

Seeking Asylum in Norway: Access to Territory, Safe Third Country and Non-Penalization

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for asylsøkere

| NOAS



**Seeking Asylum in Norway:
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Table of contents

1 EXECUTIVE SUMMARY AND RECOMMENDATIONS	5
2 METHODOLOGY	9
2.1 The relevance of the Asylum Procedures Directive for Norway	9
2.2 Interpretation of treaties under the VCLT	12
3 ACCESS TO TERRITORY	14
3.1 International legal framework	14
3.1.1 Border control and the right to asylum under EU law	14
3.1.2 Non-refoulement	16
3.1.3 Prohibition of collective expulsion	17
3.1.4 Territorial and extraterritorial jurisdiction under human rights law	18
3.1.5 Refoulement by proxy and complicity under public international law	19
3.2 Norwegian law and practice	21
3.2.1 External Schengen border with Russia	21
3.2.2 Internal Schengen borders with other Nordic states	25
3.2.3 The impact of COVID-19	26
4 THE CONCEPT OF SAFE THIRD COUNTRY	28
4.1 International legal framework	28
4.1.1 State responsibility and inter se modification of multilateral treaties	29
4.1.2 UNHCR's legal considerations	30
4.1.3 The duty under ECHR to ensure that the third country is 'safe'	31
4.1.4 Relevant EU law	32
4.1.5 Connection with the third country	33
4.1.6 Right to independent review and automatic suspensive effect	34
4.1.7 Right to free legal assistance	37
4.2 Norwegian law and practice	38
4.2.1 Non-refoulement undermined	39
4.2.2 No reasonable connection with the third country	45
4.2.3 No independent review with automatic suspensive effect	48
4.2.4 No right to free legal assistance	51
5 NON-PENALIZATION FOR ILLEGAL ENTRY OR PRESENCE	54
5.1 International legal framework	54
5.1.1 Penalties	57
5.1.2 Illegal entry or presence	58
5.1.3 Coming directly	58
5.1.4 Without delay	62
5.1.5 Good cause	63
5.2 Norwegian law and practice	64
5.2.1 Supreme Court's interpretation of 'without delay'	65
5.2.2 Supreme Court's interpretation of 'coming directly'	66
5.2.3 Implementation at the prosecutorial level	70

1 Executive summary and recommendations

This report examines Norway's asylum law and practice related to access to territory, the application of the concept of safe third country and adherence to the principle of non-penalization of asylum seekers for their illegal entry or presence. The following summary focuses on the main challenges and gaps identified in the report in light of Norway's international legal obligations, while providing recommendations on how Norway should address these issues.

Access to territory

The examination of Norway's border control measures highlights two main concerns. First, the government issued a Ministerial Instruction on 24 November 2015 to the Police Directorate, responding to an unprecedented increase in asylum arrivals at the Storskog border crossing with Russia.¹ In effect, the instruction, which is still in force, has abolished the institute of asylum at the Storskog border crossing, as it specifically instructs the Norwegian border officials to request their Russian counterparts to hold back from Norway's jurisdiction each person who does not have a Schengen visa or another entry permit, including persons intending to seek asylum.² According to the Police Directorate, only nine asylum seekers without a Schengen visa or another entry permit reached the Norwegian jurisdiction at the Storskog border crossing in the period from 2016 to 2020.³

Second, Norway introduced emergency measures in section 32(5) and (6) of the Immigration Act in 2016, allowing police officers to turn away asylum seekers directly at the border with another Nordic state. Subject to a specific governmental approval, Norway may cease to abide by the Dublin III Regulation pursuant to these provisions in the event of an extraordinarily high number of arriving asylum seekers.⁴

On the positive side, Norway's response to the COVID-19 pandemic has not affected the right to seek asylum.⁵

¹ Justis- og beredskapsdepartementet, *Instruks – Rutiner for rask handtering av personer som ankommer over norskrussisk landegrense (Storskog) uten gyldig visum eller annen gyldig innreisetillatelse til Norge*, 15/7814- EST, 24.11.2015, section 3.1, available at: <https://bit.ly/3CuiwYJ>

² For more detail, see section 3.2.1 of the report.

³ Finnmark politidistrikt, *Begjæring om innsyn Norsk organisasjon for asylsøkere (NOAS) – statistikk på antall asylsøknader på Storskog*, 03.09.2021, available at: <https://www.noas.no/wp-content/uploads/2021/11/Statistikk-Storskog-POD.pdf>

⁴ For more detail, see section 3.2.2 of the report.

⁵ For more detail, see section 3.2.3 of the report.

NOAS recommends

- Norway should ensure that all asylum-seekers and refugees have effective access to territory and to fair and efficient asylum procedures by providing minimum procedural safeguards and protection from *refoulement*, as recently reiterated by UNHCR.⁶
- In particular, Norway should repeal the Ministerial Instruction to the Police Directorate of 24 November 2015.
- Norway should also repeal section 32(5) and (6) of the Immigration Act. Alternatively, the provisions should be amended so that the related tasks are performed by the Directorate of Immigration (UDI), subject to proper procedural safeguards, including access to appeal with automatic suspensive effect.

Safe third country

Norway's safe third country provision, expressed in section 32(1)(d) of Norway's Immigration Act, could originally only be applied to declare an asylum claim inadmissible if it was established that the claim «will be examined» in the third country concerned. However, pursuant to an amendment introduced in November 2015, the new wording of the provision no longer explicitly requires access to an asylum procedure in the third country. Although sections 32(3) and 73 of the Immigration Act still subject any denial of merits assessment to legal protection against *refoulement*, the above-mentioned amendment critically undermines this protection.⁷

Alarmingly, under current practice, Norway's safe third country provision is applied in respect to a wide range of countries, including states not bound by the Refugee Convention that lack a domestic asylum system as well as an effective legal protection against *refoulement*, such as Kuwait, Saudi Arabia and United Arab Emirates. In practice, the Norwegian immigration authorities normally do not consider the question of accessibility and reliability of the third country's asylum system to be of decisive relevance unless there are specific indications that the individual in question might risk chain *refoulement*. Furthermore, rather than engaging in a serious analysis of the relevant *legal* protections and procedural safeguards in the third country, the assessment by the Norwegian immigration authorities tends to focus primarily on whether there are any documented or reported instances of *refoulement*.⁸

Norway's practice is problematic for several reasons. Refugees with various temporary permits in third countries that lack an adequate asylum system may be exposed to the risk of *refoulement* for reasons that are sudden and unexpected. This includes individual reasons, such as losing a job or a sponsor, as well as policy changes introducing new restrictions on foreigners' residency rights. Furthermore, as actual instances of *refoulement* may be difficult to document, country reports that are overly focused on the factual situation, while neglecting aspects concerning legal protection, might not provide an accurate basis for assessing the risk of chain *refoulement*. This relates especially to countries where the local non-governmental organisations face difficult legal and financial constraints and where the refugee community is vulnerable and not adequately protected by law.

6 UN High Commissioner for Refugees (UNHCR), *UNHCR recommendations to Norway for strengthened refugee protection in Norway, Europe and globally*, 12.11.2021, p. 4, available at: <https://www.unhcr.org/neu/70623-recommendations-to-norway-on-strengthening-refugee-protection.html>

7 For more detail, see section 4.2 of the report.

8 For more detail, see section 4.2.1 of the report.

Furthermore, the application of Norway's safe third country provision does not require in practice any reasonable connection between an asylum seeker and the third country other than a previous transit and access to it at the time of determination of inadmissibility. Norway's practice is unusually harsh in this regard, as 'access' does not even require lawful residence if readmission is accepted by the third country. Refugees may thus be deported from Norway pursuant to a readmission agreement to a third country where they face the risk of a long imprisonment for illegal stay, as recently accepted by Norway's administrative courts.⁹

Norway's law and practice related to the application of the concept of safe third country fails to take into serious consideration the relevant UNHCR guidelines¹⁰ as well as the recent legal findings made by the Grand Chamber of the European Court of Human Rights in the case of *Ilias and Ahmed v. Hungary*.¹¹ Norway has also not considered the implications of its obligations under Article 3(3) of the Dublin III Regulation, as these relate to the standards and safeguards laid down in the Asylum Procedures Directive relevant to the application of the concept of safe third country.¹²

Moreover, with regard to the procedural safeguards in inadmissibility procedures, there are critical shortcomings that are inconsistent with Article 13 of the European Convention on Human Rights.¹³ The Norwegian Directorate of Immigration (UDI) does not normally conduct asylum interviews in inadmissibility procedures, there is no access to appeal with automatic suspensive effect¹⁴ and no access to free legal assistance.¹⁵

NOAS recommends

- Norway should ensure that asylum seekers referred to a safe third country pursuant to section 32(1)(d) of the Immigration Act are not exposed to the risk of *refoulement*, including chain *refoulement*.
- In particular, Norway should subject the application of section 32(1)(d) of the Immigration Act to the requirement of access to an adequate asylum procedure in the third country.
- Norway should ensure access to appeal with automatic suspensive effect for all asylum seekers who present an arguable claim, including in inadmissibility procedures.
- Norway should introduce the requirement of a reasonable connection between an asylum seeker and a third country when applying the safe third country provision.
- Norway should ensure that asylum seekers referred to a safe third country are always interviewed by the UDI about their personal circumstances in the third country.
- Norway should reintroduce access to free legal assistance in inadmissibility procedures.

9 For more detail, see section 4.2.2 of the report.

10 UN High Commissioner for Refugees (UNHCR), *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, para. 4, available at: <https://www.refworld.org/docid/5acb33ad4.html>. For more detail, see section 4.1.2 of the report.

11 *Ilias and Ahmed v. Hungary* (App. 47287/15), ECtHR, 21.11.2019 [GC], paras 128–141, available at: <http://hudoc.echr.coe.int/eng?i=001-198760>. For more detail, see section 4.1.3 of the report.

12 For more detail, see sections 2.1 and 4.1.4 of the report.

13 For more detail, see sections 4.1.6 and 4.1.7 of the report.

14 For more detail, see section 4.2.3 of the report.

15 For more detail, see section 4.2.4 of the report.

Non-penalization

The Refugee Convention affords refugees the protection against penalization for unlawful entry or presence subject to the terms of Article 31(1).¹⁶ Nevertheless, asylum seekers used to be routinely sentenced to prison after presenting forged documents to passport control upon arrival to Norway, often pursuant to a simplified confession procedure without indictments and a main hearing, which would reduce the prison sentence from 60 to 45 days.

Although Norway's legislation still does not explicitly refer to the protection against penalization afforded to refugees under Article 31(1) of the Refugee Convention, the provision has nevertheless been applied by the Supreme Court on three occasions since 2014.¹⁷ Furthermore, the provision has since been implemented at the prosecutorial level¹⁸ and discussed in the Norwegian legal literature.¹⁹

So far, the Criminal Cases Review Commission has reopened only 12 cases concerning refugees that have been convicted without regard to Article 31(1). In NOAS' view, more could be done to identify persons who had been wrongfully convicted before the Supreme Court corrected Norway's wrongful practice.²⁰

NOAS recommends

- Norway should incorporate the protection afforded by Article 31(1) of the Refugee Convention in the Penal Code as well as the Immigration Act.
- However, in order to enhance the clarity and predictability of the protection against penalization under criminal law, NOAS recommends a simplified wording of the protection: «A foreigner who enters or attempts to leave the realm seeking to exercise the right of asylum shall be released from criminal liability for unlawful entry or presence.»
- Norway should adopt measures to ensure that wrongfully convicted refugees are identified, informed and provided with adequate legal assistance to have their convictions reopened by the Criminal Cases Review Commission.

¹⁶ For more detail, see section 5.1 of the report.

¹⁷ For more detail, see section 5.2.1 of the report.

¹⁸ For more detail, see section 5.2.2 of the report.

¹⁹ Kenneth A. Baklund, Sigurd Bordvik, Øyvind Røyneberg, *Utvising, tvangsmidler og straff*, Gyldendal, 2019, pp. 484–496.

²⁰ For more detail, see section 5.2.3 of the report.

2 Methodology

The present report is a desk study, which describes and analyses Norway's asylum law and practice related to three specific issue areas, namely access to territory, the application of the concept of safe third country and non-penalization for illegal entry or presence.

The analysis is based on primary sources, including the Immigration Act (utlendingsloven) and Immigration Regulations (utlendingsforskriften), as well as relevant ministerial instructions to the immigration authorities (referenced as instruks) and implementing circulars (rundskriv). The preparatory works often play an important role when determining the scope and meaning of the applicable legislation and are therefore cited as well, including law proposals (referenced as høringsnotat) and parliamentary bills (proposisjon til Stortinget, referenced as 'Ot.prp.' or 'prop.'). References are also made to important case law. English translation of the Norwegian legislation and other official documents and decisions cited in this report are based on official translations to the extent this was possible, while the rest is translated by NOAS.

The relevant analytic framework is discussed in each section of the respective issue area, referring to relevant international law that is binding for Norway. Nevertheless, references are also made to parts of EU law that are not binding for Norway, including the Asylum Procedures Directive (APD) – for comparative reasons.

However, specifically in respect to the concept of safe third country (discussed in section 4), Article 3(3) of the Dublin III Regulation, which is binding for Norway, provides that the application of this concept is subject to the rules and safeguards laid down in the APD. Hence, at least with regard to the application of the concept of safe third country, Norway is arguably bound by the APD indirectly through the Dublin III Regulation, as discussed in the next subsection (2.1). This issue remains unaddressed in Norway by both the legislator and the government.

As several references are made to the rules of treaty interpretation throughout this report, especially in section 5, which discusses specific terms of Article 31(1) of the Refugee Convention, at least a short description of these rules is included in section 2.2 below.

2.1 The relevance of the Asylum Procedures Directive for Norway

Although Norway is not bound by the Asylum Procedures Directive (APD),²¹ it is bound by Article 3(3) of the Dublin III Regulation.²² According to the provision, states «retain the right to send an

21 European Union: Council of the European Union, *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)*, 29 June 2013, OJ L 180/60-180/95; 29.06.2013, 2013/32/EU, available at: <https://eur-lex.europa.eu/eli/dir/2013/32/oj>

22 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; 29.06.2013, (EU)No 604/2013, available at: <http://data.europa.eu/eli/reg/2013/604/oj>

applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU», i.e. the APD. The Court of Justice of the European Union (CJEU) has made it clear that its interpretation of Article 3(3) of the Dublin III Regulation is based on the definition of the concept of ‘safe third country’ enshrined in Article 38 of the APD.²³ Arguably, Norway is indirectly bound by the APD, including Article 38, through the Dublin III Regulation with regard to the application of the concept of safe third country (discussed in section 4 of the report).

It may be recalled that Norway became bound by the Dublin III Regulation pursuant to a procedure set out in Article 4 of the 2001 Dublin/Eurodac Association Agreement.²⁴ The ensuing domestic legislative process has unfortunately not clarified the consequences of the reference to the APD in Article 3(3) of the Dublin III Regulation for Norway’s domestic law.²⁵ Section 32(4) of Norway’s Immigration Act simply states that the Dublin III Regulation «applies as Norwegian law».²⁶

The main issue concerns the binding nature of the reference to the APD in Article 3(3) of the Dublin III Regulation. It is worth noting that this provision uses a weaker wording than Article 28(4) of the same Regulation. The latter provision specifically refers to Articles 9 to 11 of the Reception Conditions Directive²⁷ related to detention that, according to the wording of the Regulation, «shall apply».²⁸ As noted by academic commentary, associated states like Norway are thereby bound by these specific standards even if these states are not bound by the Directive as such.²⁹ The wording of Article 28(4) of the Regulation clearly implies that the referred provisions apply directly as an incorporated part of the Regulation, i.e. not subject to the national transposition of the Directive.³⁰ In contrast, the wording of Article 3(3) of the Regulation can be described as «less precise and expressed in considerably less imperative terms».³¹ Arguably, this indicates the need for prior transposition of the relevant rules and safeguards in the APD by the legislator.

Several arguments support the conclusion that Article 3(3) of the Dublin III Regulation obliges the legislator to align Norway’s safe third country provision with the APD. First, there is nothing in general international law or EU law that precludes a binding legal effect of a reference in a binding instrument to an otherwise non-binding instrument or some of its parts. From a strictly formal perspective, Norway is bound by what is referenced in Article 3(3) of the Dublin III Regulation even

23 *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal* (C-695/15 PPU - Mirza), Court of Justice of the European Union (CJEU), 17.03.2016, paras. 62–63, available at: <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-695/15>

24 European Union, *Agreement between the European Community and the Republic of Iceland and the Kingdom of Norway concerning the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in a Member State or in Iceland or Norway*, 19.01.2001, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22001A0403%2801%29>

25 See: Prop. 25 S (2013–2014), available at: <https://www.regjeringen.no/no/dokumenter/prop-25-s-20132014/id746834/>; Prop. 26 L (2013–2014), available at: <https://www.regjeringen.no/no/dokumenter/prop-26-l-20132014/id746713/>; Innst. 68 S (2013–2014), available at: <https://stortinget.no/globalassets/pdf/innstilling/stortinget/2013-2014/inns-201314-068.pdf>

26 Norway’s Immigration Act, section 32(4), available at: <https://lovdata.no/NLE/lov/2008-05-15-35/§32>

27 European Union: Council of the European Union, *Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, 29 June 2013, OJ L 180/96 -105/32; 29.6.2013, 2013/33/EU, available at: <https://eur-lex.europa.eu/legal-content/EN/TEXT/?uri=celex%3A32013L0033>

28 Article 28(4) of the Dublin III Regulation states the following: «As regards the detention conditions and the guarantees applicable to persons detained, in order to secure the transfer procedures to the Member State responsible, Articles 9, 10 and 11 of Directive 2013/33/EU shall apply.»

29 Kay Hailbronner and Daniel Thym (Eds.), *EU Immigration and Asylum Law: A Commentary (Second Edition)*, Hart Publishing, 2016, p. 1575.

30 Ibid.

31 Ibid., p. 1501.

if transposition of the relevant APD standards is required (as is normally the case with EU directives generally).

Second, Norway has not reserved itself against Article 3(3) when negotiating its accession to the Dublin III Regulation. As the scope of the provision is limited to the application of the concept of safe third country, it does not amount to nullifying Norway's choice not to be bound by the APD as such.³² A reservation against Article 3(3) therefore cannot be automatically presumed.

Third, the Dublin III Regulation contains a hierarchy of rules governing the allocation of responsibility for asylum applications among the Member States. If Member States bound by both the Dublin III Regulation and the APD could assign the responsibility for asylum seekers to another Dublin state that could further send them to third countries without regard to the relevant safeguards under the APD, this would critically undermine these safeguards.

Fourth, the lack of harmonization of the relevant standards related to the application of the concept of safe third country undermines the purpose of the Dublin III Regulation, as it encourages secondary movement. As pointed out in section 4.2.2, Norway's domestic safe third country provision, which pays no regard to the APD, has encouraged secondary movement of a substantial number of asylum seekers from Norway to EU Member States.

Furthermore, one may also recall the preparatory works to Norway's Immigration Act. Specifically, in light of the Dublin cooperation, it was considered desirable at the time to signalise to other countries that Norway pursued comparable policy with regard to asylum.³³ The consideration of harmonization («harmoniseringshensyn») consequently appears throughout the preparatory works.³⁴

As an important side note, it should be mentioned that the reference to «Any Member State» in Article 3(3) of the Regulation means that the provision applies to both the determining state as well as the responsible state. The determining state may opt for a removal to a safe third country instead of a Dublin transfer, while the responsible state may discharge its obligation to 'examine' the application by applying the concept of safe third country.³⁵ Restricting the scope of the provision only to asylum seekers who have been subjected to the take-back procedure would contradict the Regulation's purpose, as asylum seekers would be incentivised to trigger APD's rules and safeguards by traveling to another Dublin state. The CJEU has previously considered the interpretation of Article 3(3) to such effect as unacceptable.³⁶

32 Ibid., p. 1501, cf. p. 1491.

33 Ot.prp. nr. 75 (2006–2007), p. 15, available at: <https://bit.ly/3zQtExk>

34 Ibid., p. 79–80, 83 and 110.

35 Kay Hailbronner and Daniel Thym (Eds.), *EU Immigration and Asylum Law: A Commentary (Second Edition)*, Hart Publishing, 2016, p. 1501.

36 *Shiraz Baig Mirza v Bevándorlási és Állampolgársági Hivatal* (C-695/15 PPU – Mirza), Court of Justice of the European Union (CJEU), 17.03.2016, paras. 51–52, available at: <https://curia.europa.eu/juris/liste.jsf?language=en&num=C-695/15>

2.2 Interpretation of treaties under the VCLT

The rules of treaty interpretation are expressed in Articles 31 to 33 of the Vienna Convention of the Laws of Treaties (VCLT),³⁷ reflecting customary international law.³⁸ It is commonly accepted that terms used in national legal systems, with possibly varying meanings, assume a single autonomous meaning under an international treaty, unless the treaty states otherwise.³⁹

The starting point for interpreting a treaty is the general rule of treaty interpretation, which is comprised by four paragraphs under Article 31 VCLT:

«Article 31

General rule of interpretation

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

Article 31 does neither create a hierarchy of rules nor require that they be applied in a specific sequence.⁴⁰ In the *travaux préparatoires* to the VCLT, the International Law Commission used the terms ‘crucible’ and ‘single combined operation’ to stress that at all the elements contained in article 31 must be considered together and in light of each other when interpreting a treaty.⁴¹

37 United Nations, *Vienna Convention on the Law of Treaties*, 23.05.1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <https://www.refworld.org/docid/3ae6b3a1o.html>

38 The International Court of Justice has affirmed that Article 31 and 32 reflect customary international law, see: *Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ, 13.07.2009, para. 47, available at: <https://www.icj-cij.org/public/files/case-related/133/133-20090713-JUD-01-00-EN.pdf>

39 Richard Gardiner, *Treaty Interpretation*, Oxford University Press, 2008, p. 32.

40 Ibid., p. 30. There is nevertheless a view that suggests a hierarchy between Article 31(1) and 31(3), since the latter provision only refers to the tools of interpretation that are to be ‘taken into account’ rather than to give effect or to apply. Regarding Article 31(2), this provision merely describes what the term ‘context’, used in Article 31(1), refers to. See: Dire Tladi, «Is the International Law Commission Elevating Subsequent Agreements and Subsequent Practice?» in: *EJIL:Talk! Blog of the European Journal of International Law*, 30.08.2018, available at: <https://www.ejiltalk.org/is-the-international-law-commission-elevating-subsequent-agreements-and-subsequent-practice/>

41 United Nations Conference on the Law of Treaties, Official Records: Documents of the Conference, A/CONF.39/11/Add.2, 1971, p. 39, para 8, available at: https://treaties.un.org/doc/source/docs/A_CONF.39_11_Add.2-E.pdf

Article 32 VCLT allows a limited recourse to «supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion». Relevant statements from monitoring treaty bodies, including UNHCR, may constitute ‘supplementary means of interpretation’.⁴² The recourse to supplementary means is permitted under Article 32, firstly, in order to «confirm the meaning resulting from the application of article 31». Secondly, the recourse is permitted to «determine the meaning» – but only when the interpretation according to article 31 either «leaves the meaning ambiguous or obscure» or «leads to a result which is manifestly absurd or unreasonable».

Article 33 VCLT regulates the interpretation of treaties authenticated in two or more languages. As provided in the first two paragraphs of the provision, the starting point is that only authenticated language versions of a treaty shall be considered an authentic text of the treaty and these versions are equally authoritative. Article 33(3) establishes a presumption that the terms of a treaty have the same meaning in each authentic text. However, if there is a discrepancy between language versions that cannot be resolved by the application of Articles 31 and 32, Article 33(4) provides that «the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.»

42 Jane McAdam, «Interpretation of the 1951 Convention» in: Andreas Zimmermann (red.), *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, pp. 99–115, where certain UNHCR documents are assessed within the framework of Article 32 VCLT on pp. 110–114.

See also: Terje Einarsen, *Retten til vern som flykting*, Cicero Publisher, 2000, s. 71–75, where UNHCR documents are also assessed under Article 32 VCLT.

3 Access to territory

State sovereignty implies the right of states to control the entry of foreigners as well as the right to become voluntarily bound by international agreements, including human rights treaties. As a result, the right of states to control the entry of foreigners is not entirely unconstrained. Persons outside of their country of origin who claim they would be exposed to a serious risk to their life or freedom if turned away enjoy special protection under international law, including in the context of border control, as discussed in section 3.1 below.

The examination of Norway's border control measures in section 3.2 highlights two main concerns. Firstly, since November 2015, Norway's border authorities are instructed to request its Russian counterpart to hold back from Norway's national border each person who does not have an entry permit, including persons intending to seek asylum. In effect, the instruction has thereby abolished the institute of asylum at Norway's border with Russia (see section 3.2.1).

Secondly, Norway has introduced emergency measures that would allow police officers to turn away asylum seekers directly at the border with another Nordic state under certain circumstances, but these have so far not been implemented in practice (see section 3.2.2).

On the positive side, Norway's response to the COVID-19 pandemic has not affected the right to seek asylum (see section 3.2.3).

3.1 International legal framework

This section offers a brief overview of the international legal framework relevant to the issue of access to territory for asylum seekers in the context of border control. The first subsection (3.1.1) addresses border control in light of the right to asylum under EU law. The second subsection (3.1.2) addresses the principle of *non-refoulement*. The third subsection (3.1.3) addresses the prohibition of collective expulsion. The fourth subsection (3.1.4) shortly explains the issues of territorial and extraterritorial jurisdiction in human rights law. Lastly, the fifth subsection (3.1.5) addresses *refoulement* by proxy from the perspective of the customary rule on complicity in public international law. Procedural guarantees are discussed further below in relation to the concept of safe third country, with the focus on the right to independent review with suspensive effect (4.1.6) as well as the right to legal assistance (4.1.7).

3.1.1 Border control and the right to asylum under EU law

The Schengen Borders Code recognises the state parties' common interest to control the Schengen external borders, while providing in Article 3(b) that it must be applied «without prejudice to the rights of refugees and persons requesting international protection, in particular as regards *non-*

refoulement».⁴³ As further stated in Article 4, the Schengen Borders Code must be applied «in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union (‘the Charter’), relevant international law, including the Convention Relating to the Status of Refugees [...], obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights.»

Under EU law, Article 18 of the Charter of Fundamental Rights of the European Union provides that «the right to asylum shall be guaranteed with due respect for the rules of [the Refugee Convention]».⁴⁴ This provision partially reflects Article 14 of the non-binding Universal Declaration of Human Rights, which refers to «the right to seek and to enjoy in other countries asylum from persecution.»⁴⁵ As noted by Cathryn Costello, the full potential of Article 18 of the Charter has yet to be explored.⁴⁶ Article 19 of the Charter further contains an explicit prohibition against *refoulement* and collective expulsions.

The EU asylum *acquis* applies from the moment an individual arrives at the border, including territorial waters and transit zones, as specified in Article 3(1) of the Asylum Procedures Directive (APD).⁴⁷

The effectiveness of the right to asylum, as guaranteed by Article 18 of the Charter, is conditional on that application being registered, lodged and examined within the established time periods prescribed by the APD.⁴⁸ Details concerning access to the asylum procedure are specified in Article 6 APD. As recently emphasized by the Grand Chamber of the Court of Justice of the European Union (CJEU), the very objective of the APD, and in particular that of Article 6(1), is «to ensure effective, easy and rapid access to the procedure for international protection».⁴⁹ Importantly, Article 6(2) APD requires that persons making an application for international protection must have «an effective opportunity to lodge it as soon as possible.» Furthermore, according to Article 8 APD, where there are indications that persons present at the border may wish to seek asylum, states must provide them with «information on the possibility to do so.»

Article 43 APD allows the processing of asylum applications at the border or transit zones, where decisions may be made on the admissibility of the application pursuant to Article 33 APD. In addition, decisions may be made there on the substance of the application in cases that may be processed in accelerated procedures pursuant to Article 31(8) APD. Border procedures may not be used if adequate support cannot be provided at the border in cases concerning vulnerable applicants in need of special

43 European Union: Council of the European Union, *Regulation (EC) No. 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code)*, 15.03.2006, OJ L 105/1-105/32; 13.4.2006, (EC) No 562/2006, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399>

44 European Union, *Charter of Fundamental Rights of the European Union*, 26.10.2012, 2012/C 326/02, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>

45 UN General Assembly, *Universal Declaration of Human Rights*, 10.12.1948, 217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html>

46 Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law*, Oxford University Press, 2015, p. 49.

47 European Union: Council of the European Union, *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)*, 29 June 2013, OJ L 180/60 -180/95; 29.06.2013, 2013/32/EU, available at: <https://eur-lex.europa.eu/eli/dir/2013/32/oj>

48 *European Commission v Hungary* (C 808/18), CJEU [GC], para. 102, 17.12.2020, available at: <https://curia.europa.eu/juris/liste.jsf?num=C-808/18>

49 *Ibid.*, para. 104.

procedural guarantees as a result of torture, rape or other serious forms of psychological, physical or sexual violence, as specified in Article 24(3) APD. Furthermore, Article 25(6)(b) APD imposes certain limitations on the use of border procedures in the case of unaccompanied minors.

It may further be noted that UNHCR has recently proposed a three-step border procedure resulting in relocation or return, with a focus on in-merits procedures instead of admissibility procedures, emphasizing that «efficient border procedures that maintain fairness safeguards and adhere to international and EU law, including the principle of *non-refoulement*, are possible.»⁵⁰

3.1.2 Non-refoulement

A core element of refugee protection is the principle of *non-refoulement*. It is most prominently expressed in Article 33 of the Refugee Convention, which prohibits states from returning («*refouler*») refugees «in any manner whatsoever» to a place where their life or freedom would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion.⁵¹

In addition, various human rights treaties entail a more general obligation not to remove individuals to a place where they would face a real risk of a serious harm. Specifically, Article 3 of the Convention against Torture forbids states from removing a person «to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.»⁵² Similar prohibition against removal follows implicitly from the right to life and the prohibition against cruel, inhuman or degrading treatment or punishment. This concerns specifically Articles 6 and 7 of the Civil and Political Covenant (ICCPR),⁵³ as interpreted by the UN Human Rights Committee,⁵⁴ and Articles 2 and 3 of the European Convention of Human Rights (ECHR),⁵⁵ as interpreted by the European Court of Human Rights (ECtHR).⁵⁶ The Court has established that the principle of *non-refoulement* is absolute, including in situations concerning national security.⁵⁷

The principle of *non-refoulement* includes the prohibition of indirect *refoulement*, which is also known as chain *refoulement*. This means that a state A must not remove an individual to an intermediary

50 UN High Commissioner for Refugees (UNHCR), *Practical considerations for fair and fast border procedures and solidarity in the European Union*, 15.10.2020, p. 2, available at: <https://www.refworld.org/docid/5f8838974.html>. See also: UN High Commissioner for Refugees (UNHCR), *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25.07.2018, available at: <https://www.refworld.org/docid/5b589eef4.html>

51 UN General Assembly, *Convention Relating to the Status of Refugees*, 28.07.1951, United Nations, Treaty Series, vol. 189, p. 137, UN General Assembly, *Protocol Relating to the Status of Refugees*, 31.01.1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <https://www.unhcr.org/3b66c2aa10>

52 UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10.12.1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <https://www.refworld.org/docid/3ae6b3a94.html>

53 UN General Assembly, *International Covenant on Civil and Political Rights*, 16.12.1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <https://www.refworld.org/docid/3ae6b3aao.html>

54 UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26.05.2004, CCPR/C/21/Rev.1/Add.13, para. 12, available at: <https://www.refworld.org/docid/478b26ae2.html>; UN Human Rights Committee (HRC), *General comment no. 36, Article 6 (Right to Life)*, 03.09.2019, CCPR/C/GC/35, paras. 30-31, available at: <https://www.refworld.org/docid/5e5e75e04.html>

55 Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights)*, 04.11.1950, ETS 5, available at: https://www.echr.coe.int/documents/convention_eng.pdf;

56 *Soering v. UK* (App. 14038/88), ECtHR, 07.07.1989, para. 91, available at: <http://hudoc.echr.coe.int/eng?i=001-57619>; *Bader and Kanbor v. Sweden* (App. 13284/04), ECtHR, 08.11.2005, para. 48, available at: <http://hudoc.echr.coe.int/eng?i=001-70841>.

57 *Saadi v. Italy* (App. 37201/06), ECtHR, 28.02.2008 [GC], para. 138, available at: <http://hudoc.echr.coe.int/fre?i=001-85276>

state B, where the individual would face the risk of being removed further, in violation of the *non-refoulement* principle, to another state C.

According to the jurisprudence of the ECtHR, the state A cannot be satisfied merely by the fact that the state B is bound by relevant international treaties prohibiting *refoulement*. To the contrary, the state A must make sure that the authorities in the state B actually apply this obligation in practice.⁵⁸

3.1.3 Prohibition of collective expulsion

A separate rule of consequence to asylum seekers in the context of border control is the prohibition against collective expulsion, expressed in Article 4 of Protocol No. 4 to the ECHR.⁵⁹ This provision normally precludes removal of asylum seekers to another state «without any form of examination of each applicant's individual situation.»⁶⁰

States will violate this provision if they decline to examine applications for international protection of persons who attempt «to cross a border in a legal manner, using an official checkpoint and subjecting themselves to border checks as required by the relevant law.»⁶¹

However, «persons who cross a land border in an unauthorised manner, deliberately take advantage of their large numbers and use force» may potentially be excluded from the scope of this particular provision.⁶² In such case, it is to be taken into account whether the state provides «genuine and effective access to means of legal entry, in particular border procedures.»⁶³

It should be emphasized that considerations regarding the manner of entry of asylum seekers are irrelevant in respect to the principle of *non-refoulement*.

58 *M.S.S. v. Belgium and Greece* (App. 30696/09), ECtHR, 21.01.2011 [GC], para. 359, available at: <http://hudoc.echr.coe.int/eng?i=001-103050>

59 Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16.09.1963, ETS 46, available at: https://www.echr.coe.int/documents/convention_eng.pdf

60 *Hirsi Jamaa and Others v. Italy* (App. 27765/09), ECtHR, 23.02.2016 [GC], para. 185, available at: <http://hudoc.echr.coe.int/fre?i=001-109231>; *Sharifi and Others v. Italy and Greece* (App. 16643/09), ECtHR, 21.10.2014, para. 212, available at: <http://hudoc.echr.coe.int/eng?i=001-147287>

61 *M.K. and Others v. Poland* (app. nos. 40503/17, 42902/17 and 43643/17), ECtHR, 23.07.2020, para. 207 and 210, available at: <http://hudoc.echr.coe.int/eng?i=001-203840>

62 *N.D. and N.T. v. Spain* (App. 8675/15 and 8697/15), ECtHR, 13.02.2020 [GC], para. 200, available at: <http://hudoc.echr.coe.int/spa?i=001-201353>. Cf. *Shahzad v. Hungary* (App. 12625/17), ECtHR, 08.07.2021, para. 61, available at: <http://hudoc.echr.coe.int/eng?i=001-210853>

For a detailed discussion of the Grand Chamber judgement in *N.D. and N.T. v. Spain* see: Giulia Ciliberto «A Brand-New Exclusionary Clause to the Prohibition of Collective Expulsion of Aliens: The Applicant's Own Conduct in *N.D. and N.T. v. Spain*» in *Human Rights Law Review*, Volume 21, Issue 1, March 2021, pp. 203–220; European Council on Refugees and Exiles (ECRE), *Across Borders: The Impact of N.D. and N.T. v. Spain in Europe*, Legal Note #10, June 2021, available at: <https://www.ecre.org/wp-content/uploads/2021/07/Legal-Note-10.pdf>

63 *N.D. and N.T. v. Spain* (App. 8675/15 and 8697/15), ECtHR, 13.02.2020 [GC], para. 201, available at: <http://hudoc.echr.coe.int/spa?i=001-201353>. Cf. *Shahzad v. Hungary* (App. 12625/17), ECtHR, 08.07.2021, para. 65, available at: <http://hudoc.echr.coe.int/eng?i=001-210853>

3.1.4 Territorial and extraterritorial jurisdiction under human rights law

Under international human rights law, state liability for a violation of an individual's rights presupposes the individual's presence within the state's jurisdiction. Under ECHR, this is explicitly articulated in Article 1. A state may thus incur liability for *refoulement* if it denies at-risk persons who are present within its jurisdiction access to a proper asylum procedure, including when such persons are at the state's land borders.⁶⁴

Furthermore, the jurisdictional requirement may also be met extraterritorially, including on the high seas, where state's agents exercise «physical power and control over the person in question»⁶⁵ or a «continuous and exclusive de jure and de facto control».⁶⁶ However, choosing freely to present oneself at an embassy and submitting a visa application does not trigger jurisdiction under ECHR.⁶⁷

The current case law of the Strasbourg Court on extraterritorial jurisdiction may likely preclude a finding of liability for so-called *non-entrée* policies that are entirely implemented by other parties operating outside the state's territory, even if such policies lead to *refoulement*. Such measures include visa controls along with carrier sanctions, patrol and maritime interdiction, as well as various other forms of direct and indirect deterrence measures, such as the provision of funding, equipment and training to agents of other states that in practice enforce *refoulement*.⁶⁸ As the Court has repeatedly held, acts of states «producing effects» outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 «only in exceptional cases».⁶⁹

Arguably, there is potential for further jurisprudential development on extraterritorial jurisdiction to address at least some *non-entrée* policies leading to *refoulement*. For example, Violeta Moreno-Lax and Mariagiulia Giuffré contend that «knowingly entering into an agreement with unsafe countries, such as Libya and Turkey, where risks of (direct and indirect) *refoulement*, in both its material and procedural facets, are blatant and reliably documented, with the result of heightening the possibility of an Article 3 ECHR violation, instead of diminishing or avoiding it, should be adjudged to trigger the action of the ECHR.»⁷⁰

64 *N.D. and N.T. v. Spain* (App. 8675/15 and 8697/15), ECtHR, 13.02.2020 [GC], para. 109-110, available at: <http://hudoc.echr.coe.int/spa?i=001-201353>; *M.K. and Others v. Poland* (app. nos. 40503/17, 42902/17 and 43643/17), ECtHR, 23.07.2020, para. 129-130, available at: <http://hudoc.echr.coe.int/eng?i=001-203840>

65 *Al-Skeini and Others v. the United Kingdom* (App. 55721/07), ECtHR, 07.07.2011 [GC], para. 136, available at: <http://hudoc.echr.coe.int/fre?i=001-105606>

66 *Hirsi Jamaa and Others v. Italy* (App. 27765/09), ECtHR, 23.02.2016 [GC], para. 81, available at: <http://hudoc.echr.coe.int/fre?i=001-109231>

67 *M.N. and Others against Belgium* (App. 3599/18), ECtHR, 05.05.2020 [GC], para. 118, available at: <http://hudoc.echr.coe.int/eng?i=001-202468>

68 For a quick overview, see: Nikolas Feith Tan, «International Models of deterrence and the future of access to asylum» in Satvinder Singh Juss (Ed.), *Research Handbook on International Refugee Law*, Edward Elgar Publishing, 2017, pp. 170–181.

69 *M.N. and Others against Belgium* (App. 3599/18), ECtHR, 05.05.2020 [GC], para. 102, available at: <http://hudoc.echr.coe.int/eng?i=001-202468>

70 Violeta Moreno-Lax and Mariagiulia Giuffré, «The Rise of Consensual Containment: From 'Contactless Control' to 'Contactless Responsibility' for Forced Migration Flows» in Satvinder Singh Juss (Ed.), *Research Handbook on International Refugee Law*, Edward Elgar Publishing, 2017, pp. 82–109 (at p. 107), available at: SSRN (at p. 25): <http://dx.doi.org/10.2139/ssrn.3009331>.

See also: Miles Jackson, «Freeing Soering: The ECHR, State Complicity in Torture and Jurisdiction» in *European Journal of International Law*, Volume 27, Issue 3, 01.12.2016, pp. 817–830, available at: <https://academic.oup.com/ejil/article/27/3/817/2197250>

Furthermore, as noted by Hathaway, there is «an emerging consensus that international law will hold states responsible for aiding or assisting another state's wrongful conduct even where the sponsoring state is not exercising jurisdiction.»⁷¹ The issue of jurisdiction in international human rights law nevertheless remains conceptually and legally separate from the question of international state responsibility, the latter of which is further addressed below.

3.1.5 *Refoulement* by proxy and complicity under public international law

As mentioned in the previous subsection, destination states adopting policies of *non-entrée* that are entirely implemented by other parties operating outside the state's territory may escape the jurisdictional reach of international human rights law. Nevertheless, insofar as international state cooperation prevents or deters access to asylum and leads to *refoulement*, it clearly undermines human rights as well as the object and purpose of the Refugee Convention.

Such '*refoulement* by proxy' can hardly be squared with the obligation of states to apply the Refugee Convention in line with the obligation to apply treaties in good faith, expressed in the second limb of Article 26 of the Vienna Convention on the Law of Treaties (VCLT).⁷² As noted by the International Court of Justice, this rule reflects customary law,⁷³ obliging states to apply a binding treaty «in a reasonable way and in such a manner that its purpose can be realized.»⁷⁴ The *travaux préparatoires* to the VCLT also confirms that it was deemed as «clearly implicit» in the rule that states «must abstain from acts calculated to frustrate the object and purpose of the treaty.»⁷⁵

In their recent Note on the 'Externalization' of International Protection, the United Nations High Commissioner for Refugees (UNHCR) has recently stressed that «international cooperation must not frustrate access to international protection; prevent escape from situations of insecurity or persecution; or otherwise place people at increased risk of human rights violations.»⁷⁶

Furthermore, UNHCR previously observed that «visa requirements and the imposition of carrier sanctions, as well as interception measures, often do not differentiate between genuine asylum-seekers and economic migrants.»⁷⁷ Hence, such measures can «seriously jeopardize the ability of persons at risk of persecution to gain access to safety and asylum.»⁷⁸ Over 25 years ago, UNHCR also

71 James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, p. 394.

72 United Nations, *Vienna Convention on the Law of Treaties*, 23.05.1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <https://www.refworld.org/docid/3ae6b3a1o.html>

73 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, ICJ, 20.04.2010, p. 67, para 145, available at: <https://www.icj-cij.org/public/files/case-related/135/135-20100420-JUD-01-00-EN.pdf> ;

See also: Olivier Corten, Pierre Klein (red.), *The Vienna Convention on the Laws of Treaties: A Commentary*, Oxford, 2011, p. 681.

74 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ, 25.09.1997, pp. 78-9, para. 142, available at: <https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>

75 International Law Commission, *Yearbook of the International Law Commission*, 1966, Vol II, p. 211, para 4, available at: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf

76 UN High Commissioner for Refugees (UNHCR), *Annex to UNHCR Note on the «Externalization» of International Protection: Policies and practices related to the externalization of international protection*, 28.05.2021, para. 19, available at: <https://www.refworld.org/docid/60b115b64.html>

77 UN High Commissioner for Refugees (UNHCR), *Interception of Asylum-Seekers and Refugees: the International Framework and Recommendations for a Comprehensive Approach*, 09.06.2000, EC/50/SC/CRP.17, para. 17, available at: <https://www.refworld.org/docid/49997afa1a.html>

78 *Ibid.*, para. 18.

advised that carrier sanctions in particular be implemented «in a manner which is not inconsistent with international human rights and refugee protection principles, notably Article 14 of the Universal Declaration according to which each person has the right to seek asylum and in a way which is in keeping to the intention of Articles 31 and 33 of the 1951 Convention.»⁷⁹

Holding a destination state responsible for aiding or assisting another state in breaching common international obligations is possible, at least in principle, under the international rule on complicity, expressed in article 16 of the Articles on the Responsibility of States for Internationally Wrongful Acts.⁸⁰ Reflecting a customary rule,⁸¹ this provision contains two cumulative requirements. First, a state which aids or assists another state in the commission of an internationally wrongful act must do so with knowledge of the circumstances of the act. Second, responsibility will not arise unless the act would be internationally wrongful if committed by that state. As noted by the International Law Commission, a state may incur responsibility if it «provides material aid to a State that uses the aid to commit human rights violations.»⁸²

The customary rule on complicity has so far seen limited practical application in human rights jurisprudence. As mentioned in the previous section, there is a disconnect between the current jurisprudence of the European Court of Human Rights on extraterritorial jurisdiction and the customary rule on complicity in public international law. This is problematic, not least in the light of *non-entrée* policies leading to *refoulement* that are becoming increasingly more widespread and overt.⁸³ Nevertheless, as pointed out by Thomas Gammeltoft-Hansen and Nikolas Feith Tan, «one cannot rule out important advances in this area in coming years, thereby clarifying the interaction between the law on State responsibility and international human rights law in regard to, amongst other things, cooperative forms of migration control.»⁸⁴

79 UN High Commissioner for Refugees (UNHCR), *UNHCR Position: Visa Requirements and Carrier Sanctions*, September 1995, available at: <https://www.refworld.org/docid/3ae6b33a10.html>

80 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

81 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, ICJ, 11.07.1996, para. 420, available at: <https://www.icj-cij.org/public/files/case-related/91/091-20070226-JUD-01-00-EN.pdf>.
See also: Helmut Philipp Aust, *Complicity and the Law of State Responsibility*, Cambridge University Press, 2011.

82 International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Commentary to Article 16, p. 67, para. 9, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.
See also: James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, p. 395–396.

83 Daniel Ghezelbash, *Refuge Lost: Asylum Law in an Interdependent World*, Cambridge University Press, 2018.

84 Thomas Gammeltoft-Hansen and Nikolas Feith Tan, «Extraterritorial Migration Control and Deterrence» in: Cathryn Costello, Michelle Foster, and Jane McAdam (Eds.), *The Oxford Handbook of International Refugee Law*, 2021, pp. 502-517 (at 512).

3.2 Norwegian law and practice

The present section examines how the Norwegian law and practice affect asylum seekers' access to the Norwegian territory and thereby their possibility to submit an asylum application to the Norwegian authorities. Norway has been carrying out temporary border controls inside the Schengen area on parts of the internal border since 26. November 2015.⁸⁵ These have been reintroduced several times and are still in place.⁸⁶ These measures do not affect the right to seek asylum. However, instructions issued on 24. November 2015 by the Norwegian government specifically to the Norwegian border patrols at the Storskog border crossing with Russia, along with other 'countermeasures' introduced a few days later, have in effect abolished the institute of asylum at that particular border, as discussed in the first subsection (3.2.1). The second subsection (3.2.2) notes a legislative amendment adopted in 2016, intended to prevent the entry of asylum seekers through the Schengen internal borders with other Nordic states in case of a potential collapse of the Dublin system. Finally, the third subsection (3.2.3) addresses the question of asylum seekers' access to territory in the context of the current outbreak of COVID-19 disease.

3.2.1 External Schengen border with Russia

As detailed in NOAS' previous report «Norway's Asylum Freeze», 5,464 asylum-seekers arrived at the Storskog border crossing with Russia in 2015, which represented an unprecedented increase in asylum arrivals at that particular border.⁸⁷ In reaction to this, Norway introduced several legislative amendments and measures, including new instructions to the Norwegian border guards in November 2015. These instructions are still in force, but their effectiveness depends entirely on the willingness of the Russian border patrols to comply with Norway's requests to hold back persons without a valid visa or another valid entry permit.⁸⁸

Before discussing the current border procedures, it might be instructive to address the persisting speculations as to what precipitated the sudden increase in asylum arrivals at the Storskog border crossing with Russia in the fall and winter of 2015. For example, Halvor Frihagen, a lawyer practicing in Oslo, expressed the following in November 2020 to the Home Affairs Committee of the UK House of Commons:

«What happened at the Russian border back in 2015, in my mind – and this is speculation that Mr Forfang cannot do – was that it was probably Russia that started allowing asylum seekers to approach the border for some domestic reason, or Norwegian-Russian policy. Before and after, the asylum seekers didn't reach the border, and then suddenly they started reaching the border – many on bicycles, for some strange reason.»⁸⁹

85 Justis- og beredskapsdepartementet, «Fortsatt indre grensekontroll», 15.10.2019, available at: <https://www.regjeringen.no/no/aktuelt/fortsatt-indre-grensekontroll2/id2674082/>

86 European Commission, «Temporary Reintroduction of Border Control», last visited 31.08.2021, available at https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control_en

87 Norwegian Organisation for Asylum Seekers (NOAS), *Norway's Asylum Freeze: A report on Norway's response to increased asylum arrivals at the Storskog border crossing with Russia in 2015 and subsequent legal developments*, 27.02.2019, pp. 16–18, available at: <https://www.noas.no/wp-content/uploads/2019/07/Storskog-rapport-februar-2019.pdf>

88 The current section is a slightly revised and expanded version of the corresponding section in the above-cited NOAS report, see: pp. 46–49.

89 Home Affairs Committee of the UK House of Commons, *Oral evidence: Channel crossings, migration and asylum-seeking routes through the EU*, HC 705, 11.11.2020, at: Q392, available at: https://committees.parliament.uk/oralevidence/1195/html/?fbclid=IwAR319qCDKFlt1hTUqyTQB-Wc3zWTaVii4mMEvN_CITVpCkIPfTZsQRK84o

As far as NOAS can tell, the speculations about some Russian agenda leading to a supposed change in the border practices is not supported by facts. An inquiry by NOAS in July 2014 about the border procedures at the Storskog border crossing suggests that there was in fact no change on the Russian side of the border when asylum seekers started arriving through the checkpoint in higher numbers one year later.

In July 2014, a Syrian national, who was present in Syria at the time, sent an email to NOAS, asking specifically whether NOAS was aware of any risks associated with the crossing of the Russian-Norwegian border through the official checkpoints. In particular, the person wondered whether someone without a Schengen visa would risk being stopped or detained by the Russian border guards before getting the chance to request asylum at the Norwegian checkpoint. Based on a subsequent telephone conversation with a Norwegian border official at Storskog, NOAS answered the following on 30 July 2014:

«I have spoken to the Norwegian border police at ‘Storskog’, the border post at the Norwegian side, near to Kirkenes. The border post/village on the Russian side, near to Nikel, is called ‘Boris Gleb’ (or Borisglebsky). I asked the Norwegian border official about their experience in general regarding asylum seekers entering from Russia, if they do not have a Schengen visa. The Norwegian officer informed me that the Russian border police normally will contact their Norwegian counterparts if someone tries to enter into Norway without valid entry permit, provided their other documents are in order (i.e. valid passport and permit/visa from Russia).

In other words, in their experience, the Russians would not stop someone trying to enter Norway even without a Schengen visa. In principle, the Russian border official does not have the authority to decide who shall be allowed to enter into Norway/Schengen, but the Norwegian border police have that authority. So the Russians will have to leave that decision to the Norwegians. The Norwegian border police allow anyone who wish to seek asylum to enter, and will hand them over to the proper authority for registration as an asylum seeker. As I wrote to you before, it is important to clarify your intention to seek asylum to the Norwegian border authorities immediately.

The official that I spoke to at the border post ‘Storskog’ said not many asylum seeker enter into Norway there. He did not know if someone has been stopped by the Russian police or other Russian authorities before reaching the border, little information passes from the Russians to Norway on their internal practices in that respect. He emphasized that anyone entering or staying in Russia without a valid permit, might be prosecuted and would likely be deported. If you intend to go through Russia, and necessarily must present yourself to Russian border officials or other Russian authorities, you ought to have your documents and permits for entering and travelling there in good order.»⁹⁰

90 Email from NOAS to a Syrian asylum seeker, 30.07.2014.

Under normal circumstances, an individual intending to cross the border from Russia to Norway first hands a passport to a Russian official at the Russian side, who in turn presents the passport to the Norwegian authorities. The passport is then checked at the Norwegian side, which subsequently reports back to the Russian official, who then returns the passport to the individual waiting at the Russian side. If everything is in order, the individual is then allowed to pass the Russian checkpoint and approach the Norwegian national borderline.

According to a supposedly leaked self-evaluation report prepared by the National Police Directorate (Politidirektoratet), the arrivals of asylum applicants at Storskog stopped on 30 November 2015.⁹¹ The report provides an insight into ‘counter measures’ at the Norwegian national border that have in effect stopped further arrivals of asylum-seekers at the time (translation below by NOAS):

«After the legislative changes were adopted, and Russia was portrayed as a safe third country, the police could initiate counter measures against the asylum influx. That is why the Russian authorities were notified on Sunday, November 29, that Norwegian Police from 07.00 am on Monday, November 30, would stand on the borderline, perform advanced passport control and advise all persons without a valid entry permit to turn before they reach the national border. That is exactly how the procedure was implemented the next day – the first three handed passports were checked and sent back with the message that these persons did not meet the requirements to enter Norway and should not be sent to the borderline. None of these persons were sent. The next two passports were also sent back, but the two owners cycled anyway to the borderline. After being advised to turn back, they stopped and turned. After this event, no third nationals were sent to the national border.»⁹²

Since there has been no independent monitoring of the border, it is difficult to determine whether the term ‘advised to turn back’ is a euphemism for a physical pushback or whether there have been any pushbacks at the border before or since. In any case, it seems rather clear that the two cyclists mentioned above were in practice not given a real opportunity to claim asylum while they were under Norwegian jurisdiction. Such denial may constitute *refoulement* as well as collective expulsion.

The Norwegian border procedures at the Storskog border crossing are described in an instruction from the Ministry of Justice and Public Security to the Police Directorate, which was issued on 24 November 2015.⁹³ According to the instruction, which is still in force, an asylum-seeker without an entry permit to Norway approaching the border crossing from the Russian side, while waiting there, will receive a formal refusal to approach the Norwegian national border sent from the Norwegian authorities.⁹⁴ This has been further described in a letter from the Ministry of Justice and Public Security to the Norwegian Broadcasting Corporation (translation below by NOAS):

91 Politidirektoratet (POD), *Den langsomme krisen – asylankomster over Storskog grensepasseringssted – erfaringer fra høsten 2015*, undated. What appears to be a finalized version of the report was accessible for several months in 2016 and 2017 on POD’s own server, discoverable by a simple Google-search. It is now accessible at NOAS’ server at: <https://www.noas.no/wp-content/uploads/2017/09/PU-rapport-Storskog.pdf>

92 Ibid., p. 16.

93 Justis- og beredskapsdepartementet, *Instruks – Rutiner for rask handtering av personer som ankommer over norskrussisk landegrense (Storskog) uten gyldig visum eller annen gyldig innreisetillatelse til Norge*, 15/7814- EST, 24.11.2015, available at: <https://www.regjeringen.no/no/dokumenter/instruks---rutiner-for-rask-handtering-av-personer-som-ankommer-over-norskrussisk-landegrense-storskog-uten-gyldig-visum-eller-annen-gyldig-innreisetillatelse-til-norge/id2474019/>

94 Ibid., section 3.1.

«In connection with the sharp increase of arrivals this fall, it has been decided through dialogue between the chief of police, the National Police Directorate and the Ministry of Justice and Public Security to inform all those at the Russian border that access to Norwegian territory requires a valid visa. The leaflet that is being drawn in these days is based on a letter from 2012. It will be added to the documents when they are evaluated on the Norwegian side and transferred to the individual when he or she receives the documents back on the Russian side. It is not a message to Russian border guards.»⁹⁵

Furthermore, according to the same instruction, the police on the Norwegian side of the border must consistently notify the Russian border guards that any person without an entry permit to Norway will be sent back to the Russian side. According to the instruction, the Russian border guards must be requested to not let such individuals pass through the Russian checkpoint (translation below by NOAS):

«When handing over the travel documents back to the Russian border guard, a written note in Russian must be handed over at the same time, addressed to the Russian authorities, stating that the holders of the specified travel documents do not have a valid visa to Norway and that entry for these persons is to be considered illegal entry according to Article 10(4) of the readmission agreement. Russian authorities are therefore to be requested to not let these persons through the Russian side. Furthermore, the note must state that persons who do not have a valid entry permit to Norway will be rejected and returned to Russia and that this will as a main rule also apply to persons who apply for asylum in Norway.»⁹⁶

The above-mentioned Article 10(4) of the readmission agreement between Norway and Russia specifies that unlawfulness of entry «shall be established by means of the travel documents of the person concerned in which the necessary visa or residence authorisation for the territory of the requesting State is missing».⁹⁷ Third-country nationals or stateless persons who do not fulfil, or no longer fulfil, the conditions in force for entry to, presence in, or residence on the territory of Norway, shall be admitted back to Russia pursuant to Article 3 of the agreement.

However, the readmission agreement between Norway and Russia does not regulate the allocation of responsibility for asylum applications submitted under the jurisdiction of the respective countries.⁹⁸ The agreement is «without prejudice to» (i.e., it does not affect) other international legal obligations of the state parties – including, explicitly, the obligations under the Refugee Convention, as stated in Article 18(1)(a) of the agreement.

The effectiveness of the border procedures implemented pursuant to the ministerial instruction cited above depends on the willingness of the Russian border guards to cooperate. While the precise extent

95 NRK Finnmark, *Mener Norge selv kunne stoppet asylstrømmen*, 10.11.2015, available at: <https://www.nrk.no/finnmark/mener-norge-selv-kunne-stoppet-asylstrommen-1.12647229>

See also: Dokument nr. 15:2(2015–2016), *spørsmål nr. 183 besvart 19. november 2015 av justis- og beredskapsminister Anders Anundsen*, p. 52 and *spørsmål nr. 256 besvart 1. desember 2015*, p. 143, available at: <https://www.stortinget.no/globalassets/pdf/dokumentserien/2015-2016/dok-15-2-2015-2016.pdf>

96 Justis- og beredskapsdepartementet, *Instruks – Rutiner for rask handtering av personer som ankommer over norskrussisk landegrense (Storskog) uten gyldig visum eller annen gyldig innreisetillatelse til Norge*, 15/7814- EST, 24.11.2015, section 3.1, available at: <https://bit.ly/3CuiwY>

97 *Agreement between the Government of the Kingdom of Norway and the Government of the Russian Federation on readmission*, signed 08.06.2007, entered into force 01.12.2008, available at: <https://lovdata.no/traktat/2007-06-08-10>

98 In this respect, the agreement thus differs from, for example, the Canada–United States Safe Third Country Agreement.

to which the Russian border guards comply with the requests described in the ministerial instruction cited above is not entirely clear, there have apparently been hardly any asylum seekers arriving at Storskog since 30 November 2015. According to statistics from the Police Directorate, only nine asylum seekers without Schengen visa or another entry permit reached the Norwegian jurisdiction at the Storskog border crossing in the period from 2016 to 2020.⁹⁹

Before concluding this section, it should be mentioned that Norway made an attempt in 2015 to process asylum applications directly at the border with Russia.¹⁰⁰ In practice, this meant processing applications on the Norwegian territory in close proximity to the border. This was quickly proven unworkable since Norway lacked suitable facilities in the area, which has led to severe criticism at the time, *inter alia* by the Office for Children, Youth and Family Affairs (Bufetat).¹⁰¹ Most recently, the UDI has established a brand new reception centre in Kirkenes,¹⁰² noting a «challenging and unclear migration situation.»¹⁰³

In conclusion, the above cited ministerial instruction serves the aim of preventing Norway from becoming another first Schengen country of asylum like Italy or Greece. As long as the Russian side complies with the requests from the Norwegian border guards, asylum seekers arriving at the Storskog border crossing will not reach the Norwegian jurisdiction and thus be unable to effectively invoke Norway's *non-refoulement* obligations. Norway's approach is in this respect comparable to, for example, Italy's requests addressed to the Libyan coastguard to prevent asylum seekers from reaching the Italian territorial waters.

3.2.2 Internal Schengen borders with other Nordic states

There are currently no known impediments in place preventing people from entering Norway from other Nordic countries in order to seek asylum. However, Norway introduced a new provision in the Immigration Act in 2016, which may allow police officers to turn away («bortvise») asylum seekers directly at the border with another Nordic state under specifically defined circumstances.

The newly introduced section 32(5) of the Immigration Act may be activated by a decision of the King in Council (i.e. the government) in «a crisis situation with an extraordinarily high number of arriving asylum seekers».¹⁰⁴ So far, it has never been activated.

99 Finnmark politidistrikt, *Begjæring om innsyn Norsk organisasjon for asylsøkere (NOAS) – statistikk på antall asylsøknader på Storskog*, 03.09.2021, available at: <https://www.noas.no/wp-content/uploads/2021/11/Statistikk-Storskog-POD.pdf>

100 Norwegian Organisation for Asylum Seekers (NOAS), *Norway's Asylum Freeze: A report on Norway's response to increased asylum arrivals at the Storskog border crossing with Russia in 2015 and subsequent legal developments*, 27.02.2019, pp. 31-32, available at: <https://www.noas.no/wp-content/uploads/2019/07/Storskog-rapport-februar-2019.pdf>

101 Pål Christian Bergstrøm (a regional director of Bufetat at the time), *Rapport – Befaring Ankomstsenter Finnmark i Kirkenes 20–21 nov 2015*, 22.11.2015, available at: <https://bit.ly/3BllnRp>

The report was first publicised by the newspaper Nordlys, see: Nordlys, «Rystende rapport: Fant høygravid kvinne og barn med vannhode i kaldt bomberom», 28.02.2016, available at: <https://bit.ly/2V2GgCy>

102 Utlendingsdirektoratet (UDI), «Nytt asylmottak i Kirkenes», 27.08.2021, available at: <https://www.udi.no/aktuelt/nytt-asylmottak-i-kirkenes/>

103 Wenche Fone (Director of Asylum Department at the UDI), *Twitter Account*, 19.11.2021, available at: <https://twitter.com/wenchehone/status/1461634374886166532>

104 See section 32(5) of the Immigration Act (utlendingsloven), available in English at: <https://lovdata.no/NLE/lov/2008-05-15-35/§32>

As specified in section 32(6) of the Act, such decision «should preferably apply for two weeks, and for no longer than six weeks». According to the provision, «Such decisions may be renewed once. The decision may be renewed once more if the need arises while the Storting [i.e., Parliament] is not in session.»

The preparatory works explicitly presume that if the provision is activated, Norway will cease to abide by the Dublin III Regulation¹⁰⁵ as a response to a collapse of the Dublin system, i.e., when other states stop registering a large number of asylum-seekers transiting through their territory.¹⁰⁶

Several critical comments were raised against this amendment. The Immigration Appeals Board (UNE) pointed out that one could not disregard on a general basis the eventuality that decisions to reject entry at the border with a Nordic neighbouring country may in some cases, now or in the future, be in conflict with Article 3 ECHR.¹⁰⁷

Furthermore, UNHCR expressed its «strong view» that all the relevant tasks should be performed by a single central authority (i.e. the UDI in Norway), not by police officers.¹⁰⁸

3.2.3 The impact of COVID-19

Norway's response to the pandemic has not affected the right to seek asylum, unlike the response to the Storskog situation in 2015 (see section 3.2.1 above). The Progress Party has proposed in Parliament to suspend the right to asylum but found no support for this.¹⁰⁹

On 15 March 2020, the Ministry of Justice and Public Security passed «Regulations relating to rejection etc. of foreign nationals out of concern for public health».¹¹⁰ The Regulations allowed the Norwegian authorities to reject certain categories of foreigners at the border who did not have the right to reside in Norway. However, persons seeking international protection were explicitly exempted from rejection at the border under section 2(c) of the Regulations.

The Ministry followed up the regulations by simultaneously issuing an implementing circular G-4/2020, which confirmed in clear terms that asylum-seekers were not to be rejected at the border

105 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; 29.06.2013, (EU)No 604/2013, available at: <http://data.europa.eu/eli/reg/2013/604/oj>

106 Prop. 90 L (2015–2016), *Endringer i utlendingsloven mv. (innstramninger II)*, 05.04.2016, p. 34, available at: <https://www.regjeringen.no/no/dokumenter/prop.-90-l-20152016/id2481758/>

107 Utlendingsnemnda (UNE), *Endringer i utlendingsloven – Innstramninger II*, ref. 15/00937-2, 09.02.2016, p. 3, available at: <https://bit.ly/3yWLdLE>

108 UN High Commissioner for Refugees (UNHCR), *UNHCR Observations on the proposed amendments to the Norwegian Immigration Act and Regulation: Høring – Endringer i utlendingslovgivningen (Innstramninger II)*, 12.02.2016, paras. 24–25, available at: <https://www.refworld.org/docid/56c1c6714.html>

109 Innst. 366 L (2019–2020), p. 13, available at: <https://www.stortinget.no/globalassets/pdf/innstillinger/stortinget/2019-2020/inns-201920-366l.pdf>

Stortinget, *Voteringsoversikt for sak Midlertidig lov om innreiserestriksjoner for utlendinger av hensyn til folkehelsen*, Forslag nr. 1 fra Fremskrittspartiet, available at: <https://www.stortinget.no/nn/Saker-og-publikasjoner/Saker/Sak/Voteringsoversikt?p=80052&dnid=1>

110 *Forskrift om bortvisning mv. av utlendinger av hensyn til folkehelsen*, in force from 15.03.2020 to 29.06.2020, available at Lovdata Pro (behind a paywall) at: <https://lovdata.no/pro/SFO/forskrift/2020-03-15-293>

but subjected to the rules concerning quarantine and isolation.¹¹¹ The circular has been revised several times without affecting the right to seek asylum.

The Regulations mentioned above are now replaced by an «Interim Act relating to entry restrictions for foreign nationals out of concern for public health», which has been in force since 1 July 2020.¹¹² The Interim Act is set to expire 1 December 2021. Section 2(1)(b) of the Act explicitly stipulates that a foreign national is entitled to enter if the person «seeks protection (asylum) in the realm or otherwise invokes a right to international protection due to risk of persecution etc.»¹¹³ The provision further refers to section 73 of the Immigration Act, which sets out an absolute protection against removal of persons in need of international protection.¹¹⁴

The Interim Act has been followed up by an implementing circular, which has been revised multiple times (the current version is G-27/2021),¹¹⁵ without affecting the right to seek asylum.

111 Justis- og beredskapsdepartementet, G-04/2020 – *Ikrafttredelse av forskrift om bortvisning mv. av utlendinger uten oppholdstillatelse i riket av hensyn til folkehelsen*, available at: <https://www.regjeringen.no/no/dokumenter/g-42020--ikrafttredelse-av-forskrift-om-bortvisning-mv.-av-utlendinger-uten-oppholdstillatelse-i-riket-av-hensyn-til-folkehelsen/id2693698/>

112 *Midlertidig lov om innreiserestriksjoner for utlendinger av hensyn til folkehelsen*, in force since 01.07.2020, available in English at: <https://lovdata.no/dokument/NLE/lov/2020-06-19-83>

113 *Ibid.*, section 2(1)(b).

114 See section 73 of the Immigration Act (*utlendingsloven*), available (in English) at: <https://lovdata.no/NLE/lov/2008-05-15-35/§73>

115 Justis- og beredskapsdepartementet, G-27/2021 – *Revidert rundskriv om ikrafttredelse av forskrift om innreiserestriksjoner for utlendinger av hensyn til folkehelsen*, 14.07.2021, available at: <https://bit.ly/3BjPvgY>

4 The concept of safe third country

The basic idea behind the concept of safe third country, which originated in Switzerland in 1979 and spread through Europe in the 1980s, is to deny protection to asylum seekers and refugees on the grounds that they could have, or can find, sufficient protection in another country.¹¹⁶ Pursuant to various safe third country provisions in domestic laws, an application for asylum may be declared inadmissible and thus not assessed on the merits. The assessment of asylum applications then becomes focused on the situation in the respective third country instead of the applicant's country of origin. As discussed in section 4.1 below, the application of the concept of safe third country is subject to certain constraints of international law, including procedural safeguards following from human rights law and EU law.

Building on NOAS' previous report from 2019,¹¹⁷ section 4.2 of the present report provides an updated analysis of the application of Norway's safe third country provision, highlighting serious shortcomings that expose asylum seekers to the risk of chain *refoulement*.

In 2015, the requirement of access to an asylum procedure in the third country concerned was removed, and the provision is currently being applied in practice in respect to a wide range of countries.¹¹⁸ Alarming, this includes countries not bound by the Refugee Convention that at the same time lack a domestic asylum system as well as an effective legal protection against *refoulement*, including countries such as Kuwait, Saudi Arabia and United Arab Emirates (see section 4.2.1).

What is more, the Norwegian Directorate of Immigration (UDI) normally does not conduct asylum interviews in such cases, and there is no access to appeal with automatic suspensive effect (see section 4.2.3) and no access to free legal assistance (see section 4.2.4).

Furthermore, no reasonable connection between an asylum seeker and the third country is required other than a previous transit through the third country and access to it at the time of determination of inadmissibility, where 'access' does not mean lawful residence when readmission is accepted (see section 4.2.2).

4.1 International legal framework

This section sets out the international legal framework relevant to the application of the concept of safe third country. The first subsection (4.1.1) points out that the application of this concept is subject to certain basic constraints imposed by the relevant rules of public international law. The second subsection (4.1.2) presents relevant legal considerations highlighted by UNHCR and asserts

116 Luisa Feline Freier, Eleni Karageorgiou and Kate Ogg, «The Evolution of Safe Third Country Law and Practice» in: Cathryn Costello, Michelle Foster, and Jane McAdam (Eds.), *The Oxford Handbook of International Refugee Law*, 2021, p. 518.

117 Norwegian Organisation for Asylum Seekers (NOAS), *Norway's Asylum Freeze: A report on Norway's response to increased asylum arrivals at the Storskog border crossing with Russia in 2015 and subsequent legal developments*, 27.02.2019, p. 50, available at: <https://www.noas.no/wp-content/uploads/2019/07/Storskog-rapport-februar-2019.pdf>

118 *Ibid.*, p. 50.

that these correctly reflect the previously mentioned constraints. The third subsection (4.1.3) briefly mentions the latest Grand Chamber case of the European Court of Human Rights concerning the duty to ensure that the third country is safe. The fourth subsection (4.1.4) provides a quick overview of the relevant EU law. The fifth subsection (4.1.5) looks more closely at the requirement of a reasonable connection between an asylum seeker and the third country. The last two subsections address procedural guarantees, highlighting the right to independent review along with automatic suspensive effect (4.1.6) as well as the right to legal assistance (4.1.7).

4.1.1 State responsibility and *inter se* modification of multilateral treaties

The concept of safe third country, while not expressly recognised in the Refugee Convention, is also not necessarily in breach of it. The application of this concept is nevertheless subject to certain legal constraints. These follow, *inter alia*, from the relevant rules of public international law, including the law of international state responsibility and the law of treaties.¹¹⁹

Unilateral designations of responsibility for asylum seekers through safe third country provisions in domestic law cannot alter the basic principle of independent state responsibility under general international law. As recognised in Article 47 of the International Law Commission's Articles on State Responsibility, «Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.»¹²⁰ As further noted by the Commission, «In international law, the general principle in the case of a plurality of responsible States is that each State is separately responsible for conduct attributable to it in the sense of Article 2. The principle of independent responsibility reflects the position under general international law, in the absence of agreement to the contrary between the States concerned.»¹²¹

The general principle of independent state responsibility implies that if the obligations under the Refugee Convention are not upheld in respect to refugees removed to a third country, this may give rise to state responsibility of the removing state independently of any potential responsibility of the destination state. The notion of an exception from this general principle by means of an «agreement to the contrary» brings up the question about the extent to which public international law permits modification of obligations following from a multilateral treaty like the Refugee Convention by only some of the state parties.

Two or more states may conclude an agreement to modify a multilateral treaty as between themselves alone (*inter se*) pursuant to Article 41(1) of the Vienna Convention on the Law of Treaties (VCLT).¹²² Hence, two or more states could seemingly modify their responsibilities under the Refugee Convention *inter se*, for example through a special bilateral readmission agreement or a multilateral

119 For a detailed analysis see: Violeta Moreno-Lax, «The Legality of the 'Safe Third Country' Notion Contested: Insights from the Law of Treaties» in Guy S. Goodwin-Gill and Philippe Weckel (Eds.), *Migration & Refugee Protection in the 21st Century: Legal Aspects*, The Hague Academy of International Law Centre for Research, Martinus Nijhoff, 2015, pp. 665–721, draft available at: <https://bit.ly/3gdQlyF>

120 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf

121 International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, Commentary to Article 47, p. 124, para. 3, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

122 United Nations, *Vienna Convention on the Law of Treaties*, 23.05.1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <https://www.refworld.org/docid/3ae6b3a10.html>.

Dublin-like regime. In order for such *inter se* agreement to be lawful, it would have to comply with certain requirements, including the compatibility with «the effective execution of the object and purpose of the treaty as a whole», as specified in Article 41(1)(b)(ii) VCLT. However, as noted by the International Law Commission, it is «above all» *inter se* agreements modifying treaties containing non-reciprocal obligations, such as human rights conventions, «that are likely to affect the execution of the object and purpose of the treaties and that are, thus, prohibited».¹²³

It should also be mentioned that Article 41(2) VCLT imposes a separate obligation, which would require that other state parties to the Refugee Convention be notified in case such *inter se* agreement were concluded. Yet, there seems to be no evidence that any such notification has ever been issued in regard to the Refugee Convention.¹²⁴

4.1.2 UNHCR's legal considerations

According to UNHCR, the application of the concept of safe third country, either in relation to a specific individual case or pursuant to a formal bi- or multilateral agreement, must be subject to the following legal considerations:

«Prior to transfer, it is important, keeping with relevant international law standards, individually to assess whether the third state will:

- (re)admit the person,
- grant the person access to a fair and efficient procedure for determination of refugee status and other international protection needs,
- permit the person to remain while a determination is made, and
- accord the person standards of treatment commensurate with the 1951 Convention and international human rights standards, including – but not limited to – protection from refoulement.
- Where she or he is determined to be a refugee, s/he should be recognized as such and be granted lawful stay.»¹²⁵

In addition to considering whether the third country concerned provides sufficient guarantees against *refoulement*, it is of particular importance to consider whether the third country will accord the person standards of treatment commensurate with the Refugee Convention. In the latter respect, UNHCR reminds states that the Convention obligations «go beyond protection from *refoulement*».¹²⁶ Indeed, the Refugee Convention contains much more than the refugee definition in Article 1A and the *non-refoulement* obligation in Article 33. It also provides for an entire catalogue of obligations that states must uphold in respect to refugees. These concern juridical status (Articles 12-16), gainful employment (Articles 17-19), welfare (Articles 20-24) and administrative measures (Articles 25-34), including the right to identity papers (Article 27) and travel documents (Article 28).

123 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682, 13.04.2006, para. 313, available at: https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf

124 Violeta Moreno-Lax, «The Legality of the 'Safe Third Country' Notion Contested: Insights from the Law of Treaties» *op cit.*, p. 713, draft available at: <https://bit.ly/3gdQlyF>

125 UN High Commissioner for Refugees (UNHCR), *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, para. 4, available at: <https://www.refworld.org/docid/5acb33ad4.html>.

126 *Ibid.*, para. 7.

The above-mentioned considerations deserve additional commentary. As mentioned in the previous section, the general principle of independent state responsibility implies that if the obligations under the Refugee Convention are not fulfilled in respect to refugees removed to a third country, this may give rise to state responsibility of the removing state independently of potential responsibility of the destination state. If the Convention obligations remain unfulfilled in the destination state, the act of removal by the sending state will represent «unlawful rights stripping»¹²⁷ – at least with respect to refugee rights previously acquired in the sending state as a result of the refugee’s prior physical presence and the state’s prior jurisdiction.¹²⁸ With respect to the rest of the refugee rights that remain inchoate (i.e. those that would first be acquired upon establishing lawful presence, lawful stay, or durable residence), the sending state may also be held responsible under international law if it removes a refugee with the knowledge that the destination country will not grant Convention rights.¹²⁹

4.1.3 The duty under ECHR to ensure that the third country is ‘safe’

The duty of *non-refoulement*, particularly under Article 3 ECHR, includes the prohibition of both direct and indirect *refoulement* (also known as chain *refoulement*), as previously underscored in section 3.1.2 above. Hence, in cases concerning the removal of an asylum seeker to a third country, the removing state has the duty not to deport the individual if there are substantial grounds for believing that this would expose the person to treatment contrary to Article 3 directly in that third country or indirectly in the country of origin (or another country).

In the case of *Ilias and Ahmed v. Hungary*, the Grand Chamber of the European Court of Human Rights recognised that the manner the states must discharge their duty under Article 3 in respect to asylum seekers whose asylum applications are not assessed on the merits is not the same as in cases concerning return to the country of origin.¹³⁰ With respect to the former type of cases, the Court held that «the main issue» is «whether or not the individual will have access to an adequate asylum procedure in the receiving third country.»¹³¹ The Court further added the following:

«The Court would add that in all cases of removal of an asylum seeker from a Contracting State to a third intermediary country without examination of the asylum requests on the merits, regardless of whether the receiving third country is an EU Member State or not or whether it is a State Party to the Convention or not, it is the duty of the removing State to examine thoroughly the question whether or not there is a real risk of the asylum seeker being denied access, in the receiving third country, to an adequate asylum procedure, protecting him or

127 James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, pp. 811-827; James C. Hathaway, «Taking refugee rights seriously: A reply to Professor Hailbronner» in: *Verfassungsblog*, 12.03.2016, available at: <http://verfassungsblog.de/taking-refugee-rights-seriously-a-reply-to-professor-hailbronner/>.

128 Articles 3 (non-discrimination), 4 (religious freedom), 12 (respect for personal status), 13 (preservation of property rights), 16(1) (access to the courts), 20 (access to rationing systems), 22 (primary education), 25 (access to administrative assistance), 27 (identity papers), 29 (fiscal equity), 31 (non-penalization for illegal entry or presence and freedom from arbitrary detention), 33 (*non-refoulement*) and 34 (consideration for naturalisation).

129 James C. Hathaway and Michelle Foster, *The Law of Refugee Status*, Second Edition, Cambridge University Press, 2014, pp. 39-49; James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, pp. 827-830.

130 *Ilias and Ahmed v. Hungary* (App. 47287/15), ECtHR, 21.11.2019 [GC], paras 129-130, available at: <http://hudoc.echr.coe.int/eng?i=001-198760>

131 *Ibid.*, para. 131.

her against refoulement. If it is established that the existing guarantees in this regard are insufficient, Article 3 implies a duty that the asylum seekers should not be removed to the third country concerned.»¹³²

The Court underscored that if asylum applications are not assessed on the merits it cannot be known whether the asylum seekers to be removed risk treatment contrary to Article 3 in their country of origin or are simply economic migrants. A finding on this issue can be made and relied upon «only by means of a legal procedure resulting in a legal decision».¹³³ Where such finding is not made, states must make a «thorough examination» of the question whether the receiving third country «affords sufficient guarantees» against both direct and indirect *refoulement*.¹³⁴

The Court further specified that Article 3 ECHR requires that the national authorities applying the concept of safe third country conduct «a thorough examination of the relevant conditions in the third country concerned and, in particular, the accessibility and reliability of its asylum system».¹³⁵ The Court specified further that states must assess «the accessibility and functioning of the receiving country's asylum system and the safeguards it affords in practice».¹³⁶ In this respect, the Court reiterated that states «cannot merely assume that the asylum seeker will be treated in the receiving third country in conformity with the Convention standards but, on the contrary, must first verify how the authorities of that country apply their legislation on asylum in practice».¹³⁷

4.1.4 Relevant EU law

It should not be overlooked that the application of the concept of safe third country is limited under EU law not only by the Asylum Procedures Directive (APD)¹³⁸ but also by the Dublin III Regulation (see section 2.1 of the report).¹³⁹ Importantly, Article 3(3) of the Dublin III Regulation provides that states «retain the right to send an applicant to a safe third country, subject to the rules and safeguards laid down in Directive 2013/32/EU», i.e., within the relevant limits imposed by the APD. Hence, in principle, states bound by the Regulation, but not by the APD, must still apply their domestic safe third country provisions in line with the relevant standards under the APD that are related to the application of the concept of safe third country. However, states bound by the APD should nevertheless exercise caution when requesting a Dublin transfer to a state not bound by the APD if that state in practice does not comply with the respective standards. Such transfer might risk their circumvention, in violation of both the Dublin III Regulation and the APD.

132 Ibid., para. 134.

133 Ibid., para. 137.

134 Ibid. para. 137.

135 Ibid., para. 139.

136 Ibid., para. 141.

137 Ibid. para. 141.

138 European Union: Council of the European Union, *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)*, 29 June 2013, OJ L. 180/60-180/95; 29.06.2013, 2013/32/EU, available at: <https://eur-lex.europa.eu/eli/dir/2013/32/oj>

139 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; 29.06.2013, (EU)No 604/2013, available at: <http://data.europa.eu/eli/reg/2013/604/oj>

According to Article 33(2)(c) APD, states may consider an application for international protection inadmissible if a country which is not a Member State is considered as a safe third country for the applicant pursuant to Article 38 APD. The latter provision subjects the application of the concept to a number of specific rules and safeguards.

First and foremost, Article 38(1)(a)–(d) APD prevents the application of the concept of safe third country in case this would lead to *refoulement* or chain *refoulement*.

Very importantly, Article 38(1)(e) APD requires in addition that in the third country concerned «the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Geneva Convention.»

Furthermore, Article 38(2)(a)–(c) APD requires that the application of the concept of safe third country be subject to certain additional rules laid down in national law. In summary, these include a) rules requiring a connection between the applicant and the third country concerned; b) rules on the methodology by which the competent authorities satisfy themselves that the safe third country concept may be applied to a particular country or to a particular applicant; and c) rules allowing an individual examination in line with certain minimum standards.

Moreover, Article 38(3) APD requires that states applying the concept of safe third country shall a) «inform the applicant accordingly»; and b) «provide him or her with a document informing the authorities of the third country, in the language of that country, that the application has not been examined in substance.»

Finally, Article 38(4) APD requires that «access to a procedure is given in accordance with the basic principles and guarantees described in Chapter II» where the third country does not permit the applicant to enter its territory.¹⁴⁰

It is further worth noting that Article 38(5) APD imposes a separate obligation on states to «inform the Commission periodically» of the countries to which the concept of safe third country is applied.

4.1.5 Connection with the third country

As noted by UNHCR, international law (other than EU law) does not require a connection between an asylum seeker and the third country when applying the concept of safe third country.¹⁴¹ Nevertheless, UNHCR has advocated for «a meaningful link or connection [...] that would make it reasonable and sustainable for a person to seek asylum in another state», taking into consideration the duration and

¹⁴⁰ See: The European Legal Network on Asylum (ELENA), *ELENA Legal Query Interpretation of Recital 44 and Article 38(4) recast Asylum Procedures Directive*, May 2017, p. 2, available at: <https://bit.ly/3zc7JQi>

See also: European Council on Refugees and Exiles, *Information Note on 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)*, December 2014, p. 44, available at: https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Asylum-Procedures-Directive-recast_December-2014.pdf

¹⁴¹ UN High Commissioner for Refugees (UNHCR), *UNHCR Comments on the European Commission's Proposal for an Asylum Procedures Regulation*, April 2019, COM (2016) 467, p. 42, available at: <https://www.refworld.org/docid/5cb597a27.html>

nature of previous stay in the third country, as well as family or other close ties.¹⁴² According to UNHCR, this increases the viability of the transfer, reduces the risk of irregular onward movement, helps prevent the creation of ‘orbit’ situations and advances international cooperation and responsibility sharing instead of burden shifting.¹⁴³ In other words, the requirement of a meaningful connection thus contributes to the effective execution of the object and purpose of the Refugee Convention.¹⁴⁴

Under EU law, the above concerns are addressed in Article 38(2)(a) of the Asylum Procedures Directive (APD). This provision demands that states subject the application of the safe third country concept to rules in national legislation requiring «a connection between the applicant and the third country concerned on the basis of which it would be reasonable for that person to go to that country.» In addition to this, Article 38(2)(c) APD provides, *inter alia*, that the applicant shall be «allowed to challenge the existence of a connection between him or her and the third country in accordance with point (a).»

A mere transit through a third country is not sufficient to constitute ‘a connection’ within the meaning of Article 38(2)(a) APD, as recently clarified by the Court of Justice of the European Union (CJEU).¹⁴⁵ The Court noted the opinion of the Advocate General that the requirement under Article 38(2)(c) APD, which provides that the applicant be allowed to challenge the existence of such connection, would otherwise be devoid of any purpose.¹⁴⁶

4.1.6 Right to independent review and automatic suspensive effect

With regard to the Refugee Convention, UNHCR has expressly supported the right of an individual to appeal a negative decision, including in accelerated procedures.¹⁴⁷ In this context, UNHCR has considered it to be «essential that the appeal must be considered by an authority, court or tribunal, separate from and independent of the authority which made the initial decision and that a full review is allowed.»¹⁴⁸

Furthermore, UNHCR has declared that «in respect of the principle of *non-refoulement*, the remedy must allow automatic suspensive effect except for very limited cases.»¹⁴⁹ In UNHCR’s view, the automatic application of suspensive effect should only be derogated «on an exceptional basis,» when

142 UN High Commissioner for Refugees (UNHCR), *Legal considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries*, April 2018, para. 6, available at: <https://www.refworld.org/docid/5acb33ad4.html>

143 Ibid.

144 As previously noted, this would be especially relevant under Article 41(1)(b)(ii) VCLT if a given readmission agreement were to be considered as an actual *inter se* modification of the Refugee Convention.

145 *LH v Bevándorlási és Menekültügyi Hivatal* (C-564/18), CJEU, 19.03.2020, paras. 49–50, available at: <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-564/18>

146 Opinion of the Advocate General: *LH v Bevándorlási és Menekültügyi Hivatal* (C-564/18), CJEU, 05.12.2019, para. 53, available at: <https://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-564/18>

147 UN High Commissioner for Refugees (UNHCR), *Statement on the right to an effective remedy in relation to accelerated asylum procedures*, 21.05.2010, para. 20–21, available at: <https://www.refworld.org/docid/4bf67fa12.html>

148 Ibid., para. 20.

149 Ibid., para. 21.

the decision determines that the claim is «clearly abusive» or «manifestly unfounded».¹⁵⁰ These terms are defined by UNHCR Executive Committee as «those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum».¹⁵¹

Relevant UN human rights treaty-monitoring bodies have generally underscored the importance of automatic suspensive effect with respect to claimants alleging the risk of irreparable harm. For example, the Human Rights Committee held in *Alzery v. Sweden* that «By the nature of *refoulement*, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning.»¹⁵² Similarly, the Committee Against Torture concluded in *Dar v. Norway* that the domestic appeal proceedings did not have any suspensive effect and therefore did not constitute an effective remedy with regard to the expulsion of the complainant.¹⁵³

Under ECHR, the right to an effective remedy is guaranteed in Article 13, which is applicable, *inter alia*, to asylum cases.¹⁵⁴ The jurisprudence of the European Court of Human Rights related to this provision does not differentiate between different types of asylum procedures,¹⁵⁵ unlike EU law mentioned further below. Instead, Article 13 generally requires «the provision of a domestic remedy to deal with the substance of an ‘arguable complaint’ under the Convention».¹⁵⁶ The Court has explicitly refrained from giving an abstract definition of the notion of arguability. Instead, the Court determines in each case whether a claim of a violation forming the basis of a complaint under Article 13 is arguable «in the light of the particular facts and the nature of the legal issue or issues raised».¹⁵⁷ If a substantive claim is declared by the Court as inadmissible, this does not necessarily exclude the operation of Article 13.¹⁵⁸

The remedy required by Article 13 «must be ‘effective’ in practice as well as in law.»¹⁵⁹ Even if a single remedy does not entirely satisfy the requirements of Article 13 by itself, «the aggregate of remedies

150 UN High Commissioner for Refugees (UNHCR), *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, p. 89, available at: <https://www.refworld.org/docid/4bab5752.html>

151 Executive Committee of the High Commissioner's Programme, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum No. 30 (XXXIV) – 1983*, 20.10.1983, available at: <https://www.unhcr.org/excom/exconc/3ae68c6118/problem-manifestly-unfounded-abusive-applications-refugee-status-asylum.html>

152 *Mohammed Alzery v. Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee (HRC), 10.11.2006, para. 11.8, available at: <https://undocs.org/CCPR/C/88/D/1416/2005>

153 *Nadeem Ahmad Dar v. Norway*, CAT/C/38/D/249/2004, UN Committee Against Torture (CAT), 16.05.2007, paras. 6.4–6.5, available at: <https://digitallibrary.un.org/record/600220>

154 In contrast, Article 6 ECHR, containing a separate range of procedural rights guaranteeing the right to a fair trial, is not applicable to asylum procedures. However, it may potentially become relevant in the future, see: Marie-Bénédicte Dembour, *When Humans Become Migrants*, Oxford University Press, 2015, p. 224.

155 For an overview of the Court's jurisprudence related to Article 13 see: Council of Europe: European Court of Human Rights, *Guide on Article 13 of the European Convention on Human Rights – Right to an Effective Remedy*, 31 December 2020, available at: https://www.echr.coe.int/Documents/Guide_Art_13_ENG.pdf

156 *Čonka v. Belgium* (App. 51564/99), ECtHR, 05.02.2002, para. 75, available at: <http://hudoc.echr.coe.int/eng?i=001-60026>

157 *M.A. v. Cyprus* (App. 41872/10), ECtHR, 23.07.2013, para. 117, available at: <http://hudoc.echr.coe.int/fre?i=001-122889>

158 *Ibid.*

159 *Čonka v. Belgium* (App. 51564/99), ECtHR, 05.02.2002, para. 75, available at: <http://hudoc.echr.coe.int/eng?i=001-60026>

provided for under domestic law may do so».¹⁶⁰ The provision «does not compel Contracting States to set up a second level of appeal».¹⁶¹

The authority referred to in Article 13 «does not necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective.»¹⁶² Additionally, to satisfy the requirements of Article 13, the authority must permit, *inter alia* «some form of adversarial proceedings».¹⁶³

Crucially, the Court has repeatedly held that Article 13 requires that the complaint be dealt with by a body other than the one that issued the initial decision in order to ensure «a sufficiently independent standpoint».¹⁶⁴

In relation to claims related to Article 2 and 3 ECHR, the right to an effective remedy under Article 13 requires independent and rigorous scrutiny and automatic suspensive effect. As underscored by the ECtHR in *A.M. v. the Netherlands*:

«In cases concerning expulsion or extradition it is a firmly embedded principle in the Court's case-law under Article 13, taken together with Article 3 of the Convention, that the notion of an effective remedy under Article 13 in such cases requires (i) independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there is a real risk of treatment contrary to Article 3, and (ii) a remedy with automatic suspensive effect.»¹⁶⁵

The case law concerning access to appeal with suspensive effect in the context of arguable claims under article 2 and 3 ECHR has undergone some development. Initially, the Court held in *Jabari v. Turkey* that there must exist «the possibility of suspending the implementation of the measure impugned.»¹⁶⁶ However, the Court has since repeatedly held that Article 13 requires access to appeal «with automatic suspensive effect».¹⁶⁷ This must be provided in law,¹⁶⁸ since a mere statement of

160 Ibid.

161 *A.M. v. the Netherlands* (App. 29094/09), ECtHR, 05.07.2016, para. 70, available at: <http://hudoc.echr.coe.int/eng?i=001-164460>

162 *Čonka v. Belgium* (App. 51564/99), ECtHR, 05.02.2002, para. 75, available at: <http://hudoc.echr.coe.int/eng?i=001-60026>

163 *Al-Nashif v. Bulgaria* (App. 50963/99), ECtHR, 20.06.2002, para. 137, available at: <http://hudoc.echr.coe.int/eng?i=001-60522>

164 *Silver and others v. United Kingdom* (App. 7136/75), ECtHR, 25.03.1983, para. 116, available at: <http://hudoc.echr.coe.int/eng?i=001-57577>. See also: *Leander v. Sweden* (App. 9248/81), ECtHR, 26.03.1987, para. 81, available at: <http://hudoc.echr.coe.int/eng?i=001-57519>; *Khan v. United Kingdom* (App. 35394/97), ECtHR, 12.05.2000, para. 47, available at: <http://hudoc.echr.coe.int/fre?i=001-58841>.

165 *A.M. v. the Netherlands* (App. 29094/09), ECtHR, 05.07.2016, para. 66, available at: <http://hudoc.echr.coe.int/eng?i=001-164460>

166 *Jabari v. Turkey* (App. 40035/98), ECtHR, 11.07.2000, para. 50, available at: <http://hudoc.echr.coe.int/fre?i=001-58900>

167 *Gebremedhin [Gaberamadhien] v. France* (App. 25389/05), ECtHR, 26.04.2007, para. 66, available at: <http://hudoc.echr.coe.int/eng?i=001-80333>; *M.S.S. v. Belgium and Greece* (App. 30696/09), ECtHR, 21.01.2011 [GC], para. 293 (in respect to Greece) and para. 388 (in respect to Belgium), available at: <http://hudoc.echr.coe.int/eng?i=001-103050>; *M. and Others v. Bulgaria* (App. 41416/08), ECtHR, 26.07.2011, para. 129, available at: <http://hudoc.echr.coe.int/eng?i=001-105788>; *A.M. v. the Netherlands* (App. 29094/09), ECtHR, 05.07.2016, para. 66, available at: <http://hudoc.echr.coe.int/eng?i=001-164460>; *M.A. and others v. Lithuania* (App. 59793/17), ECtHR, 11.12.2018, para. 119, available at: <http://hudoc.echr.coe.int/eng?i=001-188267>; *D.A. and Others v. Poland* (App. 51246/17), ECtHR, 08.07.2021, para. 40 and 90, available at: <http://hudoc.echr.coe.int/eng?i=001-210855>;

168 *I.M. v. France* (App. 9152/09), ECtHR, 02.02.2012, paras. 132 and 134-135, available at: <http://hudoc.echr.coe.int/eng?i=001-108934>; *A.C. and Others v. Spain* (App. 6528/11), ECtHR, para. 95, 22.04.2014, available at: <http://hudoc.echr.coe.int/eng?i=001-142467>

intent or a practical arrangement will not satisfy the requirements of Article 13.¹⁶⁹ The Court has explicitly warned against «the risks involved in a system where stays of execution must be applied for and are granted on a case-by-case basis».¹⁷⁰ Such system does not satisfy the requirement of effectiveness under Article 13.¹⁷¹

In relation to claims under Article 4 of Protocol No. 4 to the ECHR, Article 13 requires «a sufficiently thorough examination» of related complaints, which must be carried out «by an independent and impartial domestic forum».¹⁷² In the absence of a simultaneous claim of being exposed to a risk of irreversible harm in the form of a violation of Articles 2 or 3 ECHR, Article 13 does not impose an absolute obligation to guarantee an automatically suspensive remedy.¹⁷³

Under EU law, Article 46(1)(a)(ii) APD explicitly provides that the right to an effective remedy before a court or tribunal is required in all types of asylum cases, including in cases deemed inadmissible pursuant to Article 33(2). An effective remedy against an inadmissibility decision based on the concept of safe third country pursuant to Article 33(2)(c) requires automatic suspensive effect, as provided in Article 46(5) APD.

In contrast, Article 46(6)(b) APD specifies that automatic suspensive effect is not required in cases deemed inadmissible pursuant to Article 33(2)(a), (b) or (d). This refers to cases where: a) another member state has granted protection; b) a non-member state has granted protection in accordance with Article 35; and d) the application is a subsequent application with no new relevant information. However, as further provided in Article 46(6) APD, even in these cases «a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant's request or acting ex officio».

4.1.7 Right to free legal assistance

Access to legal assistance for asylum seekers is crucial in ensuring the adherence to the principle of *non-refoulement* along with the right to an effective remedy. As noted by UNHCR, «the right to legal assistance and representation is an essential safeguard, especially in complex asylum procedures.»¹⁷⁴ With regard to accelerated procedures, UNHCR has warned against undermining the right to legal assistance «when proceedings permit no or very little time to discuss the case with a legal adviser»,

169 The Court has previously noted that «the requirements of Article 13, and of the other provisions of the Convention, take the form of a guarantee and not of a mere statement of intent or a practical arrangement. That is one of the consequences of the rule of law, one of the fundamental principles of a democratic society, which is inherent in all the Articles of the Convention», see: *Čonka v. Belgium* (App. 51564/99), ECtHR, 05.02.2002, para. 83, available at: <http://hudoc.echr.coe.int/eng?i=001-60026>

170 *M.A. v. Cyprus* (App. 41872/10), ECtHR, 23.07.2013, para. 137, available at: <http://hudoc.echr.coe.int/fre?i=001-122889>

171 *Ibid.*, para. 137–142; *Abdolkhani and Karimnia v. Turkey* (App. 30471/08), ECtHR, 22.09.2009, para. 116, available at: <http://hudoc.echr.coe.int/eng?i=001-94127>; *A.C. and Others v. Spain* (App. 6528/11), ECtHR, para. 94, 22.04.2014, available at: <http://hudoc.echr.coe.int/eng?i=001-142467>

172 *Shahzad v. Hungary* (App. 12625/17), ECtHR, 08.07.2021, para. 65, available at: <http://hudoc.echr.coe.int/eng?i=001-210853>, para. 77.

173 *Khlaifia and Others v. Italy* (App. 16483/12), ECtHR, 15.12.2016 [GC], para. 279, available at: <http://hudoc.echr.coe.int/eng?i=001-170054>

174 UN High Commissioner for Refugees (UNHCR), *Fair and Efficient Asylum Procedures: A Non-Exhaustive Overview of Applicable International Standards*, 02.09.2005, p. 3, available at: <https://www.refworld.org/docid/432ae9204.html>

highlighting that it «should be acknowledged that more time is needed when the legal advisor and the person concerned are only able to communicate through an interpreter.»¹⁷⁵

Under EU law, Article 47 of the Charter of Fundamental Rights of the European Union effectively brings the right to effective remedy (Article 13 ECHR) and that to a fair trial (Article 6(1) ECHR), under the same provision.¹⁷⁶ Under Article 20 APD, asylum seekers are entitled to free legal assistance and representation upon request in the case of a negative decision by the domestic authorities for the purposes of lodging an appeal and representation at the appeal hearing. States may limit legal aid to appeals with tangible prospects of success and to applicants without the financial means to cover the cost of legal assistance, as specified in Articles 20(3) and 21(2)(a) APD. Asylum seekers must receive the services of an interpreter pursuant to Article 12 APD, both in relation to the first instance procedures and the appeals.

Under ECHR, the remedy required under Article 13 must be accessible both in law as well as in practice in order to ensure the effectiveness of *non-refoulement* under Article 3.¹⁷⁷ In finding a violation of Article 13 in combination with Article 3, the European Court of Human Rights has identified several shortcomings that may hamper access to an effective remedy. As pointed out by the Court in its considerable case law, ensuring the appropriate conduct of asylum proceedings, requires, *inter alia*, that asylum seekers receive sufficient information on rights and procedures to be able to make use of the appropriate remedies and substantiate complaints, and to have access to interpreters as well as legal aid.¹⁷⁸

4.2 Norwegian law and practice

The present section examines the concept of safe third country as defined under Norwegian law, the relevant practice of the immigration authorities and procedural guarantees. The first subsection (4.2.1) discusses a legislative amendment of 2015, which removed the requirement of access to an asylum procedure in the third country from Norway's safe third country provision. This has created a heightened risk of chain *refoulement* in practice despite formal guarantees against *refoulement* under Norwegian law. As further discussed in the second subsection (4.2.2), no connection between an asylum seeker and the third country concerned is required in practice other than a previous transit and access to the third country at the time of determination of inadmissibility. The last two subsections address procedural guarantees, concluding that these fall short of the requirements of Article 13 ECHR. Access to appeal is not provided with automatic suspensive effect (see subsection 4.2.3) and access to free legal assistance is not provided (see subsection 4.2.4).

175 UN High Commissioner for Refugees (UNHCR), *Statement on the right to an effective remedy in relation to accelerated asylum procedures*, 21.05.2010, para. 16, available at: <https://www.refworld.org/docid/4bf67fa12.html>

176 For a more detailed overview of the relevant legal standards concerning legal aid in the context of asylum proceedings, see: European Council on Refugees and Exiles (ECRE), *ECRE/ELENA Legal Note on Access to Legal Aid in Europe*, November 2017, available at: <https://www.ecre.org/wp-content/uploads/2017/11/Legal-Note-2.pdf>

177 *Sharifi and Others v. Italy and Greece* (App. 16643/09), ECtHR, 21.10.2014, para. 167, available at: <http://hudoc.echr.coe.int/eng?i=001-147287>

178 *M.S.S. v. Belgium and Greece* (App. 30696/09), ECtHR, 21.01.2011 [GC], para. 301-304 and 319, available at: <http://hudoc.echr.coe.int/eng?i=001-103050>; *Abdolkhani and Karimnia v. Turkey* (App. 30471/08), ECtHR, 22.09.2009, para. 114-115, available at: <http://hudoc.echr.coe.int/eng?i=001-94127>; *A.A. v. Greece* (App. 12186/08), ECtHR, 22.07.2010, para. 78, available at: <http://hudoc.echr.coe.int/eng?i=001-100014>; *I.M. v. France* (App. 9152/09), ECtHR, 02.02.2012, paras. 145, 151 and 155, available at: <http://hudoc.echr.coe.int/eng?i=001-108934>; *Sharifi and Others v. Italy and Greece* (App. 16643/09), ECtHR, 21.10.2014, paras. 168 and 177, available at: <http://hudoc.echr.coe.int/eng?i=001-147287>; *Hirsi Jamaa and Others v. Italy* (App. 27765/09), ECtHR, 23.02.2016 [GC], para. 204, available at: <http://hudoc.echr.coe.int/fre?i=001-109231>

It might be of some interest to note that the application of the concept of safe third country in Norway was previously shortly described in a 2017 study commissioned by the Ministry of Justice and Public Security.¹⁷⁹ The study aimed to identify «lessons learned [...] as well as some criteria that are important in order for future implementation to succeed.»¹⁸⁰ It highlighted certain «obstacles to the effective use of the safe third country provision» in Norway,¹⁸¹ as well as in the Netherlands and Greece, and provided general recommendations «to use the provision more effectively».¹⁸² Among its recommendations, the study mentioned «a need to ‘whitewash’ the concept of safe third countries» in order to rinse it of «negative connotations».¹⁸³ It also recommended that the wording of domestic safe third country provisions be «as clear and simple as possible» and stressed that there «must be a readmission agreement in place ensuring returns».¹⁸⁴ Under the heading «the way forward», the study suggested that «if not the entire country as such can be deemed safe, the existence of reception centres or areas in a third country can arguably be sufficient [...] to return asylum seekers back to this country.»¹⁸⁵ Unlike the present report, the study did not focus on the question to what degree the application of the concept of safe third country in Norway provides an effective protection against chain *refoulement*. Indeed, the study explicitly excluded from its scope of analysis key procedural safeguards, including the right to an effective remedy and the right to legal assistance.¹⁸⁶

4.2.1 Non-refoulement undermined

Norway’s safe third country provision is contained in section 32(1)(d) of the Immigration Act.¹⁸⁷ Originally, it could only be applied to deny examination of asylum claims on the merits in cases where it was established that the claim «will be examined» in a safe third country. That safeguard was repealed in November 2015 as shown by the strikethrough below:

«An application for a residence permit under section 28 [asylum] may be refused examination on its merits if [...] d) the applicant has travelled to the realm after having stayed in a state or an area where the foreign national was not persecuted, ~~and where the foreign national’s application for protection will be examined.~~»¹⁸⁸

This legislative amendment was initially passed as a temporary measure, without a public consultation, in response to the sudden increase in asylum arrivals at the Storskog border crossing with Russia in

¹⁷⁹ Charlotte Mysen, *The Concept of Safe Third Countries – Legislation and National Practices*, 2017, available at: https://www.udi.no/globalassets/global/forskning-fou_i/asyl/the-concept-of-safe-third-countries.pdf

¹⁸⁰ *Ibid.*, p. IV.

¹⁸¹ *Ibid.*, pp. 17–21 (at 21).

¹⁸² *Ibid.*, p. 43.

¹⁸³ *Ibid.*, p. 43.

¹⁸⁴ *Ibid.*, p. 43.

¹⁸⁵ *Ibid.*, p. 42.

¹⁸⁶ *Ibid.*, p. 16.

¹⁸⁷ Section 32(1)(d) of the Norwegian Immigration Act (utlendingsloven) is available in English at: <https://lovdata.no/NLE/lov/2008-05-15-35/§32>;

¹⁸⁸ *Ibid.*, cf. with the old version of the same provision (no longer in force), available in English at: <https://www.regjeringen.no/en/dokumenter/immigration-act/id585772/>

2015.¹⁸⁹ However, it was later made permanent pursuant to a proposal by the Ministry of Justice and Public Security submitted to Parliament in June 2017.¹⁹⁰

According to the preparatory works, the removal of the safeguard was deemed necessary by the Ministry because the safeguard made it «difficult to reject persons that have a residence permit in a third country on other ground than a protection need.»¹⁹¹ The Ministry considered the safeguard to go «beyond what follows from Norway's international obligations.»¹⁹²

Although the application of the safe third country provision is formally subject to legal protection against *refoulement* pursuant to sections 32(3) and 73 of the Immigration Act, the above-mentioned amendment, as well as other changes concerning procedural safeguards, significantly undermined this protection. As noted by UNHCR in December 2015:

«Concerning the application of the 'safe third country' concept, UNHCR acknowledges that applications from asylum-seekers who could have requested asylum in a 'safe third country' en route to the country where asylum is being requested may be rejected admissibility to the substantive examination procedure, provided the safeguards listed in para. 8 above are in place. Amongst the criteria listed is the presumption that the responsibility for assessing the particular asylum application in substance is assumed by a third country, and that the applicant is able to receive international protection in that country. UNHCR therefore regrets that the criteria, that the applicant has access to a fair and efficient asylum procedure, have been removed from the Immigration Act following the amendments introduced through Prop. 16 L. Consequently, an asylum-seeker who is rejected admissibility to the substantive examination procedure in Norway, and returned to a third country in which s/he will not have access to a fair and efficient asylum procedure, could be at risk of subsequent return to his or her country of origin without having had the merits of the claim examined by any country. The individual could thus be put at a risk of *refoulement*.»¹⁹³

This criticism was subsequently reiterated in a separate letter from UNHCR sent to the Norwegian government in February 2016, where UNHCR highlighted, *inter alia*, the following issues:

189 Norwegian Organisation for Asylum Seekers (NOAS), *Norway's Asylum Freeze: A report on Norway's response to increased asylum arrivals at the Storskog border crossing with Russia in 2015 and subsequent legal developments*, 27.02.2019, p. 21, available at: <https://www.noas.no/wp-content/uploads/2019/07/Storskog-rapport-februar-2019.pdf>

190 Prop. 149 L (2016–2017), *Endringer i utlendingsloven mv. (videreføring av innstramninger mv.)*, 16.06.2017, pp. 17–23, available at: <https://www.regjeringen.no/no/dokumenter/prop.-149-l-20162017/id2556657/>

See also: Justis- og beredskapsdepartementet, *Høringsnotat – Evaluering og videreføring av midlertidige endringer i utlendingsloven vedtatt på bakgrunn av forslag i Prop. 16 L (2015–2016)*, 19.01.2017, available at: <https://bit.ly/2X7HxbZ>

191 Prop. 16 L (2015–2016), *Endringer i utlendingsloven (innstramninger)*, p. 12, section 5.3, available at: <https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/>

See also: Norwegian Organisation for Asylum Seekers (NOAS), *Norway's Asylum Freeze: A report on Norway's response to increased asylum arrivals at the Storskog border crossing with Russia in 2015 and subsequent legal developments*, 27.02.2019, pp. 21–22, available at: <https://www.noas.no/wp-content/uploads/2019/07/Storskog-rapport-februar-2019.pdf>

192 Prop. 16 L (2015–2016), *Endringer i utlendingsloven (innstramninger)*, p. 12, section 5.3, available at: <https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/>

193 UN High Commissioner for Refugees (UNHCR), *UNHCR Observations on the Law Proposal «Prop. 16L (2015–2016) Endringer i utlendingsloven (innstramninger)», Instructions GI-12/2015, GI-13/2015 and 15/7814-EST». Circular «RS 2015-013», and amendment to the «Immigration Regulation, §§ 17–18»*, 23.12.2015, para. 12, available at: <https://www.noas.no/wp-content/uploads/2021/08/UNHCR-brev-23-desember-2015.pdf>

«Through the amendments adopted at the end of last year, the provision guaranteeing access to a fair and efficient asylum procedure has been removed from the Immigration Act. In addition, asylum-seekers who have been rejected, i.e. whose claims have been declared inadmissible on the basis of the ‘safe third country’ or ‘first country of asylum’ concept, will no longer have the right to free legal representation in the appeals procedure. These restrictions, coupled with the proposal in the law package of 29 December 2015 (Endringer i utlendingslovgivningen (Innstramninger II)), requiring such applicants to leave Norway immediately, without being given automatic suspensive effect of appeals, hamper, in UNHCR’s view, the possibility for applicants to rebut the presumption of safety and have access to an effective remedy.»¹⁹⁴

Furthermore, UNHCR noted in the last-mentioned letter that the application of the safe third country provision in the amended form was problematic, particularly with regard to holders of a temporary residence permits or a multi-entry visa:

«In assessing whether the Russian Federation is ‘safe’ for a particular individual, a distinction should be made between persons holding a longer-term permit – such as a permanent residence permit – and persons holding multi-entry visas in the Russian Federation. A permanent residence permit affords greater protection against removal from the Russian Federation, although even residence permits are subject to revocation in a number of specified circumstances.

Holding a multi-entry visa should not be considered sufficient evidence that the holder will not be subsequently removed from the Russian Federation. Given the limitations in access to asylum procedures in the Russian Federation, including the fact that it can take a non-Ukrainian several months to register an asylum application in key urban centres, even individuals with a valid visa may not succeed in registering and submitting an asylum application before the expiration of their visa.»¹⁹⁵

The Ministry emphasised in the preparatory works that denying merits assessment must be subject to protection against *refoulement* in every case, as this follows from Norway’s international obligations, including Article 3 ECHR, as well as Norway’s Constitution.¹⁹⁶ Importantly, the Ministry further noted the following (translation below by NOAS):

«For asylum-seekers that have resided in a third country without any form of residence permit, the requirement of effective protection against removal to a place where they would risk treatment in violation of Article 3 ECHR etc. could mean that they must have a possibility to apply and get their application for asylum assessed.»¹⁹⁷

However, the Ministry did not address in the preparatory work the issue that temporary residence permits and visas may be cancelled for different reasons or simply expire without any real possibility of prolongation or renewal.

194 UN High Commissioner for Refugees (UNHCR), *UNHCR observations regarding the processing of asylum claims from persons who have arrived to Norway from the Russian Federation*, 15.02.2016, p. 3., available at: <https://www.noas.no/wp-content/uploads/2021/08/UNHCR-brev-15-februar-2016.pdf>

195 *Ibid.*, p. 9.

196 Prop. 16 L (2015–2016), *Endringer i utlendingsloven (innstramninger)*, pp. 11–12, sections 5.2 and 5.3, available at: <https://www.regjeringen.no/no/dokumenter/prop.-16-l-20152016/id2461221/>

197 *Ibid.*, p. 12, section 5.3.

Such concerns have been eventually raised by the Norwegian Directorate of Immigration (UDI).¹⁹⁸ When considering the application of the safe third country provision in relation to Russia, the UDI found it problematic to apply the provision in cases «where it is probable that the person's visa/residence permit will be cancelled on return» as well as where the individual «will have problems with renewing a permit that expires after return to Russia.»¹⁹⁹ To exemplify such cases, the UDI mentioned that study visas expire after completion of studies, and may additionally be cancelled for various reasons; that business visas issued on false premises will be cancelled if this is discovered; and that temporary permits in general may be cancelled on several grounds.²⁰⁰

The Ministry responded that the factors mentioned by the UDI «may be relevant», stressing that the UDI, as well as the Immigration Appeals Board (UNE), must assess in each case whether there are specific indications («konkrete holdepunkter») that the individual applicant risks treatment in violation of Article 3 ECHR.²⁰¹

In practice, the immigration authorities normally do not consider the question of accessibility and reliability of the third country's asylum system to be of decisive relevance – unless there are specific indications that the individual in question will be unable to renew her temporary residence permit in the third country upon expiration or that the permit will be cancelled. As a result, the accessibility and reliability of the asylum system may be left completely unexamined when such indications are absent.²⁰²

The above-described approach is problematic because one may lose the possibility to renew a temporary residence permit for reasons that are sudden and unexpected, including for individual reasons, such as losing a job or a sponsor. Furthermore, in the absence of firmly established *legal* protection against *refoulement* in the third country, sudden changes in immigration policy of the third country may also pose a serious risk. Some of the recent examples include policy changes that have affected residency rights of Syrian nationals in Lebanon²⁰³ and Kuwait²⁰⁴ and Yemeni nationals in Saudi Arabia.²⁰⁵

Alarming, Norwegian immigration authorities apply the safe third country provision in practice also in respect to countries not bound by the Refugee Convention that at the same time lack a domestic

198 Norwegian Organisation for Asylum Seekers (NOAS), *Norway's Asylum Freeze: A report on Norway's response to increased asylum arrivals at the Storskog border crossing with Russia in 2015 and subsequent legal developments*, 27.02.2019, 33–34, available at: <https://www.noas.no/wp-content/uploads/2019/07/Storskog-rapport-februar-2019.pdf>

199 Utlendingsdirektoratet (UDI), *Praksisforeleggelse etter utlendingsloven – retur av asylsøkere til Russland i medhold av utlendingsloven* § 32, ref. 15/09788-34, 21.04.2016, p. 6., available at: <http://www.noas.no/wp-content/uploads/2018/08/01-Praksisforeleggelse-UDI-Storskog.pdf>

200 Utlendingsdirektoratet (UDI), *Bestilling - Praksisforeleggelse etter utlendingsloven – Retur av asylsøkere til Russland i medhold av utlendingsloven* § 32, UDI ref. 15/09788-39/GBS, JD ref. 15/6357, 18.05.2016, pp. 3–5, available at: <https://www.noas.no/wp-content/uploads/2018/08/04-Praksisforeleggelse-UDI-Storskog.pdf>

201 Justis- og beredskapsdepartementet, *Storskogporteføljen, tilbakemelding på praksisforeleggelse*, Rundskriv, GI-08/2016, ref. 15/6357, 24.06.2016, available at: <https://www.regjeringen.no/no/dokumenter/gi-082016-storskogportefoljen-tilbakemelding-pa-praksisforeleggelse/id2506020/>

202 E.g., NOAS ref. 37085 (UNE's decision of 14.04.2020); NOAS ref. 35979 (UNE's decision of 06.05.2020).

203 Human Rights Watch, «*I Just Wanted to be Treated like a Person*» – *How Lebanon's Residency Rules Facilitate Abuse of Syrian Refugees*, 12.01.2016, available at: <https://www.refworld.org/docid/569559c3274.html>

204 Landinfo, *Respons, Kuwait: Opphold for syriske borgere og eventuelle deportasjoner til Syria*, 15.04.2021, available at: <https://landinfo.no/wp-content/uploads/2021/04/Landinfo-respons-Kuwait-Syrere-i-Kuwait-15042021.pdf>

205 Human Rights Watch, *Saudi Arabia: Yemeni Workers at Risk of Mass Forced Returns*, 31.08.2021, tilgjengelig fra: <https://www.hrw.org/news/2021/08/31/saudi-arabia-yemeni-workers-risk-mass-forced-returns>

asylum system as well as an effective legal protection against *refoulement*. For instance, NOAS has registered cases where the safe third country provision has been applied in respect to countries such as Kuwait,²⁰⁶ Saudi Arabia,²⁰⁷ United Arab Emirates²⁰⁸ and India.²⁰⁹

Adding to this problem, country information collected and presented by Landinfo²¹⁰ regarding the protection of refugees in third countries is sometimes not sufficiently detailed, especially when it comes to non-European countries. An illustrative example is Landinfo's response from October 2016 concerning the protection of refugees in the Gulf States.²¹¹ On just three pages, it purports to provide relevant information about Kuwait, Oman, Saudi Arabia and Qatar. With respect to Kuwait for example, it states that «Kuwait's constitution contains provisions [note plural] prohibiting *refoulement* (UNHCR 2014, p.1)»²¹² – the sentence forming its own, separate paragraph. Yet, the UNHCR document referred to by Landinfo merely states that «the Constitution prohibits *refoulement*» and, in the very same sentence, that this is «not fully implemented».²¹³ A quick look at the constitution of Kuwait reveals that it contains only one relevant provision, specifically Article 46, which states (in the available English translation) that «extradition of political refugees is prohibited.»²¹⁴ The Landinfo's 2016 response not only fails to identify any specific *non-refoulement* provision, there is no clarification of the scope of application of this supposed protection and no mention of any procedural safeguards.

While Landinfo has since published updated, relevant responses that add more detail,²¹⁵ several legal issues important for correct application of the concept of safe third country nevertheless remain unaddressed. For example in relation to Kuwait, the relevant issues include, first, whether the legal protection against *refoulement* supposedly afforded by the Constitution applies to deportations generally, i.e. also in immigration proceedings (as opposed to only in criminal proceedings – as the term 'extraditions'²¹⁶ usually implies). Second, to what extent the scope of protection ('political

206 NOAS ref. 37095 (UNE's decision of 02.07.2021).

207 NOAS ref. 37085 (UNE's decision of 14.04.2020).

208 NOAS ref. 35979 (UNE's decision of 06.05.2020).

209 NOAS ref. 35345 (UNE's decision of 20.02.2019); NOAS ref. 32872 (UNE's decision of 24.11.2020).

210 Landinfo is responsible for collecting, analysing and presenting country of origin information to the Norwegian immigration authorities as well as the Norwegian Ministry of Justice and Public Security. It is a professionally independent body, which is administratively subordinate to the Directorate of Immigration. See: <https://landinfo.no/en/about-landinfo/>

211 Landinfo, *Respons, Gulfstatene: Beskyttelse av flyktninger*, 25.10.2016, available at: <https://landinfo.no/wp-content/uploads/2018/04/Gulfstatene-Beskyttelse-av-flyktninger-25102016.pdf>

212 Ibid., p. 2.

213 UN High Commissioner for Refugees (UNHCR), *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights' Compilation Report - Universal Periodic Review: State of Kuwait*, June 2014, p. 1, available at: <https://www.refworld.org/docid/54c236a34.html>

214 *Kuwait's Constitution of 1962, Reinstated in 1992*, English translation available at: https://www.constituteproject.org/constitution/Kuwait_1992.pdf?lang=en

215 Landinfo, *Golfmonarkiene: Opphold for syrere og jemenitter, og forekomst av tvangsreturer*, 28.06.2021, available at: <https://landinfo.no/wp-content/uploads/2021/06/Respons-Golfmonarkiene-Tvangsreturer-fra-golfmonarkiene-28062021.pdf>;

Landinfo, *Respons, Kuwait: Opphold for syriske borgere og eventuelle deportasjoner til Syria*, 15.04.2021, available at: <https://landinfo.no/wp-content/uploads/2021/04/Landinfo-respons-Kuwait-Syrere-i-Kuwait-15042021.pdf>;

Landinfo, *Respons: De forente arabiske emirater (FAE): Oppholdsvilkår for jemenittiske statsborgere*, 14.08.2020, available at: <https://landinfo.no/wp-content/uploads/2020/08/FAE-Respons-Oppholdsvilk%C3%A5r-for-jemenitter-i-FAE-JONOR-14082020.pdf>

Landinfo, *Temanotat, Saudi-Arabia: Opphold, arbeid og inn- og utreise for utenlandske borgere (herunder jemenitter, syrere og palestiner)*, 19.11.2020, available at: <https://landinfo.no/wp-content/uploads/2020/11/Temanotat-Saudi-Arabia-Opphold-arbeid-og-inn-og-utreise-for-utenlandske-borgere-19112020.pdf>

216 As used in the English translation of the Kuwait's Constitution available at: https://www.constituteproject.org/constitution/Kuwait_1992.pdf?lang=en

refugees’) actually conforms to the wide scope afforded by Article 3 ECHR. Third, whether there is any significant discrepancy between the practice of the Norwegian and Kuwaiti authorities with regard to risk assessment, both in terms of the applicable threshold in general and *in concreto* as applied in relation to the country of nationality of the refugee in question (such as Syria). Fourth, whether adequate procedures and sufficient procedural safeguards are in place to afford protection against *refoulement* that is effective in practice.

During a meeting between NOAS and Landinfo on 5 December 2019, Landinfo stated they had no employees with a legal background but that some were former employees of the Ministry of Justice and Public Security.²¹⁷ Landinfo was hiring at the time, but had no intention to hire someone specifically with a legal background.²¹⁸ This may be problematic, since collecting, analysing and presenting correct information about «the accessibility and functioning of the receiving country’s asylum system and the safeguards it affords in practice»²¹⁹ requires expert legal analysis. While correct information may often be collected from expert third parties, this might not always be necessarily the case, especially in light of the wide scope of application of the Norwegian safe third country provision.

In any case, as a minimum, the immigration authorities should ask Landinfo the right questions, and follow up as necessary, while consequently applying the principle of the benefit of the doubt. Unfortunately, this is not always the case. For example, UNE considered the above-mentioned response from Landinfo on protection of refugees in the Gulf States (from October 2016)²²⁰ to be sufficient to conclude, latest in July 2021, that Kuwait would afford effective protection against *refoulement* to a Syrian asylum seeker – without addressing the above-mentioned issues.²²¹

Furthermore, rather than engaging in a serious analysis of the relevant *legal* protections and procedural safeguards in the third countries, the assessment by the Norwegian immigration authorities tends to reflect Landinfo’s approach, focusing primarily on the number of reported or documented instances of *refoulement*. Inadmissibility decisions issued in 2015 and 2016 in Storskog cases provide a clear example of this tendency.²²²

Such approach is problematic for several reasons. As already mentioned, in countries with no firmly established *legal* protections against *refoulement*, refugees with various temporary residence permits may be exposed to the risk of deportation due to sudden and unexpected individual reasons, such as losing a job or a sponsor, as well as by policy changes restricting foreigners’ residency rights. Furthermore, instances of *refoulement* are often difficult to document, and the data available might not provide an accurate basis for assessing the risk. This relates especially to countries where the local non-governmental organisations face difficult legal and financial constraints, and where the refugee community is vulnerable and not adequately protected by law. In addition, international organisations and independent researchers often face considerable constraints as well, while

217 Minutes from the meeting between NOAS and Landinfo, 05.12.2019, p. 2.

218 Ibid., p. 1.

219 *Ilias and Ahmed v. Hungary* (App. 47287/15), ECtHR, 21.11.2019 [GC], para 141, available at: <http://hudoc.echr.coe.int/eng?i=001-198760>

220 Landinfo, *Respons, Gulfstatene: Beskyttelse av flyktninger*, 25.10.2016, available at: <https://landinfo.no/wp-content/uploads/2018/04/Gulfstatene-Beskyttelse-av-flyktninger-25102016.pdf>

221 NOAS ref. 37095 (UNE’s decision of 02.07.2021).

222 Norwegian Organisation for Asylum Seekers (NOAS), *Norway’s Asylum Freeze: A report on Norway’s response to increased asylum arrivals at the Storskog border crossing with Russia in 2015 and subsequent legal developments*, 27.02.2019, p. 38 and 41, available at: <https://www.noas.no/wp-content/uploads/2019/07/Storskog-rapport-februar-2019.pdf>

significantly depending on the input from local sources. It is therefore crucial that the principle of the benefit of the doubt is not set aside in such context.

What is more, even with some documented instances of *refoulement* in the case of Syrian asylum seekers in Russia²²³ – in addition to the recognition that the Russian asylum system was generally inaccessible and unreliable²²⁴ – UNE’s Grand Board (Stornemnd, UNE’s highest decision making body), found it appropriate to apply the safe third country provision.²²⁵ The majority of the Grand Board found in two separate cases,²²⁶ both concerning a young male Syrian national, that the applicants had sufficient experience and network to be able to overcome the bureaucratic obstacles of the Russian asylum system, as they had previously spent a sufficiently long period in Russia – in both cases one year and two months. According to the Grand Board, they would thus be able to get help from the Syrian diaspora in Russia as well as UNHCR and local NGO’s.²²⁷ For reasons that are unclear, this duration was not regarded by UNE as a precedent in subsequent Storskog cases (a mere transit would later be deemed sufficient for the safe third country provision to apply), as discussed in section 4.2.2 below.

In conclusion, the 2015 amendment of Norway’s safe third country provision has significantly undermined the effectiveness of protection against *refoulement* formally afforded under Norwegian law. The amendment has led to practice of referring asylum seekers to third countries not bound by the Refugee Convention that at the same time lack an asylum system as well as effective protection against *refoulement*, if they have access to that country, including a temporary residence permit or visa. The removal of the safeguard that the asylum claim «will be examined» in a safe third country is contrary to Norway’s international obligations under the Refugee Convention (see sections 4.1.1 and 4.1.2) as well as Article 3 ECHR, as clarified by the European Court of Human Rights in the case of *Ilias and Ahmed v. Hungary* (see section 4.1.3). It is also contrary to EU law, including Article 3(3) of the Dublin III Regulation (see sections 2.1 and 4.1.4). This amendment clearly encourages secondary movement of asylum seekers from Norway to the EU, as further discussed in the next subsection.

The risk of *refoulement* created by the amendment of the safe third country provision, as accepted in practice, is critically exacerbated by the fact that inadmissibility decisions are not subjected to independent review with suspensive effect, as discussed in section 4.2.3. What is more, there is no right to free legal assistance in these cases, as addressed in section 4.2.4.

4.2.2 No reasonable connection with the third country

The application of the safe third country concept under Norwegian law,²²⁸ as accepted in practice, does not require any connection between an asylum seeker and the third country concerned other than a previous transit and access to the third country at the time of determination of inadmissibility.

223 Ibid., p. 37.

224 Ibid., p. 38.

225 Ibid., pp. 39–41.

226 UNESV-2016-1, 05.06.2016, available at: <https://www.noas.no/wp-content/uploads/2017/12/UNESV-2016-1.pdf>; UNESV-2016-2, 05.06.2016, available at: <https://www.noas.no/wp-content/uploads/2017/12/UNESV-2016-2.pdf>

227 UNESV-2016-1, op. cit., p. 19; UNESV-2016-2, op. cit., p. 18.

228 Section 32(1)(d) of the Norwegian Immigration Act (utlendingsloven), available in English at: <https://lovdata.no/NLE/lov/2008-05-15-35/§32>

The precedent set by the Immigration Appeals Board's (UNE) Grand Board in the two Storskog cases from June 2016, establishing that one year and two months previously spent in Russia was a sufficiently long period to refer asylum seekers to Russia (see section 4.2.1), was not followed in UNE's subsequent decisions. In UNE's subsequent practice, a few days' transit through Russia was deemed sufficient to declare asylum applications inadmissible.²²⁹

On a more positive side, UNE's later practice established that the application of the safe third country provision requires actual access to the third country.²³⁰ This was most recently confirmed in a Grand Board decision from October 2020, establishing that the safe third country provision is inapplicable «unless the applicant has access to the third country in question, normally in the form of some valid permit, including a visa», at the time when the decision is made.²³¹ It is important to note, however, that 'access' does not necessarily mean lawful residence upon readmission, as further discussed below. It is further worth noting that the same Grand Board decision opens for cancellation of refugee status in cases where it is revealed that the applicant had previously resided in a third country to which return is possible at the time of cancellation.

Some countries, irrespective of the actual terms of the respective readmission agreement, only readmit persons who have some kind of a valid residence permit or visa at the time of readmission, while other countries do not pose such requirements. At the one end of the spectrum is Russia, which only seems to accept readmission of persons with a valid permanent residence permit.²³² At the other end is Ukraine, which does not require any residence permit or visa to accept readmission.

At least in one case, Norway's civil courts accepted that no form of lawful residence in the third country was required when the third country accepted readmission of an asylum seeker pursuant to a readmission agreement. The case concerned a Syrian asylum seeker referred by the Norwegian immigration authorities to Ukraine, where he had previously stayed on student visa, which had expired. Disturbingly, the courts explicitly accepted that the asylum seeker would face the prospect in the third country of being denied access to asylum as well as punishment for unlawful stay with a two years' prison sentence.

The Oslo District Court accepted in the above-mentioned case the information from UNHCR that asylum applications submitted by Syrian nationals are in practice rejected in Ukraine and that, as a result, many Syrians simply remain in Ukraine unlawfully without a residence permit.²³³ At the same time, the Court did not find sufficient evidence that would indicate a real risk of *refoulement* from Ukraine to Syria after readmission to Ukraine.²³⁴ The Court did not consider the eventual two years' prison sentence in Ukraine for unlawful stay after readmission to pose a serious issue, stating the following (translation by NOAS):

229 Norwegian Organisation for Asylum Seekers (NOAS), *Norway's Asylum Freeze: A report on Norway's response to increased asylum arrivals at the Storskog border crossing with Russia in 2015 and subsequent legal developments*, 27.02.2019, p. 42, available at: <https://www.noas.no/wp-content/uploads/2019/07/Storskog-rapport-februar-2019.pdf>

230 *Ibid.*, pp. 41–45.

231 Utlendingsnemnda (UNE), UNEs praksisbase, ref. N2002291030, October 2020, available at: <https://www.une.no/kildesamling/praksisbase-landingside/2020/oktober/n2002291030/>

232 Norwegian Organisation for Asylum Seekers (NOAS), *Norway's Asylum Freeze: A report on Norway's response to increased asylum arrivals at the Storskog border crossing with Russia in 2015 and subsequent legal developments*, 27.02.2019, p. X, available at: <https://www.noas.no/wp-content/uploads/2019/07/Storskog-rapport-februar-2019.pdf>

233 TOSLO-2018-128346 (18-128346TVI-OTIR/06), 05.02.2019, available at: <https://www.noas.no/wp-content/uploads/2021/08/TOSLO-2018-128346-Redacted.pdf>, pp. 16–17.

234 *Ibid.*, p. 17.

«If asylum or a residence permit on another ground is not granted [in Ukraine], the Court accepts that A risks arrest and detention for up to two years if he resides illegally in the country, unless he manages to bribe himself out of such situation. Even if such situation will be burdensome [‘belastende’], the Court cannot see that these conditions can be given a decisive importance in the assessment by UNE or this Court.»²³⁵

The Court stressed that the amendment of the provision was intended by the Ministry of Justice and Public Security, which had explicitly stated that access to the asylum procedure went beyond what follows from Norway’s international obligations.²³⁶ According to the Court, the principle of presumption of compliance with international law could not be stretched so far as to contradict an explicitly stated legislative intent from the Ministry.²³⁷ The Court further dismissed UNHCR’s legal considerations regarding the application of the concept of safe third country (see section 4.1.2) as not decisive.²³⁸

The above-cited judgment was upheld by the Borgarting Court of Appeal.²³⁹ The Court noted that the proposal by the Ministry to remove the requirement that the asylum claim «will be examined» in a safe third country was explicitly justified in the preparatory works on the grounds that this safeguard made it difficult to reject persons with a residence permit in a third country other than international protection. The Court noted the relevant quotation from the preparatory works but found that the provision could not be restricted only to this group (translation by NOAS):

«The Court of Appeal can agree with the appellant that the quotation shows that the need to be able to reject asylum seekers with a residence permit in the third country on other grounds than the need for protection was a central purpose of the amendment. However, this cannot mean that the change in the law is limited to this group. The preparatory work does not provide evidence that the Ministry intended to restrict the change in the law in line with this purpose. It would then also be a directly misleading legislative technique if one removed the condition in its entirety, when one only intended to remove the condition for a small group while keeping it for other asylum seekers.»²⁴⁰

The Court’s description «directly misleading legislative technique» seems to be rather appropriate given the explicitly stated purpose of the amendment in the preparatory work,²⁴¹ which indeed does not properly reflect the final wording of the provision. It should also be recalled that the amendment was originally proposed by the Ministry on Friday afternoon 13 November 2015, and Parliament adopted it expeditiously and without any public consultation on Monday morning, 16 November 2015.²⁴²

235 Ibid., pp. 18–19.

236 Ibid., p. 11.

237 Ibid., p. 11.

238 Ibid., p. 12.

239 LB-2019-49641, 29.01.2020, available at: <https://lovdata.no/avgjorelse/lb-2019-49641>

240 Ibid.

241 Prop. 16 L (2015–2016), *Endringer i utlendingsloven (innstramninger)*, p. 12, section 5.3, available at: <https://www.regjeringen.no/no/no/dokumenter/prop.-16-l-20152016/id2461221/>

242 Norwegian Organisation for Asylum Seekers (NOAS), *Norway’s Asylum Freeze: A report on Norway’s response to increased asylum arrivals at the Storskog border crossing with Russia in 2015 and subsequent legal developments*, 27.02.2019, pp. 20–22, available at: <https://www.noas.no/wp-content/uploads/2019/07/Storskog-rapport-februar-2019.pdf>

Such harsh application of the safe third country provision naturally encourages secondary movement from Norway to the EU. It is clear that the Norwegian safe third country provision contradicts EU law (see sections 2.1 and 4.1.4 above). By ignoring its obligations under Article 3(3) of the Dublin III Regulation – i.e., to subject the domestic safe third country provision to the rules and safeguards laid down in the Asylum Procedures Directive (APD) – Norway demonstrably encourages secondary movement. The above-mentioned applicant fled to an EU state prior to the hearing before the Court of Appeal. He later informed NOAS that the state granted him international protection. Similarly, according to the data from the Norwegian Directorate of Immigration (UDI) publicized in March 2017, some 1,000 asylum-seekers (out of the total of 5,464) who had their asylum applications declared inadmissible after arriving at the Storskog border crossing with Russia in 2015 have subsequently left Norway and applied for asylum in other Member States.²⁴³

In conclusion, the application of the concept of safe third country under Norwegian law does not require any reasonable connection with the third country. Norwegian courts have accepted that asylum seekers may be sent to a third country where they will be denied asylum status and even face imprisonment for up to two years for unlawful stay, as long as there is no evident risk of *refoulement*. This is an unusually harsh consequence of the legislative amendment of the safe third country provision, which strictly logically follows from the fact that the amendment reduced the entire scope of refugee protection under the provision to the obligation of *non-refoulement*, (while critically undermining even that aspect, as discussed in section 4.2.1). While a reasonable connection between an asylum seeker and the third country is only required under the APD (see section 4.1.5), Norway's harsh application of the concept of safe third country in reality represents unlawful rights stripping in breach of the Refugee Convention (see section 4.1.2). Since the courts have demonstrated a clear unwillingness to contradict the explicit will of the legislator on this point, a more realistic option might be an eventual legislative correction by a new government. Meanwhile, the EU should take note of Norway's disregard of its obligations under Article 3(3) of the Dublin III Regulation, as Norway's legislation demonstrably encourages secondary movement from Norway to the territories of EU Member States.

4.2.3 No independent review with automatic suspensive effect

According to an amendment passed in 2016, which formed a part of a larger legislative package of restrictions of the rights of asylum-seekers and refugees,²⁴⁴ all first instance inadmissibility decisions, except in cases falling under the Dublin III Regulation, «may be implemented immediately», as specified in section 90(3) of the Immigration Act.²⁴⁵ This includes inadmissibility decisions made pursuant to the safe third country provision.²⁴⁶

243 NRK, *Sykkelberget*, (see the data in the infographic «Hvor er Storskog-flyktningene i dag?»), available at: https://www.nrk.no/finnmark/xl/sykkelberget_-historien-om-asylstrommen-pa-storskog-1.13445624

In the period from November 2015 to March 2017, the UDI accepted 1,267 take back requests pursuant to the Dublin III Regulation concerning persons that had entered Norway via the Storskog border crossing with Russia, see: Charlotte Mysen, *The Concept of Safe Third Countries – Legislation and National Practices*, 2017, p. 20, available at: https://www.udi.no/globalassets/global/forskning-fou_i/asyl/the-concept-of-safe-third-countries.pdf

244 Prop. 90 L (2015–2016), *Endringer i utlendingsloven mv. (innstramninger II)*, 05.04.2016, available at: <https://www.regjeringen.no/no/no/dokumenter/prop.-90-l-20152016/id2481758/>

245 Section 90(3) of Norway's Immigration Act (utlendingsloven), available (in English) at: <https://lovdata.no/NLE/lov/2008-05-15/§90>

246 Section 32(1)(d) of Norway's Immigration Act (utlendingsloven), available (in English) at: <https://lovdata.no/NLE/lov/2008-05-15/§32>

According to the above-mentioned section 90(3) of the Act, a time limit for requesting suspensive effect shall only be given «if it is not clear that the application should be refused examined on its merits». In the preparatory work, the Ministry of Justice and Public Security emphasized that «when rejecting to a safe third country, it must be expected that in practice it will be clear in the vast majority of cases that rejection shall take place.»²⁴⁷ The Ministry further specified that if a time limit for requesting suspensive effect is given, it may be set to be «very short, for example to a few hours».²⁴⁸

As noted by the Ministry, section 42 of the Public Administration Act²⁴⁹ continues to apply.²⁵⁰ This provision generally allows submitting a request for deferred implementation of an administrative decision (i.e. suspensive effect). As pointed out by the Norwegian Directorate of Immigration (UDI), if a foreigner requests suspensive effect, the UDI will have to consider the request before the inadmissibility decision is implemented.²⁵¹ However, where a suspensive effect is requested, it is not granted automatically, as such requests are always subject to individual assessment. The same applies once the request for suspensive effect is forwarded by the UDI and reaches the Immigration Appeals Board (UNE) – unless the individual had already been deported, in which case the issue of suspensive effect becomes irrelevant.

The preparatory work mentions several critical points raised by the immigration authorities. The UDI noted, *inter alia*, that it could be difficult for them to decide whether suspensive effect should be granted already at the time of making an inadmissibility decision.²⁵² Importantly, the UDI further highlighted that they normally do not conduct asylum interviews in cases that are deemed inadmissible:

«In rejection cases, the UDI usually does not conduct asylum interviews, and decisions are made mainly on the basis of documentation of identity and refugee status or stay in a safe third country (travel document), as well as information from the arrival registration form.»²⁵³

Furthermore, UNE noted that, according to the legislative amendment, it would normally not take part in any inadmissibility assessments while the individual is in Norway, except for cases falling under the Dublin III Regulation.²⁵⁴ Importantly, UNE warned that if the inadmissibility decisions are implemented immediately in line with the legislative intent, the subsequent appeals process might become illusory. It is also worth mentioning that UNE disagreed with the proposed terminology, where cases falling under the inadmissibility procedures were referred to in the preparatory works

247 Prop. 90 L (2015–2016), Endringer i utlendingsloven mv. (innstramninger II), 05.04.2016, p. 175, available at: <https://www.regjeringen.no/no/dokumenter/prop.-90-l-20152016/id2481758/>

248 Ibid.

249 Norway's Public Administration Act (Forvaltningsloven), available (in English) at: <https://www.sdir.no/en/shipping/legislation/laws/procedure-in-cases-concerning-the-public-administration/>

250 Prop. 90 L (2015–2016), Endringer i utlendingsloven mv. (innstramninger II), 05.04.2016, p. 175, available at: <https://www.regjeringen.no/no/dokumenter/prop.-90-l-20152016/id2481758/>

251 Utlendingsdirektoratet (UDI), *vedlegg 4 til UDIs virksomhetsrapport for 2017, Rapport 2017: Virkninger av regelverks- og praksisendringer i 2016/2017*, p. 8, available at: <https://www.noas.no/wp-content/uploads/2019/01/05-effekt-av-lovendringer-2016-5.pdf>

252 Prop. 90 L (2015–2016), Endringer i utlendingsloven mv. (innstramninger II), 05.04.2016, pp. 174-175, available at: <https://www.regjeringen.no/no/dokumenter/prop.-90-l-20152016/id2481758/>;

253 Utlendingsdirektoratet (UDI), *Utlendingsdirektoratets kommentarer til høring om endringer i utlendingslovgivningen (innstramninger II)*, 09.02.2016, p. 65, available at: <https://bit.ly/3y9k5rN>

254 Utlendingsnemnda (UNE), *Høring - Endringer i utlendingsloven - Innstramninger II*, 09.02.2016, p. 24, available at: <https://bit.ly/2WdG1EQ>

as ‘rejection cases’ («avvisningsaker»²⁵⁵). In this regard, UNE highlighted that it has on occasion disagreed with the UDI on protection questions.²⁵⁶ According to UNE, the interests of due process (‘rettsikkerhet’) would be served better if it were UNE, not the UDI, that would decide whether suspensive effect is to be granted in a given case or not.²⁵⁷

Furthermore, UNHCR considered Norway’s safeguards in inadmissibility procedures to be inadequate, finding that the combined effect of the various restrictive measures would result in a heightened risk of *refoulement*, including chain *refoulement*.²⁵⁸

Additionally, two main criticisms may be raised. First, although the preparatory work to the 2016 amendment does mention some relevant case law of the Strasbourg Court regarding suspensive effect under Article 13 ECHR,²⁵⁹ that overview is now clearly inadequate. There can be no doubt today that the provision requires that asylum seekers with arguable claims related to Article 2 or 3 ECHR be given access to appeal satisfying the requirement of ‘independent and rigorous scrutiny’ with automatic suspensive effect (see section 4.1.6). Second, nothing in the Norwegian law, the relevant preparatory work, or the UDI’s practice suggests that the UDI must only deny suspensive effect in cases that are not ‘arguable’ and thus fall outside the scope of Article 13. Neither is it possible to generally presume that asylum seekers whose applications fall under the safe third country provision necessarily lack an ‘arguable claim’.

In conclusion, the procedural guarantees in cases deemed inadmissible under Norway’s safe third country provision do not satisfy the requirements of Article 13 ECHR. The requirements that arguable claims under Article 2 and 3 ECHR be afforded an ‘independent and rigorous scrutiny’ with automatic suspensive effect (see section 4.1.6) are not met by the relevant domestic rules. Inadmissibility decisions made in the first instance by the UDI are to be implemented – and thus deportation effected – immediately, i.e., before a potential appeal reaches UNE. What is worse, the UDI normally does not conduct asylum interviews in such cases. Where an appeal against such inadmissibility decision is submitted in the first instance to the UDI, the decision may be implemented in practice subject to UDI’s individual assessment of whether it should grant a suspensive effect. However, normally (i.e. unless the deportation is not effected in a given case due to practical reasons), inadmissibility assessments are not made by UNE while the individual is still in Norway. These problems are further confounded by the fact that asylum seekers in inadmissibility cases have no right to free legal assistance, as discussed below.

255 Ibid. p. 22.

256 Ibid. p. 25.

257 Ibid. p. 25.

258 UN High Commissioner for Refugees (UNHCR), *UNHCR Observations on the proposed amendments to the Norwegian Immigration Act and Regulation: Høring – Endringer i utlendingslovgivningen (Innstramninger II)*, 12.02.2016, paras. 114–115, available at: <https://www.refworld.org/docid/56c1c6714.html>

See also: UN High Commissioner for Refugees (UNHCR), *UNHCR observations regarding the processing of asylum claims from persons who have arrived to Norway from the Russian Federation*, 15.02.2016, p. 3., available at: <https://www.noas.no/wp-content/uploads/2021/08/UNHCR-brev-15-februar-2016.pdf>

259 Prop. 90 L (2015–2016), *Endringer i utlendingsloven mv. (innstramninger II)*, 05.04.2016, pp. 172–174, available at: <https://www.regjeringen.no/no/dokumenter/prop.-90-l-20152016/id2481758/>

4.2.4 No right to free legal assistance

Except in Dublin cases, asylum-seekers whose applications for asylum are deemed inadmissible are not eligible for free legal advice without means assessment, as specified in section 17-18(2) of the Immigration Regulations.²⁶⁰ This includes cases deemed inadmissible under the safe third country provision.²⁶¹ The abolishment of the right to free legal advice in inadmissibility cases²⁶² was explicitly intended by the government to apply in combination with the legislative amendment discussed above, which specified that inadmissibility decisions in these cases be implemented immediately (see section 4.2.3).²⁶³

In principle, an asylum seeker may submit an application for free legal advice («fritt rettsråd») to the County Governor (Statsforvalteren, previously known as Fylkesmannen) subject to means assessment in accordance with section 11 of the Legal Aid Act.²⁶⁴ However, in inadmissibility cases, this option is purely theoretical for three main reasons. First, the County Governor normally processes such applications within six to eight weeks,²⁶⁵ which means the applicant will be deported before getting an answer.

Second, the immigration authorities do not inform asylum seekers whose applications are deemed inadmissible about the possibility to apply for free legal advice, nor is any practical assistance or an interpreter provided for this purpose.

Third, these cases do not fall under any of the prioritised categories of cases listed in the first two paragraphs of section 11 of the Legal Aid Act. Section 11(3) of the Act significantly restricts granting of free legal advice in non-prioritised cases. The starting point is that free legal advice is not to be granted in non-prioritised cases unless the case in question «seen from an objective point of view is especially pressing for the applicant.» Applications for free legal advice in non-prioritised cases are thus subject to a discretionary assessment of whether it is necessary and reasonable to grant free legal advice in the specific case. The circular on free legal aid issued by the Norwegian Civil Affairs Authority,²⁶⁶ based on a previous Ministerial Circular G-12/2005,²⁶⁷ further provides that practice in immigration cases that do not fall under section 11(1), is to be «restrictive» («restriktiv»). NOAS is not aware of free legal advice ever being granted by the County Governor in an inadmissibility case.

260 Section 17–18(2) of Norway's Immigration Regulations (utlendingsforskriften), available at: <https://lovdata.no/forskrift/2009-10-15-1286/§17-18>

261 Section 32(1)(d) of Norway's Immigration Act (utlendingsloven), available (in English) at: <https://lovdata.no/NLE/lov/2008-05-15-35/§32>

262 See: Forskrift om endring i forskrift om utlendingers adgang til riket og deres opphold her (utlendingsforskriften), in force since 07.12.2015, available at: <https://lovdata.no/dokument/LTI/forskrift/2015-12-07-1402>

263 Justis- og beredskapsdepartementet, *Høringsnotat: Høring – endringer i utlendingslovgivningen (innstramninger II)*, Section 10.3.4.1, pp. 99-100, available at: <https://www.regjeringen.no/contentassets/2ff18fdc06674a43ae3fa26da4532abc/horingsnotat.pdf>

264 Section 11(3) of Norway's Legal Aid Act (rettshjelpsloven), available at: <https://lovdata.no/lov/1980-06-13-35/§11>, an English translation is available at: <https://app.uio.no/ub/ujur/oversatte-lover/data/lov-19800613-035-eng.pdf>

265 Statens sivilrettsforvaltning, «Fri rettshjelp/Saksbehandlingstid», available at: <https://www.sivilrett.no/saksbehandlingstid.305198.no.html>

266 Statens Sivilrettsforvaltning, Rundskriv om fri rettshjelp, SRF-1/2017, ref. 2016/393 VDA, 20.12.2016, pp. 44–45, available at: <https://www.sivilrett.no/getfile.php/3709936.2254.xfeyewqqst/Rundskriv+SRF-1-2017+om+fri+rettshjelp.pdf?&force=1>

267 Justis- og beredskapsdepartementet, Rundskriv G-12/2005, 15.12.2005, p. 35, available at: https://www.regjeringen.no/globalassets/upload/jd/rundskriv/g-12_05_per_29.07.2013.pdf

An asylum seeker may additionally submit an application to the County Governor for free litigation («fri sakførsel») pursuant to sections 16 and 25 of the Legal Aid Act, so that one could request suspensive effect from a civil court. However, the same three main problems mentioned above apply also here. Asylum cases are non-prioritised and the practice is to be «very restrictive» («meget restriktiv»²⁶⁸). In NOAS' experience, such applications are almost never granted to asylum-seekers generally, and we are not aware that free litigation has ever been granted by the County Governor specifically in an inadmissibility case.

The immigration authorities have raised several critical points against abolishing free legal assistance for asylum seekers with inadmissibility decisions. For example, the Norwegian Directorate of Immigration (UDI) expressed, *inter alia*, that abolishing free legal assistance in inadmissibility cases might work against the intended purpose of effectiveness and lead to «more bureaucracy, longer case processing time, increased residence time in reception and consequently greater use of resources overall.»²⁶⁹ This concern has been later confirmed by the UDI in their self-evaluation report.²⁷⁰

In relation to an initial legislative proposal (eventually dropped), to abolish free legal aid without means assessment also in Dublin cases, the Immigration Appeals Board (UNE) expressed that some of these cases are complicated, which, according to UNE, implied the need for free legal advice without means assessment.²⁷¹ Importantly, the legal and factual situation faced by asylum seekers falling under the safe third country provision would not be necessarily better, according to UNE, than for asylum seekers referred to a Dublin state.²⁷²

As already mentioned, UNHCR considered Norway's safeguards in inadmissibility procedures to be inadequate, finding that the combined effect of the various restrictive measures would result in a heightened risk of *refoulement*, including chain *refoulement*.²⁷³ In relation to the situation in 2015 at the Storskog border crossing with Russia, UNHCR previously found that the lack of free legal representation, combined with the lack of suspensive effect, hampered access to an effective remedy.²⁷⁴

Indeed, access to free legal assistance is central to ensuring that asylum seekers with arguable claims under Article 2 or 3 ECHR can exercise the right to an effective remedy under Article 13 ECHR, as confirmed by the European Court of Human Rights in several cases (see section 4.1.7). The

268 Statens Sivilrettsforvaltning, Rundskriv om fri rettshjelp, SRF-1/2017, ref. 2016/393 VDA, 20.12.2016, p. 59, available at: <https://www.sivilrett.no/getfile.php/3709936.2254.xfewyqqst/Rundskriv+SRF-1-2017+om+fri+rettshjelp.pdf?&force=1>

269 Utlendingsdirektoratet (UDI), *Utlendingsdirektoratets kommentarer til høring om endringer i utlendingslovgivningen (innstramninger II)*, 09.02.2016, p. 64, available at: <https://bit.ly/3y9k5rN>

270 Utlendingsdirektoratet (UDI), *vedlegg 4 til UDIs virksomhetsrapport for 2017, Rapport 2017: Virkninger av regelverks- og praksisendringer i 2016/2017*, p. 7, available at: <https://www.noas.no/wp-content/uploads/2019/01/05-effekt-av-lovendringer-2016-5.pdf>

See also: Norwegian Organisation for Asylum Seekers (NOAS), *Norway's Asylum Freeze: A report on Norway's response to increased asylum arrivals at the Storskog border crossing with Russia in 2015 and subsequent legal developments*, 27.02.2019, p. 51, available at: <https://www.noas.no/wp-content/uploads/2019/07/Storskog-rapport-februar-2019.pdf>

271 Utlendingsnemnda (UNE), *Høring – Endringer i utlendingsloven – Innstramninger II*, 09.02.2016, p. 23, available at: <https://bit.ly/2WdG1EQ>

272 Ibid. p. 25.

273 UN High Commissioner for Refugees (UNHCR), *UNHCR Observations on the proposed amendments to the Norwegian Immigration Act and Regulation: Høring – Endringer i utlendingslovgivningen (Innstramninger II)*, 12.02.2016, paras. 114-115, available at: <https://www.refworld.org/docid/56c1c6714.html>

274 UN High Commissioner for Refugees (UNHCR), *UNHCR observations regarding the processing of asylum claims from persons who have arrived to Norway from the Russian Federation*, 15.02.2016, p. 3., available at: <https://www.noas.no/wp-content/uploads/2021/08/UNHCR-brev-15-februar-2016.pdf>

procedural guarantees in inadmissibility cases falling under Norway's safe third country provision do not satisfy the requirements of Article 13 ECHR, as concluded in the previous subsection (see section 4.2.3).

5 Non-penalization for illegal entry or presence

Penalization for unauthorised entry or presence may potentially deter, delay or otherwise frustrate access to asylum in practice. The drafters of the Refugee Convention, some of whom personally experienced what it means to be a refugee, were aware of these issues and included an exemption from penalization for illegal entry or presence in Article 31(1) of the Convention. As discussed below in section 5.1, several specific terms of this provision raise a number of issues concerning their interpretation.

The Supreme Court of Norway has interpreted two key terms of Article 31(1), namely «without delay» and «coming directly», correcting thereby previous wrongful practice, as discussed in Section 5.2. What is more, the Court has established that a person assisting another in effecting an unauthorised entry, including by providing false documents, may not be penalised either when the refugee who received such assistance is exempted from penalisation under Article 31(1).

Article 31(1) is now implemented at the prosecutorial level, although more could be done to identify persons who had been wrongfully convicted before the practice was corrected by the Supreme Court.

5.1 International legal framework

The present section presents an overview of protections against penalization for illegal entry or presence applicable under international law in certain circumstances, with specific focus on Article 31(1) of the Refugee Convention. This overview is a revised version of a corresponding section in NOAS' previous report on detention of asylum seekers,²⁷⁵ providing an updated overview of the leading legal literature on the interpretation of Article 31(1).

Before addressing the protection against penalization accorded by the Refugee Convention, it is worth recalling similar protections in other international instruments. These include Article 5 of the UN Smuggling Protocol,²⁷⁶ which prohibits criminal prosecution of migrants for seeking or gaining illegal entry with the assistance of smugglers. A similar protection against penalization is also accorded to the victims of trafficking under Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings.²⁷⁷ In respect to the latter instrument, it is worth noting that children are to be considered trafficking victims according to Article 4(c) of the Convention

275 Norwegian Organisation for Asylum Seekers (NOAS), *Detention of Asylum Seekers: Analysis of Norway's international obligations, domestic law and practice*, 2014, pp. 28–33, available at: https://www.noas.no/wp-content/uploads/2014/02/Detention-of-asylum-seekers_web.pdf

276 UN General Assembly, *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15.11.2000, available at: <https://www.refworld.org/docid/479deeo62.html>

277 Council of Europe, *Council of Europe Convention on Action against Trafficking in Human Beings*, 16.05.2005, CETS 197, available at: <https://rm.coe.int/168008371d>

even in the absence of elements otherwise required in cases concerning adults, including coercion, abduction, fraud or deception. It should also be recalled that criminal prosecution of trafficking victims raises issues under ECHR, including in relation to Article 4 (prohibition of forced labour) and Article 6 (right to a fair trial).²⁷⁸

People seeking international protection often cannot avoid relying on irregular documentation and smugglers in order to gain access to an asylum procedure in a country of refuge. An application for asylum must normally be lodged at the border of the destination state, and few countries are willing to issue visa to asylum seekers. The *travaux préparatoires* (preparatory works) to the Refugee Convention explicitly reflect the awareness of the drafters to the fact that reaching refuge might necessitate non-compliance with the requirements for legal entry, including possession of national passport and visa.²⁷⁹

The adopting states of the Convention therefore exempted refugees from penalization for illegal entry or presence, as specified in Article 31(1) of the Refugee Convention:

«**Article 31**

Refugees unlawfully in the country of refugee

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.»

The key terms of the cited provision, namely ‘penalties’, ‘illegal entry or presence’, ‘coming directly’, ‘without delay’, and ‘good cause’ must be interpreted in accordance with the rules of treaty interpretation. These are contained in Articles 31 to 33 of the Vienna Convention of the Laws of Treaties (VCLT), as mentioned in section 2.2 above. The meaning of these key terms is addressed in separate subsections further below.

The question of the correct interpretation of Article 31(1) of the Refugee Convention is addressed in the 1999 UNHCR Detention Guidelines²⁸⁰ as well as in considerable amount of legal scholarship. The leading literature on the interpretation of this provision analyses the key terms in light of the customary rules of treaty interpretation, taking into account the *travaux préparatoires* while noting comparative case law. In 2017, Cathryn Costello with others prepared a comprehensive analysis for UNHCR,²⁸¹ which served as a background paper for discussions leading to the adoption of the Expert Roundtable Summary Conclusions later in the same year.²⁸² In 2021, Costello also co-authored a

278 *V.C.L. and A.N. v. the United Kingdom* (App. 77587/12 and 74603/12), ECHR, 16.02.2021, available at: <http://hudoc.echr.coe.int/eng?i=001-207927>

279 UN Ad Hoc Committee on Refugees and Stateless Persons, *Status of Refugees and Stateless Persons: Memorandum by the Secretary-General*, 03.01.1950, UN doc E/AC.32/2, pp. 45–46 (Ch. XI, paras. 1–2), original available in PDF at: <https://digitallibrary.un.org/record/798436> and in a more readable version at: <https://www.unhcr.org/3ae68c28o.html>.

280 UN High Commissioner for Refugees (UNHCR), *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26.02.1999, para. 4, available at: <https://www.refworld.org/docid/3c2b3f844.html>

281 Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, UNHCR Legal and Protection Policy Research Series, PPLA/2017/01, July 2017, available at: <https://www.refworld.org/docid/59ad55c24.html>

282 UN High Commissioner for Refugees (UNHCR), *Summary Conclusions on Non-Penalization for Illegal Entry or Presence: Interpreting and Applying Article 31 of the 1951 Refugee Convention*, 15.03.2017, available at: <https://www.refworld.org/docid/5b18f674o.html>

shorter overview on the topic contained in the Oxford Handbook of International Refugee Law.²⁸³ Another recent analysis published in 2021 is provided in the latest book authored by James C. Hathaway.²⁸⁴ Previously, a comprehensive analysis was prepared for UNHCR by Guy S. Goodwin-Gill,²⁸⁵ which served as a background paper for discussions leading to the adoption of 2001 Expert Roundtable Summary Conclusions.²⁸⁶ Other eminent legal scholars who have analysed the provision, including in light of the *travaux*, are Gregor Noll,²⁸⁷ Atle Grahl-Madsen²⁸⁸ and Paul Weis.²⁸⁹

It should be noted that Article 31(1) applies to all refugees under the state's jurisdiction, irrespective of whether the status determination procedure is completed or not in the specific case. Recognition of refugee status is declaratory – it does not make a person a refugee, it only declares the person to be one. A person is a refugee within the meaning of the Convention as soon as the individual fulfils the criteria contained in the refugee definition in Article 1, as amended by the 1967 Protocol.²⁹⁰

Finally, it should be stressed that Article 31(1) does not provide any legal justification for safe third country practices. Firstly, the provision has no legal bearing on the question of status under Article 1. Secondly, in keeping with the explicit intention of the drafters, the term 'coming directly' covers refugees who transit through several countries, even if they do not risk persecution there, as discussed in section 5.1.3 below. Thirdly, according to the *travaux*, the state representatives negotiating the text of the Refugee Convention have explicitly considered and rejected the proposal to subject non-penalization to the requirement of not finding asylum in the countries of transit, as noted by Goodwin-Gill:

«The French suggested that their proposed amendment be changed so as to exclude refugees, 'having been unable to find even temporary asylum in a country other than the one in which ... life or freedom would be threatened'. This was opposed by the UK representative on practical grounds (it would impose on the refugee the impossible burden of proving a negative); and by the Belgian representative on language and drafting grounds (it would exclude from the

283 Cathryn Costello and Yulia Ioffe, «Non-penalization and Non-Criminalization» in: Cathryn Costello, Michelle Foster, and Jane McAdam (Eds.), *The Oxford Handbook of International Refugee Law*, 2021, pp. 917–932.

284 James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, pp. 484–519.

285 Guy S. Goodwin-Gill, «Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection» in: Volker Türk and Frances Nicholson (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003, pp. 185–252, available at: <https://www.refworld.org/docid/470a33b10.html>

286 UN High Commissioner for Refugees (UNHCR), «Summary Conclusions: Article 31 of the 1951 Convention, expert roundtable, Geneva, November 2001» in: Volker Türk and Frances Nicholson (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003, pp. 253–258, available at: <https://www.unhcr.org/419c783f4.pdf>

287 Gregor Noll, «Article 31 (Refugees Unlawfully in the Country of Refuge)» in: Andreas Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, pp. 1243–1276.

288 Atle Grahl-Madsen, *Commentary of the Refugee Convention 1951 (Articles 2–11, 13–37)*, October 1997, pp. 97–108, available at: <https://www.refworld.org/docid/4785ee9d2.html>

289 Paul Weis, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary*, Cambridge University Press, 1995, pp. 201–219, available at: <https://www.refworld.org/docid/53e1dd114.html>

290 UN High Commissioner for Refugees (UNHCR), *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*, April 2019, HCR/1P/4/ENG/REV. 4, para. 28, available at: <https://www.refworld.org/docid/5cb474b27.html>

benefit of the provision any refugee who had managed to find a few days' asylum in any country through which he had passed).»²⁹¹

The following subsections summarise the conclusions reached in the leading literature regarding the correct interpretation of each of the key terms of Article 31(1). Where appropriate, direct references are made to the relevant parts of the *travaux préparatoires*.

5.1.1 Penalties

The term 'penalties' covers both civil and criminal penalties, i.e., measures with a disadvantageous impact.²⁹² As pointed out by Costello, this includes criminal prosecution «where bringing prosecution itself has adverse effects».²⁹³ Noll similarly notes that where the domestic law does not provide such clarity as the US law, which instructs the relevant US authority *not to instigate proceedings* leading to charges for document fraud for beneficiaries of Article 31(1), «the burdens of penal procedures must be kept to an absolute minimum».²⁹⁴

According to Hathaway, obstructed or delayed access to an ordinary refugee determination procedure simply because of illegal entry or presence will constitute a penalty within the meaning of Article 31(1), unless this is a result of an expulsion order mentioned further below.²⁹⁵

Similarly, denial of economic and social rights to refugees on account of their illegal entry or presence will also constitute a penalty within the meaning of the provision.²⁹⁶

Detention of a punitive character constitutes a penalty within the meaning of Article 31(1). As noted by Noll, «the necessary test is whether such deprivations are *predominantly* undertaken on account of objectives typically pursued by penal law (retribution and deterrence being most relevant here).»²⁹⁷

Ironically, an order of expulsion does not in itself constitute a penalty within the meaning of Article 31(1), as expressly emphasized by the drafters of the Convention.²⁹⁸ Hence, the provision does not stand in the way of an «orderly system to allocate asylum responsibilities»,²⁹⁹ including Article 13(1)

291 Guy S. Goodwin-Gill, «Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection» in: Volker Türk and Frances Nicholson (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003, p. 192, available at: <https://www.refworld.org/docid/470a333b10.html>

See also: James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, pp. 498–499.

292 Cathryn Costello and Yulia Ioffe, «Non-penalization and Non-Criminalization» in: Cathryn Costello, Michelle Foster, and Jane McAdam (Eds.), *The Oxford Handbook of International Refugee Law*, 2021, p. 921.

293 Ibid.

294 Gregor Noll, «Article 31 (Refugees Unlawfully in the Country of Refuge)» in: Andreas Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, p. 1265.

295 James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, p. 516.

296 Ibid., pp. 518–519.

297 Gregor Noll, «Article 31 (Refugees Unlawfully in the Country of Refuge)» in: Andreas Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, pp. 1263–1264.

298 James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, p. 519–520.

299 Ibid., p. 520.

in the Dublin III Regulation.³⁰⁰ There are nevertheless other relevant rules that limit expulsion, including Article 32 of the Refugee Convention as well as the principle of *non-refoulement* and other relevant rules, as discussed in sections 3.1 and 4.1 above.

5.1.2 Illegal entry or presence

The term ‘illegal entry or presence’ has generally not raised any difficult issues of interpretation. As succinctly expressed by Goodwin-Gil, the term includes «arriving or securing entry through the use of false or falsified documents, the use of other deception, clandestine entry, for example, as a stowaway, and entry into State territory with the assistance of smugglers or traffickers».³⁰¹

While some states creatively seek to punish refugees for smuggling themselves (or each other) rather than ‘on account of’ illegal entry or presence, it is clear that Article 31(1) applies in situations of collective flight, as noted by Hathaway³⁰² and Costello with others.³⁰³

5.1.3 Coming directly

According to the 1999 UNHCR Detention Guidelines, the term ‘coming directly’ does not generally exclude persons who transit an intermediate country:

«The expression ‘coming directly’ in Article 31(1), covers the situation of a person who enters the country in which asylum is sought directly from the country of origin or from another country where his protection, safety and security could not be assured. It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept «coming directly» and each case must be judged on its merits.»³⁰⁴

Applying the general rule of interpretation expressed in Article 31 VCLT, Noll finds that the ordinary meaning of the term ‘coming directly’ does not exclude transit through several countries on the way to a country of refuge.³⁰⁵ As he points out, the term implies movement in a direct line of motion

300 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; 29.06.2013, (EU)No 604/2013, available at: <http://data.europa.eu/eli/reg/2013/604/oj>

301 Guy S. Goodwin-Gill, «Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection» in: Volker Türk and Frances Nicholson (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003, p. 196, available at: <https://www.refworld.org/docid/470a33b10.html>

302 James C. Hathaway, «Prosecuting a Refugee for ‘Smuggling’ Himself», University of Michigan Public Law Research Paper Series, No 429, 01.12.2014, Available at SSRN: <http://dx.doi.org/10.2139/ssrn.2536983>

303 Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, UNHCR Legal and Protection Policy Research Series, PPLA/2017/01, July 2017, pp. 41–42, available at: <https://www.refworld.org/docid/59ad55c24.html>

304 UN High Commissioner for Refugees (UNHCR), *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26.02.1999, para. 4, available at: <https://www.refworld.org/docid/3c2b3f844.html>

305 Gregor Noll, «Article 31 (Refugees Unlawfully in the Country of Refuge)» in: Andreas Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, pp. 1254–1256.

as well as urgency in sense of time.³⁰⁶ Noll further notes the relevant context of the provision as well as the object and purpose of the Refugee Convention, including the intention of the parties expressed in the Convention's Preamble.³⁰⁷ He notes in particular Preamble's emphasis on the need to avoid placing «unduly heavy burdens on certain countries», the importance of «international co-operation» and the intention to prevent «tension between States».³⁰⁸ Noll thus finds that «the 'object and purpose' of the 1951 Convention would not sit well with the penalization of those who might hypothetically find protection in a transit country geographically closer to the country of origin.»³⁰⁹ He concludes that the term 'coming directly' covers «any refugee, with the exception of those who have been accorded refugee status and lawful residence in a transit State to which they can safely return.»³¹⁰ Among others, Costello³¹¹ and Hathaway³¹² explicitly support Noll's analysis.

In line with Article 32 VCLT, the above interpretation is also confirmed by the supplementary means of interpretation, namely the *travaux préparatoires* to the Refugee Convention. As noted by Goodwin-Gill, the inclusion of the wording 'coming directly from a territory where their life or freedom was threatened' originated during the 1951 conference as a proposal, which was «intended specifically to meet one particular concern of the French delegation».³¹³

Specifically, the French delegation expressed that it did not wish to extend the protection against penalization under the proposed article 26 (which became Article 31) to refugees who had already found asylum in another country.³¹⁴ Later during the discussions, the French representative, Mr. Colemar, further provided a specific example of a refugee granted protection in France who moves unlawfully to Belgium. According to the *travaux*, the representative expressed the following:

«The initial exemption [from any penalties imposed for illegal crossing of the frontier] was the direct corollary of the right of asylum, but once a refugee had found asylum, article 26 in its present form would allow him to move freely from one country to another without having to comply with frontier formalities. Actually, however, there was no major reason why a refugee should not comply with those formalities, since article 23 provided for the issue of documents to refugees to enable him to travel lawfully. It was to remedy that omission that the French amendment had been submitted.

[...]

306 Ibid.

307 Ibid., p. 1256.

308 Ibid.

309 Ibid.

310 Ibid., p. 1257.

311 Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, UNHCR Legal and Protection Policy Research Series, PPLA/2017/01, July 2017, p. 18 (simply referring to Noll, while contextualising one of the points further at p. 20), available at: <https://www.refworld.org/docid/59ad55c24.html>

312 James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, p. 507.

313 Guy S. Goodwin-Gill, «Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection» in: Volker Türk and Frances Nicholson (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003, p. 189, available at: <https://www.refworld.org/docid/470a33b10.html>

314 Ibid., p. 191; See also: James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, pp. 501–503.

[...] In order to illustrate his own point, he would give a concrete example—that of a refugee who, having found asylum in France, tried to make his way unlawfully into Belgium.»³¹⁵

The president of the 1951 Conference of Plenipotentiaries, speaking as the representative of Denmark, further underscored during the discussions that penalties are not to be imposed on a refugee who feels obliged to move onward from a country where he does not risk persecution, provided he can show a good cause for it:

«The PRESIDENT, speaking as representative of Denmark, and referring to the French amendment to paragraph 1, said that the Conference should bear in mind the importance of the words ‘shows good cause’ in the last line of that paragraph. A refugee in a particular country of asylum, for example, a Hungarian refugee living in Germany, might, without actually being persecuted, feel obliged to seek refuge in another country; if he then entered Denmark illegally, it was reasonable to expect that the Danish authorities would not inflict penalties on him for such illegal entry, provided he could show good cause for it. The Danish delegation therefore felt that reliance should be placed on the phrase ‘shows good cause’.»³¹⁶

Finally, the High Commissioner for Refugees, Dr. Van Heuven, noted during the discussions two categories of refugee that were to be excluded from penalization. Firstly, refugees, like himself, who were compelled to transit several countries because of danger of persecution. Secondly, refugees who were not granted the right to settle and who might suffer in a country which does not display a generous attitude:

«Mr. van HEUVEN GOEDHART (United Nations High Commissioner for Refugees) fully appreciated the motives that had prompted the French delegation to introduce its amendment (A/CONF.2/62) to article 26, and realized that that delegation had no intention of applying restrictive practices to refugees. [...]

There were two main categories of refugee. First, there were refugees who, after leaving one country of persecution, arrived in another country where they might possibly remain unmolested for a certain period, but would then again be in danger of persecution. If, as a result, they moved on again and reached a country of true asylum, it might be claimed that they had not come direct from their country of origin. For example, in 1944, he had himself left the Netherlands on account of persecution and had hidden in Belgium for five days. As he had run the risk of further persecution in that country, he had been helped by the resistance movement to cross into France. From France he had gone on into Spain, and thence to Gibraltar. Thus, before reaching Gibraltar, he had traversed several countries in each of which the threat of persecution had existed. He considered that it would be very unfortunate if a refugee in similar circumstances was penalized for not having proceeded direct to the country of asylum. [...].

Secondly, there were refugees who fled from a country of persecution direct to a country of asylum; they might not, however, be granted the right to settle there, even though the country in question was a contracting State. Thus a refugee might suffer if he arrived in a country which did not display a generous attitude. Such refugees might possibly be covered if the words ‘and

315 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 Thirteenth Meeting*, 22.11.1951, A/CONF.2/SR.13, available at: <https://www.refworld.org/docid/3ae68cdc8.html>

316 Ibid.

shows good cause' were amended to read 'or shows other good causes'. The fact that a refugee had fled from a country of persecution in itself constituted good cause for his entry into or presence in the country of asylum.»³¹⁷

Later during the discussions, Dr. Van Heuven concluded that if the French representative's amendment was adopted, the provision would protect both categories:

Mr. van HEUVEN GOEDHART (United Nations High Commissioner for Refugees) said that he had listened with great interest to the discussion. He recalled the fact that in his previous statement he had not broached the main issue, namely, whether any amendment to article 26 was really necessary. As he interpreted it, article 26 covered the various points about which the French delegation felt some concern. But, as the French representative apparently found some difficulty on accepting the text, as it stood, he wished to say that, in his opinion, both the two categories of refugees to which he had previously referred would be protected if the French representative's latest suggestion was adopted.»³¹⁸

Furthermore, as noted by Hathaway:

«In response to Belgian concerns that the 'coming directly' language might be inappropriately relied upon to impose penalties against 'a refugee who had stayed in another country for a week or a fortnight, and had then been obliged to seek asylum in the territory of the Contracting State in question,' it was agreed that Art. 31 ought not to be relied upon to 'exclude from the benefit of [Art. 31] any refugee who had managed to find a few days' asylum in any country through which he had passed.' Courts interpreting this language have thus generally been appropriately disinclined to allow penalization of refugees who spent limited amounts of time in a safe country before arriving to seek asylum.»³¹⁹

It can be concluded based on the above that the 1999 UNHCR Detention Guidelines, cited in the introduction to this subsection, reflect the correct interpretation of the term 'coming directly', reached in accordance with Articles 31 and 32 VCLT. However, the 1999 guidelines are relatively brief, and have since been expanded upon several times, as noted in the in section 5.1 above.

Importantly, a relevant factor to be taken into account when assessing whether a refugee transited through or stayed in another country is the individual's intention to reach a particular country of destination, for instance for family reunification purposes, as noted in the 2001 Expert Roundtable Summary Conclusions.³²⁰ This issue is further discussed in relation to the term 'good cause', discussed in section 5.1.5 below.

As a side note, it may be worth emphasizing that the EU Dublin III Regulation cannot affect the meaning of any of the Refugee Convention's terms, including 'coming directly'. Firstly, such approach

317 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, available at: <https://www.refworld.org/docid/3ae68cdbo.html>

318 Ibid.

319 James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, p. 500.

320 UN High Commissioner for Refugees (UNHCR), «Summary Conclusions: Article 31 of the 1951 Convention, expert roundtable, Geneva, November 2001» in: Volker Türk and Frances Nicholson (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003, p. 255, point 10(d), available at: <https://www.unhcr.org/419c783f4.pdf>

would run against the rules of treaty interpretation expressed in the VCLT. An international treaty may only have one single autonomous meaning (see section 2.2), and legislation of a local or regional character, such as the EU Regulation, cannot plausibly affect the interpretation of a global treaty. Secondly, the Regulation was neither meant to do so, as evidenced by its recital 20, which states that detention of asylum seekers covered by the Regulation «must be in accordance with Article 31 of the Geneva Convention.»

5.1.4 Without delay

Similarly to the term ‘coming directly’, the term ‘without delay’ also requires a context sensitive assessment in line with the term ‘good cause’, as expressed in the 1999 UNHCR Detention Guidelines:

«Similarly, given the special situation of asylum-seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum-seeker to another, there is no time limit which can be mechanically applied or associated with the expression ‘without delay’.»³²¹

The ordinary meaning of the term ‘without delay’ has been addressed, albeit in respect to a different treaty, by the International Court of Justice, which repeatedly noted that «as normally understood», the term is not to be equated with ‘immediately’.³²² According to the Court, what was required instead was «taking account of the particular circumstances».³²³

With regard to the time element, Goodwin-Gill notes that whether a specific duration will fall within the meaning of ‘without delay’ under Article 31(1) will depend on «the circumstances of the case, including the availability of advice, and whether the State asserting jurisdiction over the refugee or asylum seeker is in effect a transit country».³²⁴

The term ‘without delay’ also indicates an element of voluntariness. As pointed out by Grahl-Madsen, this element is less important than, but related to, the time element.³²⁵ In this respect, Grahl-Madsen notes that a refugee cannot be excluded from the protection against penalization accorded by Article 31(1) if the individual is «apprehended on his way to present himself to the authorities, or before he has even had a chance to give himself up».³²⁶ Furthermore, a refugee crossing the border illegally

321 UN High Commissioner for Refugees (UNHCR), *UNHCR’s Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26.02.1999, para. 4, available at: <https://www.refworld.org/docid/3c2b3f844.html>

322 *Avena and Other Mexican Nationals (Mexico v. United States of America)*, ICJ, 31.03.2004, para. 85, available at: <https://www.icj-cij.org/public/files/case-related/128/128-20040331-JUD-01-00-EN.pdf>; *Jadhav (India v. Pakistan)*, ICJ, 17.07.2019, para. 113, available at: <https://www.icj-cij.org/public/files/case-related/168/168-20190717-JUD-01-00-EN.pdf>

323 *Jadhav (India v. Pakistan)*, ICJ, 17.07.2019, para. 113, available at: <https://www.icj-cij.org/public/files/case-related/168/168-20190717-JUD-01-00-EN.pdf>

324 Guy S. Goodwin-Gill, «Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection» in: Volker Türk and Frances Nicholson (Eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, 2003, p. 217, available at: <https://www.refworld.org/docid/470a33b10.html>

325 Atle Grahl-Madsen, *Commentary of the Refugee Convention 1951 (Articles 2–11, 13–37)*, October 1997, p. 103, available at: <https://www.refworld.org/docid/4785ee9d2.html>

326 *Ibid.*, pp. 102–103.

may have good reasons for not giving oneself up at the nearest frontier control point or to a local authority in the border zone.³²⁷

A more generous interpretation is appropriate, as noted by Hathaway, «in the case of, for example, refugees who face linguistic or cultural barriers, who are uncertain about how best to seek protection, or who are traumatized or otherwise not in a position immediately to make their need for protection known.»³²⁸

Finally, it needs to be stressed that Article 31(1) covers refugees transiting through a state with the intent to seek asylum elsewhere in case they are apprehended in that transit state, as pointed out by Noll³²⁹ and the UK House of Lords in the often cited *Asfaw* case.³³⁰

5.1.5 Good cause

The term ‘good cause’ is closely connected to the terms ‘coming directly’ and ‘without delay’.³³¹ As noted by Goodwin-Gill, ‘good cause’ is «a matter of fact, and may be constituted by apprehension on the part of the refugee or asylum seeker, lack of knowledge of procedures, or by actions undertaken on the instructions or advice of a third party».³³²

Considered in isolation from the other terms, the term ‘good cause’ has a limited role in Article 31(1), as pointed out by the UK High Court in the often cited *Adimi* case.³³³ As noted by the Court, the requirement «will be satisfied by a genuine refugee showing that he was reasonably travelling on false papers.»³³⁴ The Court was well aware of the fact that «the combined effect of visa requirements and carrier’s liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents.»³³⁵

Since refugees often have few legal travel options, it should generally be accepted that they have ‘good cause’ for illegal entry or presence, as reflected in the *travaux*³³⁶ and pointed out, *inter alia*, by

327 *Ibid.*, p. 103.

328 James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, p. 494.

329 Gregor Noll, «Article 31 (Refugees Unlawfully in the Country of Refuge)» in: Andreas Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, Oxford University Press, 2011, p. 1260 (para 61).

330 *R v Asfaw*, UKHL, 21.05.2008, para. 26, available at: <https://publications.parliament.uk/pa/ld200708/ldjudgmt/jdo80521/asfaw.pdf>

331 Atle Grahl-Madsen, *Commentary of the Refugee Convention 1951 (Articles 2–11, 13–37)*, October 1997, pp. 103–104 (under para 8), available at: <https://www.refworld.org/docid/4785ee9d2.html>

332 Guy S. Goodwin-Gill, «Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection» in: Volker Türk and Frances Nicholson (Eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, 2003, p. 217, available at: <https://www.refworld.org/docid/470a33b10.html>

333 *R v Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29.07.1999, para. 26, available at: https://www.refworld.org/cases,GBR_HC_QB,3ae6b6b41c.html

334 *Ibid.*

335 *Ibid.*, para. 3.

336 For example, the UK representative, Mr. Hoare, stated that: «the fact that a refugee was fleeing from persecution was already a good cause», see: 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, available at: <https://www.refworld.org/docid/3ae68cdbo.html>

Costello with others.³³⁷ Hathaway also notes that refugees seeking to escape the risk of persecution cannot be expected to satisfy immigration formalities, and that «much the same sense of urgency and precariousness may drive refugees to disguise their true intentions until safely inside the asylum country.»³³⁸

Family links in the country of refuge may also constitute ‘good cause’, as pointed out by Goodwin-Gill.³³⁹ While the Refugee Convention itself does not impose clear obligations regarding family unity,³⁴⁰ the Final Act of the Conference of Plenipotentiaries refers in its ‘Recommendation B’ to the unity of the family as «an essential right of the refugee».³⁴¹ According to Article 31(1) VCLT, the terms of the treaty must be given a meaning in their context. This includes «any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty», as specified in Article 31(2)(a) VCLT. The Final Act falls within that provision, thus making the family unity a relevant contextual element when interpreting the term ‘good cause’ in line with the general rule of treaty interpretation. Furthermore, the right to family life, as recognised under human rights law, must be taken into account when interpreting the Refugee Convention’s terms, as required under Article 31(3)(c) VCLT.

5.2 Norwegian law and practice

As detailed in NOAS’ previous report on detention of asylum seekers, there had been very little awareness in Norway about Article 31(1) until 2014.³⁴² Asylum seekers presenting forged documents to passport control upon arrival to Norway used to be routinely sentenced to prison, often pursuant to a simplified confession procedure without indictments and a main hearing, reducing the prison sentence from 60 to 45 days.³⁴³ While the Norwegian law still does not contain an explicit reference to Article 31(1), the Supreme Court has applied the provision and interpreted its terms ‘without delay’ and ‘coming directly’ on three occasions since 2014, as discussed in subsections 5.2.1 and 5.2.2 respectively. The provision has since also been discussed in the Norwegian legal literature³⁴⁴ and implemented at the prosecutorial level, as noted in the final subsection 5.2.3. Unfortunately, as further discussed in the final subsection, only a very few refugees wrongfully convicted prior to

337 Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, UNHCR Legal and Protection Policy Research Series, PPLA/2017/01, July 2017, pp. 41–42, available at: <https://www.refworld.org/docid/59ad55c24.html>

For further references, see: James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, p. 496, footnote 1006.

338 James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, p. 496–497.

339 Guy S. Goodwin-Gill, «Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection» in: Volker Türk and Frances Nicholson (Eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, 2003, p. 218 (point 5), available at: <https://www.refworld.org/docid/470a33b10.html>

340 James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, p. 677.

341 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, A/CONF.2/108/Rev.1, 25.07.1951, p. 8, available at: <https://www.refworld.org/docid/40a8a7394.html>

342 Norwegian Organisation for Asylum Seekers (NOAS), *Detention of Asylum Seekers: Analysis of Norway’s international obligations, domestic law and practice*, 2014, pp. 60–68, available at: https://www.noas.no/wp-content/uploads/2014/02/Detention-of-asylum-seekers_web.pdf

343 *Ibid.*, p. 63.

344 Kenneth A. Baklund, Sigurd Bordvik, Øyvind Røyneberg, *Utvising, tvangsmidler og straff*, Gyldendal, 2019, pp. 484–496.

2014 have requested to have their cases reopened, most probably due to lack of awareness of such possibility.

5.2.1 Supreme Court's interpretation of 'without delay'

The Supreme Court of Norway considered Article 31(1) of the Refugee Convention for the first time in June 2014 in the case HR-2014-1323-A, interpreting the provision's term 'without delay'.³⁴⁵ An English translation of the entire judgment is freely available at Lovdata,³⁴⁶ and a summary has been published in the *International Law Reports*.³⁴⁷ The case was supported by an *amicus curia* brief sent to the Court by UNHCR upon request by the defendant's lawyer.³⁴⁸

The case concerned a Cameroonian national who was charged with presenting a forged document. Upon arrival at Oslo Airport, he presented his original Cameroonian passport and a forged Portuguese residence permit to the Norwegian border patrol officers. They pulled him aside for closer examination and eventually asked him whether he was in need of protection, to which he answered yes.

The Supreme Court highlighted the importance of considering the authentic text of the provision rather than just a Norwegian translation and concluded that the term 'without delay' implied the need for an individual assessment:

«The term «straks» is hardly a good translation of the terms «without delay» and «sans délai» in the English and French versions of the convention, respectively. In my view, the English and French expressions allow for wider scope than the Norwegian term «straks» in its traditional sense. The term rather translates to «promptly» and «immédiatement» in English and French. The protection objective behind Article 31(1), and the Refugee Convention in general, indicates an individual assessment of what constitutes «without delay» in each individual case. In this assessment, it is necessary to take into account not only the refugee's circumstances, objectively speaking, but also how the refugee, given his or her capacities and background, had reason to perceive the circumstances. The need for such an approach is, in my view, apparent from the 1999 guidelines, prepared by the United Nations High Commissioner for Refugees on «Applicable Criteria and Standards relating to the Detention of Asylum-Seekers».»³⁴⁹

The Court repeatedly referred to the 1999 UNHCR Detention Guidelines³⁵⁰ and accepted that refugees might generally fear rejection at the border if they do not possess proper documentation authorising entry:

345 HR-2014-1323-A, Rt-2014-645, Supreme Court of Norway, 24.06.2014, available at: <https://www.domstol.no/globalassets/upload/hret/avgjorelser/2014/saknr2014-220anonymisert.pdf>

346 Ibid., English translation available at: <https://lovdata.no/avgjorelse/hr-2014-1323-a-eng>

347 A v. Public Prosecuting Authority (Norwegian Organisation for Asylum Seekers intervening), *International Law Reports*, 175, 2018, pp. 643–651, available at: <https://doi.org/10.1017/CBO9781108291521.007>

348 UN High Commissioner for Refugees (UNHCR), *Response by the UNHCR Regional Representation for Northern Europe to request for guidance on the interpretation of certain elements in Article 31 of the 1951 Convention Relating to the Status of Refugees*, 03.03.2014, available at: https://www.noas.no/wp-content/uploads/2021/08/Intervention_Art_31_NOR_Feb_2014.pdf

349 HR-2014-1323-A, Rt-2014-645, Supreme Court of Norway, 24.06.2014, paras. 13–14, English translation available at: <https://lovdata.no/avgjorelse/hr-2014-1323-a-eng>

350 UN High Commissioner for Refugees (UNHCR), *UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers*, 26.02.1999, para. 4, available at: <https://www.refworld.org/docid/3c2b3f844.html>

«Objectively speaking, there is no reason for a refugee upon arriving in Norway to refrain from calling attention to any false documents in his or her possession at passport control. If the individual applies for protection from persecution at the same time, having false documents will not cause him or her to be turned away. It may be that the individual in question is aware of this, and right there and then is level-headed enough to act accordingly. If that is the case, the individual has no «good cause» for presenting a forged instrument at passport control, and thus is not protected by Article 31(1), even if the remaining conditions have been met.

However, I refer to the quotes above from the UNHCR guidelines on how refugees often perceive border crossings. The Supreme Court has furthermore been informed that not all countries treat asylum seekers stopped with false documents at passport control the same way Norway does, so the fear of not getting through passport control is likely to be legitimate. Even regular travellers often do not feel they have gained entry to a country before they have passed through passport control, and would likely feel uneasy about their legal standing should they be detained at this point in the process.

The District Court's description of the events that transpired when A arrived at Oslo Airport, cited above, provides sufficient basis, in my opinion, to conclude that he reported [to authorities] «without delay», in my interpretation of this term. He applied for asylum before completing the border inspection; and, given the circumstances, the condition for impunity has been met.»³⁵¹

In conclusion, the Supreme Court interpreted the term 'without delay' in line with UNHCR guidelines and the interpretation advanced in section 5.1.4 above. The decision received positive international attention, including in the leading academic literature on refugee law.³⁵²

5.2.2 Supreme Court's interpretation of 'coming directly'

The term 'coming directly' contained in Article 31(1) of the Refugee Convention has been addressed in one case by the Supreme Court and one other separate case by the Interlocutory Appeals Committee of the Supreme Court.

The Supreme Court considered the term 'coming directly' in May 2018 in the case HR-2018-846-A.³⁵³ The judgment has not been translated, but a very brief summary provided by the Court in English is available at Lovdata.³⁵⁴ The case concerned an Afghan national who had been expelled from Norway and subjected to a travel ban. He returned to Norway and sought asylum two years before the ban was to expire. The Court held that he was not to be exempted from punishment for violating the travel ban, as the requirement of 'coming directly' was not met. The Court cited the 1999 UNHCR Detention Guidelines, with which the Court agreed (translation below by NOAS):

351 HR-2014-1323-A, Rt-2014-645, Supreme Court of Norway, 24.06.2014, paras. 21–23, English translation available at: <https://lovdata.no/avgjorelse/hr-2014-1323-a-eng>

352 James C. Hathaway, *The Rights of Refugees under International Law (Second Edition)*, Cambridge University Press, 2021, pp. 494–495; Cathryn Costello and Yulia Ioffe, «Non-penalization and Non-Criminalization» in: Cathryn Costello, Michelle Foster, and Jane McAdam (Eds.), *The Oxford Handbook of International Refugee Law*, 2021, p. 924 (note 61); Cathryn Costello (with Yulia Ioffe and Teresa Büchsel), *Article 31 of the 1951 Convention Relating to the Status of Refugees*, UNHCR Legal and Protection Policy Research Series, PPLA/2017/01, July 2017, pp. 28-29, 31 available at: <https://www.refworld.org/docid/59ad55c24.html>

353 HR-2018-846-A (case no. 2018/21), Supreme Court of Norway, 04.05.2018, available at: <https://www.domstol.no/globalassets/upload/hret/avgjorelser/2018/avgjorelser-mai-2018/saknr-2018-21-anonymisert.pdf>

354 Ibid., English summary available at: <https://lovdata.no/avgjorelse/hr-2018-846-a-eng>

«The UN High Commissioner for Refugees (UNHCR) has in its revised «Guidelines [on] Applicable Criteria and Standards relating to the Detention of Asylum Seekers» from February 1999 expressed the following about the criterion ‘coming directly’ in Article 31(1):

«It is understood that this term also covers a person who transits an intermediate country for a short period of time without having applied for, or received, asylum there. No strict time limit can be applied to the concept ‘coming directly’ and each case must be judged on its merits.»

I agree with this, which means that a specific assessment must be made in the individual case of whether the condition is met.»³⁵⁵

However, the Court explicitly disagreed with another statement from UNHCR expressed in the *amicus* presented to the Court in this case by the defendant’s lawyer, which was previously also submitted to the Court in 2014 (in case HR-2014-1323-A discussed in section 5.2.1 above). The statement in question was the following: «the drafters only intended that immunity from penalty should not apply to refugees who had settled, temporarily or permanently, in another country in which effective protection is available. In all other cases, the term ‘directly’ is interpreted widely.»³⁵⁶ It is worth mentioning that this statement, albeit without the last sentence, also appears in the 2001 Expert Roundtable Summary Conclusions.³⁵⁷ In contrast, the Court did not find sufficient grounds for such interpretation (translation below by NOAS):

«Based on what was submitted to the Supreme Court, I can find no evidence that the intention when the Convention was prepared was to make impunity so wide. What appears from the preparatory works is that the requirement should exclude situations where the refugee, before he travels on, has obtained asylum in the third country. However, in my opinion, it cannot be concluded from this that the intention was that this requirement only – or first and foremost – should exclude such situations.

My view is therefore that in those cases where the refugee, on his way to Norway, has stayed in a safe third country, an overall assessment must be made of the specific circumstances when deciding whether he nevertheless has «come directly» from the country of origin. In this assessment, the length of stay in the third country and the reason for this must be central.»³⁵⁸

In this specific case, the Court noted that the defendant stayed approximately a month in Austria with his brother.³⁵⁹ The Court also noted the defendant’s explanation, which the Court did not contest, that he had considered applying for asylum in Austria but that he dismissed the idea when he saw

355 HR-2018-846-A (case no. 2018/21), Supreme Court of Norway, 04.05.2018, paras. 21–22, available at: <https://www.domstol.no/globalassets/upload/hret/avgjorelser/2018/avgjorelser-mai-2018/saknr-2018-21-anonymisert.pdf>

356 UN High Commissioner for Refugees (UNHCR), *Response by the UNHCR Regional Representation for Northern Europe to request for guidance on the interpretation of certain elements in Article 31 of the 1951 Convention Relating to the Status of Refugees*, 03.03.2014, para. 12, available at: https://www.noas.no/wp-content/uploads/2021/08/Intervention_Art_31_NOR_Feb_2014.pdf

357 UN High Commissioner for Refugees (UNHCR), «Summary Conclusions: Article 31 of the 1951 Convention, expert roundtable, Geneva, November 2001» in: Volker Türk and Frances Nicholson (Eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge University Press, 2003, p. 255, point 10(c), available at: <https://www.unhcr.org/419c783f4.pdf>

358 HR-2018-846-A (case no. 2018/21), Supreme Court of Norway, 04.05.2018, paras. 24–25, available at: <https://www.domstol.no/globalassets/upload/hret/avgjorelser/2018/avgjorelser-mai-2018/saknr-2018-21-anonymisert.pdf>

359 *Ibid.*, para. 26.

that there were several hundred people waiting in line to submit asylum applications.³⁶⁰ The Court further accepted that the applicant must have had a clear plan to end up in Norway at the latest when he left Greece.³⁶¹ The Court further noted the fact that the defendant's wife and son were in Norway, and that his original plan was to reunite with them.³⁶² Nevertheless, the Court concluded that the requirement of 'coming directly' was not met in this case (translation below by NOAS):

«The relatively long stay in Austria was in other words used to visit the brother and to assess whether he should seek asylum there. The stay was not due to the fact that he encountered special difficulties in Austria that would prevent or delay his further flight to Norway.

When this was the situation, it does not matter, in my opinion, that A's original plan was to travel to Norway to be reunited with his wife and son. The Refugee Convention does not specifically protect family reunification. But the central issue here is that the direct travel to Norway was broken when he chose to make a longer stay in Austria.»³⁶³

The overall approach adopted by the Supreme Court appears to be in line with the object and purpose of the Refugee Convention, discussed in section 5.1.3 above. The Court agreed that transit through intermediary countries where the life or freedom of the refugee is not threatened does not as such exclude the protection afforded by Article 31(1) and that each case must be judged on its merits, in conformity with the 1999 UNHCR Detention Guidelines. The Court correctly focused on the question of whether the defendant encountered any difficulties that would prevent or delay his transit.

However, some criticism may nevertheless be raised with regard to the Court's concrete assessment of the defendant's individual circumstances. Firstly, a question may be raised whether the defendant's attempt to examine the possibilities for protection in Austria, which was apparently the reason for the delay, did not actually constitute a 'good cause', interpreted together with 'coming directly'. The message that the Court appears to have sent to refugees is that spending time exploring the possibilities for protection in intermediary countries will deprive them of the protection against penalization afforded by Article 31(1). The Court's strict stance on this point serves neither the refugee nor the state.

Secondly, the Court's remark that the Refugee Convention «does not specifically protect family reunification», while strictly correct, cannot serve as a justification for dismissing the relevance of family links when assessing the applicability of Article 31(1). The fact that the defendant had a family in Norway, with whom he intended to reunite, should have been given due weight in the overall assessment of whether he was staying in Austria or 'coming directly' to Norway, as suggested in the 2001 Expert Roundtable Summary Conclusions.³⁶⁴ The Convention's terms 'coming directly' and 'good cause' cannot be interpreted in a vacuum. The Final Act of the 1951 Conference of Plenipotentiaries,

³⁶⁰ Ibid.

³⁶¹ Ibid., para. 27.

³⁶² Ibid., para. 29.

³⁶³ Ibid., paras. 28–29.

³⁶⁴ UN High Commissioner for Refugees (UNHCR), «Summary Conclusions: Article 31 of the 1951 Convention, expert roundtable, Geneva, November 2001» in: Volker Türk and Frances Nicholson (Eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, 2003, p. 255, point 10(d), available at: <https://www.unhcr.org/419c783f4.pdf>

which highlights the importance of family unity,³⁶⁵ falls under Article 31(2)(a) VCLT (an agreement made between all the parties in connection with the conclusion of the treaty), thus forming a part of the relevant context when interpreting the terms of the treaty. Moreover, the right to family life, as recognised under human rights law, is to be taken into account, as specified in Article 31(3)(c) VCLT.

The Interlocutory Appeals Committee of the Supreme Court (Høyesteretts ankeutvalg) arrived at a more favourable assessment of ‘coming directly’ with respect to an apparent survivor of torture and rape in Libya in the case HR-2019-1204-U.³⁶⁶ The defendant in the case was actually the survivor’s uncle, who has resided in Norway legally. He was convicted by the Court of Appeal for facilitation of unlawful entry of his nephew pursuant to section 108(4)(b) of Norway’s Immigration Act. This provision contains an exemption, specifying that the punishment shall not apply «if the intention is to help a foreign national falling under section 28 of the Act to enter the first safe country.»³⁶⁷ The prosecution argued that this exemption did not apply because the nephew arrived from Italy, which must be considered safe.³⁶⁸ The nephew was granted asylum and was never charged, but this did not legally hinder the prosecution of his uncle.

The Committee noted at the outset that a necessary precondition for criminal liability of the defendant was that the entry of his nephew was unlawful.³⁶⁹ The Committee further held that the cited exemption contained in the Immigration Act must be interpreted in line with Norway’s international obligations, including Article 31(1) of the Refugee Convention.³⁷⁰

The Committee then considered the facts concerning the nephew’s entry to Norway.³⁷¹ The nephew arrived together with the defendant. They were stopped by the customs control, and the defendant then immediately explained that his nephew arrived with a passport that he had obtained for him, which belonged to that nephew’s brother. The Committee noted that there was no reason to doubt that they intended to immediately approach the police to seek asylum and that their intention was not to mislead the Norwegian authorities, as accepted by the Court of Appeal.

The Committee then proceeded to the next issue concerning the requirement of ‘coming directly’. The Committee noted that the defendant’s nephew (referred to as B) stayed in Italy for a month, as was the case in HR-2018-846-A discussed above, but pointed out that there were important differences between the two cases (translation below by NOAS):

365 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, A/CONF.2/108/Rev.1, 25.07.1951, p. 8, available at: <https://www.refworld.org/docid/40a8a7394.html>

366 HR-2019-1204-U, the Interlocutory Appeals Committee of the Supreme Court of Norway (Høyesteretts ankeutvalg), 24.06.2019, available at: <https://lovdata.no/avgjorelse/hr-2019-1204-u>

367 Norway’s Immigration Act (utlendingsloven) section 108(4)(b) states the following: «A penalty of a fine or imprisonment for a term not exceeding three years shall be applied to any person who [...] (b) helps a foreign national to enter the realm or any other state unlawfully. However, this shall not apply if the intention is to help a foreign national falling under section 28 of the Act [asylum] to enter the first safe country.» An English translation of the provision is available at: <https://lovdata.no/NLE/lov/2008-05-15-35/§108>

368 HR-2019-1204-U, the Interlocutory Appeals Committee of the Supreme Court of Norway (Høyesteretts ankeutvalg), 24.06.2019, para. 7, available at: <https://lovdata.no/avgjorelse/hr-2019-1204-u>

369 Ibid., para. 9.

370 Ibid., para. 11–12.

371 Ibid., para. 13.

«Also in B's case, the stay in the transit country lasted one month, but otherwise it is very different. The Court of Appeal describes nephew's situation in Italy as follows:

«The Court of Appeal has no doubt that B suffered extensive physical and mental trauma during his six-year captivity in [countries in Africa], the subsequent flight through Sudan, and not least during his captivity in Libya. .. It is assumed that B appeared very upset over telephone conversations with the family in Norway, that he lived on the street, and that he could take little care of himself.»

In connection with the sentencing, the Court of Appeal further notes that B «showed signs of torture and rape in captivity in Libya and he was unable to take care of himself.»³⁷²

The Committee then considered whether the Court of Appeal made a correct assessment in line with Article 31(1), noting that the central question was not whether the uncle (referred to as A) could invoke the defence of necessity («nødrett»). Instead, according to the Committee, the relevant question was whether the nephew (B) had a valid reason («gyldig grunn») for the unlawful entry (translation below by NOAS):

«It is correct that Article 31(1) of the Refugee Convention requires that the foreign national must also have had a 'valid reason' for his unlawful entry. As mentioned, the Court of Appeal concluded that A could not invoke the defence of necessity because instead of helping his nephew to Norway he could have helped him out of the precarious situation in Italy in another way. However, this does not necessarily answer the question of whether B lacked a 'valid reason' under Article 31(1) of the Refugee Convention. It becomes a question of whether the Refugee Convention permits Norway to require that he, in the situation he was in, should have rejected the uncle's offer to travel to Norway with a passport belonging to B's brother.»³⁷³

The Committee thus unanimously revoked both the Court of Appeal's judgment as well as the hearing because the Court had not assessed the facts of the case in relation to Article 31(1) of the Refugee Convention.³⁷⁴

5.2.3 Implementation at the prosecutorial level

Proper implementation of Article 31(1) of the Refugee Convention, especially at the prosecutorial level, is important to ensure that newly arriving refugees can focus on the asylum procedure and early integration instead of worrying about an unnecessary criminal prosecution. Starting the integration process as wrongfully charged or convicted is clearly undesirable for both refugees as well as the wider society. A wrongful conviction may negatively affect for example future employment prospects

372 Ibid., paras. 16–17.

373 Ibid., para. 19.

374 Ibid., para. 20.

and, according to the Norwegian law, delay the possibility to acquire a permanent residence permit³⁷⁵ and Norwegian citizenship.³⁷⁶

The Director of Public Prosecutions (Riksadvokaten) promptly followed up the Supreme Court's decision HR-2014-1323-A (see section 5.2.1 above) by amending the relevant guidelines in July 2014.³⁷⁷ The amended guidelines describe the term 'without delay' in line with the decision.

Additionally, the amended guidelines also refer to the term 'coming directly', which was not considered by the Court at the time, noting that Article 31(1) of the Refugee Convention may be applicable, depending on the individual circumstances, «even if necessary stops are made in other countries as a result of transit.»³⁷⁸

The Guidelines further specify that «the exemption from penalization will also be applicable even if the refugee does not intend to seek asylum in this country.»³⁷⁹ This point was later confirmed by the Eidsivating Court of Appeal, which held that illegal stay in Norway with the aim to flee to another country may constitute a 'valid reason' («gyldig grunn»)³⁸⁰

This prompt follow-up of the Supreme Court's decision by the Director of Public Prosecutions has received positive attention in the national media³⁸¹ as well as in the leading international legal literature.³⁸²

A related issue concerned the question of how to address the cases of those who might have been wrongfully convicted prior to 2014. Noting the first case reopened by the Criminal Cases Review Commission (Gjenopptakelseskommisjonen),³⁸³ the Director of Public Prosecutions requested the Directorate of Norwegian Correctional Service (Kriminalomsorgsdirektoratet) in December 2014 to identify other cases where such requests were made and set the execution of sentences in those cases on hold until the question concerning their reopening was decided.³⁸⁴

375 The Norwegian Directorate of Immigration (UDI), *Waiting times for permanent residence permits for convicted persons and people who have been fined*, available at: <https://www.udi.no/en/word-definitions/waiting-times-for-permanent-residence-permits-for-convicted-persons-and-people-who-have-been-fined/>

376 The Norwegian Directorate of Immigration (UDI), *Waiting times for Norwegian citizenship for convicted persons and people who have been fined*, available at: <https://www.udi.no/en/word-definitions/waiting-times-for-norwegian-citizenship-for-convicted-persons-and-people-who-have-been-fined/>

377 Riksadvokaten, *Endring av riksadvokatens retningslinjer Ra 05-370 punkt 7 om unnlatt strafforfølgning i særlige tilfelle av straffbare handlinger som avdekkes i utlendingssaker mv.*, 2014/00167-009 ABC007 274, 04.07.2014, available at: <https://www.riksadvokaten.no/wp-content/uploads/2017/10/Endring-av-riksadvokatens-retningslinjer-om-unnlatt-straffefor%C3%B8lging.pdf>,

378 Ibid., p. 2.

379 Ibid.

380 LE-2018-50200, Eidsivating Court of Appeal (Eidsivating lagmannsrett), 14.06.2018, available at: <https://lovdata.no/avgjorelse/le-2018-50200>

381 Dagbladet, «Riksadvokaten med ferske ordrer til politimestrene - rydder opp i norsk misforståelse av FNs flyktningkonvensjon», 04.07.2014, available at: <https://www.dagbladet.no/nyheter/riksadvokaten-med-ferske-ordrer-til-politimestrene---rydder-opp-i-norsk-misforstaelse-av-fns-flyktningskonvensjon/61054911>

382 Cathryn Costello and Yulia Ioffe, «Non-penalization and Non-Criminalization» in: Cathryn Costello, Michelle Foster, and Jane McAdam (Eds.), *The Oxford Handbook of International Refugee Law*, 2021, p. 926.

383 GK-2014-156 (18.12.2014).

384 Riksadvokaten, *Straffritak i utlendingssaker – utsettelse av soning mv.*, 2014/00167-011 KES/ggr 274, 17.12.2014, p. 2., available as annex to the letter cited in the next footnote.

Additionally, the Director of Public Prosecutions requested the Prosecuting Authority in the Police and the Public Prosecutors to review relevant cases on their own initiative and assess whether there was a basis for reopening. However, this review was explicitly restricted to «convictions that have resulted in a *custodial sentence that has not yet been executed*.»³⁸⁵ As far as other cases were concerned, it was left up to the individual refugees or their legal representatives to request reopening of their case.

Unsurprisingly, very few refugees have done so, most probably due to the lack of awareness of such possibility. A search at Lovdata made in August 2021 shows that the Criminal Cases Review Commission has reopened 10 cases³⁸⁶ and rejected two.³⁸⁷ These are regrettably small numbers. No statistics are available that would reveal the total number of refugees convicted in relation to unlawful entry prior to 2014. Potentially, hundreds of individuals might have been wrongfully convicted, since criminal prosecution used to be a normal response when asylum seekers presented a false passport at passport control.³⁸⁸

In November 2019, the International Commission of Jurists (Norwegian branch: ICJ-Norway) asked the Director of Public Prosecutions to instruct the police and the prosecuting authorities to identify and review convictions from before 2014 where Article 31(1) may have been overlooked or misinterpreted.³⁸⁹ The Commission drew a parallel with a similar instruction by the Director of Public Prosecutions issued in the previous month³⁹⁰ in relation to criminal convictions concerning wrongful application of EEA law by the Norwegian Labour and Welfare Administration (NAV).³⁹¹ In that case, the instruction to review the relevant convictions was not restricted to non-executed sentences.

The Director of Public Prosecutions responded by stating that the offenses in question were not among the most serious ones, and that a long time has since passed, concluding that those who think they have been wrongfully convicted must themselves take the initiative to have their case reopened.³⁹²

385 Riksadvokaten, *Straffritak i utlendingssaker – utsettelse av soning mv.*, 2014/00167-013 ABG/ggr 274, 22.12.2014, available at: <https://www.riksadvokaten.no/document/straffritak-i-utlendingssaker-utsettelse-av-soning-mv/>

386 GK-2014-156 (18.12.2014); GK-2014-185 (26.03.2015); GK-2015-123 (07.10.2015); GK-2015-124 (08.10.2015); GK-2018-186 (28.08.2019); GK-2020-23-1 (06.05.2020); GK-2020-16 (06.05.2020); GK-2020-59 (23.10.2020); GK-2020-110 (23.10.2020); GK-2020-57 (27.01.2021).

387 GK-2014-144 (17.11.2014); GK-2014-106 (18.06.2015).

388 Norwegian Organisation for Asylum Seekers (NOAS), *Detention of Asylum Seekers: Analysis of Norway's international obligations, domestic law and practice*, 2014, pp. 60-68, available at: https://www.noas.no/wp-content/uploads/2014/02/Detention-of-asylum-seekers_web.pdf

389 International Commission of Jurists (Norwegian branch: ICJ-Norway), *Anmodning om å vurdere gjenåpning av straffesaker basert på feiltolkning eller manglende anvendelse av straffrihetsregelen i flyktningkonvensjonen artikkel 31*, 11.11.2019, available at: <http://icj.no/wp-content/uploads/2019/11/ICJ-Brev-Riksadvokaten-12.11.19.pdf>

390 Riksadvokaten, *NAV – Feil rettsgrunnlag i anmeldelser*, 2019/01332-002 IWI/ggr, 30.10.2019, available at: <https://www.riksadvokaten.no/wp-content/uploads/2020/02/Brev-av-30.10.19.pdf>

391 For a detailed account of the 'NAV scandal', see: Tommaso Pavone and Øyvind Stiansen, «The Shadow Effect of Courts: Judicial Review and the Politics of Preemptive Reform» in: *American Political Science Review*, 26.08.2021, pp. 1–15 (case study at 7–13), available at: <https://doi.org/10.1017/S0003055421000873>

392 Riksadvokaten, *Anmodning om gjenåpning av straffesaker på grunn av straffrihetsregelen i flyktningkonvensjonen artikkel 31*, 2014/00167-022 RTOo06, 06.01.2020, p. 8, available at: <https://www.riksadvokaten.no/wp-content/uploads/2020/01/Brev-til-ICJ.pdf>

This decision has drawn severe criticism from representatives of the Norwegian Bar Association and ICJ-Norway as to the stark difference in the approach between the two types of cases, especially in light of the potentially grave consequences for refugees, their weak social position and very limited access to legal aid.³⁹³

393 Marius O. Dietrichson, André Møkkelgjerd, Mads Harlem, *Justismordets rettsstatlige logikk*, 18.05.2020, available at: <https://www.dagbladet.no/kultur/justismordets-rettsstatlige-logikk/72471630>;

See also: André Møkkelgjerd, *Staten vil ikke rette opp urett begått mot flyktninger*, 27.11.2019, available at: <https://www.advokatbladet.no/flyktninger-nav-skandalen/staten-vil-ikke-rette-opp-urett-begatt-mot-flyktninger/145576>

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