

## **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**

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### **Introduction**

The United Nations High Commissioner for Refugees (UNHCR) Representation in the Republic of Armenia is grateful for sharing the draft amendments and appreciates the opportunity to provide its comments and the possibility to have further exchanges on this matter with the relevant authorities. In this regard, UNHCR stands ready to continue working closely with all relevant authorities, notably the Government and the National Assembly of the Republic of Armenia (the Parliament) on the development of national asylum legislation.

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/2p47kBm>.

<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 Government and Parliament of the Republic of Armenia aimed at enhancing the national asylum system and would like to emphasize the importance of the proposed amendments in strengthening the national legislation and ensuring interpretation and implementation of the non-penalization principle in accordance with Article 31 of the 1951 Refugee Convention.<sup>5</sup> 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 these draft amendments.<sup>6</sup> UNHCR expects that the proposed legislative amendments will effectively address the interpretation issues related to the non-penalization principle, improve the current practice,<sup>7</sup> and ultimately improve protection environment for asylum-seekers and refugees in the Republic of Armenia.

## Specific observations

### 1. The proposed amendments to Article 28(1) of the Law on Refugees and Asylum

The current provision on *'illegal entry'* of Article 28(1) of the Law of the Republic of Armenia on Refugees and Asylum (the Law on Refugees and Asylum) states that:

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

This provision is broader than Article 31 of the 1951 Refugee Convention, since it exempts without additional conditions all asylum-seekers and refugees who have applied for asylum or were granted international protection from punishment for their irregular entry or presence in the Republic of Armenia.

The proposed amendment to paragraph 1 of Article 28 of the Law on Refugees and Asylum incorporates the qualifying elements specified in Article 31(1) of the 1951 Refugee Convention, as follows:

*“Criminal or administrative liability shall not be imposed, on account of their illegal entry or presence in the Republic of Armenia, on refugees, as well as asylum-seekers who, coming directly from a territory where their life or freedom*

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<sup>5</sup> See note 2 above, Article 31(1) of the 1951 Refugee Convention states:

*“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>6</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>.

<sup>7</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>.

*was threatened in the sense of part 1 of Article 6 of this Law, enter or are present in the territory of the Republic of Armenia without authorization, provided they present themselves without delay to the authorities of the Republic of Armenia and show a good cause for their illegal entry or presence.”*

UNHCR welcomes that it is maintained and explicitly mentioned that the non-penalization will apply not only to refugees, but to asylum-seekers as well. It is the UNHCR's well-established position, taking into account the object and purpose of the 1951 Refugee Convention, as well as extensive State practice and the views of leading jurists<sup>8</sup> that the non-penalization principle applies to asylum-seekers and to recognized refugees. “*For Article 31(1) to be effective, it must apply to any person who is or claims to be in need of international protection, and it must only cease to apply once a decision-maker issues a final decision, after following a fair procedure, holding otherwise.*”<sup>9</sup> If this were not the case, the principle encapsulated by Article 31 would be rendered meaningless.<sup>10</sup>

UNHCR would like to recall that Article 31(1) protects asylum-seekers and refugees from the imposition of ‘penalties’ on account of illegal entry or presence, and contains three qualifying conditions, which must be satisfied and may be summarized as ‘directness’, ‘promptness’ and ‘good cause’ (‘coming directly’, ‘without delay’, ‘good cause’).<sup>11</sup> By introducing the qualifying conditions for non-penalization, it is important to ensure that they are interpreted and implemented in light of the object and purpose of the 1951 Refugee Convention.<sup>12</sup>

***Directness*** - coming directly from a territory where their life or freedom was threatened: This element covers refugees coming literally straight from such a territory, but may also include those who have merely transited through or stayed in an intermediate country or countries.<sup>13</sup> The term ‘directly’ must therefore not be interpreted in the literal

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<sup>8</sup> Guy Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, June 2003 [Guy Goodwin-Gill], available at: <https://www.refworld.org/docid/470a33b10.html>; Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR'S Global Consultations on International Protection* (Cambridge University Press, 2003), 185, at 219, para. 7; James C. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2005), at p. 389; Gregor Noll, ‘Article 31’, in Andreas Zimmerman (eds.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press, 2011), at p. 1253.

<sup>9</sup> UNHCR, *Summary Conclusions on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying Article 31 of the 1951 Refugee Convention*, 15 March 2017, Roundtable, para. 7, (“UNHCR 2017 Summary Conclusions 2017”) <http://www.refworld.org/docid/5b18f6740.html>. See also, UNHCR, *Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees*, 9 November 2001, para. 10(g), (“UNHCR Summary Conclusions 2001”): <http://www.refworld.org/docid/470a33b20.html>, and Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, July 2017, PPLA/2017/01, p.15, <http://www.refworld.org/docid/59ad55c24.html>.

<sup>10</sup> UNHCR public statement before the Court of Justice of the European Union in the case of *Cimade and GISTI v. Ministry of the Interior*, 1 August 2011, C-179/11, para. 2.2, <http://www.refworld.org/docid/4e37b5902.html>.

<sup>11</sup> UN High Commissioner for Refugees (UNHCR), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, July 2017, PPLA/2017/01, see page 10, available at: <https://www.refworld.org/docid/59ad55c24.html>; Guy Goodwin-Gill, see note 8 above, page 188.

<sup>12</sup> The *Vienna Convention on the Law of Treaties* confirms the principle of general international law, that a treaty ‘shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose’. Article 31(1) *Vienna Convention on the Law of Treaties*, (VCLT), 23 May 1969, United Nations, Treaty Series, vol. 1155, <http://www.refworld.org/docid/3ae6b3a10.html>, p.12. Which means interpreting the 1951 Convention with reference to the object and purpose of extending the protection of the international community to refugees, and assuring to “*refugees the widest possible exercise of these fundamental rights and freedoms*”. (1951 Refugee Convention, Preamble.); see also, Guy Goodwin-Gill, see note 8 above, p. 188-189.

<sup>13</sup> UNHCR's *Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26 February 1999, para. 4, <http://www.refworld.org/docid/3c2b3f844.html>; UNHCR, *The Refugee Convention, 1951: the Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*,

– temporal or geographical – sense insofar as refugees are not required to have come without crossing through, stopping or staying in other countries after leaving the territory where their life or freedom was threatened.<sup>14</sup> While length of time in an intermediate country or countries may be a relevant factor for interpreting the term ‘coming directly’, no strict time limit ought to be applied to passages through or stays in other countries, since each case must be assessed on its own facts and circumstances. Relevant factors should be taken into consideration when assessing whether transit through or previous stay in a third country or countries is consistent with the concept of “*coming directly*”:<sup>15</sup> Reasons for delay could be due to advice or coercion from agents or smugglers or the need to acquire means to travel onwards. Finally, the refugee’s intention to reach a particular country – for family reunification purposes for instance – is also a factor to consider. Situations where the refugee has found protection, or has settled – temporarily or permanently – in another country cannot be considered as covered by the word ‘coming directly’.<sup>16</sup>

**Promptness - without delay:** For refugees to be exempted from penalization by Article 31(1) of the 1951 Convention, they need to present themselves to the authorities and to do so without delay. When the State has a functioning asylum or refugee protection system, it is in the interest of both the State and the refugee for her or him to come forward as soon as reasonably possible,<sup>17</sup> i.e. within a reasonable period of time after arrival in the territory<sup>18</sup> or, in the case of unauthorized presence, within a reasonable

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1990, p. 219, “*The term ‘coming directly’ refers, of course, to persons who have come directly from their country of origin or a country where their life or freedom was threatened, but also the persons who have been in an intermediary country for a short time without having received asylum there*”, <http://www.refworld.org/docid/53e1dd114.html>. See also, *R v. Asfaw*, note 16 above, para. 56, “*The single most important point that emerges from a consideration of the travaux préparatoires is that there was universal acceptance that the mere fact that refugees stopped while in transit ought not deprive them of the benefit of the article*”, <http://www.refworld.org/docid/483d12222.html>; *R v. Jaddi* [2012] EWCA Crim 2565, para. 16, “[I]n order to give effect to the Convention it is necessary not to punish those who are merely in transit in a third country, or in *Mrs Asfaw’s* case, in this country. A person who is genuinely in transit does not, on the authority of *Asfaw*, lose the protection of the Convention and thus of section 31”, <https://bit.ly/36Ahw5n>; *R. and Koshi Pitshou Mateta and others*, [2013] EWCA Crim 1372, United Kingdom: Court of Appeal (England and Wales), 30 July 2013, para. 17, “*Given an accused does not lose the protection of Article 31 and s. 31 [of the 1999 UK Asylum Act] if he is genuinely in transit from a country where his life or freedom was threatened en route to another country wherein he intended to make an asylum application, depending on the facts of the case if he fails to present himself to the authorities in the United Kingdom ‘without delay’ during a short stopover in this country when travelling through to the nation where he proposed to claim asylum, the defence may remain extant*”, [http://www.refworld.org/cases,GBR\\_CA\\_CIV\\_5215e0214.html](http://www.refworld.org/cases,GBR_CA_CIV_5215e0214.html).

<sup>14</sup> UNHCR *Summary Conclusions 2001*, see note 9 above, para. 10(b): “*Refugees are not required to have come directly from territories where their life or freedom was threatened*; UNHCR Executive Committee Conclusion No. 15 (XXX) (1979), para. (h)(iii): “*The intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account*”, <http://www.unhcr.org/excom/exconc/3ae68c960/refugees-asylum-country.html>. See also, Guy Goodwin-Gill, see note 8 above, pp. 217–218; Newman J in *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, para. 69: “*the Convention is a living instrument, changing and developing with the times so as to be relevant and to afford meaningful protection to refugees in the conditions in which they currently seek asylum. Apart from the current necessity to use false documents another current reality and advance, occurring since 1951, is the development of a really accessible and worldwide network of air travel. As a result there is a choice of refuge beyond the first safe territory by land or sea*”, [http://www.refworld.org/cases,GBR\\_HC\\_QB,3ae6b6b41c.html](http://www.refworld.org/cases,GBR_HC_QB,3ae6b6b41c.html).

<sup>15</sup> UNHCR *Summary Conclusions 2017*, see note 9 above, para. 9.

<sup>16</sup> See Guy Goodwin-Gill, see note 8 above, p. 218, para. 4: “*The drafters only intended that immunity from penalty should not apply to refugees who had settled, temporarily or permanently, in another country.*”

<sup>17</sup> *R. and Koshi Pitshou Mateta and others*, [2013] EWCA Crim 1372, United Kingdom: Court of Appeal (England and Wales), 30 July 2013, LJ Leveson, para. 21(iii), [www.refworld.org/cases,GBR\\_CA\\_CIV\\_5215e0214.html](http://www.refworld.org/cases,GBR_CA_CIV_5215e0214.html).

<sup>18</sup> *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, para. 25, [www.refworld.org/cases,GBR\\_HC\\_QB,3ae6b6b41c.html](http://www.refworld.org/cases,GBR_HC_QB,3ae6b6b41c.html).

period of time after a well-founded fear of persecution may have arisen (i.e. a claim for refugee status *sur place*).<sup>19</sup>

The term “*without delay*” must not be interpreted as a strict temporal requirement and is broader than “*promptly*” or “*as early as possible*”. Whether a refugee has presented themselves “*without delay*” is a question of fact and degree, depending on the circumstances of the case,<sup>20</sup> including the time and mode of arrival, the availability of information in a language the refugee understands, an understanding of how, where and to which authority they are to report, and efforts in securing legal assistance.<sup>21</sup> Refugees may first gain entry into the State, including potentially with or without authorization, before approaching authorities to claim international protection.<sup>22</sup>

Each case must be evaluated on its own facts and circumstances, taking into account misperceptions of, and lack of information about, the availability of international protection and the asylum process; erroneous advice provided by smugglers; trauma; language problems; feelings of insecurity; mistrust or fear, especially mistrust or fear resulting from the experience of being a refugee; previous experiences with authorities; or other personal facts and circumstances, such as age, gender, diversity and state of health.<sup>23</sup> Presenting themselves without delay to the authorities and expressing a need for international protection is an expression of good faith on part of the refugee in coming forward as soon as she or he is reasonably able. While it may be rational in some cases to expect refugees to present themselves and express a need for international protection immediately or shortly upon arrival when meeting the first State official they encounter, newly arrived refugees might fear summary return and perceive border crossings or points of entry as unsafe or inappropriate places to make an asylum claim.<sup>24</sup>

States must ensure that all relevant State officials, including, among others, immigration officers and border officials, who may reasonably be expected to come in contact with refugees, have clear instructions for dealing with cases which might be within the purview of the relevant international instruments. This means they need to refer to the relevant asylum authorities any person who seeks international protection.<sup>25</sup> This is particularly important with regard to persons with specific needs,

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<sup>19</sup> A well-founded fear of persecution may arise after an applicant has left their country of origin, owing to circumstances arising in the country of origin during the applicant’s absence, and/or as a result of their own actions after they have left the country of origin, making the applicant a refugee *sur place*; see: UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, para. 94 to 96, in: *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, [www.refworld.org/docid/5cb474b27.html](http://www.refworld.org/docid/5cb474b27.html).

<sup>20</sup> HR-2014-01323-A, Case no. 2014/220, 24 June 2014 (Norway Supreme Court). Summary Conclusions: Article 31 of the 1951 Convention, June 2003, para. 10(g), [www.refworld.org/docid/470a33b20.html](http://www.refworld.org/docid/470a33b20.html), (“ UNHCR Summary Conclusions 2003”) para. 10(f).

<sup>21</sup> UNHCR Summary Conclusions 2003, note 20 above, para. 10(f).

<sup>22</sup> *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, para. 61, [www.refworld.org/cases,GBR\\_HC\\_QB,3ae6b6b41c.html](http://www.refworld.org/cases,GBR_HC_QB,3ae6b6b41c.html). *R v. Asfaw*, [2008] UKHL 31, United Kingdom: House of Lords (Judicial Committee), 21 May 2008, para. 16, [www.refworld.org/cases,GBR\\_HL,4835401f2.html](http://www.refworld.org/cases,GBR_HL,4835401f2.html).

<sup>23</sup> Pest Central District Court, 7.B.VIII.20.776/2013/34 (11 September and 3 December 2013), taking into account that the time and mode of arrival are often in the hands of smugglers.

<sup>24</sup> HR-2014-01323-A, Case no. 2014/220, 24 June 2014 (Norway Supreme Court), para. 22, available at: [http://www.refworld.org/cases,NOR\\_SC,5653395f4.html](http://www.refworld.org/cases,NOR_SC,5653395f4.html).

<sup>25</sup> ExCom Conclusion No. 8 (XXVIII), 1977, para. (e)(i), ExCom Conclusion No. 81 (XLVIII), 1997, para. (h); ExCom Conclusion No. 82 (XLVIII), 1997, para. (d)(ii) and (iii); ExCom Conclusion No. 85 (XLIX), 1998, para. (q). See also: UN General Assembly, Recommended Principles and Guidelines on Human Rights at International Borders: Conference room paper, 23 July 2014, A/69/CRP. 1, Guideline 7, para. 5, [www.refworld.org/docid/54b8f58b4.html](http://www.refworld.org/docid/54b8f58b4.html). See also: *Caso Familia Pacheco Tineo vs Estado Plurinacional de Bolivia*, Inter-American Court of Human Rights (IACtHR), 25 November 2013, available at:

who may include women at risk, victims of trafficking and/or sexual exploitation or other forms of torture or ill treatment, and children seeking international protection, particularly when unaccompanied or separated.<sup>26</sup> Further, States must ensure that people who seek international protection have access to relevant information in a language they understand and the ability to make a formal asylum claim with the competent authority, as well as being given the opportunity to contact UNHCR.<sup>27</sup>

When States introduce time limits by which refugees must make themselves known to the authorities and claim asylum, non-compliance will not necessarily disqualify such refugees from the exemption from penalization provided by Article 31(1) on the basis of not having presented themselves to the authorities without delay.

**Good cause – demonstration of good cause for their illegal entry or presence:** Refugees must show good cause or valid reasons for their irregular entry or presence.<sup>28</sup>

A reasonable belief on the part of the refugee that resorting to irregular means of entry or presence is necessary to promptly secure entry or to remain in the asylum country in order to seek international protection would generally constitute “good cause” within the meaning of Article 31(1).<sup>29</sup> Article 31(1) of the 1951 Convention does not require that the irregular entry or presence be necessary for seeking international protection. In reality, refugees generally have good cause, given that many face significant factual and legal risks and barriers to regular entry or stay in a host country, which consequently compel them to resort to irregular means.<sup>30</sup> As such, “good cause” may be satisfied when a person is using false or fraudulent documents, or otherwise circumventing immigration or border control requirements and physical barriers at borders for fear of being rejected at the border,<sup>31</sup> is unable to physically enter at an established port of entry; lacks information or knowledge on relevant procedures; is

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[www.refworld.org/cases,IACRTHR,52c53b154.html](http://www.refworld.org/cases,IACRTHR,52c53b154.html); Article 6(1) (3rd indent), EU Asylum Procedures directive (recast).

<sup>26</sup> *Advisory Opinion OC-21/14, "Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection"*, OC-21/14, Inter-American Court of Human Rights (IACrHR), 19 August 2014, para. 83, [www.refworld.org/cases,IACRTHR,54129c854.html](http://www.refworld.org/cases,IACRTHR,54129c854.html). UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, CEDAW/C/GC/32, para. 44, [www.refworld.org/docid/54620fb54.html](http://www.refworld.org/docid/54620fb54.html). UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22, para. 32(h), [www.refworld.org/docid/5a1293a24.html](http://www.refworld.org/docid/5a1293a24.html). See also: Article 21 EU Reception Conditions directive (recast); UNHCR, *The 10-Point Plan in Action, 2016 Update, Chapter 5: Mechanisms for Screening and Referral*, December 2016, [www.refworld.org/docid/5804e0f44.html](http://www.refworld.org/docid/5804e0f44.html).

<sup>27</sup> Article 35(1) of the 1951 Convention, requiring State parties to cooperate with UNHCR in the exercise of its functions. Simultaneously, pursuant to its mandate and Article 35(1) of the 1951 Convention, UNHCR should be given the possibility to contact and visit persons seeking international protection to assess and supervise their well-being and provide assistance when needed, see: ExCom Conclusion No. 22 (XXXII), 1981, para. III. ExCom Conclusion No. 33 (XXXV), 1984, para. (h). ExCom Conclusion No. 72 (XLIV), 1993, at para (b). ExCom Conclusion No. 73 (XLIV), 1993, at para. (b) (iii). ExCom Conclusion No. 79 (XLVII), 1996, at para. (p); UN Human Rights Committee (HRC), *General comment no. 35, para 58*, 16 December 2014, CCPR/C/GC/35, para. 18, [www.refworld.org/docid/553e0f984.html](http://www.refworld.org/docid/553e0f984.html).

<sup>28</sup> The authentic French text of Article 31(1) of the 1951 Refugee Convention refers to ‘des raisons reconnues valables’.

<sup>29</sup> Federal Cassation Court Switzerland (*Bundesgericht, Kassationshof*), judgment of 17 March 1999, reported in *Asylum 2/99*, 21, para. 3.

<sup>30</sup> *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, para. 26, [www.refworld.org/cases,GBR\\_HC\\_QB,3ae6b6b41c.html](http://www.refworld.org/cases,GBR_HC_QB,3ae6b6b41c.html). *R. and Koshi Pitshou Mateta and others*, [2013] EWCA Crim 1372, United Kingdom: Court of Appeal (England and Wales), 30 July 2013, para. 20, [www.refworld.org/cases,GBR\\_CA\\_CIV,5215e0214.html](http://www.refworld.org/cases,GBR_CA_CIV,5215e0214.html). In both cases it was confirmed that the good cause clause is satisfied by a ‘genuine refugee showing he was reasonably travelling on false papers’.

<sup>31</sup> UNHCR *Summary Conclusions 2017*, see note 9 above, para. 18; Supreme Court the Netherlands, 5 July 2011, no. 09/02249, para. 2.6.2.

acting under instruction of a smuggler or trafficker; or is traumatized.<sup>32</sup> It has also been accepted that having a well-founded fear of being persecuted may in itself be “good cause” to enter or remain irregularly, when a person is coming from a territory where her or his life or freedom is threatened or where protection is not available, particularly where she or he fears *refoulement*, including as a result of rejection at the border, or, in the context of irregular presence, deportation.<sup>33</sup>

The proposed amendment should therefore also ensure that the constituent elements of the non-penalization clause are carefully examined, analyzed on case-by-case basis, and properly applied by relevant state structures (police, prosecutor’s office, national security officials, border guards). This will guarantee their implementation in accordance with Article 31(1) of the 1951 Refugee Convention.

In this regard, it would be helpful to consider some additional actions in conjunction with the adoption of the proposed amendment, such as (i) explicitly delineating the responsibility(ies) of relevant state actors in charge of the accurate implementation of Article 28(1) of the Law on Refugees and Asylum; (ii) eventually adopting a by-law(s) elaborating on the constituent elements of the non-penalization clause so as to ensure effective and efficient examination and assessment; and (iii) capacitating new and experienced staff of relevant state agencies on refugee protection, including the non-penalization principle.

It is important to highlight that seeking asylum is a universal human right.<sup>34</sup> Each asylum application should be considered on the merits following a fair, effective and efficient asylum procedure. In this regard, initiation of criminal processes against asylum-seekers and refugees who have entered or are present irregularly and who have not come directly, not presented themselves without delay to authorities, or not shown good cause for their irregular entry or presence, does not hinder access of such persons to asylum procedures and consideration of their asylum claim on its merits.

Furthermore, UNHCR encourages the Armenian authorities to also consider the views of the Working Group on Arbitrary Detention, according to which criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention.<sup>35</sup> Therefore, the irregular entry or presence of refugees should not be treated as a criminal offence.

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<sup>32</sup> Guy Goodwin-Gill, see note 8 above, p. 217.

<sup>33</sup> UNHCR Summary Conclusions 2003, note 20 above, para. 10(e); UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Fourteenth Meeting*, 22 November 1951, A/CONF.2/SR.14, statement of Mr. Hoare (United Kingdom), p. 7, [www.refworld.org/docid/3ae68cdb0.html](http://www.refworld.org/docid/3ae68cdb0.html).

<sup>34</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 Convention and EU law.

<sup>35</sup> UN Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: report of the Working Group on Arbitrary Detention*, 10 January 2008, A/HRC/7/4, para. 53, [www.refworld.org/docid/47b306d22.html](http://www.refworld.org/docid/47b306d22.html). UN Human Rights

UNHCR would also like to propose that Article 28 of the Law on Refugees and Asylum be retitled in order to reflect both the issue of irregular entry and presence in Armenia and be consistent with the subject and scope of the legal provision.

Therefore, in light of the above developments:

**UNHCR recommends**

- Amending the title of Article 28 to “Illegal entry to **and presence** in the Republic of Armenia.
- Introducing a new article to the draft Law of the Republic of Armenia on Making Amendments to the Law of the Republic of Armenia on Refugees and Asylum that could read as follows:

*“Article 2. The definitions enshrined in paragraph 1 of this Article will be elaborated further by a Government Decree.”*

2. [The proposed amendments to Article 329\(3\) of the Criminal Code of the Republic of Armenia](#)

The proposed amendment to paragraph 3 of Article 329 of the Criminal Code states that:

*“This Article shall not apply to persons referred to in para 1 of Article 28 of the Law of the Republic of Armenia on Refugees and Asylum”.*

UNHCR is pleased that by referring to the Law on Refugees and Asylum, this amendment harmonizes the definition of the non-penalization principle specified in the two distinct national legislations, namely the Criminal Code and the Law on Refugees and Asylum.

In order to ensure a harmonized application of the new non-penalization clause, UNHCR suggests amending also Article 325 of *the Criminal Code* by way of a referral provision to Article 28 of the Law on Refugees, in order to cover circumstances of irregular entry through use of insufficient, false or fraudulent documentation by refugees and asylum seekers<sup>36</sup>.

**UNHCR recommends** amending Article 325 of the Criminal Code by introducing the following reference:

*“This Article shall not apply to persons referred to in paragraph 1 of Article 28 of the Law of the Republic of Armenia on Refugees and Asylum if they have had to use insufficient, false or fraudulent documentation to enter the Republic of Armenia.”*

Council, *Report of the Working Group on Arbitrary Detention*, 15 January 2010, A/HRC/13/30, para. 58, [www.refworld.org/docid/5a9049754.html](http://www.refworld.org/docid/5a9049754.html). UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, para. 10, [www.refworld.org/docid/5a903b514.html](http://www.refworld.org/docid/5a903b514.html).

<sup>36</sup> EXCOM Conclusion No. 58 (XL) 1989, para. (a): <http://www.refworld.org/docid/5a2ead6b4.html>. ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 102 States are Members of the Executive Committee. Armenia is a member of the Executive Committee and will retain membership for the period of October 2018 – October 2019.



## Conclusion

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

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UNHCR, 12 November 2019