

Roundtable on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying  
Article 31 of the 1951 Refugee Convention

15 March 2017

Refugee Studies Centre, University of Oxford, United Kingdom

**Summary Conclusions**

The Office of the United Nations High Commissioner for Refugees (UNHCR) convened an expert roundtable on the non-penalization of refugees for their illegal entry or presence as regulated by Article 31 of the 1951 Convention relating to the Status of Refugees (1951 Convention)<sup>1</sup> in Oxford, United Kingdom on 15 March 2017.

The roundtable, hosted by the Refugee Studies Centre of the University of Oxford, was organized by UNHCR as part of a broader project to develop Guidelines on the interpretation and application of Article 31 of the 1951 Convention pursuant to its mandate.<sup>2</sup> The issue of (non-) penalization of asylum-seekers and refugees for their irregular entry and/or presence in the country of asylum is topical in the context of managing refugee flows. With states increasingly focused on criminalizing and penalizing irregular entry and stay, the proposed Guidelines will clarify the meaning, scope and legal effect of Article 31 of the 1951 Convention. The discussion was informed by a comprehensive background study by Dr Cathryn Costello, assisted by Yulia Ioffe and Teresa Büchsel, into the law and practice of Article 31 of the 1951 Convention ('the Study'). The Study focuses on the contemporary interpretation and application of the article by States Parties to the 1951 Convention and/or its 1967 Protocol,<sup>3</sup> analyzing in particular case law from international, regional and national courts, as well as UNHCR's positions and academic literature.<sup>4</sup> The Study and roundtable follow earlier work on Article 31 undertaken in the context of UNHCR's Global Consultations on International Protection in 2001.<sup>5</sup>

Participants included 17 experts from ten countries, drawn from governments, NGOs, academia, the judiciary and the legal profession, as well as UNHCR experts.

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<sup>1</sup> Convention relating to the Status of Refugees, 28 July 1951 (entered into force 22 April 1954), 189 UNTS 137 (1951 Convention).

<sup>2</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), paras. 1 and 8(a), <http://www.unhcr.org/refworld/docid/3b00f0715c.html> and the 1951 Convention, preamble and Article 35(1).

<sup>3</sup> Protocol Relating to the Status of Refugees (31 January 1967) 606 UNTS 267 (1967 Protocol), <http://www.refworld.org/docid/3ae6b3ae4.html>

<sup>4</sup> Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, July 2017, PPLA/2017/01, ("Costello et al"), <http://www.refworld.org/docid/59ad55c24.html>.

<sup>5</sup> See in this regard, Guy S Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection [Global Consultations on International Protection/Second Track]*, 1 October 2001, ("Goodwin-Gill Article 31"), <http://www.refworld.org/docid/3bf9123d4.html> and UNHCR, *Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees - Revised [Geneva Expert Roundtable, 8-9 November 2001] [Global Consultations on International Protection/Second Track]*, 9 November 2001, para. 10(a), <http://www.refworld.org/docid/470a33b20.html>, ("UNHCR Summary Conclusions 2001").

These Summary Conclusions do not necessarily represent the individual views of participants or UNHCR, but instead broadly reflect the themes and understandings that emerged from the Study and roundtable discussions.

**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.

**The object and purpose of Article 31 of the 1951 Convention**

1. Restrictive approaches to cross-border movements often cause refugees to resort to irregular journeys and border crossings.<sup>6</sup> Refugees apprehended at land, air or sea borders, and in country, without proper documentation are often subjected to a range of punitive and repressive measures. Measures criminalizing irregular immigration frequently exceed the legitimate interest of states in controlling and regulating irregular immigration.<sup>7</sup> Laws and policies penalizing irregular entry and presence also risk denying refugees access to fair asylum procedures and protection.<sup>8</sup> The Study reveals systemic and widespread breaches of Article 31 seen in some states.<sup>9</sup>

2. Article 31 is central to the purpose of the 1951 Convention, ensuring refugees can effectively gain access to international protection. Unfortunately, the article is not well understood, may be ineffective in national law and practice, and is often generally overlooked as a principle of refugee protection. Effective implementation of Article 31 requires states to proceed promptly with the determination of refugee status through a fair and efficient asylum procedure.

3. Article 31(1) of the 1951 Convention recognizes that in exercising the right to seek asylum, refugees are often compelled to arrive, enter or stay in a territory without authorization or with no, insufficient, false or fraudulent documentation.<sup>10</sup> Notwithstanding the requirement under Article 2 of the 1951 Convention that refugees conform to the laws and regulations of the asylum country, Article 31(1) recognizes that refugees fleeing persecution to reach safety often have to resort to irregular means to enter the country of

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<sup>6</sup> Costello et al, note 4 above, refers to the criminalization and suppression of irregular migration.

<sup>7</sup> *Ibid.*, p. 38. UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, para. 3, (“UNHCR Detention Guidelines”), <http://www.refworld.org/docid/503489533b8.html>.

<sup>8</sup> UNHCR, *Note on international protection*, 16 June 2017, EC/68/SC/CRP.12, para. 24, <http://www.refworld.org/docid/595e1f684.html>.

<sup>9</sup> Costello et al, note 4 above, p. 59

<sup>10</sup> EXCOM Conclusion No. 58 (XL) 1989, para. (a).

refuge.<sup>11</sup> Travelling without fulfilling relevant travel and immigration requirements<sup>12</sup> is often a reality for refugees who seek to invoke the international protection afforded to them under the 1951 Convention.<sup>13</sup>

4. Article 31(1) of the 1951 Convention is a non-penalization clause for refugees who enter or are present in the territory of a State Party without authorization. The clause protects refugees who have come directly from territories where their life or freedom is threatened from penalties imposed on account of illegal entry or presence, provided they present themselves without delay to authorities and show good cause for their illegal entry or presence.<sup>14</sup>

5. In addition to Article 31(1)'s broad non-penalization clause, Article 31(2) of the 1951 Convention prohibits States Parties to the 1951 Convention and/or 1967 Protocol from restricting refugees' freedom of movement, except when such restrictions are necessary. As well as being subject to a necessity test, restrictions must also be applied only until either the refugee's status in the country is regularized or until the refugee has obtained admission to another country for which she or he is given a reasonable time and all the necessary facilities.

#### **Applicability *ratione personae* of Article 31(1) of the 1951 Convention**

6. Article 31(1) of the 1951 Convention protects refugees as defined in Article 1. Refugees recognized under the broader refugee criteria of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention)<sup>15</sup> and the 1984 Cartagena Declaration on Refugees (1984 Cartagena Declaration)<sup>16</sup> should equally benefit from protection afforded under Article 31(1) of the 1951 Convention when the responsible state is a party to the 1951 Convention.<sup>17</sup> Moreover, the Study argues that other persons in need of international protection, who are for example eligible for complementary or subsidiary protection statuses, ought to be protected in a similar manner from penalties

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<sup>11</sup> UN Ad Hoc Committee on Refugees and Stateless Persons, *Comité spécial pour les réfugiés et les apatrides, Deuxième session, Project de rapport du Comité spécial de l'apatridie et des problèmes connexes, Lake Success, New York, 16 janvier au février 1950*, 15 February 1950, E/AC.32/L.38, comment to paragraph 1 of then-draft Article 26, <http://www.refworld.org/docid/3ae68c264.html>.

<sup>12</sup> For example, visa requirements or related registration procedures for legally exiting one country or entering another.

<sup>13</sup> UN Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Status of Refugees and Stateless Persons - Memorandum by the Secretary-General*, 3 January 1950, E/AC.32/2, comment to paragraph 2 of then-draft Article 24, <http://www.refworld.org/docid/3ae68c280.html>, stating: "[a] refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum."

<sup>14</sup> See UNHCR Summary Conclusions 2001, note 5 above, pp. 253–58.

<sup>15</sup> OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) 1001 UNTS 45 (1969 OAU Convention), <http://www.refworld.org/docid/3ae6b36018.html>.

<sup>16</sup> Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, (Cartagena Declaration), <http://www.refworld.org/docid/3ae6b36ec.html>. The 1984 Cartagena Declaration is not a treaty within the meaning of Article 1(a) of the 1969 Vienna Convention on the Law of Treaties (23 May 1969) 1155 UNTS 331.

<sup>17</sup> In states party to the 1951 Convention and/or 1967 Protocol, refugees recognized under the 1969 OAU Convention, whether under Article I(1) or I(2), or Conclusion III(3) of the Cartagena Declaration, benefit from the 1951 Convention's rights framework. A difference in treatment would be neither reasonable nor objectively justified and would disregard the complementary character of the 1969 OAU Convention and the Cartagena Declaration. Moreover, the ninth preambular paragraph of the 1969 OAU Convention and Conclusion III(8) of the Cartagena Declaration recognize the need and desire to establish common or minimum standards for the treatment of refugees on the basis of the 1951 Convention.

resulting from their irregular entry and/or presence given that they are similarly situated to 1951 Convention refugees and often have indistinguishable protection needs. The Study argues that this protection is legally obligatory under equality norms, a point subject to lively discussion at the roundtable.

7. For Article 31(1) to be effective, it must apply to any person who is or claims to be in need of international protection, and it must only cease to apply once a decision-maker issues a final decision, after following a fair procedure, holding otherwise.<sup>18</sup> As such, Article 31(1) also applies to asylum-seekers whose claims are deemed inadmissible, as no decision has yet been made as to whether they are refugees. However, Article 31(1) does not apply to “rejected asylum-seekers” who have been found not to be in need of international protection after having been issued a final decision following a fair procedure.<sup>19</sup> Similarly, the effectiveness of Article 31 requires that its protection extend to those granted temporary forms of protection in anticipation of their refugee status determination.<sup>20</sup> A large-scale influx of refugees does not alter the prohibition on penalization under Article 31(1) of the 1951 Convention.<sup>21</sup>

### **“Coming directly”**

8. Article 31(1) covers refugees who come “directly from a territory where their life or freedom was threatened.” State practice confirms that this phrase covers refugees who enter the country in which they seek asylum from another country where their protection could not be assured.<sup>22</sup> The Study argues it not only includes refugees who come directly from their country of origin or any country in which their life or freedom is threatened, but also refugees who come from an intermediary country in which they have not received refugee protection.<sup>23</sup> Participants noted a certain ambiguity between ‘protection could not be assured’ and ‘have not received protection’, and expressed the need to consider different scenarios in this context to ensure the protective purpose of Article 31(1).<sup>24</sup>

9. Notwithstanding a few exceptionally restrictive approaches adopted by states,<sup>25</sup> the term “directly” is generally interpreted broadly and not in a literal – temporal or geographical – sense. Refugees are not required to have come without pausing, stopping, or crossing through other countries after leaving the country where they were threatened.<sup>26</sup> Further, while the length of time spent in the intermediary country or countries may be a relevant factor for interpreting the term “coming directly,” no strict time limit ought to be applied to passages through or stopovers in other countries, and each case must be assessed on its own facts. When assessing whether transit through or previous stay in another country is consistent with the concept of “coming directly,” the reasons for delay – for example to acquire the means to travel onwards or being under the control of a smuggler – and the

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<sup>18</sup> UNHCR Summary Conclusions 2001, note 5 above, para. 10(g) and Costello et al, note 4 above, p. 15.

<sup>19</sup> UNHCR Summary Conclusions 2001, note 5 above, para. 10(g).

<sup>20</sup> UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, para. 8 (ninth point), <http://www.refworld.org/docid/52fba2404.html>.

<sup>21</sup> EXCOM Conclusion No. 22 (XXII), 1981, para. IIB(2)(a).

<sup>22</sup> Costello et al, note 4 above, p. 19.

<sup>23</sup> UNHCR Summary Conclusions 2001, note 5 above, para. 10(c).

<sup>24</sup> Costello et al, note 4 above, pp. 20-22.

<sup>25</sup> *Ibid.*, p. 22, ft 113.

<sup>26</sup> UNHCR Summary Conclusions 2001, note 5 above, para. 10(b). See also, UNHCR, *Summary Conclusions on the Concept of “Effective Protection” in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, para. 11, <http://www.refworld.org/docid/3fe9981e4.html>, and Goodwin-Gill Article 31, note 5 above, pp. 217–218.

refugee's reason for wanting to reach a particular country of refuge – for example a desire to reunite with family – are relevant factors to be taken into account.<sup>27</sup>

10. Another issue arising in understanding “coming directly” is its relation to “safe third country” practices. The central concern of the “safe third country” concept is the safety and ability of return to a third country and the admissibility of the asylum application in the current country, rather than the issue of non-penalization for irregular entry. “Safe third country” practices<sup>28</sup> are therefore largely irrelevant to the “coming directly” analysis, though it may be tangentially relevant insofar as a refugee has stopped in another country where protection could have been sought and assured but unduly delayed his or her efforts to seek protection, in which case he or she may not be considered to have “come directly.” However, there is no obligation under international law for a person to seek international protection at the first effective opportunity, and in many cases it may be unrealistic to either expect the asylum-seeker to do so or to assume the availability of protection in the intermediate state.<sup>29</sup>

### **Entry or presence in the territory without authorization**

11. States are responsible under Article 31(1) for refugees who “enter or are present in their territory without authorization.” The term “territory” includes a state’s land territory and territorial waters as well as its border entry points, including international or transit zones at land borders, ports, and airports.<sup>30</sup> Refugees seeking to enter a state without authorization and intercepted at the border or in its immediate vicinity may also be protected under Article 31(1) of the 1951 Convention. It was noted at the roundtable that the extraterritorial application of Article 31(1) is limited due to the text’s explicit reference to “territory,” in contrast to the principle of *non-refoulement* under Article 33 of the 1951 Convention which has no such limitation, and includes situations in which the refugee is unambiguously seeking to enter the state’s territory as well as situations in which people are intercepted at sea and brought to the state’s territory.

12. The term “authorization” refers to the state’s permission for the person to enter and/or to be present in its territory.<sup>31</sup> Entering, including re-entering, in contravention of such rules – for example, by using false or fraudulent papers, failing to observe border control formalities, using methods of deception or clandestine entry (for example, as a stowaway), or using the assistance of smugglers or traffickers<sup>32</sup> – would qualify as entry without authorization within the meaning of Article 31(1) of the 1951 Convention. Refugees who enter a state under formal readmission or responsibility-sharing agreements<sup>33</sup> are normally, under

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<sup>27</sup> UNHCR Summary Conclusions 2001, note 5 above, para. 10(d). EXCOM Conclusion No. 15 (XXX), 1979, para. (h)(iii).

<sup>28</sup> For general considerations on safe third country concepts, see: UNHCR, *Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept*, 23 March 2016, para. 2.1, <http://www.refworld.org/docid/56f3ee3f4.html>.

<sup>29</sup> EXCOM Conclusion No. 15 (XXX) 1979, para. (h) (iv).

<sup>30</sup> Article 27 of the 1969 Vienna Convention on the Law of Treaties (*Vienna Convention on the Law of Treaties* (23 May 1969) 1155 UNTS 331 <http://www.refworld.org/docid/3ae6b3a10.html>), confirms that a state may not invoke its domestic legislation as a basis or justification for failure to perform its international obligations.

<sup>31</sup> UNHCR, “*Lawfully Staying*” - A Note on Interpretation, 3 May 1988, para. 9, <http://www.refworld.org/docid/42ad93304.html>.

<sup>32</sup> EXCOM Conclusion No 97 (LIV) 2003, para. (a)(vi).

<sup>33</sup> This includes the “EU Dublin Regulation”, 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, <http://www.refworld.org/docid/51d298f04.html>.

the terms of the agreement, authorized to enter the territory. However, if the state penalizes them nonetheless, it would potentially infringe Article 31(1).

13. Unauthorized presence refers inter alia both to persons who have never had permission to be present and also those whose permission has ceased, including persons whose regular migratory status has ended and who have become refugees *sur place*.

14. Finally, discussions turned to the applicability of Article 31(1) to situations of unauthorized exit, for example refugees intercepted when attempting to leave transit states in contravention of exit rules in order to reach their intended asylum country. The persuasive national case law supporting the inclusion of this scenario within Article 31(1) was noted and endorsed.<sup>34</sup> However, the Roundtable noted that the text of Article 31(1) refers only to “entry or presence,” and the human right to leave any country significantly limits, but does not completely prohibit, exit controls to prevent illegal entry into third states.

### **Presenting themselves without delay to the authorities**

15. For refugees to be protected by Article 31(1) of the 1951 Convention they need to present themselves to the authorities and do so without delay. The term “authorities” is broad and does not refer to any particular state entity or agent.

16. The term “without delay” must not be interpreted as a strict temporal requirement and is different from and broader than “promptly” or “as early as possible.” Its interpretation is a matter of fact and degree, depending on the circumstances of the case, including the time and mode of arrival, the availability of information<sup>35</sup> and the refugee’s understanding of where and to which authority he or she is to report. Even when apprehended or detained before reasonably being able to make an asylum claim, the refugee may still be protected under Article 31(1). Leeway must be allowed for misperceptions, erroneous advice provided by smugglers, trauma, language problems, lack of information, feelings of insecurity, mistrust or angst (especially mistrust or angst resulting from the experience of being a refugee), and previous experiences with the authorities.<sup>36</sup> On the other hand, “without delay” also refers to the duty of refugees to conform to the laws and regulations of the host country.<sup>37</sup> A proper application of “without delay” depends on the refugee’s genuine intent and good faith, indicated inter alia by his or her conduct and due diligence and his or her knowledge and understanding of the availability of international protection. Given the need for a flexible interpretation of the phrase “coming directly,” concerns were expressed about strict time limits included in some national laws by which refugees must make themselves known to the authorities and apply for asylum.

17. The situation of refugees arriving at airports and presenting false or fraudulent documents was seen as particularly important to address and clarify. One may argue that refugees can claim asylum directly upon arrival and therefore have no reason to present false or fraudulent documents. However, while it may be rational in some cases to expect the refugee to claim asylum immediately upon arrival (or at least not unduly delay making a claim), newly-arrived refugees might reasonably fear summary return and regard border crossings or points of entry as unsafe or inappropriate places to make an asylum claim. This refugee reality

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<sup>34</sup> Costello et al, note 4 above, p. 27, ft. 135.

<sup>35</sup> UNHCR Summary Conclusions 2001, note 5 above, para. 10(f).

<sup>36</sup> UNHCR Detention Guidelines, note 7 above, Guideline 1, para. 11.

<sup>37</sup> This refers to Article 2 of the 1951 Convention, see reference to this article in the UNHCR Summary Conclusions 2001, note 5 above, para. 10(f).

has been recognized by several domestic courts, which have afforded the protection of Article 31 to cover the use of false or fraudulent documents to enter the country. Further, it may be necessary for state officials to identify those seeking asylum, in particular children and other refugees with specific needs, and refer them to the proper authorities and procedures, rather than directing them to present themselves to immigration authorities.

### **Showing good cause for the illegal entry or presence**

18. Refugees must show good cause for their illegal entry or presence. Having a well-founded fear of being persecuted may in itself be a “good cause” for illegal entry or presence, depending on the factual context. As mentioned above, in reality refugees face multiple factual and legal risks and barriers in search of safety. They are often unable to enter an asylum country regularly and are therefore forced to resort to irregular means. In addition, using false or fraudulent documents – or otherwise circumventing immigration or border control requirements – for fear of being rejected at the border may also constitute “good cause.”

### **Penalties ‘on account of’ illegal entry or presence**

19. The term “penalties” may be broadly understood as any punitive measure<sup>38</sup> that has the effect of being disadvantageous to the refugee and which is imposed as a result of illegal entry or presence.<sup>39</sup> The term “penalties” thus is not limited to criminal sanctions and may include, for example, administrative sanctions,<sup>40</sup> denial of economic or social rights, and any procedural detriment to the person seeking asylum.<sup>41</sup> It was questioned whether any disadvantage in the aforementioned contexts would suffice, or whether a certain threshold would be required. For example, would any procedural detriment amount to a penalty, or only one that fell below minimum standards of procedural fairness? Further, would sanctions for non-compliance with obligations set forth in responsibility-sharing arrangements aimed at reducing onward movement amount to a penalty within the meaning of Article 31(1) of the 1951 Convention? While the outer limits of the concept of “penalties” remain to be defined, the well-reasoned case law treating procedural detriments as “penalties” was noted. Detention for illegal entry or presence that does not serve a legitimate purpose, is not proportionate or does not meet the necessity test under Article 31(2) clearly constitutes a penalty within the meaning of Article 31(1) of the 1951 Convention.<sup>42</sup>

20. Further, initiating and pursuing a criminal process may also constitute a penalty within the meaning of Article 31(1) of the 1951 Convention, especially when it imposes a material disadvantage on the refugee. In this regard, significant differences across states in criminal processes and terminology across jurisdictions were mentioned. Notably, in some states, opening a criminal investigation against a person does not immediately bring any disadvantages and is therefore not likely to be prohibited under Article 31(1).<sup>43</sup> However, disadvantages often follow later in the criminal process, following the investigative stage of the criminal process when criminal charges are brought against the refugee. In general, bringing criminal charges against a refugee for his or her illegal entry or presence is disadvantageous<sup>44</sup> and constitutes a penalty within the meaning of Article 31(1), irrespective

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<sup>38</sup> This may also include measures aimed at retribution for or deterrence of illegal entry or presence.

<sup>39</sup> Costello et al, note 4 above, p. 33.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, p. 37.

<sup>42</sup> UNHCR Detention Guidelines, note 7 above, Guideline 4.

<sup>43</sup> *Ibid.*, p. 34.

<sup>44</sup> Reference was made to criminal records being maintained and the effects of such records on opening a bank account or finding a job.

of any conviction, particularly when it entails pretrial detention or restrictions on freedom of movement. In order to implement Article 31(1) effectively and in good faith, any further criminal process should be suspended until, following a fair asylum procedure, a final decision is rendered regarding a refugee's status. It was noted in discussions that a final and fair asylum decision should not be re-visited in any subsequent criminal process. Despite consensus on the above, state practice is sometimes problematic, especially when criminal and asylum processes run simultaneously and communication, coordination or cooperation is not effective between the prosecutorial and asylum authorities.<sup>45</sup>

21. A range of offences is relevant when discussing penalization on account of illegal entry or presence. As indicated in paragraphs 3 and 12 above, these include: the use of false or fraudulent documents and offences relating to the failure to observe border control formalities; smuggling and offences relating to assisting refugees in irregular entry; and offences relating to particular modes of irregular entry. To understand the offences for which a refugee may or may not be penalized under Article 31(1), a reasonable connection between the offence and the illegal entry or presence is crucial. Some offences are intrinsic to the act of illegal entry, such as where the criminal act is irregular entry per se. In addition, the use of false documents should be regarded as intrinsic to the act of irregular entry, in particular given the nature of contemporary visa and border control practices. Admittedly, there are divergent judicial approaches to this point. However, the Study and the roundtable endorsed the view that criminalization of the use of false papers and similar crimes should be regarded as falling within Article 31(1).<sup>46</sup> A particular point of discussion concerned the penalization of refugees for smuggling others into a country of refuge.<sup>47</sup> Article 31(1) would apply if the smuggling is part of a collective effort that results in the refugee's own irregular entry alongside others.<sup>48</sup> Another example discussed was property damage, i.e. cutting through a border fence in order to physically enter a territory.<sup>49</sup> Whether or not offences related to such acts come within the scope of Article 31(1) requires a contextual assessment examining both the actions entailed in relation to the irregular entry or presence and the particular situation of the refugee.

### **Freedom of movement and necessary restrictions under Article 31(2) of the 1951 Convention**

22. Article 31(2) protects "such refugees," which can either refer narrowly to refugees who meet the conditions under Article 31(1) or more broadly to all refugees unlawfully present in the host state's territory.<sup>50</sup> The ordinary meaning of the term "such refugees," supported by *travaux préparatoires* to the 1951 Convention,<sup>51</sup> implies a narrow interpretation, while a broader view could be derived from the heading of Article 31 included in the 1951 Convention. Under a narrow interpretation, refugees protected from penalization under

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<sup>45</sup> Costello et al, note 4 above, p. 37.

<sup>46</sup> *Ibid.*, p. 39. See also paragraph 17 of these Summary Conclusions considering it is not unreasonable for refugees having just arrived to fear summary return and to regard border crossings or points of entry as unsafe or inappropriate places to make an asylum claim.

<sup>47</sup> Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, <http://www.refworld.org/docid/479dee062.html>, creating an obligation for States Parties to criminalize human smuggling (Article 6).

<sup>48</sup> *Ibid.*, Article 5, exempting migrants from criminal prosecution for having been smuggled.

<sup>49</sup> Costello et al, note 4 above, p. 43.

<sup>50</sup> *Ibid.*, p. 44.

<sup>51</sup> UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Fourteenth Meeting*, 22 November 1951, A/CONF.2/SR.14, <http://www.refworld.org/docid/3ae68cdb0.html>, see the President's explanations to a proposed amendment by Sweden to then Article 26, paragraph 2.



Article 31(1) of the 1951 Convention can nevertheless be subjected to restrictions on their freedom of movement where necessary and until their status is regularized or until they obtain admission to another country. It remains unclear what the relationship is between Article 31(2) and Article 26 of the 1951 Convention. The Study argues that the term “regularized” in Article 31(2) refers to refugees “lawfully in” the State Party within the meaning of Article 26, and includes any step undertaken by the state that addresses the unlawful presence of the refugee.<sup>52</sup>

23. The phrase “admission into another country” can be understood to refer to either the time at which the other country agrees to (re-)admit the refugee or the time at which the refugee actually departs for the other country. The provision applies to responsibility-sharing arrangements, readmission and relocation agreements and resettlement.<sup>53</sup> States must actively assist refugees in obtaining admission to another country, meaning that family reunification considerations may also be relevant. It would also be difficult to argue that a refugee who is encamped or accommodated in an isolated place, or detained, has been afforded “all necessary facilities.”<sup>54</sup> The provision should be read in light of the Convention’s preambular reference to the importance of international cooperation.<sup>55</sup>

24. Article 31(2) protects a refugee’s right to freedom of movement and allows for restrictions only when necessary. This requires an individualized assessment of the restrictions’ purpose as well as a proportionality assessment to evaluate whether less-restrictive measures are available to meet that purpose. Restrictions on freedom of movement vary and include designated places of residence, registration or reporting requirements, deposit of documents, supervised movement and encampment.<sup>56</sup>

25. Detention is the most far-reaching restriction on a person’s freedom of movement and must only be used in accordance with and when authorized by law. Even when authorized by law, it must: only be used on an exceptional basis; limited in duration; not be applied arbitrarily or in a discriminatory fashion; serve a legitimate purpose and be necessary for, reasonable in relation to and proportionate to that purpose; and be subject to minimum procedural safeguards.<sup>57</sup> The need was expressed for further guidance on the lawfulness of detention under Article 31(2) of the 1951 Convention, including for reasons of public health,<sup>58</sup> as well as in relation to children, whose immigration detention may never be in their best interest.

### **Effective implementation of Article 31**

26. Effective implementation of Article 31 of the 1951 Convention is the responsibility of all branches of government, including the legislature, the executive and the judiciary. It requires cooperation, coordination and communication between institutions and actors, especially border control authorities, prosecutorial authorities and asylum authorities. Even in those few countries that have incorporated a version of Article 31 into domestic law, the Study found that the prosecution of asylum-seekers and refugees for immigration-related offences continues. Oftentimes there is a lack of awareness among border agents,

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<sup>52</sup> Costello et al, note 4 above, p. 44.

<sup>53</sup> *Ibid.*, p. 50.

<sup>54</sup> *Ibid.*, p. 51.

<sup>55</sup> 1951 Convention, note 1 above, preambular paragraph 4.

<sup>56</sup> According to UNHCR, closed camps amount to deprivation of liberty, i.e. detention, UNHCR Detention Guidelines, note 35 above, para. 7.

<sup>57</sup> UNHCR Detention Guidelines, note 7 above, Guidelines 3 to 7.

<sup>58</sup> For example, interning asylum-seekers for fear of epidemics was raised.

prosecutorial authorities and criminal defense lawyers of the protections in Article 31. Other implementation problems include lack of communication with the asylum authorities; barriers to the domestic or regional justiciability of Article 31;<sup>59</sup> and/or a straightforward disregard of the article. To give effect to Article 31, it is important that the Article is not only reflected in asylum and/or immigration laws, but also in penal laws. It is also important that such laws are not excessively narrow in scope, but cover the full range of protection provided by Article 31.<sup>60</sup>

### **Next steps**

Participants encouraged UNHCR to develop international protection Guidelines for Article 31 of the 1951 Convention and to consider preparing recommendations on how to regulate and implement the article in national legal frameworks.

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<sup>59</sup> Costello et al, note 4 above, p. 57, referencing: *Mohammad Ferooz Qurbani*, C-481/13, European Union: Court of Justice of the European Union, 17 July 2014, <http://www.refworld.org/cases,ECJ,53c7a38a4.html>.

<sup>60</sup> Costello et al, note 4 above, p 54.