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LIMITS ON CRIMINAL LIABILITY FOR PERSONS WHO HAVE ILLEGALLY CROSSED THE STATE BORDER

Darius Pranka

Dr.
Law Institute of the Lithuanian Centre for Social Sciences, Lithuania

Contact information

Address: A. Goštauto g. 12, LT-01108 Vilnius, Lithuania
Phone: (+370 5) 2497591
E-mail: darius.pranka@gmail.com

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ABSTRACT

The article examines the issues of interpretation and application of Article 31 of the Convention Relating to the Status of Refugees of 28 July 1951 (Refugee Convention), concerning the circumstances under which asylum seekers should be exempted from criminal liability. Firstly, the author examines how Lithuania and other states assess situations in which an asylum seeker enters another country by using forged or false documents. It is concluded that this matter is not properly regulated in Lithuanian criminal law, which results in the issue having to be resolved by the courts through the application of the existing legislation. The author subsequently examines the condition of "without delay" for the application of Article 31 of the Convention, outlining its possible interpretative meanings and illustrating them with examples of its application. Having assessed the already very different legal regulations in various countries and the extremely different assessments of similar situations in court practice, the article argues that an internationally agreed minimum time frame falling within the scope of "without delay" should be established, as no such standard currently exists. Finally, the article examines the remaining conditions for immunity from criminal liability, specifically the criteria for determining whether an asylum seeker has "come directly." When assessing this requirement, the reasons and motives for an individual's stay in a transit country must be considered, as well as the factors that prompted the decision to travel to a particular state and the duration of the journey and time spent in transit states.

KEY WORDS

Refugee, criminal liability, immunity, without delay, directly.

INTRODUCTION

Western Europe has been troubled by irregular migration for many years, with individuals driven by various motives attempting to reach Italy, Greece, and other countries in the region. In recent years, however, a similar situation has emerged in other parts of Europe, most notably Lithuania, Latvia and Poland. Unlike southern states, these countries experience migration flows arriving via land borders, primarily through Belarusian territory, often with the knowledge of Belarusian officials. As the number of migrants increased sharply, Lithuania decided to construct a physical barrier in 2021[1], intended to help address this challenge. The same measure was adopted by Poland.[2] Nevertheless, although these actions reduced the number of migrants, they did not fully resolve the issue. Cases of individuals entering Lithuania unlawfully continued to occur with notable frequency. This situation naturally gave rise to the question of how such unlawful border crossings should be assessed from the perspective of criminal law. In other words, should these individuals be subject to criminal liability, or should they be exempt?

The framers of the 1951 Refugee Convention intended to ensure that asylum seekers would not generally be penalised for entering a country unlawfully.[3] It seems that they have succeeded in achieving this aim, given that both the Refugee Convention and other international treaties, as well as national legislation, generally prohibit the criminal prosecution of asylum seekers. For example, Article 31(1) of the Refugee Convention states:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.[4]

The vast majority of states worldwide are parties to the Refugee Convention and have incorporated its provisions into their national legislation. Nevertheless, despite the generally clear legal framework, it remains unclear in certain cases how the actions of migrants who have crossed a state border unlawfully should be assessed. As a result, they do not always succeed in avoiding criminal liability. This outcome is influenced not only by the legal provisions themselves, but also by how they are implemented in judicial practice and by states' broader interest in curbing the growing phenomenon of irregular migration. Some authors argue that the wrongful convictions of asylum seekers and refugees reflect, to some extent, a shift in society towards – the increased public desire for more punitive measures met with the expansion of formal social control: "the

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1 A 550-kilometer fence will be built on the border with Belarus, *15min.* (June 2021) // https://www.15min.lt/naujiena/aktualu/lietuva/a-bilotaite-pasienyje-su-baltarusija-bus-statoma-550-kilometru-ilgio-tvora-56-1532858

2 Polish soldiers erect barbed wire fence to detain migrants, *15min.* (August 2021) // https://www.15min.lt/naujiena/aktualu/pasaulis/lenkijos-kariai-stato-pjaunancios-vielos-tvora-migrantams-sulaikyti-57-1556098

3 Thomas M. McDonnell and Vanessa H. Merton, "Enter at Your Own Risk: Criminalizing Asylum Seekers," *Columbia Human Rights Law Review* 51.1 (2019): 66 // https://hrlr.law.columbia.edu/hrlr/enter-at-your-own-risk-criminalizing-asylum-seekers/

4 *Convention Relating to the Status of Refugees (1951)* // www.refworld.org/docid/3be01b964.html

increased criminalisation of migrants – both at legislative and enforcement levels – represents a widespread desire to control and criminalise migration, and the portrayal of migrants as deviant".[5]

On the other hand, states often violate their obligations under the Refugee Convention, particularly with regard to Article 31, which appears to be particularly prone to misinterpretation and misapplication.[6] These issues have also not been resolved by the Court of Justice of the European Union (CJEU), which declined to provide a national court with interpretative guidance on the meaning of the Article 31, on the basis that Article 31 did not fall within the scope of EU law, despite the fact that EU asylum law must be compatible with the Refugee Convention in general.[7]

For these reasons, many European states are struggling to properly apply and interpret Article 31 of the Refugee Convention. Refugees who come undocumented into countries may be labelled as criminals and detained contrary to the provision of Article 31 of the Refugee Convention.[8] Questions also frequently arise regarding the interpretation of certain specific conditions of immunity from criminal liability, namely "without delay" and "come directly". A more detailed analysis of these conditions can therefore help to answer these questions. For example, the domestic implementation of Article 31 is recognised as being too narrow in the United Kingdom; similarly, despite not being a party to the Refugee Convention, the United States only protects refugees from certain civil penalties, yet routinely prosecutes them for various immigration offences, in violation of Article 31 and other provisions of international refugee and human rights law.[9]

Essentially, there is no scholarly research in Lithuania that specifically addresses the exemption of refugees from criminal liability. The only relevant study is a general investigation into refugee law conducted by Lyra Jakulevičienė over twenty years ago.[10] In other countries, refugee law in general, as well as issues concerning the criminal liability of refugees, are examined much more actively and in greater depth. The authors who have made the most significant contributions to this field of research are: Cathryn Costello, Guy S. Goodwin-Gill, Gregor Noll, Yulia Ioffe, Mai Sato (Lead), Carolyn Hoyle, Naomi-Ellen Speechley, Silvia Carta, Michele LeVoy and Oghenerioborue Esther Eberechi.

This article aims to analyse the key aspects of the application of Article 31 of the Refugee Convention, as well as the practical problems that arise in this context. The author's aim is to determine whether individuals who have crossed the border illegally are justifiably held criminally liable or exempted from such liability. It uses Lithuania and other states around the world—where such issues occur and have been examined—as illustrative examples. This article examines precisely those foreign countries where issues regarding the criminal liability of migrants have most frequently arisen in practice, as well as those where academic doctrine has explored these issues. Through the use of case-law search tools and targeted keyword (criminal liability of migrants, illegal border crossing, exemption from criminal liability, etc.) queries, specific cases in

[5] Mai Sato, Carolyn Hoyle and Naomi-Ellen Speechley, "Wrongful convictions of refugees and asylum seekers: responses by the Criminal Cases Review Commission," *Criminal Law Review* 2 (2017): 4 // https://centaur.reading.ac.uk/68811/

[6] Cathryn Costello, Michelle Foster, Jane McAdam (eds.), *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021), 5.

[7] Court of Justice of the EU Case No. C-604/12 v Minister for Justice.

[8] Oghenerioborue Esther Eberechi, "The Challenges of Protecting Refugees in Mixed Migration *vis-à-vis* the Application of Articles 1f and 31 of the Refugee Convention," *Obiter* 41(2): 2020 // https://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1682-58532020000200005

[9] Cathryn Costello and Yulia Ioffe, *supra* note 6, 4.

[10] Lyra Vysockienė, *Refugee Law* (Vilnius: Mykolo Romerio universitetas, 2005).

which issues of refugees' criminal liability or exemption from such liability arose, as well as other relevant judicial practice, were selected. Historical, synthetic, deductive, and logical methods were employed to review the historical development of the conditions for exemption from criminal liability examined in this article and to identify reasons for differing interpretations.

EXEMPTION OF REFUGEES FROM CRIMINAL LIABILITY: THE CASE OF LITHUANIA

Article 291 of the Criminal Code of the Republic of Lithuania establishes criminal liability for unlawfully crossing the state border.[11] According to paragraph 2 of Article 291, individuals may be exempted from criminal liability. For example, a foreigner who enters the Republic of Lithuania illegally with the intention of seeking asylum is exempt from liability under paragraph 1 of Article 291. In other words, asylum seekers who have crossed the state border unlawfully cannot be held criminally liable. This regulation is consistent with the provisions of international treaties. The possibility of exempting asylum seekers from criminal liability was introduced into Lithuanian criminal law precisely on the basis of Article 31(1) of the Refugee Convention. However, the Lithuanian Criminal Code does not exempt individuals from criminal liability if they have crossed the state border lawfully but used forged documents during the crossing. In other words, while the border crossing itself was lawful, the individual presented false identity or travel documents. Such situations have been addressed by Lithuanian courts over a prolonged period in a rather complex manner. In one case, L.F. was convicted by a court of first instance for possessing, transporting, and using a knowingly false document. While in Athens, Greece, he had acquired a false identity card from an unknown person for €4,000 during pre-trial proceedings. He kept the card and used it on a flight from Athens to Vilnius, ultimately presenting it to a border officer at the checkpoint. L.F. was quickly sentenced under a simplified procedure to 26 days' detention for committing an offence under paragraph 2 of Article 300 of the Criminal Code.[12] This occurred despite evidence in the case suggesting that L.F. might be granted refugee status.

L.F., however, did not agree with the penal order issued by the court, and on that basis an oral hearing of the case was held. This time, the same first instance court reached a different decision – it released L.F. from criminal liability.[13] However, this was done on the basis on Article 291(2) of the Criminal Code – a provision related to unlawful crossing of the state border, which is not meant to be applied when deciding on (non-)application of criminal liability for using a false document. By a ruling of the appellate court, the prosecutor's appeal was dismissed, with a slight modification to the district court's judgment – removing the reference to Article 291(2) from the operative part. This decision aimed to eliminate the mentioned contradiction, since exemption from criminal liability on that ground is only possible when the crime provided for in Article 291(1) has been committed, whereas in this case L.F. committed a crime provided for in Article 300(2). In other words, if an offender is punished for using a false document, he cannot be exempted from criminal liability on the ground that he illegally crossed the state border.

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11 Article 291 of the Criminal Code of the Republic of Lithuania, *OG*, 2000, No. 89-2741.
12 Vilnius City District Court, Case No. 1-2440-929/2019.
13 Vilnius City District Court, Case No. 1-2724-817/2019.

Such reasoning by the lower courts (as well as the arguments mentioned by the author) did not convince the Supreme Court of Lithuania. Both of the mentioned decisions were annulled and the case was remitted to the appeal court for a new hearing.[14] However, from the Supreme Court's decision it was not clear what outcome was expected – the conviction of L.F. or his release from criminal liability on some other ground. Therefore, the appellate court hearing this case for the second time faced a difficult task. Clearly, convicting L.F. was not an option, since after being apprehended with the false document he submitted an asylum application to the Lithuanian authorities (as noted, these circumstances were known to the courts).

In its decision, the Vilnius Regional Court stated that L.F. met all the conditions set out in Article 31(1) of the Refugee Convention. He was a resident of Damascus, Syria who, not wanting to perform compulsory military service and fearing for his life, health and freedom, left his native country. He arrived by illegal means through Turkey into the European Union until he reached the Republic of Lithuania. At the Vilnius Airport border checkpoint, he presented a false document and introduced himself by his real name and surname, showing a passport photo on his phone. Later, in Lithuania, he submitted an application for asylum. In reviews of international and European standards by the United Nations High Commissioner for Refugees, it has been repeatedly clarified that the concept of "illegal entry", *inter alia*, encompasses arriving or entering by using false or forged documents, using other deceptive or illegal means of entry, including entering the territory of a State with the help of smugglers or traffickers. Essentially the same position is reiterated in one of the latest such clarifications:

> proof of authorization to enter a country may also be provided by a relevant travel document and/or an entry visa. Entering, including re-entering, in contravention of a State's domestic laws – for example, by using false or fraudulently-obtained documents to travel and gain entry.[15]

Thus, the presentation of a false document to gain entry into another country falls under the "illegal entry" contemplated in Article 31 of the Refugee Convention. This means that by presenting a false document (an identity card), L.F., in general terms, entered the Republic of Lithuania illegally. Therefore, the protection guaranteed by international treaties and European Union legal acts (including those of Lithuania) must be applied in his case. Given the above circumstances, the regional court found that the unlawful acts described in the charges were committed by L.F. while acting in a situation of necessity, which eliminates criminal liability, and therefore the criminal case against L.F. was terminated.[16]

In justifying the application of this criminal law doctrine, the appeal court emphasized that in the present case it was established that L.F.'s life, health, and other rights and freedoms were in danger in his country of origin – Syria. Seeking to remove the danger to his life and health, L.F. committed an act that met the elements of a crime against the public order – he kept, transported and used a false document (an identity card). This criminal act caused harm (created danger and risk) to values and interests protected by the criminal law that are less important than those that would have been endangered had L.F. remained in Syria. L.F., after assessing the threat he faced, chose

[14] Lithuanian Supreme Court, Case No. 2K-197-222/2020.
[15] United Nations High Commissioner for Refugees, *Guidelines on International Protection,* No. 14, HCR/GIP/24/14 (September, 2024), 13 // https://www.refworld.org/policy/legalguidance/unhcr/2024/en/148632
[16] Vilnius Regional Court, Case No. 1A-111-988/2021.

a course of action that allowed lesser harm to be done (the harm caused affected public order, not life or health). It was also noted that he essentially had no other choice and could not eliminate the danger to his health by other means – he could only do so by leaving Syria.

The Lithuanian Supreme Court, upon examining the prosecutor's cassation appeal, essentially repeated the arguments of the aforementioned regional court decision and left that decision unchanged.[17] In later decisions by other courts, this practice was repeated, exempting defendants who had committed the criminal act under Article 300(1) of the Criminal Code from criminal liability on the basis of a situation of necessity.[18] It is worth noting that in that same judgment, the same perpetrators were charged with both unlawful crossing of the state border and possession of a false document (a permit for permanent residence in Sweden). In the former case, they were released from criminal liability by applying the special form of exemption provided by the criminal law for that situation. In the latter case, a general basis for exemption was applied, which is sufficiently universal and can be applied to any situation. Clearly, in this instance the courts were seeking solutions to the situation and chose to apply the existing criminal law in a rather original way. These solutions were pursued in light of the international legal framework, specifically the mentioned Article 31(1) of the Refugee Convention and its official interpretations. Thus, following the rulings of the Supreme Court of Lithuania, judicial practice is developing in precisely this direction.

A similar situation arose in Austria. The lower court, in contrast, had given effect to Article 31 of the Refugee Convention indirectly by taking it into account when applying the general provision in the criminal code providing a defence for criminal acts committed to avoid an immediate impending disadvantage. However, unlike in Lithuania, the appeal court rejected this interpretation, arguing that the Austrian lawmakers had deliberately refrained from extending the defence in Article 31 to the use of forged documents—noting that, by contrast, there was a defence protecting migrants from being sanctioned as accomplices to their own smuggling. Furthermore, the court argued that as soon as the defendant had entered Austria, he had escaped the situation of immediate impending danger arising from the situation in his home country and could accordingly lodge an asylum application without having to use forged documents.[19] Thus, as we can see, not all national courts allow themselves to interpret Article 31(1) of the Refugee Convention so broadly (even if such an interpretation is lawful and based on official guidance). In the absence of a specific legal norm in the criminal law that reflects Article 31(1) of the Convention, one might conclude that perhaps this was indeed the intention of the legislature.

Some states also uphold this position. Case law in France, for instance, states that asylum seekers who used forged identity documents were not protected by the immunity from penalty provided in Article 31 of the Convention. Since 2016, the new law on foreigners in France seems to enshrine this jurisprudence as regards offences related to the use of forged identity documents by foreigners or those facilitating the commission of the offence. This offence is punishable by five years' imprisonment and

[17] Lithuanian Supreme Court, Case No. 2K-217-628/2021.
[18] Klaipėda Regional Court, No. 1A-183-651/2022.
[19] Cathryn Costello, Yulia Ioffe and Teresa Büchsel, *Article 31 of the 1951 Convention Relating to the Status of Refugees* (United Nations High Commissioner for Refugees, 2017), 40 // https://www.refworld.org/reference/lpprs/unhcr/2017/en/122597

a fine of 75,000 euros.[20] In Bulgaria, criminal charges are regularly brought against people who cross the border irregularly or use false documentation. In several cases, individuals charged on these grounds have been imprisoned for 6 to 12 months because they left the country after registering for asylum, which was considered a breach of bail conditions. This included people in situations of vulnerability and led to women having to give birth in prison.[21]

Meanwhile, the situation in the United Kingdom is altogether different, as protection for refugees is hardly applied there. Article 31 of the Refugee Convention and section 31 of the Immigration and Asylum Act 1999 (UK) are not applicable to offences under section 2 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 (UK) and do not provide a defence. In other words, a person who has a successful asylum claim can still be found guilty under section 2 of the 2004 Act in the United Kingdom.[22] In spite of a limited domestic incorporation of Article 31 and many high-level court rulings, the UK continued to prosecute many asylum seekers and refugees, arguably illegally.[23] Article 31(1) of the Convention has simply not been a matter of consideration or concern within the criminal justice system in Scotland, both among those prosecuting offenders and those representing them. As a result of this unfamiliarity, criminal defence solicitors routinely advise guilty pleas. When the decision to prosecute is made, cases of document offences for illegal entry appear to be processed through the criminal justice system in a routine fashion with no consideration given to whether the individual has claimed asylum or not, and without regard to the availability of the Article 31 defence. In summary, the intersection of Article 31(1) with the Scottish criminal justice system is highly problematic, and the likelihood of wrongful convictions of refugees is significant in Scotland.[24]

Nevertheless, in some countries one can find an approach similar to that of the Lithuanian courts or one consistent with the interpretations of international refugee law experts. In Norway, for example, a 2014 Supreme Court judgment established that the penalties imposed on a refugee who presented a forged document at the airport were not permitted by Article 31.[25] This view is supported by a ruling of the Supreme Court of the Netherlands, which 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 possession of false documents. Any other interpretation would deprive Article 31(1) of its protective aim.[26]

It is worth mentioning that there are some ideas to interpret entry into another state by using false documents even more broadly. The discussion in one of the criminal cases (New Zeland) uphold such minds: Article 31(1) applies "to illegal entry or use of false documents for entry purposes; but also … to illegal presence and use of false documents to secure refugee status…; and to illegal presence and use of false

[20] Frédéric Tiberghien, *'Réfugié' in Répertoire de Droit International* (2016): 89. Cited according Cathryn Costello, Yulia Ioffe and Teresa Büchsel, *supra* note 19, 41.
[21] Edited by Silvia Carta, Advocacy Officer and Michele LeVoy, *Between administrative and criminal law: An overview of criminalisation of migration across the EU* (PICUM, 2024), 15.
[22] Mai Sato, Carolyn Hoyle and Naomi-Ellen Speechley, *supra* note 5, 3.
[23] Cathryn Costello and Yulia Ioffe, *supra* note 16.
[24] Gary Christie, *Prosecuting the Persecuted In Scotland: Article 31 (1) of the 1951 Refugee Convention and the Scottish Criminal Justice System* (Scottish Refugee Council, 2016), 23 // https://www.scottishrefugeecouncil.org.uk/wp-content/uploads/2019/10/Article-31-1-of-the-1951-Refugee-Convention-and-the-Scottish-Criminal-Justice-System.pdf
[25] Supreme Court of Norway, Case No. 2014/220 // https://www.refworld.org/jurisprudence/caselaw/norsc/2014/en/108047
[26] Supreme Court of the Netherlands, Case No. 07/10516 // https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:HR:2009:BI1325

documents to maintain such presence which requires the money needed to provide food and lodging that only charity, social welfare, dishonesty or hard work can provide."[27] Nevertheless, in the author's view, such an interpretation does not withstand criticism, since subsequent uses of false documents when submitting applications for refugee status—possibly falsifying certain facts that could be significant in determining the grant of such status—cannot in any way be directly related to the person's crossing of a state border.

Returning to the Lithuanian example mentioned above, it should be noted that the situation in which, by the first court decision, a refugee was convicted for actions from which refugees (upon certain additional conditions being met) should have immunity is also encountered in other countries, where it is addressed in different ways. Therefore, it can be argued that the current Lithuanian criminal law has shortcomings. In the author's opinion, by establishing the special form of exemption from criminal liability in Article 291(2) of the Criminal Code, the legislator was implementing Article 31(1) of the Refugee Convention. As practice shows, irregular migrants (who later submit asylum requests and become refugees) typically enter other countries in one of the following ways:

- Illegally crossing state borders without any documents, or with their genuine identity documents;
- Illegally crossing state borders while in possession of false (forged) identity documents;
- Legally crossing state borders while in possession of false (forged) identity documents intended to gain entry into another country.

Thus, in the second and third cases, refugees become hostages of the situation, since, unlike the scenario of purely unlawful border crossing, Lithuanian criminal law does not explicitly provide for the possibility of exemption from criminal liability. Therefore, it may happen (as confirmed by court practice) that a refugee will be subjected to criminal liability when doing so is prohibited by Article 31(1) of the Refugee Convention. In view of this, it is suggested to amend Article 300 of the Criminal Code to establish, similarly to Article 291(2) of the Criminal Code, that a foreigner who illegally arrived in the Republic of Lithuania while possessing a false or forged document with the intention of seeking asylum is exempted from criminal liability under Article 300(1) or (2).

MISUNDERSTANDING OF THE DEFINITION "WITHOUT DELAY"

Article 10(1) of Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) provides that Member States shall ensure that applications for international protection are neither rejected nor not examined *solely* because they were not submitted immediately.[28] Thus, the failure to submit an application "without delay" in European Union countries does not automatically mean that such an application will not be examined at all or that asylum will be denied on that ground. However, a delay in submitting such an application can become an obstacle to immunity from criminal liability. As mentioned, Article 31(1) of the Refugee Convention can only be applied if the asylum request was submitted "without

[27] High Court of New Zealand, Case No. CIV2003-404-4373 // https://www.refworld.org/jurisprudence/caselaw/nzlhc/2003/en/95411

[28] *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)* // https://eur-lex.europa.eu/legal-content/LT/TXT/?uri=celex:32013L0032

delay." Therefore, determining this circumstance becomes a very important factor, as it decides whether the person will be exempted from criminal liability or, conversely, will be punished.

It has been observed in criminal law doctrine that the obligation not to impose penalties on refugees who present themselves without delay and show good cause "is perhaps the most contentious element of Article 31."[29] 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.[30] Indeed, primary attention to individual circumstances is emphasized in the official international guidance developed in the UNHCR Guidelines, which provide concrete examples of such circumstances. The Guidelines note:

> "without delay" means within a reasonable period of time after arrival in the territory or, in the case of unauthorized presence, within a reasonable period of time after a well-founded fear of persecution may have arisen.[31] Whether a refugee has presented themselves "without delay" is a question of fact, depending on the circumstances of the case, including the time and mode of arrival, opportunities to present themselves, the availability of information (in a language the refugee understands), and access to legal assistance. It may not be reasonable to expect that refugees would approach the authorities immediately upon arrival for numerous reasons, such as fear of summary return; the perception that border crossings or points of entry are unsafe or inappropriate places to make an asylum claim, at least immediately upon arrival; distrust in authorities based on experience of persecution; or the stress of the journey. Each case must be evaluated on its own facts and circumstances, taking into account the refugee's perceptions of, and potentially their lack of information about, the availability of international protection and the asylum process; erroneous advice provided by smugglers or other sources; trauma; language barriers; feelings of insecurity; mistrust or fear (especially stemming from their flight or experiences as a refugee); previous experiences with authorities; or other personal characteristics and circumstances, such as age, gender, race, and state of health.[32]

Notably, an asylum seeker may have many reasons for not immediately going to the authorities of the receiving state. Similar reasons were noted two decades ago: asylum seekers may fear authority figures because of the persecution they have suffered or because of language barriers. They may have been advised not to come forward immediately or may fear immediate removal to the country of feared persecution. They may wish to first consult with an attorney or an organization familiar with the country's asylum laws. Victims of trauma may be particularly fearful of revealing

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29 Cathryn Costello, Yulia Ioffe and Teresa Büchsel, *supra* note 19, 17.
30 Ibid., 18.
31 A well-founded fear of persecution may arise after an applicant has left their country of origin, owing to circumstances arising in the country of origin during the applicant's absence, and/or as a result of their own actions after they have left the country of origin, making the applicant a refugee sur place. See: The UN Refugee Agency, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2019) // www.refworld.org/docid/5cb474b27.html
32 United Nations High Commissioner for Refugees, *supra* note 15, 15.

themselves immediately. Some asylum seekers may wish to reunite with family members in the country of asylum before approaching the authorities.[33]

Most scholars agree with the position of the officials cited above, noting that "without delay" is also a matter of fact and degree; it depends on the circumstances of the case, including the availability of advice.[34] Thus, in each case the individual factual circumstances of the specific situation—such as the context of the asylum seeker's arrival, the person's background and personality, the nature of the persecution faced, and the length of time spent in the country before applying for asylum—should be evaluated. On the other hand, other examples are presented of situations when Article 31(1) ceases to apply: when the person does not formally apply for asylum, despite having had an effective opportunity to do so; when they withdraw the claim; or if they are found not to be a refugee in a final decision on the merits following a fair procedure.[35] Of course, such circumstances are far fewer than those that would justify a delay. Nevertheless, in the author's opinion, some of these examples are doubtful. If a person had reason to believe (subjectively) that they could apply for asylum and did so, but due to procedural issues or an assessment of the situation that application was not granted, it is hardly justified to hold them criminally liable without applying the protection provided by Article 31 of the Convention. It would seem that in such cases an administrative decision to expel the person from the country would suffice.

Perhaps fewer problems would arise in interpreting the content of "without delay" if legislation established a specific period within which a refugee could approach the authorities. However, scholars point out that the term "without delay" in its ordinary meaning does not require setting a rigid time limit. In domestic case law, two strands of interpretation have emerged. The first strand supports a flexible, individualized approach, which in our view is appropriate. In contrast, the second strand interprets "without delay" in an unnecessarily restrictive manner, imposing short and inflexible time limits.[36]

For instance, 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.[37] The law in Chile provides that no penal or administrative sanctions will be imposed on refugees upon irregular entry or residence, provided they present themselves within ten days of the breach of the immigration code to the authorities, showing "good cause."[38] Proponents of the second strand note that the indeterminacy of "without delay" in the Convention gives contracting states wide discretion to determine what constitutes "without delay." It is the reason why, for example, refugees who enter Zambia are expected to apply for asylum within seven days; in Lesotho, if they arrive unlawfully, they must report to an immigration officer within 14 days; in Ethiopia the period allowed is 15 days; Ghana allows 14 days; and Uganda allows 30 days.[39]

Nevertheless, the official UNHCR guidelines do not endorse such an approach: "when States impose time limits by which refugees must make themselves known to the authorities and claim asylum, non-compliance does not mean that refugees have

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33 "Illegal Entry," *United Nations High Commissioner for Refugees* (March 2006): 3 // https://www.refworld.org/docid/4721ccd02
34 Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection* (University of Oxford, 2001), 33.
35 United Nations High Commissioner for Refugees, *supra* note 15, 8.
36 Cathryn Costello and Yulia Ioffe, *supra* note 6, 4.
37 Cathryn Costello, Yulia Ioffe and Teresa Büchsel, *supra* note 19, 29.
38 Ibid.
39 Oghenerioborue Esther Eberechi, *supra* note 8.

delayed presenting themselves to the authorities within the meaning of Article 31(1). Whether refugees have presented themselves without delay is a question of fact."[40]

However, even agreeing with the position that this is a question of fact, some states still interpret "without delay" too restrictively. For instance, in Finland an asylum seeker was convicted of forgery for having presented a forged passport at the Finnish border. The non-penalization principle was not applied because the asylum seeker had waited one day before applying for asylum.[41] Conversely, the judicial practice in some countries is completely the opposite – for example, Canadian courts have stressed the importance of protecting refugees and have refused to penalize immigrants in such situations:

> it does not stand to the applicant's credit that, after entering Canada as visitors, they illegally obtained Canadian social security cards, worked illegally for approximately a year before they were found out and arrested, and then claimed refugee status. Nevertheless, since the law allows them to apply as refugees even in such circumstances, we must conclude that it does not intend that their refugee claims should be determined on the basis of these extraneous considerations.[42]

These examples show that national courts – in cases where domestic laws do not set specific time limits for delays – even after (as required) considering all the factual circumstances, may consider a single day's delay to be too long and not falling within the concept of "without delay." Other courts, by contrast, conclude that even a year spent in the country (even after the person was detained) is not too long a delay to apply for refugee status and thus not a ground to deny the exemption from criminal liability as provided by Article 31 of the Convention. Such fundamentally opposite decisions by courts of different states (interpreting the same treaty provision, incidentally) may indicate that setting a specific deadline could be a solution in such situations. On the other hand, these decisions reveal the differing attitudes of various countries towards the refugee issue, perhaps even reflecting certain policy directions or simply the overall sensitivity of a society and state to this question. Therefore, introducing a fixed time limit would be a more harmful than beneficial solution in these circumstances. Still, considering the already very disparate legal regulations across countries – including the establishment of very short deadlines – as well as the extremely different evaluations of similar situations in judicial practice, it is proposed that a minimum time period falling within the bounds of "without delay" be established at the international level. Such a regulation would, first, prevent states from setting unjustifiably short deadlines for coming forward. Second, it would make it more likely that similar situations in different countries would be assessed in a comparable manner. Importantly, the setting of such a time period should not be treated as categorical. On the contrary, exceeding this period would be permissible; however, in such cases the facts and the individual circumstances of the delay should be evaluated somewhat more strictly and seriously. In the meantime, one can only hope that different countries will take into account the official recommendations of international authorities and handle similar situations analogously, assessing similar facts within the bounds of reasonableness and justice.

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40 United Nations High Commissioner for Refugees, *supra* note 15, 17.

41 United Nations High Commissioner for Refugees, *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.

42 James C. Hathaway and Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2014) // https://doi.org/10.1017/CBO9780511998300

THE INTERPRETATION OF THE TERM "DIRECTLY"

This criterion is again described by legal scholars as perhaps one of the most contentious element of Article 31.[43] To arrive "directly" from a country of threat does not mean that a refugee must come straight from the country where he faces persecution and then seek asylum in the first safe country. In practice, refugees often travel through several transit countries before finally requesting asylum in one of them (not necessarily the final desired destination). It was precisely such real-life scenarios that led to the current legal regulation. This revision was intended specifically to address a concern of the French delegation during the drafting of the Refugee Convention, namely a 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.[44] Such a situation resulted in a draft of the Convention that takes into account the refugee's goal of reaching a specific country. As noted in a 2001 expert roundtable discussion, the drafters only intended that immunity from penalty should not apply to refugees who had 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 he or she transited through or stayed in another country.[45]

Essentially the same position is maintained in later commentaries on the Convention. The term "directly" should be interpreted broadly and not necessarily in a literal (geographical or temporal) sense. For Article 31(1) to apply, refugees are not required to have come to the current host country without crossing through, stopping, or staying in any other intermediate country or countries after leaving the territory where their lives or freedom were threatened. Mere transit in an intermediate country cannot be considered to interrupt "coming directly."[46]

Some authors link the term "come directly" with the term "good cause." According to these scholars, to come directly from the country in which the claimant has a well-founded fear of persecution is recognized in itself as "good cause" for illegal entry. To "come directly" from such a country via another country (or countries) in which he or she is at risk or in which generally no protection is available is also accepted as "good cause" for illegal entry. Other factual circumstances, such as close family links in the country of refuge, may also constitute "good cause." The criterion of "good cause" is flexible enough to allow the elements of individual cases to be taken into account.[47] Thus, in interpreting the terms "come directly" or "good cause," the individual circumstances of a refugee's search for asylum (i.e. their route of travel) become important, as the possibility of not applying criminal liability essentially depends on those circumstances. The "directness" of travel, therefore, needs to be considered in the context in which such travel takes place – often through circuitous routes, over land or by sea,

[43] Cathryn Costello, Yulia Ioffe and Teresa Büchsel, *supra* note 19, 17.
[44] Guy S. Goodwin-Gill, *supra* note 34, 6.
[45] *Expert Roundtable Summary Conclusions: Article 31 of the 1951 Convention,* (2001): 255 // https://www.refworld.org/policy/legalguidance/cup/2003/en/49502
[46] United Nations High Commissioner for Refugees, *supra* note 15, 10.
[47] Guy S. Goodwin-Gill, *supra* note 34, 34.

frequently with interruptions. There can be good reasons for delays, stopovers, and stays in intermediate countries, such as advice or coercion from agents or smugglers, difficulties in acquiring the means to travel onward, or constraints limiting the ability to move on.[48]

There is no obligation under international law for a person to seek international protection at the first effective opportunity. In many cases it may be unrealistic to expect the asylum seeker to do so, or to assume the availability of protection in the intermediate state.[49] Therefore, it might appear that refugees can travel from country to country ostensibly in search of a suitable country of asylum. Such travel could become endless, allowing them to preserve the right to obtain asylum and to avoid criminal liability for illegal entry into each new country. However, this should not happen in practice, since at the same time refugees do not have an unfettered right to choose the country that will determine their claims and provide asylum. The UNHCR has identified two key categories of refugees who cannot be regarded as having "come directly" within the meaning of Article 31(1) of the 1951 Convention:

1) Refugees who have been formally granted international protection and lawful stay in an intermediate or other country, or who have otherwise lawfully settled there, temporarily or permanently, with access in that country to standards of treatment commensurate with the 1951 Convention, its 1967 Protocol, and international human rights standards.
2) Asylum seekers whose claim for international protection was rejected in an intermediate or other country by a final decision in a fair and efficient asylum procedure after an assessment on the merits of their claim in accordance with international standards, and who nonetheless subsequently move on and enter or are present without authorization in their current host country.[50]

Thus, the United Nations High Commissioner for Refugees highlights two essential situations in which a refugee cannot expect exemption from criminal liability under Article 31(1) of the 1951 Convention: either they have already received protection (asylum) in a transit country, or they were denied such protection in a transit country. In both cases, such persons cannot continue traveling with immunity from criminal liability and repeatedly seek additional protection elsewhere, because tolerating such situations would, as mentioned, render their journey never-ending. Scholars hold a similar position. Gregor Noll, for example, concludes that only a narrow category of refugees should be subject to penalization, namely those "who have been accorded refugee status and lawful residence in a transit State to which they can safely return."[51]

The same view was expressed by international experts somewhat earlier: the protection of Article 31 of the Convention may not apply if the asylum seeker had settled temporarily or permanently in another country, but protection remains if other countries were merely transited with short "stopovers."[52] Therefore, 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, acquiring the means to travel onwards or being under the control

[48] United Nations High Commissioner for Refugees, *supra* note 15, 11.
[49] United Nations High Commissioner for Refugees, *Summary Conclusions Roundtable on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying Article 31 of the 1951 Refugee Convention* (2017).
[50] United Nations High Commissioner for Refugees, *supra* note 15, 12.
[51] Gregor Noll, "Article 31 (Refugees Unlawfully in the Country of Refuge)," in: Andreas Zimmermann, Terje Einarsen and Franziska M. Herrmann (eds.), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary (2nd Edition)* (Oxford University Press, 2024).
[52] Expert Roundtable Summary Conclusions: Article 31 of the 1951 Convention, *supra* note 45, 256.

of a smuggler – and the refugee's reasons 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.[53] According to this interpretation, the interpretation of the term "coming directly" becomes very similar to the understanding of the term "without delay." The difference is that here we are concerned not with a delay in approaching the authorities of a particular country for asylum, but with a delay in some intermediate country. In summary, it appears that what matters is not the mere fact of delay, but the reasons for it – understood both as the reasons for the delay and the reasons for wanting to reach a particular country. If it is recognized that the migrant had justifiable reasons for wanting to reach a specific country, or that the migrant stayed in an intermediate country for important reasons, the condition of "coming directly" will not be considered breached.

"Coming directly" as a condition necessary for exemption from criminal liability is also examined in the case law of various national courts. Some domestic courts, including those in the United Kingdom, the Netherlands, New Zealand, Germany, and Finland, have indeed adopted such an approach by developing a sophisticated individualized assessment. This assessment introduces a number of elements for the term "coming directly," including the length of stay in the intermediate country, the reason for delay, and whether or not the refugee sought or found protection *de jure* or *de facto*.[54] For example, Britain's High Court of Justice concluded that "a short term stop-over en route to such intended sanctuary cannot forfeit the protection of the Article."[55] However, what period is considered "short" is not defined, as this is a matter of evaluation. In a similar vein, UK courts have developed a sophisticated individualized assessment based on the judgment of Simon Brown LJ in *R v. Uxbridge Magistrates Court, ex parte Adimi*, which introduces three touchstones for the term "coming directly": (1) the 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 if the time was spent trying to acquire the means to travel onwards); and (3) whether or not the refugee sought or found protection *de jure* or *de facto*.[56] It can be seen that the factors identified by the UK court, which are crucial in assessing the "coming directly" requirement, are very similar to those formulated by the UNHCR. This means that the courts of some countries understand and interpret this term in essentially the same way. In such cases, one can expect judicial practice that conforms to international obligations.

However, in other countries (for example, in Germany), national case law has not been consistent or unequivocal. In one case, an 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 obtained in Greece. The German Federal Constitutional Court noted that although Greece was considered a "safe country" under German law, at the time of the entry Greece could not be regarded as completely safe due to systemic deficiencies in its asylum procedure (in light of the ECtHR's ruling on this issue). As a result, the Court held that the lower court had erred in assuming that the applicant was no longer a refugee due to his transitory 40-day stay in Greece.[57]

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[53] United Nations High Commissioner for Refugees, *supra* note 49.
[54] Cathryn Costello and Yulia Ioffe, *supra* note 16, 5.
[55] High Court of the United Kingdom of Great Britain and Northern Ireland, Case No. [1999] EWHC Admin 765; [2001] Q.B. 667 // https://www.refworld.org/cases,GBR_HC_QB,3ae6b6b41c.html
[56] High Court of New Zealand, Case No. (2003) CIV 2003-404-4373.
[57] Federal Constitutional Court of Germany, Case No. 2 BvR 450/11 // https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/12/rk20141208_2bvr045011en.htm

Thus, a 40-day period in a safe intermediate country in this case was not one that would lead to the loss of immunity from criminal liability.

Of course, contrary examples can also be found. In one New Zealand case, the court noted that "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."[58] In another case in New Zealand, a somewhat more complex situation arose. The Court of Appeal held that the appellant had not "come directly" where he had come to New Zealand and then repeatedly returned to his country of origin, Syria—exiting and entering Syria legally on multiple occasions—and then traveled through a number of other countries on false travel documents before arriving in New Zealand.[59] Thus, in the first case, long periods were spent in presumably safe countries, and therefore arrival from those countries was not recognized as direct. In the second case, even though the stays in transit countries were perhaps brief, they were undertaken multiple times; moreover, upon reaching the desired (safe) country, the person repeatedly went back to his country of origin.

Similar examples can also be found in European countries, though they relate more to the duration of stays in other countries. "While the length of time spent in intermediate countries is a relevant factor for interpreting whether the refugee has indeed "come directly," no strict time limit ought to be applied to stopovers or stays in such countries".[60] Although there is no (and arguably cannot be) fixed time limit, some courts have based their decisions on the length of time spent in transit countries. For instance, the Dutch Supreme Court held that in cases where the asylum seekers' stay extended to 10 months in Greece without applying for asylum there, or several years in Saudi Arabia, the persons concerned were deemed not to have "come directly."[61] If decisions of this kind could be considered reasonable and acceptable, some other cases would not withstand scrutiny due to the purely formal reasoning of their decisions. For example, in Hungary, courts have found that asylum seekers did not come directly when they entered from Serbia, simply on the basis that Serbia was designated as safe by a government decree.[62]

In summary of this section, it can be concluded that in cases where a refugee obtained asylum in a transit country, or was refused such asylum, his further travel to other countries has essentially never been recognized as non-punishable under Article 31 of the Refugee Convention. Meanwhile, all other cases—when a refugee travels through several transit countries, spending varying amounts of time in them—must be assessed on an individual basis, taking into account the reasons for such travel, the motives, the reasons why the person intended to arrive in a particular country, how long the travel and stays in intermediate countries lasted, and finally the manner and circumstances of the refugee's journey. It is important to evaluate the totality of these circumstances, rather than just one or a few of them. Therefore, for example, a long

[58] High Court of New Zealand, Case No. No CRI 2006-485-101 // http://www.refworld.org/cases,NZL_HC,47a1d3e32.html
[59] Court of Appeal of New Zealand, Case No. (2006) CA297/06 () [30] // http://www.refworld.org/cases,NZL_CA,47a1d2182.html
[60] United Nations High Commissioner for Refugees, *supra* note 15, 10–11.
[61] Cathryn Costello, Yulia Ioffe and Teresa Büchsel, *supra* note 19, 21.
[62] United Nations High Commissioner for Refugees, *Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016* (2016): 57–62 // http://www.refworld.org/docid/57319d514.html

period spent in a transit country by itself cannot be grounds for a conclusion that the condition of "coming directly" was not met.

CONCLUSIONS

The judicial practice of Lithuania and other countries varies in how it interprets cases where a refugee arrives in a country by crossing the border legally but using forged documents. In some instances, refugees are subjected to criminal liability in such cases, among other things, in accordance with current legislation. Regardless of the differing legal regulations in various countries, the question of exempting such a person from criminal liability should be decided based on the grounds set forth in Article 31 of the Refugee Convention. Therefore, it is recommended to amend Article 300 of the Lithuanian Criminal Code to provide, similarly to Article 291(2) of the Criminal Code, that a foreigner who illegally arrived in the Republic of Lithuania while possessing a false or forged document with the intention of seeking asylum is to be exempted from criminal liability under Article 300(1) or (2).

The study found that there is the current highly divergent legal regulations of various countries in setting even very short "without delay" deadlines, as well as the extremely different assessments of essentially analogous situations in case law. This ambiguous legal situation is viewed negatively. Therefore, it is suggested that international agreements establish a minimum time limit within which an asylum application is deemed to have been made without delay. Such a regulation would prevent states from setting unjustifiably short filing deadlines, and if that period is exceeded, each situation should be assessed individually, applying the currently existing criteria more strictly.

Assessing correctly the "come directly" condition for immunity from criminal liability can be challenging. Nevertheless, international law experts, officials, and national courts of different states generally understand this term similarly. When a refugee remains somewhat longer in transit countries, it is necessary to consider the reasons for such a stay, the motives, the reasons why the person intended to travel to a particular country, and how long such travel and stay in intermediate countries lasted.

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