

### 3.2 Summary Conclusions: Article 31 of the 1951 Convention

*Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Graduate Institute of International Studies, Geneva, Switzerland, 8–9 November 2001*



The discussion during the first day of the Geneva expert roundtable was based on a background paper by Guy Goodwin-Gill, Professor of International Refugee Law at the University of Oxford, entitled ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention and Protection’. In addition, roundtable participants were provided with written contributions from Michel Combarrous, International Association of Refugee Law Judges (IARLJ), Frankie Jenkins, Human Rights Committee of South Africa, as well as the Refugee and Immigration Legal Centre in Melbourne, Australia. Participants included twenty-eight experts from eighteen countries, drawn from governments, NGOs, academia, the judiciary, and the legal profession. Rachel Brett from the Quaker United Nations Office in Geneva moderated the discussion.

The round table reviewed the extensive practice of States in regard to refugees and asylum seekers entering or remaining illegally, many of whom fall within the terms of Article 31 of the 1951 Convention. It took account of the origins of this provision in the debates in the United Nations in 1950, and in the Conference of Plenipotentiaries held in Geneva in 1951. It noted the intention of the drafters of the Convention to lay down, among others, a principle of immunity from penalties for refugees who, ‘coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present . . . without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence’.

The following summary conclusions do not necessarily represent the individual views of participants or of UNHCR, but reflect broadly the understandings emerging from the discussion.

## General considerations

1. Article 31 of the 1951 Convention Relating to the Status of Refugees presents particular challenges to States seeking to manage asylum applications effectively, while ensuring that specific international obligations are fully implemented.
2. The interpretation and application of Article 31 requires that account be taken both of the developing factual circumstances affecting the movements of refugees and asylum seekers, and also of developments in international law, including the impact of regional and international human rights instruments, the practice of treaty and other monitoring bodies, and the provisions of related treaties, such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, and the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime.<sup>1</sup>
3. It was recalled that the UNHCR Executive Committee had acknowledged that refugees will frequently have justifiable reasons for illegal entry or irregular movement, and that it had recommended appropriate standards of treatment in, among others, Conclusions Nos. 15, 22, 44, and 58.
4. It was also observed that for States Parties to the 1951 Convention and/or 1967 Protocol, Article 31 combines obligations of conduct and obligations of result.
5. Thus, Article 31(1) specifically obliges States not to impose penalties on refugees falling within its terms. Article 31(2) calls upon States not to apply to the movements of refugees within the scope of paragraph 1, restrictions other than those that are necessary, and only until their status is regularized locally or they secure admission to another country.
6. The effective implementation of these obligations requires concrete steps at the national level. In the light of experience and in view of the nature of the obligations laid down in Article 31, States should take the necessary steps to ensure that refugees and asylum seekers within its terms are not subject to penalties. Specifically, States should ensure that refugees benefiting from this provision are promptly identified, that no proceedings or penalties for illegal entry or presence are applied pending the expeditious determination of claims to refugee status and asylum, and that the relevant criteria are interpreted in the light of the applicable international law and standards.
7. In particular, while the relevant terms of Article 31 ('coming directly', 'without delay', 'penalties', 'good cause') must be applied at the national level, full account must always be taken of the circumstances of each

<sup>1</sup> Editorial note: UN doc. A/55/383, Nov. 2000.

individual case if international obligations are to be observed. It was further noted, on the basis of the practice of States, that these obligations are implemented most effectively where accountable national mechanisms are able to determine the applicability of Article 31, having regard to the rule of law and due process, including advice and representation.

8. Steps are also required to ensure that the results laid down in Article 31(2) are achieved. In particular, appropriate provision should be made at the national level to ensure that only such restrictions are applied as are necessary in the individual case, that they satisfy the other requirements of this Article, and that the relevant standards, in particular international human rights law, are taken into account.
9. The incorporation and elaboration of the standards of Article 31 in national legislation, including by providing judicial review in the case of detention, would be an important step for the promotion of compliance with Article 31 and related human rights provisions.

### **Specific considerations**

10. In relation to Article 31(1):
  - (a) Article 31(1) requires that refugees shall not be penalized solely by reason of unlawful entry or because, being in need of refuge and protection, they remain illegally in a country.
  - (b) Refugees are not required to have come directly from territories where their life or freedom was threatened.
  - (c) Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee. The drafters only intended that immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country. The mere fact of UNHCR being operational in a certain country should not be used as a decisive argument for the availability of effective protection in that country.
  - (d) The intention of the asylum seeker to reach a particular country of destination, for instance for family reunification purposes, is a factor to be taken into account when assessing whether s/he transited through or stayed in another country.
  - (e) Having a well-founded fear of persecution is recognized in itself as 'good cause' for illegal entry. To 'come directly' from such country via another country or countries in which s/he is at risk or in which generally no protection is available, is also accepted as 'good cause' for illegal

entry. There may, in addition, be other factual circumstances which constitute 'good cause'.

- (f) 'Without delay' is a matter of fact and degree; it depends on the circumstances of the case, including the availability of advice. In this context it was acknowledged that refugees and asylum seekers have obligations arising out of Article 2 of the 1951 Convention.
  - (g) The effective implementation of Article 31 requires that it apply also to any person who claims to be in need of international protection; consequently, that person is presumptively entitled to receive the provisional benefit of the no penalties obligation in Article 31 until s/he is found not to be in need of international protection in a final decision following a fair procedure.
  - (h) The term 'penalties' includes, but is not necessarily limited to, prosecution, fine, and imprisonment.
  - (i) In principle, a carrier which brings in an 'undocumented' passenger who is subsequently determined to be in need of international protection should not be subject to penalties.
11. In relation to Article 31(2):
- (a) For the purposes of Article 31(2), there is no distinction between restrictions on movement ordered or applied administratively, and those ordered or applied judicially. The power of the State to impose a restriction must be related to a recognized object or purpose, and there must be a reasonable relationship of proportionality between the end and the means. Restrictions on movement must not be imposed unlawfully and arbitrarily.
  - (b) The detention of refugees and asylum seekers is an exceptional measure and should only be applied in the individual case, where it has been determined by the appropriate authority to be necessary in light of the circumstances of the case and on the basis of criteria established by law in line with international refugee and human rights law. As such, it should not be applied unlawfully and arbitrarily and only where it is necessary for the reasons outlined in Executive Committee Conclusion No. 44, in particular for the protection of national security and public order (e.g. risk of absconding). National law and practice should take full account of the international obligations accepted by States, including through regional and universal human rights treaties.
  - (c) Refugees and asylum seekers should not be detained on the ground of their national, ethnic, racial, or religious origins, or for the purposes of deterrence.
  - (d) Initial periods of administrative detention for the purposes of identifying refugees and asylum seekers and of establishing the elements for their claim to asylum should be minimized. In particular, detention

- should not be extended for the purposes of punishment, or maintained where asylum procedures are protracted.
- (e) Detention beyond the initial period must be justified on the basis of a purpose indicated in 11(b) above.
  - (f) UNHCR Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers provide important guidance. Families and children, in particular, should be treated in accordance with international standards and children under eighteen ought never to be detained. Families should in principle not be detained; where this is the case, they should not be separated.
  - (g) There is a qualitative difference between detention and other restrictions on freedom of movement. Many States have been able to manage their asylum systems and their immigration programmes without recourse to physical restraint. Before resorting to detention, alternatives should always be considered in the individual case. Such alternatives include reporting and residency requirements, bonds, community supervision, or open centres. These may be explored with the involvement of civil society.
  - (h) Access to fair and expeditious procedures for the determination of refugee status, or for determining that effective protection already exists, is an important element in ensuring that refugees are not subject to arbitrary or prolonged detention.
  - (i) In terms of procedural safeguards, at a minimum, there should be a right to review the legality and the necessity of detention before an independent court or tribunal, in accordance with the rule of law and the principles of due process. Refugees and asylum seekers should be advised of their legal rights, have access to counsel and to national courts and tribunals, and be enabled to contact the Office of UNHCR.
  - (j) UNHCR should, upon request, be advised of, and allowed access to, all cases of detained refugees and asylum seekers.
  - (k) Where detention is deemed necessary, States should ensure that refugees and asylum seekers are treated in accordance with international standards. They should not be located in areas or facilities where their physical safety and well-being are endangered; the use of prisons should be avoided. Civil society should be involved in monitoring the conditions of detention.

### **Additional considerations**

12. Non-legal strategies and necessary follow-up are also critical. These include the preparation and dissemination of instructions to relevant levels of government and administration on the implementation of Article 31,

training, and capacity building. Particular attention should be given to ensuring that strategies and actions taken by States do not serve to exacerbate racist or xenophobic perceptions, behaviour, or attitudes.

13. States should maintain accurate records of all cases where refugees and asylum seekers are detained or where their movement is otherwise restricted, should publish statistical data of such detention and restrictions on movement, and should regularly inform UNHCR of cases of detained refugees and asylum seekers pursuant to their obligation under Article 35 of the Convention.