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Stockholm, 11 February 2013

Notre/Our code: 049/ROBNC/2013

Dear Minister Ken-Marti Vaher,

Re: **The United Nations High Commissioner for Refugees observations on the proposed amendments to the Act on Granting International Protection to Aliens**

UNHCR would like to thank the Estonian Ministry of the Interior for the invitation to provide comments on a proposal to amend the Act on Granting International Protection to Aliens (*Välismaalasele rahvusvahelise kaitse andmise seaduse ja sellega seonduvalt teiste seaduste muutmise seadus, 354 SE I*).

As always, UNHCR appreciates the constructive relationship between Estonia and UNHCR, and we thank you for your consideration of this important matter.

We remain at your disposal for any clarifications required.

Yours sincerely,

Pia Prytz Phiri
Regional Representative

Mr Ken-Marti Vaher
Minister of the Interior

Cc: Mr. Rait Maruste
Parliament of Estonia, Constitutional Committee

Riigikogu Kantselei
Kuupäev 14. 02. 2013
Viit 1-5/12-504

The United Nations High Commissioner for Refugees observations on the proposed amendments to the Act on Granting International Protection to Aliens (*Välismaalasele rahvusvahelise kaitse andmise seadus, RT I 2006, 2, 3*)

I. Introduction

1. UNHCR would like to thank the Estonian Ministry of the Interior for the opportunity to present its comments on the Law Proposal to amend Act on Granting International Protection to Aliens (*Välismaalasele rahvusvahelise kaitse andmise seadus*) and other related legal acts (hereinafter – Law Proposal). This draft law was initiated by the Government of the Republic of Estonia on 14th January 2013 by letter nr 2-6/13-00049.

2. UNHCR has a direct interest in the law proposals relating to asylum, as the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek permanent solutions to the problems of refugees[1]. 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 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 Relating to the Status of Refugees (hereafter '1951 Refugee Convention'). Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ('UNHCR Handbook')[3] and subsequent Guidelines on International Protection[4]. This supervisory responsibility is reiterated in Article 35 of the 1951 Refugee

[1] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: http://www.unhcr.org/cgibin/texis/vtx/refworld/rwmain?docid=3ae6b3628 ("UNHCR Statute").
[2] *Ibid.*, paragraph 8(a).
[3] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1 January 1992, available at: http://www.unhcr.org/refworld/docid/3ae6b3314.html.
[4] UNHCR issues "Guidelines on International Protection" pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR Handbook and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

Convention, and Article II of the 1967 Protocol relating to the Status of Refugees[5].

3. 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")[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"[7]. Secondary EU legislation also emphasizes the role of UNHCR. The supervisory responsibility of UNHCR is specifically articulated in Article 21 of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status[8].

II. General comments

4. The observations below are based on a number of international and regional instruments with standards governing the reception and detention conditions of asylum-seekers, right to liberty and freedom of movement. Of particular relevance in the current context are the UNHCR's Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention from September 2012[9].

5. UNHCR understands that the main goal of the Law Proposal is to reorganize the current reception arrangements for asylum-seekers by merging the initial reception centre (*esmane vastuvõtukeskus*), which is under supervision of the Ministry for Social Affairs, with the expulsion centre (*väljasaatmiskeskus*), which is supervised by the Police and Border Guard Board. The aim of this reorganization is to ensure the detention of asylum-seekers either for the period of initial procedural actions (Article 15 of the Act on Granting International Protection to Aliens, hereinafter – "AGIPA"), or when it is necessary for the

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[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*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: http://www.unhcr.org/refworld/docid/4b17a07e2.html.

[7] European Union, *Declaration on Article 73k of the Treaty establishing the European Community*, OJ C 340/134 of 10.11.1997, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17: EN:HTML.

[8] European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, OJ L 326; 13 December 2005, pp. 13-34, ("*Asylum Procedures Directive*" *or* "*APD*"), available at: http://www.unhcr.org/refworld/docid/4394203c4.html. Article 21(c) in particular obliges Member States to 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 asylum at any stage of the procedure.*"

[9] UN High Commissioner for Refugees, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (hereafter"*UNHCR Guidelines on Detention*"), 2012, available at: http://www.unhcr.org/refworld/docid/503489533b8.html.

purpose of protecting public order or national security[10]. UNHCR further understands that opening of the initial reception centre and expansion of the expulsion centre are activities considered prioritized under the Government Action Programme for 2011-2015.

6. At the outset, UNHCR would like to remind that respecting the right to asylum[11] entails treatment in accordance with adequate reception conditions[12]. Reception conditions, as defined in EU law, are sets of measures related to the treatment of asylum-seekers from the time of the submission of their application until a final decision is taken with respect to their status. These measures refer to, *inter alia*, freedom of movement and detention, health care, employment, education, financial aid, accommodation, registration and documentation, and attention to individual special needs of children, women, elderly asylum-seekers and other groups. UNHCR believes that appropriate reception conditions for asylum-seekers are essential to ensure a fair and effective examination of protection needs. Furthermore, UNHCR's Executive Committee and the Global Consultations on International Protection have recognized that reception arrangements can be beneficial both to the State and to the asylum-seeker where they provide an opportunity for the asylum-seeker to attain a degree of self-reliance[13].

7. Within the European Union, the present minimum standards for the reception of asylum-seekers are provided in the Council Directive 2003/9/EC of 27 January 2003[14]. It is one of five pieces of European asylum legislation flowing from the objectives of the Amsterdam Treaty and the 1999 Tampere Conclusions. According to the European Court of Human Rights ("ECtHR"), this Directive establishes a positive obligation to provide accommodation and decent material conditions to asylum-seekers[15]. In its evaluation of 2007, the European Commission identified wide disparities in Member States' practice, notably in the

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[10] See Explanatory Memorandum to the Law Proposal, under Section II (*Seaduse eesmärk*), page 1.

[11] Article 18, European Union, Charter of Fundamental Rights of the European Union, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (OJ C 364/01), available at: http://www.unhcr.org/refworld/docid/3ae6b3b70.html

[12] UN High Commissioner for Refugees, UNHCR Statement on the right to asylum, UNHCR's supervisory responsibility and the duty of States to cooperate with UNHCR in the exercise of its supervisory responsibility. Issued in the context of a reference for a preliminary ruling addressed to Court of Justice of the European Union by the Administrative Court of Sofia lodged on 18 October 2011 - Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees, August 2012, C-528/11, at: http://www.unhcr.org/refworld/docid/5017fc202.html

[13] See UNHCR, *Reception of asylum-seekers, including standards of treatment in the context of individual asylum systems*, Global Consultations on International Protection, 4 September 2001, EC/GC/01/17, available at http://www.unhcr.org/refworld/docid/3bfa81864.html, and ExCom Conclusion No. 93 ((LIII) – 2002) on reception of asylum-seekers in the context of individual asylum systems, 8 October 2002, available at http://www.unhcr.org/refworld/docid/3dafdd344.html.

[14] 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, 2001/0091 (CNS), ("*Reception Conditions Directive or RCD*"), available online at: http://www.unhcr.org/refworld/docid/3ddcfda14.html.

[15] M.S.S. v. Belgium and Greece, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, para. 221, available at: http://www.unhcr.org/refworld/docid/4d39bc7f2.html.

application of this Directive to persons falling under the Dublin II Regulation[16]; the level and form of reception assistance provided, including health care; access to employment; free movement rights; identification of vulnerable persons and provision of care to meet their needs[17]. This was also documented in the study of the Odysseus network[18]. In December 2008, the European Commission proposed a recast of the Directive[19]. This recast proposal forms part of the second phase of building a Common European Asylum System ("CEAS"). UNHCR published its comments on the recast proposal in March 2009[20] and the European Parliament adopted its position on that proposal on 7 May 2009. However, after no final agreement was reached on the text in the Council, the European Commission on 1 June 2011 published an amended recast proposal of the Reception Conditions Directive (RCD)[21]. UNHCR provided extended commentary to the amended recast RCD in July 2012[22]. In October 2012, the Council adopted, without debate, the recast Reception Conditions Directive, on which agreement has been reached in substance with the European Parliament. The text will thus not change further, although it will enter into force based on the Parliament's approval only after publication in the Official Journal of the EU[23].

8. Estonia will be required to transpose the recast RCD into its national law within two years of the adoption. UNHCR strongly recommends that amendments to AGIPA proposed and adopted prior to the transposition phase are aligned with the recast RCD and international standards to avoid the need for subsequent revisions.

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[16] Council Regulation (EC) No 343/2003 of 18 February 2003 *establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, Official Journal ('OJ') L 050, 25/02/2003, p. 1-10, available at: http://www.unhcr.org/refworld/docid/3e5cf1c24.html, ("*Dublin II Regulation*").

[17] European Union: European Commission, *Report from the Commission to the Council and the European Parliament on the application of Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers*, 26 November 2007, COM(2007) 745 final, available online at: http://www.unhcr.org/refworld/docid/48abd56cd.html.

[18] Odysseus - Academic Network for Legal Studies on Immigration, *Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the EU Member States*, 2007, available online at: http://www.unhcr.org/refworld/docid/484009fc2.html.

[19] European Union: European Commission, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), 3 December 2008, COM(2008) 815 final, available online at: http://www.unhcr.org/refworld/docid/493e8ba62.html.

[20] UN High Commissioner for Refugees, UNHCR Comments on the European Commission's Proposal for a recast of the Directive laying down minimum standards for the reception of asylum-seekers (COM (2008)815 final of 3 December 2008), 13 March 2009, available online at: http://www.unhcr.org/refworld/docid/49ba8a192.html.

[21] European Commission, Amended proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum seekers (Recast), 1 June 2011, COM(2011) 320 final ("*the amended recast Reception Conditions Directive or amended recast RCD*"), available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0320:FIN:EN:PDF.

[22] UN High Commissioner for Refugees, *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), available at: http://www.unhcr.org/refworld/docid/500560852.html

[23] http://www.europarl.europa.eu/oeil/popups/summary.do?id=1232265&t=e&l=en

9. UNHCR notes that the Law Proposal suggests a number of significant changes, which will affect some of the most fundamental human rights and freedoms of asylum applicants, namely: right to liberty and security of person, freedom of movement, right to dignified standard of living. It is therefore important to ensure that the Law Proposal is subject to in-depth scrutiny to ensure full compatibility of its provisions with fundamental human rights, being general principles of EU law, as provided in the EU Charter of Fundamental Rights ("the EU Charter"), as well as obligations stemming from international law. Presently, some of the proposed changes (related to detention, adequate standard of living, access to the labour market) are not designed and organized in a manner which shall prepare the individual asylum-seeker both for successful integration in Estonia and for return to the country of origin in case of a negative decision on the application for asylum.

10. It is, also, important to bear in mind that any reception policy should include appropriate measures to enhance harmonious relationships with the local communities, for instance, by creating awareness of the problems of refugees and designing specifically targeted public information campaigns. Public opinion favourable to refugees and with confidence and trust in the asylum system is a key to the effective operation of any reception arrangement. The promotion of both is an important responsibility to be pursued in tandem with the arrangements themselves[24]. Such measures may also contribute to the preventing of acts of racism and xenophobia against asylum-seekers.

III. Specific comments

Proposed Article 11(4) AGIPA

11. UNHCR notes that the proposed provision relates to Article 13(4) of the present Reception Conditions Directive. It is suggested that if asylum-seekers had sufficient resources at the time when they were using the material reception conditions described in Article 32(1) AGIPA (except emergency care), they shall be obliged to reimburse these costs. The proposed Article 11(4) AGIPA seems to be also in compliance with Article 17(4) of the amended recast RCD, which states that "*Member States may require applicants to cover or contribute to the cost of the material reception conditions and of the health care..., if the applicants have sufficient resources, for example if they have been working for a reasonable period of time.*"

12. In general, UNHCR has no objections concerning this proposal: if asylum procedures can be operated swiftly and efficiently, with the requisite safeguards in place, reasonable levels of material assistance should not represent an excessive burden on the asylum state. UNHCR would like to note, however, the current text of AGIPA provides no details or clarification on what resources shall be considered sufficient, what governmental body shall be entitled to assess the financial conditions of the applicant and what are the safeguards protecting

[24] UNHCR, *Reception of Asylum-Seekers.* See footnote 13.

asylum-seekers against disproportionate interference into their right to an 'adequate standard of living' (Article 14(1)(b) RCD), 'necessary health care' (Article 15(1) RCD), and 'necessary medical or other assistance to applicants who have special needs' (Article 15 (2) RCD). In line with Article 26 of the recast RCD, UNHCR further believes that asylum-seekers should have the explicit right to appeal against decisions with regard to the granting, withdraw or reduction of their reception conditions. Without setting standards or defining what constitutes 'sufficient resources or sufficient means' in Article 11(4) AGIPA, requests for contributions could seriously undermine living standards of the asylum-seeker and his/her family.

UNHCR proposes amending the current Law Proposal with provisions establishing the concrete national standards for asylum-seekers contribution towards material reception conditions, which shall be proportionate to the costs incurred, and take into consideration the income of asylum-seeker, while not intending to endanger the living conditions of the asylum-seeker or his/her family.

Proposed Article 11(7) AGIPA

13. UNHCR notes that the proposed provision relates to Article 11 of the present Reception Conditions Directive, which establishes a maximum period of time when an asylum-seeker shall not have access to the labour market. Currently such a time limit is 12 months and it is accordingly reflected in Article 10[1] AGIPA. States taking part in UNHCR's Executive Committee, as well as in the Global Consultations on International Protection, have recognized that access to employment is in the interest of both the host country and the asylum-seeker[25]. It removes the incentive of unofficial employment, contributes to self-reliance, promotes integration in the host community for persons who will be permitted to remain and offers others an opportunity to develop their skills and experience. UNHCR therefore believes that asylum-seekers should have access to the labour market, in any case no later than six months after lodging their application, if a final decision on the claim has not been taken during this time[26].

[25] UNHCR, *Conclusion on reception of asylum-seekers in the context of individual asylum systems*, 8 October 2002, No. 93 (LIII) - 2002, available at: http://www.unhcr.org/refworld/docid/3dafdd344.html. See also page 1 of the report of the Meijers Standing Committee of experts on international immigration, refugee and criminal law, *CM1102 Redraft of Commission proposals recasting the Reception Conditions Directive (COM(2008)815) and the Asylum Procedures Directive (COM(2009)554)*, 24 March 2011, available at: http://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29336/20111014ATT29336EN.pdf.

[26] UNHCR's *Response to the European Commission's Green Paper on the Future Common European Asylum System*, September 2007, page 21, available at: http://www.unhcr.org/refworld/docid/46e159f82.html.

14. The European Commission has similarly concluded[27] that granting earlier access to the labour market promotes the social inclusion and self-reliance of asylum seekers, and avoids the loss of existing skills and dependency. For a host State like Estonia, it brings increased tax revenues and savings in accommodation and other support costs (cost savings being a stated aim of the joint statement) and reduces the risk of illegal work. As a result of such findings, Article 15(1) of the amended recast RCD obliges States to grant asylum-seekers access to the labour market, at the latest, after 9 months following the lodging of an asylum application. Considering the fact that the recast Reception Conditions Directive is in the final stages of adoption, UNHCR would advise the Estonian authorities to bring AGIPA in line with the amended recast RCD.

UNHCR recommends amending the Law Proposal by introducing a provision granting the access to the Estonian labour market at the latest after 9 months following the lodging of an asylum application.

Proposed Articles 36.1 – 36.4 AGIPA

15. UNHCR notes that the Law Proposal suggests amending AGIPA with four new articles, which shall regulate the grounds for detention and release of asylum-seekers in Estonia. UNHCR further notes that neither the new provisions proposed nor general provisions and safeguards in AGIPA, contains the requirement to examine the necessity of applying the administrative detention in each individual case (necessity test), and the requisite safeguards against arbitrariness or unlawfulness of detention, including, *inter alia*, a concrete maximum period for administrative detention of asylum-seekers. Moreover, the proposed set of amendments to AGIPA provides no provisions related to the use of alternatives to detention.

16. UNHCR would like to recall that freedom of movement and freedom from arbitrary detention is a fundamental human right[28]. Accordingly, detention of asylum-seekers should normally be avoided and **be a measure of last resort**[29]. As seeking asylum is not an unlawful act, any restrictions on liberty imposed on persons exercising this right need to be provided for in law, carefully circumscribed and subject to prompt review. Detention can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case[30].

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[27] *See European Commission staff working document accompanying the proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers - Impact Assessment {COM(2008) 815 final} {SEC(2008) 2945}* (3 December 2008, EC/2008/2944 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:2944:FIN:EN:PDF).

[28] See, e.g., Articles 3 and 9, Universal Declaration of Human Rights (UDHR); Article 9, UN International Covenant on Civil and Political Rights (ICCPR); Article 5(1), European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); Article 6, EU, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01) (hereinafter "Charter of Fundamental Rights of the EU");

[29] *UNHCR Guidelines on detention*, para 2. See footnote 9.

[30] *Ibid.*

17. International law provides substantive safeguards against *unlawful*[31] as well as *arbitrary* detention. "Arbitrariness" is to be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability[32]. To guard against arbitrariness, any detention needs to be **necessary**[33] in the individual case, **reasonable** in all the circumstances and **proportionate** to a legitimate purpose[34]. Further, failure to consider less coercive or intrusive means (alternatives to detention) could also render detention arbitrary[35]. The availability, effectiveness and appropriateness of alternatives to detention must be considered before recourse to detention[36].

18. As a fundamental right, decisions to detain are to be based on a detailed and individualized assessment of the **necessity to detain** in line with **a legitimate purpose**. The consideration of alternatives to detention 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. It must be shown that in light of the asylum-seeker's particular circumstances, there were not less invasive or coercive means of achieving the same ends[37]. Thus, consideration of the availability, effectiveness and appropriateness of alternatives to detention in each individual case needs to be undertaken[38]. **Mandatory or automatic detention is thus arbitrary** as it is not based on an examination of the necessity of the detention in the individual case[39].

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[31] See Guideline 3 of the *UNHCR Guidelines on Detention*, page 14.

[32] *Van Alphen v. The Netherlands,* HRC, Comm. No. 305/1988, 23 July 1990, para. 5.8, available at: http://www.ohchr.org/Documents/Publications/SDecisionsVol3en.pdf.

[33] The necessity requirement was expressed by the UN Human Rights Committee in its General Comment No.8 and a number of its decisions, and is reflected in Article 31(2).

[34] For more details, see Guidelines 4.1 and 4.2 of the *UNHCR Guidelines on Detention,* pages 16-21. Also, *A v. Australia*, HRC, Comm. No. 560/1993, 3 April 1997, paras. 9.2-9.4 (on proportionality), available at: http://www.unhcr.org/refworld/docid/3ae6b71a0.html.

[35] Guideline 4.3 of the *UNHCR Guidelines on Detention,* pages 22-24.

[36] *C v. Australia,* HRC, Comm. No. 900/1999, where the HRC observed that: "the State party has failed to demonstrate that those reasons justify the author's continued detention in the light of the passage of time and intervening circumstances. In particular, the State party has not demonstrated that, in the light of the author's particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party's immigration policies, by, for example, the imposition of reporting obligations, sureties or other conditions which would take account of the author's deteriorating condition. In these circumstances, whatever the reasons for the original detention, continuance of immigration detention for over two years without individual justification and without any chance of substantive judicial review was, in the Committee's view, arbitrary and constituted a violation of article 9, paragraph 1.", available at: http://www.unhcr.org/refworld/docid/3f588ef00.html.

[37] *Ibid*, para. 8.2.

[38] See, for example, *Sahin v. Canada, (Minister of Citizenship and Immigration)* [1995] 1 FC 214 available at: http://www.unhcr.org/refworld/docid/3ae6b6e610.html. See, also, WGAD, *Opinion No. 45/2006,* UN Doc. A/HRC/7/4/Add.1, 16 January 2008, para. 25, available at: http://www2.ohchr.org/english/bodies/hrcouncil/7session/reports.htm and WGAD, *Legal Opinion on the Situation regarding Immigrants and Asylum-seekers,* UN Doc. E/CN.4/1999/63, para. 69: *"Possibility for the alien to benefit from alternatives to administrative custody."* available at: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=1520 and WGAD, *Report to the Thirteenth Session of the Human Rights Council,* A/HRC/13/30, 15 January 2010, para. 65, available at: http://www.unhcr.org/refworld/docid/502e0fa62.html.

[39] See, for example, *A v. Australia,* above footnote 34 and *C v. Australia*, above footnote 36.

19. Appropriate screening or assessment tools can guide decision-makers in this regard, and also should take into account the special circumstances or **needs of particular categories of asylum-seekers** (like children, victims of trauma or torture, women, victims of trafficking or asylum-seekers with disabilities etc)[40]. Factors to guide such decisions can include the stage of the asylum process, the intended final destination, family and/or community ties, past behavior of compliance and character, and risk of absconding or articulation of a willingness and understanding of the need to comply. UNHCR would further recommend explicit exceptions to detention measures in relation to children, nursing mothers and women in the later stages of pregnancy, survivors of torture or sexual violence, and traumatized persons, in view of their special needs. In particular, it is UNHCR's opinion that asylum-seeking children should not be detained. Article 37 of the UN Convention of the Rights of the Child provides that State Parties are required to ensure that detention of minors will be used only as a measure of last resort and for the shortest period of time.

20. The fundamental right to liberty and security of the person, and the correlated right to freedom of movement, are also reflected in international refugee law[41]. In addition to Article 26, the 1951 Refugee Convention contains a non-penalization clause, which provides that even entry without authorization does not give the State an automatic power to detain under international refugee law. Article 31(1) of the 1951 Convention stipulates that refugees having "come directly" shall not be penalized for their "illegal entry or stay" if they present themselves to the authorities without delay and show good cause for their illegal entry or stay. The prohibition against penalization for illegal entry included in Article 31 applies to asylum-seekers[42].

21. A policy of prosecuting or otherwise penalizing, including through the use of detention, illegal entrants, those present illegally, or those who use false documentation, without regard to the circumstances of flight in individual cases, and the refusal to consider the merits of an applicant's asylum claim, amount to a breach of a State's obligations in international law[43]. Further, Article 31(2) of the 1951 Convention provides that States shall not apply restrictions to the movement of refugees or asylum-seekers except when it is considered necessary. Such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.

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[40] For more details, see Guideline 9 of the *UNHCR Guidelines on Detention,* pages 33-39.

[41] See, e.g. UN High Commissioner for Refugees, Global Consultations on International Protection/Third Track: Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems, 4 September 2001, EC/GC/01/17, available at: http://www.unhcr.org/refworld/docid/3bfa81864.html.

[42] In *R. v. Uxbridge Magistrates Court, ex parte Adimi*, at 527, a case involving an asylum-seeker who had used false documents to enter the United Kingdom prior to lodging his application for asylum, the High Court of the UK concluded: "That Article 31 extends not merely to those ultimately accorded refugee status but also to those claiming asylum in good faith (presumptive refugees) is not in doubt." Upheld in *R. v. Asfaw* [2008] UKHL31, at para 26.

[43] Guy Goodwin-Gill, "Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection", in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) at page 219 (paras. 11-12).

22. UNHCR would like to remind also that the right to asylum is recognized as a basic human right[44]. In exercising this right, asylum-seekers are often forced to arrive at, or enter, state territory without prior authorization. The position of asylum-seekers often thus differs fundamentally from that of ordinary migrants in that they may not be in a position to comply with the legal formalities for entry, not least because they may be unable to obtain the necessary documentation in advance of their flight, e.g., because of their fear of persecution or the urgency of their departure[45]. This element, as well as the fact that many asylum-seekers have experienced traumatic events[46], needs to be taken into account in determining the justifiability of any restrictions on freedom of movement or liberty based on irregular entry or presence.

23. The guarantee of the right to liberty and security is also reflected in Article 5 ECHR, which is applicable to "everyone" within a State's jurisdiction, irrespective of nationality or immigration status. Article 5 also explicitly states that "no one" shall be deprived of the right to liberty save in prescribed cases. As with the right to liberty and security of the person in international human rights law, as summarized above, any deprivation of liberty must (i) be lawful and (ii) not be arbitrary under Article 5(1)(f) of the ECHR.

24. The ECtHR has also held that where the lawfulness of detention is in issue, including the question of whether a "procedure prescribed by law" has been followed, the ECHR refers essentially to national law, although **the State party also needs to ensure that any deprivation of liberty is in keeping with the purpose of Article 5**, which is to protect the individual from arbitrariness[47].

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[44] Article 18 of the Charter of Fundamental Rights of the EU enshrines the right to asylum. The scope of this right is broad and incorporates not only the substantive provisions of the 1951 Convention but also the procedural and substantive standards contained in the Union's asylum *acquis*. The protection it confers plainly goes beyond protection from *refoulement* and includes a right to apply for and be granted refugee or subsidiary protection status. There will thus be a breach of Article 18 not only where there is a real risk of *refoulement* but also in the event of (i) limited access to asylum procedures and to a fair and efficient examination of claims or to an effective remedy; (ii) treatment not in accordance with adequate reception and detention conditions and (iii) denial of asylum in the form of refugee status or subsidiary protection status, with attendant rights, when the criteria are met. See UNHCR, *N.S. v. Secretary of State for the Home Department in United Kingdom; M.E. and Others v. Refugee Application Commissioner and the Minister for Justice, Equality and Law Reform in Ireland - Written Observations of the United Nations High Commissioner for Refugees*, 1 February 2011, C-411/10 and C-493/10, available at: http://www.unhcr.org/refworld/docid/4d493e822.html. The right to seek and enjoy asylum is also recognized in Article 14 of the UDHR. Read together, the right to asylum and the right to liberty and security of the person give rise to a presumption against detention for asylum-seekers.

[45] See UN Working Group on Arbitrary Detention, Report to the Seventh Session of the Human Rights Council, A/HRC/7/4/, 10 January 2008, at para. 53: "[C]riminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary [and therefore arbitrary] detention." Available at: http://daccessddsny.un.org/doc/UNDOC/GEN/G08/100/91/PDF/G0810091.pdf?OpenElement.

[46] As recognized by *M.S.S. v. Belgium and Greece*, at paras. 232-233. See footnote 15.

[47] *Amuur v. France*, ECtHR, App. No. 19776/92, 25 June 1996, at para 50, available at: http://www.unhcr.org/refworld/docid/3ae6b76710.html; *Lokpo and Touré v. Hungary*, ECtHR, App. No. 10816/10, 20 September 2011, at para. 17, available at: http://www.unhcr.org/refworld/docid/4e8ac6652.html.

25. In relation to detention for the purposes of expulsion, the ECtHR has held that any deprivation of liberty under the second limb of Article 5(1)(f) will be justified **only so long as deportation or extradition proceedings are in progress**. As stated in *Chahal v. the United Kingdom*, and subsequent cases, if deportation proceedings are "not prosecuted with due diligence, **the detention will no longer be permissible under Article 5(1)(f)**."[48]

26. Similarly to international human rights and refugee law, the prohibition against detaining asylum-seekers solely on the grounds that they have applied for asylum is also reflected in EU law, most notably in Article 18 of the Asylum Procedure Directive (APD)[49]. Furthermore, the second phase instruments (the amended recast RCD) limit detention of asylum-seekers, in particular by reiterating the principle that Member States shall not hold a person in detention *"for the sole reason that he/she is an applicant for international protection (...)"*[50]. The amended recast RCD further limits detention of asylum-seekers by introducing in Article 8(2) a necessity test (*"When it proves necessary and on the basis of an individual assessment of each case"* and *"if other less coercive alternative measures cannot be applied effectively"*). Moreover, the same article lays on Member States obligation to ensure that rules concerning alternatives to detention, such as regular reporting to the authorities, the deposit of a financial guarantee, or an obligation to stay at an assigned place, are laid down in national law[51]. In case of vulnerable applicants, the amended recast RCD provides an additional safeguard requiring that vulnerable persons shall not be detained unless it is established that their health, including their mental health, and well-being, will not significantly deteriorate as a result of the detention.

In order to bring AGIPA in line with the international refugee and human rights law and EU asylum *acquis*, UNHCR recommends amending the proposed Article 36[1] with a new paragraph, as follows:

"The detention of asylum-seekers is inherently undesirable and shall be used only as a last resort when it proves necessary on the basis of an individual assessment of each case and if other less coercive alternative measures cannot be applied effectively."

Additionally, UNHCR urges the Estonian Government to incorporate into the text of AGIPA a provision requiring that "detention shall be for as short a period as possible and shall only be maintained for as long as the grounds set out in Article 36[1] AGIPA are applicable.".

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[48] See *Chahal v. the United Kingdom*, ECtHR, App. No. 22414/93, 15 November 1996, at para. 113, available at: http://www.unhcr.org/refworld/docid/3ae6b69920.html; *Louled Massoud v. Malta*, ECtHR, App. No. 24340/08, 15 November 1996, at para. 60, available at: http://www.unhcr.org/refworld/docid/3ae6b69920.html.

[49] Article 18 APD provides: "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum." Further, Article 31(2) also provides that: "Contracting States shall not apply to the movements of such refugees (including asylum-seekers) restrictions other than those which are necessary, and that any restrictions shall only be applied until such time as their status is regularized, or they obtain admission into another country."

[50] Article 8(1) of the amended recast RCD. See footnote 21 above.

[51] Article 8(4) of the amended recast RCD.

UNHCR would further recommend providing explicit exceptions to detention measures in relation to applicants with specific needs. In particular, the detention of children shall be prohibited.

Proposed Article 36¹(1) AGIPA

27. UNHCR notes that the proposed new Article 36¹(1) AGIPA establishes nine grounds for detention of asylum-seekers in Estonia, as follows:

1) for identification of personality or verification of identity;
2) for determination or verification of citizenship;
3) for checking the legal grounds for entry or residence in the country;
4) for establishing important circumstances relevant to the asylum proceedings;
5) if there is good reason to believe that an asylum-seeker has committed a serious crime in a foreign state;
6) an asylum-seeker has repeatedly or seriously violated the internal procedure rules of the accommodation centre for asylum-seekers or the official premises of the Police and Border Guard Board;
7) an asylum-seeker fails to comply with the surveillance measures applied to him or her, or fails to perform other duties provided by law;
8) detention of person is necessary in the interests of protection of national security or public order;
9) for transferring of an asylum-seeker in accordance with the Dublin II Regulation.

28. UNHCR is seriously concerned that the proposed grounds for detaining asylum-seekers in Article 36¹(1) AGIPA are much wider than those permissible under international and European law and, in effect, allow for an almost unlimited use of detention during the asylum procedure.

29. As was already explained in paragraphs 17-18 above, the detention can only be exceptionally resorted to for a legitimate purpose. Without such a purpose, detention will be considered arbitrary, even if entry was illegal[52]. The purposes of detention ought to be clearly defined in legislation and/or regulations[53]. In the context of the detention of asylum-seekers, there are three purposes for which detention may be necessary in an individual case, and which are generally in line with international law, namely[54]:

a) To protect public order:
- *To prevent absconding and/or in cases of likelihood of non-cooperation;*
- *In connection with accelerated procedures for manifestly unfounded or clearly abusive claims;*

[52] *A v. Australia*, above footnote 34, para 9.
[53] WGAD, Report to the Tenth Session of the Human Rights Council, 16 February 2009, A/HRC/10/21, para. 67, available at: http://www.unhcr.org/refworld/docid/502e0de72.html.
[54] For more details regarding each of the purposes, please see *UNHCR Guidelines on Detention*, pages 17-19, footnote 9.

- For initial identity and/or security verification;
- In order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention.

b) To protect public health;

c) To protect national security.

30. The ECHR explicitly limits the grounds of detention: sub-paragraphs (a) to (f) of Article 5(1) contain an exhaustive list of grounds upon which persons may be deprived of their liberty[55]. Article 5(1)(f) only permits the State to restrict the liberty of third-country nationals in an immigration context, either (i) to prevent an individual from effecting an unauthorized entry or (ii) with a view to deportation or extradition.

31. With regard to the specific grounds provided in Item 8 of Article 36[1](1) AGIPA, UNHCR is of the view that they are in line with the two legitimate purposes for detention in the asylum context, namely national security and public order. UNHCR therefore agrees with Item 8 of Article 36[1](1) AGIPA and proposes to place this ground first.

32. UNHCR also agrees with the reference to "identity" in Item 1 of Article 36[1](1) AGIPA, for instance in cases where identity is undetermined or in dispute and where there are indications that the applicant used false or forged documents and/or is uncooperative in establishing his/her identity or intends to mislead the authorities. On the other hand, the simple inability to produce identification documents should not be automatically interpreted as an unwillingness to cooperate, or an assessment that the individual is at risk of absconding.

33. UNHCR notes, however, that while nationality is usually part of someone's identity, it is a complicated assessment and as far as it relates to stateless asylum-seekers, it should be undertaken in a proper procedure[56]. Moreover, statelessness of an applicant may lead to indefinite detention. UNHCR, thus, recommends deleting Item 2 of Article 36[1](1) AGIPA.

34. In UNHCR`s view, the grounds expressed in Item 3 of Article 36[1](1) AGIPA go beyond the legitimate purposes of national security or public order. UNHCR is seriously concerned that Item (3) could, depending on its implementation and application, create a risk of widespread detention in the context of border procedures and result, contrary to Article 31(1) of the 1951 Refugee Convention,

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[55] See, e.g., *Saadi v. the United Kingdom*, para. 43; *Witold Litwa v. Poland*, ECtHR, App. No. 26629/95, at para. 49.

[56] UNHCR and the Office of the High Commissioner for Human Rights (OHCHR), *Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions*, May 2011 (Global Roundtable Summary Conclusions), para 6, available at: http://www.unhcr.org/refworld/docid/4e315b882.html. See also, UNHCR, *Guidelines on Statelessness No.2: Procedures for Determining Whether an Individual is a Stateless Person*, 5 April 2012, HCR/GS/12/02, available at: http://www.unhcr.org/refworld/docid/4f7dafb52.html.

in the penalization of asylum-seekers, who enter Estonia in an irregular manner. In UNHCR's view, it is important for Estonian national legislation and administrative practice to recognize the specific legal situation of asylum-seekers, who are claiming the fundamental human right to asylum[57], which entitles them to safeguards additional to those of other aliens, who enter or are otherwise present in Estonia in an irregular manner. When detention takes place "*for checking the legal grounds for entry or residence in the country*" the sole reason for detention may in practice be that a person is an applicant for asylum. This is contrary to Article 17(1) APD[58], pursuant to which "*Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum*" as well as to Article 8(1) recast RCD. Identification of protection needs of an asylum-seeker is a question that should be determined by the International Protection Division of the Estonian Police and Border Guard Board, not by the Border Guard Department which does not meet the criteria of a determining authority established by Article 4(1) APD. UNHCR therefore urges the deletion of Item 3 in Article 36¹(1) AGIPA.

35. As regards Item 4 of Article 36¹(1) AGIPA, UNHCR notes that this provision goes beyond the permissible grounds in the UNHCR Guidelines on Detention[59] and could potentially allow for detention of significant numbers of asylum-seekers for long periods. Item 4 permitting detention "*for establishing important circumstances relevant to the asylum proceedings*" could be interpreted as covering the whole asylum procedure. UNHCR suggests changing the wording to bring this provision in line with the spirit of UNHCR's Guidelines on Detention: "*in order to record, within the context of a preliminary interview, the elements on which the application for asylum is based, which could not be obtained in the absence of detention*". In order to accommodate the legitimate interests of Estonia to tackle clearly abusive claims, UNHCR would only agree with this ground provided that the strict maximum time limits are established in AGIPA, so as to ensure that detention on the basis of this ground is not used for purposes of administrative convenience.

36. Item 5 of Article 36¹(1) AGIPA permits to detain those asylum-seekers who may have committed a serious crime in a foreign state. In UNHCR`s view, the scope of the present provision is covered by the detention grounds provided in Item 8 of Article 36¹ (1) AGIPA. UNHCR therefore recommends merging these grounds into one provision and deleting Item 5 as a separate ground.

37. UNHCR notes that Items 6 and 7 of Article 36¹(1) AGIPA stipulate excessive and far-reaching preconditions for detention. For example, an asylum-seeker may be detained if "*he or she has repeatedly or seriously violated internal regulations of the accommodation centre for asylum-seekers*" or "*if the applicant fails to comply with the surveillance measures applied with respect to him or her, or fails to perform other duties provided by law.*" UNHCR considers that these grounds are

[57] Article 18 EU Charter, see footnote 44 above, and UN General Assembly, Article 14 *Universal Declaration of Human Rights*.
[58] See footnote 8.
[59] Guideline 4.1 of the *UNHCR Guidelines on Detention*, pages 16-19. See footnote 9.