



## **EMN Ad-Hoc Query on Interaction between criminal proceedings and asylum procedure**

Requested by Zane ROZENBERGA on 5th May 2016

### **Border**

Responses from Austria, Belgium, Blocked / Unknown, Croatia, Czech Republic, Estonia, Finland, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Sweden, United Kingdom, Norway (21 in total)

#### Disclaimer:

*The following responses have been provided primarily for the purpose of information exchange among EMN NCPs in the framework of the EMN. The contributing EMN NCPs have provided, to the best of their knowledge, information that is up-to-date, objective and reliable. Note, however, that the information provided does not necessarily represent the official policy of an EMN NCPs' Member State.*



## **Background information:**

In 2013 the criminal liability for the person, who intentionally commits illegal crossing of the state border was defined in the Criminal Law of the Republic of Latvia. Since 2015 the number of third-country nationals, who illegally enter the territory of Latvia crossing its external border and submit applications for international protection has started to increase. With regard to the mentioned third-country nationals, the criminal procedure under the Criminal Law is initiated and at the same time the asylum procedure is applied.

Currently Latvia applies both procedures (criminal and asylum procedures) simultaneously. As the result of that some uncertainties arise, particularly, as regards to implementation of provisions of Article 31 paragraph 1 of the Geneva Convention relating to the Status of Refugees: “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.”

Within the meaning of Article 31 paragraph 1 of the Geneva Convention, the Contracting State is not allowed to punish asylum seekers, who have entered illegally or are staying on the territory of that Contracting State, provided that both of the following conditions exist:

- 1) refugee, has come directly from a territory where his/her life or freedom was threatened, and
- 2) his/her life or freedom was threatened in the sense of article 1 of this Convention, and
- 3) provided refugee present himself/herself without delay to the authorities and show good cause for his/her illegal entry or presence.

Taking into account the above-mentioned it is not clear whether the person may be criminally liable (can be punished) in case if he/she has arrived from the territory of the transit third country and not directly from the territory of the country where his/her life and safety was threatened, so Latvia would like to obtain information on national experiences of the Member States and is kindly asking to provide answers to the following questions:

## **Summary**

See the attached file.

## **Questions**

1. Does Your national legislation define the criminal liability for foreigner, who illegally crossed the border? Please mention the legal act that defines that.
2. If Yes:

Is the criminal procedure initiated with regard to all foreigners, who crossed the border illegally or there are any exceptions? If there are exceptions, please mention what kind of them?


3. In case the foreigner with regard to whom criminal proceedings are applied for illegal border crossing submits an application for international protection, whether the criminal proceedings with regard to this foreigner are suspended or both procedures (criminal and asylum procedures) are applied simultaneously?
4. Have there been cases in Your practice when the criminal proceedings were suspended because of the existence of the conditions mentioned in Article 31 paragraph 1 of Geneva Convention?
5. What competent authority in Your country makes an assessment whether in each individual case the conditions mentioned in Article 31 paragraph 1 of the Geneva Convention exists?
6. What is taken into account while making an assessment of conditions referred to in Article 31 paragraph 1 of the Geneva Convention?
7. If a foreigner has arrived from a transit country which has ratified the Geneva Convention and where the threats mentioned in Article 31 paragraph 1 of the Geneva Convention do not exist (additionally to this in the asylum application the foreigner has mentioned that his/her life and freedom are being threatened in the country of origin/citizenship), are the criminal proceedings continued or terminated?
8. If the both procedures (criminal and asylum) are not applied simultaneously do You apply criminal procedure after the asylum procedure has been completed and:


- the refusal to grant international protection to the foreigner was taken,

-

the international protection (refugee or subsidiary status) was granted to foreigner.

### Responses

	Country	Wider Dissemination	Response
	Austria	Yes	<p><b>1.</b> Under Austrian law, illegal entry and illegal stay of an alien do not constitute a criminal offense to be tried by courts, but only an administrative offense under the Aliens Police Act 2005. Source: Federal Ministry of the Interior.</p> <p><b>2.</b> N/A. Source: Federal Ministry of the Interior.</p>

			<p>3. N/A. Source: Federal Ministry of the Interior.</p> <p>4. N/A. Source: Federal Ministry of the Interior.</p> <p>5. N/A. Source: Federal Ministry of the Interior.</p> <p>6. N/A. Source: Federal Ministry of the Interior.</p> <p>7. N/A. Source: Federal Ministry of the Interior.</p> <p>8. N/A. Source: Federal Ministry of the Interior.</p>
	Belgium	Yes	<p>1. Yes, illegal entry and stay is legally a criminal offence: article 75 the Belgian Immigration Act stipulates that illegal entry and stay is an offence that is punishable by a fine (up to 200 Euro – to be multiplied by 6 because of the surtax) and/or imprisonment up to three months and up to one year in case of recidivism. According to article 4bis of the Immigration Act an administrative fine of 200 Euros (to be multiplied by 6) may be imposed against a foreigner for illegal border crossing. Belgium Immigration Act: <a href="https://dofi.ibz.be/sites/dvzoe/NL/Documents/19801215_n.pdf">https://dofi.ibz.be/sites/dvzoe/NL/Documents/19801215_n.pdf</a></p> <p>2. In practice, illegal entry or residence will never be prosecuted for the mere fact of violation of the entry and residence conditions. Only in combination with other criminal offences (f.i. theft, violence, human trafficking,...), the court(s) will be inclined to rule that immigration (residence) legislation has been violated.</p> <p>3. As said, a criminal procedure will not be initiated for the mere fact of illegal entry. Concerning asylum seekers, article 50 of the Immigration Act applies. This article foresees explicitly that a foreigner who enters or entered the territory without the necessary documents and who seeks to obtain an international protection status, should apply for asylum upon arrival or in the first 8 days after arrival. Article 50 ter Immigration Act: If border control authorities ask for explanations on the motivation for travelling to Belgium, the foreigner without the necessary entry documents that aims to seek asylum should apply for asylum at the border control post. In case an asylum applicant is prosecuted for criminal acts, the refugee status determination procedure could in certain cases be</p>

			<p>accelerated. In case refugee protection status was granted, the beneficiary will not be punished for the illegal border crossing while aiming to seek asylum.</p> <p><b>4.</b> See supra.</p> <p><b>5.</b> In general: the judicial authorities. [Crimes are before traced, detected and taken note of by different authorities (Police, Immigration Office) according to article 81 of the Immigration Act and brought forward to these judicial authorities.]</p> <p><b>6.</b> As pointed out, in case of an asylum seeker or refugee, a criminal procedure will not be initiated for irregular border crossing or stay.</p> <p><b>7.</b> As pointed out, in case of an asylum seeker or refugee, a criminal procedure will not be initiated for irregular border crossing or stay.</p> <p><b>8.</b> As said, a criminal procedure will not be initiated for the mere fact of illegal entry.</p>
	Blocked / Unknown	Yes	<p><b>1.</b> Illegal entry into the territory is punishable under criminal law - article L. 621-2 of the Code on Entry and Residence of Foreigners and Right of Asylum (CESEDA). The offender is liable to a term of imprisonment of one year and a fine of 3 750€.</p> <p><b>2.</b> These provisions concern only third-country nationals. Indeed, EU nationals enjoy freedom of movement.</p> <p><b>3.</b> Criminal sentences only apply in cases of flagrante delicto (Art L 621-2 CESEDA). A third-country national, minor or major, who presents him/herself at a border crossing point without the documents<sup>1</sup> required by the Schengen Borders Code (CFS) is given a “refusal of entry in the Schengen area<sup>2</sup>” decision (art. 6 and 14 of the CFS). These provisions are also provided by national law under the article L. 211-1 of the CESEDA. This foreigner can be maintained in a designated waiting zone (art R. 221-1 and the following ones of the CESEDA) for a maximum period of 20 days. If he/she is an asylum seeker at the border the refusal of entry decision can be made only: - if another Member State is responsible for the asylum application (Dublin III); - if the application is inadmissible under the</p>

article L. 723-11 of the CESEDA; - if the application is manifestly unfounded, i.e. is not credible or not relevant with regard to asylum criteria. In accordance with the provisions of articles R. 213-2 and R. 213-3 of the CESEDA, the competent administrative authority for issuing refusal of entry decisions against aliens applying for asylum at the border is the Minister in charge of Immigration (Asylum Directorate/Asylum at the Border and Admission to Stay Department). The refusal of entry decision can be made only after the French Office for the Protection of Refugees and Stateless Persons (OFPRA) has delivered its decision. Except in cases of serious threat to public order, the OFPRA decision is binding on the Minister. Therefore, in cases of asylum applications at the border, French legislation does not provide for conducting two procedures simultaneously. At the end of the asylum procedure at the border, in case of refusal, the foreigner is returned to his/her country of origin or to another country where he/she can be readmitted. 1: Invalid (expired, usurped, falsified or forged) passport and visa (or residence permit), insufficient income to ensure their livelihood, exceeding duration of legal stay in the Schengen area, subject of an alert in SIS or serious threat to public policy and interior security. 2: Only Metropolitan France is included in the Schengen area and applies the CFS requirements. Overseas territories remain bound by the national legislation on entry to the territory.



4. cf Q3


5. Cf Q3. Since the asylum procedure at the border excludes a criminal procedure, the question is not relevant in France.

6. Cf Q3

7. cf Q3


8. If the foreigner is allowed to enter the French territory, he/she is given an eight days safe conduct in order to apply for asylum in a prefecture. In this event, the normal procedure applies. Depending on the elements provided, authorities decide whether they give him/her the international protection (refugee or subsidiary protection) or not. In case of refusal, the person receives a return decision (obligation to leave the French territory - OQTF). In such cases, the criminal procedure for illegal


			border crossing is abandoned.
	Croatia	Yes	<p><b>1.</b> No. Croatian national legislation does not define criminal liability but a misdemeanour liability to a foreigner who illegally crossed the state border. According to the Act on International and Temporary Protection (Official Gazette no. 70/15) Article 8, a third-country national or stateless person who had illegally entered the Republic of Croatia, coming directly from the territory where he/she was persecuted shall not be punished for his/her illegal entry or stay provided that he/she expresses an intention to apply for international protection without delay and shows good cause for his/her illegal entry or stay. The Law on Border control (Official Gazette no. 83/13, 27/16) Article 55 paragraph 2 prescribes: a fine in the amount of 800, 00 do 8,000.00 kunas shall be onto to the person who passes or attempts to cross the state border outside border crossing or outside the time set for crossing the state border without a valid travel documents (Article 5, paragraph 1).</p> <p><b>2.</b> N/A</p> <p><b>3.</b> N/A</p> <p><b>4.</b> N/A</p> <p><b>5.</b> N/A</p> <p><b>6.</b> N/A</p> <p><b>7.</b> N/A</p> <p><b>8.</b> N/A</p>
	Czech Republic	Yes	<p><b>1.</b> No. The Czech Penal Code 40/2009 Coll. does not allow to prosecute persons for illegal crossing of the state borders. The punishable act is only when the state border is crossed by using force (§ 339), however the Czech Republic is the intra-Schengen country. The only external borders are at the international airport where special asylum procedure applies but foreigners asking for asylum at the</p>


			<p>airport do not cross the borders and are placed at the reception centre at the airport in the transit zone.</p> <p>2. N/A</p> <p>3. N/A</p> <p>4. N/A</p> <p>5. N/A</p> <p>6. N/A</p> <p>7. N/A</p> <p>8. N/A</p>
	Estonia	Yes	<p>1. Illegal crossing of the state border or temporary border line of the Republic of Estonia is criminal offence only in certain cases. According to the Penal Code § 258 illegal border crossing is a criminal offence if it was committed: 1) in disregard of a stop signal or order given by a police officer; 2) by a group; or 3) by a means of transport in a location not intended for crossing. Also, § 2374 of the Penal Code stipulates the act of illegal crossing of the Estonian state border or temporary border line by an alien, if: 1) committed in order to conceal another criminal offence against the state in the Republic of Estonia; 2) it involves violence, depriving a person of liberty, threat to use force or restrict the liberty of the person; or 3) property has been damaged or destroyed for the purpose of facilitating illegal border crossing. In all other cases, illegal crossing of the state border or a temporary control line of the Republic of Estonia (State Border Act § 172) is an administrative offence.</p> <p>2. Criminal procedure is initiated only in cases mentioned in Q1.</p> <p>3. Criminal procedure is suspended usually.</p> <p>4. N/I</p>





			<p>5. Police and Border Guard Board.</p> <p>6. -</p> <p>7. -</p> <p>8. -</p>
+	Finland	Yes	<p>1. Yes. The Criminal Code of Finland (39/1889) Chapter 17 Section 7 – State border offence (146/2014) (1) A person who (1) crosses the border of Finland without a valid passport, visa, residence permit or other document comparable to a passport, or does so other than through a valid point of entry into or departure from the country, or contrary to a statutory prohibition, or attempts the same, (2) otherwise breaches the provisions on border crossing, or (3) stays, moves or undertakes measures in the border zone in violation of section 51 of the Border Zone Act or without the permission required under section 52 of the Act, shall be sentenced for a state border offence to a fine or imprisonment for at most one year. (2) A foreigner who is refused entry or deported as a result of the act referred to in subsection 1 or a foreigner who seeks asylum or applies for a residence permit as a refugee in Finland shall not be sentenced for a border offence. Also a foreigner who has committed the act referred to in subsection 1 due to the fact that he or she has been subjected to trafficking in human beings referred to in Chapter 25, section 3 or 3(a) shall not be sentenced for a border offence. (650/2004) Section 7(a) - Petty border offence (756/2000) (1) If the border offence, in view of the short duration of the unauthorised stay or movement, the nature of the prohibited act, or the other circumstances of the offence is petty when assessed as a whole, the offender shall be sentenced for a petty border offence to a fine. (2) The provisions in section 7, subsection 2 apply also to acts referred to in subsection 1. (Aliens Act applies, if an alien is met residing illegally within borders : Aliens Act Chapter 12 Section 185 Violation of the Aliens Act (1) An alien who 1) deliberately resides in the country without the required travel document, visa or residence permit, or through negligence fails to comply with the obligation to register his or her residence or apply for a residence card or permanent residence card; ... shall be sentenced to a fine for a violation of the Aliens Act.)</p> <p>2. A foreigner who is refused entry or deported as a result of the act referred to in subsection 1 or a foreigner who seeks asylum or applies for a residence permit as a refugee in Finland shall not be</p>

			<p>sentenced for a border offence. Also a foreigner who has committed the act referred to in subsection 1 due to the fact that he or she has been subjected to trafficking in human beings referred to in Chapter 25, section 3 or 3(a) shall not be sentenced for a border offence.</p> <p><b>3.</b> Criminal proceedings are terminated.</p> <p><b>4.</b> Criminal proceedings are always terminated if a foreigner seeks asylum or applies for a residence permit as a refugee in Finland.</p> <p><b>5.</b> Border guard and Police</p> <p><b>6.</b> See the response number 4.</p> <p><b>7.</b> Criminal proceedings are terminated if a foreigner seeks asylum or applies for a residence permit as a refugee in Finland even if a foreigner has arrived from a transit country which has ratified the Geneva Convention.</p> <p><b>8.</b> No.</p>
	Germany	Yes	<p><b>1.</b> §14 Aufenthaltsgesetz (Residence Act): unlawful entry §95 AufenthG : penal provisions If a criminal offence is suspected, which in this case is an illegal entry, this offence has to be reported to the police on the basis of the principle of mandatory prosecution according to which prosecution of an offence is mandatory pursuant to sections 152 (2), 16 and 163 of the Strafprozessordnung (Code of criminal procedure).</p> <p><b>2.</b> See question 1</p> <p><b>3.</b> The application of art. 31 (1) Refugee Convention is the exclusive right of the public prosecution offices and the courts, as the case here may include a possible ground for the exemption from punishment (lawful excuse). The police offices are responsible for the proof of evidence of the abstracts of the case . That means in this case that all incriminatory and exculpatory facts have to be identified in this context with evidence; and they must be handed over to the public prosecution</p>

			<p>offices and the courts. If there is the proof of evidence of the facts of the case, then the above mentioned public prosecution offices and courts decide on illegality and guilt.</p> <p>4. See question 3</p> <p>5. See question 3</p> <p>6. See question 3</p> <p>7. See question 3</p> <p>8. In both cases: no</p>
	Hungary	Yes	<p>1. YES. – however, illegal border crossing by itself is not a criminal act, see details below. Act C of 2012 on the Criminal Code. See the above-referred national legislation in Hungarian at: <a href="http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200100.TV">http://net.jogtar.hu/jr/gen/hjegy_doc.cgi?docid=A1200100.TV</a> (especially see most relevant recent provisions §60. (2a): §352/A.; §352/B., §352/C.) Act C. of 2012 on the Criminal Code defines three crimes regarding illegal border crossing: I. The first one is Section 352/A (illegal crossing of the temporary border protection device): Any person who enters without due authorisation the territory of Hungary protected with a facility ensuring the protection of the order of the state border through this facility is guilty of a felony, punishable with imprisonment not exceeding three years. Should this act perpetrated by displaying a deadly weapon or by carrying a deadly weapon or as a participant of civil disturbance, the applicable punishment shall be an imprisonment between one to five years. II. Secondly, Section 352/B (Damaging of temporary border restriction): If a person destroys or damages the installation, insofar as the act did not result in a more serious criminal offense, the applicable punishment shall be an imprisonment between one to five years. If this act is perpetrated by displaying a deadly weapon or by carrying a deadly weapon or as a participant of civil disturbance, the applicable punishment shall be imprisonment between two to eight years. III. The third crime is Section 352/C (Preventing the construction works of the installation). This act is punishable by imprisonment up to one year. This facility ensuring the protection of the order of the state border is along the southern borders of Hungary, stretching along the Hungarian-Serbian and Hungarian-Croatian border sections.</p>

			<p><b>2.</b> There are no exceptions defined in the Criminal Code, the exceptions prescribed in the General Part of the Criminal Code are applicable.</p> <p><b>3.</b> Hungary applies criminal and asylum procedures simultaneously. The court examines ex officio and considers whether there are circumstances that can be regarded as a preliminary question during the criminal procedure which can give reason to suspend the procedure. If during a criminal proceeding initiated against a person in connection with damaging of the border fence the defendant applies for international protection and the result of the asylum procedure can affect the conducting of the criminal proceeding, the court shall consider whether that constitutes a preliminary question and may decide accordingly on the suspension of the proceeding. It must be emphasised that no expulsion may be enforced until the application for international protection has been decided on. If the defendant is granted refugee status, this fact has to be taken into consideration during the criminal proceeding according to the above, with special regard to the fact that under Section 59 (2) of the Criminal Code – and under Article 32 of the Geneva Convention – persons granted asylum may not be expelled.</p> <p><b>4.</b> No.</p> <p><b>5.</b> Every competent authority has to consider Article 31 of the Geneva Convention. The asylum authority makes the assessment if the conditions of granting refugee status are met.</p> <p><b>6.</b> Regarding the responsibility of the asylum authority in terms of Article 31 paragraph 1 of the Geneva Convention, please see the answer for question 5.</p> <p><b>7.</b> The procedures are applied simultaneously.</p> <p><b>8.</b> Not applicable, the procedures are applied simultaneously.</p>
	Italy	Yes	<p><b>1.</b> Yes. Legislative Decree 286/1998, Consolidated Act on Immigration, Article 10-bis ("Illegal entry and stay in the territory of the State"), introduced by Law 15 July 2009, No 94, "Provisions on public security", establishes that "Unless the act constitutes a more serious offence, a foreign national who enters or remains within the territory of the State illegally is liable of a fine from 5,000 to 10,000</p>

			<p>EUR” (Sub-paragraph 1).</p> <p><b>2.</b> Article 10-bis also provides that the measures referred to in Sub-paragraph 1) do not apply to foreign nationals who arrive at border crossing points without meeting entry requirements and who have been subject to a decision to refuse entry.</p> <p><b>3.</b> Under Article 10-bis, criminal proceedings are suspended if the foreign national submits an application for international protection. Moreover, once the granting of international protection has been notified, the court delivers a judgement dismissing the charges (Sub-paragraph 6).</p> <p><b>4.</b> Yes.</p> <p><b>5.</b> The Border police, and especially the Questure (Provincial Police Authorities) and the National Asylum Commission.</p> <p><b>6.</b> In general, being irregular in itself does not prevent recognition of refugee status.</p> <p><b>7.</b> As stated in answer 3) Article 10-bis provides that criminal proceedings are suspended until a decision is taken on the asylum application.</p> <p><b>8.</b> The same Article 10-bis establishes that criminal proceedings are resumed only if international protection has not been granted.</p>
	Latvia	Yes	<p><b>1.</b> Article 284 of the Criminal Law of Latvia defines the following criminal sanction: (1) For a person who intentionally commits illegal crossing of the State border, the applicable punishment is temporary deprivation of liberty or community service, or a fine. (2) For a person who commits the same acts, if they have been committed by a group of persons or using a vehicle, or violating the specified prohibition to enter the Republic of Latvia, the applicable punishment is deprivation of liberty for a term up to two years or temporary deprivation of liberty, or community service, or a fine.</p> <p><b>2.</b> There are no exceptions defined in the Criminal Law. The criminal proceedings are not initiated with regard to a foreigner, who crossed the border illegally and submitted the asylum application in</p>

			<p>case if the provisions of Geneva Convention exist.</p> <p><b>3.</b> Latvia applies criminal and asylum procedures with regard to a foreigner simultaneously (in parallel).</p> <p><b>4.</b> There were no cases when the criminal proceedings were suspended on the basis that it was found that the conditions mentioned in Article 31 paragraph 1 of Geneva Convention exist.</p> <p><b>5.</b> Two responsible state authorities make the assessment: - The State Border Guard, which controls the observation of regulations on entry, residence, exit and transit by aliens and stateless persons in the territory of Latvia, and carries out initial activities with asylum seekers; - the Office of Citizenship and Migration Affairs, which takes decision in asylum procedure.</p> <p><b>6.</b> While making an assessment all main aspects of conditions mentioned in Article 31 paragraph 1 of the Geneva Convention (direct and illegal border crossing, life or freedom of the foreigner was threatened, a foreigner presented asylum application without delay) are taken into account.</p> <p><b>7.</b> The criminal proceedings are continued in parallel with asylum procedure.</p> <p><b>8.</b> There is no practice of applying criminal procedures sequentially (one after the other) after asylum procedure.</p>
	Lithuania	Yes	<p><b>1.</b> According to the Article 291 of the Criminal Code of the Republic of Lithuania „Unlawful state border crossing“, a person who unlawfully crossed the state border of the Republic of Lithuania, shall be punished by a fine, arrest or by imprisonment up to two years. In accordance with this Article, paragraph 1 The alien who did an offence provided in this Article, paragraph 1 with the intent to unlawfully pass from the territory of the Republic of Lithuania to the third country, in accordance with this Article, paragraph 1, he shall be exempt from criminal liability if in accordance with an established procedure he shall be sent to the country from the territory of which he unlawfully passed through the state border of the Republic of Lithuania or to the state, whose citizen he is.</p> <p><b>2.</b> In accordance with the Law on the legal status of aliens (article 70) asylum applicants who have</p>

unlawfully entered the territory of the Republic of Lithuania from a country where their life or freedom was in danger shall be exempt from liability for unlawful entry into and illegal stay in the Republic of Lithuania, provided they present themselves without delay to competent authorities of the Republic of Lithuania and provide an exhaustive explanation of the reasons of their unlawful entry into or illegal stay in the territory of the Republic of Lithuania.


**3.** If the alien presents himself without delay to competent authorities of the Republic of Lithuania and provide an exhaustive explanation of the reasons of their unlawful entry into or illegal stay in the territory of the Republic of Lithuania the criminal procedure is not initiated. If the alien submit asylum application after the criminal procedure has been initiated in order to avoid liability then both procedures (asylum and criminal) are carried out at the same time.

**4.** If the criminal investigation has been initiated, it is being continued. However, if there is evidence that the alien unlawfully entered the Republic of Lithuania with the aim of asylum or if the alien unlawfully passed from the territory of the Republic of Lithuania to the third country and can be sent to the country from the territory of which he unlawfully passed through the state border or to the state, whose citizen he is, he/she shall be exempt from the criminal liability and criminal investigation is terminated.


**5.** Decisions on asylum are taken by the Migration department. State Border Guard Service assesses the fact if the alien presented himself without delay to competent authorities of the Republic of Lithuania with an asylum claim and provided an exhaustive explanation of the reasons of their unlawful entry into or illegal stay in the territory of the Republic of Lithuania.

**6.** Criminal investigation is not initiated if the alien presents himself without delay to competent authorities of the Republic of Lithuania with an asylum claim and provides an exhaustive explanation of the reasons of their unlawful entry into or illegal stay in the territory of the Republic of Lithuania.

**7.** Criminal investigation is not initiated if the alien presents himself without delay to competent authorities of the Republic of Lithuania with an asylum claim and provides an exhaustive explanation of the reasons of their unlawful entry into or illegal stay in the territory of the Republic of Lithuania.

			<p><b>8.</b> If criminal investigation is initiated it is being continued irrespective of the asylum procedure. If the criminal investigation was not initiated it will not be started irrespective of the decision to grant or not grant asylum. If criminal investigation was terminated due to circumstances (the alien presented himself without delay to competent authorities or the alien unlawfully passed from the territory of the Republic of Lithuania to the third country and can be sent to the country from the territory of which he unlawfully passed through the state border or to the state, whose citizen he is) the procedure is not renewed.</p>
	Luxembourg	Yes	<p><b>1.</b> Yes. Article 140 of the amended law of 29 August 2008 on free movement of persons and immigration punishes any migrant who enters illegally in the territory or overstays his/her visa or residence permit with eight days up to one year in prison and/or a fine of 251 to 1250 euros.</p> <p><b>2.</b> This disposition is not applied to international protection applicants except when their application has been rejected and they have not fulfilled the obligation of leaving the country in the deadline given to them.</p> <p><b>3.</b> The public criminal action is a prerogative of the Luxembourgish public prosecutor which depends of the Ministry of Justice. The criminal action can be started at the request of the of the Directorate of Immigration, which depends of the Minister in charge of Immigration, based on the report of the Grand-ducal police or the Inspectorate of labour and mines (article 133 in accordance with articles 136 (1) and (2) of the amended law of 29 August 2008). If the criminal proceedings have already started and the individual is in detention, the international protection application does not stop the proceedings. However, in the case that there are merits for granting international protection the public prosecutor will take these elements for dismiss the claim. If it considers that the international protection application is unfounded and that it was introduced in order to stop the criminal proceedings the public prosecutor and the instruction judge will continue with the proceedings.</p> <p><b>4.</b> No.</p> <p><b>5.</b> Normally a third-country national who enters illegally into the territory can apply for international protection to the police in the moment s/he is detained. In that case the Grand-ducal police will send the individual to the Directorate of Immigration which is the authority that processes the claim for the</p>



			<p>international protection claim. The Judicial police will make the identity assessment and the travel itinerary of the international protection applicant.</p> <p><b>6.</b> The Directorate of Immigration will evaluate the application on a case by case basis. The fact that the international application was not introduced without delay does not exclude the analysis of the claim.</p> <p><b>7.</b> It is important to mention that international protection in Luxembourg comprehends refugee status as well as subsidiary protection. The fact that the application does not fall on the scope of the Geneva Convention does not prevent the Luxembourgish authorities to evaluating the application also in the scope of the subsidiary protection. As we mentioned before the criminal proceedings are handled independently of the international protection procedures but normally they are started at the request of the Directorate of Immigration.</p> <p><b>8.</b> - the refusal to grant international protection to the foreigner was taken, If the international protection application was refused and the applicant does not fulfil the order to leave the country in the deadline established in the refusal decision (normally 30 days after the decision is notified and no other recourse is available) the criminal procedure can be applied. However, this is rarely used because this can obstruct the forced return of the rejected international protection applicant. - the international protection (refugee or subsidiary status) was granted to foreigner. If the international protection is granted no criminal procedure is introduced. Does your country have the lists of safe/unsafe third countries? Yes. Luxembourg has a list of safe third countries of countries of origin : Albania, Benin (only for men), Bosnia-Herzegovina, Cape Verde, Ghana (only for men), Kosovo, Macedonia, Montenegro, Senegal Serbia, Ukraine.</p>
	Netherlands	Yes	<p><b>1.</b> Answer to Question 1 to 4: A. Administrative law Administrative law does not provide for a penalty for merely entering the territory irregularly. In Vreemdelingenwet/Aliens Law, article 46, para 2 under b is stated: In secondary legislation additional provisions can be made concerning: The obligations a person has to meet in view of border control. In administrative law a maximum penalty of six months detention or a fine with a maximum of €4050,- is introduced for not showing a travel document when asked for it by a border guard. This penalty is also applied for not complying with the requirements specified in Annex VI Schengen Borders Code: See article 108, para 1,</p>

Vreemdelingenwet (Aliens Law) In article 4.5, para 1 under a, Vreemdelingenbesluit is stated: The foreigner who enters the Netherlands is obliged, if asked so by a civil servant belonging to the border authority, to show or hand over the document which is in his possession, which allows him/her to cross the border, the necessary visa (long term or short term visa) or transit visa. See article 7.1h Voorschrift Vreemdelingen (Aliens Statute) B. Criminal law Though mere entering the national territory irregularly is not a criminal offense in criminal law, a person risks a maximum penalty of six years or a fine with a maximum of € 81.000 for using a false travel document when crossing the border. This also applies if the person uses a stolen or missed travel document or a travel document or identity document which does not contain his identity. See article 231, para 2, Wetboek van Strafrecht (Penal law)

2. see answer to Question 1


3. see answer to Question 1


4. see answer to Question 1

5. The Dutch Immigration and Naturalisation Service (IND) assesses all claims for international protection.

6. This depends whether the applicant used forged documents to escape (no consequences at all) or used them merely to mislead the authorities by presenting false information or documents with respect to his or her identity and/or nationality, that could have had a negative impact on the decision, or if the applicant has in bad faith destroyed or disposed of an identity or travel document that would have helped establish his or her identity or nationality (possible rejection as manifestly ill founded).



7. Also in that case the criminal proceedings are terminated. The only relevant question to be answered is whether a first application for asylum in the Netherlands is made. As soon as this is the case no persecution is possible. This was clarified in a judgment. The case concerned an applicant who on a trip from Norway to Canada showed false documents on leaving for Canada. The rule that the public persecutor/DA cannot persecute for using false documents also applies in that case.


			<p><a href="http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2015:1093">http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2015:1093</a></p> <p><b>8.</b> When an application is granted there will be no persecution on having false or forged documents. When the application is dismissed the District Attorney might resume his persecution.</p>
	Poland	Yes	<p><b>1.</b> Legal responsibility of foreigners crossing the border in violation of the relevant regulations is stipulated in the following regulations: <input type="checkbox"/> Act of 6 June 1997 Penal Code Article 264 §2. Whoever crosses the border of the Republic of Poland in violation of the relevant regulations with the use of violence, threats or deceit or in co-operation with other persons shall be subject to the penalty of deprivation of liberty for up to 3 years. §3. Whoever organizes the crossing of the border of the Republic of Poland for other persons in violation of the relevant regulations shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years. <input type="checkbox"/> Act of 20 May 197a1 Petty offence Code Article 49a §1. Whoever crosses the border of the Republic of Poland in violation of the relevant regulations shall be subject to a fine. §2. Attempt and help are subject to a penalty.</p> <p><b>2.</b> In case of illegal crossing of the border by a foreigner and submitting the application for the refugee status the penal procedure and the administrative procedure for granting the refugee status are conducted simultaneously. Following to article 23 of the Act of 13 June 2003 on granting protection to foreigners within the territory of the Republic of Poland the Head of the Office for Foreigners is granting or refusing the refugee status. The foreigner is submitting the application for the international protection to the Head of the Office for Foreigners via the commander of Border Guard division or commander of the Border Guard post. In such situations the organ conducting penal procedure, depending on the circumstances, suspends the penal procedure until the end of procedure of verification of premises for granting the refugee status or independently of the administrative procedure can bring the case to the court that shall decide about existence of conditions mentioned in article 31 paragraph 1 of the Geneva convention.</p> <p><b>3.</b> See above.</p> <p><b>4.</b> There is no data about such cases.</p> <p><b>5.</b> The organ conducting preparatory procedure or the court deciding on the case make the assessment</p>

			<p>whether in each individual case the conditions mentioned in Article 31 paragraph 1 of the Geneva Convention exist. In case of suspension of the penal procedure the opinion of the Head of the Office for Foreigners who is granting or refusing the refugee status, shall be useful. The foreigner is submitting the application for the international protection to the Head of the Office for Foreigners via the commander of Border Guard division or commander of the Border Guard post.</p> <p><b>6.</b> While assessing premises for not imposing penalties on account of illegal entry or stay of refugees conditions referred to in Article 31 paragraph 1 of the Geneva Convention are examined by the Border Guard in the preliminary stage of verification (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 opinion of the Head of the Office for Foreigners who is granting or refusing the refugee status, shall be useful.</p> <p><b>7.</b> If conditions referred to in Article 31 paragraph 1 of the Geneva Convention do not exist than, according to Polish penal procedure there are no premises for not initiating or dismissing the penal proceeding conducted in relation to the crime or offence connected to the illegal crossing of the border or staying within the territory of the Republic of Poland.</p> <p><b>8.</b> When the penal proceeding and the administrative proceeding for granting the refugee status are conducted simultaneously and the penal proceeding is suspended until the end verification of premises by the Head of the Office for Foreigners, then in case of negative decision on granting international protection or decision granting subsidiary protection (which means that conditions from Article 31 paragraph 1 of the Geneva Convention are not fulfilled), there are no premises to dismiss the penal proceeding.</p>
	Portugal	Yes	<p><b>1.</b> No. According to n°.1 of Article 138 of Law 23/2007 of July 4 as amended by Law 29/2012 of August 9, the foreigner who comes or remains illegally in Portugal is notified by Immigration and Borders Service in order to leave voluntarily the country within the required period (between 10 and 20 days). If the foreigner tries to cross illegally the border through an external border post, his/her entry is denied, according to n°1 of Article 32 of Law 23/2007 of July 4 as amended by Law 29/2012 of August 9. Criminal proceedings are only foreseen when the foreigner violates the re-entry ban in</p>

			<p>the country (according to the Article 187 of Law 29/2013 of April 19) and he/she incurs in a penalty of two years in prison or in a fine of up to a hundred days.</p> <p>2. -</p> <p>3. In all situations mentioned in question number 1, according to Article 12 of Law 27/2008 of June 30 as amended by Law 26/2014 of May 5, if a foreigner requests for asylum or international protection, the law determines the suspension of any administrative procedure (entry refusal or removal).</p> <p>4. See answers above.</p> <p>5. See answers above.</p> <p>6. See answers above.</p> <p>7. See answers above.</p> <p>8. See answers above.</p>
	Slovak Republic	Yes	<p>1. Criminal Code of the Slovak Republic (Act 300/2005 Coll.) recognizes only two cases of crimes that are related to crossing of the state border (regardless of the subject committing the crime) and thus constitute a criminal liability– one is the violent crossing of the state border according to art. 354 (using violence or threat of direct violence, whereas „violence“ is defined in the CC, art. 122 para 7) and the other is illicit crossing of the state border (violating international flight regulation by entering the territory of the Slovak Republic using an aircraft). Otherwise, cases of unauthorised crossing of the state border are regulated in Act on the Residence of Foreigners art. 2 para 1 letter g) as administrative delict (art. 116 para 1). This means, if a person crosses an external border illegally or intentionally avoids border checks or is liable for committing an administrative delict (not criminally liable) and can be a subject of administrative proceedings and subsequently a a fine up to 1600 Euros.</p> <p>2. N/A for administrative delicts. Only applicable in cases of committing a crime of violent crossing</p>


			<p>of the state borders or illicit crossing by aircraft (as mentioned above). In such cases all the conditions for initiation of a criminal proceedings against him/her are fulfilled.</p> <p><b>3.</b> N/A for administrative delicts. Only applicable for crimes of violent crossing of the state border and illicit crossing of the state border, as stated in the first question- in such cases both procedures can be conducted simultaneously.</p> <p><b>4.</b> N/A for administrative delicts Only applicable for crimes of violent crossing of the state border and illicit crossing of the state border: In its statistical database General Prosecutor's Office does not have a record of suspending the criminal proceedings due to the inadmissibility of proceedings based on an international agreement, in this case based on conditions mentioned in Article 31 para 1 of Geneva Convention.</p> <p><b>5.</b> N/A for administrative delicts. Only applicable for crimes of violent crossing of the state border and illicit crossing of the state border. In these cases making an assessment whether in each individual case the conditions mentioned in Article 31 paragraph 1 of the Geneva Convention exist is reserved for law enforcement authorities (prosecutor, investigator).</p> <p><b>6.</b> N/A for administrative delicts. Only applicable for crimes of violent crossing of the state border and illicit crossing of the state border. All cases of the violent crossing or illicit crossing of the state border must be assessed individually for whether the conditions for suspension of criminal proceedings are met in line with the reasons in Article 31 paragraph 1 of the Geneva Convention.</p> <p><b>7.</b> N/A for administrative delicts. In case a foreinger enters the territory of the Slovak Republic committing a crime of violent crossing of the state border or illicit crossing of the state border, the fact whether the country he/she came from has ratified the Geneva Convention or whether it is a „safe country“ does not play any role and thus the asylum application cannot be a reason for the suspension of the criminal proceedings- criminal proceedings continue.</p> <p><b>8.</b> N/A for administrative delicts. Applicable only for the two crimes mentioned above. - If the application for asylum has been rejected there are no obstacles for the initiation of the criminal proceedings. - In case the international protection was granted, it is likely that the conditions under</p>
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			Article 31 paragraph 1 of the Geneva Convention have been fulfilled and so the reasons for suspension/not initiation of the criminal proceedings, due to the inadmissibility of the proceedings based on an international agreement, exist.
	Slovenia	Yes	<ol style="list-style-type: none"> <li>1. no</li> <li>2. n.a.</li> <li>3. n.a.</li> <li>4. n.a.</li> <li>5. n.a.</li> <li>6. n.a.</li> <li>7. n.a.</li> <li>8. n.a.</li> </ol>
	Sweden	Yes	<ol style="list-style-type: none"> <li>1. Yes in some cases. According to Section 20 § 4 in the Swedish Aliens Act, a foreigner who intentionally in an unauthorized way crosses an outer border according to the Schengen Convention can be fined or sentenced to prison for up to a year.</li> <li>2. There are no exceptions according to the law. However cases are probably very few since an outer border would be airports with connections outside the Schengen territory and also Swedish sea border.</li> <li>3. Both procedures may be applied simultaneously.</li> <li>4. Not to the knowledge of the Migration Agency. Note that the Agency does not handle criminal investigations.</li> </ol>

			<p><b>5.</b> The prosecutor and ultimately the Criminal Court.</p> <p><b>6.</b> No information available. Cases are very few and no case law has been developed.</p> <p><b>7.</b> Ratification of the Geneva Convention would not be a criteria but rather if that country is a safe third country according to art 38 of the Procedural Directive (2013/32/EU). The question of termination would be determined on a case by case basis depending on a weighing of the interest to enforce the law against the interest of a swift expulsion.</p> <p><b>8.</b> Both procedures may be applied simultaneously.</p>
	United Kingdom	Yes	<p><b>1.</b> Section 31 of the Immigration and Asylum Act 1999 mirrors Article 31 of the Refugee Convention and affords a refugee, who has presented himself to the UK authorities without delay, showed good cause for his illegal entry or presence and has made a claim for asylum as soon as was reasonably practicable, protection in England Wales and Northern Ireland against prosecution for a number of offences connected to the use of forged documents and deception. See section 31 of the Immigration and Asylum Act 1999 for the relevant offences. See Section 31 of the Immigration And Asylum Act 1999 and Article 31 of the 1951 Refugee Convention for the interim instruction</p> <p><b>2.</b> Section 31 of the Immigration and Asylum Act 1999 mirrors Article 31 of the Refugee Convention and affords a refugee, who has presented himself to the UK authorities without delay, showed good cause for his illegal entry or presence and has made a claim for asylum as soon as was reasonably practicable, protection in England Wales and Northern Ireland against prosecution for a number of offences connected to the use of forged documents and deception. See section 31 of the Immigration and Asylum Act 1999 for the relevant offences. See Section 31 of the Immigration And Asylum Act 1999 and Article 31 of the 1951 Refugee Convention for the interim instruction</p> <p><b>3.</b> If there is evidence to suggest that the asylum seeker may meet the requirements and a section 31 defence does or might apply, the criminal investigation will usually be placed on hold until the outcome of the asylum claim is known but this is a decision for the Crown Prosecution Service, it is not a decision made by the asylum decision maker.</p>



			<p><b>4.</b> The Home Office provides information and evidence to the Crown Prosecution Service (CPS), which is relevant to the assessment of whether or not a defence under section 31 of the 1999 Act may apply. It is always for the CPS to take the final decision as to whether there is sufficient evidence and whether it is in the public interest to proceed with a criminal prosecution. If the individual has already been granted asylum, or if it appears likely that they will be granted asylum, then the CPS would probably not consider a criminal prosecution to be in the public interest. However, this decision is entirely for the CPS to take, the Home Office are not responsible for deciding whether to prosecute. Consideration of the asylum claim continues separately to the consideration of whether to prosecute the individual.</p> <p><b>5.</b> The Home Office provides information and evidence to the Crown Prosecution Service (CPS), which is relevant to the assessment of whether or not a defence under section 31 of the 1999 Act may apply. It is always for the CPS to take the final decision as to whether there is sufficient evidence and whether it is in the public interest to proceed with a criminal prosecution. If the individual has already been granted asylum, or if it appears likely that they will be granted asylum, then the CPS would probably not consider a criminal prosecution to be in the public interest. However, this decision is entirely for the CPS to take, the Home Office are not responsible for deciding whether to prosecute. Consideration of the asylum claim continues separately to the consideration of whether to prosecute the individual.</p> <p><b>6.</b> In deciding if section 31 of the 1999 Act applies, decision makers will consider whether the individual has:</p> <ul style="list-style-type: none"><li>• travelled to the UK directly from the country where they fear persecution</li><li>• they have presented themselves to the UK authorities without delay</li><li>• shown good cause for illegally entering the UK</li><li>• in attempting to obtain services by deception such as obtaining travel tickets, this was directly linked to the attempt to flee persecution</li></ul> <p><b>7.</b> The UK courts in the case of <i>Asfaw</i> [2008] UKHL 31 held that the term “coming directly” is to be interpreted liberally in that a refugee should be entitled to transit through other countries and then claim asylum, without risk of prosecution, in more or less the country of his choice.</p> <p><b>8.</b> N/A – see above</p>
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	<p>Norway</p>	<p>Yes</p>	<p><b>1. YES</b> The Norwegian Immigration Act of 15th of May 2008 (on the entry of foreign nationals into the kingdom of Norway and their stay in the realm) section 108, defines the criminal liability for a foreigner who illegally crosses the border. Section 108 defines which infringements of the act shall be penalised and defines the penalties that can be imposed on the subject, dependent on the character of the infringement. Section 108, second paragraph, litra a, states that: "A fine or imprisonment for a term not exceeding six months or both shall be imposed on anyone who wilfully or through negligence contravenes the provisions listed below or prohibitions, orders or conditions issued under the said provisions: - section 8, first paragraph - section 9, first and fourth paragraphs - [...]"</p> <p><b>2.</b> There are a few exceptions: Section 8, first paragraph: "Section 8 Travel document Unless otherwise provided, a foreign national who comes to the realm must have a passport or other identity document that has been recognised as a travel document." Section 9, first paragraph: "Foreign nationals must hold a Norwegian visa to be able to enter the realm, unless the King has by regulations granted exemption from this requirement. A foreign national who is at the Norwegian border and who is seeking protection (asylum) under the provisions of chapter 4, or who otherwise provides information that indicates that the protection against refoulement under section 73 will be applicable, shall nevertheless have the right to enter the realm without a visa. Section 9, fourth paragraph: The total period of stay in the Schengen territory for a foreign national who is exempt from the visa requirement under the first or second paragraphs, or who is entitled to enter and stay under the third paragraph, may not exceed three months in the course of a six-month period."</p> <p><b>3.</b> The Norwegian Police districts have limited experience with criminal proceedings initiated due to illegal border crossings. Such cases are usually handled as administrative cases, where the foreigner is removed from the country if the application for asylum is rejected and the person in question does not want to leave the country voluntarily within the determined deadline. However, if the illegal border crossing is combined with a longer period of time spent illegally in the country, or the person worked illegally in the country, if the person defied an entry ban or violated some other aspect of the Immigration Act, it is more likely that the case will lead to criminal proceedings. The Director of Public Prosecutions has provided guidelines for prosecuting criminal cases revealed in connection with violations of the Norwegian Immigration Act (RA-2005-370, updated: RA-2014-167-1 og RA-2014-167-2). Our responses are in relation to considerations we make related to Article 31. If a foreigner is subjected to criminal proceedings because of illegal border crossing or residing illegally</p>
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in Norway, it is not necessary to wait for the results of the asylum application prior to bringing charges against him/her. Each case has to be considered individually, and the UDI's treatment of the case, can influence the consideration. (LE-2013-176917 and LB-2015-134490).

**4.** There might have been some ad hoc cases where a person was charged with illegal crossings or use of false passports or presenting themselves as an imposter and where the case was dropped after an asylum application was made. In this regard, the definition of "without delay" has been given a somewhat more lenient interpretation than previously.

**5.** The highest prosecuting authority determines whether criminal proceedings will be initiated in a case, but it will be the court that in the end must consider whether the conditions for article 31 are fulfilled or not.

**6.** One consideration is whether the person in question has an asylum application that is being handled, but this is not necessarily a determining factor. All possible factors are taken into consideration including the nature of the criminal offence in light of the conditions of Article 31. The case is examined based on the foreigner's reasons for seeking asylum, the situation where he/she was apprehended, how the person in question experienced that situation, as well as country of origin. The situation and circumstances surrounding the apprehension are important. It is also important to note that the circumstances of the apprehension will be considered in a criminal case and that requirements regarding evidence in criminal offences will apply. (Rt-2014-645)

**7.** Whether criminal proceedings are initiated or not in such cases (given that the other two conditions in Article 31 are met) depend on whether the foreigner came directly from the area/country where he/she was fleeing or not, as per a statement by the Director of Public Prosecutions. Making a necessary transit stop – for example through an intermediate country for a short period of time – as stipulated by the UNHCR, would fall into the definition of "directly". No further time definition has been stipulated. In one case in Norway which involved an illegal border crossing, a person had spent 10 months in Russia prior to arriving in Norway, and this was considered to be arriving "directly" while another case, where the person had crossed the border illegally, after having spent a year in Turkey prior to arriving in Norway via Greece, was not considered "coming directly". In the latter

			<p>case, it was considered possible for the person to have applied for asylum in Greece.</p>
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**8.** If an application for asylum is granted, it is unlikely that the criminal proceedings will be continued against a foreigner for an illegal crossing. In cases where asylum seekers get a negative decision the proceedings will just be continued. (see responses to Q2.)