

GUIDELINES ON INTERNATIONAL PROTECTION NO. 14:

Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees

UNHCR issues these Guidelines pursuant to its mandate, as contained in, inter alia, the *Statute of the Office of the United Nations High Commissioner for Refugees*, namely paragraph 8(a), in conjunction with Article 35 of the *1951 Convention relating to the Status of Refugees*, and Article II of its *1967 Protocol*.

These Guidelines have benefited from comprehensive research and multiple rounds of broad expert and public consultations. These Guidelines are intended to provide legal interpretative guidance for governments and other stakeholders, including policy- and decision-makers, border control authorities, prosecutorial authorities and asylum authorities, as well as legal practitioners, members of the judiciary and UNHCR staff.

Calls for public consultation on future Guidelines will be posted online at: <http://www.unhcr.org/544f59896.html>.

TABLE OF CONTENTS

I.	INTRODUCTION	3
A.	Rationale.....	3
B.	Purpose of Article 31	3
II.	ANALYSIS OF ARTICLE 31(1) OF THE 1951 CONVENTION	7
A.	Personal scope of Article 31(1) of the 1951 Convention	7
B.	Coming directly from a territory where their life or freedom was threatened.....	10
C.	Entry or presence in the territory without authorization	12
D.	Presenting themselves without delay to the authorities.....	14
E.	Showing good cause for irregular entry or presence.....	17
F.	Penalties on account of irregular entry or presence	18
III.	ANALYSIS OF ARTICLE 31(2) OF THE 1951 CONVENTION	22
A.	Personal scope of Article 31(2) of the 1951 Convention	22
B.	Necessary restrictions on freedom of movement	23
C.	Regularization of status	25
D.	Obtaining admission into another country	26
IV.	EFFECTIVE IMPLEMENTATION OF ARTICLE 31 OF THE 1951 CONVENTION	28
A.	Procedural and evidentiary issues.....	28
B.	Responsibilities for effective implementation.....	28

I. INTRODUCTION

A. Rationale

1. States have a legitimate interest, as well as the authority and responsibility, to manage and control entry to, and stay within their territory. This is in accordance with international law, including international refugee law and human rights law. States typically do so through measures, including visa requirements and border controls. Border and entry management measures and processes may not enable people to seek asylum through regular means. As a result, some people in need of international protection cross borders and enter a country without authorization. When apprehended at land-, air- or sea-borders, or within the territory of a country, without proper documentation, or otherwise in violation of the rules of entry or stay, such people may be subjected to a range of restrictive, coercive and punitive measures.¹ Laws, policies and practices penalizing people in need of international protection because of their unauthorized or irregular entry and presence² and/or restricting their freedom of movement can breach Article 31 of the 1951 Convention relating to the Status of Refugees (1951 Convention).³

2. The purpose of these Guidelines is to provide substantive guidance for interpreting and applying Article 31 of the 1951 Convention and to promote consistency in such interpretation and application among Contracting States of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees.⁴ After outlining the purpose of Article 31 as a whole, these Guidelines address the constituent elements of each of its two distinct paragraphs specifically. The final section outlines procedural and evidentiary issues, as well as other responsibilities, to ensure an effective implementation of Article 31.

B. Purpose of Article 31

3. Article 31 is central to the object and purpose of the 1951 Convention and its 1967 Protocol, because it ensures that refugees can gain access to international protection effectively, without being penalized for breaches of immigration and other laws (Article 31(1)) and that they are not unnecessarily restricted in their freedom of movement when unlawfully in

¹ Executive Committee of the High Commissioner's Programme (ExCom) Conclusion No. 44 (XXXVIII) 1986, para. (a). ExCom Conclusion No. 85 (XLIX) 1998, para. (ee). 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, pp. 7-8, www.refworld.org/docid/59ad55c24.html (Costello et al). G S Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, June 2003, p. 187, www.refworld.org/docid/470a33b10.html.

² ExCom Conclusion No. 58 (XL) 1989, para. (a).

³ *Convention relating to the Status of Refugees* (28 July 1951) 189 UNTS 137, www.refworld.org/docid/3be01b964.html (1951 Convention).

⁴ *Protocol relating to the Status of Refugees* (31 January 1967) 606 UNTS 267, www.refworld.org/docid/3ae6b3ae4.html (1967 Protocol). Pursuant to Article I(1) of the 1967 Protocol, States parties are obliged to apply Article 31 of the 1951 Convention.

the host country (Article 31(2)).⁵ Under Article 42(1) of the 1951 Convention, States may make reservations to Article 31 at the time of signature, ratification or accession.⁶ At the time of publication of these Guidelines, four Contracting States maintained reservations to this Article.⁷

Article 31(1) 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.”

4. Notwithstanding the requirement under Article 2 of the 1951 Convention that refugees conform to the laws and regulations of the country in which they find themselves, Article 31(1) of the 1951 Convention acknowledges that in seeking asylum from persecution,⁸ refugees are

⁵ *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, paras. 1, 3, 10 and 15, 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. 9, www.refworld.org/cases/GBR_HL_4835401f2.html. Inter-American Court of Human Rights (IACrHR), *The institution of asylum, and its recognition as a human right in the Inter-American System of Protection (interpretation and scope 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, requested by the Republic of Ecuador, Series A No. 25, para. 99, www.refworld.org/cases/IACRTHR_5c87ec454.html, 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. Under the Vienna Convention on the Law of Treaties, States have an obligation not to defeat the object and purpose of a treaty and to perform the treaty in good faith, *Vienna Convention on the Law of Treaties* (23 May 1969) 1155 UNTS 331, Articles 18 and 26.

⁶ See also, Article VII of the 1967 Protocol, note 4 above.

⁷ Botswana, Mexico, Papua New Guinea and the Republic of Moldova. Botswana merely stated at the time of accession “Subject to the reservation of articles 7, 17, 26, 31, 32 and 34 and paragraph 1 of article 12 of the Convention” without further elaboration. Mexico maintains a reservation to Article 31(2), reserving the right to assign, in accordance with its national legislation, the place or places of residence of refugees and to establish the conditions for moving within the national territory. Papua New Guinea does not accept obligations stipulated in Article 31. However, it partly withdrew its reservation on 20 August 2013, accepting its obligations under Article 31 in relation to refugees transferred by the Government of Australia to Papua New Guinea. The Republic of Moldova reserved the application of Article 31 as of the date of the entry into force of the Law on Refugee Status. In addition, Honduras, at the time of accession to the 1951 Convention, declared that it reserves the right to designate, change or limit the place of residence of certain refugees or groups of refugees and to restrict their freedom of movement when national or international considerations so warrant. Honduras withdrew this reservation with respect to Article 31 (and 26) on 29 May 2013. Also, the Holy See maintains a general reservation that the application of the Convention must be compatible in practice with the special nature of the Vatican City State and without prejudice to the norms governing access to and sojourn therein. For more information, see: the United Nations Treaty Collection, treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=en#EndDec or UNHCR’s Refugee Treaty and Legislation Dashboard, <https://rimap.unhcr.org/refugee-treaty-legislation-dashboard>.

⁸ The right to seek and enjoy asylum is affirmed in Article 14 of the Universal Declaration on Human Rights and 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,” *Universal Declaration of Human Rights* (10 December 1948) 217 A (III), www.refworld.org/docid/3ae6b3712c.html (UDHR). Inter-American Commission on Human Rights,

often compelled to arrive, enter or stay in a territory without authorization or documents, or with documentation which is insufficient, false or obtained by fraudulent means, or by using clandestine modes of entry. Travelling without fulfilling relevant travel and immigration requirements, including for example, obtaining visas, providing health certificates, or following registration or other procedures for legally exiting one country and entering another, is often unavoidable to enable people to seek asylum and access the entitlements afforded to them under the 1951 Convention.⁹

5. Article 31(1) is a protective clause, not an exclusion clause. It would be inconsistent with the object and purpose of the 1951 Convention, its structure, and its plain language to invoke it to justify denying a person the protection and rights that the 1951 Convention affords. The clause does not protect all irregularly entering or staying refugees from being penalized but protects those who have come directly from territories where their life or freedom is threatened, who present themselves without delay to authorities, and who show good cause for their irregular entry or presence. The requirements for non-penalization, namely of “directness”, “promptness”, and “good cause”, are cumulative.¹⁰ Refugees who do not meet one or more of the requirements do not benefit from the prohibition of the imposition of penalties under Article 31(1). An analysis of the requirements under Article 31(1) is addressed further in section II below.

6. While the text of Article 31(1) uses the term “illegal”, the term “irregular” is preferred by UNHCR. The term “illegal” has criminal connotations and may imply a serious breach of domestic penal laws. Use of the term should be avoided in the context of refugee entry or presence in a host country. Seeking asylum, including by irregular means, is not a criminal

American Declaration on the Rights and Duties of Man (2 May 1948), Article XXVII, www.refworld.org/docid/3ae6b3710.html, referring to the right to seek and receive asylum. Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica (22 November 1969) 1144 UNTS 123, Article 22(7), www.refworld.org/docid/3ae6b36510.html (ACHR), referring to the right to seek and be granted asylum. Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")* (27 June 1981) 1520 UNTS 217, Article 12(3), www.refworld.org/docid/3ae6b3630.html (ACHPR), 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 (EU Charter of Fundamental Rights), referring to the right to asylum to be guaranteed with due respect to the 1951 Convention and EU law.

⁹ This was recognized in the drafting process of the 1951 Refugee Convention. 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, 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 protect 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.” See also, *R v. Asfaw*, note 5 above, para. 9. *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. See also, UNHCR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report*, May 2013, p. 213, www.refworld.org/docid/519b1fb54.html.

¹⁰ Costello et al, note 1 above, p. 16.

act.¹¹ The terms “irregular” and “without authorization” are used interchangeably in these Guidelines.

Article 31(2) provides:

“The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.”

7. Article 31(2) deals with permissible and limited restrictions on the freedom of movement of refugees who have entered or are present in the country (hereafter ‘host country’) without authorization, regardless of whether they can or cannot be penalized for irregular entry or presence under Article 31(1).¹² In accordance with Article 31(2), refugees who have entered or are present irregularly are protected from restrictions on their freedom of movement, except when such restrictions are necessary and then only until their status in the host country is regularized, or until they obtain admission to another country. Article 31(2) seeks to ensure that host countries have time to complete procedures and inquiries into, for example, the identity and other circumstances of refugees whom they have not initially authorized to enter or remain on their territory. This enables States to carry out checks necessary for reasons of national security, public health or public order, as well as permitting them to take measures that may be necessary to manage arrivals, such as in situations of mass influx.¹³ Refugees who cannot be penalized under Article 31(1) may still, in accordance with Article 31(2), be restricted in their freedom of movement, where such restrictions are necessary, i.e. applied for legally authorized purposes, are proportionate and are subject to judicial control. An analysis of the requirements under Article 31(2) is addressed further in section III below.

¹¹ See, for example, Council of Europe: Commissioner for Human Rights, *Criminalisation of Migration in Europe: Human Rights Implications*, February 2010, pp. 8-9, www.refworld.org/docid/4b6a9fef2.html. See also, paragraph 32 of these Guidelines.

¹² A Grahl-Madsen, *Commentary on the Refugee Convention 1951: articles 2-11, 13-23, 24-30 & schedule, 31-37* (UNHCR Geneva, 1997), p. 179. The freedom of movement of refugees whose status in the country has been regularized and who are lawfully in the host country is regulated by Article 26 of the 1951 Convention, note 3 above.

¹³ 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 Thirty-fifth Meeting*, 3 December 1951, A/CONF.2/SR.35, statements of Mr. van Heuven Goedhart (UNHCR), Mr. Rochefort (France), Mr. Hoare (United Kingdom) and Mr. Larsen (Denmark), www.refworld.org/docid/3ae68ceb4.html. Grahl-Madsen Commentary, note 12 above, p. 181. UN Human Rights Committee (HRC), *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, para. 18, www.refworld.org/docid/553e0f984.html. J C Hathaway, *The rights of refugees in international law* (Cambridge University Press, 2021), pp. 529-530.

II. ANALYSIS OF ARTICLE 31(1) OF THE 1951 CONVENTION

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

8. Article 31(1) of the 1951 Convention applies to refugees as defined in Article 1 of the same instrument. It also applies to refugees as defined by the regional refugee criteria included in the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention)¹⁴ and the 1984 Cartagena Declaration on Refugees (1984 Cartagena Declaration)¹⁵ when the responsible State is a Contracting State to the 1951 Convention or 1967 Protocol.¹⁶

9. African Union (AU) Member States that are party to the 1969 OAU Convention, but not to the 1951 Convention and/or its 1967 Protocol, are not bound by the rights framework set out in the 1951 Convention, including Article 31(1).¹⁷ Additionally, those AU Member States which have retained the 1951 Convention's geographical limitation are bound by its provisions only in respect of European refugees.¹⁸ The preamble of the 1969 OAU Convention nonetheless calls upon Member States of the AU to accede to the 1951 Convention and its 1967 Protocol and meanwhile to apply the provisions of the 1951 Convention to refugees in Africa.¹⁹

¹⁴ Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa* (10 September 1969) 1001 UNTS 45, Article I(2), www.refworld.org/docid/3ae6b36018.html (1969 OAU Convention).

¹⁵ *Cartagena Declaration on Refugees Colloquium on the International Protection of Refugees in Central America, Mexico and Panama*, (22 November 1984), Conclusion III(3), www.refworld.org/docid/3ae6b36ec.html (Cartagena Declaration). The 1984 Cartagena Declaration is not a treaty within the meaning of Article 1(a) of the 1969 Vienna Convention on the Law of Treaties, note 5 above, but the broader refugee criteria contained in Conclusion III(3) are incorporated in the domestic legal framework of 15 States in the Americas region.

¹⁶ In States party to the 1951 Convention and/or 1967 Protocol, refugees recognized under the 1969 OAU Convention, whether under Article I(1) or I(2), or Conclusion III(3) of the Cartagena Declaration, benefit from the 1951 Convention's rights framework. A difference in treatment would be neither reasonable nor objectively justified and would disregard the complementary character of the 1969 OAU Convention (Article VIII(2)) and the Cartagena Declaration. Moreover, the ninth preambular paragraph of the 1969 OAU Convention and Conclusion III(8) of the Cartagena Declaration recognize the need and desire to establish common or minimum standards for the treatment of refugees on the basis of the 1951 Convention. UNHCR, *Persons in need of international protection*, June 2017, p. 3, www.refworld.org/docid/596787734.html, considering that "all persons who meet the refugee criteria under international law are refugees for the purposes of international law". UNHCR, *Key legal considerations on the standards of treatment of refugees recognized under the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, 19 December 2017, www.refworld.org/docid/5a391d4f4.html.

¹⁷ To date, of the African Union's 55 Member States, the Comoros, Eritrea, Libya and Mauritius have neither signed nor ratified the 1951 Convention or its 1967 Protocol. Also, neither instrument applies to the Western Sahara. Madagascar is a party to the 1951 Convention but not to the 1967 Protocol. Madagascar and the Republic of Congo continue to recognize the 1951 Convention's geographical limitation and as such are obliged to apply the 1951 Convention rights to European refugees, i.e. persons who are seeking asylum as a result of events occurring in Europe. Madagascar also continues to recognize the 1951 Convention's temporal limitation, applying the refugee definition only in relation to events occurring before 1951.

¹⁸ The Republic of Congo and Madagascar maintain the geographical limitation under Article 1B(1)(a) of the 1951 Convention.

¹⁹ 1969 OAU Convention, note 14 above, preambular para. 10, referencing Resolution 26 of the OAU Assemblies of Heads of State and Government, which explicitly requests (rather than calls upon) Member States of the OAU to ratify the 1951 Convention and to apply meanwhile the provisions of that Convention, see: OAU AHG/Res.26(II), para. 7. Note also in this regard the continuous call by ExCom

10. Article 31(1) of the 1951 Convention applies to refugees and asylum-seekers alike.²⁰ For Article 31(1) to be effective, it must apply to any person who is, or who claims to be, a refugee, including those who have not yet formally applied for asylum but have expressed the intention to do so, or otherwise expressed a fear of returning to their country or origin.²¹ Article 31(1) ceases to apply when the person does not formally apply for asylum, despite having had an effective opportunity to do so; when they withdraw the claim;²² or if they are found not to be a refugee in a final decision on the merits following a fair procedure.²³ As such, Article 31(1) applies to asylum-seekers, including to those whose claims are declared inadmissible, for whom no decision on the merits has been made.²⁴ Asylum-seekers whose claims are declared

and the United Nations General Assembly to States that are not Contracting States of the 1951 Convention and/or 1967 Protocol to accede to these instruments, including in the UN General Assembly, *New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly*, 3 October 2016, A/RES/71/1, para. 65, www.refworld.org/docid/57ceb74a4.html (adopted 19 September 2016). See also, numerous ExCom Conclusions, including No. 108 (LIX) 2008, and UNGA resolutions, including 71/172 (2017), para. 7.

²⁰ Due to the declaratory character of refugee status determination, a person is a refugee within the meaning of the 1951 Convention, its 1967 Protocol, the 1969 OAU Convention or the Cartagena Declaration as soon as they fulfil the criteria contained in any of these definitions. This would necessarily occur prior to the time at which the person's refugee status is formally determined, see: UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, para. 28 in: 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, www.refworld.org/docid/5cb474b27.html, and ExCom Conclusion No. 6 (XXVIII) 1977, para. (c).

²¹ *Summary Conclusions: Article 31 of the 1951 Convention*, June 2003, para. 10(g), www.refworld.org/docid/470a33b20.html, (Summary Conclusions 2003). *Beschluss der 2. Kammer des Zweiten Senats vom 08. Dezember 2014 - 2 BvR 450/11 - Rn. (1-65)*, Germany: Bundesverfassungsgericht (BVerfG), 8 December 2014, para. 27, www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5b3353ca4 [In German], (for a summary of the case in English, see: www.refworld.org/cases_DEU_BUNDESVERFASS_5b33531d4.html), indicating that Article 31 applies to asylum-seekers in a non-technical sense, including those who have not yet formally applied for asylum, but who have entered Germany and expressed the intention to seek asylum at the earliest possibility. R v. Uxbridge Magistrates, note 5 above, para. 16, www.refworld.org/cases_GBR_HC_QB_3ae6b6b41c.html. Goodwin-Gill 2003, note 1 above, p.193. UNHCR, *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*, 26 October 2018, para. 1.3.1., www.refworld.org/docid/5bd313884.html.

²² An asylum application can either be explicitly withdrawn by the applicant or be considered by the State to have been implicitly withdrawn. According to UNHCR, an implicit withdrawal of an application can be considered where national law so provides based on reasonable criteria, including failure to appear on several occasions at scheduled and effectively notified appointments without reasonable explanation and/or extenuating circumstances. In such cases, the authorities may suspend or close the case file. It is advisable that records of all asylum applications received by the State be maintained, including of suspended and/or closed cases to allow reopening of implicitly withdrawn applications, see: UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, September 2019, www.refworld.org/docid/5d8a255d4.html. See also, UNHCR, *UNHCR RSD Procedural Standards Unit 9: Procedures for RSD Case Closure and Re-opening*, 26 August 2020, www.refworld.org/docid/5e87076115.html.

²³ Summary Conclusions 2003, note 21 above, para. 10(g). *South Africa: Act No. 130 of 1998, Refugee Act, 1998* [South Africa], 26 November 2008, section 21(4), www.refworld.org/docid/4a54bbd4d.html. Costello et al, note 1 above, p. 16, arguing that "following a fair procedure" is determinative and only then may a rejected asylum-seeker be penalized for irregular entry or presence.

²⁴ Inadmissibility in this context refers to a formal decision by the State not to admit an asylum application to a procedure determining whether the applicant is a refugee or otherwise in need of international protection. Formal admissibility procedures are most often conducted in asylum procedures to determine which State has the responsibility to determine the applicant's claim for international protection. See UNHCR, *Aide-Memoire & Glossary of case processing modalities, terms and concepts*

inadmissible are protected from penalization when they otherwise meet the requirements set out in Article 31(1). Asylum-seekers also retain other protections under international and regional refugee and human rights law, including against refoulement and discrimination.

11. Article 31(1) also applies to refugees who can no longer be regarded as lawfully staying in the territory of the State concerned, i.e. after their authorization to stay or lawful status – usually conveyed or confirmed through issuance of a permit – has been terminated or not renewed by the host State as a result of an expulsion order after due process of law, in accordance with Article 32 of the 1951 Convention, or in application of an exception to the principle of non-refoulement under Article 33(2) of the 1951 Convention. Neither Article 32 nor Article 33(2) of the 1951 Convention entail loss of refugee status within the meaning of the 1951 Convention. Such persons continue to be refugees within the meaning of Article 1 of the Convention and therefore Article 31(1) continues to apply. In cases where an asylum-seeker's authorization to stay expires before a final decision on the merits of the claim is made in accordance with a fair procedure, such expiration does not affect the applicability of Article 31(1) of the 1951 Convention, even if it would otherwise render that person's stay unauthorised under domestic law.²⁵ Similarly, Article 31(1) applies to those granted temporary forms of protection in lieu and/or anticipation of their refugee status determination.²⁶ A large-scale influx of refugees does not alter the personal scope of Article 31(1).²⁷

12. UNHCR encourages States to extend under domestic law the application of Article 31(1) to, in addition to refugees, people otherwise in need of international protection,²⁸ including persons entitled to complementary forms of international protection. They are similarly situated to refugees, face comparable challenges in seeking asylum and entering a safe country in a regular manner, and often have equally serious international protection needs, which warrant extending them the same protections as refugees from penalties for irregular entry or stay. Any difference in treatment must be objectively and reasonably justifiable so as not to be discriminatory.²⁹

applicable to RSD under UNHCR's Mandate (The Glossary), 2017, p. 15,

www.refworld.org/docid/5a2657e44.html.

²⁵ *Arse v Minister of Home Affairs*, (25/2010) [2010] ZASCA 9 (12 March 2010), South Africa: Supreme Court of Appeal, 12 March 2010, para. 19, www.refworld.org/cases.SASCA.4c933be42.html.

²⁶ UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, para. 8 (ninth point), www.refworld.org/docid/52fba2404.html.

²⁷ ExCom Conclusion No. 22 (XXII), 1981, paras. II.B.(1) and (2)(a). UNHCR, *The Scope of International Protection in Mass Influx*, 2 June 1995, EC/1995/SCP/CRP.3, paras. 21-22, www.refworld.org/docid/3ae68cc018.html.

²⁸ UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, 2 June 2005, EC/55/SC/CRP.16, www.refworld.org/docid/47fd49d.html. ExCom Conclusion No. 103 (LVI), 2005. UNHCR Persons in need of international protection, note 16 above.

²⁹ Costello et al, note 1 above, p. 13. *Hode and Abdi v. The United Kingdom*, (Application no. 22341/09), Council of Europe: European Court of Human Rights, 6 November 2012, para. 50, www.refworld.org/cases.ECHR.509b93792.html, considering "that the requirement to demonstrate an 'analogous situation' does not require that the comparator groups be identical. Rather, ... they had been in a relevantly similar situation to others treated differently." UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of M.A. v. Denmark (Application no.*

B. Coming directly from a territory where their life or freedom was threatened

13. Article 31(1) applies to refugees who come “directly from a territory where their life or freedom was threatened in the sense of article 1”. Such a territory can be the refugee’s country of origin³⁰ or any other territory where their life or freedom was threatened in the sense of Article 1 of the 1951 Convention.³¹ Refugees “coming directly” include those who come straight from such territory, but may also include those who have merely transited through an intermediate country or countries, as well as those who have stayed in an intermediate country or countries.³² As further outlined in paragraphs 14 and 15, in determining whether a person can be considered to have been “coming directly,” elements to consider include the length of stay in any intermediate country or countries; the reasons for delaying onward movement from that country; and whether or not the refugee sought or found international protection there.³³

14. The term “directly” should be interpreted broadly and not necessarily in a literal (geographical or temporal) sense. For Article 31(1) to apply, refugees are not required to have come to the current host country without crossing through, stopping or staying in any other intermediate country or countries after leaving the territory where their lives or freedom are threatened.³⁴ Mere transit in an intermediate country cannot be considered to interrupt “coming directly”.³⁵ While the length of time spent in such an intermediate country or countries is a relevant factor for interpreting whether the refugee has indeed come directly, no strict time limit

6697/18) before the European Court of Human Rights, 21 January 2019, section 3.3, www.refworld.org/docid/5c4591164.html.

³⁰ The phrase “country of origin” refers to the person’s country of nationality, or, in the case of a stateless person, the country of former habitual residence, within the meaning of Article 1A(2) of the 1951 Convention, note 3 above.

³¹ Goodwin-Gill Article 31, note 1 above, p.189.

³² Summary Conclusions 2003, note 21 above, para. 10(b). Goodwin-Gill 2003, note 1 above, pp. 192 and 217–218, referring, inter alia, to the drafting history of the 1951 Convention, where it was mentioned that transits or stays in intermediate countries may be necessary. See remarks of the UN High Commissioner for Refugees, van Heuven Goedhart, 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, www.refworld.org/docid/3ae68cdb0.html.

³³ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, note 5 above, para. 18. *R v. Asfaw*, note 5 above, para. 15. *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(iv), www.refworld.org/cases,GBR_CA_CIV_5215e0214.html.

³⁴ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, note 5 above, para. 18. *R v. Asfaw*, note 5 above, para. 15. *R. and Koshi Pitshou Mateta and others*, note 33 above, LJ Leveson, para. 21(iv). *Decision KKO:2013:21*, Finland: Supreme Court, 5 April 2013, www.refworld.org/cases,FIN_SC_557ac4ce4.html. *ECLI:NL:HR:2011:BO1587*, 09/02303, Netherlands, The: Supreme Court (Hoge Raad), 24 May 2011, para. 2.5, <https://www.refworld.org/jurisprudence/caselaw/nlthg/2011/nl/148636>, where the Court in general terms highlighted the importance of taking into account the time spent in an intermediate country.

³⁵ *FMS and Others v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság and Országos Idegenrendészeti Főigazgatóság*, joined cases C-924/19 & C-925/19, ECLI:EU:C:2020:367, European Union: Court of Justice of the European Union, 14 May 2020, paras. 158-160, <https://www.refworld.org/jurisprudence/caselaw/ecj/2020/en/148635>, where the Court concluded that transit cannot constitute a “connection” for the purpose of declaring an application for asylum inadmissible on the basis of a safe third country. *R v. Jaddi* [2012] EWCA Crim 2565, [2012] EWCA Crim 2565, United Kingdom: Court of Appeal (England and Wales), 22 November 2012, para. 16, <https://www.refworld.org/jurisprudence/caselaw/gbrcaiv/2012/en/148625>.

ought to be applied to passages or stays in intermediate countries.³⁶ Moreover, each case must be assessed on its own facts and circumstances, taking into account the realities of flight. The “directness” of travel, therefore, needs to be looked at in the context in which such travel takes place – often through circuitous routes, over land or by sea, frequently with interruptions. There can be good reasons for delay, stopovers and stays in intermediate countries.³⁷ Such reasons may include, for example, advice or coercion from agents or smugglers; challenges with acquiring the means to travel onwards, or constraints limiting their ability to move on.³⁸ In recognition of the complex nature of a refugee’s journey, reasonable periods of delays, stopovers and stays that form part of an ongoing journey should not be regarded as negating the “directness” of the journey.

15. The following categories of refugees cannot be regarded as having “come directly” within the meaning of Article 31(1) of the 1951 Convention:³⁹

- Refugees who are formally granted international protection and lawful stay in an intermediate or other country, or who otherwise lawfully settled there, temporarily or permanently, with access in that country to standards of treatment commensurate with the 1951 Convention, its 1967 Protocol and international human rights standards.⁴⁰

³⁶ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, note 5 above, para. 18, LJ Brown: “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.” *Hassan v. Department of Labour*, CRI 2006-485-101, New Zealand: High Court, 4 April 2007, para. 39, www.refworld.org/cases/NZL_HC.47a1d3e32.html, where the Court made the general remark that “[t]he ‘coming directly’ requirement will not necessarily render ineligible a refugee who has spent some weeks or even months in an intermediate country”, although in the underlying case it did.

³⁷ There is no obligation under international law for a person to seek international protection at the first effective opportunity; but at the same time, refugees to do not have an unfettered right to choose the country that will determine their claims and provide asylum. See UNHCR Irregular Onward Movement Guidelines, note 22 above, paras. 1-9 and 14.

³⁸ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, note 5 above, para. 18, considering acquiring the means to travel onward as a good reason delaying onward travel. *Beschluss der 2. Kammer des Zweiten Senats vom 08. Dezember 2014*, note 21 above, para. 32, considering using the time spent in the intermediate country to arrange onward movement.

³⁹ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, note 5 above, para. 18, considering, inter alia, it relevant to determine “coming directly” whether or not the refugee sought or found protection in the intermediate country and not whether the refugee could have found protection there. See also, *R v. Asfaw*, note 5 above, para. 15; *R. and Koshi Pitshou Mateta and others*, note 33 above, para. 21(iv); and Costello et al, note 1 above, pp. 18-19, for further analysis and sources.

⁴⁰ International protection and lawful stay or lawful settlement in this context refers to being granted a formal right to stay in the host State, either as a refugee or otherwise, and being accorded standards of treatment commensurate with the 1951 Convention, its 1967 Protocol and international human rights standards, see: UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, para. 3, www.refworld.org/docid/5acb33ad4.html. It should be noted that there may be situations where the intermediate country merely condones the presence of asylum-seekers or refugees, respectively delaying the determination of their asylum claim or not providing them with a formal authorization to stay.

- Asylum-seekers whose claim for international protection was rejected in an intermediate or other country by a final decision in a fair and efficient asylum procedure after an assessment on the merits of their claim in accordance with international standards, and who nonetheless subsequently move on and enter or are present without authorization in their current host country.⁴¹

16. First country of asylum and safe third country concepts are often applied in cases where a refugee or asylum-seeker has transited or stayed in an intermediate country, where they have found international protection, or where they could have sought it. When implemented in line with relevant safeguards and conditions pursuant to international law,⁴² the transfer of a refugee or asylum-seeker to an intermediate country in application of a safe third country concept would not be prohibited by Article 31(1).⁴³ The application of safe third country concepts must be in the spirit of international cooperation,⁴⁴ with due regard to States' interests and the relevant safeguards and conditions that govern the determination of refugee status and the protection of, and solutions for, refugees. States should also ensure that protection remains a paramount consideration and that refugees and asylum-seekers are not detained or otherwise penalized for protracted periods during negotiations regarding transfer and readmission to another State.

17. In cases of *sur place* claims, the question of 'coming directly' normally will not arise, because the refugee will have travelled to and entered the country prior to the person having a well-founded fear of persecution.

C. Entry or presence in the territory without authorization

18. Article 31(1) applies to refugees who enter or are present in the "territory without authorization". The term "territory" includes land within a State's territorial borders and territorial waters as well as its border entry points, including transit areas or so-called "international

⁴¹ The drafters intended Article 31(1) to provide a wide scope of protection from penalization for irregular entry or presence, with the exception of those refugees who had already found asylum in a previous country, see: Goodwin-Gill 2003, note 1 above, pp.189 and 191, referring to a statement made by the representative of France (M Colemar): 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 Thirteenth Meeting*, 22 November 1951, A/CONF.2/SR.13, www.refworld.org/docid/3ae68cdc8.html.

⁴² Other relevant considerations include the existence of a bi- or multilateral transfer agreement as well as inter-State solidarity and international cooperation and burden-sharing. See for UNHCR's position on the meaning and application of "safe third country" concepts, including relevant safeguards for their application: UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, note 40 above. In applying "safe third country" concepts, States must avoid externalizing their international protection obligations, see: UNHCR, *UNHCR Note on the "Externalization" of International Protection*, 28 May 2021, www.refworld.org/docid/60b115604.html.

⁴³ Hathaway Rights 2021, note 13 above, p. 519. G S Goodwin-Gill and J McAdam, *The Refugee in International Law* (Oxford University Press 2021), p. 278. *AAA and Others v. Secretary of State for the Home Department* [2023] EWCA Civ 745, 29 June 2023, para. 316, www.refworld.org/cases_UK_SC.64b16aaa4.html.

⁴⁴ 1951 Convention, note 3 above, preambular para. 4.

zones⁴⁵ at land borders, sea ports and airports.⁴⁶ Refugees who are intercepted at a border or in its immediate vicinity also come within the scope of Article 31(1), when the refugee is under the jurisdiction, i.e. authority or control, of the State, including particularly when they are arrested by border guards or other State agents as they seek to enter the territory.⁴⁷

19. The term “authorization” in Article 31(1) refers to the State’s consent to a refugee’s entry into or presence in its territory.⁴⁸ Authorization to enter and/or be present is determined by a State’s legal framework regulating the entry and stay of non-nationals. This includes a State’s domestic laws and policies, as well as its international and regional legal obligations, for example in the context of regional free movement arrangements. Refugees who enter a State pursuant to formal readmission or responsibility-sharing agreements may be authorized to enter and stay in the territory under the terms of such an agreement. Proof of authorization to enter a country may also be provided by a relevant travel document and/or an entry visa. Entering, including re-entering, in contravention of a State’s domestic laws – for example, by using false or fraudulently-obtained documents to travel and gain entry,⁴⁹ failing to observe border control and/or immigration formalities, such as obtaining a visa or taking advantage of

⁴⁵ UN General Assembly, *Recommended Principles and Guidelines on Human Rights at International Borders: Conference room paper*, 23 July 2014, A/69/CRP. 1, para. 1, www.refworld.org/docid/54b8f58b4.html. Goodwin-Gill and McAdam 2021, note 43 above, p. 318. 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, para.12, www.refworld.org/docid/42dd174b4.html; *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. 220, www.refworld.org/cases_IACRTHR_54129c854.html. *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, www.refworld.org/cases_ECHR_3ae6b76710.html, at para. 52 the Court notes that “even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945, holding them in the international zone of Paris Orly Airport made them subject to French law” and considered further that “[d]espite its name, the international zone does not have extraterritorial status.” See also, *D. v. United Kingdom*, 146/1996/767/964, Council of Europe: European Court of Human Rights, 2 May 1997, para. 48 in conjunction with para. 25, www.refworld.org/docid/46deb3452.html. UNHCR, *Legal considerations on state responsibilities for persons seeking international protection in transit areas or “international” zones at airports*, 17 January 2019, www.refworld.org/docid/5c4730a44.html. *N.D. and N.T. v. Spain (Applications nos. 8675/15 and 8697/15) (Grand Chamber)*, Council of Europe: European Court of Human Rights, 13 February 2020, paras. 106-111 and 190, www.refworld.org/cases_ECHR_5e4691d54.html.

⁴⁶ J Crawford, *Brownlie’s Principles of Public International Law* (Oxford University Press 2019), pp. 191-192.

⁴⁷ Noll in A Zimmermann and T Einarsen (eds), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (Oxford University Press, 2024), p. 1415. Summary Conclusions 2003, note 21 above, para. 11. Costello et al, note 1 above, p.23. This is further supported by a State’s responsibility to protect persons from *refoulement*; a responsibility that exists regardless of whether the person has entered the country in a legal sense and has passed immigration control, was authorized to enter, or is located in the transit areas or “international zone” at a border or (air)port. Hathaway Rights 2021, note 13 above, p. 489. See, inter alia, UNHCR *Legal considerations on state responsibilities for persons seeking international protection in transit areas or “international zones” at airports*, note 45 above.

⁴⁸ ExCom Conclusion No. 58 (XL) 1989, para. (a).

⁴⁹ *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_40cecc1694.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.”

regular immigration pathways; using methods of deception or clandestine entry (for example, as a stowaway or entering the territory outside of official ports of entry, including closed or unauthorized entry points);⁵⁰ or using the assistance of smugglers⁵¹ – would qualify as entry “without authorization” within the meaning of Article 31(1) of the 1951 Convention.⁵²

20. “Illegal ... presence” in Article 31(1) refers to refugees who have not been authorized by the host State to be present on any ground in accordance with its legal framework; who have previously been banned from entering but are nonetheless present;⁵³ and those for whom authorization to be present has ceased or has been withdrawn, including refugees whose permission to stay has ended (see paragraph 11). Refugees who attempt to leave a country in contravention of exit rules and who are present without authorization, may be protected from penalization under Article 31(1). This includes when they are transiting *en route* elsewhere to claim asylum, and have not presented themselves to the authorities upon entry but are rather apprehended when trying to exit the country.⁵⁴

D. Presenting themselves without delay to the authorities

21. To be protected from penalization under Article 31(1) of the 1951 Convention, refugees should present themselves to the authorities and do so without delay. When the State has an accessible and functioning asylum or refugee protection system, it is in the interests of both the State and the refugee for them to come forward as soon as reasonably possible.⁵⁵ “Without delay” means within a reasonable period of time after arrival in the territory⁵⁶ or, in the case of unauthorized presence, within a reasonable period of time after a well-founded fear of persecution may have arisen (i.e. a claim for refugee status *sur place*).⁵⁷

⁵⁰ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, note 5 above, para. 16. *R v Payam Moradi Mirahessari and Farein Vahdani* [2016] EWCA Crim 1733, United Kingdom: Court of Appeal (England and Wales), 4 November 2016,

<https://www.refworld.org/jurisprudence/caselaw/gbraciv/2016/en/148640>, considering that the criminality in this case [walking through the Channel Tunnel and obstructing engines or carriages on railways] went beyond the crimes related to misuse of documents that are subject to the statutory defence, as it led, inter alia, to the suspension of rail services. Unfortunately, the Court failed to consider whether the particular penalty could have been regarded as arising “on account of” irregular entry, see: Costello et al, note 1 above, p. 43.

⁵¹ *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime* (15 November 2000) 2241 UNTS 507, Article 5, www.refworld.org/docid/479dee062.html (Smuggling Protocol), excluding migrants who have been the object of smuggling from criminal liability.

⁵² ExCom Conclusion No. 97 (LIV) 2003, para. (a)(vi).

⁵³ *Police Chief of Famagusta v. Seyed Ramtin Salehi*, Case No. 2073/2016, Cyprus: District Court of Famagusta, 14 November 2016, www.asylumlawdatabase.eu/en/case-law/cyprus-%E2%80%93-district-court-famagusta-14-november-2016-case-no-20732016.

⁵⁴ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, note 5 above, para. 64. *R v. Asfaw*, note 5 above, paras. 26 and 57-59. *ECLI:NL:HR:2013:BY4238, 10/05426*, Netherlands, The: Supreme Court (Hoge Raad), 28 May 2013, paras., 2.5.1-2.5.3, <https://www.refworld.org/jurisprudence/caselaw/nlhg/2013/nl/148639>. *Decision KKO:2013:21*, note 34 above. Hathaway Rights 2021, note 13 above, p. 490.

⁵⁵ *R. and Koshi Pitshou Mateta and others*, note 33 above, LJ Leveson, para. 21(iii).

⁵⁶ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, note 5 above, para. 25.

⁵⁷ 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

22. The term “without delay” must not be interpreted as a strict temporal requirement. It is broader than, and therefore should not be interpreted as, “immediately” or “as early [or as soon] as possible”. Whether a refugee has presented themselves “without delay” is a question of fact, depending on the circumstances of the case,⁵⁸ including the time and mode of arrival, opportunities to present themselves, the availability of information (in a language the refugee understands), and access to legal assistance.⁵⁹ It may not be reasonable to expect that refugees would approach the authorities immediately upon arrival for numerous reasons, such as fear of summary return; the perception that border crossings or points of entry are unsafe or inappropriate places to make an asylum claim, at least immediately upon arrival; distrust in authorities based on experience of persecution; or the stress of the journey.⁶⁰ There may therefore be circumstances upon arrival where refugees cannot reasonably be expected to present themselves to the authorities before they are confronted with, apprehended or arrested by, a State official.⁶¹ Depending on the circumstances they may still be protected from penalization under Article 31(1) of the 1951 Convention.

23. Each case must be evaluated on its own facts and circumstances, taking into account the refugee’s perceptions of, and potentially their lack of information about, the availability of international protection and the asylum process; erroneous advice provided by smugglers or other sources; trauma; language barriers; feelings of insecurity; mistrust or fear, especially mistrust or fear resulting from flight or the experience of being a refugee; previous experiences with authorities; or other personal characteristics and circumstances, such as age, gender, race and state of health. That said, refugees have a legal obligation under Article 2 of the 1951 Convention to conform to the laws and regulations of the host country. Presenting themselves or coming forward without delay to the authorities and expressing a need for international protection as soon as they are reasonably able to do so is evidence of acting on this obligation on the part of the refugee.

24. States must ensure that all relevant State officials, including immigration and border officers who may reasonably expect to come in contact with refugees, have clear instructions for dealing with them.⁶² This means that they must refer any person who seeks international

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, note 20 above, paras. 94-96.

⁵⁸ *HR-2014-01323-A*, Case no. 2014/220, 24 June 2014 (Norway Supreme Court), www.refworld.org/cases_NOR_SC.5653395f4.html. Summary Conclusions 2003, note 21 above, para. 10(f).

⁵⁹ Summary Conclusions 2003, note 21 above, para. 10(f).

⁶⁰ *HR-2014-01323-A*, note 58 above, para. 22.

⁶¹ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, note 5 above, paras. 21-25. *ECLI:NL:HR:2011:BP7855, 09/02240*, Netherlands, The: Supreme Court (Hoge Raad), 5 July 2011, para. 2.6.2, <https://www.refworld.org/jurisprudence/caselaw/ntlhg/2011/nl/148637>. Hathaway Rights 2021, note 13 above, p. 493.

⁶² European Asylum Support Office, Frontex, *Practical Guide: Access to the Asylum Procedure*, 2020, <https://data.europa.eu/doi/10.2847/308000>.

protection to the relevant asylum authorities.⁶³ This is particularly important with regard to persons with specific needs, such as 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.⁶⁴ Further, States must ensure that people who seek international protection have access to relevant information in a language they understand and the ability to lodge a formal asylum claim with the competent authority, as well as being given the opportunity to contact UNHCR.⁶⁵

25. The term “authorities” is broad and does not refer to any particular State entity or agent. If a refugee approaches an agent, branch, entity or level of government, and in doing so has a reasonable expectation of presenting themselves to the relevant authorities, they must be considered as having presented themselves to the authorities within the meaning of Article 31(1) of the 1951 Convention, regardless of whether that body is competent for asylum matters.⁶⁶ Where refugees present themselves to a State entity or agent not competent for asylum matters, such entity or agent should, when it may reasonably be expected that such

⁶³ ExCom Conclusion No. 8 (XXVIII), 1977, para. (e)(i), ExCom Conclusion No. 81 (XLVIII), 1997, para. (h); ExCom Conclusion No. 82 (XLVIII), 1997, paras. (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. See also, *Caso Familia Pacheco Tineo vs Estado Plurinacional de Bolivia*, Inter-American Court of Human Rights (IACrHR), 25 November 2013, www.refworld.org/cases.IACRTHR.52c53b154.html; European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, Article 6(1) (3rd indent), www.refworld.org/docid/51d29b224.html (EU Asylum Procedures directive (recast)).

⁶⁴ Advisory Opinion OC-21/14, note 45 above, para. 83. 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. 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. See also, European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L. 180/96 -105/32; 29.6.2013, 2013/33/EU, Article 21, www.refworld.org/docid/51d29db54.html (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.

⁶⁵ 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, para. (b). ExCom Conclusion No. 73 (XLIV), 1993, at para. (b) (iii). ExCom Conclusion No. 79 (XLVII), 1996, para. (p).

⁶⁶ Statement by Mr Herment of Belgium, Ad Hoc Committee on Refugees and Stateless Persons, UN doc. E/AC.32/SR.40, 27 September 1950, p. 6, referring to a refugee presenting themselves to local authorities. Hathaway Rights 2021, note 13 above, p. 492.

entity or agent may come in contact with refugees, have clear instructions for referring them to the appropriate authorities (see paragraph 24).⁶⁷

26. When States impose time limits by which refugees must make themselves known to the authorities and claim asylum, non-compliance does not mean that refugees have delayed presenting themselves to the authorities within the meaning of Article 31(1). Whether refugees have presented themselves without delay is a question of fact. As outlined in paragraphs 21 and 22, refugees may have good reasons for presenting themselves after some time has lapsed, and as such still be considered to have presented themselves “without delay to the authorities” within the meaning of Article 31(1). In any event, non-compliance with time limits cannot be an automatic bar to applying for asylum and having one’s claim for international protection assessed.⁶⁸

E. Showing good cause for irregular entry or presence

27. To be protected from penalization under Article 31(1), refugees must show good cause or valid reasons for their irregular entry or presence.⁶⁹ Some form of compulsion, need or reasonable belief on the part of the refugee that resorting to irregular, rather than regular, means of entry or presence is necessary to 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).⁷⁰ Whether a refugee has shown good cause is a question of fact.⁷¹ Article 31(1) does not require that the irregular entry or presence is necessary to be able to seek international protection. In practice, refugees will generally have good cause, given that many face significant factual and legal barriers to regular entry or stay in a host country, which consequently compel them to resort to irregular means.⁷² Even where genuine and effective access to means of legal entry are available, a refugee may still show good cause for irregular

⁶⁷ 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). 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. *Caso Familia Pacheco Tineo vs Estado Plurinacional de Bolivia*, note 63 above.

⁶⁸ ExCom Conclusion No. 15 (XXX), 1979, para. (i). Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR), *Oficina del Alto Comisionado de las Naciones Unidas para los Refugiados en México: Presentación de Amicus Curiae a la Suprema Corte de Justicia de la Nación. Amparo en Revisión 762/2019*, 13 Diciembre 2019, paras. 26-46, <https://www.refworld.org/es/jur/amicus/acnur/2019/es/134489>.

⁶⁹ The authentic French text of Article 31(1) of the 1951 Convention refers to ‘*des raisons reconnues valables*’.

⁷⁰ Hathaway Rights 2021, note 13 above, p. 496, referring to illegal entry being the result of some form of compulsion. UNHCR, *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*, 26 October 2018, para. 3.1.7, www.refworld.org/docid/5bd313884.html.

⁷¹ Goodwin-Gill 2003, note 1 above, p. 217.

⁷² *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, note 5 above, para. 26. *R. and Koshi Pitshou Mateta and others*, note 33 above, para. 20. 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”.

entry within the meaning of Article 31(1).⁷³ “Good cause” may be satisfied by a number of factors, such as a fear of being rejected or pushed back at the border;⁷⁴ being unable to physically enter at an established port of entry; lacking information or knowledge about relevant procedures for claiming asylum upon entry; acting under instruction of a third party, such as a smuggler; or being traumatized or otherwise lacking capacity to identify or use lawful means to enter.⁷⁵ In the absence of compelling reasons, refugees who have used false or fraudulent documents to enter a country should not use these documents again after entry is secured and should present these documents to the authorities when claiming international protection.⁷⁶

F. Penalties on account of irregular entry or presence

28. Article 31(1) prohibits penalties imposed “on account of” irregular entry or presence. In accordance with the purpose of Article 31(1) and given its unqualified use of the word “penalties”, the term should be interpreted broadly⁷⁷, referring to any criminal or administrative measure imposed by the State on account of irregular entry or presence that is unfavourable to the refugee.⁷⁸ Penalties prohibited under Article 31(1) are measures that are punitive, discriminatory, retributive or deterrent in character.⁷⁹ Penalties may include:

- pecuniary sanctions;
- restrictions on freedom of movement;

⁷³ *Case of N.D. and N.T. v. Spain (Applications nos. 8675/15 and 8697/15) (Grand Chamber)*, note 45 above, para. 210, the Court considered the case in the context of the prohibition of collective expulsion under Article 4 of Protocol 4 of the European Convention on Human Rights rather than in relation to the prohibition of penalization for irregular entry or presence under Article 31(1) of the 1951 Convention. The Court found that, where a State has made available genuine and effective access to means of legal entry, the State may refuse entry to their territory to aliens, including potential asylum-seekers, who have failed, without cogent reasons based on objective facts for which the respondent State was responsible, to comply with these arrangements by seeking to cross the border at a different location, especially, as happened in the underlying case, by taking advantage of their large numbers and using force. In para. 201, the Court clarified that its reasoning relates to the present context of the cases and that it is without prejudice to the application of Articles 2 and 3 of the European Convention on Human Rights, i.e. to application of the obligation of non-refoulement.

⁷⁴ *H. gegen Staatsanwaltschaft des Kantons Aargau* (6S.737/1998) (unofficial English translation), Switzerland: Federal Court, 17 March 1999, <https://www.refworld.org/jurisprudence/caselaw/chefc/1999/en/148641>. *BP7855*, note 61 above, para. 2.6.2.

⁷⁵ Goodwin-Gill 2003, note 1 above, p. 217. Goodwin-Gill and McAdam 2021, note 43 above, p. 276.

⁷⁶ *BP7855*, note 61 above, para. 2.3.

⁷⁷ Hathaway Rights 2021, note 13 above, p. 514.

⁷⁸ ExCom Conclusion No. 22 (XXXII) 1981, para. II.B.2.(a). The French language version of Article 31(1) of the 1951 Convention refers to ‘*sanctions pénales*’; possibly a narrower concept. However, in this context, in line with Article 33(4) of the Vienna Convention on the Law of Treaties, the broader concept of “penalties” from the English language version is to be preferred in accordance with the 1951 Convention’s object and purpose of protecting fundamental rights and freedoms. Goodwin-Gill and McAdam 2021, note 43 above, p. 277. Goodwin-Gill 2003, note 1 above, p. 204, referencing a decision from the Social Security Commissioner accepting that any treatment that was less favourable than that accorded to others and was imposed on account of illegal entry was a penalty within Article 31 unless objectively justifiable on administrative grounds. Hathaway Rights 2021, note 13 above, p. 515, referring to “any detriment for reasons of their [refugees] unauthorized entry or presence in the asylum country”. *AAA and Others v. Secretary of State for the Home Department*, note 43 above, para. 328, Lord Justice Underhill, referring to Goodwin-Gill above, considering that the term “penalty” is not confined to sanctions of a criminal character.

⁷⁹ Goodwin-Gill and McAdam 2021, note 43 above, p. 278, referring to Costello et al, note 1 above, p. 38 and UNHCR, *Note on International Protection (submitted by the High Commissioner)*, 9 August 1984, A/AC.96/643, para. 29, www.refworld.org/docid/3ae68c040.html.

- deprivation of liberty;
- restrictions on economic or social rights, such as education, employment and social and immigration support services;⁸⁰
- exit restrictions; and
- any discriminatory treatment or procedural detriment to the refugee, including denial, obstruction, delay or limits on access to the territory or asylum procedure or applying limitations on due process guarantees and limiting duration of status, or a decision to declare an application for international protection inadmissible for the sole reason of the applicant's irregular entry or presence.⁸¹

29. A penalty is prohibited under Article 31(1) when it is imposed on the refugee because of their irregular entry or presence, or the means and related actions whereby irregular entry or presence has occurred (see paragraph 19).⁸² As noted above, this includes penalties imposed for the use of false or fraudulent documents, or other deceptive or fraudulent means, to gain entry or remain; failure to observe border control or immigration formalities, such as obtaining a visa or taking advantage of regular immigration pathways; or using methods of deception or clandestine entry, for example as a stowaway; entering the territory outside of official points of entry, including closed or unauthorized entry points, or using the assistance of smugglers or others to enter or remain. As outlined in paragraphs 21 and 22 respectively, refugees may have good reasons for not immediately claiming asylum upon arrival and may, moreover, have good cause for their irregular entry or stay, including for example by using false or fraudulently obtained documents, or no documents at all.⁸³

30. Penalizing refugees who are suspected or found to have organized, facilitated or assisted in the irregular entry or stay by smuggling themselves and/or others is prohibited under Article 31(1) where they are the object of smuggling or where they have organized or facilitated smuggling of themselves and/or others to secure their own entry and/or that of family or other

⁸⁰ Costello et al, note 1 above, p. 37.

⁸¹ ExCom Conclusion No. 15 (XXX) 1979, para. (i). ExCom Conclusion No. 22 (XXXII) 1981, para. B.2(a). *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, Canada: Supreme Court, 27 November 2015, paras. 57 and 63, www.refworld.org/cases/CAN_SC.56603be94.html. European Union: Council of the European Union, *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)*, 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, recital 20, www.refworld.org/docid/51d298f04.html. EU Reception Conditions directive (recast), note 64 above, recital 15. Costello et al, note 1 above, pp. 37 and 38. Hathaway Rights 2021, note 13 above, pp.513-519.

⁸² Costello et al, note 1 above, p. 38. Hathaway clarifies that Article 31(1) is not prohibiting a particular kind of penalty, but penalties in general imposed in particular context, namely as a result of unlawful entry or presence, Hathaway Rights 2021, note 13 above, p. 514.

⁸³ *Ghuman v. Registrar of the Auckland District Court*, CIV2003-404-4373, note 49 above, paras. 62 and 64, Baragwanath J referring to a traumatic stress disorder compelling a refugee claimant to maintain irregular presence.

persons for humanitarian reasons.⁸⁴ In such cases, penalization, in the form of criminal prosecution for migrant smuggling, is also in violation of Article 5 of the Smuggling Protocol,⁸⁵ including when the refugee does not meet the requirements of Article 31(1) of the 1951 Convention.⁸⁶

31. Applying Article 31(1) of the 1951 Convention effectively and in good faith requires an efficient determination of refugee status in order to recognize refugees as promptly as possible, and identify those who benefit from the provision and those who do not.⁸⁷ Pending the determination of refugee status, no penalties should be imposed on any asylum-seeker for irregular entry or presence.⁸⁸ When, however, following a fair asylum procedure, the asylum-seeker is, by a final decision in accordance with international standards, found not to be a refugee or otherwise not in need of international protection (see paragraph 10), or is found to be a refugee but does not fulfil one or more of the other requirements of Article 31(1), the provision does not protect against penalization on account of the person's irregular entry or presence.⁸⁹ The imposition of a penalty on refugees on account of irregular entry or presence is without prejudice to expulsion measures a State may take in accordance with Article 32 and 33 of the 1951 Convention.⁹⁰

32. Article 31(1) does not prohibit the imposition of penalties on refugees who enter or are present irregularly and (i) who have not come directly, (ii) have not presented themselves without delay to authorities, and/or (iii) have not shown good cause for their irregular entry or presence. Article 31(1) impliedly reserves a margin for States to impose penalties on refugees not meeting the requirements of the provision. Article 31(1) does not itself require or regulate

⁸⁴ Travaux Préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, p. 469, www.unodc.org/pdf/ctocccop_2006/04-60074_ebook-e.pdf.

⁸⁵ *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, Article 5, www.refworld.org/legal/agreements/unga/2000/en/53096, protecting migrants from becoming liable to criminal prosecution under the Protocol for the fact of having been the object of smuggling and related conduct as referenced in Article 6 of the Protocol.

⁸⁶ *Ibid.*, Articles 3(a), 5, 6(a) and 19. *R. v. Appulonappa*, 2015 SCC 59, Canada: Supreme Court, 27 November 2015, para. 43, www.refworld.org/cases.CAN_SC.56603caa4.html, in which the Court stated that “art. 31(1) of the Refugee Convention seeks to provide immunity for genuine refugees who enter illegally in order to seek refuge. For that protection to be effective, the law must recognize that persons often seek refuge in groups and work together to enter a country illegally. To comply with art. 31(1), a state cannot impose a criminal sanction on refugees solely because they have aided others to enter illegally in their collective flight to safety.” Smuggling Protocol, note 51 above, Article 5, prohibiting the criminal prosecution of people who have been the object of smuggling. *B010 v. Canada (Citizenship and Immigration)*, note 81 above. ExCom Conclusion No. 97 (LIV) 2003, para. (a)(vi).

⁸⁷ Article 26, Vienna Convention on the Law of Treaties. Summary Conclusions 2003, note 21 above, para. 6. Goodwin-Gill 2003, note 1 above, p.187.

⁸⁸ Summary Conclusions 2003, note 21 above, para. 6. *ECLI:NL:HR:2013:BY4310*, 11/01046, Netherlands, The: Supreme Court (Hoge Raad), 28 May 2013, <https://www.refworld.org/jurisprudence/caselaw/ntlhg/2013/nl/148609>, para. 2.5.2.

⁸⁹ *ECLI:NL:HR:2012:BW9266*, 10/04365, Netherlands, The: Supreme Court (Hoge Raad), 6 November 2012, para. 2.8, <https://www.refworld.org/jurisprudence/caselaw/ntlhg/2012/nl/148638>.

⁹⁰ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirteenth Meeting, note 41 above, statement of Mr. Fritzier (Austria) at p. 12 and of Mr Herment (Belgium) at p. 14. Hathaway Rights 2021, note 13 above, p. 519.

the imposition of penalties on account of breaching immigration laws and regulations when its requirements are not met. However, penalties imposed on account of irregular entry or presence when not prohibited under Article 31(1) must be in accordance with international and regional refugee and human rights law standards. They must not be discriminatory or undermine the right to seek and enjoy asylum, including by denying access to territory, a fair asylum procedure or the rights to which refugees are entitled under the 1951 Convention and other human rights instruments, including for example the right to leave any country.⁹¹ As such, penalties on account of irregular entry or presence used by States in cases where Article 31(1) does not protect against penalization may include administrative sanctions, including pecuniary sanctions, limitations on freedom of movement and restrictions on exercising economic or social rights, provided they are in accordance with international and regional legal standards.⁹² While penalties may include limitations on freedom of movement, any such limitations must be in accordance with and authorized by law and be necessary, reasonable (including in light of any specific individual needs and circumstances of the refugee) and proportionate in each individual case. Detention would not fulfil a legitimate purpose or be proportionate when imposed as a penalty on account of a refugee's irregular entry or presence. It is particularly important that States ensure any penalties, including when this concerns the imposition and implementation of an expulsion order or non-entrée measures, do not breach the States' non-refoulement obligations, whether under Article 33 of the 1951 Convention or otherwise, the right of people to seek and enjoy asylum, or other rights under international and regional refugee and human rights law.

33. Where Article 31(1) does not protect against penalization and States decide to penalize refugees on account of their irregular entry or stay, States must avoid criminal penalties. The irregular entry or presence of refugees must not be treated as a criminal offence. As per paragraph 12, this should also apply to those in need of complementary forms of international protection. Imposing criminal sanctions would be unnecessary and disproportionate, exceeding

⁹¹ The right to asylum is implicit in the 1951 Convention as considered by the French delegate (Mr Colemar) at the Conference of Plenipotentiaries, see: Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Thirteenth Meeting, note 41 above. The right to leave a country is stipulated in Article 13(2) of the UDHR, note 8 above, and Article 12(2) of the *International Covenant on Civil and Political Rights* (16 December 1966) 999 UNTS 171. www.refworld.org/docid/3ae6b3aa0.html (ICCPR).

⁹² Refugees are protected from arbitrary interference with their right to liberty and security and their right to freedom of movement under international and regional human rights law: ICCPR, note 91 above, Articles 9 and 12. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14* (4 November 1950) ETS 5, Article 5, www.refworld.org/docid/3ae6b3b04.html. ACHR, note 8 above, Article 7. ACHPR, note 8 above, Articles 6 and 12. HRC General Comment No. 35, note 13 above, paras. 3, 10, 18 and 58. UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, paras. 7-8, www.refworld.org/docid/45139acfc.html. UN Human Rights Committee (HRC), *CCPR General Comment No. 18: Non-discrimination*, 10 November 1989, www.refworld.org/docid/453883fa8.html.

the legitimate interest of States to control irregular immigration.⁹³ Seeking asylum is a universal human right, the exercise of which must not be criminalized.⁹⁴

III. ANALYSIS OF ARTICLE 31(2) OF THE 1951 CONVENTION

A. Personal scope of Article 31(2) of the 1951 Convention

34. Article 31(2) protects “such refugees” – meaning all refugees who have entered or are present irregularly (i.e. unlawfully or without authorization) in the host country⁹⁵ - from restrictions on their freedom of movement, other than those that are necessary and only until either their status is regularized in the host country, or they obtain admission into another country. The authority for States to restrict the freedom of movement of “such refugees” is thus strictly provisional and temporally limited. The term “refugees” refers to Article 1 of the 1951 Convention and its effective, good faith implementation includes asylum-seekers (see paragraph 10). The term “refugees” also includes refugees as defined by broader refugee criteria included in the 1969 OAU Convention and the 1984 Cartagena Declaration (as outlined in paragraphs 8 and 9).

35. The phrase “such refugees” includes refugees to whom Article 31(1) applies. As such, despite the prohibition on imposing penalties on account of their irregular entry or presence under Article 31(1), their freedom of movement may nonetheless be restricted, on a provisional and temporary basis under Article 31(2). As soon as the refugee’s status is regularized (see paragraphs 39 to 41), the refugee is, at a minimum, lawfully present in the host country within the meaning of the 1951 Convention, at which point their freedom of movement is governed by Article 26 of the 1951 Convention in conjunction with international and regional human rights law regarding a person’s freedom of movement.⁹⁶

⁹³ 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. UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, 15 January 2010, A/HRC/13/30, para. 58, 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. *Caso Vélez Loo vs. Panamá*, Inter-American Court of Human Rights (IACrTHR), 23 November 2010, para. 169, www.refworld.org/cases.IACRTHR.4d2713532.html.

⁹⁴ UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, para. 9, www.refworld.org/docid/5a903b514.html. Hathaway Rights 2021, note 13 above, p. 526 (ft 1162). On the right to asylum, UDHR, note 8 above, Article 14.

UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 32, www.refworld.org/docid/503489533b8.html.

⁹⁵ A Grahl-Madsen, *The Status of Refugees in International Law, Volume II* (Sijthoff Leiden, 1972), pp. 419-420, taking a textual and contextual approach, as well as referring to the Convention’s drafting history and concluding: ‘it seems justified to conclude that the term ‘such refugees’ in the first sentence of Article 31(2) merely means what it meant from the outset, namely ‘refugees who enter or are present in [the] territory [of a Contracting State] without authorization’, period’. See also, A Grahl-Madsen Commentary, note 12 above, pp. 179-180; Noll in A Zimmermann, note 47 above, pp. 1425; and Costello et al, note 1 above, p. 44.

⁹⁶ Article 31(2) is closely related to Article 26 of the 1951 Convention, both governing refugees’ right to freedom of movement, albeit for unlawful and lawful refugees respectively. See also, ICCPR, note 91

B. Necessary restrictions on freedom of movement

36. In accordance with Article 31(2), the freedom of movement of refugees who have entered or are present irregularly may be restricted when “necessary”. As an exception to the general human right to liberty⁹⁷ and freedom of movement, including the freedom to choose a place of residence,⁹⁸ Article 31(2) must be interpreted narrowly and applied cautiously. It requires an assessment of the purpose of measures to restrict a refugee’s freedom of movement, as well as their reasonableness, including in light of any specific individual needs and circumstances of the refugee,⁹⁹ and proportionality, i.e. requiring an evaluation of whether less restrictive measures are available to fulfil the purpose of the restriction, in an individual case.¹⁰⁰ Automatic, routine or collective measures to restrict the freedom of movement of unlawfully present refugees would be in violation of Article 31(2).¹⁰¹ Restrictions on a refugee’s freedom of movement may include directed residence, reporting requirements, deposit of documents, supervised movement, and, exclusively as a measure of last resort and in line with human rights standards, detention.¹⁰² Any restrictions on a refugee’s freedom of movement must be regulated in domestic law¹⁰³ and serve a legitimate purpose in the individual case to protect public order, public health or national security of the host country.¹⁰⁴

37. Detention is the most far-reaching restriction on a refugee’s freedom of movement.¹⁰⁵ It is governed by human rights law standards on deprivation of liberty and must only be used

above, Article 12, on the right to freedom of movement for everyone lawfully within the territory of a State.

⁹⁷ ICCPR, note 91 above, Article 9(1).

⁹⁸ *Ibid.*, Article 12(1).

⁹⁹ Such specific individual needs and circumstances can concern, inter alia, children, disabled people, pregnant people, single parents with minor children, victims of trafficking, people with serious illnesses or mental disorders, and persons subjected to torture, rape or other serious forms of psychological, physical or sexual violence. See, for example, Article 21 of the EU Reception Conditions directive (recast), note 64 above.

¹⁰⁰ Human Rights Committee General Comment No. 35, note 13 above, para. 18.

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. 24, (“Summary Conclusions 2017”), www.refworld.org/docid/5b18f6740.html.

¹⁰¹ *Attorney-General v. Refugee Council of New Zealand, Inc.*, [2003] 2 NZLR 577, New Zealand: Court of Appeal, 16 April 2003, para. 97, www.refworld.org/cases/NZL_CA_40cec4c84.html.

¹⁰² According to UNHCR, closed camps amount to deprivation of liberty, i.e. detention, UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 7, (“UNHCR Detention Guidelines”),

www.refworld.org/docid/503489533b8.html. UNHCR, *UNHCR intervention before the High Court of Kenya in the case of Kituo Cha Sheria and others v. The Attorney General*, 12 March 2013, Petition No. 115 of 2013, www.refworld.org/docid/5151b5962.html, para. 5.3: “[a] directive subjecting all asylum-seekers and refugees – *en masse* – to forced relocation from urban centres to camps from which they may not be able easily or at all to leave may be viewed as being punitive and amount to a breach of a State’s obligations in international law, in particular Article 31 of the 1951 Convention.”

¹⁰³ ICCPR, note 91 above, Article 12(3).

¹⁰⁴ UNHCR Detention Guidelines, note 102 above, Guideline 4.1.

¹⁰⁵ *Guzzardi v. Italy*, Application no. 7367/76, Council of Europe: European Court of Human Rights, 6 November 1980, paras. 92-93, www.refworld.org/cases/ECHR_502d42952.html. *Medvedyev and Others v. France*, Application no. 3394/03, Council of Europe: European Court of Human Rights, 29 March 2010, para. 73, www.refworld.org/cases/ECHR_502d45dc2.html. *Case of de Tommaso v. Italy* (Application no. 43395/09), ECLI:CE:ECHR:2017:0223JUD004339509, Council of Europe: European Court of Human Rights, 23 February 2017, para. 80,

on an individual basis, namely as a measure of last resort when no alternative exists.¹⁰⁶ It is unlawful to detain an individual for the purpose of deterring other people from seeking asylum,¹⁰⁷ or on a discriminatory basis. Further, detention of a refugee in accordance with Article 31(2) can only be lawful when taking place in designated places of detention. Such places must be properly equipped to ensure conditions are humane and dignified and otherwise in accordance with human rights standards.¹⁰⁸ Immigration-related administrative detention in accordance with Article 31(2) should not be carried out in criminal or penal detention facilities, even when criminal and administratively detained populations are separated.¹⁰⁹ Further, the duration of detention in accordance with Article 31(2) should be as short as possible.¹¹⁰ For example, while a minimal period of detention may be lawful in order to carry out checks where identity is undetermined or in dispute, or public health or security risks exists, such detention must last only as long as reasonable efforts are required and made to establish identity, carry out such checks, or mitigate such risks.¹¹¹ It is impermissible to prolong immigration-related administrative detention due to inefficient processing modalities or resource constraints.¹¹² Decisions to detain, including decisions to extend the duration of detention, must be taken on an individual basis and are subject to minimum procedural safeguards, including the right for the individual concerned to be informed about the reasons for detention,¹¹³ access to legal counsel, and access to prompt and periodical independent judicial oversight of the lawfulness of the decision to detain or extend the detention.¹¹⁴

<https://www.refworld.org/jurisprudence/caselaw/echr/2017/en/148633>, considering that “[t]he difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance”.

¹⁰⁶ HRC General Comment No. 35, note 13 above, para. 18. *Commission v Hungary (Accueil des demandeurs de protection internationale) C-808/18*, ECLI:EU:C:2020:1029, European Union: Court of Justice of the European Union, 17 December 2020, paras. 174-175,

www.refworld.org/cases_ECJ_5fdb914e4.html. *FMS, FNZ (C-924/19 PPU) SA, SA junior (C-925/19 PPU) v Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Országos Idegenrendészeti Főigazgatóság*, note 35 above, para. 221. UNHCR Detention Guidelines, note 102 above, Guideline 4.3, para. 35. Notably, while alternatives to detention need to be considered over detention, they must still be demonstrably necessary in the individual case before being lawfully applied. ¹⁰⁷ Deterrence is not a legitimate purpose for detention as seeking asylum is a universal right (see also paragraph 32). See *Attorney-General v. Refugee Council of New Zealand, Inc.*, [2003] 2 NZLR 577, New Zealand: Court of Appeal, 16 April 2003, para. 101, www.refworld.org/cases_NZL_CA_40cec4c84.html. Hathaway Rights 2021, note 13 above, pp. 526-527.

¹⁰⁸ According to ICCPR, Article 10: “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”, note 91 above.

¹⁰⁹ HRC General Comment No. 35, note 13 above, para. 18. ExCom Conclusion No. 44 (XXXVII) 1986, para. (f). ExCom Conclusion No. 85 (XLIX) 1986, para. (ee). Summary Conclusions 2003, note 21 above, para. 11(k).

¹¹⁰ *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, para. 9.4, www.refworld.org/cases_HRC_3ae6b71a0.html. Summary Conclusions 2003, note 21 above, para. 11(d).

¹¹¹ UNHCR Detention Guidelines, note 102 above, para. 24.

¹¹² *VL, C-36/20 PPU*, European Union: Court of Justice of the European Union, 25 June 2020, <https://www.refworld.org/jurisprudence/caselaw/ecj/2020/en/147489>, paras. 105-107.

¹¹³ ICCPR, note 91 above, Article 9(2). HRC General Comment No. 35, note 13 above, paras. 24-30.

¹¹⁴ ICCPR, note 91 above, Article 9(4). *A. v. Australia*, CCPR/C/59/D/560/1993, UN Human Rights Committee (HRC), 3 April 1997, para. 9.4, www.refworld.org/cases_HRC_3ae6b71a0.html. Summary Conclusions 2003, note 21 above, para. 11(i). UNHCR Detention Guidelines, note 102 above, Guidelines 6 and 7.

38. Child refugees, including those who are irregularly present, should not be detained for immigration-related purposes, including when accompanied by parents or legal guardians who have entered or are present irregularly.¹¹⁵ Detention, when solely or exclusively based on the irregular entry or presence of the child and/or their parents or legal guardians, or to ensure attendance at asylum proceedings, would exceed the requirement of necessity and is not in the child's best interests.¹¹⁶ The detention of pregnant women and nursing mothers should also be avoided.¹¹⁷ In such cases, when restrictions on freedom of movement are necessary, other restrictions should be applied in lieu of detention including, for example, appropriate care arrangements and community-based programmes to ensure adequate reception and treatment of irregular child and pregnant and nursing refugees and their families.¹¹⁸ The detention of children for other – non-immigration related – purposes to protect public order, public health or national security, and with the safeguards as outlined in paragraph 37, should only be used as a matter of last resort, on an individual basis and for the shortest possible period of time.¹¹⁹

C. Regularization of status

39. The phrase “until their status in the country is regularized” refers to the period up to the authorization by the State, on any grounds in accordance with its laws and policies, of the refugee's presence (see paragraph 19). This includes situations where a person claims international protection and has been admitted to an asylum procedure, including where they are directed to await the adjudication of their claim or where the admissibility of their claim is being determined.¹²⁰ When it is determined that another State is responsible for adjudication

¹¹⁵ *Convention on the Rights of the Child* (20 November 1989) 1577 UNTS 3, Articles 9(4) and 37, www.refworld.org/docid/3ae6b38f0.html. UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on deprivation of liberty of migrants*, 7 February 2018, para. 11, www.refworld.org/docid/5a903b514.html. UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, paras. 5, 7 and 10, www.refworld.org/docid/5a12942a2b.html. Advisory Opinion OC-21/14, note 45 above, para. 154, www.refworld.org/cases_IACRTHR_54129c854.html. *R.K. et autres c. France*, Requête no 68264/14, Council of Europe: European Court of Human Rights, 12 July 2016, para. 88, www.refworld.org/cases_ECHR_5784e8574.html. UNHCR, *UNHCR's position regarding the detention of refugee and migrant children in the migration context*, January 2017, www.refworld.org/docid/5885c2434.html.

¹¹⁶ IACrTHR Advisory Opinion OC-21/14, note 45 above, para. 154.

¹¹⁷ CEDAW General recommendation No. 32, note 64 above, para. 49. *Convention on the Rights of the Child*, note 115 above, Article 3.

¹¹⁸ CMW *Joint general comment No. 4 (2017)*, note 115 above, para. 11.

¹¹⁹ *Convention on the Rights of the Child*, note 115 above, Article 37(b).

¹²⁰ For example, in the European Union, a person has a right to remain in the host country once an asylum application is made, including pending a decision on the admissibility of the application, see: EU Asylum Procedures directive (recast), note 63 above, Articles 6 and 9. See also, *Mehmet Arslan v Policie ČR, Krajské ředitelství policie Ústeckého kraje, odbor cizinecké policie (Police Force of the Czech Republic, Regional Police Directorate of the Ústí nad Labem Region, Foreigners Police Section)*, C-534/11, European Union: Court of Justice of the European Union, 30 May 2013, para. 48, www.refworld.org/cases_ECJ_51a88fc04.html, considering that where an asylum-seeker has the right to remain in the territory of the [EU] Member State concerned at least until his application has been rejected at first instance, [they] cannot therefore be considered to be “illegally staying” within the meaning of Directive 2008/115 [Return Directive].

of the claim and the refugee can be transferred in accordance with international law - for example in the context of applying safe third country concepts¹²¹ - the refugee's status in the country may be considered no longer regularized.

40. Following regularization by the State of a refugee's presence, on any ground in accordance with its legal framework (see paragraphs 19 and 20), the person is "a refugee lawfully in" the host country within the meaning and for the purpose and effective application of the 1951 Convention. As such, their freedom of movement is no longer governed by Article 31(2), but by Article 26 of the 1951 Convention, which allows "refugees lawfully in" the territory to move freely within the territory, subject to regulations applicable to aliens generally in the same circumstances and subject to international and regional human rights law governing freedom of movement and liberty of the person.

41. Asylum-seekers whose claims for international protection are declared inadmissible or are rejected on the merits, including at first instance in cases where no right to remain is granted,¹²² may no longer enjoy a status that is considered regularized within the meaning of Article 31(2) of the 1951 Convention. Their freedom of movement may therefore be restricted, provided it is prescribed by law and necessary, reasonable and proportionate in accordance with the criteria outlined in paragraphs 36 to 38, until they obtain admission into another country. The freedom of movement of asylum-seekers whose claims for international protection are rejected by a final decision in a fair process and are ordered to leave the country may also be restricted to facilitate expulsion, provided this is in accordance with international and regional legal standards.

D. Obtaining admission into another country

42. In the context of Article 31(2), the phrase "obtain admission into another country" refers to the time at which admission has been successful, normally when the refugee actually departs for the other country and no longer is under the jurisdiction of the current host country.¹²³

¹²¹ UNHCR, *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, www.refworld.org/policy/legalguidance/unhcr/2018/en/120729, see particularly para. 4.

¹²² *Staatssecretaris van Veiligheid en Justitie v C and J and S v Staatssecretaris van Veiligheid en Justitie*, C-269/18 PPU, ECLI:EU:C:2018:544, European Union: Court of Justice of the European Union, 5 July 2018, para. 47, <https://www.refworld.org/jurisprudence/caselaw/ecj/2018/en/148634>.

¹²³ A Grahl-Madsen Status of Refugees in International Law, note 95 above, pp. 420-421 and A Grahl-Madsen Commentary, note 12 above, referring to the *travaux préparatoires* of the 1951 Convention: "This wording [*author's note*: referring to the original wording implying that the decision of being admitted into another country was relevant] was criticized by the Danish delegate who wondered whether the country where the refugee was present 'would be obliged to release the refugees as soon as they had obtained entry visas to another country. Some refugees might possibly use such an opportunity to remain in the country illegally', and at the prompting of the Chairman, Mr. Leslie Chance of Canada, the present wording was substituted for that just quoted. This makes clear that in the case of a refugee whose admission into another country has been authorized, necessary restrictions on his movements may be applied until such time as he actually leaves for that country." Hathaway Rights 2021, note 13 above, p. 541. The French language version of Article 31(2) of the 1951 Convention refers to "*ou qu'ils aient réussi à se faire admettre*", which implies the refugee having succeeded in being admitted into another country.

Notwithstanding the fact that refugees' freedom of movement may be restricted until their actual departure for another country and successful admission therein, such restrictions are only lawful when they continue to be necessary, reasonable and proportionate (see paragraphs 36 to 37) and, as such, cannot be imposed as a deterrent or solely for the purpose of securing admission, or compelling a refugee to seek admission, to the other country.

43. Admission requires permission by another State to enter that country.¹²⁴ Admission into another country may be obtained unilaterally or through bilateral or multilateral transfer arrangements,¹²⁵ or with the assistance of UNHCR¹²⁶ or other entities and organizations,¹²⁷ including by way of resettlement or other pathways.¹²⁸ When admission into another country is sought, for example by the current host State in accordance with a transfer arrangement and/or otherwise in the application of a "first country of asylum" or "safe third country", the current host State must ensure that this is in line with relevant safeguards and conditions pursuant to international law (see also paragraph 16).¹²⁹

44. Where admission into another country is sought, the current host State must allow a reasonable period of time for a refugee to obtain admission to another country, as well as all the necessary facilities for doing so. States are obliged to actively assist refugees in obtaining admission into another country and to refrain from hindering them from doing so.¹³⁰ This obligation reflects the importance of international cooperation, solidarity and responsibility-sharing among States with regard to refugees, including refugees whose entry or presence is not initially authorized.¹³¹

45. Allowing all the necessary facilities for refugees to obtain admission into another country requires the current host State to provide advice and assistance to the refugee and afford the refugee a level of freedom to obtain information, communicate and travel. For

¹²⁴ Noll in Zimmermann and Einarsen 2024, note 47 above, p. 1430.

¹²⁵ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, www.refworld.org/docid/51af82794.html.

¹²⁶ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), www.refworld.org/docid/3ae6b3628.html, according to paragraph 8(d) UNHCR has the duty to promote the admission of refugees to the territories of States.

¹²⁷ For example, the African Union in accordance with Article II(4) of the 1969 OAU Convention, note 14 above.

¹²⁸ New York Declaration for Refugees and Migrants, note 19 above, paras 77-79 and Annex I, paras. 10 and 14-16. UNHCR, *Global Compact on Refugees*, 2018, paras. 94-96,

www.refworld.org/docid/63b43eaa4.html. For further information on other pathways, see: UNHCR, *Complementary Pathways for Admission of Refugees to Third Countries: Key Considerations*, April 2019, www.refworld.org/docid/5cebf3fc4.html.

¹²⁹ For further information on relevant UNHCR guidance, see: UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, www.refworld.org/docid/51af82794.html. UNHCR Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries, note 42 above. UNHCR Onward Movement Guidance, note 22 above.

¹³⁰ Noll in Zimmermann and Einarsen 2024, note 47 above, p. 1432.

¹³¹ 1951 Convention, note 3 above, preambular paragraph 4. New York Declaration for Refugees and Migrants, note 19 above.

example, a refugee who is accommodated in an isolated place or who is detained may not have easy or direct access to the necessary facilities to obtain admission into another country.¹³² Further, the State should permit the refugee to travel and communicate with such entities and organizations as are relevant and likely to assist the refugee in obtaining admission into another country, particularly UNHCR.¹³³

46. The time for allowing the refugee to obtain admission into another country must be “reasonable”. Its duration will depend on the individual, their circumstances and the adequacy of methods chosen to seek admission, and may continue for as long as the prospects of successfully obtaining admission are not fully exhausted.¹³⁴ The time for allowing the refugee to obtain admission into another country is without prejudice to the limits that apply to permissible duration of detention in accordance with international standards, as outlined in paragraph 37.

IV. EFFECTIVE IMPLEMENTATION OF ARTICLE 31 OF THE 1951 CONVENTION

A. Procedural and evidentiary issues

47. In accordance with its plain meaning and purpose, Article 31(1) of the 1951 Convention exempts refugees from penalization on account of their irregular entry or presence. Where a State seeks to impose penalties on refugees on account of their irregular entry or presence, the onus falls on that State to show that one of the requirements of Article 31(1) - i.e. directness, promptness and good cause - are not met, or that the person is not a refugee as outlined in paragraph 10.¹³⁵ The application of Article 31(1) is best determined by immigration or asylum authorities in a process separate from the refugee status determination or asylum procedure.

48. In accordance with the plain meaning and purpose of Article 31(2) of the 1951 Convention, any restriction on the freedom of movement of “such refugees” as implied by the article must be justified by the State. The burden is on the State to show the restriction is necessary, reasonable and proportionate in the individual case.¹³⁶

B. Responsibilities for effective implementation

49. Effective implementation of Article 31 of the 1951 Convention is the responsibility of all branches of government, including the legislature, the executive and the judiciary. In general,

¹³² Costello et al, note 1 above, p. 51.

¹³³ N Robinson, *Convention relating to the Status of Refugees. Its History, Contents and Interpretation. A Commentary*, (UNHCR Reprint, 1997), p. 131.

¹³⁴ Noll in Zimmermann and Einarsen, note 47 above, p. 1432-1433, referencing Robinson, note 133 above, p. 131.

¹³⁵ *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, note 5 above, para. 41. *Canada: Immigration and Refugee Protection Act (IRPA)* [Canada], SC 2001, c. 27, 1 November 2001, section 133, www.refworld.org/docid/4f0dc8f12.html.

¹³⁶ *Arse v Minister of Home Affairs*, note 25 above, para. 5. HRC General Comment No. 35, note 13 above, paras. 15 and 18.

a regulatory framework giving domestic legal effect to Article 31, as well as cooperation, coordination and communication between State institutions and actors, especially border control, immigration and asylum authorities is essential. Notwithstanding that irregular entry or presence of refugees must not be treated as a criminal offence (see paragraph 33), prosecutorial authorities should be aware of the requirements under Article 31. There may be a lack of awareness among border officials, criminal and prosecutorial authorities and criminal lawyers of the protections provided to refugees by Article 31, which can result, inter alia, in criminal investigations, prosecutions and convictions for immigration-related offences which are at variance with the provision. In addition to limited awareness, other implementation problems could be due to lack of effective communication between border, criminal and/or prosecutorial entities with the asylum authorities; barriers to the domestic or regional justiciability of Article 31;¹³⁷ and/or a failure to apply the provision.

50. To give effect to Article 31, it is important that the provision is reflected not only in asylum and/or immigration laws, but also in administrative provisions, for example through inclusion of defences based on the provision,¹³⁸ or a “savings clause” referring to protection from penalization of refugees on account of their irregular entry or presence in accordance with Article 31.¹³⁹ While penal laws must not criminalize the irregular entry or presence of refugees (see paragraph 33), if they do, similar defences or savings clauses must be included. It is also important that the protection afforded by such laws is not excessively narrow in scope, but offers the full range of protection provided by Article 31, including the safeguards contained in Article 31(2) ensuring that restrictions on freedom of movement are applied temporarily and only as may be necessary and proportionate in individual cases.¹⁴⁰ In addition, such laws should be accompanied by administrative guidance addressed to border officials, police and prosecuting authorities, including regarding the obligation to enquire whether the requirements under Article 31 are met in a particular case, to suspend the imposition of penalties while awaiting the outcome of the determination of the asylum claim, and to exercise discretion to prosecute refugees who have unlawfully entered or are unlawfully present.¹⁴¹

51. States party to the 1951 Convention and/or its 1967 Protocol should record cases of refugees who are penalized on account of their irregular entry or presence; whose freedom of movement is restricted, or who are deprived of their liberty; and regularly inform UNHCR thereof

¹³⁷ Costello et al, note 1 above, p. 57, referencing: *Mohammad Ferooz Qurbani*, C-481/13, European Union: Court of Justice of the European Union, 17 July 2014, www.refworld.org/cases/ECJ/53c7a38a4.html.

¹³⁸ See, for example, *R v. Asfaw*, note 5 above, paras. 23-24.

¹³⁹ Costello et al, note 1 above, pp. 35-36, footnotes 190 (Canada); 191 (South Africa); 192 (Argentina)

¹⁴⁰ Summary Conclusions 2003, note 21 above, para. 8. Costello et al, note 1 above, p 54. See, for example, UNHCR, *Comments by the UNHCR Regional Representation for the Baltic and Nordic Countries on the Finnish Ministry of Justice's proposal for amendments to the Criminal Code's provision on Arrangement of Illegal Immigration*, 28 March 2013, para. 15, www.refworld.org/docid/5187675b4.html.

¹⁴¹ Summary Conclusions 2003, note 21 above, para. 12.

in accordance with Article 35(2) of the 1951 Convention.¹⁴² This will enable UNHCR to engage in dialogue with States on how to address challenges around unlawful entry and stay, while fulfilling their international legal obligations towards refugees and others in need of international protection.

¹⁴² *Ibid.*, para. 13.