



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

Introduction

UNHCR welcomes the opportunity to provide comments to the *Working Group on Development of the new Criminal Code of the Republic of Armenia* in respect of Article 329(3) of the existing Criminal Code.

The UNHCR comments and proposal follow earlier advocacy and subsequent amendments to the Criminal Code, which were adopted in 2014. Prior to 2014, the Criminal Code contained a specific exemption from prosecution for the offence of illegal border crossing for persons applying for “political asylum” under the prerogative of the President stipulated by the then in force Constitution of Armenia. Those applying for or granted refugee status under the 2008 Law on Refugees and Asylum were not explicitly exempted and were at risk of being prosecuted and detained in case of irregular entry. UNHCR welcomed the amendment in 2014, which removed the word “political” and broadened the application of the exception to all those seeking asylum in Armenia, thus bringing national law more closely in line with international standards, as required also by point 7.4.2 of the 2012-2016 National Action Plan for Implementation of RA Policy in the Field of State Regulation of Migration.¹

Article 329(3) of the existing Criminal Code states that:

“This Article is not extended to cases when a foreign citizen or stateless person enters the Republic of Armenia without prescribed documents or without due authorization to enjoy the right for asylum stipulated by the Constitution and legislation of the Republic of Armenia”.

UNHCR cooperates closely with the Government in respect of the application of this provision and in 2014 – 2016 has observed that the interpretation given to Article 329(3) of the Criminal Code by the Armenian authorities and judiciary has not always been consistent with international standards. In some cases, Article 329(3) has been interpreted to mean that non-penalization applies only to recognized refugees (excluding asylum-seekers) and to individuals who arrived with the prior intention to seek asylum in Armenia. This type of interpretation has resulted in prolonged and/or arbitrary detention of asylum-seekers. The

¹ Decree of the Government of the Republic of Armenia No. 1593-N of 10 November 2011

drafting of a new Criminal Code presents an opportunity to redress such protection gaps and harmonize national law with international standards, thus addressing Armenia's obligations under the 1951 Convention relating to the Status of Refugees (hereafter the 1951 Convention).

UNHCR offers its comments as the agency entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees 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, "promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto." UNHCR's supervisory responsibility under its Statute is reiterated in the preamble of the 1951 Convention. Further, Article 35 of the 1951 Convention requires State parties 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". The same commitment is included in Article II of the 1967 Protocol relating to the Status of Refugees ("the 1967 Protocol"). UNHCR's supervisory responsibility has also been reflected in the national law of the Republic of Armenia also. Particularly, Article 44 of the Law on Refugees and Asylum provides that UNHCR "shall be granted full support and co-operation by all bodies responsible for asylum and refugees, in order to supervise the implementation of the Convention and its 1967 Protocol".

By ratifying the 1951 Convention and acceding to the 1967 Protocol, Armenia is bound by both instruments. The importance of these instruments as the cornerstone of the international system for the protection of refugees has been reaffirmed on a number of occasions.² In accordance with the Constitution of the Republic of Armenia (Article 5), in case of contradiction between norms of international treaties ratified by the Republic of Armenia and norms of laws of the Republic of Armenia, norms of the international treaties shall be applied.

States being bound by the 1951 Convention and/or the 1967 Protocol necessarily undertake to implement those instruments in good faith (the principle of *pacta sunt servanda*).³ In no case will mere formal compliance itself suffice to discharge a State's responsibility; the test is whether, in the light of domestic law and practice, including the exercise of administrative discretion, the State has attained the international standard of reasonable efficacy and efficient implementation of the treaty provisions concerned.⁴ Therefore, States Party to the 1951 Convention and the 1967 Protocol undertake to accord certain standards of treatment to refugees, and to guarantee to them certain rights,

² See *Conclusions of the Executive Committee No. 74 (XLV) – 1994 and No. 103 (LVI) – 2005*. See also *EU Asylum Law, specifically, the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, OJ L 337/9-337/26; 20.12.2011, 2011/95/EU, available at: <http://www.refworld.org/docid/4f197df02.html>, which acknowledges that the Common European Asylum System is based on "the full and inclusive application" of the 1951 Convention and its 1967 Protocol.

³ See 1969 Vienna Convention, 1155 UNTS 331, Article 26.

⁴ See G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon Press, Oxford, 1996), pp. 230–41.

including the benefit of non-penalization in case of illegal entry or presence (Article 31).

Article 31(1) of the 1951 Convention

Article 31(1) of the 1951 Convention provides that 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.”

Article 31(1) is reflected in Article 28(1) of the Law on Refugees and Asylum of the Republic of Armenia, which provides 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.”⁵ Further, under Article 329(3) of the Criminal Code, an exception to the charge of illegal border crossing is made in “cases when a foreign citizen or stateless person enters the Republic of Armenia without prescribed documents or without due authorization to enjoy the right for asylum stipulated by the Constitution and legislation of the Republic of Armenia.”

Personal scope of Article 31(1) of the 1951 Convention

In practice, UNHCR has observed that in some cases, the Government of Armenia has declined to apply the protection of Article 31(1) to asylum-seekers, stating that only upon their being recognized as refugees, would they benefit from the respective Article 329(3) of the Criminal Code.

However, it is UNHCR's well-established position, taking into account the object and purpose of the 1951 Convention, as well as extensive State practice and the views of leading jurists,⁶ that Article 31(1) applies to asylum-seekers as well as to recognized refugees. The term asylum-seeker applies to individuals whose claim to international protection has not yet been determined.⁷ In Armenia such cases would include claims that are being considered under an admissibility or pre-screening procedure as well as those who are being considered under refugee status determination procedures in accordance with the Law on Refugees and Asylum of the Republic of Armenia. It also includes those exercising their right to seek judicial and/or administrative review of their asylum request.⁸

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

⁶ See, for example, Guy Goodwin-Gill, “Article 31 of the 1951 Convention relating to the Status of refugees; non-penalization, detention and protection”, in 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.

⁷ EXCOM Conclusion No. 29 (XXXIV), para. (j).

⁸ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 9, available at: <http://www.refworld.org/docid/503489533b8.html>.

Although Article 31 of the 1951 Convention does not refer explicitly to “asylum-seekers”, this provision applies as well to them, by virtue of the fact that the determination of refugee status is declaratory rather than constitutive in nature. This means that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfils the criteria contained in the definition. This would ordinarily occur prior to the time at which his/her refugee status is formally determined.⁹ Accordingly, in order to give meaning to Article 31(1) of the 1951 Convention, it must apply not only to recognized refugees but also to asylum-seekers.¹⁰

Indeed, Article 31 was specifically designed to protect the rights of individuals seeking asylum, and who may be compelled to arrive at or enter the territory without prior authorization. It would be nonsensical for the provision therefore to be inapplicable to asylum-seekers.

Furthermore, asylum-seekers are explicitly included in the non-penalization provision of Article 28(1) of the RA Law on Refugees and Asylum.

Conditions for entitlement to the protection of Article 31(1)

UNHCR has also noted that in some cases, questions have arisen over the individual's wish or genuine intention to seek asylum in Armenia at the time of irregularly crossing the border and as a result, penalties are applied to the individual.

This interpretation appears to arise from the current wording of Article 329(3), which provides for an exemption from criminal charges when the individual concerned has arrived in Armenia ‘*to enjoy the right for asylum.*’ This phrase is interpreted as stipulating prior intention to seek asylum in Armenia as a necessary condition to enjoy non-penalization for irregular entry. However, in Article 31(1) of the 1951 Convention, prior intention to seek asylum is not included as a condition for entitlement to non-penalization. Rather, 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 shall apply. For this reason, UNHCR would recommend revising the wording of Article 329(3) as outlined below in order to ensure that it is interpreted and implemented in line with the meaning of Article 31(1) of the 1951 Convention.

The term “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. The term “directly” must not be taken 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. To

⁹ See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, para. 28; <http://www.unhcr.org/refworld/docid/3ae6b3314.html>; Executive Committee of the High Commissioner's Programme (ExCom) Conclusion No. 6 (XXVIII) – 1977 on Non-Refoulement, para. c), <http://www.unhcr.org/excom/EXCOM/3ae68c43ac.html>.

¹⁰ See UNHCR, *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; available at: <http://www.refworld.org/docid/4e37b5902.html>.

ensure its legal effect in practice, Article 31 was also intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries, who are unable to find protection from persecution in the first country or countries to which they flee.¹¹ No strict time limit can be applied to the concept "coming directly" and each case must be judged on its merits. When assessing whether transit through or previous stay in another country is consistent with "coming directly", the intention of the refugee to reach a particular country of refuge, for instances, for family reunification purposes, is also a relevant factor to be taken into account. The term "coming directly" does not cover situations where the refugee has found protection, or has settled – temporarily or permanently – in another country, or has halted his or her flight in a country where protection could have been available for to him or her, but delayed unduly his or her efforts to use that opportunity to seek protection.

With regard to the expression "without delay", the promptness of presentation is a matter of fact and degree; it depends on the circumstances of the case, including the availability of advice.¹² Given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum-seeker to another, there is no time limit which can be mechanically applied or associated with the expression "without delay".

The criterion of "good cause" for illegal entry is clearly flexible enough to allow the elements of individual cases, in particular the circumstances under which the refugee fled, to be taken into account. Having a well-founded fear of persecution is recognized in itself as 'good cause' for illegal entry, while 'coming directly' from such a country via another country or countries in which s/he is at risk or in which generally no protection is available, is also accepted as 'good cause' for illegal entry. There may, in addition, be other factual circumstances, such as close family links in the country of asylum, which constitute 'good cause'.¹³

Furthermore, while taking note of the State's desire to manage migration and to prevent irregular and onward movements, it is also important to acknowledge a variety of factors that determine an individual's route, including the time, and reasons for, departure; entry, transit and exit requirements in the countries concerned; personal circumstances; material resources; historical or cultural ties

¹¹ UNHCR, Global Consultations on International Protection: Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees - Revised, 8-9 November 2001, para. 10(c), available at: <http://www.unhcr.org/3bf4ef474.html>. See, also, *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, available at: <http://www.refworld.org/docid/3ae6b6b41c.html>, at para. 18, where Simon Brown LJ concluded that: "I am persuaded by the applicants' [...] submission, drawing as it does on the travaux préparatoires, various Conclusions adopted by UNHCR's executive committee (Ex Com), and the writings of well respected academics and commentators (most notably Professor Guy Goodwin-Gill, Atle Grahl-Madsen, Professor James Hathaway and Dr Paul Weis), that some element of choice is indeed open to refugees as to where they may properly claim asylum. I conclude that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the Article, and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection *de jure* or *de facto* from the persecution they were fleeing."

¹² Global Consultations Summary Conclusions, at para. 10(f).

¹³ Global Consultations Summary Conclusions, at para. 10(e).

to specific countries; family and other transnational social networks; and rumours and chance.¹⁴

Conclusion/recommendation

In conclusion, the protection from penalization for illegal entry or presence applies to both refugees and to asylum-seekers. Article 31 was also intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries, who are unable to find protection from persecution in the first country or countries to which they flee.

UNHCR Armenia is of the opinion that re-wording the Criminal Code will address the existing protection gaps and help to avoid a situation of prolonged and arbitrary detention of asylum-seekers in Armenia.

In order to support a more consistent application in accordance with obligations under Article 31 of the 1951 Convention in Armenia and Article 28(1) of the RA Law on Refugees and Asylum, UNHCR recommends introducing amended wording to Article 329(3) of the Criminal Code.

Suggested wording for Article 329(3):

"This Article shall not extend to asylum-seekers and refugees who have entered the Republic of Armenia without prescribed documents or without due authorization".

UNHCR Armenia
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¹⁴ UN High Commissioner for Refugees (UNHCR), *Refugee Protection and Mixed Migration: The 10-Point Plan in action*, February 2011, available at: <http://www.refworld.org/docid/4d9430ea2.html>.