Submission by the Office of the United Nations High Commissioner for Refugees in the case of *Alizada v. Armenia* (application no. 2439/18) before the European Court of Human Rights

1. Introduction*

1.1. UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and together with governments to seek solutions for refugees.[1] UNHCR is responsible for supervising the application of international conventions for the protection of refugees.[2] UNHCR welcomes the opportunity to intervene in this case, as granted by the European Court of Human Rights ('the Court') in its letter of 5 October 2018.

1.2. In this submission, UNHCR outlines the domestic legislative framework and practice applicable to asylum-seekers apprehended and subsequently prosecuted after irregularly crossing the Armenian border (Part 2), and provides UNHCR's interpretation of the relevant principles of international refugee and human rights law to assist the Court (Part 3) in addressing the question of whether the penal conviction under review was compatible with the requirements of Article 7 of the European Convention on Human Rights (no punishment without law) and in particular, the "foreseeability" requirement.[3] UNHCR does not address the facts or the merits of the case.

2. The legislative framework and practice regarding penalization, including detention, of refugees and asylum-seekers after irregularly crossing the Armenian border

2.1. Applicable domestic legislation

2.1.1. The Republic of Armenia ratified the 1951 Refugee Convention and its 1967 Protocol in 1993. The Armenian Constitution foresees the primacy of international law. According to

* This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoy under applicable international legal instruments and recognized principles of international law. UN General Assembly, *Convention on the Privileges and Immunities of the United Nations*, 13 February 1946, http://www.refworld.org/docid/3ae6b3902.html.

[1] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), para. 1, http://www.unhcr.org/refworld/docid/3ae6b3628.html.

[2] *Ibid,* para. 8(a).

[3] The second question from the Court to the parties: "Was the conviction of the applicant under Article 329 § 2 of the Criminal Code compatible with the requirements of Article 7 of the Convention [no punishment without law]? In particular, was his conviction under that Article compatible with the requirement of "foreseeability" given the limitation on the scope of application of Article 329 contained in paragraph 3 of that Article?"

Article 5(3),[4] international treaties ratified by the Republic of Armenia prevail over domestic law should the latter be in conflict.

2.1.2. Both the Law on Refugees and Asylum of the Republic of Armenia[5] and the Criminal Code of Armenia[6] reflect the non-penalization principle enshrined in Article 31 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol ('1951 Convention').

2.1.3. Article 5(3) of the Armenian Law on Refugees and Asylum states:

> *"A foreign national or stateless person, who has submitted an asylum claim in the territory of the Republic of Armenia, shall, before the taking of a final decision on his/her application for being granted asylum, be considered an asylum-seeker and shall enjoy, in the Republic of Armenia, all the rights of asylum-seekers prescribed by this Law."*

2.1.4. Article 28 of the Armenian Law on Refugees and Asylum further states:

> *"Illegal entry into the Republic of Armenia*
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> 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**."*

2.1.5. Article 329(1) and (2) of the Armenian Criminal Code specify the conditions and penalties related to illegal border crossing as follows:

> *"Article 329. Illegal state border crossing*
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> 1. *Crossing the guarded state border of the Republic of Armenia without relevant documents or permits, is punished with a fine in the amount of 100-200 minimal salaries or imprisonment for up to 3 years.*
> 2. *The same act committed by a group with prior agreement or by an organized group or with violence or threat thereof, is punished with imprisonment for 3-7 years."*

2.1.6. Article 329(3) of the Armenian Criminal Code states that asylum-seekers shall be exempted from such penalties:

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[4] 'In case of conflict between the norms of international treaties ratified by the Republic of Armenia and those of laws, the norms of international treaties shall apply.' *The Constitution of the Republic of Armenia* (with Amendments), 6 December 2015, http://www.parliament.am/parliament.php?id=constitution&lang=eng.

[5] *Armenia: Law No. HO-211-N of 2008 on Refugees and Asylum (2015)* [Armenia], 27 November 2008, http://www.refworld.org/docid/4f1986412.html.

[6] *Criminal Code of the Republic of Armenia*, 18 April 2003, non-official translation available at: http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=527766599 and amendments of 21 June 2014: http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5bc456984.

"This Article is not extended to cases when a foreign citizen or stateless person enters the Republic of Armenia [without relevant documents or permits] to enjoy the right for asylum stipulated by the Constitution and legislation of the Republic of Armenia."

2.2. The relevant practice

2.2.1. While the Armenian legislative framework reflects the non-penalization clause enshrined in international refugee law under Article 31 of the 1951 Convention, this essential right is not always upheld in practice. Instead, by applying a restrictive interpretation of Armenian law, state authorities have in some cases imposed 'criminal liability' on asylum-seekers and refugees, including prolonged detention.[7]

2.2.2. As noted above, the wording of Article 329(3) of the Armenian Criminal Code provides for an exemption from criminal liability, including detention, when the individual concerned has arrived in Armenia to enjoy the right of asylum.

2.2.3. As observed by UNHCR in its recommendations to the Government of Armenia in July 2016,[8] the Armenian authorities has in some cases interpreted this phrase as requiring a prior intention to seek asylum in Armenia as a necessary condition to benefit from the non-penalization exception for irregular entry under Armenian law. From UNHCR's monitoring of practice, penalization has been particularly observed to be applied in cases of asylum-seekers crossing the Turkish-Armenian border, but not usually to those arriving by air and other land borders.[9]

2.2.4. In cases such as the present one, the failure to apply the non-penalization provision by the Armenian authorities is based on the contention that an applicant did not have a prior intention to seek asylum in Armenia as their country of destination was another state. In a number of such cases, the Armenian authorities have disregarded the individual's status as an asylum-seeker notwithstanding the fact that s/he may have claimed asylum as soon as s/he had an opportunity to do so, in line with Article 31 of the 1951 Convention.

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[7] 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*.: http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsiz2h%2FRs7Wsu8%2FeBy9Sh53xzTb9oMILhzi1Cvt3D8bP6U7WVa87PjauSC1TjtSllEo2YXxTMp6xfpRxPnqE0GKV1e17IrsW51%2FoHNw%2BFpy3F. See also United States Department of State, *Country Report on Human Rights Practices 2017 – Armenia*, 20 April 2018, page 22: "During the year there were repeated reports of the detention of asylum seekers for illegal entry, in particular after crossing the highly guarded and fenced border with Turkey. Authorities continued to detain and sentence asylum seekers for illegal entry into the country after registering their asylum applications. Despite a provision in the law exempting asylum seekers from criminal liability for illegal border crossing, authorities required them to remain in detention pending the outcome of their asylum applications or to serve the remainder of their sentences.": https://www.state.gov/documents/organization/277381.pdf.

[8] *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, ("UNHCR Comments Draft New Criminal Code"), http://www.refworld.org/docid/5a69a3304.html.

[9] *Ibid*. See also UN Committee against Torture, Concluding observations, note 7 above.

3. Principles of international refugee and human rights law regarding non-penalization and no punishment without law

3.1. Article 31(1) 1951 Convention: non-penalization for illegal entry

3.1.1. Article 31(1) of the 1951 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."*

3.1.2. Article 31 is central to the purpose of the 1951 Convention, ensuring refugees can effectively gain access to international protection. Article 31 recognizes that in exercising the right to seek asylum, refugees are often compelled to arrive, enter or stay in a territory without authorization or with no, insufficient, false or fraudulent documentation[10] and was designed to protect the rights of those individuals. The provision's object and purpose needs to be taken into account in any interpretation of the article itself or of its replication in national law.[11]

3.1.3. UNHCR recalls that '[f]or 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.'[12] If this were not the case, the principle encapsulated by Article 31 would be rendered meaningless.[13] Thus, under both Armenian law and the 1951 Convention, non-penalization,

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[10] 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, including Armenia.

[11] The *Vienna Convention on the Law of Treaties* (VCLT), 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) VCLT, 23 May 1969, UN Treaty Series, vol. 1155, http://www.refworld.org/docid/3ae6b3a10.html, p.12. This means interpreting the 1951 Convention with reference to the object and purpose of extending the protection of the international community to refugees and assuring "the widest possible exercise of these fundamental rights and freedoms", Preamble, 1951 Convention. See also, Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, ("Goodwin-Gill") June 2003, http://www.refworld.org/docid/470a33b10.html, p. 188-189.

[12] 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, ("Costello et al"), p.15, http://www.refworld.org/docid/59ad55c24.html.

[13] *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.

applies not only to refugees but to asylum-seekers as well. Due to the declaratory nature of refugee status determination, a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the refugee definition.[14] This would necessarily occur prior to the time at which his/her refugee status is formally determined. Recognition of refugee status does not make the person a refugee but declares him or her to be one.[15] This interpretation is widely confirmed by jurisprudence throughout Europe.[16]

3.1.4. Consequently, in line with Article 31 of the 1951 Convention, as long as the individual *comes directly* from a territory where his life or freedom was threatened, presents him/herself to the authorities *without delay*, and demonstrates *good cause* for the irregular entry or presence, non-penalization applies.

3.1.5. UNHCR notes that "the expression 'coming directly' covers the situation of a person who enters the country in which asylum is sought directly from his/her country of origin, or from another country where his/her protection, safety and security could not be assured."[17] The term "directly" must not be interpreted in the literal – temporal or geographical – sense as refugees are not required to have come without pause or stops and without crossing other countries from their country of origin.[18] Further, no strict time limit ought to be applied to

[14] 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, para. 28, http://www.refworld.org/docid/4f33c8d92.html.

[15] *Ibid*.

[16] For references, see Costello et al, para. 4.1.5, p. 15.

[17] *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*, 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 préperatoires 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, […]. 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", http://www.unodc.org/res/cld/case-law-doc/migrantsmugglingcrimetype/gbr/2012/r__v_s_j__html/UKh006_-_R._v_S.J._2012_EWCA_Crim_2565_22_November_2012.pdf; *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.

[18] UNHCR *2001 Summary Conclusion*, para. 10(b): "Refugees are not required to have come directly from territories where their life or freedom was threatened", http://www.unhcr.org/419c783f4.pdf; 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, Goodwin-Gill, note 8 above, pp. 217–218; Newman J in *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, para. 69: "The

passages through or stopovers in other countries, and each case must be assessed on its own facts. When assessing whether transit through or previous stay in another country is consistent with the concept of "coming directly," relevant factors to be taken into account include: the reasons for delay – for example to acquire the means to travel onwards or being under the control of a smuggler – and the refugee's reason(s) for wanting to reach a particular country of refuge – for example a desire to reunite with family. [19] The phrase does not cover, however, situations where the refugee has found protection, or has settled – temporarily or permanently – in another country.[20]

3.1.6. Regarding the requirement that the asylum-seeker presents him/herself without delay, UNHCR underlines that the term 'without delay' must not be interpreted as a strict temporal requirement and is different from and broader than 'promptly' or 'as early as possible'. Applying 'without delay' is a matter of fact and degree, depending on the circumstances of the case,[21] including the time and mode of arrival, the availability of information in a language that the refugee understands and his or her understanding of where and to which authority he or she is to report.[22] Refugees may first gain entry into the state, including on an unauthorized basis, before claiming asylum. Even when apprehended or detained before reasonably being able to make an asylum claim, the person may still be protected under Article 31(1), provided there is no evidence of bad faith on the part of the individual.[23] They have to claim asylum within a reasonable period of time after arrival or, in the case of unauthorized presence, within a reasonable period of time after the person has become a refugee *sur place*. States must ensure that all relevant officials, including, among others, immigration officers and border officials refer people who may be in need of international protection to the relevant asylum authorities, thereby enabling them formally to apply for international protection.[24]

3.1.7. Regarding the 'good cause' requirement, UNHCR is of the view that having a well-founded fear of being persecuted may in itself be a 'good cause' for unauthorized entry or

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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.

[19] UNHCR, *2017 Summary Conclusions,* para. 9.

[20] "The drafters only intended that immunity from penalty should not apply to refugees who had settled, temporarily or permanently, in another country." Goodwin-Gill, note 8 above, p. 218, para. 4.

[21] HR-2014-01323-A, Case no. 2014/220, Norway Supreme Court, 24 June 2014, http://www.refworld.org/cases,NOR_SC,5653395f4.html.

[22] UNHCR, 2017 *Summary Conclusions,* para. 16.

[23] *Ibid.* See also, James C. Hathaway, *The Rights of Refugees under International Law*, 2005, p. 391 and footnote 498; and *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, paras. 528-529.

[24] 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); all of which are available at http://www.refworld.org/docid/5a2ead6b4.html. 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, http://www.refworld.org/docid/54b8f58b4.html,

presence when coming from a territory where life or freedom is threatened or where protection is not available.[25] "Refugees generally have 'good cause' in reality, based on the factual and legal risks and barriers that surround their flight."[26] They are often unable to enter an asylum country regularly and are therefore forced to resort to irregular means. In addition, using false or fraudulent documents - or otherwise circumventing immigration or border control requirements - for fear of being rejected at the border may also constitute "good cause."[27]

3.1.8. Both Armenian law as well as international law provide for non-penalization of irregular entry of asylum-seekers and refugees. Under Article 31(1) of the 1951 Convention, States Parties are obliged not to impose penalties for irregular entry on asylum-seekers, i.e. those who have applied for asylum with the State Party, irrespective of any prior intent to apply for asylum in another country, provided the conditions of Article 31 of the 1951 Convention outlined above are met.[28] While Article 329(3) of the Criminal Code excludes penalization only for persons that enter the Republic of Armenia 'to enjoy the right for asylum', this must not be interpreted as requiring a prior intention to seek protection in Armenia. Not only is such a requirement absent from Article 31 of the Refugee Convention, it is also absent from Article 28 of the Armenian Law on Refugees and Asylum which replicates the non-penalization principle in national law. Read in light of these two provisions, it is clear that Article 329(3) may not be interpreted as requiring prior intent. European case law has equally confirmed the applicability of Article 31 of the 1951 Convention to refugees whose intention was to claim asylum elsewhere.[29]

3.1.9. Lastly, in UNHCR's view, both the 1951 Convention and the Armenian national legislation on non-penalization are coherent and consistent, and there is no conflict between

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and *Caso Familia Pacheco Tineo vs Estado Plurinacional de Bolivia*, Inter-American Court of Human Rights, 25 November 2013, http://www.refworld.org/cases,IACRTHR,52c53b154.html.

[25] *2001 Summary Conclusions*, para. 10(e).

[26] Costello et al, p. 30.

[27] UNHCR, *2017 Summary Conclusions*, para. 18.

[28] *UNHCR intervention before the House of Lords in the case of Regina (Respondent) and Fregenet Asfaw (Appellant)*, 28 January 2008. para. 10, http://www.refworld.org/docid/483d12222.html, and Costello et al, para. 4.3.4.

[29] See *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. 15, 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, http://www.refworld.org/cases,GBR_HL,4835401f2.html, as well as UNHCR's intervention in *Asfaw*, note 15 above. See also Decision KKO:2013:21, where the Finish Supreme Administrative Court held that "the transit and short sojourn of an asylum-seeker in other countries on the way to the final destination does not prevent the application of the protection granted by article 31 (1) of the 1951 Convention even in cases where the asylum-seeker has not been in risk of persecution or threat in the sense of article 1 of the 1951 Convention in the countries of transit."; http://www.refworld.org/cases,FIN_SC,557ac4ce4.html, p.3. Finally, see ECLI: NL: HR: 2013: BY4238, where the Dutch Supreme Court states that "[t]he aim of the Refugee Convention is to ensure that this protection is not denied on the sole ground that he did not report to the authorities in the Netherlands without delay or did not apply for asylum in the Netherlands, where the protection of this treaty provision would have been granted to him in the country of refuge. Another explanation of this provision would not adequately do justice to the intention of article 31 Refugee Convention to protect refugees from prosecution because of "illegal entry or presence" and the related possession of false identity papers and would seriously compromise the protection of refugees intended by that

them. However, even if a criterion of a prior intent to seek asylum in Armenia is (erroneously) applied under Article 329(3) of the Criminal Code, the 1951 Convention's non-penalization principle which does not provide for such, would prevail in light of the primacy of international law, as enshrined in Article 5(3) of the Armenian Constitution.

3.2. Article 7 European Convention on Human Rights: No punishment without law

3.2.1. With the international refugee law framework in mind, the key question before this Court is whether a criminal conviction is foreseeable in a case in which:

> (i) an exception to an offence, which would exculpate an accused, is not being considered, or
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> (ii) such an exception is being considered, but wrongfully interpreted and therefore not applied.

General considerations on foreseeability

3.2.2. Article 7 enshrines a foundational element of the rule of law, which is the principle that no one should be punished without a legal basis (*nullum crimen, nulla poena sine lege*). In addition, it contains the principle that laws need to be sufficiently clear and precise to allow individuals to determine which conduct constitutes a criminal offence, and what the consequences of non-compliance are. Regarding these two main principles under Article 7, the ECtHR has developed a rich case law, in particular on the issue of foreseeability.[30]

3.2.3. According to the Court, the consequences of any law must be foreseeable, in order to be compatible with Article 7 ECHR. The relevant test for foreseeability is whether the applicant *could reasonably have foreseen at the material time*, if necessary with the assistance of a lawyer, that s/he *risked being charged with and convicted of the crime* in question,[31] and that s/he would incur the penalty which that offence carried. This means, first, that foreseeability must be appraised from the angle of the convicted person (possibly after the latter has taken appropriate legal advice), and, second, that foreseeability must be appraised at the moment in time of the commission of the offence charged.

3.2.4. The Court has found that the foreseeability requirement was not met in situations of inconsistent case law – i.e. where materially similar cases are decided differently without

provision.", Unofficial translation of the judgment, available in Dutch at: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:HR:2013:BY4238&showbutton=true&keyword=BY+4238.

[30] See, for example, ECtHR, *Cantoni v. France*, Application No. 45/1995/551/637, 15 November 1996, para. 29, http://www.refworld.org/cases,ECHR,3ae6b68318.html; ECtHR, *Kafkaris v. Cyprus*, Judgment [GC], Application No. 21906/04, 12 February 2008, para. 140, https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=002-2237&filename=002-2237.pdf&TID=thkbhnilzk,; ECtHR, *Del Río Prada v. Spain*, Judgment [GC], Application No. 42750/09, 21 October 2013, para. 79, http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-127697&filename=001-127697.pdf&TID=uynnlohkyr.

[31] ECtHR, *Jorgic v. Germany*, Judgment, Application No. 74613/01, 12 July 2007, paras. 109-113, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-81608%22]}.

justifiable basis – since they lack the required precision to avoid all risk of arbitrariness and to enable individuals to foresee the consequences of their actions.[32] Similarly, cases where there has been an extensive and unforeseeable interpretation of a criminal law to the accused's disadvantage which is incompatible with the very essence of that offence[33] has also been found by the Court to lack foreseeability.

Foreseeability of non- or misapplication of the exception to non-penalization for illegal entry

3.2.5. UNHCR submits that punishment for illegal entry in cases in which either (i) the status of an accused as an asylum-seeker is not being considered, or (ii) the status as asylum-seeker is being denied because there was allegedly no prior intent to seek asylum in a specific country, is not foreseeable.

3.2.6. This is because Article 28 of the Armenian Law on Refugees and Asylum (see Section 2.1. above), Article 329(3) of the Armenian Criminal Code (see Sections 2.1.; 3.1.8 – 3.1.9. above) and Article 31 of the 1951 Convention (see Section 3.1. above) protect refugees and asylum-seekers from the imposition of criminal penalties for breaches of the law reasonably or necessarily committed in the course of flight from persecution or threatened persecution. These protections/exceptions from punishment for irregular entry or stay do not include, correctly interpreted, a requirement of prior intent. An accused cannot be expected to foresee the non-application or wrongful application of these provisions, which is why they can reasonably expect not to be punished for irregular crossing. As for Article 329(3) of the Armenian Criminal Code, a provision which UNHCR had recommended to clarify in 2016,[34] it should be noted that under the ECtHR's case law, a punishment is equally unforeseeable if the legal basis lacks the necessary degree of clarity.[35]

3.2.7. Consequently, in assessing the foreseeability of a conviction in light of the applicable standards of international law, in UNHCR's view, the three non-penalization clauses mentioned in the preceding paragraph create a legitimate expectation for refugees and asylum-seekers crossing irregularly into Armenia that the non-penalization exceptions found in the law, will be correctly applied. The non-application of the exception and the concomitant punishment is thus unforeseeable and at variance with the principle of 'no punishment without law'.

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[32] ECtHR, *Žaja v. Croatia*, Judgment, Application No. 37462/09, 4 October 2016, para. 103, https://hudoc.echr.coe.int/eng#{%22appno%22:[%2237462/09%22],%22itemid%22:[%22001-166925%22]}.

[33] ECtHR, *Navalnyye v. Russia*, Judgment, Application No. 101/15, 17 October 2017, para. 68, https://hudoc.echr.coe.int/eng#{%22appno%22:[%22101/15%22],%22itemid%22:[%22001-177665%22]}, where the court held that 'such an interpretation could not be said to have constituted a development consistent with the essence of the offence (see Liivik, cited above, §§ 100-01, and Huhtamäki, cited above, § 51; cf. *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, §§ 788 et seq., 25 July 2013).' ECtHR, *Liivik v. Estonia*, Judgment, Application No. 12157/05, 25 June 2009, http://hudoc.echr.coe.int/eng?i=001-93250; ECtHR, *Huhtamäki v. Finland*, Application No. 54468/09, Judgment, 6 March 2012, http://hudoc.echr.coe.int/eng?i=001-109341; ECtHR, *Khodorkovskiy and Lebedev v. Russia*, Judgment, Application Nos. 11082/06 and 13772/05, 25 July 2013, http://hudoc.echr.coe.int/eng?i=001-122697.

[34] UNHCR Comments Draft New Criminal Code, note 7 above.

[35] ECtHR, *Cantoni v. France*, Application No. 17862/91, Judgment, 11 November 1996, para. 29, http://hudoc.echr.coe.int/eng?i=001-58068.

4. Conclusion

4.1 In light of the foregoing, the Armenian practice of punishing asylum-seekers for 'illegal entry' into Armenia on the basis that they did not necessarily intend to seek asylum in Armenia, in a situation in which both international refugee law and domestic law provisions foresee an exemption from liability in these circumstances and do not explicitly require such an intent, is at variance with international law, including the principle of 'no punishment without law' as enshrined in Article 7 ECHR.

UNHCR
26 October 2018