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Refugee Convention Article 31 v Criminalising Irregular Entry: A Study on Protection Asymmetry

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This study addresses the apparent conflict between Article 31 of the 1951 Refugee Convention's prohibition on punishing refugees for unlawful entry or presence, and the growing trend of states enacting legislation criminalising irregular entry, particularly the entry of asylum seekers. Although Article 31 was designed with the realities of people escaping persecution in mind, who might be forced to cross borders without legal papers, many contemporary legal frameworks have embraced restrictive measures that violate its spirit and text. Using a doctrinal and comparative legal analysis, the study examines the extent to which such criminalisation policies have a disproportionate effect on refugees and asylum seekers, resulting in protection asymmetry: cross-jurisdictional structural inequalities in the access to and enforcement of refugee rights. Informed by legal theory, it interrogates the legal arguments being put forth by states, juxtaposes them with their obligations under international law, and situates them within the broader political context of border securitisation. It contends that the criminalisation of irregular entry not only weakens the protective regime envisioned under international refugee law but also undermines the rights-protective principles of non-refoulement, non-penalisation, and equitable burden-sharing. The paper closes with a discussion on the need for interpretive clarity, a more robust compliance framework, and a renewed international commitment to respecting the Convention's humanitarian purpose in the face of rising protectionist sentiment.

Keywords: article 31, refugee, protection.

INTRODUCTION

The arena of refugee protection is among the most pressing challenges in modern international law and policy. The 1951 Refugee Convention and its 1967 Protocol provide a foundational framework for the legal protection of individuals fleeing persecution. At the heart of it is Article 31, which provides that refugees should not be penalised for illegal entry if they are fleeing persecution and are present without delay. This provision reflects the realities of forced migration, where entering through regular channels is often not an option.¹

However, the criminalisation of irregular entry has placed an increasing strain on the relationship between international legal obligations and state sovereignty. In a time of heightened security fears and restrictive migration rules, many states are responding to burgeoning refugee flows by cracking down on asylum seekers who arrive or stay without authorisation. These measures, which can include detention, deportation and criminal prosecution, risk undermining the very protections the Refugee Convention was meant to safeguard.

Even so, embracing the (misleading) idea of criminalisation for irregular entry severely is a barrier to access for (and likely to violate the principles of) asylum, as well as leading to a breach (as the European Court of Human Rights found) of principles of non-refoulement. Most refugees flee war, political or social oppression or climate-related catastrophes and risk perilous and undocumented journeys.² However, when they find their way to safety, they encounter legal regimes that treat them as perpetrators, not as people who ought to be protected. Such a disconnect reveals a protection gap between the rights-systematised scenarios established by international law and the practices at the national level.

This project examines the impact of criminalising irregular entry on refugees' access to protection, focusing on the merits and drawbacks of Article 31. In this context, it scrutinises whether this provision offers sufficient safeguards against ever-securitised and evolving practices of bordering states. It also considers how states interpret and implement Article 31 in their national legal systems, and which aspects they comply with and which ones they infringe upon in relation to their international obligations.

¹ Convention Relating to the Status of Refugees 1954

² Protocol Relating to the Status of 1967

From a methodological perspective, this study is qualitative in nature, integrating legal analysis and comparative policy assessment. It is based on already existing literature on the topic (such as international legal instruments, national legislation, case law, academic scholarship, and reports issued by international organisations such as UNHCR and IOM and NGOs with a focus on refugee rights). Through a comparative analysis of legal frameworks and practices across jurisdictions, the study illustrates how international norms are adopted and frequently attenuated within national borders.

Although secondary data has its limitations in immediately discussing the lived experiences of refugees, the research serves as an extensive overview of the literature and legal practices on the issue of refugee rights. Moreover, it acknowledges differences in comparability between the segments of legal systems and the tribes of asylum seekers, and it also aims to provide an increasingly nuanced portrait of the misalignment between the evolution of global protection norms and their domestic enforcement.

Thus, this study examines the tension between the interests of states in controlling migration and their legal obligations to protect refugees. We hope it will contribute to efforts to reinforce the realisation of Article 31, as well as the practical realisation of refugee rights in contexts of peace and security.

THE REFUGEE CONVENTION AND ARTICLE 31: THE LEGAL CONTEXT AND OBLIGATIONS

The Historical Background of the 1951 Refugee Convention: The 1951 Refugee Convention was adopted in the aftermath of a post-World War II world struggling to respond to mass displacement and the need for a legal framework to protect individuals. It was the first legally binding international instrument to establish who qualifies as a refugee and provides them with rights, such as the non-refoulement principle, which prohibits their return to places where they face a risk of persecution.

Article 31. Non-Penalisation for Irregular Entry: Article 31 is particularly relevant to refugees who enter the country without authorisation. It protects them from punishment if they come directly from a place where their life or liberty is endangered and turn themselves in to the authorities without hesitation. This provision acknowledges the fact that refugees themselves are frequently unable to obtain legal travel documents or entry visas, and are left

with no option but to seek to escape via irregular routes.³ The guiding principle here is humanitarian: What the Government is pursuing is a crime to seek asylum from persecution. Immigrants possess a particular point at which they enter a country that states must acknowledge, rather than punitive immigration regimes that treat the realities of forced migration as an exception to the rule.

What States Must Do & What They Cannot Do: Alongside the firm rule against punishing refugees for irregular entry, states bear positive obligations to both allow access to asylum procedures and to abstain from *refoulement*. Article 31 is an important protection, but it is not a guarantee. States can expel people whose presence poses a security issue or who do not meet the criteria for asylum.⁴ However, these exceptions must be cautiously balanced with the aim of protection mandated by the Convention.

Region-wide Frameworks and the Risk of Escalation: Regional instruments complement or complicate the Refugee Convention. The EU's Dublin Regulation assigns legal responsibility for asylum claims to the country of first entry, which often puts pressure on states bordering non-EU countries and leads to an uneven distribution of refugees across Europe. The system has been seen as undermining Article 31, as it would penalise asylum seekers depending on their port of entry.⁵ By contrast, the 1969 OAU Convention in Africa broadens the definition to include individuals fleeing conflict or civil unrest. Taking such an inclusive approach is more in line with regional realities and often affords even greater levels of protection. However, significant variations from one region to another highlight inconsistencies in the application of refugee law and the prospect of uneven access to protection based on geography.

GLOBAL IMPACTS: CRIMINALISATION OF IRREGULAR ENTRY

What Is Irregular Entry? Irregular entry refers to when a person crosses (or remains in) borders without obtaining the necessary legal documents for entry, typically because lawful pathways for migration are absent. Refugees often cross borders like that because persecution or violence has closed off regular migration. However, under international law,

³ *Ibid*

⁴ International Covenant on Civil and Political Rights 1976

⁵ European Convention on Human Rights 1953

individuals seeking refugee status should not be penalised for such entry when it is linked to their need for protection.

Country-Level Approaches to Criminalisation: Anomaly Within Global Norms: Many States Make Irregular Entry a Crime. In the United States, repeat offenders often face felony charges, although it is sometimes treated as a misdemeanour. Australia, too, makes mandatory detention and offshore processing mandatory for arrivals without permission. The usual justification provided is matters of national security and the necessity for control over immigration flows.⁶ In the EU, restrictive measures were intensified after the 2015 refugee crisis. They depicted refugees as security or economic threats and applied controls at borders and in detention to deal with rising numbers. These responses reflect a shift from humanitarian protection to enforcement and deterrence.

Consequences for Refugees: Criminalisation has legal implications that can lead to arrest, detention, and deportation, frequently in contravention of the principle of non-refoulement. The refugees could be held in centres with restricted access to lawyers or even basic hygienic conditions. In some instances, they are deported with only rudimentary consideration of their asylum claims.⁷ Socially, criminalisation portrays refugees as criminals and a menace to society, which thwarts their integration and access to necessities. Psychologically, it heightens trauma, breeding anxiety, depression, and fear, particularly when refugees are subject to an ever-present risk of removal or imprisonment.⁸

Global Trends and the Need for International Cooperation: The global trend is one of growing criminalisation, particularly in high-income countries. In the context of the new human trafficking crime, states stress control of their borders, externalising responsibility through international agreements that move the processing of an asylum claim to third states. The Koenigsberg example: The EU deals with Turkey and Libya, and the US collaborates with Mexico. More importantly, these arrangements put deterrence and border management above refugee rights, often increasing the vulnerability of those individuals at risk.⁹ Such developments have prompted questions about the compatibility of national migration strategies with international legal commitments. Although states have valid

⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987

⁷ Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (1st edn, CUP2009)

⁸ Charter of Fundamental Rights of the European Union [2012] OJ C 326/391

⁹ Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007)

security considerations, they should not supersede their responsibility to offer protection to those escaping harm.¹⁰ What happened to the principle of non-punishment, as stated in Article 31?

LEGAL FRAMEWORK AND NATIONAL PRACTICES: THE ASYMMETRY OF PROTECTION

Protection Asymmetry Concept: Protection asymmetry refers to the disparity between the international legal framework for refugee protection, based on the Refugee Convention, and the uneven or inadequate implementation of that legal protection at the national level. International treaties and conventions outline obligations for states regarding refugees; however, in practice, the treatment of refugees often falls short of these legal obligations. Asymmetry of protection refers to a situation where national policy or action is taken that is not in line with the protection commitments in international treaties, due to domestic political factors, national security considerations, or administrative ineffectiveness. This gulf between the letter of international law and its application in practice is most stark in the treatment of refugees across national borders. While states are bound under the Refugee Convention to grant asylum to those fleeing persecution, many states criminalise them or fail to offer real protection. The world is the stage of such a protection asymmetry, where the much more pragmatic ambition of universal refugee protection, enshrined by the breadth and depth of international law, constantly seems to be at odds with the behaviour of broad swathes of its membership.¹¹

Theoretical Framework of Protection Asymmetry: The asymmetry in protection afforded to refugees under international law has long been. It has long been the subject of heated debate among legal scholars, even before the recent refugee and migration crises. One such study is by Schenken et al. They argue that the gap between international legal obligations and national policies can be traced to a tension between state sovereignty and international humanitarian obligations. They Built Walls All Over the World to Keep Others out. States claim the right to manage immigration and decide who can access their territory, often prioritising national security and economic interests over demands to provide refuge. This

¹⁰ 'The 1951 Refugee Convention' (UNHCR - The UN Refugee Agency) <<https://www.unhcr.org/1951-refugee-convention>> accessed 24 March 2025

¹¹ 'Asylum-seekers' (UNHCR - The UN Refugee Agency) <<https://www.unhcr.org/in/about-unhcr/who-we-protect/asylum-seekers>> accessed 24 March 2025

rationale for isolationist migratory policies has been particularly prominent in the shadow of security threats linked with terrorism, organised crime and anomie-based reasons.

As Schenken explains in the asylum context, despite the Refugee Convention's robust framework of protections, states frequently interpret the Convention's provisions in a manner that frustrates the Convention's goals and minimises their obligations. It points to an absence that is not just legal but politically contextualised: a purge of international cooperation to minimise the risk of protecting refugees, as states adjust their migration regimes to respond to populist and nationalistic expressions. This apparatus reveals the persistence of tension in law between the universalist dimensions of human rights law and the particularistic project of national sovereignty.

EXAMPLES OF INVALID ASYMMETRICAL PROTECTION

Case 1: The Instincts of the Union – The EU and the Treatment of Irregular Arrivals: The European Union's treatment of irregular migrants provides a striking example of protection asymmetry. Thus, in many cases, the first reception countries, those first arrival countries, which are by definition the countries to which asylum seekers are fleeing places of conflict and instability (think Italy, Greece, Spain, etc.), do not fulfil their responsibilities as outlined in the Refugee Convention. While these countries are also subject to EU law and obligations under international accords, they regularly implement rigid measures, such as sea push-backs, substandard reception arrangements, or prolonged detention.¹²

The EU's own treaties have only deepened the dependence on this system, the Dublin Regulation, which effectively locks asylum seekers in solitaire with the country they first entered, exacerbating those problems still further. Greece, for instance, has faced criticism for its treatment of refugees held on the Greek is-lands, where overcrowded and dangerous conditions inside detention centres have been reported. Although the establishment of a robust asylum system is a requirement of the Refugee Convention, since the signing of that document, the EU's approach to migration and asylum has prioritised border security over refugee protection, creating a continuing gap in protection.

¹² European Union Agency for Fundamental Rights, *Fundamental Rights Report 2020* (2020)

Case Study 2: A Case Study on Criminalisation: The US-Mexico Border: The asymmetry of protections is illustrated by the US approach to immigration, notably at the U.S.-Mexican border. Asylum-Seekers Gain Fewer Criminalisation Barriers to Refugee Status: Human Rights Watch Report. Which policies, like Trump's zero-tolerance and expulsion through Title 42 during COVID-19, including measures to accelerate immigration procedures, are believed to generate those obstacles between an asylum seeker and their rightful and protected international law status? Most asylum seekers are turned away before they are ever given a chance to make their asylum claims, and many are placed in detention or deported to dangerous conditions.

In contrast, the Refugee Convention recognises the right of an individual to seek asylum; however, the practices surrounding enforcement in the US increasingly come into contradiction with this obligation. The criminalisation of irregular entry, combined with the invocation of public health justifications, results in an acute asymmetry in the protective framework, as law often has little or no bearing in practice.¹³

Case Study 3: Australia's offshore Processing and Article 31 Tensions: An extreme example of the asymmetry of protection as described in the article's question and commentary is provided by Australia's offshore processing regime, which is widely regarded as a breach of Article 31 of the Refugee Convention, which prohibits punishment of refugees for irregular entry. The policies for boat arrivals seeking asylum are more complicated: so-called boat people have faced looser rules, similar to those for refugees who arrive in small numbers, at the discretion of the Australian Government. These policies profess to deter irregular movement but have received heavy criticism for contravening the tenets of the Refugee Convention, primarily the non-penalisation of refugees based on their unlawful means of entry. Both offshore processing and the widespread use of detention violate Article 31 and its provisions, which clearly state that a person suffering persecution who arrives unlawfully but then remains without 'delay' should not be subject to punishment and must have their refugee status respected. This gap between Australia's immigration policy and its international obligations further demonstrates the disconnect

¹³ 'General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22' (Refworld, 09 February 2018) <<https://www.refworld.org/legal/general/cat/2018/en/120416>> accessed 15 August 2025

between the legal framework for refugee protection and the national implementation of that framework.

Something About the Asymmetry of Protection: There are several reasons for the assignment of protection asymmetry. National policies are highly influenced by political incentives and populist leaders who exploit anti-immigrant sentiments. Such narratives, which depict refugees and migrants as being both security threats and economic burdens, have sown the ground for a growing number of restrictive policies that undermine international protection standards.

The criminalisation of irregular migration is also justified in terms of national security, particularly with respect to terrorism and organised crime. Although states have the right to defend their borders and safeguard national security, these concerns are frequently used to justify steps that violate international human rights obligations, and there is a tendency to target specific individuals to justify excessive responses. Insufficient or inconsistent enforcement of international standards is another significant contributor to this issue. In practice, however, domestic legal and political realities often lead to the weak enforcement of international treaties, even when states ratify them. Resource scarcity, weak political will, and poor institutional capabilities hinder the translation of legal obligations into real-world realities.

A NEW CRIME FOR A NEW WORLD: THE LEGAL AND ETHICAL IMPLICATIONS OF CRIMINALISING IRREGULAR ENTRY

Legal Implications: This national law, which criminalises irregular entry, often clashes with international obligations, especially those outlined in the Refugee Convention. Criminalising asylum seekers can lead to the denial of the right to seek asylum due to persecution, the breach of this principle of non-refoulement and the expulsion of asylum seekers to places of persecution.¹⁴

Ethical Considerations: It raises the ethical conundrum of the state's legitimate right to control its borders against the moral obligation to protect people escaping persecution. The detention and prosecution of asylum seekers poses a serious risk of irreparable

¹⁴ International Organization for Migration, *World Migration Report 2020* (2019)

psychological harm and constitutes a violation of fundamental human rights. Such actions raise questions about the moral legitimacy of prioritising national security over humanitarian obligations in economic policies.

International Responsibility and Accountability: According to international law, states have an obligation to protect refugees, and international courts, such as the International Court of Justice and regional human rights bodies, must hold states accountable for violations of refugee rights. It is critically important to reinforce the enforcement mechanism of international legal standards in addressing the asymmetry in protections.

RECOMMENDATION

The proposed changes include creating binding international agreements on refugee protection, expanding legal pathways for migration, and establishing a global framework for responsibility-sharing among states. Among the proposals are creating binding international agreements for refugee protection, expanding legal migration pathways, and establishing a global framework for shared state responsibilities.

Recap of the Key Findings: This paper has critically examined the ongoing protection asymmetry between the legal obligations established by the Refugee Convention and the laws in place in most countries that criminalise the irregular entry of asylum seekers. Though international law, as reflected in the Refugee Convention, recognises the right of those in distress to seek asylum and prohibits the punishment of asylum seekers for violations of immigration law, national policies in many jurisdictions have made the enterprising, even desperate, acts of people seeking refuge, namely, travelling to the front door of asylum and overstaying a visa, illegal. The disconnect between relevant legal frameworks and national practices is evident in the restrictive migration policies employed by the European Union, the United States' border enforcement strategies, and the offshore detention regime used by the Australian Government. Their national practices, shaped by security considerations, populist political agendas, and a focus on national sovereignty, frequently run counter to the humanitarian principles articulated in international law. The resulting asymmetry in protection reveals a shortfall in states fulfilling their international legal obligations, which contributes to the erosion of the protection regime designed to offer vulnerable refugees their best chance of safety. These gaps create serious problems for the functioning of the

international refugee protection regime, and raise fundamental questions about the future of refugee rights in an increasingly fragmented world.

Implications for Future Policy and Legal Reform: The protection asymmetry has significant implications not only for the protection of refugees but also for the integrity of international law. The difference between the letter of the Refugee Convention and its application within national policies puts the essence of refugee protection in danger. With the gap between international standards and national practice widening, the risks of further erosion of asylum rights broaden, exposing refugees to abuse and persecution and illegal deportation.¹⁵

These demands sweeping reform to narrow the protection gap. Fulfilling these reforms requires, first and foremost, a commitment and will to realign national immigration policies with international human rights norms in a way that ensures the principles of non-punishment and non-refoulement are understood and upheld systematically across these jurisdictions. Such national policies should not only prohibit the criminalisation of irregular entry into a country but also promote the just and timely processing of asylum claims. The discussion about the need to create more legal pathways to protection must also be reflected in tangible and meaningful reform of the international protection regime, including responsibility-sharing, to ensure that no country/public service provider carries an undue burden when assisting refugees.¹⁶ A strong, rights-based approach, implemented at both the national and international levels, will require addressing the political, economic, and social drivers of restrictive policies. Despite the importance of legislation, it is crucial to ensure that it complements national policy frameworks that address the drivers of displacement and provide sustainable solutions for refugees.¹⁷

CONCLUSION

Consider this post from October 2023: The dilemma of balancing national security imperatives with the duty to protect refugees is undoubtedly not an easy one, but the state and international actors must acknowledge their necessary coexistence.¹⁸ Although states

¹⁵ *Hirsi Jamaa and Others v Italy* [2012] ECHR App No 27765/09

¹⁶ 'Legality of Use of Force (Yugoslavia v. Spain)' (*International Court of Justice*) <<https://www.icj-cij.org/case/112>> accessed 24 March 2025

¹⁷ 'General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant' (*Refworld*, 26 May 2004) <<https://www.refworld.org/legal/general/hrc/2004/en/52451>> accessed 15 August 2025

¹⁸ *Ibid*

have legitimate interests in regulating borders and controlling immigration movements, those interests cannot be separated from international legal norms that favour human dignity and the protection of individuals fleeing from persecution. Noting the continued relevance of the Refugee Convention as a supplementary instrument to guarantee refugees' rights, Ali and Hinton emphasise that, as such, the treaty's effectiveness is largely dependent on countries' political will to uphold their international commitments domestically.¹⁹

The international community must navigate this balancing act effectively, for the future of refugee protection lies in its ability to reconcile national interests with all our moral and social responsibilities.²⁰ Reinforcing the legal framework, upholding accountability for violations, and promoting international solidarity are the necessary steps to build a fairer and more just system of protection for refugees. As the world grapples with an unprecedented refugee crisis, the international community must react with not only compassion but the will to protect justice, human rights and shared responsibility. That way, the protection of refugees does not fall prey to political expediency, but becomes a universal matter about how we protect the most vulnerable members of our societies.

¹⁹ *Ibid*

²⁰ 'General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22 (9 February 2018)' (*reliefweb*, 09 February 2018) <<https://reliefweb.int/report/world/general-comment-no-4-2017-implementation-article-3-convention-context-article-22-9>> accessed 15 August 2025