

**UNITED NATIONS
HIGH COMMISSIONER
FOR REFUGEES**



**NATIONS UNIES
HAUT COMMISSARIAT
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Dear Sir / Madam:

Re: Criminal Prosecution of Asylum-Seekers for Illegal Entry

I am writing in response to your request for information regarding the prosecution of asylum-seekers for illegally entering or using fraudulent documents to enter the United States and the conformity of this practice with international standards.

UNHCR has been formally mandated by the United Nations General Assembly to ensure international protection to refugees and other persons of concern and to assist governments in identifying and implementing durable solutions on their behalf.¹ The United States has agreed to uphold international refugee protection standards and to cooperate with UNHCR in the exercise of its functions and its duty of supervising the application of the provisions of the 1951 Convention relating to the Status of Refugees (1951 Convention) and its 1967 Protocol.² Pursuant to UNHCR's supervisory function, this letter discusses UNHCR's views on important aspects of Article 31 of the 1951 Convention.

I. Article 31 of the 1951 Convention

Article 31(1) of the 1951 Convention 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 ..., enter or are present in their territory

¹ The General Assembly established the Office of UNHCR as of 1 January 1951. *See* Statute of the Office of the United Nations High Commissioner for Refugees, U.N.G.A. Res. 428(V), 14 Dec. 1950; Executive Committee Conclusion No. 46 (1987) (reiterating UNHCR's leading role in refugee protection, including detention issues). The UNHCR Executive Committee is an intergovernmental group currently consisting of 64 member states that advises UNHCR in the exercise of its international protection mandate.

² 1967 Protocol relating to the Status of Refugees, Article 2. The United States acceded to the 1967 Protocol in 1968, which incorporates Articles 2-31 of the 1951 Convention relating to the Status of Refugees.

without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

According to the drafting history of the 1951 Convention, Article 31 was included to address the fact that "[a] refugee whose departure from his country of origin is usually in 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."³ UNHCR's Executive Committee, of which the United States is a member, has recognized that "circumstances may compel a refugee or asylum-seeker to have recourse to fraudulent documentation when leaving a country in which his physical safety or freedom are endangered."⁴ The Committee has further noted that it is essential that asylum seekers who have been admitted to a country for a refugee status determination "not be penalized or exposed to any unfavourable treatment solely on the ground that their presence in the country is considered unlawful."⁵

II. "Penalties"

The term "penalties" includes, but is not limited to, prosecution, fine, and imprisonment.⁶ The criminal prosecution of an asylum-seeker for illegally entering or using fraudulent documentation to enter a country would therefore constitute a penalty for purposes of Article 31.

III. "Coming Directly"

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.⁷

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.⁸

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

³ See Draft Report of the *Ad hoc* Committee on Statelessness and Related Problems. Proposed Draft Convention relating to the Status of Refugees: UN doc. E/AC.32.L.38, 15 February 1950, Annex I (draft Article 26); Annex II (comments. p. 57); Executive Committee Conclusion No. 58(i) (1989).

⁴ Executive Committee Conclusion No. 58(i) (1989).

⁵ Executive Committee Conclusion No. 22(B)(2)(a) (1981).

⁶ See Global Consultations on International Protection, Geneva Expert Roundtable, Summary Conclusions on Article 31 of the 1951 Convention relating to the Status of Refugees – Revised, ¶ 10(h), 8-9 November 2001.

⁷ *Id.* at ¶ 10(c).

⁸ *Id.* at ¶ 10(d).

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’.⁹

IV. Presenting Oneself to the Authorities “Without Delay”

Article 31 does impose certain obligations on refugees seeking protection in another country. One of these is that refugees must “present themselves without delay to the authorities.” In interpreting this phrase, no strict time limit should be mechanically applied.¹⁰ There are many reasons why refugees crossing a frontier illegally may choose not to present themselves to the first authorities they encounter. They may fear authority figures because of the persecution they have suffered or because of a language barrier. They may have been advised not to come forward immediately or fear immediate removal to the country of feared persecution. They may wish to first consult with an attorney or organization familiar with the country’s asylum laws. Trauma victims may be particularly fearful of revealing themselves immediately. Some asylum-seekers may wish to reunite with family members in the country of asylum before approaching the authorities.

V. Conclusion

Given the above, asylum-seekers need not voluntarily "self-identify" upon arrival at a port-of-entry to benefit from the protection of Article 31.¹¹ Any of the factors noted above could cause an asylum-seeker to present a false travel document to border authorities and to insist on its authenticity, while at the same time intending to submit a claim for asylum once s/he has entered the country and achieved some sense of security. For these reasons and bearing in mind the overall purpose of Article 31, a determination of whether an asylum-seeker has presented himself without delay must be considered on a case-by-case basis, taking into account the individual’s circumstances and applying the above factors in a flexible manner.¹²

Taking the above guidance into consideration, government authorities will need to investigate and make a determination on refugee status before seeking to prosecute or penalize asylum-seekers for their unlawful entry or presence. Once a full refugee status determination is completed, including the right to appeal, and a claim to refugee status or

⁹ *Id.* at 10(e).

¹⁰ *See id.* at ¶ 10(f) (discussing various factors that should be taken into account when determining whether an individual has presented himself “without delay”); *see also, Landgericht (Regional Superior Court), Muenster, Fed. Rep. Of Germany*, (Ref: 20 Dec. 1988, LG Muenster Ns 39 Js 688/86 (108/88)) (concluding that there is no general time limit for determining what constitutes “without delay” and that the issue should be considered on a case-by-case basis).

¹¹ *See, e.g., R. v. Uxbridge Magistrates Court, ex parte Adimi*, [1999] 4 Imm. AR 560, 568 (rejecting government's argument that individual must self-identify as asylum-seeker at "passport control" (primary inspection) to benefit from Article 31 protection).

¹² *Id.*; *see also* Guy Goodwin-Gill, *supra* note 9 at ¶ 105.

asylum is established, a refugee's illegal entry or status incidental to this claim would not be a basis for prosecution.¹³

We hope this information is useful to you and the United States authorities responsible for decisions with regard to prosecution for illegal or fraudulent entry into the United States.

Sincerely,


H. Elizabeth Dallam
Protection Officer

¹³ Executive Committee Conclusion No. 8 (1977); UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (1988) para. 192 (vi) (a refugee applicant whose claim is not recognized in the first instance should be able to appeal for a formal reconsideration of the decision).