giving rise to subsidiary protection status. Article 61 of the Istanbul Convention further entails the obligation for States Parties to take the necessary legislative and other measures aiming at respecting the principle of *non-refoulement* with regard to victims of violence against women who may fear persecution if returned and regardless of their status of residence.
16. UNHCR would like also to remind that elaboration of the concept note shall take into consideration the relevant standards of the EU asylum *acquis*. The latter requires, *inter alia*, EU Member States to develop and implement national guidelines (in relation to substantive and procedural issues) for asylum systems. In the context of Estonia this means that internal regulations of reception and detention centres for asylum-seekers will

²⁰ For example, a recommendation was made to "[R]einforce protection against trafficking in persons by adopting specific legislative measures to prevent, combat and punish human trafficking" (Canada) during the 1st cycle UPR examination of Estonia and enjoyed the support of Estonia. See: Report of the Working Group of the Universal Periodic Review: Estonia, A/HRC/17/17, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/EESession10.aspx>.

²¹ See *supra* footnote 11.

have to be reviewed and, if necessary, amended to ensure, for instance, separate accommodation and toilet facilities, lockable rooms and adequate lighting²². A 24/7 protection by guards, including female guards, should also help protecting victims. Appropriate training and formal procedures for intervention and protection should be in place in reception centres. Victims should also have access to specialized assistance services and information in relation to gender-based violence. Finally, monitoring and reporting mechanisms should be created. Involvement of the residents in reception centre committees which discuss these issues may also contribute to more awareness raising among residents and help in preventing and responding to incidents of violence against women and girls.²³

UNHCR recommendation:

- UNHCR recommends incorporating into the Concept Note a special section which includes Articles 60 and 61 of the Istanbul Convention and which promotes:
 - gender-sensitive interpretation of the 1951 Convention grounds, the concepts of persecution and serious harm and adoption of gender guidelines on the adjudication of asylum claims;
 - development of gender-sensitive reception and detention conditions;
 - relevant training of the PBGB staff and other relevant institutions, including such as the administration of the Vao reception centre for asylum-seekers and Harku Detention Centre, also awareness raising among reception/detention centres residents.
- UNHCR recommends analysing in the Concept Note the existing national asylum law and policy to ensure that it encompasses necessary standard operating procedures facilitating the prompt identification and referral of victims of trafficking to the asylum system as well as provisions ensuring that asylum claims from victims of trafficking are fairly and appropriately examined.

III. Implementation of Article 31 of the 1951 Convention

17. UNHCR notes with concern that there is a regular practice of applying penalties under Article 258 (1) of the Penal Code with regard to asylum-seekers who entered Estonia in an irregular manner. UNHCR has recorded a number of reports suggesting that criminal proceedings were initiated against asylum-seekers from Syria and Sudan and as a result fines and/or sentences of up to four months of conditional imprisonment were imposed. In UNHCR's view, such a practice, implies criminalising the seeking of asylum, contrary to international human rights law and refugee law.

18. Every person has the right to seek and enjoy in other countries asylum from persecution, serious human rights violations and other serious harm. Seeking asylum is not, therefore,

²²European 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 (hereinafter – recast Reception Conditions Directive or recast RCD), available at: <http://www.refworld.org/docid/51d29db54.html>, See Article 18 (3) and (4): “3. Member States shall take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises and accommodation centres referred to in paragraph 1(a) and (b) and “4. Member States shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment, within the premises and accommodation centres referred to in paragraph 1(a) and (b).

²³ Article 18 (7) and (8) of the RCD: “7. Persons working in accommodation centres shall be adequately trained and shall be bound by the confidentiality rules provided for in national law in relation to any information they obtain in the course of their work.” and “8. Member States may involve applicants in managing the material resources and non-material aspects of life in the centre through an advisory board or council representing residents.

an unlawful act.²⁴ In exercising the right to seek asylum, asylum-seekers are often forced to arrive at, or enter, a territory without prior authorisation. 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 are the main factors that influenced the drafters to include in the 1951 Convention provisions that asylum-seekers shall not be penalised for their illegal entry or stay²⁵, provided they present themselves to the authorities without delay and show good cause for their illegal entry or presence.²⁶

19. While not defined in Article 31, the term ‘penalties’ in the mind of the drafters appear to have had included measures such as prosecution, fine and imprisonment.²⁷ The meaning of ‘illegal entry or presence’ has not generally raised any difficult issue of interpretation. The former would include arriving or securing entry through the use of false or falsified documents, the use of other deception, clandestine entry, for example, as a stowaway, and entry into State territory with the assistance of smugglers or traffickers. ‘Illegal presence’ would cover lawful arrival and remaining after the elapse of a short, permitted period of stay (for example, in transit). The notion of ‘good cause’ has also not been the source of difficulty; being a refugee with a well-founded fear of persecution is generally accepted as a sufficient good cause, although this criterion is also considered relevant to assessing the validity of the reason why a refugee or asylum seeker might choose to move beyond the first country of refuge or transit.²⁸
20. In UNHCR’s view, the effective implementation of the obligation under Article 31 of the 1951 Convention requires concrete steps at the national level. In light of experience and in view of the nature of the obligation laid down in Article 31, States should take the necessary steps to ensure that asylum-seekers and refugees are not subject to any penalties on account of illegal entry or stay. Specifically, States should ensure that refugees benefiting from this provision are promptly identified, that no proceedings or penalties for illegal entry or presence are applied pending the expeditious determination of claims to refugee status and asylum, and that the relevant criteria are interpreted in light of the applicable international law and standards, as well as regional instruments such as the Reception Conditions Directive.²⁹

²⁴ Article 14, Universal Declaration of Human Rights, 1948 (UDHR); Article 22 (7) ACHR; Article 12(3), ACHPR; Article 27, American Declaration of the Rights and Duties of Man, 1948 (ADRDM); Article 18, Charter of Fundamental Rights of the European Union, 2000, (CFREU).

²⁵ The drafters of the Convention when referring to Article 31 have commented at the time, ‘A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. See Draft Report of the *Ad hoc* Committee on Statelessness and Related Problems. Proposed Draft Convention relating to the Status of Refugees: UN doc. E/AC.32.L.38, 15 February 1950, Annex I (draft Article 26) and Annex II (comments. p. 57).

²⁶ See UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, Article 31, available at: <http://www.refworld.org/docid/3be01b964.html>.

²⁷ For details on instances when the administrative detention is permitted see UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, Guideline 4, available at: <http://www.refworld.org/docid/503489533b8.html>.

²⁸ For details on interpretation of Article 31 and the notion of penalties see UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General*, 3 January 1950, E/AC.32/2, page 46, available at: <http://www.refworld.org/docid/3ae68c280.html> cited in UN High Commissioner for Refugees (UNHCR), *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection [Global Consultations on International Protection/Second Track]*, 1 October 2001, paragraph 29 available at: <http://www.refworld.org/docid/3bf9123d4.html>.

²⁹ See Articles 8 and 9 of the recast RCD, as well as the related UNHCR comments on these articles in UN High Commissioner for Refugees (UNHCR), *UNHCR Annotated Comments to Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, April 2015, pages 15-26 available at: <http://www.refworld.org/docid/5541d4f24.html>.

UNHCR recommendation:

- UNHCR recommends amending the Concept Note with a proposal to bring national legislation into compliance with Article 31 of the 1951 Convention. This could be done by amending the *Estonian Penal Code* with a safeguard clause or a provision ensuring that persons exercising the right to seek international protection (asylum) are exempted from any criminal liability for illegal entry or stay in accordance with Article 31 of the 1951 Convention and relevant EU Asylum acquis provisions as well as Article 18 of the EU Charter of Human Rights.

UNHCR Regional Representation for Northern Europe

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