

# Oxford Public International Law

## **Part VI Refugee Rights and Realities, Ch.51 Non-penalization and Non-Criminalization**

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From: The Oxford Handbook of International Refugee Law  
Edited By: Cathryn Costello, Michelle Foster, Jane McAdam

**Content type:** Book content

**Product:** Oxford Scholarly Authorities on International Law [OSAIL]

**Series:** Oxford Handbooks

**Published in print:** 03 June 2021

**ISBN:** 9780198848639

### **Subject(s):**

Asylum — Refugees

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# **(p. 917) Chapter 51 Non-penalization and Non-Criminalization**

## **1. Introduction**

REFUGEES are often at the sharp end of migration controls. States and regions create a raft of legal and practical barriers to flight and onward travel in search of protection. While some aspects of immigration policies have become more liberal in the past decades, there is a widespread practice of containing would-be refugees in their home States and regions.<sup>1</sup> Refugee containment is the single dominant story in refugee studies since the end of the Cold War, as several other chapters in this *Handbook* attest.<sup>2</sup> Refugee containment means that when refugees do flee, in particular if they seek asylum in Europe, North America, or elsewhere in the Global North, they generally must use irregular means. Irregular travel is often dangerous as carrier sanctions in particular preclude access to safe, licit means of travel.

This facet of the contemporary predicament of refugees has been exacerbated by an increasingly criminal and punitive approach to dealing with irregular migration. Once a mere administrative matter, irregular migration and presence are now often made a crime in domestic laws, often with additional criminal offences such as for failure to cooperate in migration and asylum proceedings, or failure to have or produce identity documentation. In addition to criminalization, States also have meted out increasingly harsh treatment to those who breach their migration controls, irrespective of whether they are refugees or not. These practices have earned a new term, ‘cimmigration’, to convey how comprehensively criminal approaches to migration control have been (p. 918) imbricated.<sup>3</sup> While Stumpf coined the term in the US context, this field of inquiry has burgeoned globally. Against this backdrop, this chapter examines the protections under international law which purport to secure refugees’ right to seek asylum by protecting them from penalization.

The chapter begins by analysing article 31 of the Refugee Convention, the provision which purports to protect refugees from penalization for ‘illegal entry and stay’, drawing on our previous work<sup>4</sup> and that of other scholars.<sup>5</sup> The chapter argues that non-penalization reflects one of the objects and purposes of the Refugee Convention. Accordingly, it considers the distinct obligation on States to refrain from any acts frustrating the treaty’s object and purpose. It then explores whether international human rights law substantively limits States’ ‘right’ to criminalize irregular entry and stay, not only as regards refugees but of other migrants too, who either have good cause to breach immigration laws, or whose irregular migration is harmless and not blameworthy. Finally, it considers whether non-penalization of irregular entry or stay may be an emerging general principle of law.<sup>6</sup> We do not explore the right to seek asylum (in the UDHR) or the right to seek and be granted asylum in regional instruments, which may provide a further means to challenge immigration controls,<sup>7</sup> or indeed the right to leave any country.<sup>8</sup>

## **2. Article 31 of the Refugee Convention**

### **a. An ‘Object and Purpose’ of the Refugee Convention**

Article 31 reflects one of the objects and purposes of the Refugee Convention, namely, to ensure to ‘refugees the widest possible exercise of...fundamental rights and freedoms’<sup>9</sup> by balancing their rights to protection with the rights of States to impose migration con(p.

919) trols. The *travaux préparatoires* recognize that seeking protection may require refugees to breach domestic immigration rules.<sup>10</sup> The drafters observed:

A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge. It would be in keeping with the notion of asylum to exempt from penalties a refugee, escaping from persecution, who after crossing the frontier clandestinely, presents himself as soon as possible to the authorities of the country of asylum and is recognized as a *bona fide* refugee.<sup>11</sup>

The discussion of non-penalization surfaced not only in the context of article 31, but also in the course of preparatory work on article 7 (exemption from reciprocity)<sup>12</sup> and article 9 (provisional measures).<sup>13</sup> Article 31 thus in itself reflects an ‘object and purpose’ of the Convention, which has an important bearing on the provision’s interpretation, as the next section explains.

As parties to a treaty, the Contracting States to the Refugee Convention have an obligation not to defeat the instrument’s object and purpose.<sup>14</sup> In the *Military and Paramilitary Activities Case*, the International Court of Justice (ICJ) opined that undermining a treaty’s object and purpose was *independent* from a breach of the treaty’s substantive provisions.<sup>15</sup> This means that a Contracting State to the Refugee Convention could act in a manner that is inimical to the object and purpose of the Convention, even when the act itself is not expressly prohibited by article 31.

Both articles 18<sup>16</sup> and 26<sup>17</sup> of the Vienna Convention on the Law of Treaties (VCLT) reflect customary international law. The drafters of the VCLT considered that States’ (p. 920) obligation to refrain from any acts frustrating the object and purpose of the treaty was ‘clearly implicit in the obligation to perform the treaty in good faith’.<sup>18</sup> In fact, under article 18, the obligation not to defeat the object and purpose of a treaty exists prior to the treaty’s entry into force, and continues after ratification under article 26 of the VCLT.<sup>19</sup>

Finally, under article 19 of the VCLT, reservations that are incompatible with a treaty’s object and purpose are impermissible.<sup>20</sup> Several Contracting States have made reservations to article 31 of the Refugee Convention.<sup>21</sup> Since these reservations affect an essential element of the treaty—the protection of refugees from being penalized for violating domestic immigration law in order to seek asylum—they may be considered invalid.<sup>22</sup> This legal question warrants further doctrinal examination.

## **b. Elements of Article 31**

Article 31 prohibits States from imposing ‘penalties’ on the grounds of illegal entry or presence of ‘refugees’ in their territory, as long as three conditions are met: ‘directness’ of flight, ‘promptness’ in notifying officials, and ‘good cause’ for entering without the requisite documents. This trio of interrelated conditions should be interpreted consistently, employing an individualized, subjective approach that takes into account the complexity of flight and a refugee’s individual circumstances.

As we have argued elsewhere,<sup>23</sup> the term ‘refugees’ in article 31(1) should be interpreted broadly, and clearly includes asylum seekers, understood broadly to include all those in search of international protection.<sup>24</sup> There are also good legal reasons to regard refugees under expanded regional definitions as entitled to the protection in article 31.<sup>25</sup> As regards beneficiaries of subsidiary and other forms of protection, in many instances equality guarantees under international human rights law ought to ensure that they are also accorded the benefits of non-penalization. While State practice varies, including (p. 921)

national court decisions on this point,<sup>26</sup> in our view a wide interpretation of the personal scope of article 31 is crucial.

The protection offered by article 31(1) is against the imposition of ‘penalties’ where there is a connection between the penalties in question and illegal entry or presence (‘on account of’). While the English language version of the Convention refers broadly to ‘penalties’, the French version speaks of ‘*sanctions pénales*’, implying penal measures (that is, measures primarily in the criminal sphere). In English, by contrast, a ‘penalty’ may be criminal or civil (a contractual penalty, for example), or more broadly a measure with a disadvantageous impact. If there is a discrepancy between language versions, article 33(4) of the VCLT provides that ‘the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted’. In view of the protective purpose of article 31, article 33(4) of the VCLT tends to support the interpretation based on the broader wording if this supports the object and purpose of the treaty,<sup>27</sup> a position supported both by Goodwin-Gill<sup>28</sup> and Hathaway.<sup>29</sup> This broad reading of ‘penalties’ also has support in the case law<sup>30</sup> and legislation of many States.<sup>31</sup> This broad interpretation of penalization means that article 31(1) also prohibits the prosecution of refugees on account of illegal entry and stay,<sup>32</sup> where bringing prosecutions itself has adverse effects, although there is conflicting national authority on this point.<sup>33</sup> Furthermore, if economic or social rights are denied on account of illegal entry or presence, this may also constitute a ‘penalty’ in breach of article 31.<sup>34</sup>

(p. 922) Some States routinely detain asylum seekers who enter irregularly. If such detention can be characterized as a ‘penalty’ (punitive in character), then it is incompatible with article 31.<sup>35</sup> In order to establish whether detention is punitive, its purpose and character must be considered, including by ascertaining State’s intent and objective in resorting to detention, as well as its effect.<sup>36</sup> If detention is used as a deterrent, then it violates article 31(1),<sup>37</sup> since its objective is similar to that of penal law. By contrast, recourse to non-punitive detention is limited by article 26 of the Refugee Convention on free movement.<sup>38</sup> Article 26 must be read in light of the prohibition on arbitrary detention in international human rights law, and so proscribes any automatic detention of asylum seekers or refugees, and also establishes important legal limits on the duration and conditions of detention.<sup>39</sup>

Article 31(1) protects refugees from being penalized ‘on account of their illegal entry or presence’. The textual interpretation of the phrase ‘on account of’, a rather loose expression,<sup>40</sup> indicates that some causal connection between the penalty imposed and the illegal entry or presence must be demonstrated, but it applies not only to crimes encompassing illegal entry or stay in themselves.<sup>41</sup> In particular, crimes relating to the use of false documents fall within the ambit of article 31(1), although some States wrongly exclude them from its scope.<sup>42</sup> To the extent that States seek to punish refugees for smuggling themselves or others into their territories, article 31(1) is applicable.<sup>43</sup> By contrast, it does not extend to other persons who assist refugees to enter a State for the purposes of seeking asylum, whether that assistance is framed as smuggling or otherwise. Article 31 is, however, legally relevant to understand what scope States have to criminalize such assistance. For example, the Supreme Court of Canada in its 2015 ruling in *Appulonappa* took article 31 into account in determining the proper scope of smuggling prohibitions, supporting its legal conclusion that the Canadian domestic prohibitions were ‘overbroad’.<sup>44</sup>

As mentioned at the outset, article 31’s protection against penalization is limited, reflecting a compromise between the refugee’s right to seek asylum and the State’s right (p. 923) to impose border controls. Non-penalization only applies to those who come ‘directly’, present themselves ‘without delay’, and have ‘good cause’ for their illegal entry or stay. Directness is the most controversial element: ‘coming directly from a territory’ suggests that there is no requirement for a refugee to come directly from the country of origin or residence,

provided that the territory is one where the person's life or freedom is threatened. The preparatory work confirms that the drafters envisaged the possibility that refugees might experience such threats at any point in their journey in search of protection.<sup>45</sup> In fact, the *travaux préparatoires* reveal that the 'directness' condition was only added to address a particular concern of the French delegation. They wished to exclude from article 31(2) a narrow category of refugees already afforded international protection in another State, but who still attempted to enter illegally.<sup>46</sup> The drafters also acknowledged that refugee flight may be perilous and non-linear because of the difficulties facing refugees arriving in a State 'which did not display a generous attitude'.<sup>47</sup> As a result, article 31 cannot be considered to require a person to seek international protection at the first effective opportunity.<sup>48</sup> As such, it is evident that the provision does not provide a basis for safe third country practices.<sup>49</sup> Indeed, to the contrary, it is based on the realization that refugees often transit through a number of countries before they find protection. It follows that an individualized, subjective approach, taking into account the reality of flight and individual circumstances, ought to be applied to the condition of directness. Some domestic courts, including in the United Kingdom,<sup>50</sup> the Netherlands,<sup>51</sup> New Zealand,<sup>52</sup> Germany,<sup>53</sup> and Finland,<sup>54</sup> indeed adopted such an (p. 924) approach by developing a sophisticated individualized assessment. This assessment introduces a number of elements for the term 'coming directly', including the length of stay in the intermediate country, the reason for delay, and whether or not the refugee sought or found protection *de jure* or *de facto*.<sup>55</sup>

The second condition set out in article 31 is that refugees should present themselves to the authorities 'without delay'. The term 'without delay' is not synonymous with 'immediately', and its ordinary meaning does not require setting a rigid time limit. In fact, the ICJ has interpreted the term (albeit in a different context),<sup>56</sup> reiterating that 'neither the terms of the [Vienna] Convention as normally understood, nor its object and purpose, suggest that "without delay" is to be understood as "immediately"'.<sup>57</sup> The court underlined that the determination of whether conduct was undertaken 'without delay' should be made on the basis of individual circumstances.<sup>58</sup> According to UNHCR, the proper interpretation of 'without delay' in article 31 is a 'matter of fact and degree',<sup>59</sup> depending on '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'.<sup>60</sup> When it comes to domestic case law, two strands of interpretation have emerged. The first strand supports a flexible, individualized approach,<sup>61</sup> which in our view is appropriate. In contrast, the second strand interprets 'without delay' unnecessarily restrictively, imposing short and inflexible time limits.<sup>62</sup>

The criterion of 'good cause' for illegal entry is also sufficiently flexible to allow the individual circumstances of refugees to be taken into account.<sup>63</sup> Being a refugee is, in itself, a sufficiently 'good cause'.<sup>64</sup> Domestic practices again reflect two conflicting trends. Some courts have recognized that the 'good cause' condition is satisfied where refugees fail to avail themselves of protection opportunities out of misapprehension or fear, including a perception that it may be hazardous to claim asylum at border-crossing points.<sup>65</sup> By contrast, other courts have taken a less protective view, for instance, treating (p. 925) the failure to apply for asylum at the point of arrival at an airport as evidence that there was no 'good cause' for the irregular entry.<sup>66</sup>

### **c. Implementation of Article 31**

States often violate their obligations under the Refugee Convention and other human rights treaties, and article 31 appears to be particularly prone to misinterpretation and misapplication. Undoubtedly, there are some examples of good practice in terms of incorporation of article 31 into domestic legislation, as in South America.<sup>67</sup> For instance, national legislation in both Argentina<sup>68</sup> and Brazil<sup>69</sup> is framed in similar terms to article 31, specifying that both administrative and criminal sanctions are precluded. However, overall,

refugee rights and realities diverge starkly when it comes to non-penalization for illegal entry.

First, some States and scholars, in particular in Europe, have read the 'coming directly' condition not only to limit the scope of article 31, but also to legitimize country of first asylum and safe third country practices.<sup>70</sup> As explained above, this is a profound misinterpretation of article 31, undermining the object and purpose of the Convention.

Secondly, many States do not implement article 31 properly, or in some cases at all.<sup>71</sup> For example, some domestic measures afford the protection of non-penalization only to a narrow category of offences. In the US, refugees are only protected from having certain civil penalties imposed, but are routinely prosecuted for various immigration offences, which is in violation of article 31 and other provisions of international refugee and human rights law.<sup>72</sup> Similarly in the UK, the domestic implementation of article 31 is too narrow. Its lack of protective effect has led UNHCR to argue that the manner of drafting and interpretation of the domestic provision has left refugees worse off.<sup>73</sup> The legislation does not include many common migration control-related (p. 926) offences. The EU has also failed to implement article 31 within its own legal system. In *Qurbani*, for instance, the Court of Justice of the EU (CJEU) declined to provide interpretative guidance to a national court on the meaning of article 31, on the basis that article 31 did not fall within the scope of EU law, despite the fact that EU asylum law must be compatible with the Refugee Convention in general.<sup>74</sup> This ruling is unpersuasive and ought to be interpreted narrowly. As Holiday has suggested, article 31 is pertinent to the interpretation of many provisions of EU law, so falls properly within the CJEU's jurisdiction.<sup>75</sup>

Thirdly, prosecutorial authorities are often unaware of the provision, and may wrongly prosecute refugees. The contrast between the UK and Norwegian experience provides an illustration. In spite of (limited) domestic incorporation of article 31 and many high-level court rulings, the UK continued to prosecute many asylum seekers and refugees, arguably illegally. Many convicted refugees successfully had their cases overturned, after assessment by the body charged with dealing with miscarriages of justice, the Criminal Cases Review Commission.<sup>76</sup> This remedy often came years after their initial convictions. Strategic litigation attempted unsuccessfully to establish that prosecutions should not be brought in the first place,<sup>77</sup> but the Supreme Court rejected the argument narrowly on the facts.<sup>78</sup> In contrast, in Norway, a 2014 Supreme Court judgment established that the penalties imposed on a refugee who presented a forged document at the airport were not permitted by article 31.<sup>79</sup> In response, the Director of Public Prosecutions initiated reopening of cases against asylum seekers who had been penalized for having entered Norway irregularly, and suspended their gaol sentences.<sup>80</sup> The crucial point is that non-penalization requires that asylum seekers and refugees not be prosecuted, which means that article 31 must be understood and implemented within prosecutorial institutions.

Fourthly, there are many contexts where, despite article 31's incorporation in domestic law, other deficiencies in the asylum process render it ineffective. All too often, refugees are detained on arrival and deprived of effective access to asylum procedures. The protections of article 31 remain distant, as these presumptive refugees must wait long periods in order to even lodge an asylum claim.

### **(p. 927) 3. The Criminalization of Irregular Migration under International Human Rights Law**

Beyond article 31 of the Refugee Convention, this section looks to international human rights law as a potentially wider source of protection. In particular, this section examines whether the criminalization of irregular migration itself may be regarded as a human rights violation, thereby opening up a new avenue for legal research and advocacy. This section suggests that international human rights law may provide arguments to challenge the

criminalization of refugees and others whose irregular migration is harmless or blameless, or who have good cause to breach migration controls.

There are strong arguments that, from an ethical standpoint, many of the current laws criminalizing migration are a misuse of the criminal law, being out of keeping with the proper scope of the criminal law in States that value the rule of law and individual liberties. Given the criminal law's stigmatic, punitive character, there is a consensus in liberal political and legal theory that its use should be limited. On this basis, an important body of scholarship in criminal law theory critiques the criminalization of migration as a distortion of the proper role of criminal law.<sup>81</sup> These authors generally argue that immigration law is itself often arbitrary, in that it excludes those with the strongest ethical and legal claim to admission, including refugees, and so criminalization of immigration itself is arbitrary. Another important line of argument focuses on the harmless and blameless nature of many immigration crimes. In general, criminal law theorists point out that irregular migration is not a crime entailing harm to others in the usual sense, but rather is a regulatory crime, whose suitability for criminalization is in doubt. There are often strict liability offences that bear down on those who are not blameworthy.

In some contexts, national constitutional law may be invoked to constrain the scope of criminalization. For instance, Criddle has powerfully argued that under the US Constitution's Eighth Amendment,<sup>82</sup> criminalization of refugees for irregular entry ought to be regarded as unconstitutional. The argument draws on constitutional jurisprudence that has precluded the criminalization of other blameless individuals, such as addicts and the homeless, where their predicaments lead them unavoidably to breach the criminal law.<sup>83</sup>

(p. 928) We suggest that international human rights law ought also to be read to limit criminalization. In general, international human rights law defers to States' rights to control the entry and residence of non-nationals. Indeed, many significant critiques of human rights law have argued that this deference to the 'statist migration control assumption' generates an unprincipled, unstable jurisprudence when migration control is invoked to limit human rights, including on detention, deportation, and non-discrimination.<sup>84</sup> Nonetheless, some authoritative interpretations of international human rights law criticize the criminalization of migration, including by the Inter-American Court of Human Rights (IACtHR), several Special Rapporteurs, and other human rights bodies.<sup>85</sup> In some instances, human rights institutions make general critiques of the impact of criminalization, for instance, that '[m]igration management based on criminal law tends to disregard a human rights dimension of migration'.<sup>86</sup> This section seeks to go beyond these general claims to begin to identify some principled material limits to criminalization.

Under the ECHR, the criminal law is tamed by various human rights provisions, such as the right to a fair trial and respect for the right to liberty. However, clear substantive limits on recourse to the criminal law have not emerged, although if conduct that is protected by the ambit of a substantive right is criminalized, that criminalization violates the right in question.<sup>87</sup> An important body of commentary on the ECtHR identifies a tendency to emphasize the 'sword' function of human rights law—that it sometimes *requires* criminalization in order to protect rights, over its 'shield function'—that it demands a limit on recourse to criminal law.<sup>88</sup>

(p. 929) In contrast, the IACtHR has established just such limits. For example, in *Vélez Loor v Panama*, the court cited with approval a statement by the Working Group on Arbitrary Detention<sup>89</sup> that 'criminalizing an irregular entry into a country goes beyond the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention'.<sup>90</sup> The court set out clear material limits on the punitive power of the State, observing that: 'In a democratic society punitive power is exercised only to the extent that is strictly necessary to protect fundamental legal rights from serious attacks that may impair or endanger them. The opposite would result in the abusive exercise of the punitive

power of the State'.<sup>91</sup> The court held accordingly that the use of detention in the immigration context was a violation of human rights, in so doing construing the States' power to detain in a markedly narrower way than the European Court of Human Rights.<sup>92</sup> But even beyond the issue of detention, the court, most importantly, limited the use of the criminal law in this context.

The IACtHR approach was also endorsed by the former UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, who stressed that irregular entry or stay should never be considered criminal offences, as they 'are not *per se* crimes against persons, property or national security'.<sup>93</sup> This logic seems to align with the criminal law theory approach, which requires a behaviour (irregular migration) to be sufficiently harmful and wrongful to be treated as a crime.

#### **4. A General Principle of Non-penalization?**

Aside from the treaty obligations under international refugee law and international human rights law, this section explores whether non-penalization of refugees and some other migrants for illegal entry or presence may be an emerging general principle of law, in the sense of article 38(1)(c) of the ICJ Statute. General principles perform several functions, such as to fill legal gaps, to serve as sources of rights and obligations, and to aid interpretation and reinforce legal reasoning.<sup>94</sup> Despite controversy and uncertainty (p. 930) about the content and origin of such general principles,<sup>95</sup> a widely accepted view amongst the scholars is that general principles may be derived not only from national legal systems but also formed within the international legal system.<sup>96</sup> The ICJ often refers to general principles that do not find a parallel in domestic laws.<sup>97</sup> We argue that there is an emerging general principle of non-penalization formed within the international legal system.

To ascertain whether a general principle of non-penalization formed within the international legal system exists, the requirement of recognition must be met.<sup>98</sup> Such recognition 'could take place by deduction or abstraction from existing rules of conventional and customary international law, or through acts of international organizations, such as resolutions of the General Assembly', indicating general acceptance by States.<sup>99</sup> Simma and Alston have discussed and encouraged the use of general principles derived from international law in the human rights context.<sup>100</sup> They describe the process of determining the existence of such general principles as 'a decidedly consensual process, giving "a sufficient expression in legal form" to the underlying humanitarian considerations'.<sup>101</sup> The origin of the principle of non-penalization can be found in the international legal system, which implies that the States recognize and accept the existence of this principle in their international relations.

Article 31 of the Refugee Convention reflects a widely accepted recognition that refugees should not be penalized when they have good cause to breach immigration laws. As discussed above, there is some support for non-penalization in international human rights law.<sup>102</sup> In addition, the international instruments in relation to both smuggling and trafficking assume that migrants should not be the main object of criminalization. Specifically, article 5 of the UN Smuggling Protocol shields irregular migrants from criminalization merely for seeking or gaining illegal entry with the assistance of smugglers.<sup>103</sup> This provision is important, in that migrants who have recourse to (p. 931) smugglers may not be refugees, or even fleeing at all. Smuggling includes most forms of assistance in irregular border crossings. And yet, international law focuses on those who enable irregular migration, rather than those who engage in it, an acknowledgement that irregular migrants are not engaged in harmful or blameworthy conduct. The international instruments on trafficking reflect this approach,<sup>104</sup> albeit less clearly, although the case for the non-criminalization of victims of trafficking is even stronger. Schloenhardt and Markey-Towler persuasively argue that the principle of non-criminalization of victims of trafficking in persons has also been developing.<sup>105</sup> This argument is supported by the pronouncements of a number of international institutions.<sup>106</sup> Together, these provisions reflect a consensus

of sorts that while States may be obliged to use the criminal law to seek to limit irregular migration, they should not criminalize migrants in so doing.

A further possibility, in need of further research, is whether there may be stronger regional principles of non-penalization. In South America, it appears States have prioritized non-penalization in their domestic law.<sup>107</sup> In his first report on general principles of law, the Special Rapporteur for the International Law Commission included the possibility of general principles of law with a regional scope of application.<sup>108</sup> Therefore, the move towards non-criminalization in South America in regional fora<sup>109</sup> and domestic (p. 932) legislation could be relevant to the emergence of a non-penalization principle of regional scope. Since the question whether such regional general principles exist remains doctrinally unresolved,<sup>110</sup> it would be premature to consider non-penalization of illegal entry and stay a regional South American general principle of law, but this matter warrants further research.

## 5. Conclusion

This chapter has explored non-penalization for illegal entry and stay under article 31 of the Refugee Convention, and in the broader context of protection against penalization and criminalization in international human rights law. It argued that there is an emerging general principle of law relating to non-penalization of refugees and other vulnerable migrants. The doctrinal arguments in this chapter range from the well-settled (the interpretation of article 31 of the Refugee Convention espoused) to more speculative (a general principle of non-penalization). They all stand in stark contrast to the expansion of punitive and criminal measures towards individuals who cross borders in search of protection. This gap between legal protections and punitive practice demands new thinking about how to make refugee and human rights law more effective. One important strategy is to draw in more actors, both locally and transnationally—refugees, their NGO allies, prosecutors, courts, and legislators—in order to temper the executive excesses of criminalization and penalization of those in search of refuge and protection. It is our hope that some of the legal and ethical arguments in this chapter may inform such actions.

### Footnotes:

\* Research for this chapter was supported by Cathryn Costello's European Research Council (ERC) grant under the European Union's Horizon 2020 research and innovation programme (Grant Agreement ERC STG 2016 RefMig (716968)).

<sup>1</sup> Hein de Haas and others, 'International Migration: Trends, Determinants, and Policy Effects' (2019) 45 *Population and Development Review* 885, 913.

<sup>2</sup> See Chapters 7 and 27 in this volume.

<sup>3</sup> Juliet Stumpf, 'The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power' (2006) 56 *American University Law Review* 367.

<sup>4</sup> 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).

<sup>5</sup> See eg Guy S Goodwin-Gill, 'Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention, and Protection' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003); 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* (OUP 2011).

<sup>6</sup> Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) art 38(1)(c).

<sup>7</sup> See eg Thomas Gammeltoft-Hansen and Hans Gammeltoft-Hansen, 'The Right to Seek—Revisited: On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' (2008) 10 EJML 439; see Chapter 48 in this volume.

<sup>8</sup> ICCPR, art 12. See also Dimitry Kochenov, 'The Right to Leave Any Country' in Richard Plender (ed), *Issues in International Migration Law* (Brill 2015); Elspeth Guild and Vladislava Stoyanova, 'The Human Right to Leave Any Country: A Right to be Delivered' [2018] *European Yearbook on Human Rights* 373.

<sup>9</sup> 'Considering that the United Nations has, on various occasions, manifested its profound concern for refugees and endeavoured to assure refugees the widest possible exercise of these fundamental rights and freedoms': Refugee Convention, preamble.

<sup>10</sup> See eg Ad Hoc Committee on Refugees and Stateless Persons, 'Status of Refugees and Stateless Persons: Memorandum by the Secretary-General', UN doc E/AC.32/2 (3 January 1950) ch XI, para 1.

<sup>11</sup> *ibid* para 2.

<sup>12</sup> The French representative stated that '[t]here was no doubt that refugees must not be penalized because they were refugees': Ad Hoc Committee on Refugees and Stateless Persons, Second Session, Summary Record of the Thirty-Fourth Meeting Held at the Palais des Nations, Geneva (14 August 1950), UN doc E/AC.32/SR.34, 16.

<sup>13</sup> The US representative observed: 'A country might have many provisions concerning aliens which were not based on security reasons alone, including confiscation measures, limitations on trade and so forth, and in such cases the *bona fide* refugee should not be penalized but be given the opportunity of showing his good faith' (*ibid* 19).

<sup>14</sup> Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), arts 18, 26; also under customary international law (which the VCLT reflects): *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* (Merits) [1986] ICJ Rep 14, 136–7, para 273 (*Military and Paramilitary Activities Case*).

<sup>15</sup> *Military and Paramilitary Activities Case* (n 14) 136–7, para 273; cf dissenting opinions of Judge Oda 249, para 79 and Judge Jennings 542, arguing that the object and purpose of a treaty cannot exist independently of its terms. See further Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018) 484.

<sup>16</sup> Yearbook of the International Law Commission (ILC) (1966) Vol II, 202; *Certain German Interests in Polish Upper Silesia* (Merits) (1926) PCIJ Series A, No 7, 30. See also Lassa Oppenheim, *International Law: A Treatise*, vol I, Hersch Lauterpacht (ed) (8th edn, Longmans/Green 1955) 909.

<sup>17</sup> *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, 67, para 145. See also Jean Salmon, 'Article 26' in Olivier Corten and Pierre Klein (eds), *The Vienna Convention on the Law of Treaties* (OUP 2011) 662; Dörr and Schmalenbach (n 15) 475.

<sup>18</sup> Yearbook of the ILC (n 16) 211 para 4; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, 78–9, para 142.

- 19** Dörr and Schmalenbach (n 15) 485; *Gabčíkovo-Nagymaros Case* (n 18), dissenting opinion Judge Fleischhauer 206.
- 20** VCLT (n 14) art 19.
- 21** See the reservations made by Mexico, Papua New Guinea, and Botswana: UN Treaty Collection, 'Convention relating to the Status of Refugees' <[https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-2&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en)> accessed 21 July 2019.
- 22** See ILC, 'Guide to Practice on Reservations to Treaties', UN doc A/66/10/Add.1 (2011) guideline 3.1.5.
- 23** Costello, Ioffe, and Büchsel (n 4) 10-17.
- 24** An asylum seeker is 'any person who claims to be in need of international protection; consequently, that person is presumptively entitled to receive the provisional benefit of the no penalties obligation in Article 31 until s/he is found not to be in need of international protection in a final decision following a fair procedure': UNHCR, 'Summary Conclusions: Article 31 of the 1951 Convention' (2003) para 10(g).
- 25** Cartagena Declaration, conclusion III(8); Marina Sharpe, 'The 1969 African Refugee Convention: Innovations, Misconceptions, and Omissions' (2012) 58 McGill Law Journal 95, 129-45.
- 26** The Supreme Court of Denmark held that article 31 was only applicable to asylum seekers and recognized Convention refugees, and not to beneficiaries of subsidiary and other protection: *Decisions 178/2011 and 179/2011* (3 February 2012) (Supreme Court of Denmark) (this account is based on the summary in English provided by Simon Hein Nielsen (on file with the authors)). See further Jens Vedsted-Hansen, 'Straf eller straffrihed for asylansøgeres anvendelse af falske rejsedokumenter' (2012) Ugeskrift for Retsvaesen 360 (UfR online U.2012B.360).
- 27** See Dörr and Schmalenbach (n 15) 649.
- 28** Goodwin-Gill (n 5) 412.
- 29** James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 411-12.
- 30** See eg *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704, where the Canadian Supreme Court firmly rejected the government's argument that article 31(1) only related to criminal penalties, instead holding that it applied to a procedural detriment (in that case, inadmissibility) imposed on the asylum seeker.
- 31** See eg legislation in Argentina, Bolivia, Brazil, Chile, Costa Rica, Nicaragua, and Uruguay which defines the protection against penalization as covering both criminal and administrative sanctions: Ley No 26.165 Ley General de Reconocimiento y Protección al Refugiado 2006, art 40 (Argentina); Ley de Protección a Personas Refugiadas 2012, art 7 (Bolivia); Ley No 9.474 1997, art 10 (Brazil); Ley No 20.430 2010, art 8 (Chile); Reglamento de Personas Refugiados 2011, art 137 (Costa Rica); Ley No 655 de la Protección a Refugiados 2008, art 10 (Nicaragua); Ley No 18.076 del Refugiado 2006, art 15 (Uruguay). For a more detailed analysis, see Costello, Ioffe, and Büchsel (n 4) 33.
- 32** Costello, Ioffe, and Büchsel (n 4) 34-7.
- 33** See *BW9266* [2012] 10/04365 (Supreme Court of the Netherlands); *BY4310* [2013] 11/01046 (Supreme Court of the Netherlands) (the account of the Dutch case law and translation of the original Dutch text into English are from Isa van Krimpen 'Article 31 of the Refugee Convention: Summary of Dutch Caselaw' (24 March 2017) (on file with the

authors)); cf *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] EWHC Admin 765, [2000] 3 WLR 434, para 43 (*Adimi*); *SXH v The Crown Prosecution Service* [2017] UKSC 30.

<sup>34</sup> Costello, Ioffe, and Büchsel (n 4) 37.

<sup>35</sup> *ibid* 38. See further UNHCR, 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' (2012). See also Chapter 52 in this volume.

<sup>36</sup> cf Australian practice, where the mandatory indefinite scheme of immigration detention was not considered punitive despite its punitive effect, because the official purpose of the scheme was 'administrative'. See eg *Al-Kateb v Godwin* (2004) 219 CLR 562. The case was not concerned with the interpretation of article 31 however.

<sup>37</sup> UNHCR, 'Note on International Protection', UN doc A/AC.96/643 (9 August 1984) para 29; UNHCR Detention Guidelines (n 35) guidelines 3-4.

<sup>38</sup> Noll (n 5) 1263. See also Galina Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Martinus Nijhoff 2010) ch 7.

<sup>39</sup> For an analysis and critique of these standards in international human rights law, see Cathryn Costello, 'Human Rights and the Elusive Universal Subject: Immigration Detention under International Human Rights and EU Law' (2012) 19 *Indiana Journal of Global Legal Studies* 257.

<sup>40</sup> 'On account (also upon account)' means 'for the sake of, in consideration of; by reason of, because of': *Oxford English Dictionary* (OUP online).

<sup>41</sup> Costello, Ioffe, and Büchsel (n 4) 38.

<sup>42</sup> *ibid* 38-41.

<sup>43</sup> James C Hathaway, 'Prosecuting a Refugee for "Smuggling" Himself' (2014) University of Michigan Public Law Research Paper Series No 429, 4. See further Costello, Ioffe, and Büchsel (n 4) 41-2.

<sup>44</sup> *R v Appulonappa* 2015 SCC 59 [2015], 3 SCR 754, para 73 (Canada).

<sup>45</sup> UN Ad Hoc Committee on Refugees and Stateless Persons, 'Decisions of the Committee on Statelessness and Related Problems Taken at the Meetings of 2 February 1950', UN doc E/AC.32.L.26 (2 February 1950).

<sup>46</sup> '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. It was obviously impossible for the Belgian Government to acquiesce in that illegal entry, since the life and liberty of the refugee would be in no way in danger at the time': Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 'Summary Record of the Thirteenth Meeting' (10 July 1951), UN doc A/CONF.2/SR.13, 14-15 (Mr Colemar, France).

<sup>47</sup> Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 'Summary Records of the Fourteenth Meeting' (10 July 1951), UN doc A/CONF.2/SR.14, 4. See also Goodwin-Gill (n 5) 192.

<sup>48</sup> See UNHCR Executive Committee Conclusion No 15 (XXX), 'Refugees without an Asylum Country' (1979) paras (iii)-(iv).

<sup>49</sup> See generally Chapter 28 in this volume.

<sup>50</sup> *Adimi* (n 33) para 18 (Brown LJ); *R v Mateta* [2013] EWCA Crim 1372, [2014] 1 WLR 1516, para 21(iv) (Leveson LJ).

- 51** *BO1587* [2011] 09/02303, para 2.4.3 (Supreme Court of the Netherlands); *BQ7762* [2011] 09/03918 (Supreme Court of the Netherlands); *BV7412* [2012] 10/05212 (Supreme Court of the Netherlands).
- 52** *Hassan v Department of Labour* (2007) CRI 2006-485-101 (High Court of New Zealand); *R v Zanzoul (No 2)* (2006) CA297/06, para 30 (Court of Appeal of New Zealand).
- 53** 2 BvR 450/11 (8 December 2014) (Federal Constitutional Court of Germany) (the account here is based on the abstract of the German Federal Constitutional Court's order of 8 December 2014, 2 BvR 450/11, [GER-2015-1-001], and the translation of the original provided by Teresa Büchsel (on file with authors) para 32.
- 54** *Decision KKO:2013:21* (5 April 2013) (Supreme Court of Finland), See EDAL, 'Finland: Supreme Court, 5 April 2013, KKO:2013:21 Summary'  
<<http://www.asylumlawdatabase.eu/en/case-law/finland-supreme-court-5-april-2013-kko201321>> accessed 21 July 2019.
- 55** *Adimi* (n 33) para 18 (Brown LJ).
- 56** *Jadhav Case (India v Pakistan)* (Merits) [2019] ICJ Rep 1, para 113. The case concerned the treatment of an Indian national under the Vienna Convention on Consular Relations, who was detained, tried, and sentenced to death by a military court in Pakistan. See Victor Kattan, 'Jadhav Case (India v Pakistan)' (2020) 114 AJIL 281.
- 57** *Jadhav Case* (n 56) para 113, referring to *Avena and Other Mexican Nationals (Mexico v United States of America)* (Merits) [2004] ICJ Rep 12, 48 para 85.
- 58** *Jadhav Case* (n 56) para 113.
- 59** UNHCR (n 24) para 10(f).
- 60** UNHCR, 'Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers' (26 February 1999) para 4.
- 61** See eg *HR-2014-01323-A*, Case No 2014/220 (24 June 2014) (Norwegian Supreme Court). See also annotation by Eirik Bjorge, 'A v Public Prosecuting Authority (Norwegian Organisation for Asylum Seekers intervening)' (2018) 175 International Law Reports 643.
- 62** 2 BvR 450/11 (n 53). UNHCR, 'Comments by the UNHCR Regional Representation for the Baltic and Nordic Countries on the Finnish Ministry of Justice's Proposal for Amendments to the Criminal Code's Provision on Arrangement of Illegal Immigration' (28 March 2013) para 16.
- 63** *Goodwin-Gill* (n 5) 9.
- 64** *Noll* (n 5) 1260; *Costello, Ioffe, and Büchsel* (n 4) 30.
- 65** *Costello, Ioffe, and Büchsel* (n 4) 31; Case No 2014/220 (n 61).
- 66** *Costello, Ioffe, and Büchsel* (n 4) 31-2; 2 BvR 450/11 (n 53).
- 67** *Costello, Ioffe, and Büchsel* (n 4) 55.
- 68** Ley No 26.165 (n 31) art 40 (Argentina).
- 69** Lei No 9.474 (n 31) art 10 (Brazil).
- 70** Kay Hailbronner, 'The Concept of "Safe Country" and Expeditious Asylum Procedures: A Western European Perspective' (1993) 5 IJRL 31, 58-9; Morten Kjaerum, 'The Concept of Country of Asylum' (1992) 4 IJRL 514, 515. The 'safe third country' notion has been incorporated into EU law and the domestic law of some European States. Council Directive 2013/32/EU of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (recast) [2013] OJ L180/60, arts 33, 38; Germany, Asylum Act

(AsylVfG) (2 September 2008) sections 26a, 18(2); France, Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA) (22 February 2005) Article L.723-11.

<sup>71</sup> See Costello, Ioffe, and Büchsel (n 4) 40-1, 49, 53-4, 58. See eg practice in Sweden, France, Ireland, the UK, the US, Australia, and others.

<sup>72</sup> Emily Puhl, 'Prosecuting the Persecuted: How Operation Streamline and Expedited Removal Violate Article 31 of the Convention on the Status of Refugees and 1967 Protocol' (2015) 25 Berkeley La Raza Law Journal 87; Evan J Criddle, 'The Case against Prosecuting Refugees' (2020) 115 Northwestern University Law Review 717.

<sup>73</sup> UNHCR, 'UNHCR Intervention before the House of Lords in the Case of *Regina (Respondent) and Fregenet Asfaw (Appellant)*' (28 January 2008) para 7.

<sup>74</sup> Case C-604/12 v *Minister for Justice, Equality and Law Reform* (CJEU, 8 May 2014), para 27, citing *X, Y, and Z*, para 39 and the case law cited there. For more detailed analysis of EU law in this context, see Costello, Ioffe, and Büchsel (n 4) 60-3.

<sup>75</sup> Yewa Holiday, 'Penalising Refugees: When Should the CJEU Have Jurisdiction to Interpret Article 31 of the Refugee Convention?' (*EU Law Analysis Blog*, 19 July 2014) <<http://eulawanalysis.blogspot.com/2014/07/penalising-refugees-when-should-cjeu.html>> accessed 25 March 2020.

<sup>76</sup> Mai Sato, Caroline Hoyle, and Naomi-Ellen Speechley, 'Wrongful Convictions of Refugees and Asylum Seekers: Responses by the Criminal Cases Review Commission' (2017) 2 Criminal Law Review 106; Yewa Holiday, Elspeth Guild, and Valsamis Mitsilegas, 'The Court of Appeal and the Criminalisation of Refugees' (*Criminal Case Review Commission*, 2018) 31-2 <<https://ccrc.gov.uk/research-at-the-ccrc/published-research-on-the-ccrc/>> accessed 14 May 2020.

<sup>77</sup> *SXH* (n 33). See further UNHCR, '*SXH (Somalia) v Crown Prosecution Service: Case for the Intervener*' (6 July 2016).

<sup>78</sup> *SXH* (n 33).

<sup>79</sup> Case No 2014/220 (n 61) paras 23-4.

<sup>80</sup> Riksadvokaten (2014) 2014/00167-009 AB6007 274.

<sup>81</sup> Ana Aliverti, 'The Wrongs of Unlawful Immigration' (2017) 11 Criminal Law and Philosophy 375; Alessandro Spina, 'A Just Criminalization of Irregular Immigration: Is It Possible?' (2017) 11 Criminal Law and Philosophy 351; Cathryn Costello, 'Victim or Perpetrator? The Criminalised Migrant and the Idea of "Harm" in the Labour Market Context' in Alan Bogg, Jennifer Collins, Mark Freedland, and Jonathan Herring (eds), *Criminality at Work* (OUP 2020) 309.

<sup>82</sup> Constitution of the United States of America, Eighth Amendment: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'.

<sup>83</sup> Criddle (n 72) 725, 761-2.

<sup>84</sup> Cathryn Costello, *The Human Rights of Migrants and Refugees in European Law* (OUP 2015) 10-11, 316; Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (OUP 2015) 503-5.

<sup>85</sup> *Vélez Loor v Panama*, Inter-American Court of Human Rights Series C No 218 (23 November 2010) para 169; UNGA, *Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante*, UN doc A/65/222 (3 August 2010) para 19; Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau*, UN doc A/HRC/20/24 (2 April 2012) para 13; Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development: Report of the Working Group on Arbitrary Detention*, UN doc A/HRC/7/4 (10 January 2008) para 53; Human Rights Council, *Report of the*

*Working Group on Arbitrary Detention*, UN doc A/HRC/13/30 (15 January 2010) para 58; New York Declaration for Refugees and Migrants, paras 33, 56; OHCHR, 'Administrative Detention of Migrants' (Migration Discussion Papers, undated) 13; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), 'General Comment No 2 on the Rights of Migrant Workers in an Irregular Situation and Members of Their Families', UN doc CMW/C/GC/2 (28 August 2013) para 24; CMW and Committee on the Rights of the Child, 'Joint General Comment No 4/23 on State Obligations regarding the Human Rights of Children in the Context of International Migration in Countries of Origin, Transit, Destination and Return', UN doc CMW/C/GC/4-CRC/C/GC/23 (6 November 2017) para 7; Council of Europe Commissioner for Human Rights, 'Criminalisation of Migration in Europe: Human Rights Implications' (4 February 2010) 1.

**86** UNGA (n 85) para 19.

**87** The European Court of Human Rights found criminalization of male same-sex activity/acts to be a violation of the right to private life under article 8 of the ECHR. See *Dudgeon v UK* (1982) 4 EHRR 149, paras 41, 63; *Norris v Ireland* (1988) 13 EHRR 186, paras 46–7; *Modinos v Cyprus* (1993) 16 EHRR 485, paras 24–5; *ADT v UK* (2000) 31 EHRR 803, paras 38–9.

**88** See in particular Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577; Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart 2020).

**89** Human Rights Council 2008 (n 85) para 53.

**90** *Vélez Loo* (n 85) para 169, citing *ibid* para 53.

**91** *Vélez Loo* (n 85) para 170.

**92** For an illuminating comparison, see Dembour (n 84) ch 11.

**93** Human Rights Council 2012 (n 85) para 13.

**94** ILC, 'Report on the Work of the Seventy-First Session', UN doc A/74/10 (2019) ch IX para 232. See also Bin Cheng, *General Principles of Law: As Applied by International Courts and Tribunals* (Stevens 1953) 390; Fabián Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Brill 2008) 16, 20; Mads Andenas and Ludovica Chiussi, 'Cohesion, Convergence and Coherence of International Law' in Mads Andenas, Malgosia Fitzmaurice, Attila Tanzi, and Jan Wouters (eds), *General Principles and the Coherence of International Law* (Brill 2019) 10; Miles Jackson, 'State Instigation in International Law: A General Principle Transposed' (2019) 30 *European Journal of International Law* 391, 397.

**95** Alain Pellet and Daniel Müller, 'Article 38' in Andreas Zimmermann and Christian J Tams (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 924, para 255; Catherine Redgwell, 'General Principles of International Law' in Stefan Vogenauer and Stephen Weatherill (eds), *General Principles of Law: European and Comparative Perspectives* (Hart 2017) 5.

**96** ILC, *First Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, UN doc A/CN.4/732 (5 April 2019) paras 22, 231–2, 253.

**97** In its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* [1951] ICJ Rep 15, 23, the ICJ noted that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'. See also *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 22; Giorgio Gaja, 'General Principles of Law', *Max Planck Encyclopedia of Public International Law* (May 2013) para

17; Giorgio Gaja, 'General Principles in the Jurisprudence of the ICJ' in Andenas, Fitzmaurice, Tanzi, and Wouters (n 94) 39–41.

**98** ILC (n 96) paras 234–5; Gaja 2019 (n 97) 41.

**99** ILC (n 96) para 234.

**100** Bruno Simma and Philip Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1992) 12 *Australian Yearbook of International Law* 82, 102.

**101** *ibid* 107.

**102** See n 85.

**103** Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 28 January 2004) 2241 UNTS 507, art 5. See Global Compact for Migration, para 25; see also Chapter 29 in this volume.

**104** Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 June 2007) CETS 197, art 26; Council Directive 2011/36/EU of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting Its Victims [2011] OJ L101/1 (EU Trafficking Directive) art 8; ASEAN Convention against Trafficking in Persons, especially Women and Children (adopted 21 November 2015, entered into force 8 March 2016) (ASEAN Convention) art 14(7) <<https://www.asean.org/wp-content/uploads/2015/12/ACTIP.pdf>> accessed 20 May 2020. See Chapter 30 in this volume.

**105** Andreas Schloenhardt and Rebekkah Markey-Towler, 'Non-Criminalisation of Victims of Trafficking in Persons: Principles, Promises, and Perspectives' (2016) 4 *Groningen Journal of International Law* 11.

**106** Global Compact for Migration, para 26(g); Working Group on Trafficking in Persons, 'Non-Punishment and Non-Prosecution of Victims of Trafficking in Persons: Administrative and Judicial Approaches to Offences Committed in the Process of Such Trafficking', UN doc CTOC/COP/WG.4/2010/4 (9 December 2009) paras 5–6; OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking Commentary*, UN doc HR/PUB/10/2 (2010) principle 7, 129–40; UN Office on Drugs and Crime, 'Model Law against Trafficking in Persons' (2009) art 10; Organization for Security and Co-operation in Europe, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and Legislative Recommendations: Towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking* (OSCE 2013).

**107** See n 31, 67–9. See also Diego Acosta, *The National Versus the Foreigner in South America: 200 Years of Migration and Citizenship Law* (CUP 2018) 122–3; Diego Acosta, 'Regional Governance of Migration in South America' in Anna Triandafyllidou (ed), *Handbook of Migration and Globalisation* (Edward Elgar 2018) 73.

**108** ILC (n 96) paras 33, 137, 261.

**109** See Mercosur and Associate States Meeting of Ministers of the Interior, 'Regional Position Ahead of the Global Forum on Migration and Development' (XXV Specialised Migration Forum (MERCOSUR/RMI/DI N 01/08) Buenos Aires, 10 June 2008); 'Bogotá Declaration' (4th Andean Community's Migration Forum, Bogotá, 10 May 2013); 'Asunción Declaration' (The South American Conference on Migration, Asunción, 5 May 2006). See also Draft Inter-American Principles on the Human Rights of Migrants, Refugees and Other Persons in the context of Mixed Migration Movements, Principle 48 (on file with the authors).

**110** ILC (n 94) ch IX paras 240, 253.