

# A NON-REFOULEMENT EXCEPTION? AN ANALYSIS OF ARTICLE 33 OF THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES IN LIGHT OF THE GENERAL RULE OF INTERPRETATION OF TREATIES

## *UMA EXCEÇÃO AO NON-REFOULEMENT? UMA ANÁLISE DO ARTIGO 33 DA CONVENÇÃO DE 1951 SOBRE O STATUS DOS REFUGIADOS À LUZ DA REGRA GERAL DE INTERPRETAÇÃO DE TRATADOS*

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**Abstract:** Article 33 of the 1951 Convention Relating to the Status of Refugees prescribes the duty of non-refoulement, forbidding States to return refugees in their territory to their country of origin. Nonetheless, when faced with mass influxes of refugees, some States claim the right to close their borders or even to return the refugees. This article discusses whether this alleged “non-refoulement exception” is permissible under international law. In order to do so, article 33 was analyzed in light of the General Rule of Interpretation of treaties enshrined in the Vienna Convention on the Law of the Treaties. This methodology provided for the conclusion that there is no “non-refoulement exception” for mass refugee influxes in the 1951 Convention.

**Keywords:** 1951 Refugee Convention; Mass Influxes; Non-refoulement; Refugees.

**Resumo:** O artigo 33 da Convenção de 1951 sobre o Status dos Refugiados prevê o dever de non-refoulement, proibindo Estados de retornarem refugiados em seu território a seus países de origem. No entanto, ao serem confrontados com influxos massivos de refugiados, alguns Estados alegam a existência de um direito de fechar as fronteiras ou, ainda, de retornar os refugiados. O presente artigo discute se a alegada “exceção ao non-refoulement” é permitível perante o Direito Internacional. Para tal, o artigo 33 foi analisado à luz da Regra Geral de Interpretação de tratados prevista na Convenção

*de Viena sobre Direito dos Tratados. Tal metodologia levou à conclusão de que não há uma “exceção ao non-refoulement” para influxos massivos de refugiados na Convenção de 1951.*

**Palavras-chave:** *Convenção sobre Refugiados de 1951, Influxos massivos; Non-refoulement; Refugiados.*

**SUMMARY:** Introduction. 1. The ordinary meaning of the term “refouler” and its derivatives. 2. The object and purpose of the 1951 Refugee Convention. 3. The context. 3.1. Article 33 of the 1951 Refugee Convention. 3.2. The 1951 Refugee Convention, its preamble, and its annexes. 3.3. Authentic interpretation of the 1951 Refugee Convention and the agreements concluded after the conclusion of the treaty 3.4. Subsequent practice regarding the 1951 Refugee Convention 3.5. Relevant rules of public international law 3.5.1. UN Declaration on Territorial Asylum (1967) 3.5.2. OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) 3.5.3. Cartagena Declaration on Refugees (1984) 3.5.4. Articles on Responsibility of States for Internationally Wrongful Acts (2001). Conclusion. References.

## INTRODUCTION

Mass influxes may be described as the sudden and rapid crossing of international borders by large numbers of people fleeing their country of origin, which generates an inability to cope with the incoming refugees on the State. As of March 2019, 146 States are parties to the 1951 Refugee Convention Relating to the Status of Refugees (1951 Refugee Convention) and, therefore, bound to respect the *non-refoulement* obligation enshrined on its Article 33. Nevertheless, when faced with the prospect of a mass influx, many States consider closing their borders to the incomers or sending them back to the home countries by alleging reasons such as the preservation of public order or national security.

Therefore, it is important to analyze whether this alleged “*non-refoulement* exception” for mass influxes is permissible under international law – specifically, under Article 33 of the 1951 Refugee Convention. This analysis will be done based on the “General Rule of Interpretation” of treaties enshrined in Article 31 of the Vienna Convention on the Law of the Treaties (VCLT). This choice is based on the customary character of the rule (highlighted, for example, by the ICJ in 41 of *Territorial Dispute (Libya/Chad) I.C.J.* 6, Feb. 3, 1994) and its widespread use by international courts to determine rights and obligations deriving international treaties.

According to the rule, any interpretation of a treaty must be effected with good faith and take into account, with equal value (ILC, 1966: 219 ff.), the ordinary meaning of the terms, the object and purpose of the treaty, and the context.

## 1. THE ORDINARY MEANING OF THE TERM “REFOULER” AND ITS DERIVATIVES

The evaluation of the ordinary meaning of the terms is the starting point of the treaty interpretation process (Villiger, 2009: 426). Amongst the many possible meanings of a word, the meaning agreed upon by the parties is to be given particular weight (Villiger, 2009: 426). This is coherent with Article 31(4) of the VCLT, which legitimizes the possibility of the parties establishing a “special” meaning for a specific term in a treaty.

Article 33(1) of the 1951 Refugee Convention, which enshrines the *non-refoulement* principle, prescribes the following:

No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Reading Article 33 of the 1951 Refugee Convention, what strikes the attention is the specific usage of the French term “*refouler*” and its derivatives in the English version of the text, despite the existence of the *quasi* synonym “return”, which is also mentioned in the treaty. According to Hathaway (2005: 357-8), the term “*refoulement*” was chosen “in order to ensure that the traditional civil law understanding of that term ... would be formally recognized”, and this understanding “was agreed not to apply in the event that national security or public order was genuinely threatened by a mass influx”.

This is confirmed in the 1951 Refugee Convention’s preparatory works, such as the following position by the delegate for the Netherlands:

Baron van BOETZELAER (Netherlands) recalled that ... article 28 [which became Article 33] *would not have involved any obligations in the possible case of mass migrations across frontiers or of attempted mass migrations ... The Netherlands could not accept any legal obligations in respect of large groups of refugees seeking access to its territory.* In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation *that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33* [emphasis added] (UN Conference of Plenipotentiaries, 1951).

This statement was agreed upon by the President and its inclusion on the official records had no objections.

In order to dispel any possible ambiguity and to reassure his Government, he wished to have it placed on record that the Conference was in agreement with the interpretation that the possibility of mass migrations across frontiers or of attempted mass migrations was not covered by article 33. There being no objection, the PRESIDENT ruled that the interpretation given by the Netherlands representative should be placed on record. (UN Conference of Plenipotentiaries, 1951).

Therefore, there seems to be an inclination towards a “*non-refoulement* exception” for mass influxes in the ordinary meaning of the term “*refouler*” as included in the treaty.

Nevertheless, there is some severe criticism of this position. Goodwin-Gill and McAdam (2007: 207), for example, sustain that these comments are not an “official” interpretation of the Convention and that “little is to be gained today by further analysis of the motives of States or the meaning of words in 1951”. Our position is that, even if there was an intention to signalize a “*non-refoulement* exception” by using the French word “*refouler*” in Article 33 of the 1951 Refugee Convention, the ordinary meaning of the terms has no greater importance than the other elements of the General Rule of Interpretation (ILC, 1966: 219), which will be analyzed in turn.

## 2. THE OBJECT AND PURPOSE OF THE 1951 REFUGEE CONVENTION

Article 31(1) of the VCLT prescribes that the interpretation of a treaty has to take into account its object and purpose. Despite the great value of this notion to the Law of the Treaties, there is no established definition of object and purpose and no universally agreed mechanism on how to determine it. It has been sparkling doctrinaire debates since Grotius (1625: 411-3) and is considered to be so flexible as to allow inconsistent and convenient applications (Klabbers, 1997: 141). To avoid such an application, this work will analyze the methodology of the International Court of Justice (ICJ) when determining the object and purpose of treaties on human rights and humanitarian law in order to define the object and purpose of the 1951 Refugee Convention.

The ICJ first discussed the notion of object and purpose on its Advisory Opinion *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide, 1951 I.C.J. 15 (May 28)*. It characterized the purpose of the Genocide Convention as “purely humanitarian and civilizing”, without detailing how this purpose was to be identified. Nevertheless, Judge Alvarez provided some guidance on his dissenting opinion. Accordingly, the Genocide Convention is a treaty that “seek[s] to establish new and important principles of international

law” and “seek[s] to regulate matters of a social or humanitarian interest with a view to improving the position of individuals”, so that it is not “established for the benefit of private interests but for that of the general interest”. This would justify its “purely humanitarian and civilizing” purpose, especially considering that “they impose obligations upon States without granting them rights”.

The Genocide Convention and the 1951 Refugee Convention share this “purely humanitarian and civilizing” purpose, as both deal with the most fundamental human rights and important rules of humanitarian law. This logic is in line with the interpretation of other courts on the object and purpose of the 1951 Refugee Convention, such as the Canadian Supreme Court. It concluded, in 57 of *Pushpanathan v. Minister of Citizenship and Immigration, 1998, Can. Sup. Ct. Lexis 29 (Can. SC, June 4, 1998)* that “[t]he overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place”.

The ICJ used other means to identify the object and purpose of the Convention Against Torture (CAT) in *Questions relating to the Obligation to Prosecute or Extradite (Belgium/Senegal), 2011 I.C.J. 534 (July 11)*. The Court highlighted that the preamble of the CAT has a recital that indicates its object and purpose: “Desiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world [emphasis added]”.

While no part of the 1951 Refugee Convention’s preamble begins with such a preambulatory clause as “desiring”, it has one that expresses a similar desire: “Expressing the wish that all States, recognizing the *social and humanitarian nature* of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States [emphasis added].”

While this comparison confirms the humanitarian nature of the Convention, it also grants some value to the interests of the States – namely, of not developing tension amongst themselves – which did not feature in the analysis that applied the ICJ’s method in the 1951 Advisory Opinion. Here, the Convention seems to call for a balance between the rights of refugees and avoiding conflict between States. Nevertheless, this does not change the result of our analysis because this balance has to favor the individual. This reasoning is aligned *e.g.* with that of the European Court of Human Rights in 8 of *Wemhoff v. Germany, 27 June 1968, Series A no. 7*, which stated that, regarding treaties, “it is ... necessary to seek the interpretation that is most appropriate in order to realize the aim and achieve the object of the treaty, not that that would restrict to the greatest possible degree the obligations undertaken by the Parties”.

Therefore, considering this humanitarian and individual-focused object and purpose, a “*non-refoulement* exception” that would restrict the degree of obligations of the State and leave millions of people unprotected cannot be derived from the 1951 Refugee Convention.

Moreover, even if one is to understand that both elements have equal value in the balance between the rights of refugees and avoiding conflict between States, the result is the same. This is because establishing a “*non-refoulement* exception” for mass influxes will not improve the relationship between States, but rather generate tension. When mass displacements occur, some State always ends up having many refugees on its territory, legally or illegally. Not having this regulated by international refugee law generates legal uncertainty, “finger-pointing” and injustices amongst States. Moreover, leaving so many people unprotected could be grounds for international intervention.

The aforementioned methods are not the only ones used by the ICJ to establish object and purpose: a resource to the treaty’s terms, title, and preparatory works is also commonly made. Nevertheless, the result when analyzing the preamble is coherent with the treaty’s terms and title and to the position of the UNHCR (2007), which made “a comprehensive review” of the preparatory works and concluded that they confirm the “overriding humanitarian object and purpose of the Convention”.

Therefore, regardless of which specific formulation the object and purpose of the 1951 Refugee Convention may assume, the notion of a humanitarian object and purpose should permeate the analysis of the legal possibility of a “*non-refoulement* exception” for mass influxes.

### 3. THE CONTEXT

#### 3.1. ARTICLE 33 OF THE 1951 REFUGEE CONVENTION

Keeping the focus on the term “*refouler*” and its derivate “*refoulement*”, it is important to analyze Article 33 as a whole as textual context to these terms. Its first paragraph seems to imply an individualistic approach to the 1951 Refugee Convention, through the terms “a refugee” and the reference to “fear” as a criterion for the refugee definition, considering that fear tends to be experienced individually (Goodwin-Gill and McAdam, 2007: 8).

However, as already noted by Goodwin-Gill and McAdam (2007: 8), this “individualization” merely represents the rule that asylum seekers have the right to an assessment of the conditions that forced them to flee. This is sustained by the great emphasis that authoritative sources of interpretation over the 1951 Refugee

Convention, such as the Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (UNHCR, 2011: 37-42), give to the individualized process of assessment. Nevertheless, the individualized assessment does not hinder the application of *non-refoulement* to mass influxes. This is because all asylum seekers have the right to stay in a country's territory until their individual status is determined (Grahl-Madsen, 1997: 105-6).

The second paragraph of Article 33 implies that the *non-refoulement* principle is not absolute.

Article 33(2): The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

It seems to support the idea that there might be an exception to *non-refoulement* in cases of mass influxes, as they may represent a "danger to the security" of a country.<sup>1</sup> Nevertheless, the dangers to security encompassed by this Article are necessarily offenses individually committed (Hathaway, 2005: 360), for example,

If a person is engaged in activities aiming at facilitating the conquest of the country where he is staying or a part of the country, by another State, he is threatening the security of the former country. The same applies if he works for the overthrow of the Government of his country of residence by force or other illegal means (e.g., falsification of election results, coercion of voters, etc.), or if he engages in activities which are directed against a foreign Government, which as a result threaten the Government of the country of residence with repercussions of a serious nature. Espionage, sabotage of military installations and terrorist activities are among acts which customarily are labelled as threats to national security. Generally speaking, the notion of 'national security' or 'the security of the country' is invoked against acts of a rather serious nature endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned. (Grahl-Madsen, 1997: 236)

<sup>1</sup> See e.g. Statements by India (U.N. Doc. A/C.3/SR, 1971, p. 11), Tansania (U.N. Doc. A/AC.96/SR.510, Oct. 15, 1996, 14), Cote d'Ivoire (U.N. Doc. A/AC.96/SR.520, Oct. 21, 1997, 50), Pakistan (U.N. Doc. A/AC.96/SR.527, Dec. 2, 1998, 12), Tunisia (U.N. Doc. A/AC.96/SR.527, Dec. 2, 1998, 32), and Zimbabwe (U.N. Doc. A/AC.96/SR.530, Oct. 13, 1998, 61).

Therefore, Article 33(2) merely states that a refugee is not protected under the scope of this Article if he or she represents a danger to the security of a country or was convicted of a serious crime. This is further supported by the preparatory works of the 1951 Refugee Convention, as the discussion regarding Article 33(2) has always been phrased in terms of the individual,<sup>2</sup> and immigration law and practice (Goodwin-Gill, 1978: 241-50). Therefore, dangers stemming from the sheer number or scale of a refugee influx do not fall within the formulation chosen in the Article (Eggli, 2002: 172).

Therefore, the exception in Article 33(2) does not impact the analysis on the existence of a “*non-refoulement* exception” for mass influxes.

### 3.2. THE 1951 REFUGEE CONVENTION, ITS PREAMBLE, AND ITS ANNEXES

There is no textual reference to any sort of “*non-refoulement* exception” for mass influxes on the Convention’s text, preamble and annexes. Nevertheless, the following recitals of the preamble and Article 41 of the 1951 Refugee Convention may shed some light on the matter.

Considering ... the principle that human beings shall enjoy fundamental rights and freedoms without discrimination...

Considering that the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation...

Taking into account the right to non-discrimination, it does not seem reasonable to grant some conventional rights to refugees arriving in groups and other conventional rights to people arriving individually.

Moreover, although the preamble mentions the “unduly heavy burdens on certain countries” that may be generated by refugees, this excerpt does not go as far as to support the idea of a “*non-refoulement* exception” for mass influxes. This is because it proposes “international cooperation” as a “remedy” to those burdens and not derogation to any obligations.

Moreover, the fact that Article 42 does not allow any reservation to Article 33 speaks in favor of the impossibility of derogating *non-refoulement*.

<sup>2</sup> See, e.g. UN Doc. E/AC.32/SR.20, Feb. 1, 1950 and UN Doc. E/AC.32/SR.40, Aug. 22, 1950.

### 3.3. AUTHENTIC INTERPRETATION OF THE 1951 REFUGEE CONVENTION AND THE AGREEMENTS CONCLUDED AFTER THE CONCLUSION OF THE TREATY

Agreements posterior to the conclusion of the treaty may be taken into account as authentic sources of interpretation. According to Villiger (2009: 429), they do not only establish a reliable source of interpretation, but rather a binding one. This is the case of conclusions from meetings between the parties (Aust, 2007: 191 ff.). The Executive Committee (ExComm) was established by the UN General Assembly in 1957 and is composed of State parties to the 1951 Refugee Convention elected in the United Nations Economic and Social Council (ECOSOC). In 1981, the ExComm uttered Conclusion n. 22, which specifically addresses the “Protection of Asylum-Seekers in Situations of Large-Scale Influx”. It provided that:

I(3) It is therefore imperative to ensure that asylum-seekers are fully protected in large-scale influx situations ....

II(A)(1) In situations of large-scale influx, asylum-seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection ....

II(A)(2) In all cases the fundamental principle of *non-refoulement* including non-rejection at the frontier-must be scrupulously observed.

Therefore, the ExComm authoritatively established that refugees in mass influxes should be protected and that *non-refoulement* may not be derogated from. It further emphasizes international cooperation as the adequate remedy for mass influxes, reiterating what was already expressed in the 1951 Refugee Convention’s preamble. The ExComm had already uttered this understanding before 1981 (in Conclusions 15 and 19) and continued to do so after Conclusion n. 22 (in Conclusions 23, 25, 46, 71, 74, 81, 85, 100, 103, and 104). Thus being, authentic interpretation unambiguously points towards the full protection of refugees in mass influxes.

### 3.4. SUBSEQUENT PRACTICE REGARDING THE 1951 REFUGEE CONVENTION

Consistent State practice occurring with a certain frequency may be taken into account as “subsequent practice” in the terms of Article 31(3)(b) of the VCLT, as long as it represents the agreement of the parties regarding its interpretation (Villiger, 2009: 431), and that the practice in question is motivated by a sense of legal obligation (McGinley, 1985: 218).

An analysis of how States generally react to mass influxes provides for the conclusion that temporary protection and/or *prima facie* determination are the main tools used and recommended to immediately deal with the incoming people (UNHCR, 2001, p. 1; UNCHR EXCOMM, 1981, I.2). While temporary protection refers to the procedure in which a safe State speedily admits people to avoid overwhelming regular asylum systems (UNHCR, 2002), *prima facie* determination means the recognition by a State of refugee status based on the readily apparent, objective circumstances in the country of origin giving rise to the exodus (UNHCR, 2001, 6). Considering that none generates the return to the country of origin, *refouler* is not seen as an option by the majority of state practice and the UNHCR.

For example, during the period of mass expulsions of ethnic Albanians from Kosovo, it was understood that they could not be returned to Kosovo – despite the “the large numbers, the rapidity of flight and arrival and the current circumstances in the main receiving countries” (UNHCR, 1999). In that context, temporary protection was considered as the minimum protection to be granted to those refugees. Temporary protection was also used, *e.g.* to protect the Vietnamese refugees in Hong Kong, Thailand and elsewhere in South East Asia, the Afghan refugees in Pakistan and Iran, and the Iranian refugees in Turkey (Kjaerum, 1994: 397).

The situation was not different in the largest refugee outflow in recent history, mostly composed of Syrian refugees. The UNHCR prepared a comprehensive Regional Response Plan alongside the most affected States, namely Lebanon, Jordan, Turkey, Iraq, and Egypt (UNHCR, 2013). It recognized that those governments were facing “a heavy burden on their own infrastructure and resources” - especially Lebanon, a State in which, by the end of 2013, about 25% of the population is composed of refugees.<sup>3</sup> Regardless, the burdened States “have largely continued to demonstrate their commitment to giving Syrian refugees access to their territory and to assure their safety” (UNHCR, 2013: 6, 26).

Even though there are some notorious examples of non-compliance regarding mass influxes, they tend to be accompanied by protests by the international community (Kälin, 1996: 13-4). To mention the same case above, when FYR Macedonia disregarded the common practices regarding refugees amongst states and engaged in *refoulement*, the UNHCR protested and urged it to uphold its international commitments, as well as the Council of Europe and some other States (Coleman, 2003: 38). Further, when Croatia engaged in *refoulement*

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<sup>3</sup> According to the UNHCR, the proportion of refugees in the Libyan population is 208,91/1000. See United Nations High Commissioner for Refugees, Mid-Year Trends 2015, available at: <http://www.unhcr.org/statistics/unhcrstats/56701b969/mid-year-trends-june-2015.html>.

of Bosnian refugees in 1992, several States and institutions condemned it, such as the United States Committee for Refugees (Argent and US Committee for Refugees, 1992). Although those protests may be seen by some as shy (Coleman, 2003: 58), they still demonstrate that the international community is not agreeing to the practice and that arguing for the existence of a state practice towards denying the applicability of *non-refoulement* to mass influxes is impossible. Rather, the continuous use of the aforementioned methods, temporary protection, and *prima facie* determination, demonstrate that *refouler* is not considered as a legal option in relevant state practice.

### 3.5. RELEVANT RULES OF PUBLIC INTERNATIONAL LAW

The proper interpretation of a treaty provision may demand interpretation in light of the *corpus juris* of international law. This includes any relevant rules of international law applicable in the relations between the parties (Villiger, 2009: 432). In the following sub-sections, other international covenants and instruments enshrining the *non-refoulement* principle will be analyzed, with a focus on whether they provide or not for the “*non-refoulement* exception”. The Articles on Responsibility of States for Internationally Wrongful Acts (ARISWA) will also be considered due to its reference to the “state of necessity” and its impact on international obligations, such as *non-refoulement*.

#### 3.5.1. UN DECLARATION ON TERRITORIAL ASYLUM (1967)

The UN Declaration on Territorial Asylum (UNDTA) has no binding power, but still set some principles regarding *non-refoulement* in 1967. The UNDTA explicitly provides for a “*non-refoulement* exception” in cases of mass influxes in its Article 3(2). Nevertheless, this exception is limited by cases in which a “mass influx of persons” actually threatens the “national security” or the “population”, so that a mass influx on itself would not justify reducing the protection provided by *non-refoulement*. The chances that the mass influx generates such a threat are reduced by the fact that Article 2 of the declaration provides for international solidarity in cases of difficulty in sustaining this right, so that this would already lighten the burden of a State and diminish effective threats to national security or the population.

Moreover, before expelling someone on the grounds provided by the declaration, the State shall consider giving the person(s) concerned a chance to seek asylum elsewhere or provisional asylum, thus diminishing even more the exception’s scope pursuant to Article 3(3). Therefore, authors such as Goodwin-Gill and McAdam (2007: 242) consider that claiming that this Declaration allows for a mass influx exception is an exaggeration.

### 3.5.2. OAU CONVENTION GOVERNING THE SPECIFIC ASPECTS OF REFUGEE PROBLEMS IN AFRICA (1969)

While Articles 2(3) and (4) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) recognize that States may find “difficulty” to grant asylum in some circumstances, the solution it provides is not to flexible *non-refoulement* and return them, but rather to seek international solidarity. This is especially remarkable considering that the countries that suffer the most with massive refugee inflows are parties to the OAU Convention.

### 3.5.3. CARTAGENA DECLARATION ON REFUGEES (1984)

In this declaration, several Latin American States reiterated their commitment to, amongst others, “to ensure that any repatriation of refugees is voluntary, and is declared to be so on an individual basis...”. Thus, they highlighted that involuntary or collective repatriations are not accepted in any event. Considering that the Cartagena Declaration on Refugees (Cartagena Declaration) clearly acknowledges the “massive flows of refugees in the Central American area” in its Conclusion No. 3, it is possible to assert that those massive flows cannot be grounds for an exception.

### 3.5.4. ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS (2001)

Although the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) do not refer to refugees, they enshrine the rules of customary international law regarding the consequences of breaching an international obligation, such as *non-refoulement*. It also specifies which circumstances preclude wrongfulness when a State fails to fulfill an obligation, such as a state of necessity (Article 25). Nevertheless, Article 26 emphasizes that “nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law”, so that necessity cannot preclude wrongfulness in cases referring to the breach of peremptory norms.

A great share of doctrine defends the peremptory character of *non-refoulement*, relying, *inter alia*, on the fact that it is customary international law<sup>4</sup> and that no derogation to it is allowed (Paula, 2008: 59). This would already suffice to dispel the applicability of “state of necessity” as a means to preclude wrongfulness for breaching *non-refoulement*.

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<sup>4</sup> See e.g. UNHCR, 1994: 1-25; ALLAIN, 2001: 538; GOODWIN-GILL, MCADAM, 2007: 167-170; LAUTERPACHT, BETHLEHEM, 2003: 160-164.

Nevertheless, even if the peremptory character of *non-refoulement* was not to be considered, it is debatable whether any mass influx would be enough to justify this preclusion. Pursuant to the ARSIWA, it is only possible to plead a state of necessity if the action “is the only way for the State to safeguard an essential interest against a grave and imminent peril [emphasis added]”.

It is questionable whether a mass influx can generate a “grave and imminent peril” as in this article, as its application usually demands a very high risk to which a mass influx would hardly attain. For example, the State of Necessity was already considered to have to be grave enough so as to imperil the existence of the State or seriously endanger its internal or external situation in p. 443 of the *Russian Indemnity Case, 1912, XI UNRIAA 421*. Not even Lebanon has attempted to resort to this rule to curb the duty to receive a mass influx of refugees. Moreover, the expression “only way” highlights that the plea is excluded if there are other means available, including cooperative action with other States or through international organizations (Crawford, 2001: 83). International cooperation tends to be present in situations of mass influx (Eggli, 2002: 253), so that it is unlikely that a mass influx may justify the declaration of State of Necessity and a consequent preclusion of wrongfulness. Thus, the analysis of the ARSIWA only supports previous findings.

## CONCLUSION

The aforementioned elements of the “General Rule of Interpretation”, enshrined in Article 31 of the VCLT, have to be taken into account together, as “one and the same” (Villiger, 2009: 435). Therefore, we proceed to assess the evidence gathered throughout the previous analysis and conclude on the existence of a “*non-refoulement* exception” in the 1951 Refugee Convention.

The French term “*refoulement*” and its meaning might have been specifically chosen to exclude mass influxes from the prohibition of *refoulement*. While this assertion is questioned by some authors, we assumed its correctness and put it in the context of the other elements of the rule.

Turning to the object and purpose of the 1951 Refugee Convention, it is difficult to define it in a sole, precise, and unequivocal sentence. Nevertheless, it undoubtedly has to favor the individuals, namely the refugees, even if in detriment to State interests. Encore, the State interest in avoiding the inflow of refugees on its territory may not prevail over their right not to be sent to a place where their sheer existence is at risk, so that a “*non-refoulement*” exception could not be derived from a Convention with this object and purpose.

The textual context offered by Article 33 does not change this understanding. Article 33 does not enshrine any reference to an exception to *non-refoulement* other than the one in its second paragraph. This paragraph, on its turn, only allows for an exception to *non-refoulement* in cases in which a person, individually and demonstrably, poses a danger to the security of the country. Situations in which a State argues that a group of people, due to its magnitude and speed of arrival, poses a risk to national security, are not included in this article.

The text, the annexes, and the preamble of the Convention do not mention any “*non-refoulement* exception”, but some excerpts deserve attention: (i) the first recital of the preamble, which emphasizes the right to non-discrimination; (ii) the fourth recital of the preamble, which indicates that the “unduly heavy burdens on certain countries” eventually placed by mass influxes have, as a remedy, “international cooperation”; and (iii) Article 42, which does not allow any reservation to Article 33 on *non-refoulement*. These three elements speak against the existence of a “*non-refoulement* exception”.

The authentic interpretation of the 1951 Refugee Convention sheds significant light on States’ obligations towards mass influxes. Diverse conclusions from the Executive Committee, composed of State-parties, undoubtedly ascertain that refugees are to be granted the same full standards of protection when they arrive in a mass influx. This makes clear that even if in 1951 the States-Parties wanted to exclude mass influxes of the Convention’s scope of protection, this is not their current understanding and does not reflect the present obligations enshrined in the Convention. Subsequent practice only confirms this interpretation, as it reveals that the most current responses to mass influxes are temporary protection and *prima facie* determination.

Lastly, other international instruments on refugee rights, such as the OAU Convention and the Cartagena Declaration do not provide a “*non-refoulement* exception”. Such exception cannot likewise be derived from the application of “state of necessity” as a means to preclude wrongfulness on the terms of the ARSIWA. Finally, even though the UNDTA enshrines a “*non-refoulement*” exception, it is not binding, represents a considerably old understanding of the duties of States, and would be of hard applicability to real situations.

Therefore, the examination of Article 33 of the 1951 Refugee Convention in light of the various means of interpretation enshrined in Article 31 of the VCLT provides for the absence of a “*non-refoulement* exception” in the 1951 Refugee Convention for mass refugee influxes. By means of different methodologies, other authors reached the same result.<sup>5</sup>

<sup>5</sup> See, e.g. EGGLE, 2002; GOODWIN-GILL, MCADAM, 2007; KAELIN, CARONI, HEIM, 2011;

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