Non-Refoulement as a Qualifier of Nation-State Sovereignty: The Case of Mass Population Flows

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ABSTRACT

Dieser Aufsatz prüft, ob das Rückführungsverbot, das Staaten daran hindert Asylsuchende an die Plätze zurückzuführen, an denen ihr Leben oder ihre Freiheit in Gefahr sind, auch dafür gedacht war Anwendung in Fällen von Massenflucht aus Konfliktgebieten zu finden, wie dies aktuell in Syrien oder im Südsudan der Fall ist. Durch eine detaillierte Prüfung der vorbereitenden Studien und Verhandlungen zur Flüchtlingskonvention aus dem Jahr 1951 sowie weiterer Archivmaterialien wird belegt, dass – entgegen der unzutreffenden Interpretation des US-Supreme Court – Nichtrückführung war für ausnahmslos alle Fälle vorgesehen, einschließlich solcher Massenbewegungen. Im Folgenden wird untersucht, warum der Europäische Gerichtshof für Menschenrechte das Rückführungsverbot im Unterschied zum US-Gericht korrekt deuten konnte. Hieran schließen sich methodologische Betrachtungen an, welche Regeln bei der Benutzung historisch-juristischen Materials und von Verträgen aus der Vergangenheit anzuwenden sind.

1. Foreword

As the total of the world's refugees, displaced persons, and asylum seekers continues to grow – having crossed the 60 million mark for the first time since World War II – nation states are faced with a seemingly unprecedented challenge, confronted as they are with uncontrollable mass population flows.[1] Between Australian "off-shoring" policies,

1 For a comprehensive overview of the European perspective on its current refugee crisis, see the official website

European regimes veering towards the extreme right and blocking refugees from crossing their borders, and Israel's ensuing constitutional crisis due to governmental anti-migrant policies, few issues are nowadays more hotly contested than adherence to the universal tents of non-refoulement.[2] This unequivocal "negative" duty upon states *not* to turn asylum seekers back into the hands of their tormentors has always been amongst the hardest international legal obligations for states to accommodate.[3]

The non-refoulement of refugees (also known as the "Prohibition on Expulsion or Return") forms the bedrock of all international refugee protections. It prohibits states from returning refugees to places where their lives or freedoms would be endangered on the grounds of their ethnicity, race, gender, or religion. This "seemingly simple moral imperative, of not returning refugees into the hands of their tormentors merely because of who they are" actually poses the greatest challenge to nation states, as they cease under these circumstances to be the sole determinants as to who shall enter their territory.[4] While the original drafting of non-refoulement legislation took almost three years to accomplish (1949–1951), the clause finally adopted into the 1951 Refugee Convention's Final Act of contains some of the strongest prohibitive language of any modern treaty:

> *Art. 33: 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.*[5]

At the heart of all the debates regarding non-refoulment's applicability lies one fundamental question: at its core, does non-refoulement *ipso facto* entail a limit to nation-state sovereignty?

of the European Commission dedicated to the issue: http://ec.europa.eu/echo/refugee-crisis_en (accessed 16 January 2017). For a good comparative study of the challenges posed by boat people to Europe and Australia, see I. Glynn, Asylum Policy, Boat People and Political Discourse: Boats, Votes and Asylum in Australia and Italy, Basingstoke 2016. For a good general overview, see I. Mann, Humanity at Sea: Maritime Migration and the Foundations of International Law, Cambridge Studies in International and Comparative Law, Cambridge 2016..

2 On the origins and true meaning of non-refoulement as it was envisaged by the drafters of the 1951 Refugee Convention, see G. Ben-Nun, The British-Jewish Roots of Non-Refoulement and its True Meaning for the Drafters of the 1951 Refugee Convention, in: Journal of Refugee Studies 28 (1), pp. 93–118. On Israel's constitutional crisis and the direct confrontation between its legislator (the Knesset) and its Supreme Court, see G. Ben-Nun, Seeking Asylum in Israel: Refugees and the History of Migration Law, London 2017, pp. 165–219.

3 The term "negative duty" was used by one of the key figures in the drafting of the 1951 Refugee Convention – UNHCR's first director of protection, Paul Weis. For a comprehensive overview of the legal tenants of non-refoulement, see A. Zimmermann and P. Wennholz, Article 33 para 2 (prohibition of Expulsion or Return ('Refoulement'), in: A. Zimmermann, J. Dörschner, and F. Machts (eds.), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, Oxford 2011, pp. 1,397–1,423. For biographical details of Weis and his experience, as both a Holocaust survivor (Dachau) and a refugee, for the drafting of the 1951 Refugee Convention, see G. Ben-Nun, The Israeli Roots of Article 3 and Article 6 of the 1951 Refugee Convention, in Journal of Refugee Studies 27 (1), pp. 101–125, at 107.

4 Ben-Nun, British-Jewish Roots, p. 93.

5 See the official text of the 1951 Refugee Convention on the UNHCR website, Art. 33 p. 30. Available at http://www.unhcr.org/3b66c2aa10 (accessed 16 January 2017). Italics added

A case in point is provided by the deep rift in legal interpretation between the European Court of Human Rights and the US Supreme Court as to whether non-refoulement protection applies ex-territorially on the high seas. From the late 1980s, following the overthrow of Haitian dictator Jean-Claude "Baby Doc" Duvalier, more and more boats of migrants began arriving clandestinely on the shores of Florida. Many of these migrants were political dissidents who had been persecuted by the Haitian security forces and were, therefore, eligible for refugee status on the grounds of political persecution. From 1992 onwards, the Republican Bush administration instructed the US Coast Guard to conduct "push back" operations of these vessels, away from American – and even international – territorial waters, back to the Haitian capital, Port-au-Prince. Following the successful appeal of pro-refugee non-governmental organizations (NGOs) to the US Court of Appeals for the Second Circuit, the Bush administration appealed to the US Supreme Court against the Appeals' Court decision to apply the non-refoulement principle on the high seas, between Florida and Haiti. In its decision, the US Supreme Court, headed by Chief Justice William Rehnquist, reversed the plea and sided with the US government's "push back" operations, providing them with a mantle of legality.
Reading Article 33 textually, the US Court ruled that the high seas were not "a territory" and hence, the non-refoulement principle did not apply in them. In his powerful dissenting opinion, Justice Harry Blackmun, who was appalled by the intellectual dishonesty of his peers in interpreting Article 33 of the 1951 Refugee Convention, wrote:

> *What is extraordinary in this case is that the Executive, in disregard of the law, would take to the seas to intercept fleeing refugees and force them back to their persecutors – and that the Court would strain to sanction that conduct.*[6]

However, the most stringent criticism of the US Supreme Court's decision came in 2012 from none other than the European Court of Human Rights, in its own ruling against Italy (one of the executives under its purview), which, like the US over Haiti, had undertaken "push back" operations against boat-going refugees on the Mediterranean Sea, who had left the coast of Libya in order to seek refuge on Italian shores. The European Court adopted a diametrically opposed interpretation of Article 33 to that of the US Supreme Court. In his concurring opinion, Judge Paulo Pinto de Albuquerque referred to the American position in *Sale* v. *Haitian Centers Council* as follows:

> *With all due respect, the United States Supreme Court's interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the United Nations Con-*

6 For the full quote and a detailed explanation of the entire case, see T.D. Jones, Sale v. Haitian Centers Council: U.S. Supreme Court, June 21, 1993, in: American Journal of International Law Vol. 88 (1994), pp. 114–126, at 126. Not long after this judgment, the decision attracted the scorn of other well-respected high courts. In 1997, the Inter-American Court for Human Rights heavily criticized Sale v. Haitian Centers Council, and Judge Brown of the British High Court ("Queens Bench") remarked that this decision by the US Supreme Court "certainly offends one's sense of fairness" (W. Kälin, M. Caroni and L. Heim, Article 33, para 1 (Prohibition of Expulsion or Return ("Refoulement"), in: Zimmermann, Dörschner and Machts, 1951 Convention, p. 1,363.

vention relating to the Status of Refugees and departs from the common rules of treaty interpretation.[7]

In contrast to legal commentaries in academic journals, this is an unusually strong statement from a high court judge towards his peers across the Atlantic. It is noteworthy to recall here that Judge Albuquerque was not merely writing on his own behalf but rather in the name of the entire European Court's Grand Chamber, given the unanimousness of the verdict and the lack of any European judicial dissent.
This paper will demonstrate that non-refoulement does indeed entail a limit to nation-state sovereignty – and does so without qualification, despite the efforts of some powerful 1951 Refugee Convention delegates - who insisted otherwise.

2. Non Refoulement Overrides National Sovereignty at the Outset of the 1951 Refugee Convention's Drafting

The idea that there is indeed a fundamental contradiction between the non-refoulement obligations of states and their own sovereignty, in the sense of their ability to exercise full control over who enters their territory, is certainly not new. In fact, it was strikingly evident to the drafters of the 1951 Refugee Convention, and it proved to be one of the most contested issues in the three-year drafting process (*travaux préparatoires*) of that treaty.
The dilemma is a basic one. If states assert full control over their borders, and are entitled to "push back" refugees and asylum seekers who throng to their frontiers for protection, then universalist legal refugee protections are rendered meaningless. If on the other hand, states are stripped of their unbridled ability to control who crosses their frontiers, being *bound* to accept refugees who enter their territory, even clandestinely, and are prohibited from blocking their entry or forcefully turning them back *in any manner whatsoever* (as Art. 33 stipulates), then one must concede that their sovereignty has indeed been qualified in favour of a higher, universalist legal principle. As Jacob Robinson – the Holocaust-surviving Israeli representative – told the delegates to the Refugee Convention's very first drafting session of the UN-ECOSOC's (the UN Economic and Social Council's) Ad Hoc Committee on Statelessness in February 1950:

The principal factor lies in the exceptional limitation of the sovereign right of States to turn back refugees to the frontiers of their country of origin.[8]

That no reservation could be tabled to Article 33 of the 1951 Refugee Convention, and that a refugee who indeed clandestinely crossed into a signatory state's territory was not

7 Judge Paulo Pinto de Albuquerque, Concurring Opinion to the Ruling of the European Court of Human Rights, Hirsi Jamaa v. Italy, App. No. 27765/09 (Eur. Ct. H.R. 23 February 2012), pp. 62–82, at 67. Available at: http://hudoc.echr.coe.int/eng# (accessed 16 January 2017).

8 UN Doc. E/AC.32/SR.20, Statement of Robinson (Israel), Morning session – 10 FEB 1950- Lake Success- NY. For the biographical details of Jacob Robinson, his experiences as a leading international jurist of his era, and his work as a refugee on the drafting of the 1951 Refugee Convention, see Ben-Nun, Israeli Roots, pp. 105–106.

to be penalized for this action (Art. 31 – Non-Penalization) are rightfully seen as further strengthening elements of this breach of nation-state sovereignty.
This conundrum was all too clear to the drafters of the Refugee Convention, and from its earliest stages the Convention's text was subject to continuous debates concerning this very point. The Ad Hoc Committee's chairman – Ambassador Chance of Canada – framed the debate in distinctly clear terms:

> *The Committee was confronted with a dilemma. If it wished to grant the greatest possible number of guarantees to refugees, it met with resistance from delegations which had the greater good of their Governments at heart. If, on the other hand, it tried to safeguard the sovereign rights of States to the greatest possible extent, it was liable to draw up a convention which would be unfavourable to refugees. The solution obviously lay in finding the lowest common denominator in those opposing interests.*[9]

In a clear preference for the universalist "horn" of this dilemma, the renowned international jurist Louis Henkin, who represented the United States on the Ad Hoc Committee, proclaimed his country's preference for the supremacy of a refugee's rights over and above nation-state sovereignty considerations:

> *Whatever the case might be* […] *he* [i.e. the refugee – GBN] *must not be turned back to a country where his life or freedom could be threatened. No consideration of public order should be allowed to overrule that guarantee*.[10]

It was not until the end of the Ad Hoc Committee's second session, in August 1950, once a full-blown and comprehensive draft for the entire Refugee Convention text was put forward, that most of the diplomatic delegations began seriously considering its text with their respective headquarters in the various national capitals. The UK's approach is worth mentioning in this regard. The British Inter-ministerial Committee, which was to oversee the consecutive developments of the UK's drafting notes for the Refugee Convention, was only established after the positive conclusion of ECOSOC's Ad Hoc Committee's second round of talks. In his top-secret report to the British Cabinet, issued one month after this session, the British delegate (and former home secretary) Samuel Hoare explained the problems that faced governments as they came to discuss the non-refoulement clause:[11]

> *The United Kingdom representative invited the other representatives present to say whether their governments were prepared to take the serious step of surrendering their powers completely, with no reservations for exceptional cases. Switzerland (an observer- not a*

9 UN Doc. E/AC.32/SR.20, Statement of Chance (Canada- Chair), Morning session – 10 FEB 1950- Lake Success- NY.

10 UN Doc. E/AC.32/SR.20, Statement of Henkin (US.), Morning session – 10 FEB 1950- Lake Success- NY.

11 For biographical details of Samuel Hoare, his experience as Nansen's deputy high commissioner for refugees under the League of Nations, and his role in saving Austrian Jews during his Home Office tenure, see Ben-Nun, Israeli Roots, pp. 107–108.

member of the Ad Hoc committee) was the only country which said straight out that it could not accept the Article.[12]

Hoare's report to Cabinet should be seen in its correct context in and around the drafting stage of the 1951 Refugee Convention text, as it stood after the Ad Hoc Committee's second session in August 1950. While advocates of universalism rightly point to the fact that already, by this early drafting stage, a comprehensive articulation of non-refoulement was at hand (and was then still known as Article 28 of the draft Convention text), it would be a mistake to infer that this text was indeed endorsed by the majority of governments. The Ad Hoc Committee was certainly *not* representative of most governments, having had merely 12 member states present as delegates. Nor did the text of the Refugee Convention as it stood in 1950 fully represent governments' views. If anything, it was a nuanced representation of the views of the UN and IRO (International Refugee Organization) secretariats, given that the office of the United Nations High Commissioner for Refugees (UNHCR) was still in the making (the UNHCR's creation was only fully secured in December 1950). In the end, both the UN and IRO secretariats and the participating governments knew full well that the most important diplomatic hurdles would inevitably arise at the Conference of Plenipotentiaries, where, ultimately, the UN secretariats would lose much of their grip over the Convention texts being drawn up.

3. The Political Camps and their Attitude towards Non Refoulement at the 1951 Refugee Convention

The literature concerning non-refoulement is exhaustive, and the deliberations regarding the different stages that the text underwent until its final endorsement have been well researched.[13] Nevertheless, one important point worth mentioning in this regard concerns the strengthening of the legal text on non-refoulement (now known in its final numbering as Article 33) at the Conference of Plenipotentiaries. It was during this conference that the words "in any manner whatsoever" were added to the prohibition of refoulement, so as to strengthen the treaty by further limiting the ability of states to interpret its text with ill intent and *mauvaise foi*. This textual strengthening, specifically within the article most associated with the qualification and limitation of nation-state sovereignty, is one of the unique features of the 1951 Refugee Convention – its like has seldom been observed in the treaty-making processes of other international humanitarian law instruments.

It is against this backdrop, and the very specific example set by the drafters of the non-refoulement article, that one must ponder how exactly the US Supreme Court arrived at its ill-advised conclusion that this principle did not apply on the high seas – in this case,

12 UK National Archives London – Kew, BT 271/349, Inter-ministerial Oversight Committee for the drafting of a Convention for Refugees, 25 September 1950, p. 28.

13 See the literature mentioned in notes 3, 4, and 5 above.

vis-à-vis Haitian asylum seekers off the coast of Florida. To be sure, for the drafters of the 1951 document, it would be safe to say that for the Convention's president – Danish representative, Knud Larsen – no article in the entire text was more important and in greater need of securing.[14] That this article was certainly intended to specifically cover refugees on the high seas is was made absolutely clear to the Venezuelan delegate by his Belgian and French peers, as early as 1950.[15]

This is the point to recall the proclamation by Henkin – the US delegate to the 1951 Refugee Convention, in favour of non-refoulement's legal superiority over sovereignty considerations, back in 1950.[16] A close reading of the US Supreme Court's *Sale* v. *Haitian Centers Council* is revealing, given the cardinal methodological error in the historical reading of the 1951 Refugee Convention's *travaux préparatoires* undertaken by the judges of the majority opinion in reaching that verdict. Any court that engages (or, perhaps we should say, indulges) in the intricacies of a treaty's *travaux* invariably accepts their validity for the interpretation of the treaty in question. In fact, one would be hard pressed to find instances in which either of the usual textual or intentionalist approaches is totally disregarded by a court. In most cases, courts will consider both approaches before applying what suits them best for that given case. The example of non-refoulement is no different. Both the US Supreme Court and the European Court of Human Rights based their verdicts (at least partially) on quotations from the 1951 Refugee Convention's *travaux*. The difference, however, lies in the manner in which each court delved into these historical materials. In order to explain this difference, and the resulting divergence in interpretation, a brief survey of the drafting process of the 1951 Convention, and the compilation of its *travaux*, is merited.

The drafting history of the 1951 Refugee Convention can be broken down into three periods, roughly according with the compilation of its drafting materials. The first period – between the 1949 memorandum of the UN Secretary-General, requesting work to begin towards a UN Refugee Convention, and its accompanying letters – is mainly declarative, and encompasses materials from the UN secretariat that do not, as such, consist of binding legal materials since they do not represent the ideas of treaty-member states. The second period (1950) comprises the deliberations of UN-ECOSOC's two sessions of the Ad Hoc Committee on Statelessness and related problems. It was here that the first "blueprints" of the Refugee Convention text were articulated. The third period consists of the deliberations during the diplomatic Conference of Plenipotentiaries (2–28 July 1951), when the final text was worked over and endorsed by vote, article by article, by the state-parties' plenary. Full accounts of the second and third periods are available in bound format, as these deliberations were edited and then published by ECOSOC's secretariat. These records comprise transcripts of every single meeting (two meetings a

14 Ben-Nun, British-Jewish Roots, p. 95.
15 Ibid., pp. 100-101
16 See note 10 above.

day, morning and afternoon), on UN-letterheaded paper, with the full names of all participants and a protocol-based account of the speaker and his main points.[17]

At its outset, the 1951 Refugee Convention was intended to solve the refugee problems primarily of Europe. The countries represented at the drafting table were broadly divided into what commonly became known as the 'Europianists vs. Universalists' political camps. Concerning non refoulement, the 'Europeanists' advocated for a broad scope of protection for refugees, yet within the limited geographical area of Europe. The 'Universalists' (also known as 'the countries of immigration: the US, Australia, Canada and New Zealand), advocated for a single Convention to be applied the world over. Yet in contrast to the 'Europianists', the protections they were prepared to afford refugees were much more limited in scope, and certainly *did not* include non refoulement protection for refugees at sea.[18]

The fact that the 'Europeanists' were prepared to afford more protections to post World War II refugees they were hosting, also had to do with the experiences of that war, which affected several of the key drafters who were holocaust-surviving Jews. This group included Robinson from Israel, Lewin (the NGO representative who first drafted non-refoulement) and UNHCR's own Paul Weis. To them one must add the diplomats who actively helped rescue Jews from the Nazis during that war such as Hoare from the UK, President Larsen from Denmark, and Vice President Herment from Belgium.[19]

The question here was one of moral high ground. The immigration countries (The US, Canada, Australia) on the other side of the Atlantic and Pacific oceans did not have to bear the brunt of the European refugee crisis.[20] When it came to non refoulement, these countries, already during early drafting stages announced that they would not see the conduct of "push back" operations at sea – as refoulement.[21] As we shall see – little has changed over the past six odd decades in the diametrically opposed positions advocated by the US and Australia versus those adhered to by many European nations.[22] One area where this cardinal difference is most apparent is in the very different interpretations of Supreme Courts on both sides of these oceans concerning the geographical reach which ought to be applied with regard to non refoulement. And at the heart of this difference

17 The second period's deliberations (August 1950) are all marked as U.N. Doc. E/…, while the Conference of Plenipotentiaries' (third-period – July 1951) documents are all marked UN. Doc. A/...

18 Ben-Nun, Israeli Roots, pp. 109-112.

19 Ben-Nun, Seeking asylum in Israel, pp. 21-50, 52-69.

20 It is worth mentioning here that the US never signed the 1951 Refugee Convention and only became a State party to the accompanying 1967 Protocol to that treaty. Australia's current harsh anti-refugee attitudes are certainly consistent with its openly hostile attitudes during the different drafting stages of the 1951 Refugee Convention. On the Australian open hostility to accord refugees adequate protections, which in turn brought to the drafting and insertion of Article 6 into the 1951 Refugee Convention see: Ben-Nun, Israeli Roots, pp. 117-119. On the harsh confrontations between the European countries (Belgium and France) and Australia, with regard to its openly-offensive attitudes towards instilling extra refugee protections into the 1951 Refugee Convention see: Ben-Nun, British-Jewish Roots, pp. 97-99.

21 Ben-Nun, British-Jewish Roots, pp. 95-104.

22 On the stark comparative difference between Anglo-Saxon and Continental European attitudes towards refugees, see also Glynn's contribution in this volume.

in interpretation lies the methodological differences through which both Courts chose to examine the same historical drafting sources.

4. Mass Population Flows and Non-Refoulement's Deliberate Misinterpretation in the 1951 Refugee Convention's Travaux Préparatoires

A glance at both opinions, of the US Supreme Court and of the European Court, reveals one simple fact. In both cases, the 1951 Refugee Convention's *Travaux Préparatoires* were invoked. However, in the US Supreme Court's opinion, delivered by Justice John Paul Stevens, the right honourable judge in fact "cherry-picked" statements by the Swiss and Dutch delegates from three single sessions (3, 11, and 25 July 1951) of the Conference of Plenipotentiaries so as to suit the predetermined and premeditated conclusion that he wished to convey. Stevens' approach was not in fact about interpreting the treaty, but rather about finding statements within the *travaux* that would suit the textual reading he wished to apply. In contrast, the European Court's opinion includes a lengthy deliberation on the entire *travaux* – starting from the second period (1950), when the non-refoulement principle came into being (2 February 1950). Its concurring opinion only then follows through the entire development of Article 33's drafting, until its final version in the Final Act. Consequently, Judge Albuquerque took time to expose the inconsistencies in the very passages quoted by Judge Stevens of the US Supreme Court vis-à-vis the full development of the Article over its three-year drafting process.

The entire issue turns on three statements made by Zutter, the Swiss delegate to the July 1951 Conference of Plenipotentiaries in Geneva, prior to the endorsement of the Convention's Final Act. These statements were followed up by the Dutch representative, Baron Von Boetzler, during the very last reading of the entire Convention text, prior to its signature and its becoming the known Final Act. All three statements revolved around the issue of whether states were still bound to uphold non-refoulement in the event of mass population flows, when sizeable waves of refugees undertake an exodus from their native lands across national borders. On the second day of the Conference of Plenipotentiaries, the Swiss delegate declared:

> *The Swiss delegation considered, however, that it went without saying that the Contracting States must also undertake to help each other and to assist a country invaded by a mass-influx of refugees because of its geographical position, by relieving it of the some of the refugees it had admitted. It was obvious that a small country could not accept an unlimited number of refugees without endangering its very existence*.[23]

The context here is quite clear. During the very early deliberations, the Swiss delegate was calling for an official mechanism of burden-sharing once mass population flows arose.

23 UN Doc. A/CONF.2/SR3, pp. 9–10, Statement of Zutter (Delegate of Switzerland). Conference of Plenipotentiaries, 3rd July 1951.

It is important to stress here that the delegate *was not* in any way qualifying the non-refoulement principle, but rather wished to press for a structured mechanism for refugee burden-sharing between the Convention's High Contracting Parties.

The second instance in which the non-refoulement principle and the situation of mass population flows collided took place in the midst of the Conference of Plenipotentiaries, during the very contentious discussions concerning Article 3 (Non-Discrimination). The central question here was whether states were entitled to discriminate between refugees who had entered their territory lawfully under their immigration laws and those who had clandestinely transgressed national borders in their flight from torment – the latter being the "classic" case in which non-refoulement's utmost humanitarian necessities would come into play. Against the opinions of the majority of the representatives present, the Swiss delegate now proclaimed his *minority opinion* – certainly *not* accepted by the majority of the delegates present – for the qualification of non-refoulement in the case of a mass population flow. In the course of a heated discussion regarding the exact meaning of "refoulement" (that is, the "turning away" of a refugee), the Swiss delegate outlined for the first time the stark distinction that he saw between refugees who had already entered a country's territory and those who had now been stranded once the borders had been sealed by that country:

> *The Swiss Government considered that in the present instance the word* [i.e. "refoulement" – GBN] *applied solely to refugees who had already entered a country, but were not yet resident there. According to that interpretation, States were not compelled to allow large groups of persons claiming refugee status to cross its frontiers.*[24]

The Swiss delegate's conflation of terms here, of non-expulsion with non-refoulement, is quite clear. He stated that the Swiss government would graciously not *expel* a refugee who had already entered its territory, but would not adhere to the non-refoulement principle at its border. This conflation of terms, between non-expulsion (of refugees already in country) and non-refoulement (of refugees actually attempting to cross over into a state) is very indicative of the fundamental difference in the legal meaning of terms which the 1951 Refugee Convention brought about.

As both White and Caestecker demonstrate in their contributions to this volume, in the 1930s non refoulement was in fact tantamount to non-expulsion, as states kept absolute sovereignty over their border policies. The states who did join international refugee instruments during the interwar period, be it the Convention of 1933 for the Russian refugees, or the Convention of 1938 for the Jewish refugees from Nazi Germany, limited their international commitments only to those refugees who had already resided lawfully within their territories. Non refoulement in both Conventions (1933 and 1938) restricted the expulsion of those refugees who already had been granted asylum, or who

24 UN Doc. A/CONF.2/SR16, Statement of Zutter (Delegate of Switzerland), Conference of Plenipotentiaries, 11th July 1951.

were merely authorized to reside in the country, while border policy remained a sole national competence.

The majority of the delegates at the 1951 Plenipotentiaries' Conference accepted a much further commitment for their states under their newly-formulated universal international refugee regime. This was the interpretation of non refoulement which was accepted by the majority of the delegates at the Plenipotentiaries' Conference, which came now to include refugees who were actively seeking to transgress a state's border so as to save their life. With this view in mind, one can understand why both acts (non-expulsion *and* non-refoulement), to which the Swiss delegate referred in his statement, later became the substantive legal bedrocks (along with non-penalization) upon which the entire international refugee regime was founded, as enshrined in Articles 31, 32, and 33 of the 1951 Refugee Convention.

The third reference to the Swiss delegate's reading of non-refoulement – as if it might not apply under conditions of mass population flows – was made by the Dutch delegate to the Conference of Plenipotentiaries on 25 July 1951, during the second (afternoon) session of that day. In what was, in fact, the very last statement of the entire Refugee Convention's drafting process, during the final session of the Conference of Plenipotentiaries – which had involved three years of drafting debates and several thousand pages of protocols. In his statement from this very last session, the Dutch delegate stated:

> *Article 28* [i.e. Non-Refoulement, which finally was renumbered to become Article 33 – GBN] *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. At the first reading the representatives of Belgium, the Federal Republic of Germany, Italy, the Netherlands and Sweden had supported the Swiss interpretation* […] *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* […] *He then declared the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons closed, except for the signing ceremony.*[25]

It was to this statement that Justice Stevens of the US Supreme Court referred in his majority opinion in *Sale* v. *Haitian Centers Council*, and it is here that the grave methodological errors of statement "cherry-picking" come to light in their most overt and harmful manner.

What was at stake in this statement, and why was it made?

25 UN Doc. A/CONF.2/SR.35, Statement of Baron Von Boetzler (Netherlands), 25th July 1951, Afternoon Session 2:30 PM.

What was the exact purpose and meaning of this statement as it was placed on record, for protocol's sake, upon the explicit demand of the Dutch delegate?

The correct answer to these questions is inextricably intertwined with the context within which the statement was uttered. The entire drafting process of the Refugee Convention had been plagued, from its outset, by a conflict between states who wished to limit refugee protections, and those who wished to expand them. Time and again, as some countries attempted to limit the scope of the Convention to deal with conditions like those recently experienced by European refugees from Nazi Germany or post-war refugees, they were rebutted by other nations who refused to adhere to clauses which would harm refugees and reduce their protection threshold. This was precisely the case concerning Article 1 (Definition of the Term "Refugee"), which India and Pakistan for example, took to ECOSOC's session at the 5th General Assembly, where they simply outvoted certain European countries, adopting a universalist rather than a limited "European" definition of *ratione personae* and the scope of who qualified for recognition as a refugee.[26] The countries who wanted to limit refugee protections could neither outvote them nor twist the Refugee Convention's text in favour of their limited readings – and no article was more explicit and indicative of their failure to dominate the drafting of the Convention text as the non-refoulement clause (Art. 33). At the end of the day Von Boetzler simply failed to convince the majority of nation states present at the drafting table, to qualify non-refoulement when faced with mass population flows.

The three points that unequivocally prove this failure concern the very nature of the strengthening of the non-refoulement clause in the face of the challenges mounted against it at this very last drafting stage of the Conference of Plenipotentiaries.

The first proof has to do with the strengthening of the language of the non-refoulement clause, as the words "in any manner whatsoever" were deliberately inserted into its text at the Conference of Plenipotentiaries. These words came to deliberately disqualify any contingent argument that might be made to qualify the applicability of non-refoulement in certain circumstances. The insertion of these words, in the teeth of the attempt by Western states to qualify non-refoulement in the case of mass population flows, should be read for what it is – namely, a *rejection* of the notion that non-refoulement was to be limited in such circumstances.

The second proof concerns the stipulation as to the inadmissibility of reservations by the High Contracting Parties to Article 33. According to Article 46, no contracting state can make a reservation vis-à-vis the non-refoulement clause. This idea was reinforced once non-refoulement had attained the status of *jus cogens* (supreme legal principle). If indeed Von Boetzler was convinced that the majority of states accepted his interpretation of non-refoulement as *not* applying in conditions of mass population flows, why did he not table an amendment to officially qualify its applicability under those conditions?

26 Gilad Ben-Nun, From Ad Hoc to Universal: The International refugee regime from Fragmentation to Unity, in: Refugee Survey Quarterly 34 (2), pp. 23–44, at 37 n. 55.

Surely, if most states agreed with him, would they not have accepted that qualification? After all, that is precisely what took place with the issue of national security when it was to be put at risk by non-refoulement. And indeed, with regard to national security needs, the UK succeed in persuading most states to accept this qualification, which is present in the Convention to this day as Paragraph 2 to Article 33.[27] Yet most states were *not* in accord with the view of limiting the scope and applicability of non-refoulement concerning mass-population flows, which is precisely why no amendment to qualify its applicability under such conditions was never tabled.

The third, and perhaps most convincing, proof as to the failure to convince most nation states to qualify non-refoulement - when faced with mass population flows, concerns the demand by the Dutch delegate to place his words *on record*. While being a point of proof of a *procedural* nature, this situation holds a strong *methodological* lesson for diplomatic historians and legal scholars engaged in the interpretation of international legal treaties; When do delegates demand that their words be put on record?

In most cases, it is due to them thinking that their position is the correct one, while being outvoted or blocked by a majority of the representatives at that particular assembly. This is *not* to say that that delegate did not have a point, nor does it hold any bearing towards any ontological truth that his claim might have had. History is full of examples of venerable minoritarian voices who demanded that their words be put on record, only to be subsequently (and tragically) confirmed in their views and warnings. Edmund Burke's call for concessions to the British colonies in North America during the early 1770s and Beneš' outcry at the 1938 Munich conference, when the world succumbed to Hitler's demands for the Sudetenland, are but two examples.

These examples, however, prove the point. In these two latter instances, irrespective of their ontological truth and prophetic foresight, Burke's and Beneš' were strictly minoritarian voices. This was all the more relevant with regard to the statement made by the Dutch delegate during the final session of the 1951 Refugee Convention's Conference of Plenipotentiaries. To most delegates present – and most probably to the president, Knud Larsen, who had championed non-refoulement as his own personal cause – Von Boetzler's declaration would have sounded like no more than a diplomatic statement of "sour grapes," and an affirmation of the non-attainability of his efforts to limit and qualify non-refoulement in the cases of mass population flows.[28]

To be sure, Von Boetzler was not the only delegate at the Conference of Plenipotentiaries to demand that his words be put on the record when his opinion had not been endorsed by the majority of the other delegates present. Three days earlier, Jacob Robinson had attempted for his part to persuade the delegates not to accept Germany's amendment to Article 1 F, which was intended to strike out of the Convention's text any reference to the Nuremberg trials (known in international law language as "The London Charter").[29]

27 Gilad Ben-Nun, British-Jewish Roots, pp. 108–112.

28 On President Larsen making non-refoulement his own humanitarian cause, see Ibid., p. 95.

29 Article 1 F removes refugee protections from those who have committed war crimes or crimes against human-

Robinson saw this action on Germany's behalf, at the very first international conference that it had attended since Hitler had resigned from the League of Nations, as part of "the process of 'forgive and forget' which was taking place in Germany" with regard to the Jewish Holocaust.[30] Upon his failure to convince the other delegates of his point of view, Robinson requested that his speech concerning the Nazi past and the responsibility of Germany for the Holocaust be entered into the record as his statement *in extenso*.[31] In both cases, that of Robinson and that of Von Boetzler, the statements entered the records for protocol's sake – nothing more.

President Larsen was not going to oppose the Dutch delegate over his abstrusely false claim 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." Both Larsen and Von Boetzler, and most of the other delegates present, knew full well that the Dutch delegate was placing on record his personal view in a shrewd diplomatic manoeuvre so as to place into the Refugee Convention's protocol minutes his false misinterpretation of (if not an outright misrepresentation about) the meaning of non-refoulement. Larsen's ruling in favour of recording Von Boetzler's words should under no circumstances be seen as an acceptance of his view, let alone of his claim that most states agreed with his interpretation of non-refoulement. For Larsen, what mattered was what was entered into the Final Act, and here non-refoulement was expounded in the strongest form: "in any manner whatsoever." Little did Larsen know just how far the intellectual dishonesty of supreme courts wishing to support their own executives would go.

4. Conclusion

That the US Supreme Court based its false judgment in *Sale* v. *Haitian Centers Council* on a statement that one of its presiding judges (Justice Stevens) selected from well over 3,000 pages of statements in the 1951 Refugee Convention's *travaux préparatoires* is alarming in more than one respect. One wonders what was worse: that the judges of one of the most respected high courts the world over failed to contextualize a false statement by a defeated delegate, and read it wrongly – or, alternatively, that the bench had already reached its judgment and only looked to the *travaux* to provide a crooked justification for its unacceptable decision. The minority dissenting opinion of Justice Blackmun certainly points to the latter option. That said, one should not be surprised if this were to prove a

ity, and who, after they have committed those crimes, press forward with a request for asylum and the granting of refugee status. The German amendment was tabled under the reference UN Doc. A/CONF.2/76 (1951), and was intended to replace the reference to the London Charter with references to the Fourth Geneva Convention for the Protection of Civilians (Art. 147), and the Genocide Convention (1948) (A. Zimmermann and P. Wennholz, Article 1 F, in: Zimmermann, Dörschner and Machts, 1951 Convention, pp. 579–610, at 587.

30 UN Doc. A/CONF.2/SR.29, p. 10, Statement of Robinson (Israel), Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Twenty-Ninth Meeting (Friday 20 July 1951).

31 Ibid. "He requested that his statement should be reproduced verbatim in the summary record of the meeting."

mistake in good faith by Justice Stevens, given the tendency of international lawyers to haphazardly cherry-pick statements from various Conventions' *travaux préparatoires*.
This tendency, however, becomes especially alarming when one is engaged in the interpretation of treaties of international humanitarian law, in which a change in interpretation of the scope or meaning of terms could directly affect human lives – as in the case of the reversal of European refugee policy on Mediterranean waters thanks to the European Court of Human Rights' 2012 ruling in *Hirsii Jam'aa* v. *Italy*.[32]
From the earliest drafting stages of the 1951 Refugee Convention, the clash between the universalist tenets of non-refoulement on the one hand and the requirements of national sovereignty, in the form of total control upon the entry of persons into a state's sovereign territory, on the other was absolutely clear to the drafting delegates. That they chose to strengthen the wording of the non-refoulement clause by inserting the words "in any manner whatsoever" at its final drafting stage during the Conference of Plenipotentiaries demonstrates their deliberate and clear rejection of any limitation upon its application. The obstacles to non-refoulement – in the form of challenges to a state's national security, or the case of mass population flows – were well known and heatedly debated during the Convention's three-year drafting process. In the case of the needs of national security, the drafters indeed chose to limit non-refoulement through the insertion of Paragraph 2 of Article 33. In the case of mass population flows, they chose *not* to qualify it despite recurrent calls to this end by certain delegates.
And rightly so, for in many cases it is precisely *in and during* humanitarian catastrophes – ones which trigger mass-refugee flows, that the non-refoulement principle is most needed. As Holocaust survivors or those who had attempted to help Jewish refugees as much as they could, several of the key drafters of the 1951 Refugee Convention were

32 Much the same can be said of the Fourth Geneva Convention for the Protection of Civilians – the treaty that underpins all our laws concerning war and armed conflict, whose interpretation has also suffered its share of misinterpretations thanks to the "cherry-picking" of statements from its *travaux* by international lawyers looking to substantiate premeditated and partial legal claims. Methodologically, I have tried to argue for the need to engage in deep archival-historical research if one wants to understand the legal meanings of treaties to their full extent. The importance of this methodological observation comes across starkly when one observes a recently published, erudite study concerning the Fourth Geneva Convention's cardinally important Common Article 3, which extends humanitarian protections to all combatants – regular and irregular (Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law, Cambridge 2010, p. 29). Cullen mistakenly attributes a strong étatist and anti-universalist view to France and its delegate, Albert Lamarle – the very person who drafted this Convention's entire first blueprint, and who was personally responsible for the first drafting version of Common Article 3, which was later adopted by the ICRC (International Committee of the Red Cross). In fact, Lamarle's positions and those of the French establishment were both diametrically opposed to any such étatist views. A scrutiny of the footnotes confirms the sources of this misjudgement. Not only did the author rely entirely on a selective reading of statements from the Plenipotentiaries Conference' Final Record, he also overlooked vitally significant published literature. That such a high-quality study (whose conclusions, it should be reiterated, are generally spot on!) should incur such a mistake speaks loudly of interdisciplinary problematics. Just as historians do not use legal sources sufficiently, so do legal experts often avoid searching for the relevant historical publications, which are outside their legal bibliographical sphere. On Lamarle's vital role in the 4th Geneva Convention's drafting, and his responsibility for the articulation of its very first blueprint see: Gilad Ben-Nun, The Fourth Geneva Convention for Civilians: The History of International Humanitarian Law (London: I.B. Tauris 2018, forthcoming), Ch. 3

very well acquainted with conditions of mass populations flows – some of which had taken place only a few years prior to the Convention's drafting, during World War II. It is within this context that one must understand their insertion of the words "in any manner whatsoever" into the text – in direct reference to the ample cases of refoulement that had indeed taken place during that conflict – be these of Jews aboard the MS *St. Louis* off the coast of Cuba, of Gypsy and Roma communities fleeing Nazi persecution in the Balkans, or of native Czech communities driven out of the Sudetenland by the armed forces of the Third Reich. Thus, when the US Supreme Court decides to falsely utilize the 1951 Refugee Convention's *travaux préparatoires* so as to justify an intellectually dishonest and deliberate misinterpretation of this international treaty, it not only renders an insult to the layperson's intelligence (as its own Justice Blackmun so eloquently remarked) but it also does *methodological* harm, by sanctioning the conduct of "cherry picking" of statements from the drafting records of international treaties. After all – if Supreme Court judges behave this way, what claim can one forward against individual international lawyers or academics, who merely repeat the same methodologically-flawed practice. Fortunately, though - and for all its faults, Europe still has its Court of Human Rights where judges such as Pinto de Albuquerque still take the time and effort to scrutinize the entire record of a treaty – before they render their judgment on its meaning.

Beyond the specificities of non-refoulement's application in cases of mass-population flows, there lies the more general methodological principle of how Supreme Courts ought to work with *travaux préparatoires*, which at the end of the day – are in their nature historical source materials in the 'classical' sense. If and when Supreme Courts do turn to *travaux préparatoires* in search for help in interpreting a treaty, they must do so in the same manner as a good and thorough historian would treat his source materials. They must first read the entire *travaux préparatoires* available to them, and not merely focus on the substantive provisions. This means for example, paying attention to the legally non-binding resolutions which we usually find at the end of many treaties, and to which Courts seldom turn precisely due to their non-bindingness.[33] A good knowledge of the historical circumstances and a reaching-out to standard historical works so

33 A salient example of this tendency to disregard significant portions of a treaty's official *travaux préparatoires* can be observed in the conduct of even the highest Court in the world – the International Court of Justice (ICJ) in The Hague. In 1996, the ICJ was requested to render its legal opinion as to whether the usage of nuclear arms was legal. In its final legal opinion, the ICJ was split down the line (seven judges against seven with the president of the Court casting the definitive vote as primus inter pares) concerning the legality of the usage of nuclear arms, due to their indiscriminate nature and the inability to distinguish between civilians and combatants within their usage, as per the stipulations of the 4th Geneva Convention for the Protection of Civilians (GC-IV). In over 1000 pages of the opinions of its 14 judges, not one single judge on the ICJ bench had taken the time to consult GC-IV' t*ravaux préparatoires*. Nor did the ICJ judges care to consult cardinal historical works such as that of Geoffrey Best's 1995 War and Law since 1945 (Oxford) which were already available during their deliberations Had the ICJ judges cared to examine these materials they would have discovered that this very question of the legality of nuclear arms' usage was one of the most contested issues at the 1949 Geneva Conference of Plenipotentiaries, and that humanitarian positions advocated for by the Soviet delegations, would have significantly helped the holders of the ICJ majority opinion in 1996. See Gilad Ben-Nun, The Fourth Geneva Convention for Civilians: The History of International Humanitarian Law (London: I.B. Tauris 2018, forthcoming), Ch. 2.

as to understand the psychological and *zeitgeist* context under which the drafters were operating – would also be of good sense. If there is one thing they ought *not* to do – it is to resort to the practice of "cherry picking" statements which is methodologically and factually indefensible.

The drafters of non refoulenment in the 1951 Refugee Convention understood full-well the inherent sovereignty-limiting qualities which the adoption of this principle, in its current wording ("in any manner whatsoever"), would *ipso facto* entail. Six decades on, the fundamental rift between the continental European understanding of non-refoulement - as adopted by the European Court for Human Rights in 2012, and that of the countries across the oceans (as expressed by the Supreme Courts of the US and Australia) is still very much alive and kicking.