

**LEGAL AND PROTECTION POLICY
RESEARCH SERIES**



**Article 31 of the 1951 Convention Relating to the
Status of Refugees**

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**DIVISION OF INTERNATIONAL PROTECTION
JULY 2017**

PPLA/2017/01

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The author is grateful for insightful comments from UNHCR staff and from various experts, including those participating at a roundtable organized by UNHCR in cooperation with the Refugee Studies Centre on 15 March 2017.

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Article 31

REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE

1. 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.

2. 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.

Article 31

RÉFUGIÉS EN SITUATION IRRÉGULIÈRE DANS LE PAYS D'ACCUEIL

1. Les Etats Contractants n'appliqueront pas de sanctions pénales, du fait de leur entrée ou de leur séjour irréguliers, aux réfugiés qui, arrivant directement du territoire où leur vie ou leur liberté était menacée au sens prévu par l'article premier, entrent ou se trouvent sur leur territoire sans autorisation, sous la réserve qu'ils se présentent sans délai aux autorités et leur exposent des raisons reconnues valables de leur entrée ou présence irrégulières.

2. Les Etats Contractants n'appliqueront aux déplacements de ces réfugiés d'autres restrictions que celles qui sont nécessaires ; ces restrictions seront appliquées seulement en attendant que le statut de ces réfugiés dans le pays d'accueil ait été régularisé ou qu'ils aient réussi à se faire admettre dans un autre pays. En vue de cette dernière admission les Etats Contractants accorderont à ces réfugiés un délai raisonnable ainsi que toutes facilités nécessaires.

1. INTRODUCTION

The aim of this paper is to clarify the correct interpretation of Article 31 of the 1951 Convention Relating to the Status of Refugees (the 1951 Refugee Convention).¹ The interpretation proposed is based on the binding international precepts relating to treaty interpretation, as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT), as discussed in the next section.²

This paper draws on the contemporary practice around Article 31 by States parties to the 1951 Refugee Convention and/or its 1967 Protocol,³ clarifying where those interpretations are correct, and where State practice appears to depart from the obligations in Article 31. The aim of the paper is ultimately to inform UNHCR when developing guidelines on Article 31. In terms of identifying pertinent State practice, particular attention is given to higher court rulings of national courts interpreting Article 31. The role of national courts in international refugee law is crucial, given the absence of a centralized adjudicatory body for international refugee law.⁴ In that endeavor, an attempt has been made to survey jurisprudence and other State practices extensively.⁵ UNHCR offices were asked to provide information on the law and practice pertaining to Article 31 globally. We received responses pertaining to the law and practice of 23 States, and also conducted independent surveys of case law and legislation. In total, this paper highlights the law and practice in 41 States.

This study also draws on various UNHCR statements and interventions relating to Article 31. Formal UNHCR interpretative guidance, while not binding, draws its authority from the 1951 Refugee Convention, in particular UNHCR's supervisory role over the Convention enshrined in Article 35 thereof.⁶ In addition, it is informed by various scholars' accounts of

¹ Convention relating to the Status of Refugees (adopted 28 July 1951) 189 UNTS 137 (1951 Refugee Convention).

² The International Court of Justice (ICJ) has on a number of occasions reaffirmed that Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) reflect customary rules, including in *Peru v Chile* [2014] ICJ Rep 4, 57; *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep 213, [47]; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, [160]; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Rep 625, [37]; *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1045, [18]; *Qatar v Bahrain case* [1995] ICJ Rep 6, [33]; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6, [41].

³ Protocol relating to the Status of Refugees (adopted 31 January 1967) 606 UNTS 267 (1967 Refugee Protocol).

⁴ For a general discussion, see Jane McAdam, 'Interpretation of the Refugee Convention' in Andreas Zimmermann (ed), *Commentary on the Refugee Convention* (OUP 2011) 75; Guy S Goodwin-Gill, 'The search for the one, true meaning ...' in Guy S Goodwin-Gill and Hélène Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (CUP 2010) 204.

⁵ Previous guidelines have been criticized for failing to engage with an adequate range of national jurisprudence. See, for example, Cecilia M Bailliet, 'National Case Law as a Generator of International Refugee Law: Rectifying an Imbalance within UNHCR Guidelines on International Protection' (2015) 29 *Emory International Law Review* 2059.

⁶ Article 35 of the 1951 Refugee Convention provides that: '1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention. 2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statisti-

Article 31, notably that of Goodwin-Gill prepared in 2001 for UNHCR's *Global Consultations on International Protection*.⁷ Goodwin-Gill's analysis in turn informed the 2001 Expert Roundtable's *Summary Conclusions on Article 31 of the 1951 Convention* ('2001 Expert Roundtable Summary Conclusions').⁸ Also frequently cited in this paper is the analysis of Noll in the Zimmermann commentary on the 1951 Refugee Convention,⁹ and the work of Hathaway, in particular the account of Article 31 in *The Rights of Refugees in International Law*.¹⁰

2. TREATY INTERPRETATION

2.1 Rules on Treaty Interpretation

Article 31 VCLT sets out the general rule of interpretation.¹¹ There is no hierarchy between the various elements (paragraphs) of Article 31, as commentators accept.¹² The overarching principle is that a treaty has to be interpreted in good faith.¹³ UNHCR has argued that States may be deemed to lack good faith if they seek to 'avoid or to "divert" the obligation which

cal data requested concerning: (a) The condition of refugees, (b) The implementation of this Convention, and (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees.' See also Article 36 of the 1951 Refugee Convention; Articles 2 and 3 of the 1967 Refugee Protocol; and Statute of the Office of the United Nations High Commissioner for Refugees, UNGA Resolution 428(v), annex, 5 UN GAOR Supp (No. 20) 46, UN Doc A/1775 (December 1950) (UNHCR Statute), Paragraph 8(a).

⁷ Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection' in Erika Feller, Volker Türk, Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003), 425-478, ('Goodwin-Gill').

⁸ UNHCR, 'Summary Conclusions: Article 31 of the 1951 Convention' (June 2003), ('2001 Expert Roundtable Summary Conclusions').

⁹ Gregor Noll, 'Article 31 (Refugees Unlawfully in the Country of Refuge)' in A Zimmermann (ed), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 1243-1276, ('Noll').

¹⁰ James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) ('Hathaway Rights').

¹¹ 'General rule of interpretation: 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. 3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties. 4. A special meaning shall be given to a term if it is established that the parties so intended.', VCLT, art. 31.

¹² Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm D Evans (ed), *International Law* (OUP 4th edn, 2014) 166, 179; Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 161-162; Richard Gardiner, 'The Vienna Convention Rules on Treaty Interpretation' in Duncan B. Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 480. The ILC also clarified that the use of the singular 'rule' in the title of Article 31 was deliberate to underline the connection between all the paragraphs of the provision. See ILC, 'Draft Articles on the Law of Treaties with Commentaries' [1966] II UNYBILC 219, para 8.

¹³ VCLT, art 31(1); see also Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014) 166, 179; Olivier Corten and Pierre Klein, *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011) 807.

[they have] accepted, or to do indirectly what [they are] not permitted to do directly.¹⁴ The interpretative approach in Article 31(1) VCLT incorporates three further elements: the ordinary meaning of terms, the context, and the object and purpose of the treaty.¹⁵ This combined approach of textual, contextual and purposive interpretative requires further delineation. The ‘context’ of a treaty is defined in detail in Article 31(2) VCLT and includes a treaty’s preamble and annexes, as well as any instruments relevant to the conclusion of a treaty.¹⁶ Article 31(3) VCLT refers to the means of interpretation that should be considered ‘at the same time as the context’ – subsequent interpretative agreements, subsequent practice, and reference to relevant rules of international law. The requirement to interpret in line with the ‘object and purpose of the treaty’ generally rules out strict literal interpretation, particular where for example the purpose of the treaty is to protect the rights of refugees and acknowledge the realities of refugee flight.

‘Subsequent practice’ in the meaning of Article 31(3)(b) VCLT is limited. It only includes practice that establishes the agreement of the parties, which dictates the relevant evidence to show the ‘concordant’ conduct of the parties.¹⁷ This means that the same conduct of the parties should be expressly in pursuance of the treaty or if this is a unilateral conduct, it should reveal the agreement of the other party(ies).¹⁸ Legislation and case law constitute State practice,¹⁹ where the legislation giving effect to a treaty can provide evidence of the State’s understanding of its obligations under the treaty.²⁰ However, in assessing the weight to be attached to State practice for the purposes of Article 31(3)(b) VCLT it is necessary to consider its extent, uniformity, consistency, as well as which States are involved.²¹ Domestic courts seem to have relied regularly on State practice in the context of interpretation of the 1951 Refugee Convention.²² In this context, UNHCR Executive Committee Conclusions on International Protection (EXCOM Conclusions) have also been invoked by the domestic courts, particularly in the United Kingdom, New Zealand, Australia, and Canada.²³ The New Zealand Court of Appeal, for instance, stated that the value of UNHCR EXCOM Conclusions ‘derive[d] in part from the fact that the Executive Committee is itself an assembly of States which has debated the issue and settled on a formal statement concerning it’.²⁴ Some

¹⁴ UNHCR’s Submission in the *Roma Rights Case* [2005] 2 AC 1: UNHCR, ‘Written Case’ (2005) 17 Int J Refugee Law 427, para 32. See further Guy S Goodwin-Gill, ‘State Responsibility and the Good Faith Obligation in International Law’ in Malgosia Fitzmaurice and Dan Sarooshi (ed), *Issues of State Responsibility before International Judicial Institutions: The Clifford Chance Lectures* (Bloomsbury Publishing, 2004) 85-8.

¹⁵ VCLT, art 31(1).

¹⁶ VCLT, art 31(2).

¹⁷ Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 255; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 137.

¹⁸ The latter was also confirmed by the ICJ in the *Kasikili/Sedudu Island* case, where the Court took a narrow approach to what comprises subsequent practice and did not take into consideration unilateral acts of the previous authorities of Botswana as they were unknown to the Namibian authorities, *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Rep 1075, [49]-[55]. Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 255.

¹⁹ Ian Brownlie, *Principles of Public International Law* (OUP 2008) 6.

²⁰ Jane McAdam, ‘Interpretation of the 1951 Convention’ in A Zimmermann (ed), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 75, 96.

²¹ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 148.

²² Hathaway *Rights*, 71.

²³ Jane McAdam, ‘Interpretation of the Refugee Convention’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 75, 112.

²⁴ *AG v Refugee Council of New Zealand Inc.* [2003] 2 NZLR 577 (CA) (New Zealand), para 100 (McGrath J).

scholars, however, remain cautious about the use of State practice in the interpretation of multilateral treaties, including the 1951 Refugee Convention, owing to the *pacta tertiis* rule.²⁵

In contrast, the reference in Article 31(3)(c) VCLT to ‘any relevant rules of international law applicable in the relations between the parties’ opens the way for systemic integration of *relevant* rules from other areas of international law. Article 31(4) VCLT complements the previous paragraphs when there exists an intention of the parties to give a special meaning to a term.²⁶

Article 32 VCLT covers the use of supplementary means of interpretation, including preparatory work (or *travaux préparatoires*).²⁷ In contrast to the means of interpretation under the general rule in Article 31 VCLT, supplementary means, including preparatory work, ‘may’ be used either to confirm the meaning of the treaty or determine the meaning where it remained ambiguous or obscure, or leads to a result that is manifestly absurd or unreasonable after the application of Article 31 VCLT.²⁸ This means that preparatory work plays only a supporting role to the means of interpretation in the general rule in Article 31 VCLT.²⁹

Article 33(3) VCLT provides that with regard to treaties in two or more languages, the terms of the treaty are presumed to have the same meaning in each authentic text, but according to Article 33(4) VCLT, ‘when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.’ As will be seen, this rule is applicable when interpreting Article 31 of the 1951 Refugee Convention, as there are tensions between some aspects of the English and French language version of the provision.

2.2 Article 31 and the Object and Purpose of the 1951 Refugee Convention

When interpreting Article 31 (or indeed any treaty provision), a contextual purposive approach is legally required. The Preamble of the 1951 Refugee Convention reflects its multifaceted object and purpose, in particular to ‘revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement.’ The Preamble also

²⁵ Hathaway *Rights*, 68–69; see also Jane McAdam, ‘Interpretation of the 1951 Convention’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary* (OUP 2011) 75, 97.

²⁶ VCLT, art 31(4).

²⁷ ‘Supplementary means of interpretation: Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning, when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.’, VCLT, art 32.

²⁸ VCLT, art 32; Malgosia Fitzmaurice, ‘The Practical Working of the Law of Treaties’ in Malcolm D Evans (ed), *International Law* (4th edn, OUP 2014) 172, 181; Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 354; ILC, ‘Draft Articles on the Law of Treaties with Commentaries’ [1966] II UNYBILC 220, para 10. See also *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6, [55].

²⁹ Richard Gardiner, *Treaty Interpretation* (2nd edn, OUP 2015) 347.

notes the efforts of the United Nations to ‘assure refugees the widest possible exercise of these fundamental rights and freedoms.’

The centrality of Article 31 to the purposes and scheme of the 1951 Refugee Convention should be borne in mind. Indeed, it has been framed as reflecting one of the three distinct objectives of the Convention. In the United Kingdom, Lord Bingham in the House of Lords observed that:

‘The Refugee Convention had three broad humanitarian aims. The first was to ensure that States acceding to the Convention would afford a safe refuge to those genuinely fleeing from their home countries to escape persecution or threatened persecution [...]. Such refugees were not to be returned to their home countries. The second aim was to ensure reasonable treatment of refugees in their countries of refuge, an aim to which most of the articles in the Convention were addressed. The third aim, broadly expressed, was to protect refugees from the imposition of criminal penalties for breaches of the law reasonably or necessarily committed in the course of flight from persecution or threatened persecution.’³⁰

In this respect, Article 31 is treated as embodying a central aim of the Convention, with non-penalization in itself as an object of the 1951 Refugee Convention.

The 1951 Refugee Convention also acknowledges that, ‘the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.’ This need for international cooperation is again acknowledged in the Preamble when it exhorts, ‘all States, recognizing the social and humanitarian nature of the problem of refugees, [to] do everything within their power to prevent this problem from becoming a cause of tension between States.’ These preambular statements are pertinent to the interpretation of Article 31, particularly to the extent that some States attempt to rely on the Article to legitimize ‘safe third country’ and related practices, which seek to contain refugees and ultimately undermine international cooperation for refugee protection.

2.3 Article 31 in Legal Context

Reading Article 31 contextually, taking into account the other provisions of the Refugee Convention, is also mandatory.

In South Africa, the Supreme Court of Appeals had described the domestic provision giving effect to Article 31³¹ and the surrounding statutory scheme in the Act as follows:

³⁰ *R v Asfaw* [2008] UKHL 31, para 9.

³¹ South African Refugees Act, s 21(4); ‘Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or (b) if such person has been granted asylum.’

'The words of the Act mirror those of the [Refugee] Convention and the OAU Convention of 1969. They patently prohibit the prevention of access to the Republic of any person who has been forced to flee the country of her or his birth because of any of the circumstances identified in s 2 of the Act. Refugees entitled to be recognized as such may more often than not arrive at a port of entry without the necessary documentation and be placed in an inadmissible facility. Such persons have a right to apply for refugee status, and it is unlawful to refuse them entry if they are bona fide in seeking refuge.'³²

In this view, Article 31 forms a key part of the Convention's commitment to access to asylum, without which the other guarantees in the Convention would be undermined.

Article 2 of the 1951 Refugee Convention requires the refugee to 'conform to the laws and regulations of the country.' This reflects an important principle, and importantly, Article 31 is not an exception to that obligation, but rather obliges the State not to engage in a particular form of enforcement of those obligations (penalization). As Noll has put it, there is thus a 'special relationship' between Article 2 and Article 31.³³ As will be seen, however, Article 31(1)'s purpose reflects a legal recognition of the practical predicament of the refugee, where 'good cause' for failing to comply with legal requirements is acknowledged.

Article 31(2), first sentence, permits certain restrictions on a category of unauthorized refugees.³⁴ However, Article 26 sets the general rule, obliging States to accord freedom of movement to refugees 'lawfully in' their territory.³⁵

Accordingly, the limits set in Article 31(2) must be assessed in light of Article 26, which sets up a general rule of free movement. The line between Article 26 (free movement) and Article 31(2) (restrictions) is that the former applies to refugees 'lawfully in' the territory, while the right to impose restrictions only applies as long as refugees' presence has not been 'authorized', or they have been helped to move onwards regularly. It is generally accepted that 'lawfully in' and 'authorized' refer to admission to a status determination procedure, as well as any other form of express or implied permission to stay, whether temporary or permanent.³⁶ This means that the permission to impose restrictions under Article 31(2) is strictly provisional and temporally limited.

The strictly provisional character of the permission granted by Article 31(2) to impose restrictions on refugees unlawfully in the country of refuge is apparent from the text, which envisages that States should either regularize such refugees, or enable them to gain

³² *MAA3 v Minister of Home Affairs* [2011] (3) SA 37 (SCA) (Supreme Court of Appeals of South Africa) [22].

³³ Noll, 1251.

³⁴ See discussion of personal scope of Article 31(2) below at Section 5.1.1.

³⁵ Article 26 is headed 'Freedom of Movement' and states that 'Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.' See further Reinhard Marx, 'Article 1 E (Definition of the Term 'Refugee') in Andreas Zimmermann (ed), *Commentary on the Refugee Convention* (OUP 2011) 570.

³⁶ Hathaway *Rights* 414-419.

admission to other States. The second sentence of Article 31(2) obliges States to 'allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.'

3. THE HEIGHTENED CONTEMPORARY SIGNIFICANCE OF ARTICLE 31

The importance of Article 31 to the effectiveness of refugee protection has increased in light of two contemporary developments. Firstly, States are not using their great resources and discretion to offer refugees legal admission to their territories, but rather have developed a panoply of measures hindering access to asylum. Accordingly, irregular journeys and border crossings have become the norm for many refugees. Secondly, irregular migration has been subjected to a range of diverse criminal and repressive measures.

3.1 Absence of Legal Access to Asylum

The drafters of the 1951 Refugee Convention clearly understood that refugees fleeing often would be unable to comply with immigration law requirements.

However, if anything the legal and practical barriers to flight have increased since the drafting of the Convention. Writing in 1983, Grahl-Madsen noted that it was 'part of the tragedy of our times that several States by various methods are seeking to prevent or at least to discourage refugees from reaching their shores to seek sanctuary.'³⁷ Numerous scholarly and official works have examined the various barriers to access asylum that have emerged in the past decades.³⁸ These access barriers have also been acknowledged judicially. For instance, Lord Simon-Brown stated in the UK High Court in *Adimi*:

'The need for Article 31 has not diminished. Quite the contrary. Although under the Convention subscribing States must give sanctuary to any refugee who seeks asylum (subject only to removal to a safe third country), they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it. The combined effect of visa requirements and carrier's liability has made it well-nigh impossible for refugees to travel to countries of refuge without false documents. [...].'³⁹

3.2 The Criminalization and Suppression of Irregular Migration

In attempts to restrict irregular migration in general, many States employ a greater array of restrictive, coercive and punitive measures. Although some of these restrictive measures

³⁷ Atle Grahl-Madsen, 'Identifying the World's Refugees' (1983) 467 *The Annals of the American Academy of Political and Social Science: The Global Refugee Problem: U. S. and World Response* 11, 20.

³⁸ See, for example Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control* (CUP 2011); Maarten den Heijer, *Europe and Extraterritorial Asylum* (Hart Publishing 2012); Cathryn Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) 12(2) *Human Rights Law Review* 287; Gregor Noll, Jessica Fagerlund and Fabrice Liebaut, 'Study on the feasibility of processing asylum claims outside the EU' (2002) *The Danish Centre for Human Rights and the European Commission*.

³⁹ *R v Uxbridge Magistrates Court, ex part Adimi* [1999] EWHC Admin 765 (Simon Brown LJ) 527.

purport to exempt or treat refugee admissions differently, in practice refugees are often swept up in the net of general measures to restrict irregular migration. Indeed, one of the main themes that emerges in the review of State practice relating to Article 31 is that the provision tends to be ineffective if refugees are not afforded swift access to asylum procedures, and if those procedures do not insulate them from penalization until their status is determined. While this report focuses on Article 31, a provision of the 1951 Refugee Convention that acknowledges the particular circumstances of refugee flight, it should not be taken as an endorsement of increasing migration control, in particular of the criminalization of irregular entry or stay in general. Indeed, even when the individuals concerned are clearly not refugees, the criminalization of migration raises serious legal and human rights concerns.

3.3 The Human Rights Response to the Criminalization of Migration

It is important to note that the principle reflected in Article 31 (non-penalization of refugees for unauthorized entry or stay) is not unique, but rather finds analogous expression in other instruments. For instance, the international instruments aiming to suppress smuggling and trafficking envisage that migrants themselves should not be the main object of criminalization. Importantly, the main international instrument on migrant smuggling, the UN Smuggling Protocol, envisages that migrants who travel irregularly using smugglers should not be criminalized.⁴⁰ In addition, several international anti-trafficking instruments also reflect this non-criminalization principle, as Schloenhardt and Markey-Towler have illustrated.⁴¹ While the UN Trafficking Protocol is itself silent on the issue of non-criminalization of victims of trafficking (except for including a strong victim protection ethos), the UN Working Group on Trafficking in Persons has noted that:

‘Criminalization limits the trafficking victims’ access to justice and protection and decreases the likelihood that they will report their victimization to the authorities. Given the victims’ existing fears for their personal safety and of reprisals by the traffickers, the added fear of prosecution and punishment can only further prevent victims from seeking protection, assistance and justice.’⁴²

Moreover, the Model Law against Trafficking in Persons developed by the United Nations Office on Drugs and Crime (UNODC) suggests the inclusion of a provision on the ‘non-liability, non-punishment or non-prosecution of victims of trafficking in persons’.⁴³ At the

⁴⁰ Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507; Andreas Schloenhardt and Hadley Hickson, ‘Non-Criminalisation of Smuggled Migrants: Rights, Obligations, and Australian Practice under Article 5 of the Protocol against the Smuggling of Migrants by Land, Sea, and Air’ (2013) 25(1) Int J Refugee Law 39.

⁴¹ Andreas Schloenhardt and Rebekah Markey-Towler, ‘Non-criminalisation of victims of trafficking in persons: principles, promises, and perspectives’ (2016) 4 Groningen Journal of International Law 10.

⁴² UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, *Non-Punishment and Non-Prosecution of Victims of Trafficking in Persons: Administrative and Judicial approaches to Offences Committed in the Process of Such Trafficking* (9 December 2009) UN Doc CTOC/COP/WG.4/2010/4 2–3, paras 5–6.

⁴³ UNODC, *Model Law against Trafficking in Persons* (2009), art 10 <https://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf> accessed 8 April 2017.

regional level, the non-criminalization principle finds stronger expression. For example, the Council of Europe Anti-Trafficking Convention explicitly reflects this principle,⁴⁴ as does the pertinent EU Directive.⁴⁵

More generally, human rights bodies have also commented on the negative impact of the criminalization of migration on human rights. Some human rights bodies have reminded States that these practices may go beyond legitimate powers of migration control. For instance, the UN Working Group on Arbitrary Detention has argued that ‘criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention.’⁴⁶ The UN Special Rapporteur on the Human Rights of Migrants François Crépeau has reiterated this point.⁴⁷ The Office of the United Nations High Commissioner for Human Rights (OHCHR) expressed the view that ‘infractions of immigration laws and regulations should not be considered as criminal offences’ and that ‘detention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature.’⁴⁸ The Council of Europe Commissioner for Human Rights has argued that European States should reverse the trend to criminalize migration and rather ‘establish a human rights compliant approach to irregular migration.’⁴⁹ In the EU context, legal limits on States’ criminalization of irregular stay have been established, as criminalization has also been found to hinder removal processes as set out in the EU Returns Directive.⁵⁰

As well as these general concerns that the criminalization of migration contributes to arbitrary punitive detention, some migration control practices also violate the right to leave any country.⁵¹ For instance, the European Court of Human Rights (ECtHR) has emphasized

⁴⁴ ‘Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.’ Council of Europe, *Convention on Action against Trafficking in Human Beings* (16 May 2005) CETS 197, art 26.

⁴⁵ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. Article 8 deals with ‘Non-prosecution or non-application of penalties to the victim’.

⁴⁶ UN Human Rights Council ‘Report of the Working Group on Arbitrary Detention’ (10 January 2008) 7th Session A/HRC/7/4, para 53; UN Human Rights Council ‘Report of the Working Group on Arbitrary Detention’ (18 January 2010) 13th Session A/HRC/13/30, para 58.

⁴⁷ UN Human Rights Council ‘Report of the UN Special Rapporteur on the Human Rights of Migrants François Crépeau to the UN Human Rights Council’ (June 2012) A/HRC/20/24. See also the Report of his predecessor Jorge Bustamante UN Human Rights Council ‘Report of the UN Special Rapporteur on the Human Rights of Migrants on the Criminalization of Irregular Migration’ (2008) A/HRC/7/12.

⁴⁸ Office of the United Nations High Commissioner for Human Rights ‘Administrative Detention of Migrants’ (Migration Discussion Papers, undated) 13

<<http://www2.ohchr.org/english/issues/migration/taskforce/docs/administrativedetentionrev5.pdf>> accessed 14 April 2017.

⁴⁹ Council of Europe Commissioner for Human Rights, ‘Criminalisation of Migration in Europe: Human Rights Implications’ (4 February 2010) CommDH/IssuePaper(2010) 1.

⁵⁰ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (24 December 2008) L348/98, art 15, 16. Case C-61/11 PPU *Hassen El-Dridi alias Karim Soufi* [2011] ECR I-3015; See further EU Fundamental Rights Agency (FRA), ‘Criminalisation of Migrants in an Irregular Situation and of Persons Engaging with Them’ (2014).

⁵¹ UDHR, art 13.2; ICCPR, art 12; Protocol No 4 ECHR, art 2; 1981 African Charter on Human and Peoples’ Rights,

that while it may be permissible to restrict the right to leave in order to prevent individuals breaching the immigration laws of other States, any such actions must demonstrate that they pursue a legitimate aim, and are strictly necessary.⁵²

This section illustrates that international migration and human rights norms and institutions limit the legality and appropriateness of punitive and criminal measures to control migration. Article 31 of the 1951 Refugee Convention contains a specific and qualified protection against penalization for refugees, but should also be read against the background of these human rights commitments.

4. THE ELEMENTS OF ARTICLE 31(1)

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.’

In essence, the Article protects ‘refugees’ from the imposition of ‘penalties’ on account of illegal entry or presence, and contains three qualifying conditions which must be satisfied, which may be summarized as ‘directness’, ‘promptness’ and ‘good cause’. These qualifying conditions reflect a notion of good faith on the part of the refugee, as well as the drafter’s instrumental concerns to ensure that unauthorized refugees approach the authorities of the State of refuge without delay.

4.1 Personal Scope

4.1.1 ‘Refugees’ under the Refugee Convention & Expanded Definitions

The 1951 Refugee Convention protects ‘refugees’ as defined in Article 1A of that instrument.

The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (‘the OAU Refugee Convention’)⁵³ enshrines both the Refugee Convention definition, and broader refugee criteria. Article I (1) of the OAU Refugee Convention mirrors the refugee definition in Article 1(A)(2) of the Refugee Convention (without the temporal limitation), while Article I(2) thereof provides that

art 12(2); 1948 American Declaration of the Rights and Duties of Man, art VIII; 1969 American Convention on Human Rights, art 22; 1994 Arab Charter on Human Rights, art 21. See generally Council of Europe Commissioner for Human Rights, ‘The right to leave a country’ (Issue Paper, 2013).

⁵² *Stamose v Bulgaria*, App no 29713/05 (ECHR, 27 November 2012).

⁵³ Organization of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969) 1001 UNTS 45.

‘the term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’.

Even though the OAU Refugee Convention relates primarily to qualification for and disqualification from refugee status and does not enumerate the refugee rights, the treaty in effect provides that the rights of the refugees who meet the broader criteria under Article I(2) are also covered in general by the rights catalogue in the 1951 Refugee Convention.⁵⁴

The other significant broader refugee criteria are enshrined in the 1984 Cartagena Declaration,⁵⁵ as affirmed in the 2014 Brazil Declaration.⁵⁶ Although non-binding, the criteria have been incorporated into the national laws of 15 states in Central and South America.⁵⁷ The Declaration envisages that refugees within the broader sense should benefit from the same rights as those under the 1951 Refugee Convention.⁵⁸ The national laws of the 12 of the 15 States in question apply Article 31-type protections also to Cartagena definition refugees.⁵⁹

⁵⁴ Marina Sharpe, ‘The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions’ (2012) 58 McGill Law Journal 95–147, sec III; Marina Sharpe ‘The Regional Law of Refugee Protection in Africa’ (DPhil thesis, University of Oxford 2016).

⁵⁵ Cartagena Declaration on Refugees, Conclusion III (3) states that: ‘To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.’

⁵⁶ The Brazil Declaration, ‘A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean’ (3 December 2014) <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2014/9865.pdf> accessed 14 April 2017.

⁵⁷ The following countries have incorporated the regional extended definition into their domestic laws: (1) Argentina: Ley No 26.165. Ley General de Reconocimiento y Protección al Refugiado (28 November 2006), art 4(b); (2) Belize: Refugees Act (y sus reformas) (1991 – Revised edition 2000), s 4(1)(c); (3) Bolivia: Ley No 251 de Protección a Personas Refugiadas (20 June 2012), art 15(b); (4) Brazil: Lei No 9.474 (22 July 1997), art 1(III); (5) Chile: Ley No 20.430. Establece disposiciones sobre protección de refugiados (8 April 2010), art 2(2); (6) Colombia: Decreto No 2840, por el cual se establece el Procedimiento para el Reconocimiento de la Condición de Refugiado, se dictan normas sobre la Comisión Asesora para la Determinación de la Condición de Refugiado y otras disposiciones (6 December 2013), art 1(b); (7) Ecuador: Ley orgánica de movilidad humana (published on 6 February 2017), art 98(2); (8) El Salvador: Decreto Ley No 918. Ley para la determinación de la condición de personas refugiadas (published 14 August 2002), art 4(c); (9) Guatemala: Acuerdo Gubernativo No 383-2001. Reglamento para la protección y determinación del estatuto de refugiado en el territorio del Estado de Guatemala (14 September 2001), art 11(c); (10) Honduras: Decreto No 208. Ley de Migración y Extranjería (3 March 2004), art 42(3); (11) Mexico: Ley sobre Refugiados y Protección Complementaria (27 January 2011), art 13(II); (12) Nicaragua: Ley No 655 de Protección a Refugiados (26 June 2008), art 1(c); (13) Paraguay: Ley No 1938 General sobre Refugiados (9 July 2002), art 1(b); (14) Peru: Ley No 27.891. Ley del Refugiado (22 December 2002), art 3(b); (15) Uruguay: Ley No 18.076. Derecho al refugio y a los refugiados (5 January 2007), art 2(b).

⁵⁸ Cartagena Declaration, Conclusion III (8).

⁵⁹ Source: Romina I. Sijniensky, ‘Memorandum - The inclusion in domestic laws implementing the Cartagena expanded refugee definition of the protections of Article 31 of the Refugee Convention’ (4 April 2017) [on file with the author].

The 12 are Argentina, Belize, Bolivia, Brazil, Chile, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Peru and Uruguay.⁶⁰ With regard to Paraguay and Colombia, there is no provision in its national legislation mirroring Article 31 of the 1951 Refugee Convention, although it seems that in practice any prosecutions related to irregular entry are suspended until the asylum claim is determined. In respect to El Salvador, the law provides that ‘illegal entry into the national territory will not be grounds for rejection of refugee status, provided that the conditions established in this Law have been fulfilled’.⁶¹

4.1.2 *Subsidiary and Other Protection Beneficiaries*

As well as employing broader refugee criteria, many States grant those entitled to international protection other (often lesser) statuses.⁶² Sometimes, these practices are legally circumscribed to reflect the primacy of the 1951 Refugee Convention, and formally are complementary or subsidiary to Convention status. This is the case most notably with subsidiary protection in EU law, which is expressly only to be provided to those who are *not* Convention refugees.⁶³ Nonetheless, in practice, often the individuals granted subsidiary or other forms of protection are indistinguishable in their protection needs from Convention refugees. The evidence for such a phenomenon in Europe is often the shifting and divergent recognition rates for Convention refugees and subsidiary protection beneficiaries, often

⁶⁰ (1) Argentina: Ley No 26.165. Ley General de Reconocimiento y Protección al Refugiado, art 2, art 40; (2) Belize: Refugees Act (y sus reformas) (1991 – Revised edition 2000), art 10; (3) Bolivia: Ley No 251 de protección a personas refugiadas (20 June 2012), art 7; (4) Brazil: Lei No 9.474 (22 July 1997), art 8, art 10; (5) Chile: Ley No. 20.430. Establece disposiciones sobre protección de refugiados (published on 8 April 2010), art 3, art 6; (6) Ecuador: Constitución de la República del Ecuador, art 41; Ley orgánica de movilidad humana (published on 6 February 2017), art 113; (7) Guatemala: Acuerdo Gubernativo No 383-2001, Reglamento para la protección y determinación del estatuto de refugiado en el territorio del Estado de Guatemala (14 September 2001), art 52; (8) Honduras: Decreto No 208. Ley de Migración y Extranjería (published on 3 March 2004), art 46; (9) Mexico: Ley sobre Refugiados y Protección Complementaria (27 January 2011), art 2, 7; Reglamento de la Ley sobre Refugiados y Protección Complementaria, art 12; (10) Nicaragua: Ley No 655 de Protección a Refugiados (26 June 2008), cap III, art 10; (11) Peru: Ley No 27.891. Ley del Refugiado (published on 22 December 2002), art 31; Decreto Legislativo de Migraciones (2017), art 44; (12) Uruguay: Ley No 18.076. Derecho al refugio y a los refugiados (published on 5 January 2007), art 10, 15.

⁶¹ El Salvador: Decreto Ley No 918. Ley para la determinación de la condición de personas refugiadas (published on 14 August 2002), art 19; ‘La persona interesada, su representante legal y otros organismos de las Naciones Unidas, podrán presentar la solicitud de reconocimiento de la condición de persona refugiada, a la Secretaría de la Comisión, dentro de los cinco días hábiles siguientes a la fecha de ingreso al territorio nacional. La Secretaría trasladará a la Subcomisión a la que se hace referencia en el Art. 13 de la presente Ley, la solicitud para su evaluación; así también deberá enviar copia a la Procuraduría para la Defensa de los Derechos Humanos de todo el proceso. La entrada ilegal al territorio nacional no será motivo para el rechazo de la condición de persona refugiada, siempre y cuando se hayan cumplido las condiciones establecidas en la presente Ley.’

⁶² Thomas Spijkerboer, ‘Subsidiarity in Asylum Law. The Personal Scope of International Protection’ in Daphné Bouteillet-Paquet (ed), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant 2002) 28–29; Jane McAdam, ‘The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection’ in Jane McAdam (ed), *Forced Migration, Human Rights and Security* (Hart Publishing 2008) 263.

⁶³ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or Stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast Qualification Directive) [2011] OJ L337/9, art 2(f).

coming from the same countries and presenting similar claims.⁶⁴

In this context, the question arises whether subsidiary and other protection beneficiaries should also benefit from Article 31 (and indeed other provisions of the 1951 Refugee Convention). One legal argument in support of that contention has been well made by McAdam,⁶⁵ namely a *lex specialis* argument that as the 1951 Refugee Convention provides the definitive statement of international law's treatment of persons in need of international protection and, as human rights law has expanded the category of those protected against *refoulement*, the rights accruing to refugees under the Convention should also be extended to other protection beneficiaries. Although this argument is well crafted, it has not met with official acceptance.

The other source of protection for subsidiary and other protection beneficiaries are the equality guarantees in international and regional human rights law. To the extent that Convention refugees and other protection beneficiaries are similarly situated, differences in treatment between them may amount to legally prohibited discrimination. This argument has been made out under the International Covenant on Civil and Political Rights (ICCPR).⁶⁶ It is now also well-established under the European Convention on Human Rights (ECHR) that where the holders of different forms of migration status are similarly situated, differences in treatment between them require objective justification. Otherwise, they may be found to be in breach of Article 14 ECHR (non-discrimination).⁶⁷ Accordingly, States may be obliged under international human rights law to afford protections analogous to those set out in Article 31 to subsidiary protection beneficiaries.

In practice however, States often use subsidiary and other protection statuses precisely in order to limit the protections of the 1951 Refugee Convention. In Denmark, for example, the Supreme Court held that Article 31 was only applicable to asylum-seekers and recognized Convention refugees, not others permitted to stay as complementary protection beneficiaries.⁶⁸

4.1.3 Temporary Protection Beneficiaries

⁶⁴ UNHCR 'Safe at Last: Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence' (UNHCR, July 2011).

⁶⁵ Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007); James C Hathaway, 'Leveraging Asylum' (2010) 45 *Texas International Law Journal* 503.

⁶⁶ Jason Pobjoy, 'Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Protection of Refugees and Beneficiaries of Complementary Protection' (2010) 34(1) *Melbourne University Law Review* 181 – 229.

⁶⁷ *Hode & Abdi v UK* App no 22341/09 (ECHR, 6 November 2012). On equal treatment between Convention refugees and subsidiary protection beneficiaries (here as regards family reunification rights) under Article 14 ECHR, see Council of Europe Commissioner for Human Rights (Issue Paper), *Realizing Refugees' Rights to Family Reunification in Europe* (2017) Council of Europe Commissioner for Human Rights (Issue Paper), by Cathryn Costello, Kees Groenendijk, Louise Halleskov Storgaard.

⁶⁸ Decisions 178/2011 and 179/2011, 3 February 2012 (Supreme Court of Denmark). This account is based on the summary in English provided by Simon Hein Nielsen [on file with the author]. See further Jens Vedsted-Hansen, 'Straf eller straffrihed for asylansøgers anvendelse af falske rejsedokumenter' UfR online U.2012B.360.

Strictly as a matter of interpretation of the 1951 Refugee Convention, it is difficult to see how Article 31 may be applicable to those who are not Convention refugees. However, some protection categories explicitly leave open or undetermined whether an individual is a Convention refugee or not. This is particularly the case with forms of temporary protection, which are applicable in some cases of mass influx. In such contexts, States sometimes simply forestall formal refugee status determination until it is administratively feasible, or accept that amongst those arriving are Convention refugees and other protection beneficiaries. In such circumstances, the effectiveness of Article 31 would require that its protection be extended to all those granted temporary protection, similarly to protections for asylum-seekers, that is until they are found *not* to be in need of international protection in a final decision following a fair procedure.

4.1.4 *Mass Influx Arrivals*

There is nothing in the 1951 Refugee Convention to suggest that its provisions are inapplicable in the context of 'mass influx' arrivals. Regarding Article 31 specifically, it is noteworthy that EXCOM Conclusion No. 22 on the protection of asylum-seekers in situations of large-scale influx notes the contents of Article 31, and affirms that those arriving in 'mass influx', 'should not be penalised or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful; they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health or public order.'⁶⁹ Accordingly, the Conclusion affirms the principle of non-penalization, and goes further, as is expressly noted: 'The standards defined in [Article 31] do not cover all aspects of the treatment of asylum-seekers in large-scale influx situations.'⁷⁰

4.1.5 *Asylum-Seekers*

It is widely accepted that in light of the declaratory nature of refugee status determination, and in order to ensure the effectiveness of the protection in Article 31, that the provision also applies to asylum-seekers. Concerning the declaratory nature of refugee status determination, the *UNHCR Handbook* states:

'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.'⁷¹

Accordingly, the 2001 Expert Roundtable Summary Conclusions provided that,

⁶⁹ EXCOM Conclusion No 22 (XXII) 'Protection of Asylum-seekers in Situations of Large-scale Influx' (1981), para II(B)(1).

⁷⁰ *Ibid.*

⁷¹ *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979, reissued January 1992 and December 2011), para 28.

‘The effective implementation of Article 31 requires that it applies 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.’⁷²

This proposition is widely supported in jurisprudence. For example, many national courts have affirmed that Article 31 applies to those ‘claiming asylum in good faith (presumptive refugees)’⁷³, regarding the matter as well-settled.⁷⁴ In Germany, the Federal Constitutional Court has held that the protection of 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 with the intention to seek asylum at the earliest possibility.⁷⁵

This wider proposition, namely that asylum-seekers benefit from Article 31(1), also has the support of leading publicists. As Goodwin-Gill has put in his authoritative study of Article 31(1), the Article also applies to asylum-seekers, as ‘although expressed in terms of the ‘refugee’, this provision would be devoid of all effect unless it also extended, at least over a certain time, to asylum-seekers.’⁷⁶ Such persons are *prima facie* entitled to Article 31(1) until a final decision on their protection need has been administered in a fair procedure.⁷⁷ Similarly, Hathaway argues that Article 31 requires no more than physical presence, therefore the provisional benefit must be granted to all persons claiming refugee status, until they are finally determined not to be Convention refugees.⁷⁸ Noll also shares this view.⁷⁹

This interpretation has important implications for the practical and temporal protection afforded by Article 31. As is discussed further below [Section 6], the effectiveness of Article 31 depends on ensuring that refugees are not penalized. Where bringing charges against a refugee itself brings with it disadvantages on account of alleged illegal entry or stay, then charges should not be brought.

4.1.6 *Asylum-Seekers with Claims deemed Inadmissible*

⁷² 2001 Expert Roundtable Summary Conclusions, para 10(g).

⁷³ *R v Uxbridge Magistrates’ Court and Another, ex parte Adimi* 1999 4 ER 520, para 16 (Simon Brown LJ); *R v Asfaw* [2008] UKHL 31, *United Kingdom: House of Lords (Judicial Committee)*, 21 May 2008; *R v Ali Reza Sadighpour* [2012] EWCA Crim 2669; *R and Koshi Pitshou Mateta and others* [2013] EWCA Crim 1372, 30 July 2013; *R v Chikho* [2016] EWCA Crim, 13 October 2016; *R v Abdul Haroun* [2016] EWCC, 1 April 2016; *R v Mirahessari and Vahdani* [2016] EWCA Crim 1733.

⁷⁴ See, for example, Decision 179/2011, 3 February 2012 (Supreme Court of Denmark); *BO2913* [2011] 09/02696 (Supreme Court of the Netherlands), *BO2914*, [2011] 09/02785 (Supreme Court of the Netherlands). *BO2915*, [2011] 09/02786 (Supreme Court of the Netherlands), *BU2863* [2012] 10/02976 (Supreme Court of the Netherlands); *Arse v Minister of Home Affairs* [2010] 252010 2010 ZASCA 9 (Supreme Court of Appeal of South Africa), *Bula and Others v Minister of Home Affairs and Others* [2011] 58911 2011 ZASCA 209 2012 2 SA 1 SCA 2012 4 SA 560 SCA.

⁷⁵ 2 BvR 450/11, 8 December 2014 (Federal Constitutional Court of Germany), para 27.

⁷⁶ Goodwin-Gill, 193.

⁷⁷ *Ibid.*, 219, para 7.

⁷⁸ Hathaway *Rights*, 389.

⁷⁹ Noll, 1253.

In the case of asylum-seekers whose claims are deemed inadmissible, there is a strong case for their inclusion within the protective ambit of Article 31. There are many grounds upon which States reject asylum claims as inadmissible, but it should be recalled the basic notion of inadmissibility (as opposed to that of unfoundedness) is that there are reasons why the claim need not be examined, without necessarily casting doubt on the applicant's refugeehood.⁸⁰ In particular, inadmissibility practices are often associated with safe third country and first country of asylum practices. In this context, when asylum-seekers move onwards in search of protection, a question arises about whether the protections of Article 31 apply.

In some instances, applicants in such circumstances are denied the protection of Article 31(1) as they are deemed not to have 'come directly' (as discussed below in Section 4.2). But irrespective of the 'coming directly' requirement, it is important to clarify whether an asylum-seeker whose claim is rejected on inadmissibility grounds may fall within the personal scope of Article 31(1). If a claim is rejected on admissibility grounds, then the claimant's refugeehood is not contested. In these circumstances, it appears she or he is still presumptively a refugee, within the meaning of the 1951 Refugee Convention, as the asylum claim has not been examined in substance. Provided the other qualifying conditions of Article 31(1) are met, that is 'directness', 'promptness' and 'good cause', she or he may benefit from the non-penalization clause, as discussed below.

4.1.7 *Rejected Asylum-Seekers*

As noted above, the 2001 Expert Roundtable Summary Conclusions provide that the term 'refugee' includes asylum-seekers and 'presumptive refugees' and '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'.⁸¹ The reference to 'following a fair procedure' is both an important and necessary interpretative gloss. It is all too easy to imagine scenarios where asylum claims are wrongly rejected, and the procedure is manifestly unfair. In such circumstances, should the unrecognized refugee be penalized and wish to rely on Article 31, it would undermine the effectiveness of the provision were there no possibility for the reliability of the asylum determination to be questioned. Accordingly, Article 31(1) should also afford protection to rejected asylum-seekers, in the limited situation where they can demonstrate that the rejection of their asylum claim was wrong, in particular when the asylum procedure was unfair. Admittedly, this may require some adaptation of domestic laws and practices, as oftentimes procedural rules permit or indeed oblige one arm of the State to rely on the determinations of another. However, where the rejected asylum-seeker casts serious doubt on the reliability or fairness of the asylum determination, Article 31's

⁸⁰ UNHCR 'Summary Observations on the Amended Proposal by the European Commission for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status' COM (2000) 326 final/2 (2002) 7; EXCOM Conclusion No 30 (XXXIV) 'The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum (1983).

⁸¹ 2001 Expert Roundtable Summary Conclusions, para 10(g).

protective purpose would be undermined if she or he were not permitted to contest that matter, particularly in criminal proceedings related to irregular entry or stay.

Some domestic legislation caters for rejected asylum-seekers, at least in some limited circumstances. For instance in the United Kingdom, the statutory provision that aims to give effect to Article 31⁸² defines 'refugees' as someone who is a refugee under the 1951 Refugee Convention⁸³ or alternatively states that, 'if the Secretary of State has refused to grant a claim for asylum made by a person who claims he has a defence under Subsection 1, that person is to be taken not to be a refugee unless he shows that he is.'⁸⁴ This provision allows rejected asylum-seekers to argue that they ought to have been recognized as refugees, although they bear the legal burden in this matter.⁸⁵

4.2 Directness - '... coming directly from a territory where their life or freedom was threatened in the sense of Article 1 ...'

This is perhaps the most contentious element of Article 31. The provision refers to 'coming directly' not from the country of origin or residence, but rather from any 'territory' where the refugees' 'life or freedom was threatened in the sense of Article 1'. The drafters rejected the notion of requiring direct flight from the country of origin, acknowledging that refugees may experience threats to the life or freedom elsewhere also, which provide good cause for flight and irregular entry to a country of asylum.⁸⁶

In spite of the proliferation of practices which seek to deflect and contain refugees in countries and regions of first asylum, it should be recalled, in the words of EXCOM Conclusion No. 15, that '[t]here is no obligation under international law for a person to seek international protection at the first effective opportunity' and that '[t]he intentions of the asylum-seeker as regards the country in which he wishes to request asylum should as far as possible be taken into account. Regard should be had to the concept that asylum should not be refused solely on the ground that it could be sought from another State.'⁸⁷ The Preamble to the 1951 Refugee Convention notes that the grant of asylum may impose 'unduly heavy burdens' on certain countries, and urges international cooperation in refugee protection, thereby acknowledging that containing refugees in overburdened countries of first asylum ought to be avoided.

⁸² Immigration and Asylum Act 1999, s 31.

⁸³ *Ibid.*, s 31(6).

⁸⁴ *Ibid.*, s 31(7).

⁸⁵ If an application for asylum has been refused by the Secretary of State, then s 31(7) of the Asylum and Immigration Act 1999 places the legal burden on the defendant to establish on a balance of probabilities that he is a refugee. See also *R v Ali Reza Sadighpour* [2012] EWCA Crim 2669.

⁸⁶ The earliest versions of what would become Article 31 made no reference to whether flight was from the country of origin or otherwise, but simply stated 'The High Contracting Parties undertake not to impose penalties, on account of their illegal entry or residence, on refugees who enter or who are present in their territory without authorization, and who present themselves without delay to the authorities and show good cause for their illegal entry.' Decisions of the Committee on Statelessness and Related Problems taken on 3 February 1950' (3 February 1950) UN Doc E/AC.32.L.26.

⁸⁷ EXCOM Conclusion No 15 (XXX) 'Refugees without an Asylum Country' (1979).

There are several possible ordinary meanings of the term ‘directly’ in ‘coming directly’. As Noll points out (examining the dictionary meaning in both English and French), directness can connote a spatial or temporal criterion.⁸⁸ To those criteria, may also be added notions of intention. Accordingly, to isolate the appropriate interpretation of the term, we must engage in a contextual, purposive interpretation pursuant to Article 31(1) VCLT. Noll turns to the above-mentioned preambular exhortation to international cooperation in order to ensure refugee protection, and the need to avoid ‘unduly heavy burdens on certain countries’. In light of this object and purpose, Noll concludes that only a narrow category of refugees should be open to penalization, that is those ‘who have been accorded refugee status and lawful residence in a transit State to which they can safely return.’⁸⁹

In accordance with Article 32 VCLT, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31. In this instance, we draw on Goodwin-Gill’s analysis of the drafting history.⁹⁰ The proposed narrow interpretation is confirmed by the *travaux préparatoires*, which reveal that ‘[t]he 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.’⁹¹ As Goodwin-Gill puts it, ‘the drafting history of Article 31(1) shows clearly only a small move from an ‘open’ provision on immunity (benefiting the refugee who presents him- or herself without delay and shows ‘good cause’), to one of slightly more limited scope, incorporating references to refugees ‘coming directly from a territory where their life or freedom was threatened’. It shows that this revision was intended specifically to meet one particular concern of the French delegation,⁹² namely concerning the type of scenario where ‘a refugee who, *having found asylum* in France, tried to make his way unlawfully into Belgium. It was obviously impossible for the Belgian Government to acquiesce in that illegal entry, since the life and liberty of the refugee would in no way be in danger at that time.’⁹³

Accordingly, there is strong support for the view that all refugees are to be regarded as ‘coming directly’ except those who have found secure asylum elsewhere. Indeed, the drafters discussed extensively various scenarios of complex flight, as well as moving from countries of asylum where protection was unsatisfactory, assuming that Article 31 would be applicable in these cases.

UNHCR’s interpretation of Article 31 has supported this interpretation, emphasizing the drafting history and the purpose of the provision. The 1999 UNHCR Detention Guidelines state that,

‘the expression ‘coming directly’ in Article 31(1) covers the situation of a person who enters the country in which asylum is sought directly from the country of origin, or

⁸⁸ Noll, 1254.

⁸⁹ *Ibid.*, 1257.

⁹⁰ Goodwin-Gill, 189-193.

⁹¹ 2001 Expert Roundtable Summary Conclusions, para 10(c).

⁹² Goodwin-Gill, 189.

⁹³ Statement of Colemar (France), Conference of Plenipotentiaries (1951) UN Doc A/CONF.2/SR.13 15 (emphasis added).

from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept 'coming directly' and each case must be judged on its merits.⁹⁴

The 2001 Expert Roundtable Summary Conclusions noted that:

- '- Refugees are not required to have come directly from territories where their life or freedom was threatened.
- 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.
- 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.'⁹⁵

Respectfully, these Conclusions seems to mask an internal contradiction. The drafters' intention is accurately summarized in the sentence that 'the only refugees who fall outside Article 31 are those who 'found asylum, or who were settled, temporarily or permanently, in another country.' However, the previous sentence unhelpfully introduces the notion of whether refugees were unable to find 'effective protection' in the 'first country or countries to which they flee.' To the extent that this language is redolent of that used around safe third country practices, it introduces an element of confusion.

The practices that have emerged around safe third country and related concepts⁹⁶ are not pertinent to the interpretation of Article 31. The Expert Roundtable Summary Conclusions' reference to whether the asylum-seeker found 'effective protection' may have contributed to the confusion on this question. The better view legally is that questions of safe third country, and whether it may be permissible to return an asylum-seeker to another country to have her claim assessed, are best kept separate from the question of non-penalization. The legality of

⁹⁴ UNHCR 'Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers' (February 1999), para 4.

⁹⁵ 2001 Expert Roundtable Summary Conclusions, para 10(b)-(d).

⁹⁶ EXCOM Conclusion No 15 (XXX) 'Refugees Without an Asylum Country' (1979); EXCOM Conclusion No 58 (XL) 'The Problem of Refugees and Asylum-seekers who Move in an Irregular Manner from a Country in which they had Already Found Protection' (1989). These conclusions distinguish between 'safe third country' and 'first country of asylum'. See further UNHCR Global Consultations on International Protection, 'The application of the 'safe third country' notion and its impact on the management of flows and on the protection of refugees' (May 2001) Background Paper No 2. It is generally accepted that the legality of returns depends on the assessment of whether the safe third country is indeed safe for the particular asylum-seeker. However, for the view that the practices in themselves are of dubious legality, see Violeta Moreno-Lax, 'The Legality of the 'Safe Third Country' Notion Contested: Insights from the Law of Treaties' in Guy S Goodwin-Gill and Philippe Weckel (eds), *Migration & Refugee Protection in the 21st Century: Legal Aspects* (Brill | Nijhoff 2015) 665-721.

safe third country practices is unavoidably about the safety of return, a forward-looking assessment of the risks posed to the asylum-seeker, taking into account whether she will have access to an asylum procedure if returned and if she is at risk of onward *refoulement*. Even in regions where safe third country is institutionalized with a range of safeguards, such as in Europe with the Dublin System, its operation has led to serious and repeated human rights concerns.⁹⁷ In contrast, Article 31 is solely concerned with the question of whether the refugee may be penalized. Its underlying premise is that refugees generally have good cause to use irregular methods of entry, and indeed that their flight routes may be complex and protracted. In this context, the considerations which inform safe third country practices, and those that should inform the assessment of the qualifying conditions under Article 31 are best kept separate.

A further ambiguity often arising on whether ‘coming directly’ becomes a subjective assessment of the particular flight of the asylum-seeker in question. Noll argues that while this individualized subjective approach reflects the complexity of flight, it is insufficient for two reasons. Firstly, because penalization for illegal entry is often a matter of domestic criminal law, a high degree of legal certainty around the scope of Article 31(1) is required. Secondly, including intent in the assessment should be rejected on principle, as inferences about refugees’ intent would have to be drawn from their movements, resting on assumptions, which would make Article 31(1) into a separate test of credibility. However, Noll’s argument fails to contextualize ‘coming directly’ in Article 31(1). The provision is inherently concerned with the refugee’s individual predicament, and the trio of interrelated conditions, ‘good cause’, ‘without delay’ and ‘coming directly’ related to bona fides, and so ought to be interpreted consistently to take into account the reality of refugees’ flight conditions and the types of barriers they encounter.

The UK courts have, in this vein, developed a sophisticated approach to individualized assessment, based on the judgment of Simon Brown LJ in *Adimi*, which introduces three touchstones for the term ‘coming directly’.⁹⁸ These are 1) length of stay in the intermediate country, 2) the reason for delay (noting that even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means to travel onwards), 3) whether or not the refugee sought or found protection *de jure* or *de facto*.⁹⁹ The touchstones are accordingly sensitized to the complex flight routes of refugees, under the current conditions whereby refugees’ mobility is often particularly suppressed.

In *Mateta*, the State accepted that refugees with many complex flight paths nonetheless benefitted from Article 31(1). In the case of one of the sets of applicants (Ghavami and Afshar, refugees from Iran), their 4-month flight route entailed several stops - two months in

⁹⁷ ECtHR Factsheet, ‘Dublin Cases’ (June 2016) http://www.echr.coe.int/Documents/FS_Dublin_ENG.pdf accessed 16 July 2017.

⁹⁸ *Adimi*. The decision was cited with approval in New Zealand: *Ghuman v. Registrar of the Auckland District Court* (2003) CIV 2003-404-4373 (High Court of New Zealand) <<http://www.refworld.org/docid/40cec1694.html>> accessed 16 November 2016; *R v Zanzoul (No 2)* [2006] CA 297/06. Notably, Hathaway suggests the touchstones go more to the issue of ‘good cause.’ Hathaway *Rights*, 399, n 539.

⁹⁹ *Adimi* (Brown LJ) [18].

Thailand, 20 days in Tanzania, one week in Kenya, and 20 days in Spain.¹⁰⁰ The British authorities nonetheless conceded that their account meant they fell within the *Adimi* touchstones, as they were under the control of their agent (smuggler) in Thailand, Tanzania and Kenya (where it was accepted no effective protection was available), who had advised them that they would be returned to Iran if they approached the Spanish authorities.

The Courts in New Zealand have considered the meaning of Article 31, in particular ‘coming directly’. They have tended to apply the *Adimi* approach. In *Hassan*, the applicant was deemed not to have ‘come directly’ as he had left Somalia in 1991, and lived for long periods in Kenya and Ethiopia prior to arriving in New Zealand. It was decisive that there was no evidence that his protection, safety and security could not be assured in those countries.¹⁰¹ On the facts, he had also not presented himself to the authorities without delay. In *Zanzoul (No 2)*, the Court of Appeal held that the appellant had not ‘come directly’, where he had come to New Zealand and repeatedly returned to his country of origin, Syria, exiting and entering Syria legally on a number of occasions, and then travelling to a number of other countries on false travel documentation before arriving in New Zealand. On the facts, he clearly fell outside the extended meaning of ‘coming directly’ given to those words in *Adimi*.¹⁰²

In 2011, the Dutch Supreme Court held, that the expression ‘coming directly’ includes people who come to the Netherlands from another country where protection, safety and security could not be assured. The term also covers a person transiting another country for a short period of time ‘without having applied for, or received, asylum there’, citing the 1999 UNHCR Detention Guidelines.¹⁰³ It held that each case must be judged on its merits. However, cases where the applicants’ stay extended to 10 months in Greece without applying for asylum there¹⁰⁴ or several years in Saudi-Arabia,¹⁰⁵ the persons concerned were deemed *not* to have ‘come directly’.

In 2014, the German Federal Constitutional Court (FCC) considered the interaction between safe third country practices and Article 31.¹⁰⁶ In the particular case, the asylum-seeker had flown from Iran to Turkey, and then travelled by boat to Greece, staying there for 40 days. Thereafter, he flew to Germany on false papers he had procured in Greece. The Court noted

¹⁰⁰ *Mateta* [2013] EWCA Crim 1372 (Leveson LJ) [21(iv)]. Coming directly – ‘the fact that a refugee stopped in a third country in transit is not necessarily fatal and may be explicable: the refugee has some choice as to where he might properly claim asylum. 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 and whether or not the refugee sought or found protection de jure or de facto from the persecution from which he or she was seeking to escape.’

¹⁰¹ *Hassan v Department of Labour* (2007) CRI 2006-485-101 (High Court of New Zealand)

<http://www.refworld.org/cases,NZL_HC,47a1d3e32.html> accessed 9 April 2017.

¹⁰² *R v Zanzoul (No. 2)* (2006) CA297/06 (Court of Appeal of New Zealand) [30]

<http://www.refworld.org/cases,NZL_CA,47a1d2182.html> accessed 9 April 2017.

¹⁰³ *BO1587* [2011] 09/02303 (Supreme Court of the Netherlands), para 2.4.3.

¹⁰⁴ *BQ7762* [2011] 09/03918 (Supreme Court of the Netherlands).

¹⁰⁵ *BV7412* [2012] 10/05212 (Supreme Court of the Netherlands).

¹⁰⁶ 2 BvR 450/11, 8 December 2014 (Federal Constitutional Court of Germany). The account here is based on the abstract of the German Federal Constitutional Court’s order of 8 December 2014, 2 BvR 450/11, [GER-2015-1-001], and the translation of the original provided by Teresa Büchsel, and particularly helpful comments by Dr Roland Bank.

that although Greece was a 'safe country' under German law, at the time of the entry (November 2009), Greece could not be regarded as completely safe country due to systemic deficiencies in its asylum proceedings, in light of the ECtHR ruling on this issue.¹⁰⁷ As a result, the FCC held that the lower court had erred in assuming that the applicant was no longer a refugee due to his transitory stay (forty-days) in Greece.¹⁰⁸ This element of the ruling (related to questions of the admissibility of the asylum claim) turned on the finding that Greece was unsafe in light of the ECtHR ruling in *MSS v Belgium and Greece*.¹⁰⁹

However, when the Court addressed the issue of the meaning of 'coming directly' it referred to a different set of facts, namely that the applicant should be regarded as 'coming directly' as he had always intended to move on to Germany to apply for asylum and had not taken up residence in Greece.¹¹⁰ The Court noted that,

'a refugee does not lose his protection under [Article 31(1)] by simply arriving from a third country instead of his country of origin, insofar as the third country is used only as a transit country and the stay in the third country is not culpably prolonged. 'Coming directly' is intended to preclude refugees who have settled in another country from traveling further without impediment under the Refugee Convention.'¹¹¹

The Supreme Administrative Court of Finland¹¹² found that a refugee had 'come directly' to Finland in the particular case of a journey from Afghanistan over 8 days, transiting the United Arab Emirates, Egypt, Cyprus and Germany. Even though there was no threat in those countries, and indeed protection may have been available, it was found that Article 31 applied and the applicant had 'come directly' to Finland.

In contrast, in some jurisdictions the interpretation of 'coming directly' has become unduly restrictive. For instance, in Hungary, courts have found asylum-seekers in Hungary not to have come directly when they entered from Serbia, simply on the basis that Serbia was designated as safe by government decree.¹¹³ Applying this sort of quasi-automatic safe third country practice is in any event in breach of a previous ruling by the Hungarian Supreme Court.¹¹⁴ The ECtHR has since also confirmed that returns to Serbia are not safe.¹¹⁵ While this is an extreme case, it illustrates the dangers of conflating safe third country issues, and the obligation not to penalize refugees under Article 31. An earlier Hungarian case before the

¹⁰⁷ Citing *MSS v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011).

¹⁰⁸ 2 BvR 450/11, 8 December 2014 (Federal Constitutional Court of Germany), para, 26.

¹⁰⁹ *MSS v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011).

¹¹⁰ 2 BvR 450/11, 8 December 2014 (Federal Constitutional Court of Germany), para 33.

¹¹¹ *Ibid*, para 32.

¹¹² Decision KKO:2013:21, 5 April 2013 (Supreme Court of Finland), EDAL Summary <<http://www.asylumlawdatabase.eu/en/case-law/finland-supreme-court-5-april-2013-kko201321>> accessed 11 March 2017.

¹¹³ Szeged District Court, 25.Be.2082/2015/2/l.; Szeged District Court, No. 4.Bpkf.III4/2015; Szeged District Court, II.Be.2080/2015/2. See further UNHCR, 'Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016' (May 2016) paras 57-62 <<http://www.refworld.org/docid/57319d514.html>> accessed 7 April 2017.

¹¹⁴ Opinion No 2/2012 (XII.10) 10 December 2012 (Supreme Court of Hungary).

¹¹⁵ *Ilias and Ahmed v Hungary* App no 47287/15 (ECHR, 14 March 2017).

Pest District Court found the applicant to have ‘come directly’ although he had transited Russia and Ukraine (and possibly Turkey), as it was held that no effective protection was available in those States.¹¹⁶

4.3 ‘... enter or are present in their territory without authorization ...’

There are three elements that define the geographic and material scope of Article 31: 1) State territory, 2) the refugee’s entry or presence to or in that territory, 3) the qualification of the refugee’s entry as unauthorized.

4.3.1 Territory

The ‘territory’ refers to a State’s territory under international law.¹¹⁷ States have attempted to disavow responsibility for their actions at borders or international zones of airports,¹¹⁸ but in reality, border entry points, including international zones at airports, are generally within a State’s territory. The term ‘territory’ also includes the territorial waters of the State.¹¹⁹

4.3.2 Unauthorized Entry

Ordinarily, the notion of entry into the territory of a State will be straightforward, and means crossing into the territory of the State in question.

The notion of ‘enter ... their territory’ would seem also potentially to include State actions extraterritorially in the vicinity of borders, which are part of the States’ migration control activities. The scope of Article 31(1) relates to penalties imposed ‘on account of illegal entry or presence.’ If a would-be asylum-seeker was intercepted in the vicinity of a State border and punished for attempted ‘illegal entry’, then Article 31(1) would seem to be applicable, notwithstanding that the actions of the State in question commenced extraterritorially. While the Article envisages that the protection is for those who ‘enter or are present in their territory without authorization’, presumably a refugee in such a scenario would be present in the territory thereafter.

If States devise border crossing-points with juxtaposed controls, which mean that they carry out their border checks extraterritorially, scenarios may arise where the authorities of one State prevent entry of asylum-seekers before they can reach the ‘territory’ in question. It is now well-established that *non-refoulement* applies extraterritorially, as long as States are exercising ‘jurisdiction.’ However, the formulation of Article 31 is different. The formulation ‘enter ... their territory’ seems only to embrace a narrow range of extraterritorial acts where the State encounters refugees seeking to enter. However, beyond some specific contexts where the refugee is unambiguously entering the State in question, Article 31 does not have

¹¹⁶ Pest Central District Court, 7.B.VIII.20.776/2013/34 (11 September and 3 December 2013), para 4.1.

¹¹⁷ VCLT, art 27.

¹¹⁸ *Amuur v France* App no 1976/92 (ECHR, 25 June 1996).

¹¹⁹ UNCLOS, art 2(1).

the extraterritorial reach of Article 33 (*non-refoulement*). It should be recalled that Article 33 has no territorial qualification whatsoever, referring to the expulsion or return of a refugee 'in any manner whatsoever.'

There are some other scenarios where the moment of the refugee's entry or presence requires clarification. For instance, if State agents intercept a refugee on the High Seas, a question arises as to whether she or he may be regarded as 'entering' the State at that point.¹²⁰ If the interception is followed by being brought to the State in question, then Article 31 would still be applicable as the refugee then becomes present in the State in question. In contrast, if the refugee is transported to a third State (say, under safe third country arrangements or duties of rescue), it would seem a step too far to regard Article 31 as applicable to the actions of the intercepting State, but of course other provisions of international law will be applicable.¹²¹ However, it is noteworthy that in the context of interception at sea, the ECtHR has deemed the prohibition of collective expulsion to be applicable, even though the individual may not have been expelled from the territory of the State.¹²² This move lends some support to the view that legally, those who are interdicted should be equated with those who have entered, in order to ensure the effectiveness of the provisions in question.

4.3.3 *Unauthorized Presence*

'Unauthorized presence' covers both refugees who never had permission to be present, or those whose permission to reside has ceased, including those who have become refugees *sur place*. There will be situations where the notion of 'unauthorized' presence may be contested, as different legal orders take different perspectives on residence rights. For instance, refugees or asylum-seekers being returned to States under formal safe third country agreements or regulations like the EU Dublin Regulation¹²³ are usually authorized to re-enter those States under the terms of those arrangements, as those legal measures generally provide mechanisms for readmission. However, it is not unheard of for receiving States to ignore those provisions and nonetheless treat returned refugees / asylum-seekers as unauthorized. The meaning of the term in Article 31 should be contextualized, in order to ensure that refugees are not penalized, and so should encompass those situations where domestic law or practice treats those returned under safe third country and similar arrangements as unauthorized.

In *Ghuman v Registrar of the Auckland District Court*,¹²⁴ a New Zealand Court considered the situation of an asylum-seeker who had maintained his false identity for a prolonged period

¹²⁰ For consideration, see Noll, 1258.

¹²¹ *Hirsi Jamaa and others v Italy* App no 27765/09 (ECHR, 23 February 2012); Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23(3) Int J Refugee Law 443; Andreas Fischer-Lescano, Tillmann Lähr, Timo Tohidipur, 'Border Controls at Sea: Requirements under International Human Rights and Refugee Law' (2009) 21(2) Int J Refugee Law 256.

¹²² *Hirsi*, para 178.

¹²³ 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.

¹²⁴ *Ghuman v Registrar of the Auckland District Court* (2003) CIV 2003-404-4373 (High Court of New Zealand).

while present in the country. Arguments were heard to the effect that refugees may fear the authorities and be traumatized, which may offer good cause for on-going offences of dishonesty in order to maintain 'unauthorized presence.' The court did not rule definitively on this matter, but accepted there was some cogency to the applicant's arguments.

Another contemporary situation where refugees may be present in an unauthorized manner may arise when refugees are offered only temporary status. For instance, current EU proposals render refugee status precarious and subject to regular reviews.¹²⁵ This proposal, if adopted, means that some refugees may find themselves 'unauthorized' if their status runs out and is not renewed. In such situations, Article 31 may become applicable, along with other provisions of the 1951 Refugee Convention. It should be recalled that the Convention permits the limited grounds upon which refugee status may legally be terminated.¹²⁶ Outside of those situations, refugees remain refugees, and so taking action against them as ostensibly 'unauthorized' in their residence may raise issues under the cessation provisions, and if the measures in question entail penalization, under Article 31.

4.3.4 *Unauthorized Exit*

The applicability of Article 31 to the situation of refugees attempting to leave transit States has been supported by UNHCR:

'In granting this protection from penalisation, Article 31(1) recognizes, *inter alia*, that departure and entry into host countries by irregular means may be a method used by refugees fleeing persecution to reach safety as refugees are often forced to flee their own country in fear of their lives. In UNHCR's view, a purposive interpretation of Article 31 will also include situations where a person seeking international protection arrives in the UK by irregular means without a valid travel document; whether with a false passport, a passport s/he is not entitled to or without a passport. Refugees and asylum-seekers in transit to a final destination country could equally benefit from Article 31 of the 1951 Convention, if all the conditions of Article 31 are met.'¹²⁷

UK case law has led the way in clarifying the applicability of Article 31 to refugees leaving the territory. The cases generally concerned refugees whose intention was to claim asylum elsewhere being apprehended at UK airports when travelling on false papers. In *Adimi*, Lord Simon Brown held that Article 31 was applicable to the scenario of two refugees

¹²⁵ European Commission Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' COM(2016) 466 final 2016/0223 (COD) 5.

¹²⁶ 1951 Refugee Convention, art 1C(5) and (6). See also UNHCR 'Summary Conclusions: Cessation of Refugee Status', Expert Roundtable 3-4 May 2001; UNHCR 'Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) (the "Ceased Circumstances" Clauses)' HCR/GIP/03/03 (10 February 2010); Joan Fitzpatrick and Rafael Bonoan, 'Cessation of Refugee Protection' (2001) UNHCR Global Consultations on International Protection.

¹²⁷ UNHCR 'Memorandum to the House of Commons Home Affairs Select Committee' (1 December 2005), para 13.

apprehended when transiting the United Kingdom on their way to Canada to seek asylum. They had been apprehended in transit when changing flights in the United Kingdom. The government argued that this put them outside the scope of Article 31 (also as they had not presented themselves to the authorities without delay). Lord Simon Brown rejected those arguments, noting that,

‘If I am right in saying that refugees are ordinarily entitled to choose where to claim asylum, and that a short term stopover *en route* in a country where the traveler’s status is in no way regularized will not break the requisite directness of flight, then it must follow that these applicants would have been entitled to the benefit of Article 31 had they reached Canada and made their asylum claims there. If Article 31 would have availed them in Canada, then logically its protection cannot be denied to them here merely because they have been apprehended *en route*.’¹²⁸

In *Asfaw* the UK House of Lords confirmed that Article 31 was applicable in this situation.¹²⁹ While two judges dissented on this point (Lords Rodger and Mance), the majority of the House of Lords held that it did apply to those leaving. The government urged a narrow, literal interpretation of Article 31, to which Lord Bingham responded as follows:

‘It is of course true that in construing any document the literal meaning of the words used must be the starting point. But the words must be construed in context, and an instrument such as the Refugee Convention must be given a purposive construction consistent with its humanitarian aims.’¹³⁰

He noted that the drafters had not directed their minds to air travel, but that refugees were envisaged as having a right to flee across States.

The Supreme Administrative Court of Finland cited *Adimi* and *Asfaw* with approval in 2013.¹³¹ In that case, the refugee was intercepted leaving Finland for Canada, but Article 31 was held nonetheless to be applicable. In the Netherlands, Courts have also held Article 31 applicable in such scenarios. For instance, Article 31 was deemed applicable to those who are merely travelling through the Netherlands *en route* elsewhere to claim asylum.¹³² In 2013, the Supreme Court of the Netherlands considered the case of an asylum-seeker who arrived in the Netherlands, having fled from Somalia. His intention was to travel via Dublin, Ireland to his final destination London, United Kingdom. The Supreme Court reiterated that

‘[i]n his final destination country, for instance, he would have been able to rely on Article 31 of the Refugee Convention. Hence, a different interpretation of “present themselves without delay to the authorities” would not do justice to the aim of

¹²⁸ *Adimi*, [64].

¹²⁹ *R v Asfaw* [2008] UKHL 31.

¹³⁰ *Ibid*, para 11.

¹³¹ Decision KKO:2013:21, 5 April 2013 (Supreme Court of Finland), EDAL Summary <<http://www.asylumlawdatabase.eu/en/case-law/finland-supreme-court-5-april-2013-kko201321>> accessed 11 March 2017.

¹³² *BY4310* [2013] 10/05426 (Supreme Court of the Netherlands), para 2.5.1.

Article 31 of the Refugee Convention.¹³³

Scholars have generally supported this move. Hathaway assessed the ruling in *Asfaw* positively,¹³⁴ and Goodwin-Gill lauded the ruling in his treatment of purposive interpretation of the 1951 Refugee Convention.¹³⁵ In contrast, while Noll treats refugees in transit as a ‘special category’, citing *Asfaw*,¹³⁶ he doubts the notion that prosecution for using false documents to exit a country should fall within the scope of Article 31(1).¹³⁷

4.4 Prompt Presentation - ‘... provided they present themselves without delay to the authorities ...’

This sentence includes two distinct elements. Firstly, refugees must present themselves to the ‘authorities’. Clearly the term ‘authorities’ is broad, and does not refer to any particular official body. Secondly, they must do so in a particular manner, namely ‘without delay’. Refugees will not be penalized for unauthorized entry or stay, but this is subject to the qualifying condition that they must come forward to the authorities promptly once in the State. The drafters thus catered for the States’ interest in the early identification any authorized persons, as well as conceding that refugees should generally not be penalized once they fulfill the qualifying conditions in Article 31(1).

4.4.1 Present to the Authorities

Hathaway stressed that the benchmark for exclusion from Article 31 is ‘bad faith’ on the part of the refugee. If a refugee approaches the wrong branch or level of government, they still benefit from Article 31.¹³⁸ If refugees are detained or apprehended, before they were reasonably able to make a claim, they still fall under Article 31.

In 2013, the Pest District Court in Hungary considered the applicability of Article 31 in a case concerning a recognized subsidiary protection beneficiary.¹³⁹ The Court took a flexible approach to ‘without delay’ noting the time and mode of arrival are often in the hands of ‘traffickers’ (i.e. smugglers). In that case, the individual had been arrested and then requested recognition as a refugee. This was held to meet the requirement of prompt presentation, although he had not voluntarily presented himself to the authorities.¹⁴⁰

4.4.2 Without Delay

¹³³ BY4238 [2013] (Supreme Court of the Netherlands), para 2.5.2. See also 1093 [2015] 14/00663 (Supreme Court of the Netherlands) ECLI:NL:HR:2015:1093.

¹³⁴ Hathaway *Rights*, 372, n 412.

¹³⁵ Guy S Goodwin-Gill, ‘The search for the one, true meaning...’ in Guy S Goodwin-Gill and Helen Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (CUP 2010) 235.

¹³⁶ Noll, 1260.

¹³⁷ *Ibid.*, 1266, n 109.

¹³⁸ Hathaway *Rights*, 390.

¹³⁹ Pest Central District Court, 7.B.VIII.20.776/2013/34 (11 September and 3 December 2013).

¹⁴⁰ *Ibid.*, para 4.2.

The 2001 Expert Roundtable Summary Conclusions describe this requirement as a ‘matter of fact and degree’ that ‘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.’¹⁴¹

The 1999 UNHCR Detention Guidelines state that, ‘given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances vary enormously from one asylum-seeker to another, there is no time limit which can be mechanically applied or associated with the expression “without delay”.’¹⁴² This flexible, individualized approach is also supported by the main commentators.¹⁴³

Given that the purpose of Article 31 is to deny protection from prosecution only to those of bad faith, if there is good reason for refugees to delay coming forward, or if they do not know where or how to pose an asylum claim, then ‘without delay’ should be interpreted in light of those personal or institutional challenges they have faced, which are not connected with bad faith. As Noll puts it, the ‘criterion needs to be applied with caution, as misconceptions on the part of the refugee may, e.g. delay or frustrate contacts with authorities without any bad faith on the part of the refugee.’¹⁴⁴

It is easy to imagine scenarios where refugees have lived for considerable periods in a country without approaching the authorities, genuinely unaware that international protection was available to them. In such circumstances, a purposive interpretation would still afford such refugees the protection of Article 31, interpreting ‘without delay’ in light of their individual circumstances. ‘Without delay’ must be understood in light of the refugees’ state of knowledge and understanding of the availability of international protection.

In *A v Public Prosecutor*,¹⁴⁵ the Norwegian Supreme Court considered the matter of whether an asylum-seeker had presented himself ‘without delay to authorities’. The Norwegian implementing legislation had used language stricter than ‘without delay.’ The Court accepted that in light of the object and purpose of the provision and of the Convention generally, ‘without delay’ necessitated a ‘concrete assessment’ in each individual case.¹⁴⁶ On the facts, the applicant, a Cameroonian national, arrived at Oslo Airport from Moscow, and presented a forged Portuguese residence permit (along with his own passport). When pulled aside for closer examination, he later informed officers that he was seeking asylum in

¹⁴¹ 2001 Expert Roundtable Summary Conclusions, para 10(f).

¹⁴² UNHCR ‘Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers’ (26 February 1999), para 4.

¹⁴³ Goodwin-Gill, 217; Hathaway *Rights*, 391-392; Noll, 1258-1260.

¹⁴⁴ Noll, 1259.

¹⁴⁵ *HR-2014-01323-A*, Case no 2014/220, 24 June 2014 (Norway Supreme Court) <http://www.refworld.org/cases,NOR_SC,5653395f4.html> accessed 10 March 2017.

See also, annotation by Erik Bjorge, ‘*A v Public Prosecutor: Norwegian Organisation for Asylum Seekers Intervening*, Case HR-2014-01323-A, 24 June 2014’ ILR [case note] 9forthcoming).

¹⁴⁶ *Ibid*, para 11-13.

Norway. He was charged with presenting a forged instrument. Objectively, the Court noted that there was no reason for him to present the false document, as he could have claimed asylum directly at the airport.¹⁴⁷ However, the Court accepted that in reality, refugees do not regard border crossings as places where it is always safe to manifest their intention to claim asylum, and indeed, noted that not all countries treat asylum-seekers stopped with false documents at passport control according to the Convention. Indeed, as Bjorge suggests, the case demonstrated that the Norwegian practice had up until that point largely ignored Article 31. The fear of not getting through passport control was, therefore, likely to explain the delay in approaching the authorities. The Court also noted that even regular travelers often feel they have not gained entry to a country before they have passed through passport control.¹⁴⁸ Accordingly, the Court held that there was sufficient basis to conclude that the appellant reported to authorities ‘without delay’, as he applied for asylum before completion of the border inspection.

The result is in contrast to that reached by the German Constitutional Court in its 2014 ruling. In that case, the conclusion was that the refugee ought to have presented himself at the airport, rather than use false papers to pass through the airport and claim asylum later.¹⁴⁹

However, it is reported that some States interpret ‘without delay’ too restrictively. For instance, in Finland, UNHCR reports that it filed a judicial intervention in a case where an asylum-seeker was convicted of forgery having presented a forged passport at the Finnish border. The non-penalization principle was not applied since the asylum-seeker had waited *one day* before applying for asylum.¹⁵⁰ Other instances where short inflexible time limits are imposed not only risk violating Article 31 (if they entail penalization), but also human rights norms on *non-refoulement* and effective judicial protection.¹⁵¹

Some national laws appear to include time limits that are too strict, taking into account the correct interpretation of the Article 31 requirement to present ‘without delay’. This is the case for instance in Chile, where the law provides that no penal or administrative sanctions will be imposed on refugees upon irregular entry or residence, provided they present themselves within the following ten days of the breach of immigration code to the authorities, providing ‘good cause’.¹⁵² Such rigid short time-limits are not compatible with the correct interpretation of ‘without delay’ under the Article 31 (discussed above), and may also infringe other international norms on access to asylum and *non-refoulement*. The legislation in Spain giving effect to Article 31 appears to envisage protection conditional on applying for asylum within one month of arrival in Spain or from the events establishing the well-founded fear of

¹⁴⁷ *Ibid*, para 17.

¹⁴⁸ *Ibid*, para 18.

¹⁴⁹ 2 BvR 450/11, 8 December 2014 (Federal Constitutional Court of Germany). The account here is based on the Abstract of the German Federal Constitutional Court’s order of 8 December 2014, 2 BvR 450/11, [GER-2015-1-001], and the translation of the original provided by Teresa Büchsel.

¹⁵⁰ 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 16.

¹⁴⁵ *Jabari v Turkey* App no 40035/98 (ECHR, 11 July 2000).

¹⁵² Chile, Ley No 20.430 establece disposiciones sobre protección de refugiados (2010), art 8.

persecution or serious harm.¹⁵³ The statutory provision provides only that illegal entry into Spanish territory cannot be penalized when it has been made by a person who qualifies to be a beneficiary of the international protection provided for in this Law.¹⁵⁴ The consequences for late application for the applicability of the non-penalization guarantee are not spelled out, although the two requirements appear in the same provision. Notably, the procedural consequences of late application are limited by human rights and EU law.¹⁵⁵ In contrast, in Nicaragua, the statutory framework sets out the condition for refugees to present themselves not later than within a year.¹⁵⁶ While one year would be adequate time in most cases, any rigid time limit may hinder access to asylum if there are particular extenuating circumstances in the individual case.

4.5 Good Cause - '... show good cause for their illegal entry or presence.'

The English text 'good cause' differs slightly from the French (*'des raisons reconnues valables'* – in English – 'for reasons recognized as valid' – without specifying which agent is responsible or qualified to assess the reasons' validity.) As mentioned above, Article 33 VCLT provides that with regard to treaties in one or more languages, the terms of the treaty are presumed to have the same meaning in each authentic text, but according to Article 33(4) VCLT, 'when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.'

The 2001 Expert Roundtable Summary Conclusions provide that, '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".'¹⁵⁷

Refugees generally have 'good cause' in reality, based on the factual and legal risks and barriers that surround their flight. However, as a matter of law, the 'good cause' requirement must mean something specific over and above refugeehood, as it must be presumed to add something to the Article.¹⁵⁸ The text makes clear that the 'good cause' relates to the illegal entry or stay in the particular case. In general, it can be assumed that it was not possible for refugees to enter States legally, due to visa requirements, or that complying with entry

¹⁵³ Spain, Ley No 12/2009. Reguladora del Derecho de Asilo y de la Protección Subsidiaria (30 October 2009), art 17(2).

¹⁵⁴ 'La comparecencia deberá realizarse sin demora y en todo caso en el plazo máximo de un mes desde la entrada en el territorio español o, en todo caso, desde que se produzcan los acontecimientos que justifiquen el temor fundado de persecución o daños graves. A estos efectos, la entrada ilegal en territorio español no podrá ser sancionada cuando haya sido realizada por persona que reúna los requisitos para ser beneficiaria de la protección internacional prevista en esta Ley.' (Ley No 12/2009, art 17(2)).

¹⁵⁵ For example, by Article 10(1) 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 Asylum Procedures Directive) [2013] OJ L180/60.

¹⁵⁶ Nicaragua, Ley No 655. Protección a Refugiados (2008), art 10(a).

¹⁵⁷ 2001 Expert Roundtable Summary Conclusions, para 10(e).

¹⁵⁸ Noll, 1260.

requirements was excessively risky as it would have exposed the refugee to danger. In reality, refugees often have few legal travel options, so it should generally be accepted that they have 'good cause' for illegal entry or presence. As was noted in *Adimi*, the real world predicament of refugees is such that the 'good cause' requirement 'has only a limited role in the Article. It will be satisfied by a genuine refugee showing that he was reasonably travelling on false papers.'¹⁵⁹

Goodwin-Gill's view is that 'good cause', like the other qualifying conditions, is 'a matter of fact, and may be constituted by apprehension on the part of the refugee or asylum-seeker, lack of knowledge of procedures, or by actions undertaken on the instructions or advice of a third party.'¹⁶⁰ Hathaway shares the view that the aim of this provision is to limit non-penalization of refugees, who enter the territory of a State illegally as a result of compulsion. As such, fleeing persecution constitutes itself a 'good cause', as does failing to comply with immigration requirements due to fear of summary rejection at the border.¹⁶¹

Importantly, the 'good cause' requirement should not be used to rehearse arguments relating to safe third countries. Although Grahl-Madsen was of the view that the 'good cause' requirement was also intended to exclude refugees who wished to change their country of asylum for purely personal reasons from the immunity provided by Article 31,¹⁶² these matters are examined under the 'coming directly' criterion, and should not bear on the 'good cause' assessment.

Some courts have accepted that the 'good cause' requirement is met where refugees fail to avail of protection opportunities out of misapprehension. For instance, the Swiss Federal Court held that the fear of summary rejection at the border may also constitute a 'good cause'.¹⁶³ Similarly, the Supreme Court of the Netherlands held that asylum-seekers were only expected to disclose their use of false documents once they reached their destinations, after which time they should register with the authorities as soon as possible, considering all their circumstances.¹⁶⁴

Similarly, the Norwegian Supreme Court in *A v Public Prosecutor*,¹⁶⁵ discussed above, where the refugee presented a false document at the airport, although he could have claimed asylum then and there, accepted that in reality, refugees do not always regard border crossings as places where it is always safe to manifest their intention to claim asylum.

In contrast, the German Constitutional Court in its 2014 ruling held that Article 31 was not applicable to the situation where a refugee presented false documents at the airport, as he

¹⁵⁹ *Adimi*, 679; *Mateta* [20] (Leveson LJ).

¹⁶⁰ Goodwin-Gill, 217.

¹⁶¹ Hathaway *Rights*, 393.

¹⁶² Atle Grahl-Madsen, *Commentary on the Refugee Convention 1951* (1962-63), para 8.

¹⁶³ 6S737/1998/bue [1999] ASYL 992 (Swiss Federal Court) 21.

¹⁶⁴ *BP7855* [2011] 09/02240 (Supreme Court of the Netherlands), para 16.

¹⁶⁵ *HR-2014-01323-A*, Case no 2014/220, 24 June 2014 (Norway Supreme Court). See also, annotation by Erik Bjorge, 'A v Public Prosecutor: Norwegian Organisation for Asylum Seekers Intervening', Case HR-2014-01323-A, 24 June 2014' ILR [case note] 9forthcoming).

could have claimed asylum there.¹⁶⁶ Similarly in *Zanzoul* (although on somewhat different facts), the New Zealand Supreme Court held, that Article 31 was inapplicable for a range of reasons, but in particular noted that the use of a false passport on arrival was not necessary, as the applicant could have entered on his Syrian passport, and claimed asylum at the airport.¹⁶⁷ While the diverse outcomes do, to an extent, turn on the particular facts of the cases, it is argued that the Norwegian ruling is preferable, acknowledging as it does the widespread perception that it may be hazardous to claim asylum at border crossing points, for being more attuned to the realities of refugee flight and the protective purpose of Article 31.

4.6 Non- Penalization on Account of Illegal Entry or Presence (Article 31(1))

There are two elements in this phrase – first the obligation itself to refrain from the imposition of penalties, and secondly, the necessary nexus between the penalties in question and illegal entry or presence ('on account of'). Each element is considered in turn.

4.6.1 '*... Shall not Impose Penalties ...*'

While the English language version refers broadly to 'penalties', the French version speaks of '*sanctions pénales*', which connotes penal measures, that is measures predominantly in the criminal sphere. In English in contrast 'penalty' may be criminal or civil (a contractual penalty for example), or more broadly a measure that has the effect of being disadvantageous. As Article 33(4) VCLT stipulates, if there is a tension between language versions, 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.' Given the protective purpose of Article 31, Article 33(4) VCLT tends to support the interpretation based on the broader wording if this supports the object and purpose of the treaty.¹⁶⁸

Referring to the interpretation of 'penalties' in other human rights treaties¹⁶⁹, Goodwin-Gill argues that penalties should be understood in a wider sense, as the English version 'penalties' implies. Since the object and purpose of Article 31(1) is the avoidance of penalization on account of illegal entry, a restrictive interpretation of 'penalties' would permit States to circumvent the protection intended. This view has been supported by Hathaway, who takes the view that a penalty is 'a loss inflicted for violation of a law', so Article 31(1) denies governments the right to subject refugees to 'any detriment for reasons

¹⁶⁶ 2 BvR 450/11, 8 December 2014 (Federal Constitutional Court of Germany). The account here is based on the Abstract of the German Federal Constitutional Court's order of 8 December 2014, 2 BvR 450/11, [GER-2015-1-001], and the translation of the original provided by Teresa Büchsel.

¹⁶⁷ *Zanzoul v R*, Supreme Court, Wellington SC 17/2008, [2008] NZSC 44, para 11, distinguishing *Asfaw*.

¹⁶⁸ See Matthias Herdegen, 'Interpretation in International Law' (Max Planck, EPIL), giving the example of the extensive interpretation of the scope of Art 6 (1) ECHR (see *Ringeisen v Austria* App no 2614/65 (ECHR, 16 July 1971), para 94; *König v Germany* App no 6232/73 (ECHR, 28 June 1978), paras 90, 97; *Feldbrugge v The Netherlands* App no 8562/79 (ECHR, 29 May 1986), paras 26–40 which in his view 'essentially rests on the English wording ('civil rights and obligations')).

¹⁶⁹ *Van Duzen v Canada* (1982) UN Doc CCPR/C/15/D/50/1979 (HRC, 7 April 1982), para 10.2.

of their unauthorized entry or presence in the asylum country.’¹⁷⁰ Noll too endorses Goodwin-Gill’s approach.¹⁷¹

This broad reading of ‘penalties’ has much support. The Canadian Supreme Court in *B010*¹⁷² expressly rejected the government’s argument that Article 31(1) only related to criminal penalties, rather assuming it applied to a procedural detriment (in that case inadmissibility) imposed on the asylum-seeker.

Moreover, legislation in many States supports a broader reading of ‘penalties’ going beyond the criminal sphere. The national laws in Argentina, Bolivia, Brazil, Chile, Costa Rica, Nicaragua and Uruguay specify that the protection against penalization applies as regards both ‘criminal and administrative sanctions’.¹⁷³ In Honduras, the non-penalization provision speaks of ‘pecuniary or sanctions of any other type’.¹⁷⁴ In Venezuela, the pertinent provision specifies that non-penalization applies to any type of sanction (*‘no se impondrá sanción ninguna’*).¹⁷⁵ In both Uruguay and Mexico, the statutory schemes treat non-penalization of refugees as a general principle, along with other basic principles of international refugee law.¹⁷⁶ In Guatemala, ‘non-penalization for illegal entry’ is also expressed as a general principle.¹⁷⁷ In Mexico, the non-penalization provision speaks of ‘any kind of sanction’ for irregular entry. In the case where immigration procedures for irregular entry to the national territory have been initiated, these procedures shall be suspended until a decision on the recognition of refugee status is issued.¹⁷⁸ In Peru, Article 31 of its statutory scheme mirrors Article 31 of the Convention, prohibiting ‘sanctions of any kind’.¹⁷⁹ Article 31(2) adds, that the same criteria will be applied to a refugee, who for the same reasons as contained in Article 34 [effects of cessation of refugee status], has transited through other States, which did not grant him/her stable and permanent migration.

¹⁷⁰ Hathaway *Rights*, 411-412, and citing Goodwin-Gill with approval, 412.

¹⁷¹ Noll, 1262-1263; ‘[E]ven measures beyond the boundaries of penal law must be considered in the framework of Article 31(1)’.

¹⁷² *B010 v Canada (Citizenship and Immigration)* 2015 SCC 58, [2015] 3 S.C.R. 704.

¹⁷³ Argentina, Ley General de Reconocimiento y Protección al Refugiado (2006), art 40; Bolivia, Ley de Protección a Personas Refugiadas (2012), art 7; Brazil, Ley No 9.474 (22 July 1997), art 10; Chile, Ley No 20.430 (2010), art 8; Costa Rica, Reglamento de Personas Refugiadas (2011), art 137; Nicaragua, Ley No 655 de la Protección a Refugiados (2008), art 10; Uruguay, Ley del Refugiado, art 15.

¹⁷⁴ Honduras, Ley de Migración y Extranjería (2003), art 46.

¹⁷⁵ Venezuela, Ley Orgánica sobre refugiados o refugiadas, asilados o asiladas (2001), art 2.4.

¹⁷⁶ Uruguay, Ley No 18.076, art 10 sets out the following general principles: ‘1) non-discrimination; 2) non-rejection at the border; 3) no direct or indirect *refoulement* to a country in which his/her life, physical, moral and intellectual integrity, freedom or security are in danger; 4) non-penalization for illegal entry; 5) most favourable interpretation and treatment (interpretación y trato más favorable) and 6) confidentiality.

The Mexican Ley sobre Refugiados, Protección Complementaria y Asilo Político (2011), art 5 enumerates the following six principles: ‘1) *non-refoulement*; 2) non-discrimination; 3) best interests of the child; 4) family unity; 5) non-penalisation for irregular entry and 6) confidentiality.’

¹⁷⁷ Guatemala, Acuerdo Gubernativo 383 (2001), art 52 provides that ‘the interpretation and application of the provisions established in the present regulation shall be carried out in accordance with the principle of non-penalisation for illegal entry, as well as with the rights and obligations applicable to refugees established in the Constitution of Guatemala, international treaties and conventions ratified by the State of Guatemala.’

¹⁷⁸ Mexico, Ley sobre Refugiados, Protección Complementaria y Asilo Político (2011), art 7.

¹⁷⁹ Peru, Ley No 27.891 (2002), art 31(1).

4.6.2 *Bringing Charges*

Article 31(1) refers to the imposition of penalties. An earlier original formulation entailed an obligation not to 'apply' penalties. Hathaway suggests that the original language would have entailed a duty not to initiate a prosecution, while he doubts whether the current language entails such a duty.¹⁸⁰ However, the correct interpretation would seem to be that as 'penalty' includes the imposition of any disadvantage 'on account of illegal entry or presence', that bringing a criminal prosecution will breach Article 31 to the extent that it brings with it some particular disadvantage.

On this point, it must be borne in mind that criminal processes differ significantly across States. In some States, opening a criminal investigation against an individual may incur no material disadvantage. In this instance, Article 31 would not be applicable, as no 'penalty' has been imposed. In contrast, in some States, bringing a criminal prosecution will involve a considerable disadvantage, in that the individual will have to appear in court, may be subject to pre-trial detention and a range of other restrictions. In such cases, bringing charges will be materially disadvantageous.

There is considerable support for the view that prosecution itself should be regarded as the imposition of a penalty, where it brings disadvantage. To this end, the 2001 Expert Roundtable Summary Conclusions urged that,

'States should ensure that refugees benefitting from this provision are promptly identified, that no proceedings or penalties for illegal entry or presence are applied pending expeditious determination of claims to refugee status and asylum, and that the relevant criteria are interpreted in light of the applicable international law and standards.'¹⁸¹

The obligation not to prosecute is in effect a temporary one in order to ensure the effectiveness of Article 31(1). It means only that the prosecutorial authorities should be obliged not to bring charges pending the final determination of the asylum claim. Goodwin-Gill has argued that

'In most cases, only if an individual's claim to refugee status is examined *before* he or she is affected by an exercise of State jurisdiction (for example, in regard to penalisation for "illegal entry"), can the State be sure that its international obligations are met. Just as a decision on the merits of a claim to refugee status is generally the only way to ensure that the obligation of *non-refoulement* is observed, so also is such a decision essential to ensure that penalties are not imposed on refugees, contrary to Article 31 of the 1951 Convention.'¹⁸²

¹⁸⁰ Hathaway *Rights*, 406-407.

¹⁸¹ 2001 Expert Roundtable Summary Conclusions, para 6.

¹⁸² Goodwin-Gill, 187.

This matter has been considered in some detail by courts in the Netherlands.¹⁸³ In 2012, the Supreme Court of the Netherlands held that a prosecution for possessing false or forged identity papers when entering the Netherlands was conditional upon a final and binding determination of the refugee claim in the administrative procedure.¹⁸⁴ In 2013, the Supreme Court established that ‘an alien should therefore not be prosecuted for possessing false or forged identity papers when entering the Netherlands until [the Minister or administrative judge] have issued a final decision on his or her asylum application.’¹⁸⁵ The Supreme Court has consistently applied this legal framework in later judgments.¹⁸⁶

In contrast, in *Adimi*, Simon Brown LJ was not prepared to go so far as to say that prosecution *per se* violated Article 31(1), but stated that in order to be effective, the domestic statutory defence should be such that a refugee would simply have to raise it, and then it would fall to the prosecution to disprove its applicability.¹⁸⁷ UNHCR in its intervention in *SXH (Somalia)* made the primary submission, that the prosecution of a refugee who fulfils the qualifying conditions is contrary to Article 31(1) irrespective of a conviction. It argued alternatively that

‘if [...] a conviction is necessary for there to be a ‘penalty’, UNHCR’s secondary submission is as follows: where there is a prosecution of a refugee that, if prosecuted to conviction, would violate Article 31(1), Article 8 ECHR is engaged. This is because the refugee will have been prosecuted for a course of conduct that is integral to a quest for asylum, and is expressly contemplated by Article 31(1), irrespective of the approach to “penalty”’.¹⁸⁸

The UK Supreme Court decided the case on very narrow grounds, focusing exclusively on whether commencing prosecution was in breach of Article 8 ECHR. Provided there was evidence to support the prosecution, it held that no breach of Article 8 ECHR had occurred, although the ruling leaves open the possibility that maintaining a prosecution where it was clear that an asylum-seeker or refugee would have a defence could be a breach of Article 8 ECHR.¹⁸⁹

Some national laws *prohibit* prosecution of asylum-seekers. In Canada, Article 31 of the Convention is expressly incorporated into Canadian law. Notably, the relevant provision states that the asylum-seeker ‘may not be charged’ with any of the specified offenses ‘pending disposition of their claim to refugee protection or if refugee protection is

¹⁸³ The account of the Dutch case law and translation of the original Dutch text into English are from Issa van Krimpen ‘Article 31 of the Refugee Convention: Summary of Dutch Caselaw’ (24 March 2017) [on file with the author].

¹⁸⁴ *BW9266* [2012] 10/04365 (Supreme Court of the Netherlands); See also, for example, *BY4310* [2013] 11/01046 (Supreme Court of the Netherlands).

¹⁸⁵ *BY4310* [2013] 11/01046 (Supreme Court of the Netherlands), para 2.5.3.

¹⁸⁶ See, for example, *1304* [2014] 13/01304 (Supreme Court of the Netherlands) (ECLI:NL:HR:2014:1304); *1093* [2015] 14/00663 (Supreme Court of the Netherlands) (ECLI:NL:HR:2015:1093).

¹⁸⁷ *Adimi*, para 43.

¹⁸⁸ UNHCR ‘Intervention in the Supreme Court of the United Kingdom UKSC 2014/0418, on appeal from the Court of Appeal (Civil Division) [2014] EWCA Civ 90 *SXH v Crown Prosecution Service*’, para 8.10.

¹⁸⁹ *SXH v The Crown Prosecution Service* [2017] UKSC 30, 11 April 2017.

conferred.¹⁹⁰ In South Africa, the relevant legislation states that no proceedings may be 'instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if [...] such person has applied for asylum [...] until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal [...]; or [...] such person has been granted asylum.'¹⁹¹

Some national laws and practices provide explicitly for a *suspension* of any criminal procedure pending the determination of the asylum claim. For instance, in Argentina,¹⁹² the national legislation is framed in similar terms to Article 31. It requires that any criminal proceedings that have been initiated should be suspended until determination of refugee status. If refugee status is granted, all pending administrative or criminal sanctions are expunged. In Brazil, any pending administrative or criminal proceedings for irregular entry are suspended for the asylum-seeker and any accompanying family unit. If the asylum-seeker is recognized as a refugee, all proceedings are terminated under the condition that the irregular entry was committed for the same reasons that justify the conferral of refugee status.¹⁹³ In Uruguay, the law establishes that the administrative and judicial procedures imposing penal or administrative sanctions on account of irregular or fraudulent entry are suspended by order of a competent judge until the refugee determination process is definitely completed.¹⁹⁴

In contrast, the failure to establish clear rulings prohibiting or suspending criminal prosecution while the asylum claim is determined appears to be a serious problem across European States. The matter was recently raised by Latvia in the context of the European Migration Network, an EU-hosted network of national contact points which serves to meet the information needs of EU institutions and of EU Member States on migration and

¹⁹⁰ Section 133 of the Immigration and Refugee Protection Act (IRPA) provides: 'A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the Criminal Code, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.'

¹⁹¹ South Africa, Act No 130 of 1998, Refugee Act (26 November 2008), s 24(1) <<http://www.refworld.org/docid/4a54bbd4d.html>> accessed 12 April 2017.

¹⁹² Argentina, Ley No 26.165. Ley General de Reconocimiento y Protección al Refugiado, art 40; 'No se impondrán sanciones penales o administrativas al solicitante de la condición de refugiado por motivo de ingreso ilegal al país, a condición de que se presente sin demora a las autoridades y alegue causa justificada de su ingreso o permanencia ilegal. La autoridad competente no aplicará otras restricciones de circulación que las estrictamente necesarias y solamente hasta que se haya regularizado la situación del solicitante en el país. En caso de que se haya iniciado causa penal o expediente administrativo por ingreso ilegal, estos procedimientos serán suspendidos hasta que se determine por medio de resolución firme la condición de refugiado del solicitante. En caso de reconocimiento de la condición de refugiado los procedimientos administrativos o penales abiertos contra el refugiado por motivo de ingreso ilegal serán dejados sin efecto, si las infracciones cometidas tuvieron su justificación en las causas que determinaron su reconocimiento como refugiado.'

¹⁹³ Brazil, Lei No 9.474 (22 July 1997), art 8 and 10.

¹⁹⁴ Uruguay Ley 18076 sobre Estatuto de Refugiados enumerates the principle of non-penalization for illegal entry as one of 6 fundamental principles imposed on the State in relation to those seeking refuge, art 10. Article 15 deals with the suspension of proceedings.

asylum.¹⁹⁵ Latvia raised a query amongst the network members on the practice relating to prosecuting refugees, explicitly raised how States understood their duties under Article 31. Latvia itself reported that it did apply criminal and asylum process simultaneously, the provisions of Article 31 notwithstanding.¹⁹⁶ Responses were received from 21 States.¹⁹⁷ Notably, Italy was the only State that reported that in practice criminal proceedings were suspended when Article 31(1) of the 1951 Refugee Convention was found to be applicable. Several States, such as Hungary, Luxembourg, Latvia, Poland, Slovakia, Sweden and Norway reported that they apply criminal and asylum procedures simultaneously. While the responses are somewhat terse, they suggest that there is a lack of understanding and implementation of the obligations under Article 31.

4.6.3 Denial of Economic or Social Rights

The denial of economic or social rights may be a ‘penalty’ in breach of Article 31, if it is imposed on account of illegal entry or presence. Many States deny all or certain categories of asylum-seekers economic or social rights, in a manner that has been found to violate human rights. For instance, in the United Kingdom, the denial of social support to asylum-seekers was found to breach Article 3 ECHR, as exposing them to inhuman and degrading treatment.¹⁹⁸ Notably, in earlier litigation on these restrictions, they were also found to be in breach of Article 31 of the 1951 Refugee Convention, as they were designed as a penalty on account of irregular entry and delay in claiming asylum.¹⁹⁹

4.6.4 Disadvantages in the Asylum Procedures

The Canadian Supreme Court has examined practices of treating asylum claims as inadmissible, where the asylum-seekers were involved in smuggling themselves into Canada. The Court assumed that ‘[o]bstructed or delayed access to the refugee process is a “penalty” within the meaning of Article 31(1) of the Refugee Convention.’²⁰⁰

As Noll states, ‘[a]s the use of irregular means of entry is not causally related to the protection need, there are good reasons to believe that this is a deterrent measure, and thus in violation of Article 31(1).’²⁰¹ Some States have in the asylum procedures explicit rules requiring decision-makers to draw negative inferences from the fact that applicants have

¹⁹⁵ Council Decision 2008/381/EC of 14 May 2008 establishing a European Migration Network [2008] OJ L131/7.

¹⁹⁶ European Migration Network, Ad Hoc Query from Latvia ‘Interaction between criminal proceedings and asylum procedure’ (requested 5 May 2016; compilation produced 3 October 2016) <https://www.udi.no/globalassets/global/european-migration-network_i/ad-hoc-queries/interaction-between-criminal-proceedings-and-asylum-procedure.pdf> accessed 26 March 2017.

¹⁹⁷ Austria, Belgium, Croatia, Czech Republic, Estonia, Finland, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovakia, Slovenia, Sweden, United Kingdom, Norway.

¹⁹⁸ See, for example, *R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66, [2006] 1 AC 396.

¹⁹⁹ *Social Security, Child Support and Pensions Appeal Commissioners Scotland* (1999) CIS/4439.1998 [17] discussed by Goodwin-Gill, 204; Noll, 1264.

²⁰⁰ *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704 (MacLachlan CJ), para 57, citing Anne T Gallagher and Fiona David, *The International Law of Migrant Smuggling* (CUP 2014) 163-164.

²⁰¹ Noll, 1264.

travelled on false papers. Just as treating claims as inadmissible may be regarded as a 'penalty', such evidential or procedural practices that make it more difficult to be recognized as a refugee yet lack a sound justification, should also be regarded as 'penalties.'

4.6.5 *Detention qua Penalty*

The legal limits of detention of asylum-seekers and refugees are discussed more fully below in Section 5.1.5. But it is important to note that the imposition of punitive detention, that is detention that is properly characterized as a 'penalty', will infringe Article 31(1), if it is imposed on account of illegal entry or presence. This means that a distinction must be drawn between punitive and non-punitive detention.²⁰² Punitive detention is impermissible under Article 31(1). Whether detention is considered punitive depends on its purpose and character, drawing on the intent of the State resorting to detention and whether the objective is similar to that of penal law, i.e. retribution or deterrence. As a result, detention used as a deterrent violates Article 31(1).²⁰³

4.6.6 *'... on account of their illegal entry or presence ...'*

A range of criminal offences have been designed as part of States' increasing criminalization of irregular migration. Whether Article 31 protects refugees from the imposition of these criminal penalties depends on whether they are imposed 'on account of their illegal entry or presence' (or in the French text 'du fait de leur entrée ou de leur séjour irréguliers'). On account of is a fairly loose expression, meaning 'for the sake of, in consideration of; by reason of, because of.'²⁰⁴ Some causal connection between the penalty meted out, and the illegal entry or presence must be demonstrated. In Hathaway's explanation, acts should be regarded as subsumed within the concept of 'illegal entry' if they are 'incidental to the primary and legally protected goal of ensuring that migration control laws do not impede a refugee from vindicating her or his rights under the Refugee Convention.'²⁰⁵

4.6.7 *Using False Documents and Related Offences*

Somewhat surprisingly, it appears some States have taken an extremely narrow view of the range of offences to which Article 31 applies. At the outset, the nature of contemporary illegal entry or presence should be borne in mind. For many refugees, it is the absence of proper documents (passports and visas in particular), that means they are unable to board regular means of travel due to carrier sanctions measures. Using false documents is in this context a common means of irregular entry, particularly if regular means of transport are to

²⁰² *Ibid.*, 1263. See also Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff Publishers 2010) ch 7.

²⁰³ UNHCR 'Note on International Protection' (9 August 1984) UN Doc A/AC.96/643, para 29; UNHCR 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012) 3–5 (Guideline 3).

²⁰⁴ 'on account (also upon account)' *Oxford English Dictionary* (OUP 2017).

²⁰⁵ James C Hathaway, 'Prosecuting a Refugee for "Smuggling" Himself' (2014) 429 U of Michigan Public Law Research Paper Series 4, discussed further below.

be used. Failing to include the use of false papers within the scope of Article 31 would have the rather perverse effect of privileging clandestine entry by irregular means over travelling in regular planes and ferries, which for refugees often requires that they travel on false papers. Such an interpretation would be perverse, in that it would mean that a provision designed to encourage refugees to approach the authorities would make them more vulnerable to dangerous clandestine means of travel. In contrast, the correct interpretation would ensure that where using false papers is a punishable offence, it would seem clear that the penalty inherent in any charge or conviction is 'on account of irregular entry or stay.'

Noll explains that the correct approach turns on the fact that the use of false documents is a lesser offence that may be subsumed into the greater offence of illegal entry or stay. In addition, both offences relate to the protection of the same social interest.²⁰⁶ Goodwin-Gill assumes that the range of offences subsumed under the notion of 'illegal entry' would include

'arriving or securing entry through the use of false or falsified documents, the use of other methods of deception, clandestine entry (for example, as a stowaway), and entry into State territory with the assistance of smugglers or traffickers. The precise method of entry may nevertheless have certain consequences in practice for the refugee or asylum-seeker. 'Illegal presence' would cover lawful arrival and remaining, for instance, after the elapse of a short, permitted period of stay.'²⁰⁷

It should be noted that on these views presenting false papers is intrinsic to the act of illegal entry. In fact, the Article 31 requirement is simply to show that the penalty is 'on account of' the irregular entry, which opens up the range of conduct that may be pertinent even further.

This view is supported by the ruling of the Supreme Court of the Netherlands, which has held that the use of false documents to gain illegal entry or stay generally falls under illegal entry or stay and therefore Article 31(1) applies when a refugee is prosecuted for the possession of false documents. Any other interpretation would deprive Article 31(1) of its protective aim.²⁰⁸ Similarly in the United Kingdom in *Adimi*, it was assumed that 'Article 31's protection can apply equally to those using false documents as to those (characteristically the refugees of earlier times) who enter a country clandestinely.'²⁰⁹

In contrast, the ruling of the German Federal Constitutional Court in 2014 held that Article 31(1) did not protect against the imposition of penalties for use of forged identity documents in the case at hand.²¹⁰ The Court took a narrow interpretation of the scope, noting that overall only criminal offences relating to entry which are necessary to reach protection are covered. On the particular facts, it was held that as the claimant could have applied for asylum at the airport, the offence committed was not covered under Article 31(1) of the 1951 Refugee Convention. The Court in effect imposed a particularly demanding necessity requirement

²⁰⁶ Noll, 1265.

²⁰⁷ Goodwin-Gill, 196.

²⁰⁸ *BI1325* [2009] 07/10516 (Supreme Court of the Netherlands).

²⁰⁹ *Adimi*, para 16.

²¹⁰ 2 BvR 450/11, 8 December 2014 (Federal Constitutional Court of Germany).

(*notstandsähnliche Unmöglichkeit*'), requiring a situation where the offence of presenting false documents is committed in order to avoid endangering life, limb or liberty.²¹¹ The FCC, purporting to take into account the drafting history of Article 31, concluded that Article 31 only applied where the illegal entry was required by the flight from persecution. It found that this was structurally impossible in German airports where there is a possibility to apply for asylum at the first border control point.²¹² The reasoning is incorrect for several reasons. Most importantly, the ordinary meaning of the Article, in particular its 'good cause' requirement, suggests that this must be viewed from the perspective of the refugee. While as a matter of fact asylum procedures are accessible from German airports, the key point is that refugees have good cause to be unaware, afraid, or untrusting at this point, as the Norwegian Supreme Court accepted. Legally also, the requirement of 'good cause' is a considerably less demanding requirement than the high standard of necessity demanded of refugees in the German case. Moreover, 'on account of' simply posits a reasonable causal connection, and should not be read as creating an additional demanding necessity test for the conduct in question.

The Courts in Austria have also declined to extend the protections of Article 31 to crimes relating to the use of false documents. In a decision of the Vienna High Court,²¹³ the defendant, a Chinese national, had presented a forged travel document to the Austrian border authorities upon arrival at Vienna airport. The Court rejected the defendant's attempt to rely on Article 31. Similarly, in a case concerning a Syrian national who presented various forged documents to the border authorities at Vienna Airport upon arrival, the appeal court confirmed this approach in 2013.²¹⁴ The lower court, in contrast, had given effect to Article 31 indirectly, by taking it into account when applying the general provision in the criminal code providing a defence for criminal acts committed so as to avoid an immediate impending disadvantage.²¹⁵ However, the appeal court rejected this interpretation, arguing that the Austrian lawmakers deliberately refrained from extending the defence in Article 31 to the use of forged documents, noting that in contrast there was a defence protecting migrants from being sanctioned as accomplices to their own smuggling.²¹⁶ Furthermore, the Court argued, that as soon as the defendant had entered Austria, he has escaped the situation of immediate impending danger resulting from the situation in the home country and could accordingly lodge an asylum application without having to making use of forged documents.

In France, there is no clear legislative provision incorporating and giving effect to Article 31. The French immigration code²¹⁷ distinguishes between offences related to illegal entry and

²¹¹ *Ibid*, para 53.

²¹² *Ibid*, paras 54, 56, 57.

²¹³ OLG Wien, 20 Bs 348/10p (12 April 2011).

²¹⁴ OLG Linz, 7 Bs 185/13z (14 October 2013).

²¹⁵ StGB (Criminal Code), §10.

²¹⁶ Fremdenpolizeigesetz (FPG) 2005 (Foreigner's Police Law). Under § 144(5) FPG the same law provides, that 'foreigners, whose illegal entry or transit has been facilitated by smugglers, are not to be sanctioned as accomplices under §12 StGB (Criminal Code)'.

²¹⁷ Code of Entry and Residence of Foreigners and Asylum (Code de l'entrée et du séjour des étrangers et du droit d'asile, 'CESEDA')

residency and those relating to carriers' sanctions.²¹⁸ Only the latter offences are explicitly stated not to apply when the foreigner admitted submits an asylum claim that is not manifestly unfounded.²¹⁹ Although Article 31 may be invoked before domestic courts, the commentary notes the diverse practice of different national courts in applying Article 31, with courts of first instance reportedly quite flexible when applying Article 31, while the Court de Cassation has been more restrictive.²²⁰ Notably in 2013 in *Cimade et Oumarov* the Conseil d'Etat, confirming the case of 13 December 1991²²¹, relied *inter alia* on Article 31 to reach its conclusion that the 1951 Refugee Convention necessarily implies that asylum-seekers are authorized to stay temporarily on the territory of the country until their claims have been decided.²²² However, otherwise, there is little detailed judicial consideration of the elements of Article 31. In 2001, the Conseil d'Etat confirmed the practice of prosecuting asylum-seekers for use of forged documents, albeit without considering Article 31 explicitly.²²³ A higher criminal court equally had previously held that asylum-seekers who used forged identity documents were not protected by the penal immunity provided in Article 31 of the Convention.²²⁴ Since 2016, the new law on foreigners seems to enshrine this jurisprudence as regards offences relating to use of forged identity documents by foreigners or those facilitating the commission of the offence. This offence is punishable by five years' imprisonment and a fine of 75,000 euros.²²⁵

4.6.8 *Smuggling and Offences Relating to Assistance to Refugees in Irregular Entry*

The scope of Article 31 only applies to refugees and not to the benefit of persons who assist their entry to a State of refuge, whether that assistance is framed as smuggling or otherwise. Article 31 should however be borne in mind when offences relating to assistance to refugees in entering States irregularly ought to be formulated. Goodwin-Gill argues, for example, that as a matter of principle it should follow from the logic of Article 31 that third parties (carriers) should equally not be penalized for bringing in someone illegally if that person is later to be found in need of international protection.²²⁶ Notably, the Supreme Court of Canada in its 2015 ruling in *Appulonappa*²²⁷ took into account Article 31 in determining the proper scope of smuggling prohibitions, finding the Canadian domestic prohibitions to be overbroad.

As discussed above, the UN Smuggling Protocol creates obligations for States to criminalize human smuggling, but contains an obligation not to penalize migrants for using

²¹⁸ On the former, see CESEDA, art 621 and the latter CESEDA, art 625.

²¹⁹ CESEDA, art 625(5); 'Les amendes prévues aux articles L.625-1 et L.625-4 ne sont pas infligées - Lorsque l'étranger a été admis sur le territoire français au titre d'une demande d'asile qui n'était pas manifestement infondée.'

²²⁰ Frédéric Tiberghien (Councillor of State), 'Réfugié' in *Répertoire de Droit International* (Daloz 2006, updated October 2016), para 89.

²²¹ Conseil d'État, No 119996, ECLI:FR:CEASS:1991:119996.19911213 (13 December 1991).

²²² Conseil d'État, No 349735, ECLI:FR:CEASS:2013:349735.20131113 (13 November 2013).

²²³ Conseil d'État, *Mme Hyacinthe*, No 229039 CE (12 January 2001).

²²⁴ Cour de cassation, Chambre criminelle, Rejet N° 99-83.391 (27 April 2000).

²²⁵ Article 53 of Law No. 2016-274, amending article 441-8 of the Criminal Code.

²²⁶ Goodwin-Gill, 219.

²²⁷ *R v Appulonappa*, 2015 SCC 59, [2015] 3 SCR 754.

smugglers.²²⁸

Concerning Article 31 of the 1951 Refugee Convention, if a refugee is smuggling others into his country of refuge, then it would seem the non-penalization protection of Article 31 would *not* apply. However, if a refugee was part of a ‘collective effort’ that results in her or his own illegal entry and that of others, then Article 31 still applies. As Hathaway has put it

‘[s]o long as a refugee is seeking to ensure her or his own access to protection, the incidental entry or presence of others arising from the same actions should be viewed simply as that: incidental to the primary and legally protected goal of ensuring that migration control laws do not impede a refugee from vindicating her or his rights under the Refugee Convention. It would in my view be duplicitous to argue that while the actions required to secure a refugee’s access to protection may not lead to prosecution those same actions become the basis for prosecution because others have been incidentally advantaged.’²²⁹

In *B010*,²³⁰ the Supreme Court of Canada recognized that ‘refugees often flee in groups and work together to enter a country illegally. Article 31(1) thus does not permit a State to deny refugee protection (or refugee determination procedures) to refugees solely because they have aided others to enter illegally in an unremunerated, collective flight to safety. Rather, it targets those who assist in obtaining illegal entry for financial or other material benefit.’ In contrast, in Finland, although there is a domestic provision incorporating Article 31, its benefit has not been extended to protect asylum-seekers against convictions for ‘arrangement of illegal immigration,’ when for example driving cars to the border together with other asylum-seekers.²³¹ This would seem to be in breach of Article 31 of the 1951 Refugee Convention.

In the UK case of *R v Liliane Makuwa*²³² the applicant presented a passport that had been tampered with. She was later convicted of (1) using a false instrument with the intention of inducing somebody to accept it as genuine and (2) two counts of facilitating illegal entry, pertaining to that of her two children. She was sentenced to 12 months imprisonment. She appealed against the conviction before the Court of Appeal (Criminal Division). The Court of Appeal quashed her conviction on the grounds that the judge had not instructed the jury properly. However, the statutory protection against penalization under UK law does not protect against prosecution or conviction for facilitation of illegal entry even when it relates primarily to the refugees’ own entry to the United Kingdom, which is a serious protection

²²⁸ See discussion above at III.3.

²²⁹ James C Hathaway, ‘Prosecuting a Refugee for “Smuggling” Himself’ (2014) 429 U of Michigan Public Law Research Paper 4.

B010 v Canada (Citizenship and Immigration) 2015 SCC 58, [2015] 3 S.C.R. 704; confirmed in *R v Appulonappa* 2015 SCC 59, [2015] 3 S.C.R. 754, (McLachlin CJ) para 43.

²³⁰ *Ibid.*

²³¹ *Decision KKO:2016:66* (Supreme Court of Finland). The asylum-seeker who had driven five other asylum-seekers, who were not in the possession of a visa required for the entry into Finland, to the Finnish border, was found guilty of and fined for “arrangement of illegal entry”. The Supreme Court did not refer to Article 31 in this case.

²³² *R v Liliane Makuwa* [2006] EWCA Crim 175.

gap.

4.6.9 Offences Related to Particular Modes of Irregular Entry

In the United Kingdom, refugees have been prosecuted when they walk through the Channel Tunnel from France, under legislation from 1861 of ‘obstructing engines or carriages on railways.’²³³ In one case, the refugees appealed against their conviction and sentencing to 21 months imprisonment. On the facts, the actions had led to the suspension of rail services, which was clearly held to amount to an ‘obstruction’ within the meaning of the legislation.²³⁴ On appeal, the applicants argued that the prosecution had been an abuse of process, as the prosecutor had deliberately chosen an offence that was not subject to the Article 31 defence available to refugees relating to irregular entry. The Court held that the criminality in this case went beyond the documentary crimes that are subject to the statutory defence in question, without considering whether the particular penalty could be regarded as arising ‘on account of’ irregular entry.

Hungary has introduced new criminal offences in 2015,²³⁵ when it constructed fences along its borders with Serbia and Croatia. The offences included unauthorized crossing of the border fence, destroying/vandalizing the border fence, and obstruction of the construction works related to the border fence.²³⁶ As is discussed further below, attempts to invoke Article 31 to prevent prosecution or conviction in the Hungarian courts have thus far failed.²³⁷ While it could be argued that some of the offences that involve damage to property fall outside the scope of Article 31, a contextual assessment is necessary. Evidence suggests that the processes in place at formal border crossings entailed unfair asylum processes and summary rejection at the frontier, leading to illegal returns to unsafe third countries.²³⁸ In this context, the new offences are clearly designed as penalties ‘on account of’ a form of illegal entry that is part of the state’s general migration control apparatus.

5. THE ELEMENTS OF ARTICLE 31(2)

5.1 Article 31(2), Sentence 1

5.1.1 Personal Scope

This provision prohibits States from ‘apply[ing] to the movements of such refugees

²³³ Malicious Damage Act 1861, s 36.

²³⁴ *R v Payam Moradi Mirahessari and Farein Vahdani* [2016] EWCA Crim 1733, 4 November 2016. A previous similar case was *R v Haroun (Abdul Rahman)* [2016] CC Canterbury, 1 April 2016.

²³⁵ UNHCR ‘Hungary as a Country of Asylum. Observations on Restrictive Legal Measures and Subsequent Practice Implemented between July 2015 and March 2016’ (UNHCR, May 2016); AIDA, ‘Country Report: Hungary’ (2016 Update) <http://www.asylumineurope.org/sites/default/files/report-download/aida_hu_2016update.pdf> accessed 7 April 2017.

²³⁶ Hungary, Criminal Code (2012), s 352/A - 352/C Act C.

²³⁷ See below at VI.4.

²³⁸ *Ilias and Ahmed v Hungary* App no 47287/15 (ECHR, 14 March 2017).

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 first question to be addressed concerns the personal scope of this provision. It refers to '*such refugees*'. At first glance, this might be thought to refer to refugees who meet the qualifying conditions of Article 31(1) ('coming directly', 'prompt presentation' and 'good cause'), and so are not amenable to penalization. However, that reading would mean the relatively privileged category of unauthorized entrants who ought not to be penalized under Article 31(1) would be subject to additional State restrictions under Article 31(2), while other unauthorized refugees would not be subject to Article 31(2). That outcome also seems inappropriate, so the better view on the meaning of '*such refugees*' is, that it denotes '*refugees unlawfully in the country of refuge*', drawing on the heading of Article 31.²³⁹ Article 31(2) permits restrictions on the movements of refugees, to the extent that they are necessary. The general rule under the 1951 Refugee Convention is free movement for those refugees who are '*lawfully in*' the territory, in accordance with Article 26 of the Convention (subject only to the restrictions that are applicable to aliens generally in the same circumstances). This supports the view that the personal scope of Article 31(2) is *all* refugees unlawfully in the country of refuge. Once a refugee is '*lawfully in*', Article 26 applies.

To clarify, this means that the personal scope of Article 31(1) and 31(2) is different, and in both cases limited by Article 26. If an individual refugee meets the qualifying conditions for Article 31(1), then she or he is protected against penalization. Forms of detention that are properly characterized as '*penalties*' are thus prohibited in her or his individual case. Only non-punitive detention may be contemplated in the case of such protected refugees, relying on Article 31(2).

This reading is confirmed by the reference in Article 31(2) to restrictions only being permissible until the status of these refugees is '*regularized*' (or as will be discussed further below '*or they obtain admission into another country*'). Status regularization means any step undertaken by the State that addresses the unlawful presence of the refugee. It does not mean that refugee status has to be recognized definitively, but rather is subject to a broad interpretation, such that regularization is understood as occurring when '*a refugee has met the host State's requirements to have her or his entitlement to protection evaluated.*'²⁴⁰ This interpretation is demanded by the context, in order to ensure that the appropriate scope of Article 26 of the 1951 Refugee Convention (free movement) is respected, which applies once a refugee is lawfully in a State, including once admitted to an asylum procedure.

Regarding '*admission to another country*', it would appear that restrictions under Article 31(2) cease to be permissible once '*admission*' has been secured. Hathaway, drawing on the drafting history, contends that '*Article 31(2) authorizes detention to the time of departure for that other State.*'²⁴¹ In contrast, Noll interprets the provision as meaning that '*any restrictions on the movements of such a person need to cease from the moment the third State has *agreed**

²³⁹ Noll, 1267-1268.

²⁴⁰ Hathaway *Rights*, 417.

²⁴¹ *Ibid*, 414.

to admit or readmit him or her.’ (emphasis added).²⁴² Noll’s view appears preferable, as ‘admission’ seems to connote permission to enter, given that Article 31(2) speaks of ‘admission’ being ‘obtained’, suggesting that it is the official permission to which the provision refers, rather than the act of physical entry itself. Moreover, it should be recalled that the provision is premised on the refugees’ agency in arranging onward movement, so it is difficult to envisage how a refugee could move to another country without being free to make her or his own travel arrangements.

5.1.2 Necessity of Restrictions

For those refugees who have not yet been regularized or admitted to another country, only restrictions that are *necessary* may be imposed. Necessity demands an individual assessment of the legitimacy of the purpose being pursued by the restrictions in question, and an assessment of whether less restrictive means are available to meet that aim. It is a demanding test, always focused on the individual case. It does not grant States a general power to detain asylum-seekers or refugees, but rather always requires individual assessment. Independent judicial scrutiny of the grounds of detention is necessary.²⁴³

5.1.3 Encampment

In its submissions before the Kenyan High Court, UNHCR argued that forced relocation to camps would breach Article 31(2).²⁴⁴ The case concerned a directive subjecting all asylum-seekers and refugees – *en masse* – to forced relocation from urban centers to camps. The Court did not consider Article 31 expressly, but did apply Article 26 of the 1951 Refugee Convention, suggesting that it assumed the population in question were ‘authorized’ in their residence. Much of the ruling turned on the fact that the refugees in question had lived in Kenya for some time.²⁴⁵ In general, it can be assumed that encampment breaches Article 26 of the 1951 Refugee Convention, if it is applied to any refugees who are ‘lawfully in’ the country of refugee.

5.1.4 Other Restrictions on Movement

As well as encampment policies, there are a range of other practices States employ to limit the movement of refugees. Often, these are styled as formal ‘alternatives to detention’, generally seen as a welcome move away from detention *per se*.²⁴⁶ However, any policies or

²⁴² Noll, 1273.

²⁴³ See UNHCR ‘Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012) (hereafter UNHCR Detention Guidelines), paras 4.1.4, 7.

²⁴⁴ 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), para 5.3.

²⁴⁵ *Kituo Cha Sheria v Attorney General* [2013], Petition No. 19 of 2013 consolidated with Petition No.115 of 2013, 26 July 2013, para 51. For an analysis, see Kate Ogg ‘Protection from “Refugee”: On What Legal Grounds Will a Refugee Be Saved from Camp Life?’ (2016) 28 (3) Int J Refugee Law 384.

²⁴⁶ See generally Alice Edwards, ‘Back to Basics: The Right to Liberty and Security of the Person and “Alternatives to Detention” of Asylum-Seekers, Refugees, Stateless Persons and Other Migrants’ (April 2011) UNHCR Legal

practices that limit free movement within the State of refuge must be demonstrably necessary. There are a range of such practices, which include reception systems that require asylum-seekers to reside in particular residential centres, other forms of designated residence, registration requirements, deposit of documents, bond/bail or surety/guarantor systems to be released from immigration detention, reporting requirements, case management/supervised release. As discussed below, in order to be demonstrably necessary, States must consider alternatives to detention before detention is deemed necessary. Moreover, the alternative contemplated must itself meet the necessity test. In practice, the empirical evidence base for detention is often scant, and alternatives can be designed to achieve the legitimate purposes being pursued, particularly if that is ensuring asylum-seekers cooperate with asylum procedures and do not abscond.²⁴⁷

5.1.5 Detention

EXCOM Conclusion No. 44 (XXXVII) lists the purposes of detention that are deemed acceptable, namely verification of identity, determination of the elements of the claim for asylum, protection of national security and public order.²⁴⁸ If less restrictive means are available to meet the particular legitimate aim pursued, then the restriction being contemplated is not necessary. This means that restrictions are exceptional, and require strong justification in the individual case. As will be discussed below in relation to detention in particular, this incorporates the standards articulated in international human rights law, but also sets important limits to them concerning the significance of formal admission to an asylum process.

As well as meeting the standards set out in the 1951 Refugee Convention, detention of asylum-seekers and refugees must meet the standards set out in international human rights law. UNHCR integrates international refugee and human rights law standards in its 2012 Revised UNHCR Guidelines on Detention. It summarizes the overall position regarding the detention of asylum-seekers as follows:

‘Article 31 of the 1951 Convention specifically provides for the non-penalization of refugees (and asylum-seekers) having entered or stayed irregularly if they present themselves without delay and show good cause for their illegal entry or stay. It further provides that restrictions on movement shall not be applied to such refugees (or asylum-seekers) other than those which are necessary and such restrictions shall only be applied until their status is regularised or they gain admission into another

and Protection Policy Research Series <<http://www.unhcr.org/4dc949c49.html>> accessed 16 April 2017; Robin Sampson et al, ‘There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention’ (revised edition 2011) International Detention Coalition <<http://idcoalition.org/cap/handbook/>> accessed 16 April 2017; Jesuit Refugee Service (JRS) Europe, ‘From Deprivation to Liberty. Alternatives to Detention in Belgium, Germany and the United Kingdom’ (December 2011) <<http://www.jrseurope.org/JRSEuropeFromDeprivationToLiberty20122011.pdf>>.

²⁴⁷ See further Cathryn Costello and Esra Kaytaz, ‘Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva’ (June 2013) UNHCR Legal and Protection Policy Research Series <<http://www.refworld.org/docid/51a6fec84.html>> accessed 16 April 2017.

²⁴⁸ UNHCR ‘Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012) 4 (Guideline 3).

country. Article 26 of the 1951 Convention further provides for the freedom of movement and choice of residence for refugees lawfully in the territory. Asylum-seekers are considered lawfully in the territory for the purposes of benefiting from this provision. These rights taken together – the right to seek asylum, the non-penalization for irregular entry or stay and the rights to liberty and security of person and freedom of movement – mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.²⁴⁹

In order to meet the standards in international human rights law, and give effect to the presumption of liberty that underpins these standards, detention must pursue a legitimate aim, and be necessary in order to achieve that aim.²⁵⁰ As UNHCR emphasizes, to establish the necessity of detention in any individual case, alternatives to detention must be considered, and deemed unsuitable. This is required in order to give effect to the basic notion that in order to demonstrate that detention is necessary, there must be no less rights-restrictive measure that will achieve the same aim. In practice, some States engage in systematic detention based on mere presuppositions that asylum-seekers may abscond or fail to cooperate with the asylum determination system. These presuppositions are not based on evidence, and in general fail to meet the necessity test in individual cases.²⁵¹ Notably, the Court of Justice of the European Union (CJEU) has recently clarified that as regards the risk of absconding as a ground of detention in the context of the Dublin System, the individual risk of absconding must be assessed in light of pre-established legislative standards, as ‘only a provision of general application could meet the requirements of clarity, predictability, accessibility and, in particular, protection against arbitrariness.’²⁵²

A further important recent development at the international level is the clarification of the standards of necessity as regards detention of children. As United Nations Special Rapporteur on Torture Juan E. Méndez in his report stated that ‘it is now clear that the deprivation of liberty of children based on their or their parents’ migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children’.²⁵³

²⁴⁹ UNHCR ‘Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention’ (2012), paras 13, 14.

²⁵⁰ *Ibid*, paras 21-31. Three purposes for which detention may be necessary in an individual case: (1) To protect public order, (i) to prevent absconding and/or in cases of likelihood of non-cooperation; (ii) in connection with accelerated procedures for manifestly unfounded or clearly abusive claims; (iii) for initial identity and/or security verification; (v) in order to record, within the context of a preliminary interview, the elements on which the application for international protection is based, which could not be obtained in the absence of detention; (2) To protect public health; (3) To protect national security. See also EXCOM Conclusion No 44 (XXXVII) ‘Detention of Refugees and Asylum Seekers’ (1986).

²⁵¹ HRC General Comment No 35, ‘Article 9 (Liberty and Security of Person)’ (16 December 2014) UN Doc CCPR/C/GC/35.

²⁵² Case C-528/15 *Al Chodor* [2017] ECLI 213, para 43.

²⁵³ HRC ‘Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez’ (5 March 2015) UN Doc A/HRC/28/68, para 80. The Inter-American Court of Human Rights found that ‘the deprivation of liberty of children based exclusively on migratory reasons exceeds the requirement of necessity, because this measure is not absolutely essential in order to ensure their appearance at the immigration proceedings or to guarantee the implementation of a deportation order’. *Rights and guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion (IACHR 19 August

One difficulty that has emerged is that in some respects, human rights law has failed to integrate the particular protections for refugees as regards protection against penalization and detention. In particular, the central premise informing Articles 26 and 31 of the 1951 Refugee Convention is that asylum-seekers once admitted to the asylum procedure are ‘regularized’. In contrast, the European Court of Human Rights, in a much criticized ruling of *Saadi v the United Kingdom*,²⁵⁴ held that asylum-seekers were unauthorized in their presence until the State deemed otherwise, and also accepted ‘administrative convenience’ as a legitimate purpose for detention. In contrast, UNHCR had argued before the ECtHR that a person who claims asylum in accordance with national procedures is seeking admission to asylum procedures of the State pursuant to international refugee law, as transposed domestically. If admitted to those procedures, s/he is lawfully present (but not lawfully staying or durably resident) there. The grant of temporary admission is precisely an authorization by the State to temporarily allow the individual to enter its territory consistent with the law. In such a situation, the asylum-seeker is not seeking unauthorized entry, but rather, has been granted temporary but authorized entry, for the purpose of having the asylum claim examined (and where successful, being granted asylum, that is, lawful stay, in the scheme of the 1951 Refugee Convention).²⁵⁵

5.1.6 Problematic Detention Practices

Australia’s detention practices have been repeatedly condemned as in breach of international human rights law,²⁵⁶ although the Australian courts have generally upheld their domestic legality.²⁵⁷ The domestic courts did not evaluate whether mandatory detention breached Australia’s human rights obligations because they regard themselves as having no power to

2014) para 154. The ECtHR also found that immigration detention was unlawful and failed to meet the needs of children, and as a result constituted a violation of Article 5 ECHR. *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* App no 13178/03 (ECtHR, 12 October 2006), para 105; *Muskhadzhiyeva and Others v Belgium* App no 41442/07 (EtCHR, 19 January 2010), para 75; *Kanaqaratnam v Belgium* App no 15297/09 (ECtHR, 13 December 2011), para 88; *Rahimi v Greece* App no 8687/08 (ECtHR, 5 April 2011), para 110; *Popov v France* App nos 39472/07 and 39474/07 (ECtHR 19 January 2012), para 121; *A.B. and Others v France* App no 11593/12 (ECtHR, 12 July 2016), para 125; *R.K. and Others v France* App no 68264/14 (ECtHR, 12 July 2016), para 87; *R.M. and Others v France* App no 33201/11 (ECtHR, 12 July 2016), para 88. The Committee on the Rights of the Child (UNCRC) declared that the deprivation of freedom of migrant children on the ‘sole basis of their status’ was a violation of children’s rights, and always contravened the principle of the best interests of the child. UNCRC, Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration (2013), para 32.

²⁵⁴ *Saadi v UK* (2008) 47 EHRR 17. For critique, see for example, Helen O’Nions, ‘No Right to Liberty: The Detention of Asylum Seekers for Administrative Convenience’ (2008) 10 EJML 149.

²⁵⁵ See in contrast UNHCR ‘Intervention before the European Court of Human Rights in the case of *Saadi v United Kingdom* App no 13229/03 (ECHR, 30 March 2007)’.

²⁵⁶ *A v Australia* UN Doc CCPR/C/59/D/560/1993 (HRC, 30 April 1997); *Danyal Shafiq v Australia* UN Doc CCPR/C/88/D/1324/2004 (HRC, 31 October 2006); *Shams et al v Australia* UN Doc CCPR/C/90/D/1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004 (HRC, 20 July 2007); *Baban v Australia* UN Doc CCPR/C/78/D/1014/2001 (HRC, 06 August 2003); *MMM et al v Australia* UN Doc CCPR/C/108/D/2136/2012 (HRC, 25 July 2013); *D and E v Australia* UN Doc CCPR/C/87/D/1050/2002 (HRC, 11 July 2006).

²⁵⁷ See, for example, *Al-Kateb v Godwin* [2004] HCA 37, (2004) 219 CLR 562, 595, [74].

do so.²⁵⁸ The detention is unlawful under human rights law as it is mandatory and automatic, and the system does not check whether there are grounds of detention in the individual case. It may also be regarded as in breach of Article 31(1) as a penalty for illegal entry, given that detention is not justified in the circumstances of each individual detained, and is directed at asylum-seekers who arrive without a visa.²⁵⁹ Australia runs both an onshore detention system, and has established external processing centres in neighboring countries Nauru and Papua New Guinea. It is noteworthy that in 2016, the Constitutional Court of Papua New Guinea held that the detention practices entailed in the processing centres there were unconstitutional, and ordered both Australia and Papua New Guinea to cease and desist from the illegal detention of asylum-seekers.²⁶⁰

Detention practices in the United States of America clearly do not meet the pertinent standards in Article 31(2), or international human rights law. In particular, under its so-called 'expedited removal' procedures, if a non-citizen expresses the intention of applying for asylum, the individual is mandatorily detained until an asylum officer conducts a 'credible fear interview.'²⁶¹ The individual may be detained until further proceedings can be held in court. These provisions prohibit the individualized determinations of the necessity, proportionality and reasonableness of detention as provided in Article 31(2). In an amicus brief in the *Rodriguez* case currently before the US Supreme Court, UNHCR discusses US treaty obligations and the interplay between Article 31 and detention.²⁶² Concerns have also been expressed about the so-called 'reinstatement of removal' procedures, whereby a person illegally re-entering the US is precluded from making an asylum application and may only apply for 'withholding of removal' or CAT relief²⁶³ before an immigration judge.²⁶⁴ In *Ramirez-Mejia v Lynch*, the 5th Circuit Court of Appeal upheld this practice, concluding that Ramirez-Mejia was ineligible for asylum based on her illegal re-entry status. The Court found that the reinstatement statute, which States that an individual who illegally re-enters the country after removal is not eligible for 'any relief', 'denies all forms of redress from removal, including asylum'.²⁶⁵

²⁵⁸ Kaldor Centre, 'Factsheet: Immigration Detention' (21 October 2015) <http://www.kaldorcentre.unsw.edu.au/sites/default/files/Factsheet_Immigration_detention.pdf> accessed 14 April 2017.

²⁵⁹ Jane McAdam et al, 'Submission to Joint Select Committee on Australia's Immigration Detention Network, Inquiry into Australia's Immigration Detention Network' (10 August 2011) 4 <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/GT_Detention_Submission.pdf> accessed 14 April 2017.

²⁶⁰ *SCA.No.84 of 2013*, SC1497, 26 April 2016 (Papua New Guinea: Constitutional Court), paras 74, 119.

²⁶¹ Immigration and Nationality Act (INA), § 235(b)(1)(B)(iii)(I), 8 U.S.C. § 1225(b)(1)(B)(iii)(I).

²⁶² UNHCR, '*David Jennings, et al. v Alejandro Rodriguez et al*: UNHCR Brief for Refugees as Amicus Curiae in the Supreme Court of the United States' (31 October 2016, No 15-1204).

²⁶³ Applying for protection from *refoulement* under Article 3 of the UN Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment.

²⁶⁴ 8 U.S.C. § 1231(a)(5), 8 C.F.R. § 241.8. The Reinstatement Statute states: '(5) Reinstatement of removal orders against aliens illegally re-entering. If the Attorney General finds that an alien has re-entered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the re-entry.'

²⁶⁵ *Ramirez-Mejia v Lynch*, 794 F3d 485 (5th Circuit Court) 6.

The detention of asylum-seekers who arrive in Malta is also quasi-automatic, and has been repeatedly condemned by the ECtHR. Before 2015, its administrative detention of people arriving irregularly lacked any statutory basis. In 2015, new legislation required the detention of any person arriving illegally.²⁶⁶ There is no specific provision in Maltese law referring to Article 31 of the 1951 Refugee Convention.

Israel has various legislative enactments²⁶⁷ providing for prolonged mandatory detention of asylum-seekers (styled as ‘infiltrators’). These provisions have been subject to repeated legal challenges before domestic courts.²⁶⁸ The Israeli Supreme Court, sitting as a High Court of Justice (HCJ), quashed the first two enactments for disproportionately violating the constitutional rights to liberty and human dignity to which ‘every person’ is entitled under Israeli law.²⁶⁹ The final amendment was generally upheld, the maximum detention period, however, was decreased to 12 months.²⁷⁰ However, the successful grounds of review were mainly grounded in the domestic principle of proportionality, notwithstanding the fact that there is a ‘presumption of compatibility’ in the Israeli legal system, which potentially enables judges to interpret national law in conformity with international law. UNHCR’s intervention in the cases attempting to rely, *inter alia*, on Article 31 were not given explicit consideration by the Court.²⁷¹

5.2 Article 31(2), Sentence 2

This provision states that, ‘the Contracting Parties shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.’ The provision applies to resettlement, relocation or any other form of onward movement (such as seeking to join family members elsewhere in the EU under the Dublin system). It confirms the obligation to enable the agency of refugees over their own futures.

Notably, Hathaway considers this provision in his chapter on ‘Rights of Solution.’²⁷² The provision means that refugees are ‘legally entitled to an opportunity to devise [their] own resettlement solutions before being required to accept the government’s option.’²⁷³ The provision implicitly entails both negative obligation on States not to hinder their attempts in

²⁶⁶ Immigration Act 2015, art 5, 14, 16.

²⁶⁷ Law for the Prevention of Infiltration (Crimes and Jurisdiction) (Amendment No 3 and Temporary Order) 5772-2012 (Amendment No 3); Law for the Prevention of Infiltration (Crimes and Jurisdiction) (Amendment No 4 and Temporary Order) 5774-2013 (Amendment No 4); and Law for the Prevention of Infiltration and Securing the Departure of Infiltrators from Israel (Legislative Amendments and Temporary Orders) 5775-2014 (Amendment No 5).

²⁶⁸ See generally Reuven (Ruvi) Ziegler R, ‘No Asylum for “Infiltrators”: the Legal Predicament of Eritrean and Sudanese Nationals in Israel’ (2015) 29 (2) Journal of Immigration, Asylum and Nationality Law 172.

²⁶⁹ *Ibid.* 172, 173.

²⁷⁰ HCJ 8665/14 *Desete et al. v the Minister of Interior*, August 2015; see the detailed discussion in Reuven (Ruvi) Ziegler, ‘The Legal Challenges concerning the Removal of Asylum-Seekers from Israel to Third States’ (2015) The Israel Democracy Institute <<https://en.idi.org.il/articles/3938>> accessed 13 March 2017.

²⁷¹ See UNHCR ‘UNHCR’s Oral Submission before the Supreme Court regarding the Request for Leave to be Joined as Amicus Curiae in these Proceedings (Case HCJ 7146/12)’ (Jerusalem, 2 June 2013), para 13 <<http://www.refworld.org/pdfid/51ad9be64.pdf>> accessed 14 March 2017.

²⁷² Hathaway *Rights*, ch 7.

²⁷³ *Ibid.*, 965.

this regard, as well as positive obligations on States in the form of ‘all the necessary facilities’ to obtain admission elsewhere.²⁷⁴ ‘All the necessary facilities’ is a capacious formulation, and it would be difficult to argue that a refugee who is encamped or accommodated in an isolated place, or detained, has been afforded ‘all the necessary facilities.’ Normally securing entry to another State will entail physical visits to embassies, consulates and other agencies who may be supporting resettlement, relocation or onward migration. ‘All the necessary facilities’ would also entail ample access to pertinent advice and support, and a range of alternative means of communication. The interpretation of ‘reasonable period’ too must be context sensitive, and adapted to the specific profile of the refugee.

6. ENSURING THE EFFECTIVENESS OF ARTICLE 31

Article 26 of the VCLT, which reflects the general position under customary international law, obliges States to perform treaties in good faith. Article 27 VCLT provides that States may not rely on the provisions of domestic law as justification for their failure to perform a treaty. Therefore, it is incontrovertible that States must implement Article 31 effectively. Every breach of a treaty obligation (or of any obligation ‘regardless of its origin’)²⁷⁵ by a State (or its organ) gives rise to State responsibility.²⁷⁶ The International Court of Justice (ICJ), for instance, in its advisory opinion on the *Interpretation of Peace Treaties (Second Phase)* confirmed that ‘refusal to fulfil a treaty obligation involves international responsibility’.²⁷⁷ In particular, State responsibility arises where conduct consisting of an act or omission is attributable to the State under international law and constitutes a breach of an international obligation.²⁷⁸ The general rule is that the conduct of any State organs or others who act under the direction, instigation or control of these organs is attributed to the State.²⁷⁹ The ICJ reiterated in its advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* that ‘[a]ccording to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule [...] is of a customary character’.²⁸⁰ The International Law Commission (ILC) defined the term ‘State organ’ as to cover all the individual and collective entities that form the organization of the State and act on its behalf.²⁸¹ The conduct of the State organ under the State responsibility law is attributable to the State even if its organ exceeds its authority.²⁸² Hence, the breach of the obligations under the 1951 Refugee Convention by any organ of the

²⁷⁴ Noll, 1275.

²⁷⁵ ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts’ (10 August 2001) UN Doc A 56/10, ch IV (ARSIWA), art 12; ILC, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (2001) II UNYBKILC, pt 2, 31; ARSIWA Commentary, art 12 (3).

²⁷⁶ ARSIWA, art 1; *Rainbow Warrior Affair* (1990) Sales No E/F.93.V.3, XX UNRIAA 215, para 75.

²⁷⁷ *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase* (Advisory Opinion) [1950] ICJ Rep 221, 228.

²⁷⁸ ARSIWA, art 2; see also *Phosphates in Morocco* PCIJ Rep Series A/B No 74 (1938) 10, 28; *United States Diplomatic and Consular Staff in Tehran* [1980] ICJ Rep 3, [56].

²⁷⁹ ARSIWA, arts 4-11; see, for example, Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Oxford, Clarendon Press 1983) 132-166.

²⁸⁰ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* (Advisory Opinion) [1999] ICJ Rep 62, [62].

²⁸¹ ARSIWA Commentary, art 4 (1).

²⁸² ARSIWA, art 7.

State party will give rise to State responsibility under international law. More generally, the State (and its organs) must perform its obligations under the treaties, to which it is a party, in good faith pursuant to the principle *pacta sunt servanda*.²⁸³

Throughout this paper, the role of different organs of State has been implicated. In this section, we contrast some good and bad State practices, to emphasize the importance of adapting the practice of diverse State institutions to ensure that States meet their obligations under Article 31 of the 1951 Refugee Convention.

6.1 Prosecutorial Authorities

As regards the prosecutorial authorities, the UK litigation on Article 31 reveals that irrespective of whether Article 31(1) per se prohibits the bringing of charges against asylum-seekers, the prosecutorial authorities are obliged to adapt their processes to respect Article 31 of the 1951 Refugee Convention. Otherwise, the effectiveness of the Article is greatly impaired.

In spite of UK court rulings from the highest level insisting on a correct interpretation of Article 31, overzealous prosecution of asylum-seekers and refugees for migration-related crimes continues. One of the difficulties in the UK context is that the statutory provision aiming to give domestic effect to Article 31 is too narrow, and it takes the form of a defence. In practice, lack of awareness of the statutory defence on the part of the police force, criminal defence solicitors and naturally refugees and asylum-seekers themselves, led to a 'significant' likelihood of wrongful convictions.²⁸⁴ The prosecutorial practices led to a series of interventions by the UK Criminal Cases Review Commission,²⁸⁵ in order to raise these cases as miscarriages of justice. Most recently, the UNHCR Intervention in *SXH* argued that such prosecutions should be regarded as a breach of Article 8 ECHR,²⁸⁶ although the Supreme Court rejected the argument narrowly on the facts.²⁸⁷

In contrast, in Norway, after the 2014 Supreme Court judgment, the Director of Public Prosecutions instructed the Norwegian police to re-open all cases concerning asylum-seekers who had been penalized for having entered Norway illegally, and suspended the jail sentences imposed on them.²⁸⁸ In Denmark, an asylum-seeker will not be penalized until the assessment of his or her asylum claim by the immigration authorities is completed. Asylum-

²⁸³ VCLT, art 26; Ian Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 119.

²⁸⁴ See generally Gary Christie, 'Prosecuting the Persecuted in Scotland: Article 31(1) of the 1951 Refugee Convention and the Scottish Justice System' (Scottish Refugee Council 2016), ch 7-8; Ana Aliverti, *Crimes of Mobility* (Routledge 2014) 46; Vladislava Stoyanova, 'Smuggling of Asylum-seekers and Criminal Justice' (2012) 5 Refugee Law Initiative Working Paper Series.

²⁸⁵ Yewa Holiday, 'CCRC Concern Over Advice Given to Refugees' Law Society Gazette (14 June 2012) <<https://www.lawgazette.co.uk/law/ccrc-concern-over-advice-given-to-refugees/66102.article>> accessed 17 March 2017.

²⁸⁶ UNHCR 'Intervention in *SXH Somalia* UKSC 2014/0148 (on appeal from Appeal from [2014] EWCA Civ 90)' (6 July 2016).

²⁸⁷ *SXH v The Crown Prosecution Service* [2017] UKSC 30, 11 April 2017.

²⁸⁸ Riksadvokaten (2014) 2014/00167-009 AB6007 274.

seekers who are granted refugee status (but not complementary or other forms of protection) are subsequently exempted from penalization. This practice is based on guidelines issued by the Danish Director of Public Prosecutions.²⁸⁹

6.2 National Legislatures

The role of the national legislature is central to effective implementation. Legislative adaptation to ensure that refugees are not penalized in contravention of Article 31 is crucial, in particular in contexts where irregular entry, stay and the use of false papers are subject to criminalization and other forms of penalization.

Evidently, whether Article 31 requires specific domestic legislation in order to be effective depends on the constitutional configuration of the State in question, in particular whether it is a monist or dualist system. In some qualified dualist systems, Article 31 has proven effective, but usually only after a concerted effort to adapt prosecutorial and other practices to protect refugees from penalization. The example of Norway shows that under the right domestic conditions, a single court ruling can lead to a significant change in practice. Both the Norwegian Criminal Procedure Act and the Norwegian Penal Code provide that domestic law is subject to the limitations under international law.²⁹⁰ The Norwegian Immigration Act analogously requires the application of the immigration rules 'in accordance with international provisions by which Norway is bound when these are intended to strengthen the position of the individual'.²⁹¹

However, without domestic legislation, the protections in Article 31 are often ignored. For instance, in Sweden, Article 31 is not specifically incorporated into domestic law. There are reported cases of asylum-seekers and refugees being penalized for irregular entry. For example, the Supreme Court in 2010 sentenced an applicant to pay a fine for the use of false documents.²⁹² At the same time, the Court considered the use of false documents not to be a crime of such severity to warrant imprisonment. In 2016, the Court of Appeal also sentenced

²⁸⁹ Meddelelse nr. 9/2005 Rettet (June 2010), J.nr. RA-2005-609-0003 <<http://www.krim.dk/undersider/straffesager/strafferet/285-287-tyveri-berigelse-mv/rigsadvokatmeddelse-straftaastande-straffelov-juni-2010.pdf>> accessed 6 April 2017, cited by Marek Linha M and André Møkkelgjerd, 'Analysis of Norway's International Obligations, Domestic Law and Practice: Detention of Asylum Seekers' (2014) 19 <http://www.noas.no/wp-content/uploads/2014/02/Detention-of-asylum-seekers_web.pdf> accessed 6 April 2017.

²⁹⁰ Norwegian Penal Code (straffeloven), art 1 (2); Norwegian Criminal Procedure Act (straffeprosessloven), art 4. Marek Linha and André Møkkelgjerd, 'Analysis of Norway's International Obligations, Domestic Law and Practice: Detention of Asylum Seekers' (2014) 19 <http://www.noas.no/wp-content/uploads/2014/02/Detention-of-asylum-seekers_web.pdf> accessed 6 April 2017.

²⁹¹ Norwegian Immigration Act (utlendingsloven), art 3. Marek Linha M and André Møkkelgjerd, 'Analysis of Norway's International Obligations, Domestic Law and Practice: Detention of Asylum Seekers' (2014) 19 <http://www.noas.no/wp-content/uploads/2014/02/Detention-of-asylum-seekers_web.pdf> accessed 6 April 2017.

²⁹² *NJA 2010 s 358*, B5521-09, 11 June 2010 (Swedish Supreme Court) <<https://lagen.nu/dom/nja/2010s358>> accessed 12 April 2017.

a Syrian man who had used a valid Syrian passport, where one page had been ripped out to pay a fine for use of forged documents.²⁹³

Even in systems that effectively treat international norms as part of domestic law, given that Article 31 may require adaptation of prosecutorial practice, criminal law, immigration law, appropriate domestic legal adaptation is usually required. Even in States that enshrine refugee protection and the non-penalization principle at the constitutional level, Article 31 generally also entails legislative incorporation. For instance, in Ecuador, Article 41 of the Constitution recognizes the rights of asylum and refuge in accordance with the international law and international human rights instruments, and further specifies that no penal sanctions on account of irregular entry or presence will be applied to asylum-seekers or refugees. These protections are reiterated in the 2017 Human Mobility Law.²⁹⁴ Moreover, in Ecuador, non-criminalization of migration in general is expressed as one of the guiding principles of the law in question.²⁹⁵

Some national provisions that aim to give domestic effect to Article 31 are evidently too narrow. For instance, the pertinent US provision only protects against some civil penalties,²⁹⁶ whereas there are several criminal laws that are applicable when refugees enter the United States irregularly. In practice, border guards are required to refer all apprehended migrants to the US Attorney's Office, and routinely prosecute for the criminal offenses including illegal entry, illegal re-entry, and use of fraudulent documents.²⁹⁷ This practice led to the prosecution of over 90,000 cases of illegal entry and illegal re-entry in 2012 and 2013.²⁹⁸ Reports have criticized this operation as being in violation of Article 31 of the 1951 Refugee Convention and other provisions of international refugee and human rights law.²⁹⁹

²⁹³ UNREPORTED. SEE ALLTOM JURIDIK (EVERYTHING ABOUT LAW), 'SIDA SAKNADES I PASSET – DÖMS FÖR BRUKANDE AV FALSK URKUND' (5 SEPTEMBER 2016) <[HTTPS://WWW.ALLTOMJURIDIK.SE/SIDA-SAKNADES-I-PASSET-DOMS-FOR-BRUKANDE-AV-FALSK-URKUND/](https://www.alltomjuridik.se/sida-sakna-des-i-passet-doms-for-brukande-av-falsk-urkund/)> ACCESSED 12 APRIL 2017.

²⁹⁴ Article 98(2) of Ley Orgánica de Movilidad Humana includes the extended refugee definition, which entitles all refugees falling under the refugee definition of this law to the protection under the prohibition of criminalization principle, envisaged in Article 2. In addition, Article 113.6. of the law specifies that no sanction shall be imposed on a person for irregular entry or stay while she/he is applying to be recognized as a stateless person.

²⁹⁵ Article 2 of the Ley Orgánica de Movilidad Humana provides that the following are principles of the law: Universal citizenship; free human mobility/movement; prohibition of criminalisation of migration; protection of Ecuadorian people abroad; equality before the law and non-discrimination; pro-persona principle in human mobility; best interests of the child; *non-refoulement*; and regional integration.

²⁹⁶ US Code of Federal Regulations (CFR), § Sec 270.2(j) Enforcement procedures, 8 U.S.C §1101, §1103, and §1324(c); '(j) *Declination to file charges for document fraud committed by refugees at the time of entry.* The Service shall not issue a Notice of Intent to Fine for acts of document fraud committed by an alien pursuant to direct departure from a country in which the alien has a well-founded fear of persecution or from which there is a significant danger that the alien would be returned to a country in which the alien would have a well-founded fear of persecution, provided that the alien has presented himself or herself without delay to an INS officer and shown good cause for his or her illegal entry or presence. Other acts of document fraud committed by such an alien may result in the issuance of a Notice of Intent to Fine and the imposition of civil money penalties.'

²⁹⁷ 1 CBP Headquarters, Office of Public Affairs (December 16 2005). DHS Launches 'Operation Streamline II.' 1.

²⁹⁸ TRACImmigration, 'At Nearly 100,000, Immigration Prosecutions Reach All-time High in FY 2013: Illegal Reentry Prosecutions Jump 76% During Obama Administration' (25 November 2013) <<http://trac.syr.edu/immigration/reports/336/>> accessed 14 April 2017.

²⁹⁹ Emily Puhl, 'Prosecuting the Persecuted: How Operation Streamline and Expedited Removal Violate Article 31 of The Convention on the Status of Refugees and 1967 Protocol' (2015) 25 Berkeley La Raza Law Journal 87.

Some examples of good practice in terms of domestic legislation are found in the Americas, as has emerged throughout this report. For instance, in Argentina,³⁰⁰ the national legislation is framed in similar terms to Article 31, but specifies that both administrative and criminal sanctions are precluded. It also requires that any criminal proceedings that have been initiated should be suspended until determination of refugee status. If refugee status is granted, all pending administrative or criminal sanctions are expunged. In Brazil, any pending administrative or criminal proceedings for irregular entry are suspended for the asylum-seeker and any accompanying family unit. If the asylum-seeker is recognized as a refugee, all proceedings are terminated under the condition that the irregular entry was committed for the same reasons that justify the conferral of refugee status. This is assumed to constitute 'good cause'.³⁰¹ The other qualifying conditions in Article 31 are not included in the domestic legislation.

In Canada, Article 31 of the 1951 Refugee Convention is expressly incorporated into Canadian law. Notably, the relevant provision states that the asylum-seeker 'may not be charged' with any of the specified offenses 'pending disposition of their claim to refugee protection or if refugee protection is conferred', whether they came to Canada 'directly or indirectly from the country in respect of which the claim is made'.³⁰² As noted above, the Canadian courts have also interpreted Article 31 beyond the context of prosecution for criminal offences, finding it applicable to the 'penalty' of treating an asylum claim in a procedurally disadvantageous manner.³⁰³

It should also be borne in mind that States always remain free to offer refugees more protection than the 1951 Refugee Convention requires. In that respect, it is notable that some States go further than non-penalization, and choose not to criminalize refugees at all on account of illegal entry or stay. Thus, for instance, Belize deems refugees not to have committed the offence of illegal entry under its immigration laws.³⁰⁴

³⁰⁰ Argentina, Ley No 26.165. Ley General de Reconocimiento y Protección al Refugiado, art 40; 'No se impondrán sanciones penales o administrativas al solicitante de la condición de refugiado por motivo de ingreso ilegal al país, a condición de que se presente sin demora a las autoridades y alegue causa justificada de su ingreso o permanencia ilegal. La autoridad competente no aplicará otras restricciones de circulación que las estrictamente necesarias y solamente hasta que se haya regularizado la situación del solicitante en el país. En caso de que se haya iniciado causa penal o expediente administrativo por ingreso ilegal, estos procedimientos serán suspendidos hasta que se determine por medio de resolución firme la condición de refugiado del solicitante. En caso de reconocimiento de la condición de refugiado los procedimientos administrativos o penales abiertos contra el refugiado por motivo de ingreso ilegal serán dejados sin efecto, si las infracciones cometidas tuvieron su justificación en las causas que determinaron su reconocimiento como refugiado.'

³⁰¹ Brazil, Lei No 9.474 (22 July 1997), art 8 and 10.

³⁰² Section 133 of the Immigration and Refugee Protection Act (IRPA) provides: 'A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the Criminal Code, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.'

³⁰³ See *B010 v Canada (Citizenship and Immigration)* 2015 SCC 58, [2015] 3 S.C.R. 704.

³⁰⁴ Belize, Refugees Act (y sus reformas) (1991 – Revised edition 2000), cap 156:10(1); 'Saving in respect of illegal entry by refugees. Notwithstanding the provisions of the Immigration Act, a person or any member of his family shall be deemed not to have committed the offence of illegal entry under that Act or any regulations made there

In contrast, vague or under-inclusive legislation can create legal uncertainty, and fail to provide effective protection against penalization. Indeed, in its intervention in *Asfaw*,³⁰⁵ UNHCR suggested that the manner of drafting and interpretation of the domestic provision that sought to incorporate Article 31 had left refugees worse off. That provision should be a safety net for the few prosecutions that were taken – the general obligation incumbent on the United Kingdom was not to prosecute. However, as the legislation did not encompass many common migration control related offences, it failed to meet this aim.

And of course, national legislation depends on proper implementation in order to be effective. For instance, in Bulgaria, Article 31 has been incorporated.³⁰⁶ In practice, however, many asylum-seekers have difficulty accessing the asylum procedure, where formal registration comes after a considerable delay, and many asylum-seekers are detained as irregular entrants pending registration.³⁰⁷ Furthermore, if asylum-seekers attempt to move onwards, the statutory provision is inapplicable to those exiting Bulgaria, and so they still may find themselves penalized for irregular exit.

In South Africa, it was assumed that the domestic provision giving effect to Article 31 effectively established a limit on the general statutory detention powers, apparently assuming that the duty not to penalize was a bar on detention.³⁰⁸ The Immigration Act proscribes illegal entry as a criminal act and permits detention of ‘illegal foreigners’. In *Arse*, the Supreme Court of Appeals reconciled these provisions with that giving effect to Article 31, concluding that where an asylum application had been lodged, detention of the asylum-seeker under the Immigration Act is unlawful.³⁰⁹ In *Bula*, the Supreme Court further held, that where the asylum-seeker has not had the opportunity to apply for asylum before being detained, she or he was entitled to be released from detention.³¹⁰ That ruling is a strong endorsement of the principle of legality that should govern access to asylum, and ensure that would-be asylum-seekers are granted swift access to asylum procedures, which afford them protection against arbitrary detention. Navsa JA (Cloete, Maya, Bosielo and Leach JJA concurring) stated: ‘It follows ineluctably [from the principle of legality] that once an intention to apply for asylum is evinced the protective provisions of the Act and the associated regulations come into play and the asylum-seeker is entitled as of right to be set free subject to the provisions of the Act.’³¹¹ However, in spite of the rights-protective

under: (a) if such person applies in terms of section 8 for recognition of his status as a refugee, until a decision has been made on the application and, where appropriate, such person has had an opportunity to exhaust his right of appeal in terms of that section; or (b) if such person has become a recognised refugee.’

³⁰⁵ UNHCR ‘UNHCR Intervention before the House of Lords in the Case of *Regina (Respondent) and Fregenet Asfaw (Appellant)*’ (28 January 2008), para 7.

³⁰⁶ Criminal Code, art 279(5); ‘No one shall be punished who enters the country to avail himself of the right of asylum in accordance with the Constitution’.

³⁰⁷ AIDA, ‘Country Report: Bulgaria’ (2015) 14 <http://www.asylumineurope.org/sites/default/files/report-download/aida_bg_update.iv_.pdf> accessed 14 April 2017.

³⁰⁸ *Arse v Minister of Home Affairs* 25/10 [2010] ZASCA 9 (12 March 2010) (Supreme Court of Appeal of South Africa), para 19. Admittedly, the reasoning turned on questions of domestic statutory interpretation, as well as concern for refugee protection in general.

³⁰⁹ *Ibid.*

³¹⁰ *Bula & others v Minister of Home Affairs & others* (589/11) [2011] ZASCA 209 (29 November 2011).

³¹¹ *Ibid.*, para 80.

legislation and case law, in practice it appears many asylum-seekers are denied access to asylum procedures and detained. A 2012 report concluded that

‘widespread violations of the law [...] have become a matter of course. Adherence to the procedural guarantees protecting against arbitrary and unlawful detentions have become the exception, while the failure to implement these legal requirements is the norm. Rather than seeking to obfuscate these activities, DHA [the Department of Home Affairs] has openly sought to defend its role as law-breaker, making litigation the only recourse to vindicate the rights guaranteed by law.’³¹²

As discussed above, a general problem in States in Europe appears to be the failure to avoid or suspend criminal prosecution while the asylum claim is determined.

6.3 National Courts

National courts are key actors in giving effect to Article 31. Again in this context, the constitutional configuration of the national legal order and court system determines the extent of the role of national courts in giving effect to international norms. Throughout this paper, extensive reference is made to national case law in order to illustrate how national courts interpret and apply Article 31.³¹³ This case law is an important indicator of States’ interpretation of an important multilateral treaty, usually a principled approach often seeking to correct other State organs’ willful misinterpretation or ignorance of their treaty obligations. National case law is particularly important in the refugee law context given that the 1951 Refugee Convention lacks its own enforcement apparatus. Moreover, the role of national courts is all the more important as Article 31 is not currently regarded as amenable to interpretation by the Court of Justice of the European Union,³¹⁴ wrongly in the author’s view as the next section explores.

The US Courts have refused to find that Article 31 was ‘self-executing’, so in general it is ineffective in domestic court proceedings. The leading case is *US v Malenge*,³¹⁵ concerning an individual who entered the United States from Canada using a false passport, apparently to reunite with her husband, a refugee. She was prosecuted for various document-related crimes, and attempted to invoke Article 31 in her criminal trial and on appeal to the United States Court of Appeals for the Second Circuit. However, the Court of Appeals affirmed the trial court’s ruling, holding that the treaty (in this instance the 1967 Protocol) did ‘not

³¹² Roni Amit, ‘Breaking the Law, Breaking the Bank: the Cost of Home Affairs’ Illegal Detention Practices’ (September 2012) ACMS Research Report (South Africa) 62 <<http://www.migration.org.za/uploads/docs/report-37.pdf>> accessed 13 March 2017.

³¹³ See generally Andre Nollkaemper, *National Courts and the International Rule of Law* (OUP 2011); Helmut Philipp Aust and Georg Nolte, *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (OUP 2016).

³¹⁴ Case C-481/13 *Qurbani* [2014] OJ C 31/24.

³¹⁵ *United States v Malenge*, 472 F. Supp. 2d 269 (NDNY 2007), aff’d, 294 F. App’x 642 (2d Cir. 2008); affirmed in *United States v Barry*, 500 F. Supp. 2d 125 (NDNY 2007), aff’d, 294 F. App’x 641 (2d Cir. 2008). In earlier cases, the courts had found Article 31 not engaged on the facts, so did not address or left unresolved the matter of whether it was ‘self-executing’ in the US legal order. See, for example, *Bazzi v Ashcroft*, 118 F. App’x 953 (6th Cir. 2004); *Singh v Nelson*, 623 F. Supp. 545 (SDNY 1985).

provide Malenge with any judicially enforceable rights.’ In addition, deferring to executive and prosecutorial discretion, the Court noted it lacked authority to prevent her prosecution.³¹⁶ In spite of finding Article 31 legally inapplicable, the District Court had also opined that in any event it was not engaged on the facts.³¹⁷

For instance, in some national systems that are rigidly and traditionally dualist, without specific legislative incorporation, judges may decline to give effect to Article 31. For instance, in Ireland, the High Court held that as the 1951 Refugee Convention was not incorporated into Irish law, nor did it create a ‘legitimate expectation [...] that Article 31 [...] could be successfully invoked [...] so as to prevent the Director of Public Prosecutions prosecuting her and maintaining such prosecution’.³¹⁸ This is a highly rigid dualistic approach, quite out of keeping with developments in other common law jurisdictions.

In contrast, other dualist systems nonetheless offer some indirect means to enforce Article 31 in national courts, such as through statutory interpretation and administrative law remedies.³¹⁹ Thus, for instance, in *Asfaw*, the UK House of Lords admitted that the United Kingdom legislation implementing Article 31 did not cover the offence in question. In spite of UNHCR’s powerful intervention, they could find no way under UK law to interpret the domestic legislation in line with the full scope of the protection contemplated by Article 31. However, the Court agreed that the prosecution had been *an abuse of process*, in that the appropriate prosecutorial course was not to prosecute for any offence to which Section 31 was not applicable, or to stay that prosecution until any trial of the other offence had reached its completion. In *SXH*, the UK Supreme Court noted that there were many legal remedies that could be available to a refugee who was prosecuted in spite of evidence that she or he would have a defence to an action related to illegal entry, such as torts under domestic law of malicious prosecution or misfeasance in public office.³²⁰ It was also noted that any pre-trial detention could breach Article 5 ECHR if the prosecutorial authorities failed to consider and inform the court of potential defences, which led to a prolongation of detention.³²¹

A 2009 immigration law in New Zealand sets out specific offences relating to the provision of false or misleading information. The Section also provides that ‘[t]o avoid doubt, no proceedings under subsection (1)(b) may be brought if the documents or information are

³¹⁶ *United States v Malenge*, 294 F. App’x 642, 644 (2d Cir. 2008).

³¹⁷ ‘Inversely paraphrased, contracting states are free to prosecute when refugees illegally enter either from a country in which they have settled following their exodus from the country of persecution, or when they fail to immediately notify authorities that they are seeking asylum and explain their illicit entry. Nothing in the Treaty itself precludes prosecution for the use of false documents, including passports. As the facts reflect, Malenge did not immediately notify authorities that she was seeking asylum and arguably, she had settled in Canada before attempting entry into the United States.’ *United States v Malenge*, 472 F. Supp. 2d 269, 273 (NDNY 2007).

³¹⁸ *Sofineti v Judge David Anderson, Director of Public Prosecutions and the Minister for Justice, Equality and Law Reform* [2004] IEHC 440 (Ireland). This was confirmed in the later case of *Siritanu v. The Director of Public Prosecutions and Anor* [2006] IEHC 26 (02 February 2006).

³¹⁹ See generally Melissa Waters, ‘Creeping Monism: The Judicial Trend Towards Interpretative Incorporation of Human Rights Treaties’ (2007) 107 *Columbia Law Review* 628. Waters’ expression ‘creeping monism’ refers to courts moving away from dualism to develop tools to give effect to international human rights and refugee law.

³²⁰ *SXH v The Crown Prosecution Service* [2017] UKSC 30, 11 April 2017, per Lord Toulson (with whom Lord Mance, Lord Reed and Lord Hughes agreed) [36].

³²¹ *Ibid* (Lord Kerr) [43]-[45].

supplied in the circumstances to which Article 31(1) of the Refugee Convention applies.’³²² Prior to the introduction of this provision, it appears that if asylum-seekers or refugees were tried for other immigration-related offences, such as those under the 1991 Passports Act, the courts sought to give effect to the principle in Article 31(1) by requiring trial courts to take it into account in sentencing or when applying general defences under criminal law (such as ‘reasonable excuse’ and ‘compulsion’). For example, in *Appiah*, where the applicant was convicted of an offence under the 1992 Passports Act, the High Court held that it required a finding on the applicant’s refugee status before it could exercise an informed judgment when sentencing.³²³ In a later case of *AHK*, the High Court went further and held that the asylum application had to be processed before a decision on his passport offence could be made, because if he were later found to be a refugee, his refugee status would constitute a reasonable excuse under the legislation.³²⁴

6.4 Systemic Breaches

Some of the State practices surveyed reveal systemic and widespread breaches of Article 31, combined with other human rights and refugee law violations. Often in these States, the role of domestic courts has been ignored or restricted, suggesting that these sorts of breaches also entail deep rule of law challenges at the domestic level.

For example, Hungary has introduced new physical, criminal and asylum measures to deflect, deter and unfairly reject asylum-seekers since 2015.³²⁵ It enacted a number of new criminal offences when it constructed fences along its borders with Serbia and Croatia, in order to deflect refugees and migrants who were arriving *en masse* in 2015. The offences included unauthorized crossing of the border fence, destroying/vandalizing the border fence, and obstruction of the construction works related to the border fence.³²⁶ In addition, special, fast-track criminal procedures were introduced (which in themselves raised concerns about the fairness of the criminal trials conducted).³²⁷ Under these new provisions, between 2015 and 2016, thousands of asylum-seekers were convicted of criminal offences relating to the border fence. Attempts to rely on Article 31 in these cases apparently failed, including because asylum-seekers were deemed not to have ‘come directly’ to Hungary.³²⁸ In March 2017, Hungary introduced a further law making administrative detention at the border mandatory.³²⁹ As mentioned above, the new criminal measures were also combined with

³²² Immigration Act 2009, s 342.

³²³ *Appiah v New Zealand Police* [1997] AP97/97 (High Court of New Zealand).

³²⁴ *AHK v Police* [2002] NZAR 531 (High Court of New Zealand) 11 December 2001.

³²⁵ UNHCR ‘Hungary as a Country of Asylum. Observations on Restrictive Legal Measures and Subsequent Practice Implemented between July 2015 and March 2016’ (May 2016); AIDA, ‘Country Report: Hungary’ (2016 Update) <http://www.asylumineurope.org/sites/default/files/report-download/aida_hu_2016update.pdf> accessed 7 April 2017.

³²⁶ Criminal Code (2012), s 352/A - 352/C Act C.

³²⁷ See further Letter from the European Commission to Mr Olivér Várhelyi, Permanent Representative of Hungary to the EU, Ref Ares (2015) 4109816 (6 October 2015) 7 <<http://www.statewatch.org/news/2015/oct/eu-com-letter-hungary.pdf>> accessed 26 March 2017, discussed further below.

³²⁸ UNHCR ‘Hungary as a Country of Asylum. Observations on Restrictive Legal Measures and Subsequent Practice Implemented between July 2015 and March 2016’ (May 2016) 57- 62.

³²⁹ ECRE, News Item, ‘Hungary Approves Controversial Law Allowing Automatic Detention of Asylum Seekers’ (17 March 2017) <<http://www.ecre.org/hungary-approves-controversial-law-allowing-automatic-detention-of->

changes to the asylum legislation to deflect asylum-seekers back to Serbia using a quasi-automatic safe third country rule, in defiance of a clear ruling by the Hungarian Supreme Court,³³⁰ and more recently the ECtHR.³³¹ These measures entail multiple violations of EU and international law, including Article 31 of the 1951 Refugee Convention. The various criminal measures (pre-trial detention, process, and formal sentences imposed) may arguably be regarded as ‘penalties’ within the meaning of Article 31(1). The systematic detention of asylum-seekers also clearly violates Article 31(2).

6.5 EU Law and Article 31

In its ruling in *Qurbani*, the CJEU declined to provide interpretative guidance to a national court on the meaning of Article 31. However, that ruling does not mean that Article 31 is not pertinent to EU law, or that in another context, such an interpretation would not be forthcoming. Generally speaking, the CJEU has repeatedly stated that the 1951 Refugee Convention is the ‘cornerstone of the international legal regime for the protection of refugees and that [the Qualification Directive was] adopted to guide the competent authorities of the Member States in the application of [the 1951 Refugee Convention] on the basis of common concepts and criteria’.³³²

The reason the Court declined to interpret Article 31 in *Qurbani* lies in the nature of the domestic proceedings, and the failure to demonstrate the clear link with EU law. Mr Qurbani was an Afghan national who sought asylum in Germany, using a forged passport to enter the country. He was arrested at the airport and immediately indicated that he wished to apply for refugee status. He had entered the EU in Greece, having passed through Iran and Turkey. Mr Qurbani was acquitted by the lower court, but the State Prosecutor brought an appeal against the acquittal, arguing that Article 31 was inapplicable as Mr Qurbani had not ‘come directly’ (having passed through Greece) and that Article 31 only applied to unauthorized entry itself, and not related offences (in this case use of forged documents). The questions referred thus raised elementary issues around the correct interpretation of Article 31.³³³

The German and Dutch governments, and the European Commission intervened, arguing that the CJEU had no jurisdiction to hear the case, as it could only interpret matters falling within the scope of EU law. Regarding international agreements entered into by EU Member

asylum-seekers/> accessed 7 April 2017.

³³⁰ Opinion No 2/2012 (XII.10), 10 December 2012 (Supreme Court of Hungary).

³³¹ *Ilias and Ahmed v Hungary* App no 47287/15 (ECHR, 14 March 2017).

³³² Case C-604/12 *HN* [2014] OJ C 202/6, para 27, citing *X, Y, and Z*, para 39 and the case law cited.

³³³ Case C-481/13 *Qurbani* [2014] OJ C 31/24, para 16; ‘1) Does the personal ground for exemption from penalties in Article 31 of the Geneva Convention also include beyond its wording forgery of documents which took place on presentation of a forged passport to a police officer on the occasion of entry by air into Germany when the forged passport is not in fact necessary to apply for asylum in that State. 2) Does the use of human traffickers preclude reliance on Article 31 of the Geneva Convention? 3) Is the factual requirement in Article 31 of the Geneva Convention of “coming directly” from a territory where the life or freedom of the person concerned was threatened to be interpreted as meaning, that that condition is also satisfied if the person concerned first entered another Member State, here the Hellenic Republic, from where he continued to another Member State, here the Federal Republic of Germany in which he seeks asylum.’

States (but to which the EU is not a party), the position in EU law is that if the EU is deemed to have assumed powers in the fields covered by the international agreement, those agreements fall within the Court's jurisdiction. On this basis, the CJEU interprets many such international agreements. However, regarding Article 31 of the 1951 Refugee Convention, the Court stated that although the EU is competent to establish a Common European Asylum System which must, as a matter of EU law, 'be in accordance with the [1951 Refugee Convention] and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties'³³⁴, nonetheless 'Member States have retained certain powers falling within that field, in particular relating to the subject matter covered by Article 31 of that Convention'. It appears that it was decisive that the particular case arose out of the criminal proceedings for use of forged documents, and the referring judge did not make clear what the link with EU law was in the particular case.

However, it is entirely possible that many other disputes may arise in national courts which raise both EU law and Article 31 issues simultaneously. For instance, many specific EU asylum measures make reference to Article 31, including the Qualification Directive.³³⁵ The Preambles of both the Dublin III Regulation³³⁶ and the Reception Conditions Directive³³⁷ refer to Article 31 relating to detention. If any legal case raised questions of interpretation pertaining to those instruments, and Article 31 was relevant, it would certainly be a question falling within the jurisdiction of the CJEU. Indeed, in light of the requirement in Article 78(1) that the CEAS must be 'in accordance with' the 1951 Refugee Convention, it would seem that a question of EU law could be raised if any aspect of the CEAS was alleged to be incompatible with any provision of the Convention.

The manner in which EU law regulates external border crossings also means Article 31 is directly legally relevant. Article 3a of the Schengen Border Code refers to compliance with the 1951 Refugee Convention generally.³³⁸ Article 3 of the same Code applies to any person

³³⁴ TFEU, art 78(1).

³³⁵ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, art 14(6).

³³⁶ Regulation (EU) No 604/2013 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), recital (20); 'The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection. Detention should be for as short a period as possible and subject to the principles of necessity and proportionality. In particular, the detention of applicants must be in accordance with Article 31 of the Geneva Convention.'

³³⁷ Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), recital (15); 'The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention. Where an applicant is held in detention he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority.'

³³⁸ Act 562/2006 (EU) of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), art 3a.

crossing an internal or external border of a State, and is stated to be ‘without prejudice to: [...] (b) the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*.’ Article 5 sets out the entry conditions and requirements for stays not exceeding three months per six months for third country national. Article 7 regulates border checks on persons, comprising ‘thorough checks on entry and exit’ of third country nationals, for the purpose of verifying identity and documentation. Article 4(3) refers to the imposition of penalties for the unauthorized crossing of external borders (although it adds ‘at places other than border crossing points or at times other than the fixed opening hours’).

As Holiday notes, ‘it would seem to be at least implicit that Article 31 of the Refugee Convention would be relevant to the obligation in the Code to impose penalties for crossing the borders without authorization.’³³⁹ Indeed, the meaning of these provisions could have been pertinent to the criminal case at issue in *Qurbani*. It may simply have been that the national judge failed to demonstrate their pertinence to the satisfaction of the CJEU. Moreover, in spite of the position it supported in the case, in other contexts the European Commission has raised Article 31 in its correspondence with Member States on border controls. For instance, in a detailed letter to the Hungarian government about its new laws of July and September 2015, under the heading of ‘Criminalisation of Illegal Entry’ it asked Hungary to explain ‘in so far as these criminal sanctions fall within the scope of Article 4(3) Schengen Borders Code, [...] how they are in line with Article 31 of the [1951 Refugee Convention], given that this Article requires Member States (under conditions laid down therein) not to impose sanctions on asylum-seekers for their illegal entry.’³⁴⁰

It would also be wrong to infer that EU law was inapplicable as the matter arose in a criminal trial. There are many EU measures that impinge on domestic criminal trials. For instance, in *El Dridi* and a number of other cases concerning the EU Returns Directive, the imposition of criminal penalties for illegal stay was held to be precluded as a matter of EU law, as it undermined the effectiveness of the EU Directive in question. This illustrates that EU norms have effects in many domains, not simply in those they regulate directly.³⁴¹

There are four key EU Directives that relate to the fairness of criminal trials.³⁴² Most recently,

³³⁹ Yewa Holiday, ‘Penalising Refugees: when should the CJEU have jurisdiction to interpret Article 31 of the Refugee Convention?’ EU Law Analysis Blog (19 July 2014) <<http://eulawanalysis.blogspot.de/2014/07/penalising-refugees-when-should-cjeu.html> blogpost> accessed 25 March 2017.

³⁴⁰ Letter from the European Commission to Mr Olivér Várhelyi, Permanent Representative of Hungary to the EU, Ref. Ares (2015) 4109816 (6 October 2015) 7 <<http://www.statewatch.org/news/2015/oct/eu-com-letter-hungary.pdf>> accessed 26 March 2017.

³⁴¹ Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015) 301-306 for discussion of Case C-61/11 PPU *Hassen El-Dridi alias Karim Soufi* [2011] ECR I-3015; Case C-329/11 *Alexandre Achughbabian v Préfet du Val-de-Marne* [2011] ECR I-12695; Case C-430/11 *Sagor* [2013] OJ C 26/13; Case C-522/11 *Mbaye* [2013] OJ C 156/16.

³⁴² Directive 2010/64/EU (EU) of 20 October 2010 on the right to interpretation and translation in criminal proceedings (Translation and Interpretation Directive); Directive 2012/13/EU (EU) of 22 May 2012 on the right to information in criminal proceedings (The Right to Information Directive); Directive 2013/48/EU (EU) of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty (Access to a Lawyer Directive); Directive 2016/343 (EU) of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings (Presumption of Innocence Directive).

the EU adopted a Directive on the presumption of innocence. Legal experts have suggested that this measures' implementation in cases concerning refugees where Article 31 is applicable requires careful attention, in particular to ensure that the defence complies with Article 5 of that Directive (on the burden of proof).³⁴³ For instance, in its general report on defense rights in Europe in 2016, the Legal Experts Advisory Panel (LEAP), an EU-wide network of over 150 criminal justice experts coordinated by the NGO Fair Trials, noted that criminal prosecutions related to irregular entry were on the increase, and that cases raised questions pertaining both to Article 31 and the Presumption of Innocence Directive:

'Hungary, for example, has created a criminal offence, with a specific procedural regime relating to crossing its fence at the Serbian border. UK authorities have also prosecuted a number of refugees for using false documents and walking through the Channel Tunnel. Such offences create legal obstacles to access to asylum and may divert asylum- seekers away from the EU-regulated asylum process, into the criminal justice system. They may also be incompatible with the 1951 Convention relating to the status of refugees, Article 31 of which prohibits the imposition of penalties on account of illegal entry. Where the burden of proving Article 31-type defences rests upon the refugee, an issue may arise in relation to Article 4 of the Presumption of Innocence Directive, which prohibits reversals of the burden of proof.'³⁴⁴

In this way, future cases on the interpretation of Article 31 of the 1951 Refugee Convention may raise questions of EU law, even directly in the criminal context.

³⁴³ Legal Experts Advisory Panel (LEAP), 'Defence Rights in Europe the Road Ahead' (16 March 2016) <<https://www.fairtrials.org/wp-content/uploads/Defence-Rights-in-the-EU-full-report.pdf?platform=hootsuite>> accessed 14 April 2017.

³⁴⁴ *Ibid* 46-47.

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ACKNOWLEDGEMENTS

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