

## UNHCR Comments on the Drafts of Criminal and Criminal Procedure Codes of the Republic of Armenia

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### Introduction

The United Nations High Commissioner for Refugees (UNHCR) Representation in the Republic of Armenia is highly grateful for the opportunity to participate in the Public Discussions on *the drafts of Criminal and Criminal Procedure Codes of the Republic of Armenia*, which were organized by the Ministry of Justice of the Republic of Armenia and the Council of Europe and took place in December 2019. UNHCR appreciates this opportunity to provide its comments and expertise. In this regard, UNHCR stands ready to have further exchanges on enhancement of refugee protection safeguards and continue working closely with all relevant authorities, notably the Government and the National Assembly of the Republic of Armenia (the Parliament) on strengthening of refugee protection in Armenia.

UNHCR offers these comments as the Agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees and other persons within its mandate, and for assisting governments in seeking permanent solutions to the problem of refugees. As set forth in its Statute, UNHCR fulfils its international protection mandate by, *inter alia*, "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."<sup>1</sup> UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees (hereafter the 1951 Refugee Convention) according to which State parties undertake to "co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention".<sup>2</sup> A similar provision is included in Article II of the 1967 Protocol relating to the Status of Refugees.<sup>3</sup>

Thus, UNHCR's comments and availability for further consultations in the context of this legislative process are based on these international instruments. Moreover, the provisions of Article 81(1) of the Constitution of the Republic of Armenia (hereinafter the Constitution) require consideration for the practice of bodies operating on the basis of international human rights treaties, ratified by the Republic of Armenia, when interpreting the provisions concerning basic rights and freedoms enshrined in the Constitution. As described above, UNHCR has a very similar legal status as considered by Article 81(1) of the Constitution and as such is seeking to be treated analogously.<sup>4</sup>

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<sup>1</sup> See para 8(a) of the Statute of the Office of the High Commissioner for Refugees, as revised by General Assembly res. 58/153, 24 February 2004; available at: <https://bit.ly/2p47kBr>.

<sup>2</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <https://www.refworld.org/docid/3be01b964.html>.

<sup>3</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <https://www.refworld.org/docid/3ae6b3ae4.html>.

<sup>4</sup> Constitution of the Republic of Armenia - Article 81. Basic Rights and Freedoms and International Legal Practice:

"1. The practice of bodies operating on the basis of international treaties on human rights, ratified by the Republic of Armenia, shall be taken into account when interpreting the provisions concerning basic rights and freedoms enshrined in the Constitution."; available at: <https://www.president.am/en/constitution-2015/>.

## General remarks

UNHCR highly appreciates the continuous and systematic efforts of the relevant state agencies, the Government and Parliament of the Republic of Armenia aimed at enhancing the national legislation, including legal provisions relating to refugee protection. Although the Criminal and Criminal Procedure Codes are not primarily in the scope of UNHCR's attention, during the last decade there were a number of asylum-seekers and refugees, who have applied for asylum being apprehended at the border for irregular entry or were requested for extradition by their country of origin/habitual residence. There were also a few cases when asylum-seekers and refugees have been prosecuted for other criminal offences. UNHCR provides its recommendations focusing particularly on important safeguards in criminal and expulsion proceedings, which derive from its experience of monitoring the application of the relevant domestic provisions in practice. UNHCR expects that the proposed legislative amendments will effectively address the interpretation issues related to the non-penalization principle, improve the current practice,<sup>5</sup> and ultimately improve protection environment for asylum-seekers and refugees in the Republic of Armenia.

UNHCR provides these comments based on the versions posted on the Unified Website for Publication of Drafts of Legal Acts (e-draft.am) on 19.11.2019 (the draft Criminal Code of the Republic of Armenia) and on 08.11.2019 (the draft Criminal Procedure Code of the Republic of Armenia).

## Specific observations

### 1. Draft Criminal Code of the Republic of Armenia:

#### 1.1 Article 13. Extradition or transfer of persons who committed a crime

UNHCR notes that Article 13(4) of *the draft Criminal Code of the Republic of Armenia (the draft Criminal Code)* provides for safeguards against extradition for persons in need of international protection, as follows:

*“4. Persons who allegedly committed a crime or convicted persons, who are in the Republic of Armenia, shall not be extradited to another State if there are well-founded reasons to believe that extradition is being sought for investigation or application of a punishment for reasons of their race, religion, nationality, membership of a particular social group or political opinion.”*

UNHCR is concerned that this provision does not cover some other categories of persons in need of protection: (i) asylum-seekers; (ii) persons who, besides fearing prosecution or punishment for a common law crime, may also have “*well-founded fear of persecution*”<sup>6</sup>; and (iii) persons falling under the extended refugee definition of Article

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<sup>5</sup> See, UN Committee against Torture, *Concluding observations on the fourth periodic report of Armenia*, 26 January 2017, CAT/C/ARM/CO/4, 27 January 2017, para. 41: *While noting the amendments expanding the provision on exemption from liability for illegal border crossing (art. 329 (3) of the Criminal Code) to all persons seeking asylum and not only to those who are considered for “political asylum”, the Committee is concerned at reports that this provision is not always respected in practice and that some asylum seekers are still detained for illegal border crossing*, available at: <https://bit.ly/36w482l>; see also United States Department of State, *2017 Country Reports on Human Rights Practices - Armenia*, 20 April 2018, available at: <https://bit.ly/36JYedX>

<sup>6</sup> UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, para 58, available at: <https://www.refworld.org/docid/5cb474b27.html>

6(1)(2) of the Law of the Republic of Armenia on Refugees and Asylum (the Law on Refugees and Asylum).<sup>7</sup> All these categories of persons, which fall out of the scope of the current Article 13(4) of *the draft Criminal Code*, are protected against refoulement by virtue of Article 9 of the Law on Refugees and Asylum. Thus, a proper safeguard against violations of the principle of non-refoulement should take the form of a reference to Article 9 of the Law on Refugees and Asylum to avoid misunderstanding and ensure uniformity of practice.<sup>8</sup>

Furthermore, UNHCR also notes that the provisions relating to extradition had been withdrawn from *the draft Criminal Procedure Code of the Republic of Armenia*. UNHCR is also aware that the Ministry of Justice has developed a *draft Law on Legal Assistance in Criminal Cases of the Republic of Armenia* and Chapter 3 of this draft Law aims to stipulate extradition-related rules, requirements and procedures in a comprehensive manner. In this regard, UNHCR considers that Article 13 of *the draft Criminal Code* is redundant, and its deletion should be considered in order to avoid confusion and ensure smooth application of the relevant provisions and protection safeguards in practice.

**UNHCR recommends** deleting Article 13 from *the draft Criminal Code* or making a direct reference to Article 9 of the Law on Refugees and Asylum, which sets out the various categories of protected persons.

### *1.2 Article 64. Expulsion of foreign citizens from the territory of the Republic of Armenia*

This provision introduces “*expulsion*” as a new type of a criminal punishment in case of foreigners. According to this article, expulsion will apply as a main criminal punishment for minor and medium gravity crimes and an additional punishment for serious and particularly serious crimes. Although expulsion of foreigners is a sovereign right of Armenia, international human rights law contains safeguards for certain categories of individuals.

UNHCR welcomes that Article 64(3) does not allow the expulsion of asylum-seekers, refugees and other persons who should be protected against refoulement:

“3. *Those who may not be expelled from the territory of the Republic of Armenia are:*

- 1) *a person who was granted refugee status or asylum in the Republic of Armenia before committal of the crime;*
- 2) *a person seeking asylum at the time of sentencing;*
- 3) *a foreign citizen benefitting from the principle of non-refoulement in accordance with international treaties;*
- 4) *a person married to a citizen of the Republic of Armenia or to a person holding a special residency status in the Republic of Armenia or to a person permanently residing in the Republic of Armenia, prior to committal of the crime, or a person having custody over a child holding citizenship of the Republic of Armenia.”*

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<sup>7</sup> Armenia: Law No. HO-211-N of 2008 on Refugees and Asylum (2015) [Armenia], 27 November 2008, available at: <https://www.refworld.org/docid/4f1986412.html>.

<sup>8</sup> Detailed guidance on extradition and asylum nexus may be found at UN High Commissioner for Refugees (UNHCR), *Guidance Note on Extradition and International Refugee Protection*, April 2008, available at: <https://www.refworld.org/docid/481ec7d92.html>.

Nevertheless, UNHCR is concerned that Article 64 §3(1) refers only to refugees who have been granted protection “*before committal of the crime*”. If the person meets the refugee definition criteria, s/he should be recognized and treated as a refugee irrespective of the time of her/his recognition.

As for the provision concerning asylum-seekers (Article 64 §3(2), the reference to “*the time of sentencing*” may lead to interpretation that this safeguard does not apply in case of an asylum application submitted after the sentencing. Thus, it is important to highlight that seeking asylum is a universal human right.<sup>9</sup> Each asylum application should be considered on the merits following a fair, effective and efficient asylum procedure. In this regard, timing of submission of an asylum application, such as before, during or after the sentence, should not be considered as a factor undermining protection of asylum-seekers in the expulsion procedure and/or hindering access of such persons to the asylum procedure and the consideration of their asylum claim on its merits.

Therefore, UNHCR proposes to consider Article 9 of the Law on Refugees and Asylum,<sup>10</sup> which stipulates explicit and comprehensive provision on non-refoulement and possible exceptions in accordance with international standards. Therefore, it would be important that Article 64(3) of *the draft Criminal Code* refers explicitly to Article 9 of the Law on Refugees and Asylum as the absence of such a reference could lead to misunderstandings and a practice that might be at variance with the principle of non-refoulement as enshrined in Article 9(1) and (2) of the Law on Refugees and Asylum in transposition of Article 33 of the 1951 Refugee Convention, as well as with provisions in international human rights law providing for protection against refoulement, namely Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

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<sup>9</sup> The right to seek and enjoy asylum is affirmed in various regional legal instruments and is implemented in part by states' obligations to provide international protection to refugees in accordance with the 1951 Convention and its 1967 Protocol, as well as regional refugee law instruments. Article 14 of the Universal Declaration of Human Rights provides that '[e]veryone has the right to seek and to enjoy in other countries asylum from persecution'. Organization of American States, American Declaration on the Rights and Duties of Man, 2 May 1948, Article XXVII, [www.unhcr.org/refworld/docid/3ae6b3710.html](http://www.unhcr.org/refworld/docid/3ae6b3710.html), referring to the right to seek and receive asylum. Organization of American States, American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Article 22(7), [www.unhcr.org/refworld/docid/3ae6b36510.html](http://www.unhcr.org/refworld/docid/3ae6b36510.html), referring to the right to seek and be granted asylum. African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 12(3), [www.refworld.org/docid/3ae6b3630.html](http://www.refworld.org/docid/3ae6b3630.html), referring to the right to seek and obtain asylum. European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Article 18, [www.refworld.org/docid/3ae6b3b70.html](http://www.refworld.org/docid/3ae6b3b70.html) (EU Charter of Fundamental Rights), referring to the right to asylum to be guaranteed with due respect to the 1951 Refugee Convention and EU law.

<sup>10</sup> *Armenia: Law No. HO-211-N of 2008 on Refugees and Asylum (2015)* [Armenia], 27 November 2008, available at: <https://www.refworld.org/docid/4f1986412.html>.

#### **Article 9. Non-refoulement**

1. According to this Law and international law, the principle of non-refoulement is not returning a refugee in any manner whatsoever to the frontiers of territories where his/her life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group, political opinion or generalised violence, foreign aggression, internal conflicts, massive violations of human rights, or other serious events disrupting public order.  
The present provision does not apply to a refugee whom there are reasonable grounds for regarding as a danger to the security of the Republic of Armenia or who— having been convicted by a final judgment of a particularly serious crime— constitutes a danger to the community.
2. An asylum seeker may not be expelled from the territory of the Republic of Armenia prior to the making of a final decision on the asylum claim submitted by him/her pursuant to Article 47 of this Law.
3. A foreign national or stateless person may not be expelled, returned or extradited to another country where there is a danger, as per well-founded reasons, that he/she would be subjected to cruel and inhuman or degrading treatment or punishment, including torture.

**UNHCR recommends** amending Article 64(3(1 and 2) as follows:

*“Foreigners who shall not be expelled from the territory of the Republic of Armenia are:*

- 1) *asylum-seekers, refugees, and other persons who come under the purview of the provisions of Article 9 of the Law of the Republic of Armenia on Refugees and Asylum”.*

### *1.3 Article 432. Forgery of documents, stamps, seals, forms or sale or use of forged documents, stamps, seals, forms*

In order to ensure a harmonized application of the non-penalization clause specified in Article 443(5) of the draft *Criminal Code* (see para 1.4 below) and in Article 28(1) of the *Law on Refugees and Asylum*<sup>11</sup>, UNHCR suggests including a new paragraph in Article 432 of the draft *Criminal Code* to cover circumstances of irregular entry through use of insufficient, false or fraudulent documentation by asylum-seekers and refugees<sup>12</sup>.

UNHCR observes that in practice in Armenia some irregular border crossing cases concerning asylum-seekers and refugees both the offense of illegal border crossing and use of forged documents have been invoked. UNHCR wishes to emphasise that the main purpose of the protection envisaged by Article 31(1) of the 1951 Refugee Convention is the avoidance of penalization on account of irregular entry or irregular presence, provided the other conditions for exemption are present.<sup>13</sup> Irregular entry should therefore also include arriving or securing entry through the use of false or fraudulent documents, obtained by fraudulent means, or other methods of deception, arriving in or crossing the state border of Armenia outside official border crossing check points, as well as entry into Armenia with the assistance of smugglers or traffickers.<sup>14</sup>

<sup>11</sup> Armenia: Law No. HO-211-N of 2008 on Refugees and Asylum (2015) [Armenia], 27 November 2008, available at: <https://www.refworld.org/docid/4f1986412.html>.

Article 28(1): “Asylum-seekers and refugees shall not be subjected to criminal or administrative liability for illegal entry into, or presence in, the Republic of Armenia.”

<sup>12</sup> 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, comment to paragraph 2 of then-draft Article 24, [www.refworld.org/docid/3ae68c280.html](http://www.refworld.org/docid/3ae68c280.html), stating: “[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. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum.” *R v. Asfaw*, [2008] UKHL 31, United Kingdom: House of Lords (Judicial Committee), 21 May 2008, para. 9, [www.refworld.org/cases,GBR\\_HL,4835401f2.html](http://www.refworld.org/cases,GBR_HL,4835401f2.html); *Mahamad Arwah Abdi and Another v Minister of Home Affairs and others*, Case No: 734/2010, South Africa: Supreme Court of Appeal, 15 February 2011, para. 22, [www.refworld.org/cases,SASCA,50239bb62.html](http://www.refworld.org/cases,SASCA,50239bb62.html); see also: UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, p. 213, [www.refworld.org/docid/519b1fb54.html](http://www.refworld.org/docid/519b1fb54.html); UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on Draft Amendments to the Law of the Republic of Armenia on Refugees and Asylum and the Criminal Code of the Republic of Armenia Concerning the Non-Penalization Principle*, 12 November 2019, available at: <https://www.refworld.org/docid/5df895004.html>.

<sup>13</sup> Article 31(1) of the 1951 Refugee Convention provides:

*“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.*

<sup>14</sup> *R v. Asfaw*, [2008] UKHL 31, United Kingdom: House of Lords (Judicial Committee), 21 May 2008, para. 9, [www.refworld.org/cases,GBR\\_HL,4835401f2.html](http://www.refworld.org/cases,GBR_HL,4835401f2.html). I/A Court H.R., *The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope*

**UNHCR recommends** supplementing Article 432 of *the draft Criminal Code* with the following reference:

*“This Article shall not apply to asylum-seekers and refugees if they have had to use forged documents, stamps, seals, forms to enter the Republic of Armenia.”*

#### *1.4 Article 443. Illegal state border crossing*

Paragraph 5 of Article 443 of *the draft Criminal Code* states that:

*“This Article shall not be extended to victims of trafficking who cooperate with law enforcement bodies, as well as to asylum-seekers and refugees”.*

UNHCR is pleased to note that the observations it made in 2016 in relation to the interpretation and implementation of the non-penalization clause were taken into consideration during the preparation of *the draft Criminal Code*.<sup>15</sup> UNHCR welcomes that the new provision explicitly mentions that the non-penalization will apply not only to refugees, but to asylum-seekers as well, which will bring this provision in accordance with Article 28 of the Law on Refugees and Asylum.

UNHCR also notes that this Article is broadly focused on irregular entry and exit, though in the refugee context, the non-penalization principle relates to irregular entry only. Therefore, UNHCR suggests introducing amended wording to Article 443(5) of *the draft Criminal Code*.

**UNHCR recommends** amending Article 443(5) of *the draft Criminal Code* as follows:

*“This Article shall not be extended to victims of trafficking who cooperate with law enforcement bodies, as well as to asylum-seekers and refugees who have entered the Republic of Armenia without prescribed documents or without due authorization.”*

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of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights), Advisory Opinion OC-25/18 of May 30, 2018, Series A No. 25, para. 99, recalling that the right to seek and receive asylum imposes certain specific duties on States, including the obligation not to penalize or sanction for irregular entry or presence; Ghuman v. Registrar of the Auckland District Court, CIV2003-404-4373, New Zealand: High Court, 16 December 2003, para. 59, [www.refworld.org/cases/NZL\\_HC\\_40cec1694.html](http://www.refworld.org/cases/NZL_HC_40cec1694.html), according to Baragwanath J, Article 31(1) applies “to *“illegal entry or use of false documents” for entry purposes; but also [...] to “illegal presence and use of false documents to secure refugee status” [...] and to “illegal presence and use of false documents to maintain such presence” which requires the money needed to provide food and lodging that only charity, social welfare, dishonesty or hard work can provide’.*

<sup>15</sup> UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the Draft New Criminal Code of the Republic of Armenia with particular reference to the wording of Article 329(3) of the existing Criminal Code*, July 2016, available at: <https://www.refworld.org/docid/5a69a3304.html>; UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on Draft Amendments to the Law of the Republic of Armenia on Refugees and Asylum and the Criminal Code of the Republic of Armenia Concerning the Non-Penalization Principle*, 12 November 2019, available at: <https://www.refworld.org/docid/5df895004.html>.

## 2. Draft Criminal Procedure Code of the Republic of Armenia:

### 2.1 Articles 113 and 282 concerning sharing of information with the countries of origin of foreign nationals and stateless persons

Proposed Article 113(1) of *the draft Criminal Procedure Code of the Republic of Armenia (the draft Criminal Procedure Code)* provides for the obligation of the authority conducting the proceedings to inform, within 24 hours, the country of citizenship or habitual residence about an arrested foreign national or stateless person, and grounds and place of her/his detention.

Article 113(2) further enshrines the right of authorized representative of the country of nationality or habitual residence of the arrested person to contact or visit her/him.

Article 282(4) of *the draft Criminal Procedure Code* also stipulates the obligation of the Court to notify the country of origin or habitual residence of the placement of the execution order of the judgment with respect to a foreigner.

These articles guarantee the right of the foreigner concerned to seek consular assistance and the obligation of relevant state authorities to provide unimpeded access to this right and provision of consular assistance in accordance with the rules of international law on consular relations.<sup>16</sup> These provisions, while aimed at providing for additional guarantees for foreigners concerned, do not require a consent of such persons for sharing information on the fact of their arrest and whereabouts with the country of origin or habitual residence.

These provisions, if applied to asylum-seekers and refugees, can raise particular concerns. Sharing information with the country of origin/habitual residence regarding asylum-seekers and refugees, as well as persons expressing fears of persecution without having yet filed a formal asylum request, may potentially result in a violation of the principle of confidentiality, as provided for under Article 32(2) of the Law of the Republic of Armenia on Refugees and Asylum.<sup>17</sup>

The principle of confidentiality in asylum procedures derives from international human rights law, which guarantees everyone the right to privacy and protects individuals from arbitrary or unlawful interference.<sup>18</sup> Confidentiality in asylum procedures is particularly important because of the vulnerable situation in which asylum-seekers and refugees find themselves. Such situation inherently supposes a fear of persecution, often from the authorities of the country of origin and can be further jeopardized if protection of information is not ensured. It would be against the spirit and purpose of the 1951 Refugee Convention to share personal data or any other information relating to asylum-seekers with the authorities of the country of origin until a final decision of the asylum claim has been made. Potential threats to the safety of family members of an asylum-seeker or refugee in the country of origin would also be an additional important consideration.

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<sup>16</sup> Vienna Convention on Consular Relations, 24 April 1963, United Nations, Treaty Series, vol.596, No. 8638, p. 261.

<sup>17</sup> Armenia: Law No. HO-211-N of 2008 on Refugees and Asylum (2015) [Armenia], 27 November 2008, available at: <https://www.refworld.org/docid/4f1986412.html>.

Article 32(2): "State bodies listed in part 1 of this Article shall view the grant of asylum under the international obligations of the Republic of Armenia and under no circumstances shall information on an asylum-seeker or a refugee be shared with the authorities of the country of his/her nationality or former habitual residence during the application of this Law or any other legislative act of the Republic of Armenia on asylum and refugees."

<sup>18</sup> Article 12 of the Universal Declaration of Human Rights of 10 December 1948; Article 17 of the International Covenant on Civil and Political Rights; Article 16 of the Convention on the Rights of the Child; Article 8 of the European Convention on Human Rights.

### UNHCR recommends

- amending Articles 113(1), 113(2) and 282(4) of *the draft Criminal Procedure Code* to expressly provide that a detained foreign national or stateless person shall be effectively and timely informed about the right to seek consulate assistance and such assistance should be provided upon her/his request.
- considering a note in Articles 113 and 282 of *the draft Criminal Procedure Code* as follows:  
“Under no circumstances shall information on an asylum-seeker or a refugee be shared with the authorities of the country of her/his nationality or former habitual residence in accordance with Article 32(2) of the Law of the Republic of Armenia on Refugees and Asylum.”

## 2.2 Articles 107(4) and 410(1(1) concerning age determination

According to Article 410(1(1) of *the draft Criminal Procedure Code*, in case of criminal proceedings involving a child, the age of the child shall be established. Article 107(4) of *the draft Criminal Procedure Code* provides that age determination shall be carried out through obtaining conclusions of forensic medical and forensic psychology experts in case of absence of documents confirming the age.

While monitoring criminal prosecution practice related to unaccompanied children seeking asylum in Armenia, UNHCR observed cases where an accused claiming to be a child was treated as an adult pending determination of the age. Such an approach may potentially result in the violation of the human rights of the individual concerned and question the lawfulness of detention should an age assessment later reveal that the individual concerned is indeed a child. Therefore, it would be important to introduce an explicit safeguard indicating that any person claiming to be or reasonably supposed to be a child shall be treated as a child unless determined otherwise, and that in case of conflict or inconclusive evidence, the possibility to give the individual benefit of the doubt.<sup>19</sup>

Furthermore, it should be borne in mind that certain age-assessment methods can be frightening and traumatising for children and may even amount to inhuman and degrading treatment.<sup>20</sup> Therefore, it would be important to introduce specific procedural guarantees for the conduct of age-assessment examinations based on applicable international standards.<sup>21</sup>

<sup>19</sup> 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 Refugee Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, paragraphs 75-76; available at: <https://www.refworld.org/docid/4b2f4f6d2.html>; 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 31, available at: <https://www.refworld.org/docid/42dd174b4.html>; UN Committee on the Rights of the Child (CRC), *General comment No. 10 (2007): Children's Rights in Juvenile Justice*, paragraph 39, available at: <file:///C:/Users/borisevi/Downloads/G0741351.pdf>.

<sup>20</sup> Council of Europe Parliamentary Assembly (PACE) Resolution 2195 (2017), on *child-friendly age assessment for unaccompanied migrant children*, paragraph 5, available at: <https://bit.ly/2YX85cX>; European Court of Human Rights, *Yazg ul Yilmaz v. Turkey*, No. 36369/06, 1 February 2011.

<sup>21</sup> For further guidance on this, see, for example, Council of Europe, *Standards, guidance and current practices: Promoting Child Friendly Approaches in the Area of Migration*, December 2019, pages 23-26, available at: <https://bit.ly/2tuClijK>. Council of Europe, *Age assessment: Council of Europe member states' policies, procedures and practices respectful of children's rights in the context of migration*, September 2017, available at: <https://www.refworld.org/docid/59d203a14.html>; European Union: European Asylum Support Office (EASO), *EASO Age assessment practice in Europe*, December 2013, available at:



#### **UNHCR recommends**

- supplementing Article 107 or 410 or, alternatively, Chapter 32 [Expert examination] of *the draft Criminal Procedure Code* with a provision indicating that any person claiming to be or reasonably supposed to be a child shall be treated as a child unless determined otherwise, and in case of conflict or inconclusive evidence, the individual shall be applied the benefit of the doubt.
- supplementing Article 107 or 410 or, alternatively, Chapter 32 of *the draft Criminal Procedure Code* with procedural guarantees for the conduct of age-assessment examinations based on applicable international standards and guidance.

### *2.3 Article 61 concerning translation/interpretation services*

UNHCR commends the requirement of Article 61(2) of *the draft Criminal Procedure Code* that the translator/interpreter shall have proper knowledge of the language of proceedings and the language s/he is translating/interpreting from. However, during monitoring of asylum procedures, as well as criminal procedures conducted against asylum-seekers, UNHCR has observed challenges in identifying qualified translators/interpreters with proper knowledge of certain rare languages in Armenia. In some instances, interpreters from a language of the same language family have been engaged notwithstanding the limited knowledge of the individual of that language.

Considering the crucial importance of qualified interpretation and with a view to ensuring such in practice, it would, thus, be advisable to introduce a provision envisaging the possibility of distance interpretation by a professional outside of Armenia. Such distance interpretation would imply resorting to suitable means of communication and subsequent interpretation into Armenian in case the professional identified does not speak the language of the proceedings.

Furthermore, Article 61(4)(1) provides for the right of the interpreter to address questions to those present during interpretation with a view to seeking clarifications and ensuring correctness of interpretation. While indeed a need for seeking clarifications often arises during interpretation, it is equally important to ensure that independent communication between the interpreter and the interviewed person is drawn to the absolute required minimum and takes place only with a prior approval of the authority conducting the proceedings. This advice derives from UNHCR's experience of monitoring the quality of interpretation services in Armenia, including within the framework of criminal proceedings.

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<https://www.refworld.org/docid/532191894.html>; European Union: European Asylum Support Office (EASO), *Practical Guide on Age Assessment*, 7 March 2018, Second Edition, available at: <https://www.refworld.org/docid/5aafb42c0.html>; UN Children's Fund (UNICEF), *Age Assessment: A Technical Note*, January 2013, available at: <https://www.refworld.org/docid/5130659f2.html>; UN High Commissioner for Refugees (UNHCR), *UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum*, 1 June 2015, available at: <https://www.refworld.org/docid/55759d2d4.html>; UN High Commissioner for Refugees (UNHCR), *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the draft law proposal "Age Assessment Earlier in the Asylum Procedure" ("Åldersbedömning tidigare i asylprocessen")* Ds 2016:37, 7 June 2017, available at: <https://www.refworld.org/docid/5937a8e14.html>.

**UNHCR recommends**

- supplementing Article 61 of *the draft Criminal Procedure Code* with a provision envisaging distance interpretation with the use of suitable means of communication and subsequent interpretation into the language of the proceedings, in case a proper interpreter is not identified in Armenia.
- amending Article 61(4)(1) of *the draft Criminal Procedure Code* to the effect that an interpreter may address questions to the interviewed person only after communicating the need for obtaining clarification to the authority conducting the proceedings and receiving an approval for seeking such clarification.

## Conclusion

UNHCR welcomes the participatory approach and comprehensive consultative process in preparation of these legislative proposals and remains available for further discussions and is committed to provide any further expertise and support as required.

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UNHCR, 29 January 2020