

Comments by the United Nations High Commissioner for Refugees (UNHCR) on the Memorandum of 6 December 2013, proposing Criminalization of Refugee Espionage

I. Introduction

1. UNHCR is grateful to the Ministry of Justice of Finland for the invitation to comment on the Memorandum proposing a criminalization of so-called “refugee espionage”.
2. UNHCR has a direct interest in law proposals in the field of international protection, 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 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 Convention’). Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (‘UNHCR Handbook’) and subsequent Guidelines on International Protection.³ This 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.⁴

II. Observations

3. UNHCR welcomes the initiative of the Finnish Ministry of Justice aimed at bringing the national criminal legislation in line with criminal law in other Nordic countries and most Western European countries to ensure that laws relating to the unauthorized collection of information consider the protection needs of refugees and asylum-seekers. UNHCR would like to convey the following observations on the Memorandum.
4. According to the Memorandum, the Finnish Security Intelligence Service has since 2011 reported an increased number of incidents where the authorities of foreign States have tried to control their citizens residing in Finland. The Memorandum further states that the aim of refugee espionage is to obtain

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/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628> (“UNHCR Statute”).

² *Ibid.*, paragraph 8(a).

³ 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>.

⁴ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention.”

information that can be used to exert pressure on the refugee or relatives of the refugee, for the purpose of threat or persecution. Some of the means used during refugee espionage, such as illicit observation and coercion, are already in the existing Finnish Criminal Code. The Memorandum notes that Norway and Sweden have explicitly criminalized refugee espionage. Other countries (like Denmark, Germany and Switzerland) consider refugee espionage to be included in the general provisions on espionage. According to the Memorandum, existing Finnish legislation does not criminalize all activities that can fall within the scope of refugee espionage. The early stages of the espionage, when information of the person is gathered, that later can be used to threaten the person in order to prevent further political activism or practicing of religion, do not, according to the Memorandum, fall within the current criminalization in Finland.

5. The Memorandum asks the question, which are the legal interests that should be protected by the criminalization of refugee espionage. International human rights law guarantees everyone the right to privacy and protects individuals from arbitrary or unlawful interference. Effective measures need to be taken to ensure that information concerning a person's private life does not reach the hands of third parties that might use such information for purposes incompatible with international human rights law.⁵ Such purposes could be threats to life, torture, inhuman or degrading treatment.
6. The right to freedom of opinion and expression is guaranteed under articles 19 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), which affirm that everyone has the right to hold opinions without interference, and to seek, receive and impart information and ideas of all kinds through any media and regardless of frontiers. At both the international and regional levels, privacy is also unequivocally recognized as a fundamental human right. The right to privacy is enshrined in Article 12 of the UDHR, Article 17 of the ICCPR and in Article 16 of the Convention on the Rights of the Child. At regional level, the right to privacy is protected by the European Convention on Human Rights, Article 8. Despite the widespread recognition of the obligation to protect privacy, the specific content of this right was not fully developed by international human rights protection mechanisms at the time of its inclusion in the above-mentioned human rights instruments. Privacy can be defined as the presumption that individuals should have an area of autonomous development, interaction and liberty, a "private sphere" with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals. The right to privacy is also the ability of individuals to determine who holds information about them and how that information is used. The right to privacy is often understood as an essential requirement for the realization of the right to freedom of expression. Undue interference with individuals' privacy can both directly and indirectly limit the free development and exchange of ideas.⁶

⁵ UN High Commissioner for Refugees (UNHCR), *UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information*, 31 March 2005, available at: <http://www.refworld.org/docid/42b9190e4.html>

⁶ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (A/HRC/23/40), available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf, see also UN General Assembly draft resolution 1 November 2013 *The right to privacy in the digital age*, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/68/L.45

7. The Human Rights Committee has provided important guidance in its General Comment No. 16 on the interpretation of Article 17 of the ICCPR. The Committee emphasizes that the right reflected in Article 17 must be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons.⁷ This guidance should be read together with that provided by the Committee in its General Comment No. 31 on the nature of the general legal obligation imposed on States Parties. There, the Committee has specified that “the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.”⁸
8. In the asylum and refugee-specific context, the right to privacy and its confidentiality requirements vis-à-vis the country of origin and its national authorities are especially important. The claim of an asylum-seeker or refugee inherently supposes a fear of persecution by his or her national authorities, alternatively, that these authorities are unable or unwilling to protect the individual from persecution by non-State actors. The safety and well-being of asylum-seekers and refugees can thus be seriously jeopardized if protection of information is not ensured. Article 25 of the 1951 Refugee Convention, which concerns administrative assistance, also reflects the fact that a refugee cannot rely on the national protection of his or her country of origin. It is intended to prevent a refugee from being exposed to persecution through contact with the authorities of his or her country of origin and to prevent family members and/or associates who still remain in the country of origin being placed at risk.⁹ Both criminalization of refugee espionage and confidentiality rules concerning asylum as well as measures aimed at preventing contacts between a refugee and the authorities of the refugee’s country of origin can be seen as having the same goal of protecting the refugee.
9. However, while UNHCR agrees that the proposed criminalization of refugee espionage will enhance the protection of asylum-seekers and refugees in Finland, it will be important to formulate the corresponding legal provision(s), and its travaux préparatoires, in a way which ensures that asylum-seekers and refugees do not risk losing their protection in Finland on grounds not permissible under international refugee law. For example, in situations when an asylum-seeker or refugee would be suspected of involvement in espionage, the possibility of duress, e.g. through pressure on family members in the country of origin, would need to be considered when examining the criminal case, as well as any consequences on their eligibility for refugee status or or their entitlement to protection against expulsion. Hence, UNHCR recommends that a thorough

⁷ General Comment No. 16, Article 17 (The right to respect of privacy, family, home and correspondence, and protection of honour and reputation), available at: <http://www.globalhealthrights.org/wp-content/uploads/2013/10/General-Comment-16-of-the-Human-Rights-Committee.pdf>

⁸ General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant : . 2004-05-26. CCPR/C/21/Rev.1/Add.13. (General Comments), available at: <http://www.unhcr.ch/tbs/doc.nsf/0/58f5d4646e861359c1256ff600533f5f>

⁹ UN High Commissioner for Refugees (UNHCR), *UNHCR Advisory Opinion on the Rules of Confidentiality Regarding Asylum Information* , 31 March 2005.

review of the possible impact of the proposed provision(s) on the protection of asylum-seekers and refugees under international refugee and human rights law be undertaken, to ensure that the protection against *refoulement* guaranteed today under Finnish law is not – unintentionally – undermined.

III. Conclusion

10. In view of the above, UNHCR welcomes the proposed criminalization of refugee espionage in the Criminal Code of Finland and wishes to express support for the continued drafting of the actual proposal.

UNHCR Regional Representation for Northern Europe
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