European Journal of Migration and Law **5:** 23–68, 2003.

Non-Refoulement Revised
Renewed Review of the Status of the Principle of *Non-Refoulement* as Customary International Law *

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1. Introduction

The issue of the international legal status of the principle of *non-refoulement* has been debated since the 1960s. The majority doctrinary opinion is that the principle has over time acquired the status of customary international law.[1] The purpose of this article is to critically evaluate this position. While there are several cases of infringement of the principle of *non-refoulement* that would qualify as legitimate reasons for doubting the continued existence of a customary norm – US interdiction of Haitian refugees, rejection of Kurdish refugees at the Turkish frontier during and following the Gulf War, rejection at the frontier of Afghan refugees by Pakistan during the Taliban regime, to name a few – this article has selected as case studies acts of *refoulement* by Croatia in 1992, and by FYR Macedonia during the Kosovo crisis in 1999. Review of the customary norm of *non-refoulement* will primarily entail analyzing the possible evolution of a new customary norm; one which incorporates an exception in situation of a mass influx of refugees. The case is made that the status of the principle of *non-refoulement* as an unconditional regional international custom in Europe has become untenable.

The object of study of a possible customary norm of *non-refoulement* has always been the content of Article 33 of the 1951 Convention relating to the

* This article is a revised version of a thesis, written at the University of Nijmegen.

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[1] Goodwin-Gill, Hailbronner, Kimminich, Lieber, Mushkat, Weis and Stenberg are among those in favour of a customary norm, Stenberg 1989, p. 266. The International Institute of Humanitarian Law has also recently confirmed the principle as 'an integral part of customary international law', San Remo Declaration on the Principle of *Non-Refoulement*, September 2001.

Status of Refugees[2] (hereinafter referred to as 1951 Refugee Convention). Article 33(1) reads:

> (1) 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.

With regard to scope, this article deviates from previous studies in that it takes the perspective of the recognized customary norm of *non-refoulement* based on Article 33 of the 1951 Refugee Convention, and determines whether it currently exists in some modified form. Its starting point is thus the customary norm, and not the treaty norm. Also, the customary norm is the sole focus of this article; it does not address possible consequences of state practice for the treaty norm, i.e. reinterpretation of Article 33 of the 1951 Refugee Convention to include a mass influx exception.

First, a detailed description is given of what occurred between Croatia and Bosnia-Hercegovina in 1992, and between FYR Macedonia and Kosovo in 1999. The theoretical framework is then laid out in paragraphs 3 to 5 which deal with the issue of inclusion of non-rejection at the frontier under the principle of *non-refoulement*, the position of *non-refoulement* in the situation of a mass influx of refugees, and a reflection of doctrine on the customary status of *non-refoulement* as it stands. This is followed by an analysis – in terms of the doctrine of tacit acceptance, the requirements of customary international law, and the doctrine of necessity – of the consequences of the described events for the customary norm, finalized by a few general conclusions.

2. Selected Cases of Negative State Practice

From July 1992 onwards, Croatia closed its borders to refugees from Bosnia-Hercegovina, and in addition sent back a number of Bosnian refugees from within Croatian territory. During the Kosovo crisis, shortly after the NATO-bombings commenced, and tens of thousands of Kosovo Albanian refugees arrived at the Macedonian border within days, the Macedonian authorities started periodically closing the border in late March 1999. Although this latter case is primarily concerned with rejection at the border, a push-back of refugees by Macedonian border police over the border with Kosovo

[2] See, for example, J. Stenberg, *Non-Expulsion and Non-Refoulement*, Uppsala, Iustus Förlag, 1989. Also, sir E. Lauterpacht and D. Bethlehem, *The scope and content of the principle of* non-refoulement, 2001 (www.unhcr.ch), although they also include other international instruments containing a prohibition of *refoulement* in their analysis.

was also reported. FYR Macedonia was party to both the 1951 Refugee Convention and European Convention for the Protection of Human Rights and Fundamental Freedoms.[3] In the summer of 1992, Croatia was party to neither convention.[4] Croatia therefore arguably violated only the customary norm, whereas FYR Macedonia would have violated both the treaty and the customary norm.

This section will give a detailed account of the order of events, the circumstances that surrounded them, and the response by the international community.

2.1. *Croatia – Bosnia-Hercegovina 1992*

A few days after Bosnia-Hercegovina had been recognized as an independent state by the European Community and the United States, widespread fighting and violence erupted in April 1992, prompting an enormous refugee flow. Refugees spread out towards Croatia, Macedonia, Montenegro, Serbia and Slovenia. The far larger part fled to Croatia. At that time, Croatia already held 260,000 internally displaced Croatians due to the fighting between Croatians and Serbs from June 1991 to January 1992.[5] By mid-July some 340,000 Bosnian refugees had entered Croatian territory,[6] leading to a total number of approximately 600,000 dependants, which represented 12 per cent of the total population and in some towns outnumbered the indigenous residents. In June 1992, it was estimated that the financial burden this refugee population placed upon Croatia amounted to USD66 million a month,[7] which was second

[3] FYR Macedonia ratified the Convention Relating to the Status of Refugees on 18 January 1994, (www.unhcr.ch). It ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms on 9 November 1995, (www.coe.int). The mention of the European Convention is relevant in the context of rejection at the frontier, as section 3 below will show.

[4] Croatia issued a declaration of continued adherence to the Convention Relating to the Status of Refugees on 12 October 1992, Trb. 1995, 136. The UNHCR website also lists Croatia as a party-member through state succession from this date. Croatia ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms on 5 November 1997, Trb. 1998, 87. There is a possibility that party-membership of Croatia to the 1951 Refugee Convention may in fact have come about sooner through state succession. In this case, Croatia would also have been bound to the treaty norm of Article 33 at the time of the violation. The law on state succession, however, is not clear presently (Jennings and Watts 1992). Also, whether the treaty norm was violated in addition to the customary norm is not of influence on the analysis of this article.

[5] Argent (USCR) 1992, pp. 4–5.

[6] UNHCR Emergency Report 1992.

[7] Helsinki Watch 1992, p. 142. The highest number of refugees and displaced persons in Croatia was reached in December: 810,000, UN doc. A/48/92 S/25341, p. 31.

only to defence expenditure.[8] Also, aid from the international community in these days of the crisis was not forthcoming.

On 14 July, the Croatian government announced that only those refugees who were in possession of a 'letter of guarantee' – a declaration of sponsorship by relatives, friends or organizations in Croatia, or a third country, stating that the refugee would be financially supported while in Croatia – would be permitted to enter Croatian territory.[9] At first, this policy was not fully enforced. Many refugees without the required letter were able to enter until the end of July. By mid-August however, the Croatian authorities allowed only a few exceptions, leaving others stranded at the border. A few weeks later, exceptions were no longer granted. In September, the government cancelled the policy of entry on the basis of a letter of guarantee all together. Only refugees in direct transit to other European countries would be allowed to enter in exceptional cases – where UNHCR had pre-arranged their accommodation in those countries.[10]

Publicly, the Croatian Government cited economic and financial reasons as justification for the border closure. It was clear that closing the border was also a means to coerce the international community into supplying more financial, logistical and humanitarian aid, and admitting more refugees. But there were additional motivations. Croatia, like Bosnia, was at war with Serbia. All citizens of Bosnia-Hercegovina were under military obligation, or working obligation as prescribed by Civil Defence units. At the beginning of the war, a law was passed determining that all persons within the territory of Bosnia-Hercegovina on 6 April 1992 were citizens of Bosnia-Hercegovina and therefore subject to mobilization.[11] Therefore, refugees not only represented a burden to Croatia, but also weakened Croatia defensively against Serbia.[12] Croatia's goals were best served by these persons standing and fighting with the Bosnian forces. The head of the Croatian Office for Displaced Persons and Refugees (ODPR) stated: "If all people leave Bosnia-Hercegovina, then who will fight the enemy?".[13] Croatian President Franjo Tudjman also made intentions clear: "Croatia has taken in nearly 400,000 refugees from Bosnia-Hercegovina and cannot supply humanitarian aid to those who, in wartime, should stay on the battlefields to fight the aggressor".[14] Bosnian interests ran parallel to those of Croatia. Bosnia-Hercegovina wished

[8] Helsinki Watch 1992, p. 142.

[9] Refugee Reports (USCR), 28 August 1992, pp. 11–12. Argent (USCR) 1992, p. 7. News, from the USCR, 12 August 1992, p. 1. Amnesty International Index: EUR 48/26/92, p. 10.

[10] Argent (USCR) 1992, p. 13. Frelick 1992, pp. 444–445.

[11] UNHCR Position Paper on Former Yugoslavia, 13 June 1995, p. 8.

[12] Argent (USCR) 1992, p. 7.

[13] *Ibid.*

[14] De Volkskrant, 22 July 1992.

to increase the number of persons under arms, and to keep productive Bosnians inside Bosnia, in order to keep its economy alive.[15]

The translation of these political, economic and military interests into government policy was twofold. Persons who wished to leave Bosnia-Hercegovina were required to obtain an 'exit permit' from either the Croatian Defence Council or the Muslim Territorial Defence – the two principal Croatian and Muslim military forces in Bosnia-Hercegovina. The US Committee for Refugees reported that this policy was used for screening out able-bodied men and women and prevent them from leaving.[16] Secondly, on 21 July 1992 the governments of Croatia and Bosnia-Hercegovina announced the Agreement on Friendship and Co-operation between the Republics of Bosnia-Hercegovina and Croatia. Its primary goal was military cooperation.[17] Furthermore, the agreement provided for return of Bosnians from Croatia to Bosnia-Hercegovina. It specified the categories of refugees that would be returned as draft-age men and women.[18] It also determined that the Bosnian Government would delineate which areas in Bosnian territory it considered "safe", to which the refugees would be returned.[19] The head of the ODPR explained that as soon as the new Bosnian embassy opened in Zagreb, cooperation in this area would take shape. Bosnia-Hercegovina would declare safe areas, and Croatia would be responsible for identifying refugees from those areas and within the correct age group, who would subsequently be required to return.[20]

The ODPR upheld that the returns organized by the Croatian authorities were voluntary: "We bring back only the young people who want to go back and those who are really not resisting our attempts. We are not applying force at the moment."[21] There is clear indication, however, that the returns were involuntary and forceful.[22] It must be assumed that some of these returns

[15] Argent (USCR) 1992, p. 18.

[16] News, from the USCR, '1 August 1992.

[17] One of the essential points of the agreement was the following: "Aware of the fact that if the aggression on the two countries is not stopped urgently, they are both facing further devastation and destruction of their countries, they will, if the efforts of the international community remain futile, study and undertake all necessary forms of broader co-operation in the military area and co-ordination of the military operations aimed at the final repulsion of the danger directed at them", Hrvatski Glasnik, *Croatian Herald*, Number 7, 25 July 1992, p. 2.

[18] The Croatian authorities did not refer to these persons as refugees, but as military conscripts, reservists, or as deserters, Yugoslav News Agency, 22 August 1992.

[19] Argent (USCR) 1992, p. 14. Refugee Reports (USCR), August 28 1992, p. 12. UNHCR Position Paper on Former Yugoslavia, 13 June 1995, p. 2.

[20] Argent (USCR) 1992, p. 14, 16. Refugee Reports (USCR), August 28 1992, p. 12.

[21] Argent (USCR) 1992, p. 14. Refugee Reports (USCR), August 28 1992, p. 12.

[22] *Ibid.*

have gone unnoticed and that not all were reported on. The following are the returns of which reports have been obtained:

> During the weekend of July 18th of 1992, Zagreb was cleared of the thousands of Bosnian refugees who had camped around the city. Women and children had either been put on trains in the direction of Austria, Italy and Germany, or sent to a newly built refugee camp in Djakovo (within Croatia). However, 2,000 draft-age men had been sent to Rijeka, from where they would be brought back to Bosnia-Hercegovina by boat.[23]
>
> The following Tuesday, 21 July, 900 men were returned. A large group of refugees had travelled by train to the north of Croatia, where they intended to continue to Italy by boat. Instead, the boat sailed to Split, where the men were violently separated from their wives and children, and loaded into busses back to Bosnia-Hercegovina.[24]
>
> Also in July, Croatian officials arrested 'several hundred' men in Rijeka, who were returned to Bosnia-Hercegovina via Split.[25]
>
> In mid-August, 200 Bosnian men were removed from a temporary refugee centre in the city of Karlovac during the night, and returned to Bosnia-Hercegovina by bus.[26]

Estimates of the amount of draft-age men forcibly returned to Bosnia-Hercegovina during the months July and August of 1992 are around 4,000.[27] After the last mentioned incident in Karlovac, which was reportedly followed by vigorous protests from international organizations, the Croatian vice-president Mate Granić, while acknowledging that 2,000 of such returns had occurred, announced on 18 August that the practice had been suspended for the moment. Croatia would no longer return Bosnians without consulting UNHCR, except in cases where persons constituted a threat to public order.[28] Granić acknowledged that the returns were a violation of the rights of the individuals involved, but claimed that this was necessary to prevent a social explosion in Croatia. He also stated that, although the returns had been suspended, the Croatian Government would not hesitate to continue returning refugees if danger to social stability were to arise.[29] On 21 August, Zagreb

[23] *NRC Handelsblad*, 20 July 1992.

[24] *De Volkskrant*, 22 July 1992.

[25] Argent (USCR) 1992, p. 13–14.

[26] *New York Times*, 19 August 1992. Migration News Service, Sept. 1992, p. 6. Amnesty International Index: EUR 63/01/92, p. 42. Argent (USCR) 1992, p. 16.

[27] Migration News Service, Sept. 1992, p. 6.

[28] *New York Times*, 19 August 1992. Migration News Service, September 1992, p. 6. Amnesty International Index: EUR 63/01/92, p. 43. Argent (USCR) 1992, p. 16.

[29] *New York Times*, 19 August 1992.

announced that, instead of returning Bosnian military conscripts to Bosnia-Hercegovina, it would send them to Western European Countries.[30] The US Committee for Refugees, however, feared that this assurance by the Croatian Government did not preclude the possibility that local authorities, acting independently or without substantial scrutiny from central authorities, would continue the forced returns of draft-age persons.[31] Also, allegations that Croatian police were rounding up draft-age Bosnian men continued to come to the attention of Amnesty International, indicating that the practice was indeed continuing after this date.[32]

The fact that Croatia and Bosnia-Hercegovina claimed that refugees were returned to "safe areas" does not change the nature of these returns as *refoulement*. Returns took place before the determination of refugee status, and so constitute *refoulement*.[33] Furthermore, assuming for a moment that these areas were safe,[34] and therefore formed an internal flight alternative, individual review of safety on a case by case basis – as part of a refugee determination procedure – would be required before return is warranted.[35] Also, these Bosnians were not returned to safe areas to reside, but for forced introduction into military and militia units.

Qualifying equally as *refoulement* was the rejection at the border[36] of "uncounted thousands".[37]. In this particular case, denial of entry also had the same substantive effect as a forceful return. As humanitarian aid in border towns was fully saturated, Bosnian refugees were forced to go back to where they had fled from, or travel south in an attempt to reach government-held central Bosnia. Either option additionally meant crossing the confrontation line between the warring parties.[38]

[30] Yugoslav News Agency, 22 August 1992. A group of "300 to 1500" Bosnian draft-age men was, that day, transported to Varazdin, from where they would continue to the Netherlands, *ibid.*

[31] Argent (USCR) 1992, p. 16.

[32] Amnesty International Index: EUR 48/26/92, p. 4.

[33] Goodwin-Gill 1996, pp. 32, 121.

[34] Which they most likely were not. The notion that areas existed in Bosnia-Hercegovina where the Bosnian authorities could guarantee the safety of Bosnian Muslim men, except perhaps for a relatively quiet region in the south of Bosnia-Hercegovina, can not be upheld. The country was in a constant state of flux and changing frontlines.

[35] On internal flight alternative in general, see Hathaway 1999, pp. 131–141.

[36] See section 3.

[37] Argent (USCR) 1992, p. 13.

[38] The United Nations reported large numbers of people moving from areas of intense ethnic cleansing, such as the Banja Luka region, towards central Bosnia, which meant crossing the front line. The UN did point out that this had been going on for quite some time, and that it was not possible to say whether it was caused by Croatia's border closure, or by Serb forces, deliberately pushing these people towards the front line, UN doc. A/48/92 S/25341, p. 26.

2.1.1. *The International Response*

Humanitarian Response. Continuous warnings by Croatia of having reached the limits of its capacity in carrying the disproportionate burden of refugees went largely unheeded by the international community. Finally, in July 1992, Croatia started signalling its increasing desperation by transporting trainloads of newly arrived refugees to the Slovenian border, in an effort to urge the rest of Europe to open their borders and alleviate some of the pressure on Croatia. These borders, however, remained firmly shut for several days as European states remained reluctant to admit refugees from Bosnia-Hercegovina, leaving refugees waiting aboard the stopped trains, sending a clear message that Croatia would not receive assistance.[39] In addition, those European countries that did not already have a visa requirement for Bosnians, started introducing these rapidly when the exodus from Bosnia-Hercegovina started picking up steam. The rationale offered was that these visa requirements were not imposed in order to obstruct asylum seekers, but rather to fulfil their usual purpose; to provide a necessary and legitimate device to control illegal immigration. It is hardly a coincidence, however, that their introduction came precisely at the time the magnitude of the outflow of refugees was becoming clear.[40] For fear of being left with carrying a disproportional burden of refugees, one state introducing a visa requirement leads others to do the same. Gradually, therefore, more and more doors of potential destination countries were closing. Countries that might otherwise have been used only in transit – Croatia, Slovenia – were now facing the problem alone with thousands of refugees locked in. This lack of international participation meant that the traditional response to a mass influx situation – following the so-called principle of first asylum[41] – effectively broke down.[42] After accounts of the atrocities in Bosnia-Hercegovina started reaching the outside world, European states relaxed somewhat their strict policies, admitting a few Bosnian refugees on a temporary basis. Their numbers were not nearly

[39] Croatian Radio, Zagreb 1500 gmt, 13 July 1992. Argent (USCR) 1992, pp. 3–4. Helsinki Watch 1992, p. 143. Spijkerboer 1992, p. 921.

[40] Amnesty International Index: EUR 48/26/92, pp. 4–5. The Benelux countries and Finland for example, introduced visa requirements in July 1992, Argent (USCR) 1992, p. 17.

[41] This response, as formulated by UNHCR, entails admission to safety of refugees to countries bordering the conflict region, followed by international assistance to these countries. Since the Balkan crisis, this sequence of response is also known as the principle of first asylum, a term which I will adopt for the continuation of this article. On the exact formulation and the origin of the principle, see section 4.

[42] Argent (USCR) 1992, p. 4.

sufficiently substantial, however.[43] Croatia subsequently started closing its borders as well.[44]

In sum, by not admitting Bosnian refugees from Croatia to the rest of Europe and thereby not taking part in the refugee burden which Croatia was facing,[45] refugees were unable to leave a country where they were at risk of being subjected to *refoulement*. Moreover, although it is difficult to determine whether an adequate humanitarian response would have averted the Croatian border closure, the lack thereof was certainly a contributing factor to the opposite. It can be said that the inadequate humanitarian response of the international community played a role in creating circumstances that were conducive to the closing of Croatia's border and *refoulement* of Bosnian refugees.

Protest against refoulement. *The New York Times* reported: "United Nations officials say the Croatian efforts to return Bosnians to their homeland violates longstanding human-rights protections. The United Nations is insisting that each refugee be interviewed before being sent back".[46] Recorded protests such as these, however, are few and far between, and were mostly made by non-governmental organizations. It has been difficult to gage the international reaction to the border closure and the returns of Bosnian refugees by Croatia.

Amnesty International has, characteristically, been the most explicit in condemning the actions of Croatia. In an oral statement addressed at the United Nations Commission on Human Rights in December 1992, Amnesty International found Croatia's refusal to grant access and give adequate protection to Bosnian refugees "deplorable".[47] Amnesty International called upon Croatia to stop the return of refugees, which it deemed contrary to international law,[48] and started a letter-writing campaign to the Croatian authorities. AI members were requested to urge Croatia to comply with its international

[43] Compared to the numbers hosted by Croatia they were not more than a trickle. By October 1992, Austria, Germany, Hungary, Italy, Sweden, Switzerland and Turkey had each taken in more than 10,000 refugees. The remainder of (Western) Europe – Belgium, Denmark, Finland, France, Greece, Ireland, Luxembourg, the Netherlands, Norway, Spain and the United Kingdom – had only admitted a total of 17,000 refugees between them, Argent (USCR) 1992, p. 17. In the following weeks and months, the offers of protection did increase.

[44] Argent (USCR) 1992, p. 17. Spijkerboer 1992, 921, 924.

[45] Awaiting a binding international instrument in the European region with regard to burden sharing, there exists only a politically binding duty to burden sharing for now, as formulated, *inter alia*, in EXCOM Conclusion Nos. 19 and 22. EXCOM Conclusion No. 85 (1998), which also holds such obligations, had not yet been endorsed at the time.

[46] *New York Times*, 19 August 1992.

[47] Amnesty International Index: EUR 48/31/92, p. 3. In the same statement, AI equally condemns the restrictive practices of Western European states.

[48] Amnesty International Index: EUR 63/01/92, p. 43.

obligations by re-opening the border and halt forced returns, and remind the authorities that the principle of *non-refoulement* is a "norm of general international law" and therefore binding on states whether party to the 1951 Refugee Convention or not.[49] The US Committee for Refugees also strongly condemned Croatian policy, and called on Croatia not to proceed with the Agreement on Friendship and Co-operation of July 21.[50]

Both Amnesty International and the US Committee for Refugees reported the suspension of the policy to return draft-age men to Bosnia-Hercegovina after the Karlovac incident. Amnesty International understood this change in policy "as a result of pressure from international bodies".[51] USCR even spoke of "vigorous protests" and "intervention" by "international organizations" in response to the Karlovac incident, which led to the suspension.[52]

An important barometer in regard to relevant protest in this context are the actions of the United Nations High Commissioner for Refugees, as the primary representative of the international community in refugee issues. With regard to UNHCR involvement there are only indirect references. The US Committee for Refugees reported: "UNHCR argued for an approach that called on Croatia to keep its borders open, even for those refugees who will probably never receive temporary protection outside the immediate region, and Western Europe to permit entry of greater numbers of refugees".[53] A UN source mentions that "UNHCR is in constant negotiation with the Croatian government to allow the admission of those who seek refuge", but quickly adds that Croatia had already taken in more than 700,000 refugees, making burden sharing a pressing need.[54] The impression given is that UNHCR adopted a mild attitude in addressing Croatia, as it had showed hospitality to so many refugees already. Whether UNHCR also behaved moderately behind closed doors is difficult to assess. After the Karlovac incident, UNHCR "received assurances" from the Croatian Government that it would no longer continue the forced returns.[55] This implies that UNHCR was amongst the organizations that intervened with the government, and that it did so effectively. Even though there are indications that Croatia continued returns after this date, and in announcing the suspension of returns stressed the element of

[49] Amnesty International Index: EUR 48/26/92, pp. 10–11.

[50] Argent (USCR) 1992, p. 22. USCR was especially harsh in judging the international community: "The European Community has been morally spineless, and even the United States, while certainly more respectable than the EC has been, will not be bathed in glory by those who analyze the history of this period in the Balkans", USCR 1993, p. 4.

[51] Amnesty International Index: EUR 63/01/92, p. 43.

[52] Argent (USCR) 1992, p. 16.

[53] *Ibid*., p. 17.

[54] UN doc. A/48/92 S/25341, p. 26.

[55] Amnesty International Index: EUR 48/26/92, p. 10.

conditionality it felt was attached to the principle of *non-refoulement* when protecting national security,[56] it was a substantial yield.

It is difficult to draw conclusions from an *absence* of information. Undoubtedly, not every reference to protest has been obtained. However, after an extensive search, results were minimal, which indicates a void of information where there should be abundance following violation of a principle recognized at the time as a customary norm. A tell-tale sign is also that every major United Nations International Conference in that period concerned with either the situation of human rights, humanitarian, or general situation in the Former Yugoslavia, remained silent on the subject of forced returns or border closures by Croatia. A minimum deduction is, therefore, that the international community, whether represented by international organizations or by individual states, or states acting independently, did not publicly protest to the extent one would expect after such blatant violation of the principle of *non-refoulement*.

2.2. *FYR Macedonia – Kosovo 1999*

The NATO bombings of Yugoslavia commenced on 24 March 1999. The intention was to end Serb violence in Kosovo and to force Yugoslav authorities to accept the terms of the Rambouillet peace plan after the peace talks of January–March had failed. The bombings had unexpected side effects. Violence by Serb forces against the civilian population increased, and many thousands of Kosovo Albanians fled in the direction of Albania, Montenegro or FYR Macedonia, either voluntarily or after being expelled, forming yet another mass exodus. An extraordinary feature of this particular flow was the speed at which it had developed. Refugee outflows have frequently been large, but usually develop more slowly. In this case, within five days after the NATO bombings had begun, more than 130,000 Kosovar Albanian refugees arrived in Albania, FYR Macedonia and Montenegro. Two days later this figure had doubled. After nine weeks, some 860,000 persons had fled to Albania (444,600), FYR Macedonia (344,500) and Montenegro (69,900).[57]

FYR Macedonia was the least willing host for these refugees. Macedonian politicians and local media had warned for years, that if large-scale fighting

[56] *Supra*, notes 28–32.

[57] UNHCR Evaluation and Policy Analysis 2000, *The Kosovo Refugee Crisis: an independent evaluation of UNHCR's emergency preparedness and response*, February 2000, ch. 1, p. 2 (www.unhcr.ch/eval). This document has been the main source of information for this descriptive section. Barutciski and Suhrke, who were involved in this UNHCR evaluation, later published 'Lessons from the Kosovo Refugee Crisis' (*JRS* Vol. 14, No. 2, 2001), which is based on the same description of events.

erupted in Kosovo, it would close its borders.[58] Yet, UNHCR and the international community were ill prepared when FYR Macedonia actually did so in late March.[59]

FYR Macedonia had calculated that it could host 20,000 refugees and had, at the onset of the NATO airstrikes, passed this figure on to the US, the UN, NATO and the European Union, together with requests for assistance.[60] The amount of refugees hosted by FYR Macedonia in camps and private homes soon far surpassed this estimation. FYR Macedonia's unwillingness to host refugees stemmed from concerns for the internal stability of the young nation-state. It feared that large numbers of ethnic Albanian refugees entering the country would upset its ethnic balance, which was perceived as precarious already, and increase the risk of FYR Macedonia being pulled into the conflict.[61] Amnesty International pointed to the fact that the Kosovo Albanian refugees would only be on Macedonian soil temporarily, and that there was little analysis or evidence which suggested that allowing Albanian refugees to remain for a period of time to enable proper arrangement of transfers to other countries would destabilize the country.[62] In any case, the continuing unrest in FYR Macedonia shows that its ethnic situation is at least troublesome.

FYR Macedonia, too, had economic concerns. The years of conflict in the Balkans had already impacted on its economy, suffering from the sanctions imposed on the Federal Republic of Yugoslavia, its main trading partner, and the cutting off of its rail and road links with the rest of Europe. In addition, FYR Macedonia maintained that the present situation was costing USD250

[58] UNHCR Evaluation and Policy Analysis 2000, Ch. 6, p. 12.

[59] UNHCR had prepared contingency plans in 1998, which did recognize FYR Macedonia's reluctance to admit refugees, and stated: "it is expected that political and thus protection issues (question of open borders, refoulement, access to and status of refugees) will constitute the biggest challenges in a possible refugee emergency whereas assistance and logistics should not pose major problems." However, the contingency plans focus on what, at the time, UNHCR considered the most likely scenario: "The influx scenario is based on the assumption that the [Macedonian] Government will allow access to new arrivals from Kosovo and that the majority could be accommodated with Macedonian families of Albanian ethnicity", UNHCR Evaluation and Policy Analysis 2000, Ch. 6, n. 85.

[60] Report by the Committee on Migration, Refugees and Demography of the Council of Europe, Doc. 8392, 26 April 1999, p. 13. Amnesty International Report 1999, AI Index: EUR 65/03/99, p. 7.

[61] Report by the Committee on Migration, Refugees and Demography of the Council of Europe, Doc. 8392, 26 April 1999, pp. 12–13. British Helsinki Human Rights Group, 28 April 1999, p. 1. UNHCR Evaluation and Policy Analysis 2000, ch. 1, p. 5.

[62] Amnesty International Report 1999, AI Index: EUR 65/03/99, p. 11.

million a month, and had ended all prospects of international investment and tourism.[63]

To prevent any more refugees from entering the country FYR Macedonia engaged in periodic border closures. On 23 March 1999, a day before the NATO bombings started, Macedonian authorities closed the border for the first time. The border was reopened the next day, after "reported international intervention".[64] On 30 March the border was, in effect, closed again due to extensive border checks. This led to a pile-up of refugees at Blace, which became the prime locus of media coverage. By 3 April, 65,000 refugees were stranded at this border crossing, unable to enter FYR Macedonia and unable to go back.[65] On 4 April, when the clearing of the Blace border area commenced,[66] the border was opened again, but it marked the beginning of periodical border closures or slow processing of refugees that lasted well into May. During the second week of April, and again on 20 April, the refugee flow suddenly stopped temporarily. Yugoslav authorities, on their side of the border, were preventing refugees from crossing and forcing them to turn back. Several tens of thousands of refugees were thus prevented from leaving Kosovo at the Macedonian and Albanian border.[67] On 5 May, human rights organizations reported another border closure by FYR Macedonia, and a violent push-back of a group of a thousand refugees over the border with Kosovo by Macedonian border police and special forces.[68]

Border closures by Macedonian authorities occurred at each border crossing point with Kosovo. The most notorious was the Blace crossing point.

[63] Report by the Committee on Migration, Refugees and Demography of the Council of Europe, Doc. 8392, 26 April 1999, p. 13.

[64] Amnesty International Report 1999, AI Index: EUR 65/03/99, p. 7. In any case, the US Committee for refugees protested the border closing on 24 March, USCR 1999, Country Report: Macedonia, p. 1.

[65] Amnesty International Report 1999, AI Index: EUR 65/03/99, p. 3. USCR 1999, Country Report: Macedonia, p. 1.

[66] Unsatisfied with the efforts by the international community to relocate these refugees, FYR Macedonia took matters into own hands. It entered into bilateral agreements with Turkey and Albania to transfer the refugees at Blace to NATO-built camps on their territory. Macedonian authorities started bus transports during the night of 3 April. By 5 April, the Blace border crossing was cleared. UNHCR was never informed of the forced evacuation. Outrage was expressed by the media and UNHCR at the nature of these transports: excessive use of force, and no measures to prevent families from being separated, *De Volkskrant*, 8 April 1999. Amnesty International Report 1999, AI Index: EUR 65/03/99, pp. 4, 7.

[67] The cause of the reversal of the policy of expulsion by the Yugoslav authorities was unknown. It was speculated that the refugees were to be used as hostages or as a "human shield" against the bombings, *De Volkskrant*, 8 April 1999. UNHCR Evaluation and Policy Analysis 2000, ch. 6, p. 4. Report by the Committee on Migration, Refugees and Demography of the Council of Europe, Doc. 8392, 26 April 1999, p. 6.

[68] Amnesty International Report 1999, AI Index: EUR 65/03/99, p. 1. Long 1999, p. 1.

It was here that FYR Macedonia and the international community jousted over a solution for the refugee exodus. Refugees were left waiting on a small strip of no-man's-land around the border crossing. Conditions were appalling. No shelter, no sanitary facilities, and no clean water. Humanitarian agencies were denied entry to the area by the Macedonian authorities. These were likely means to coerce the international community to transport refugees directly from the border to other countries and rapidly develop a burden-sharing mechanism.[69] After such transports had indeed commenced, border closures became the means to speed up these transports. FYR Macedonia also employed what Amnesty International has characterized as an "intake out-take" method, connecting the numbers of refugees who were allowed to cross Macedonian border points to the progress of the evacuation to third countries.[70]

It is clear that FYR Macedonia's position and actions violated the principle of *non-refoulement* and the (political) international obligations in a situation of mass influx, collated under the principle of first asylum. Namely, admission of refugees to at least temporary protection, followed by international assistance, and not the other way round. Although the principle of first asylum connects burden sharing with protection, the protection obligation is not contingent upon assistance by third states.[71] This is certainly also true for adherence to the principle of *non-refoulement*. As Goodwin-Gill points out: "the peremptory character of *non-refoulement* makes it independent of principles of solidarity and burden sharing."[72]

[69] On 6 May, after the border closure and push-back of refugees described above, the Macedonian authorities issued a statement, which reflected the Macedonian position throughout the refugee crisis: "the border will remain open, but governments which want to take part of the burden will have to take the refugees directly from the border. If the international community does not show the minimum understanding and does not speed up the transport of refugees, the government will take new measures to protect the country from further destabilization", Dnevnik, 6 May 1999, taken from Amnesty International Report 1999, AI Index: EUR 65/03/99, pp. 1–2.

[70] Amnesty International Report 1999, AI Index: EUR 65/03/99, p. 8. USCR 1999, Country Report: Macedonia, p. 3, House of Commons, Select Committee on International Development 1999, para. 79.

[71] EXCOM Conclusion No. 85 (1998), para. (p): "Recognizes that international solidarity and burden-sharing are of direct importance to the satisfactory implementation of refugee protection principles; stresses, however, in this regard, that access to asylum and the meeting by States of their protection obligations should not be dependent on burden-sharing arrangements first being in place, particularly because respect for fundamental human rights and humanitarian principles is an obligation for all members of the international community."

[72] Goodwin-Gill 1996, p. 201.

2.2.1. *The International Response*

Humanitarian Response. Compared to 1992, the international humanitarian response to the Kosovo refugee crisis was more substantial. This was undoubtedly also the result of the greater role played by Western public opinion, which was fuelled by more extensive media coverage from the early stages of the crisis onwards, as well as the fact that the NATO bombings marked the beginning of the refugee exodus. Whether persons were fleeing from the bombings, or whether the exodus was a timed organized mass expulsion on the part of the Serbs, the simultaneity created the outward impression of at least partial responsibility. In any case, humanitarian assistance was swifter and more forthcoming. There was even an element of competition between the numerous humanitarian organizations to assist on the scene,[73] and between states to receive refugees.

During the first few days of the crisis, it became clear that the preparedness measures that had been put in place over the preceding months were insufficient. UNHCR and its humanitarian partners had not anticipated the size and speed of the outflow and UNHCR has been severely criticized for its initial slow response.[74]

In the words of UNHCR, a "compromise"[75] solved the situation at the Macedonian border. On 4 April 1999 UNHCR announced the Humanitarian Evacuation Programme (HEP), to which the Humanitarian Transfer Programme (HTP) would later be added. Both were unprecedented conceptual innovations in the international protection of refugees. The purpose of HEP was to quickly off-load refugees from Macedonian territory. It did so by airlifting refugees out of the region to participating countries. UNHCR called upon countries outside the region to take a quota of refugees, in line with their obligation of burden sharing. UNHCR already had offers of 90,000 places by donor governments in those early stages of the programme. By the end of the emergency, 92,000 refugees had been relocated under HEP in 29 host countries. This evacuation programme was quite contrary to UNHCR's traditional approach of keeping refugees within their region of origin, so as

[73] UN agencies, International Red Cross and Red Crescent, and some 180 NGOs were active during the crisis, UNHCR Evaluation and Policy Analysis 2000, ch. 1, p. 2.

[74] *Ibid*., pp. 4, 5. Report by the Committee on Migration, Refugees and Demography of the Council of Europe, Doc. 8392, 26 April 1999, p. 7. Also, UNHCR was deemed to not have made adequate preparations even for the numbers of refugees it *did* predict would flee Kosovo, House of Commons, Select Committee on International Development 1999, para. 12. The same report mentions: "Several weeks into the crisis we have no sense that UNHCR has as yet taken control of the situation, providing clear direction, leadership and coordination", *ibid*., para. 14.

[75] UNHCR Evaluation and Policy Analysis 2000, ch. 6, p. 3.

to be able to facilitate repatriation more easily.[76] In order to further relieve pressure on FYR Macedonia, HTP was added, which consisted of transfers of refugees from Macedonian territory to Albania. This was more in line with the preferences of asylum-weary European states, and UNHCR's traditional regional approach. But it was also introduced in order to prevent evacuations of the type undertaken earlier by FYR Macedonia at the Blace border crossing.[77] Very few refugees were relocated under HTP, however. One of the main reasons for this was the parallel existence of HEP, which provided a rapid way of obtaining a ticket to the West and was thus preferred by most refugees.[78]

Protest against Refoulement. Initially, UNHCR stood their ground and insisted that FYR Macedonia uphold the principle of first asylum.[79] Criticism of the border closure was also voiced by several individual states.[80] It must be added that UNHCR protests and concern did not address directly the principle of *non-refoulement*. They were voiced in terms of the principle of first asylum, i.e. admission.[81] They therefore only implied protest against *refoulement*.

In dealing with the Macedonian authorities at the beginning of the refugee crisis, UNHCR was in the difficult position of having to choose between a hard-line approach, and much needed humanitarian relief for refugees at the Macedonian border. Choosing to insist on traditional principles of refugee protection meant sacrificing short term achievement of protection. Moreover, there was strong government pressure headed by the US, to find a swift prac-

[76] *Ibid*., pp. 3–6.

[77] Amnesty International Report 1999, AI Index: EUR 65/03/99, p. 8.

[78] UNHCR Evaluation and Policy Analysis 2000, ch. 6, pp. 5, 8.

[79] According to the independent evaluation of UNHCR's performance (*supra*, n. 57), the UNHCR stance during these days was best characterized by an internal UNHCR memorandum, stating: "There is a need to maintain pressure on the authorities to keep borders open, allow unrestricted UNHCR access to the no-man's-land, and ease up the processing requirements for arrivals. There is also a need to strengthen our language of protest, which to date has been rather equivocal", UNHCR Evaluation and Policy Analysis 2000, ch. 6, p. 2.

[80] There is reported criticism on Macedonian policy from Minister Herfkens of the Netherlands and UK Secretary of State Clare Short, British Helsinki Human Rights Group, 28 April 1999, p. 2. The latter is also recorded to have stated, in addressing parliament: "all the people were being held in no-man's-land for days without food and sanitation and people were dying . . . Macedonia was saying, "We cannot accept refugees because of the ethnic balance in our country; fly one out and we will let one in'. Well that is a complete breach of the duty of any nation under international human rights law to care for refugees", House of Commons, Select Committee on International Development 1999, para. 79.

[81] On the current preference for the language of admission, see Goodwin-Gill 1996, p. 199.

tical solution.[82] UNHCR was simultaneously criticized for being timid by some, and rigid by others.

These were the conditions that led UNHCR to arrange the transfer of refugees from the Macedonian border. The agency was aware that the introduction of HEP and HTP marked a "giving-in",[83] and a move away from previously absolute principles in dealing with a mass influx of refugees. UNHCR attempted to present the transfers as recognition of FYR Macedonia's unique and precarious situation, and an appropriate burden sharing scheme.[84] Strictly speaking, however, they were an acceptance and therefore implicit condoning of Macedonian policy to reject refugees at the border until their transfer had been arranged.[85]

The principle of first asylum is premised on the exact reverse: admission, followed by arrangement of burden sharing. A UNHCR approach in line with its original protection mandate would have been to insist that until FYR Macedonia admit every refugee, it would not receive any international assistance at the border or within its territory. Under the circumstances such a principled stance was generally felt to be untenable.

On the whole, the tenor towards principles of international refugee law during the Kosovo crisis is best described as being perceived as *impractical*, which was illustrated by a high-level US diplomat who led negotiations over refugee admissions: "UNHCR was impossibly dogmatic on the Blace question. I told them, you can't solve that problem by citing chapter and verse from the [1951 Refugee] Convention".[86]

Outside UNHCR context, reaction to Macedonian border closure by the international community was scarce. Strong language did come from the Parliamentary Assembly of the Council of Europe in late April 1999:[87]

[82] Strategically, military access to Macedonian territory was necessary during the allied campaign. The US had therefore accepted the premise that the influx posed a national security threat to FYR Macedonia. NATO assisted in any way in dealing with the refugees on Macedonian soil. There was also US involvement in the dubious clearing of the Blace border in April 1999. FYR Macedonia made use of this bargaining position in negotiations over refugee admissions. It hinted to the US embassy on several occasions, and threatened publicly, that it would demand withdrawal of NATO troops from its territory, UNHCR Evaluation and Policy Analysis 2000, ch. 6, pp. 3, 5, 6.

[83] Some members of own UNHCR protection staff viewed HEP and HTP as "succumbing to host government blackmail", UNHCR Evaluation and Policy Analysis 2000, ch. 6, pp. 4, 7.

[84] Briefing by Mrs Sadako Ogata, United Nations High Commissioner for Refugees, to the Security Council, 5 May 1999, p. 2.

[85] See also Amnesty International Report 1999, AI Index: EUR 65/03/99, p. 11. UNHCR Evaluation and Policy Analysis 2000, ch. 6, pp. 4, 7.

[86] UNHCR Evaluation and Policy Analysis 2000, ch. 6, n. 7.

[87] Recommendation 1404 (1999) 1, 28 April 1999.

> 1. The Assembly underlines that according to the United Nations High Commissioner for Refugees (UNHCR) those fleeing Kosovo for neighbouring countries are refugees within the 1951 Geneva Convention and should be given unimpeded access to those countries, protected and treated accordingly.
>
> 10. The Assembly recommends that the Committee of Ministers:
> iii. urge the governments of Albania and "the former Yugoslav Republic of Macedonia":
>
> a. to fully comply with the principles of the 1951 Geneva Convention and UNHCR guidelines in respect of refugees from Kosovo, and in particular to admit them in safety.

Although not a condemnation of FYR Macedonia's actions, this recommendation did call upon FYR Macedonia to adhere to its international obligations. The value of this indirect protest would later be significantly reduced, however, when the Parliamentary Assembly closed the monitoring procedure for accession of FYR Macedonia to the Council of Europe, by stating:[88]

> 1. The Assembly congratulates the Macedonian nation on its hospitality towards the refugees all through the Kosovo crisis, its restraint and its determination to maintain democratic stability, as well as its co-operation with the international community, all of which has contributed to easing the dangerous situation in the Balkans. In doing so, Macedonia has honoured in an exemplary way important obligations as a member state of the Council of Europe and its commitment to seek settlement of international disputes by peaceful means. It decides therefore to close the monitoring procedure concerning "the former Yugoslav Republic of Macedonia."

3. Rejection at the Frontier

These refugee crises in the Balkans of 1992 and 1999 both involved large-scale rejection at the frontier. Unfortunately, the 1951 Refugee Convention is unclear on its application to refugees at the border,[89] and this question has therefore been a subject of debate from the beginning.[90] This section aims

[88] Doc. 8669, *Honouring of obligations and commitments by "the former Yugoslav Republic of Macedonia"*, 15 March 2000.

[89] Fitzpatrick 1996, pp. 246–247.

[90] For an overall reflection of the evolution of this debate see Robinson 1953, pp. 162–163; Grahl-Madsen 1972, p. 223; Kälin 1982, pp. 106–107; Stenberg 1989, pp. 175, 178; Weis 1995, pp. 325–343; Goodwin-Gill 1996, pp. 121–137; Noll 2000, p. 387.

to show that non-rejection at the frontier has come to be interpreted to fall within the scope of the principle of *non-refoulement*. Rejecting a refugee at the frontier is therefore synonymous with the *refoulement* of a refugee.

An inclusionary reading of rejection at the border is supported by the text of Article 33 of the 1951 Refugee Convention. Firstly, by the express complementation of the English term "return" with the French term "*refouler*". The latter is a legal term used in Belgium and France and refers to "police actions without formality which are applied to aliens which are in the country in an irregular manner or who are turned back at the frontier".[91]. Secondly, by the phrase "in any manner whatsoever", which favours inclusion. Furthermore, in line with Article 31(1) 1969 Vienna Convention on the Law of Treaties, a reading of the text of Article 33 in light of the "object and purpose" of the 1951 Refugee Convention would include non-rejection, when considering that the object and purpose of the Convention may be described as "the protection of refugees and the widest possible assurance of their fundamental rights and freedoms".[92]

The relevance of the issue of non-rejection becomes clear when realizing that a prohibition of rejection at the border implies a right of entry for asylum seekers. This "implication of fundamental sovereignty interests"[93] explains state reluctance to expressly include non-rejection within the scope of the 1951 Refugee Convention. Nevertheless, states have, in practice, come to apply the principle of *non-refoulement* to asylum seekers who present themselves at the border.[94] Also, states have expressed support for inclusion of non-rejection in their recorded views.[95] By and large, the encompassment by the principle of *non-refoulement* of non-return as well as non-rejection is firmly established.

This is even more the case on the European continent.[96] Within the EU context, Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures of the European Union[97] lists:

[91] Robinson 1953, p. 162.

[92] Goodwin-Gill 1996, p. 367.

[93] Fitzpatrick 2000, p. 296.

[94] Stenberg 1989, p. 175. Goodwin-Gill 1996, pp. 123–124.

[95] Goodwin-Gill 1996, pp. 123–124. For examples, see EXCOM Conclusions 6, 14, 21, 22 and 85.

[96] For relevant material within the Council of Europe framework, see Recommendation No. R (84) 1 regarding the Protection of persons satisfying the criteria in the 1951 Convention but who are not formally recognized as refugees, adopted by the Committee of Ministers of the Council of Europe on 25 January 1984, and Recommendation No. R (98) 15 of the Committee of Ministers to Member States on the training of officials who first come into contact with asylum seekers, in particular at border points, of 15 December 1998.

[97] OJ C 274, 19 September 1996.

> 5. The authorities responsible for border controls and local authorities must receive clear instructions so the [asylum] applications can be forwarded without delay to the competent authority.
>
> 9. Any asylum-seeker must be able to lodge an [asylum] application at the frontier. The application may then be examined to establish, prior to the decision on admission, whether it is manifestly unfounded (. . .).

The current Proposal for a Directive on minimum procedures[98] firmly includes non-rejection at the border. Its Article 3(1) reads:

> 1. This Directive shall apply to all applications for asylum at the border, at port and airport transit zones or on the territory of Member States.

Furthermore, Article 2 defines "application for asylum" as:

> (b) (. . .) an application made by a person which can be understood as a request for international protection from a Member State under the Geneva Convention. Any application for protection is presumed to be an application for asylum (. . .).

With regard to the definition of application for asylum, the original Explanatory Memorandum comments that "application for asylum is defined with reference to the (. . .) Geneva Convention. Any request by a person for protection at the border or on the territory of the Member States shall be understood to fall within the terms of the Geneva Convention (. . .)".[99]. Thus, besides laying down the obligation to examine asylum applications for EU Member States, the Commission has also forwarded its reading of the 1951 Refugee Convention as including non-rejection at the border within its scope.

Of a currently binding nature, moreover, is Article 3(1) Dublin Convention:

> Member States undertake to examine the application of any alien who applies at the border or in their territory to any one of them for asylum.

Implicitly, an obligation to examine asylum applications at the border makes rejection at the border an act of *refoulement*.[100] The Dublin Convention was concluded between the Member States of the European Union. While all parties to the Dublin Convention are also parties to the 1951 Refugee Convention – which makes the norms of the 1951 Convention part of the context

[98] Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, COM(2002) 326 final, 3 July 2002.

[99] COM(2000) 578 final, p. 7.

[100] Steenbergen, Spijkerboer, Vermeulen en Fernhout 1999, pp. 178–179. Noll 2000, p. 432.

of Article 3(1) of the Dublin Convention[101] – the Member States of the EU hereby accepted the applicability of Article 33 of the 1951 Convention at the border.[102]

The European Commission proposal for a Dublin Regulation[103] does not have a corresponding provision. It does not contain a generally formulated obligation to examine requests, at the border or otherwise. It does, however, contain a similar definition of "application for asylum" and accompanying comment in the Explanatory Memorandum as the minimum procedures Directive. Also, it states in Article 3(2):

> The application shall be examined by the Member State responsible in conformity with Council Directive . . ./. . ./EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.

The new Dublin Regulation, if adopted in its current form, would thus present a regime of non-rejection at the border equal to the current Dublin Convention.

Of final relevance is the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the European Convention). The argument has been made by Noll that from the geographical scope of applicability of Article 3 of the European Convention, as delineated by Article 1,[104] a right of entry for asylum seekers may be deduced.[105] The basis for this argument lies with a decision of the European Commission of Human Rights with regard to the geographical scope of the European Convention.[106] The Commission stresses the absence of limitation of the applicability of the European Convention to the national territories of the contracting parties. Instead, the drafters chose to apply the European Convention to everyone "within their jurisdiction". The Commission states:[107]

> (. . .) the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when the authority is exercised within their own territory but also

[101] Article 31(3) Vienna Convention on the Law of Treaties.

[102] Noll 2000, p. 432.

[103] Proposal for a Council Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodges in one of the Member States by a third-country national, COM(2001) 447 final, 26 July 2001.

[104] Article 1 European Convention of Human Rights: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention."

[105] See Noll 2000, pp. 441–445.

[106] Dec. Adm. Com. Ap. 9360/81, 28 February 1983, D&R 32.

[107] *Ibid*., pp. 214–215.

> when it is exercised abroad. As stated by the Commission in Applications Nos. 6780/74 and 6950/75, the authorised agents of the State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property "within the jurisdiction" of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.

An asylum seeker, who requests entry at the border of a contracting state to the European Convention of Human Rights, is under the authority of that state. An act or omission by the state with regard to entry affects that asylum seeker, which engages the responsibility of the state under the European Convention. More specifically, it makes Article 3 applicable, and the implicit prohibition of *refoulement* therein.[108] A rejection of a request of entry would thus arguably be contrary to Article 3.[109]

In short, in addition to general treaty interpretation of Article 33 of the 1951 Refugee Convention, the inclusion of non-rejection at the border under the prohibition of *refoulement* on the European continent can be deduced from a set of binding and non-binding regional instruments. This degree of confirmation also provides strong indication that non-rejection at the border has evolved as a regional customary international norm in Europe.

4. Mass Influx

State practice as well as elements of the drafting history of the 1951 Refugee Convention hint at an additional derogation possibility from the principle of *non-refoulement*, besides Articles 33(2) and 1(F) of the Convention, namely in the event of a mass influx of refugees. Certain passages from the *travaux préparatiores*[110] have been a source of unresolved debate with regard to the possible intention of the drafters to exclude the application of the 1951 Refugee Convention to a mass influx of refugees. The 1967 United

[108] For the European Court of Human Rights' interpretation of Article 3 as a prohibition of *refoulement*, see *inter alia*: Soering, ECHR 7 July 1989, Series A161; Cruz Varas, ECHR 20 March 1991, Series A201; Vilvarajah, ECHR 30 October 1991, Series A215; Chahal, ECHR 15 November 1996, Reports 1996-V.

[109] Noll 2000, pp. 442, 444.

[110] Comments made by the Swiss and Dutch delegates, see, *inter alia*, Goodwin-Gill 1996, pp. 121–122; Weis 1995, pp. 325–344. Fitzpatrick regularly refers to these as "confused passages" (Fitzpatrick 1996, p. 247), or "ambiguous comments" (Fitzpatrick 2000, pp. 296). In any case, for the US Supreme Court these "snippets of negotiating history" (Koh 1994, pp. 17, 34) were sufficient to validate the US policy of Haitian interdiction, see *Sale* v. *Haitian Centers Council*, Inc. 509 U.S. 155 (1993).

Nations Declaration on Territorial Asylum,[111] in its Article 3(2), contains further indication towards a mass influx exception to *non-refoulement*. While being another confirmation of the prohibition of rejection at the frontier,[112] the declaration clearly sanctions a conditional element in the principle of *non-refoulement* in situations of mass influx.

Notwithstanding the above, a mass influx exception to the principle of *non-refoulement* is, as of yet, not recognized. The text of the 1951 Refugee Convention contains no such exception, nor any opening for interpretation of its inclusion. Also, UNHCR has always emphasized the protection needs of refugees in situations of mass influx. In contemporary policy, the response to mass influx has been the development of temporary protection and burden sharing arrangements. In cases of conflict involving a mass exodus of refugees, UNHCR has promoted the admission of refugees to countries of first refuge in the direct vicinity of the conflict area, followed by assistance to the region by the international community. EXCOM Conclusion No. 22,[113] for example, states:

> 2. 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 according to the principles set out below. They should be admitted without any discrimination to race, religion, political opinion, nationality, country of origin or physical incapacity.
>
> 3. In all cases the fundamental principle of *non-refoulement* – including non-rejection at the frontier – must be scrupulously observed.

Paragraph IV of this Conclusion is concerned with burden sharing:

> (1) A mass influx may place unduly heavy burdens on certain countries; a satisfactory solution of a problem, international in scope and nature, cannot be achieved without international co-operation. States shall, within the framework of international solidarity and burden-sharing, take all necessary measures to assist, at their request, States which have admitted asylum seekers in large-scale influx situations.

This combination of protection and burden sharing later became known as the aforementioned principle of first asylum, a term which became fashionable

[111] Declaration on Territorial Asylum, GA Resolution 2312 (XXII), UN Doc. A/6716 (1967).

[112] See Article 3(1) Declaration on Territorial Asylum.

[113] Executive Committee Conclusion No. 22 (XXXII) 1981, "Protection of Asylum Seekers in Situations of Large-Scale Influx". See also EXCOM Conclusion No. 85 (1998), *supra*, n. 71.

during the Balkan crisis in the early 1990s. Although Conclusion No. 22 clearly positions *non-refoulement* as a minimum condition, the emphasis of the principle as promoted by UNHCR in the Balkans has always been on admission, rather than *refoulement*. Implications of this choice of language will be addressed in section 6.1.

In any case, the agency has always made clear that a mass influx does not warrant rejection at the frontier or otherwise return of refugees to a conflict area.

5. The Status of *Non-Refoulement* as Customary International Law: Existing Consensus

As is well known, Article 38(1)(b) of the statute of the International Court of Justice defines international custom as "evidence of a general practice accepted as law". For years the principle of *non-refoulement*, as contained in Article 33 of the 1951 Refugee Convention, has regularly been referred to as constituting customary international law.[114] While a majority of the literature has indeed found in favour of this status, it is not an uncontested finding. The most prominent opposing argument concerns the lack of general practice in certain (specially affected) regions.[115] Taking the literature as a whole, the lowest common denominator position (and therefore safest conclusion) is to accept the principle of *non-refoulement* as regional international customary law in Africa, the Americas and Europe.[116] As the cases of negative state practice examined in this work concern the European region, it is the latter regional norm that is taken as the notion to confirm or contest here. A brief reflection of this minimal consensus position of current doctrine will now follow.

The real disagreement with regard to the fulfillment of the requirements of customary international law by the principle of *non-refoulement* concerns the requirement of generality of practice. Fulfillment of the other requirements is virtually uncontested. Article 33 is deemed to be of fundamentally norm

[114] Occasional claims have been made that the principle of *non-refoulement* has even attained the status of *jus cogens* (see for example, Allain, J., "The *jus cogens* nature of *non-refoulement*", 13 IJRL (2001), pp. 533–558), which seem to be based on primarily teleological argumentation. Although it would undoubtedly be of beneficial effect to the overall international protection of refugees, the existence of a peremptory norm of *non-refoulement* can not be considered realistic. See also Hannikainen 1998, pp. 261–262.

[115] Forwarded by Kälin, see Kälin 1982. Other opponents are Feliciano and Hyndman, Goodwin-Gill 1996, p. 135.

[116] Kälin 1982, p. 65. Stenberg 1989, p. 274. See Harris on interpretation of Article 38(1)(b) of the statute of the International Court of Justice as including the possibility of regional custom, Harris 1998, p. 25.

creating character. Besides the wording being sufficiently general, the main argument is the sizable amount of state-parties to – and thus successfully applying Article 33 as a rule in practice – the 1951 Refugee Convention.[117] Instances of state rhetoric reflecting *opinio juris* with regard to the customary nature of the principle of *non-refoulement* are sufficient, especially within the United Nations or Council of Europe context.[118] Moreover, no state – party or not to the 1951 Refugee Convention – will claim it has a general right to commit *refoulement*.[119] Towards uniformity of practice[120] of the principle goes not only the high number of parties to the 1951 Refugee Convention, but also additionally those states applying, separately or in parallel, other treaty provisions that contain a *non-refoulement* norm.[121] Especially lenient has been the assessment of the requirement of consistency. In short, although serious breaches of the principle have been signaled, none have been deemed of sufficient weight to question the customary nature of the principle of *non-refoulement*.[122] Moreover, according to a number of authors, if states do act contrary to the principle, they do so with a certain attempt at justification, which indicates that they feel they are infringing upon a rule of law.[123]

The central factor for determining generality of practice in the present context has again been the number of state-parties to the 1951 Refugee Convention. Although this number is sizable – 141 states to date[124] – party-membership is not spread evenly over the different regions. In 1982, Kälin pointed to the fact that while almost all states in Western Europe, the Americas and Africa had ratified the Convention and other international *non-refoulement* instruments, the number of ratifications amongst Eastern European, Arabic and Asian states – many of which qualified as specially

[117] Stenberg 1989, pp. 270–271. Goodwin-Gill 1996, pp. 134, 168.

[118] See Stenberg 1989, p. 279 and Goodwin-Gill 1996, pp. 167–168 on UNGA Resolutions regarding *non-refoulement*. For an example within CoE context see Recommendation No. R (84) of January 1984.

[119] Stenberg 1989, p. 279. Goodwin-Gill 1996, pp. 168–169.

[120] See, *inter alia*, the *North Sea Continental Shelf* case, Judgement, ICJ Reports 1969, p. 44; Meijers 1979, pp. 14, 16–17; Stenberg 1989, p. 276.

[121] These are Article 3 Convention Against Torture; Article 3 European Convention of Human Rights; Article 7 International Covenant of Civil and Political Rights; Article 2 European Convention of Human Rights; Article 6 International Covenant of Civil and Political Rights. While there are differences (see Steenbergen, Spijkerboer, Vermeulen en Fernhout 1999, pp. 169–176), it can be stated that these different provisions all concern at least a *similar* rule.

[122] Stenberg 1989, p. 278. Goodwin-Gill 1996, pp. 130–133, 141–145, 170.

[123] Stenberg 1989, p. 279. Fitzpatrick 1996, p. 237. Goodwin-Gill 1996, pp. 168–169. This is also the central element of the reasoning of the San Remo Declaration, *supra*, n. 1.

[124] <www.unhcr.ch>, 5 December 2002.

affected by the refugee issue – was very low.[125] Taking into account ratifications of the Convention since 1982 in these regions,[126] party-membership in Eastern Europe is now widespread. However, the Arabic and Asian regions show no significant increase in Convention ratifications.[127] Considering that Asia hosts several of the world's major refugee areas, and the *refoulement* history of that particular region,[128] it seems plausible that Kälin's argument still stands: practice towards the principle of *non-refoulement* cannot be considered sufficiently widespread and representative because too many affected states are not included in the practice. It can therefore not be considered to be universal customary international law.[129]

The opposing view argues that practice *is* sufficiently widespread and representative, because the inclusion of Europe, the Americas and Africa amounts to a majority of specially affected states worldwide.[130] For a while international law doctrine had indeed settled on finding a majority of specially affected states sufficient.[131] The majority argument for declaring generality of practice seems unreasonable as well as undesirable, however. In general terms, thus superimposing a customary norm upon regions with insufficient history or tradition with the particular rule – although arguably of general beneficial effect to adherence to, in the present case, the principle of *non-refoulement* in these regions – goes against the very fabric of customary law, if one views the latter with Villiger as arising out of consensus in an international community where states participate as equals in forming customary law.[132] More specifically, one must doubt whether it is beneficial to create the

[125] Kälin 1982, p. 65.

[126] Since 1982 Armenia, Azerbaijan, Belarus, Bulgaria, Cambodia, China, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyzstan, Republic of Korea, Latvia, Lithuania, Moldova, Poland, Romania, Russian Federation, Slovakia, Slovenia, Tajikistan, Turkmenistan and Ukraine have joined. In 1982, Kälin had only Israel, Sudan, Yemen, Egypt, Iran, Japan and the Philippines to consider.

[127] The majority of Asian states have still ratified neither the Convention nor the 1967 Protocol. In the Middle East, only Iran, Israel, Sudan and Yemen are party to the Convention and have ratified the Protocol. The remaining ten – Bahrain, Iraq, Jordan, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria and the United Arab Emirates – have ratified neither.

[128] See in general Muntarbhorn, *The Status of Refugees in Asia*, Oxford, Clarendon Press, 1992.

[129] Kälin did view the principle of *non-refoulement* as customary international customary law *in statu nascendi*, motivated by the then recent ratifications by Egypt, Japan, Yemen and the Philippines, and a perceivably changing attitude towards the principle in these regions, Kälin 1982, pp. 72–74. Taking into account the maturity of this trend in Eastern Europe, and its, albeit slow, continuation in the Arabic and Asian regions, this view is arguably also still valid.

[130] Stenberg 1989, p. 274.

[131] Meijers 1979, p. 20. Stenberg 1989, p. 275.

[132] Villiger 1985, p. 39.

contradictory situation of declaring the principle of *non-refoulement* universal customary international law, while several main refugee areas have a history of negative practice and still do not adhere to the principle. Whether for similar reasons or others, more recently, doctrine has moved in the direction of recognizing the possibility that the non-acceptance of a practice by certain important actors could prevent the formation of a customary rule, even in the presence of a majority of adhering specially affected states.[133]

In summary, it is arguable that the nature of the principle of *non-refoulement* as universal customary international law has never been definitely established. The relevant conclusion for the continuation of this article is that long term agreement has existed on the existence of a regional customary international norm of *non-refoulement* in Europe.

6. The Status of *Non-Refoulement* as Customary International Law Revised

As a general description, two main determinants of the creation and evolution of international customary norms are state practice and reaction to that practice by other states. Taking the refugee crises of Croatia and FYR Macedonia as a whole, the above described violations, more than depicting the discontinued existence of the customary norm of *non-refoulement* altogether, seem to support the incorporation of an exception to the existing norm in case of mass influx. The primary focus of the following analysis is thus on the creation of a new customary norm, and not on the demise of an existing norm. These two forms of change in a customary regime are not mutually exclusive, however. Rather the opposite. Firstly, strictly speaking, the finding of a new customary norm would logically entail the demise of the previous, as it is replaced. Secondly, the finding of an *incomplete* evolution of a new customary norm can still mean the ending for the previous. Even if the new norm does not meet all the requirements, it can, at the very minimum, provide sufficient indication that the existing norm no longer has any right of recognition.

Before a breakdown of the facts into requirements of customary international law, the following will first discuss the response to both cases of *refoulement* and the role of international reaction to state practice in the evolution of customary international law, and formulate an appropriate international response to border closures in situations of mass influx in particular. Finally, section 6.3 will look at the case studies from the perspective of the doctrine of necessity.

[133] ILA Statement of principles of customary international law 2000, p. 26.

6.1. *Protest and Tacit Acceptance*

When regarding the protests that were made concerning *refoulement*, even the most substantial UNHCR protest after the return of Bosnian refugees from Karlovac in August 1992 is of relative value. Protest against violation of an international custom should not be behind closed doors. When a principle of such standard is breached, the international community should address the violation, and it should do so in public. Not only as a matter of principle, but also as a matter of law.[134] Of major significance is, furthermore, that the Croatian border closure, each rejection at the border equally being an act of *refoulement*, received no attention in terms of protest. Similarly, protest against the border closure of FYR Macedonia must be put in perspective, while the protests did not concern *refoulement* directly: UNHCR chose to avoid the laden term "*refoulement*", and preferred the softer language of admission. Although more conducive to results in negotiations in a sensitive situation with many political and strategic features, it meant that clearly addressing what is the heart of the matter – *refoulement* of refugees – was avoided. This is odd, given the involvement of a principle perceived as customary international law. Also, the level of protest was not maintained. The introduction of HEP and HTP largely neutralized the protest that had taken place up to that point.

The modest measure of protest from the international community against *refoulement* can be explained under the circumstances of each of the two cases. In 1992, UNHCR had to take into account that Croatia was already filled to the brim with refugees. The shortcomings in burden sharing and international assistance and the consequences this entailed, moreover, explain the absence of (individual) state protest; European states especially lacked the moral credibility to reproach Croatia's actions. In 1999, the Macedonian tactic of purposefully holding refugees in border areas in worrying humanitarian conditions proved successful. UNHCR understandably sought the short-term solution of providing protection and humanitarian relief for the thousands waiting at the border. In addition, FYR Macedonia's strategic importance in the war necessitated a degree of care by the international community in approaching the Macedonian authorities.

However, these factors are of little influence for the purposes of assessment of the consequences of practice and subsequent state reaction. Within an analysis of the requirements of customary international law, circumstantial *understanding* for a contrary practice and the lack of protest it provokes, plays a very limited role.

[134] In order to "count", verbal acts such as protests must be public, ILA Statement of principles of customary international law 2000, p. 15.

It can hardly be ignorance on the part of states and international organizations of the importance of protest in the formation and evolution of customary international law that lies at the root of the tepid overall reaction. Regardless, however, of awareness, intent, and motivation, it is this softly-softly approach that has affected most the status of *non-refoulement* as a regional European custom, more so than the individual actions of Croatia and FYR Macedonia.

Change in a customary regime is instigated by *defection*.[135] The means by which to defect is for states to express their disagreement with an existing rule, which can be done by statements or votes, but also by abstaining from its exercise, or by adhering to a different practice; in other words, to breach the existing rule.[136] Each instigation of a new, perhaps contrary, practice contains the seed for change, which subsequently depends on support for, or opposition to the new practice by other states. Protest is relevant in this context in two ways. Firstly, the means by which to oppose the development of a new practice and possible customary norm is to publicly protest.[137] Secondly, *absence* of protest, according to the doctrine of *tacit acceptance*, does not have a neutral qualification, but denotes support.[138] If other states, provided they are aware of the new practice,[139] refrain from response or respond insufficiently, their consent is assumed and they are "counted in". Such an informed passive attitude not only constitutes a possible reaction to a new practice, but may also go towards evidence of the new practice itself. Villiger notes: "passive conduct may constitute part of a *general practice* and thus contribute towards the formation (. . .) of a customary rule".[140] A lack of reaction is thus identified with actual practice, the rationale being that a state did not "expressly or impliedly disclose its dissatisfaction with an emerging rule over a longer period of time in situations where other States could, in good faith, have expected the State to do so".[141] Presumably, this permitted period of time for response varies. In case of violation of the principle of *non-refoulement* in a (emergency) situation of mass influx, one would expect near instant response. In any case, more significant protest against *refoulement* by Croatia and FYR Macedonia was not forthcoming at a later date, either.[142]

135 Brownlie 1990, p. 11.

136 Villiger 1985, p. 15.

137 Villiger 1985, p. 16. Brownlie 1990, p. 10. ILA Statement of principles of customary international law 2000, p. 15.

138 Meijers 1979, pp. 22–23. Villiger 1985, pp. 16–18, 20. Brownlie 1990, pp. 6, 10. ILA Statement of principles of customary international law 2000, p. 27.

139 Villiger 1985, pp. 20, 24–25.

140 *Ibid*., p. 18.

141 *Ibid*., p. 19.

142 A note must be made here with regard to the Croatian case. The statement by Croatian authorities after the Karlovac incident – suspending the return of Bosnian refugees and recog-

The impression then surfaces of a new European practice towards incorporating mass influx as an exception to the principle of *non-refoulement*, instigated by Croatia and FYR Macedonia, and accepted, but also contributed to, by the international community. And perhaps a new customary rule.

6.1.1. *Formulation of Protest*

What, then, would have been an appropriate response in light of protecting the principle of *non-refoulement* in a situation of mass influx? Here, the role of UNHCR and that of states and state organizations should be separated. As shown most clearly by the Macedonian situation, UNCHR's protection mandate is an obstacle to its ability for protection of (abstract) principles of international refugee protection from a long term perspective and on the general level. Recalling the predicament in which the agency found itself in having to choose between short term humanitarian relief and long term refugee protection, the events at the Macedonian border make clear that UNCHR will, rightfully and true to its purpose, opt for direct fulfillment of its mandate in mass influx situations. The role of general watchdog of the principle of *non-refoulement*, and consequently the status of the principle in international law, thus falls primarily to states. Unhindered by the obligation to focus on the grassroot level of humanitarian relief during a mass influx of refugees, states are more able to take into account, and should therefore be more mindful of, the overall consequences for international refugee protection.

On this level, the above has shown that protest is essential. In the circumstances of the two case studies chosen, protesting was politically sensitive. The common element of both situations – which will likely surface again during future occurrences – was the demand of burden sharing by a state, bordering a conflict area and afflicted by a mass influx, the non-compliance with which would lead to (more) rejection at the frontier of refugees. In considering what would be an appropriate international reaction in terms of protecting the principle of *non-refoulement*, it must be noted that providing international assistance and protest against *refoulement* are not mutually exclusive, as opposed to the impression that was created by especially the response to the Kosovo refugee crisis. In fact, burden sharing by states

nizing the violation of their rights – acknowledged a breach of an international obligation. After this point, protest by the international community was therefore no longer required for affirmation of the existence of that obligation. A relevant period, however, lay before that statement. There was roughly a month between reports of the first incidents of *refoulement* and the statement by Granić in mid-August. It is in this period that the required "near instant public protest" in affirmation of the principle of *non-refoulement* should have occurred, but was absent. Moreover, not addressed by this statement was the Croatian border closure, the matter which also went entirely without international protest.

provides the political vehicle by which protest is possible, regardless of the particular sensitivities of a situation. At every extension of humanitarian, financial or logistical assistance, or instance of "adoption" of asylum seekers – thereby satisfying what the afflicted state set out to achieve – the international community is able to freely protest any mistreatment of refugees or breach of international obligations without repercussions from the afflicted state. This way, both the short and long term interests of the refugee are taken into account, as well as the interests of states neighbouring a conflict region.

6.2. *Requirements of Customary International Law*

In 1982, Hyndman recognized that many states made reservations to the principle of *non-refoulement* in the case of threats to national security, or in case of a mass influx: "(. . .) the oft-repeated (. . .) exceptions cannot be ignored and may be indicative that if *non-refoulement* has become a binding principle it has become so with these limitations".[143] *Goodwin-Gill* is also of the opinion that 'the practice of States indicates that a significant element of *contingency* attaches to the obligation, particularly in situations of mass influx that may constitute a threat to the security of the receiving State'.[144]

Authors have acknowledged the possibility of change in a customary regime.[145] Dissenting practice, if below a certain thresh-hold, may be construed as violations of an otherwise binding rule. If the practice goes beyond said thresh-hold, it may lead to the demise of the rule. The other possibility is that "what appears at first glance (. . .) to be inconsistent practice may well contain as a common denominator a general rule".[146] Whether the principle of *non-refoulement* as a regional European international customary rule presently exists in some new modified norm will now be discussed.

6.2.1. *Fundamentally Norm Creating Character*

As this requirement only applies when regarding the possible evolution of a treaty provision into customary law, it does not apply here. The origin of a possible customary norm of *non-refoulement* has always been Article 33 of the 1951 Refugee Convention. However, as doctrine stands, Article 33 does not, by itself or within the wider context of the 1951 Convention, allow for an exception in case of a mass influx, and therefore can not form the subject of the present study. We are here concerned with the evolution of one customary norm into another.

[143] Goodwin-Gill 1996, p. 135.
[144] *Ibid*., p. 169.
[145] Brownlie 1990, p. 11.
[146] Villiger 1985, p. 23.

As a future re-interpretation of Article 33 to include the mass influx exception is not unrealistic, it is worth speculating for a moment whether the treaty provision of Article 33 would in that case still be of fundamental norm creating character – *suitable* for forming a customary norm.[147] That a treaty provision allows for exceptions – as is the case with the principle of *non-refoulement* – does not of itself deprive the provision of its potentially norm creating character.[148] However, ICJ case law shows unsuitable treaty provisions are those which, for example, cease to apply in case of a contrary agreement between states, are subject to reservations, or subject to derogation in times of emergency.[149] A mass influx of refugees would certainly fall within the latter category. Also, one must wonder whether the incorporation of such an exception would not make the content of the treaty provision insufficiently determined, due to the subjective nature of the term mass influx.[150] In all, the suitability for forming the basis of a customary norm of a possible treaty provision of *non-refoulement* with a mass influx exception is open to doubt.

6.2.2. *Generality of Practice*

Universality of state practice is not required, but it must be substantial.[151] In the words of the ICJ, the requirement of generality is fulfilled if practice is *very widespread and representative*, and includes those states whose *interests are specially affected*.[152] The required amount of defected states able to establish a sufficiently widespread and representative practice from which a new customary rule may be decuced is higher or lower, depending on the amount of adhering states to the previous rule.[153] Of the total of European states, only Croatia and FYR Macedonia expressly dissented from the existing principle of *non-refoulement* by exercising a contrary practice. Recalling, however, that other European states may be assumed to also adhere to new practice

147 *North Sea Continental Shelf* case, Judgement, ICJ Reports 1969, p. 43. The norm has to be able to determine future behaviour of states in any number of situations and apply to an unlimited, general number of subjects, Meijers 1979, p. 7; Stenberg 1989, p. 270.

148 Goodwin-Gill notes: "That *refoulement* may be permitted in exceptional circumstances does not deny this premise, but rather indicates the boundaries of discretion", Goodwin-Gill 1996, p. 168.

149 Stenberg 1989, pp. 270–271, and ch. 2 and 6.

150 Though clarity of content of the rule primarily determines whether states apply a similar rule, and thus concerns the uniformity of practice requirement, it also determines the suitability of the content of a treaty provision in the potential norm-creating sense.

151 Stenberg 1989, p. 274. ILA Statement of principles of customary international law 2000, p. 23.

152 *North Sea Continental Shelf* case, p. 43. See also Meijers 1979, pp. 8, 19–20; Kälin 1982, p. 63; Stenberg 1989, pp. 274–275.

153 Villiger 1985, p. 17.

on the basis of their acquiescence, this low number of express dissent does not prevent the practice from qualifying as general.

Additionally, in the present cases, one cannot ignore the more active involvement in Croatian and Macedonian practice by the international community, including European states. The rest of Europe refused to admit trains with Bosnian refugees, and instantly imposed visa requirements. Although not equal to a border closure, the purposeful introduction of visa requirements formed at least a major barrier to entry of this mass influx. The result of this policy was, furthermore, an aggravation of the state in which Croatia found itself. Reluctance in admitting Bosnian refugees pervaded through the entire response to this first Balkan crisis.[154] In 1999, airlifting Kosovar Albanian refugees from the Macedonian borders to other countries condoned mass rejection at the frontier, and formed a participation in a practice contrary to the previous protection-before-burden-sharing tradition.

A final argument is that during the last decade Croatia and FYR Macedonia, together with other Balkan states, would certainly qualify as the most specially affected states in the European region by the refugee issue. Taking for a moment the converse perspective, it will be difficult to maintain that without the participation of these Balkan states European practice with regard to the existing *unconditional* customary rule of *non-refoulement* is still sufficiently widespread and representative.

6.2.3. *Uniformity and Consistency of Practice*

Even though this article is concerned with the possible presence of a consistent practice in favour of a customary norm of *non-refoulement* made conditional upon the absence of a situation of mass influx, it is nevertheless worth briefly considering the possible *in*consistency of the current unconditional norm.

The finding of inconsistent practice is difficult to ascertain. This is due to an ICJ rule of thumb to view contrary state practice first and foremost as permissible breaches, as formulated in the *Nicaragua* case[155] – "permissible" in the sense that they will not lead to a finding of inconsistent practice and

[154] Regional containment was the prime object. The introduction of the concept of "preventive" protection went even a step further: the creation of so called safety zones with UN presence inside Bosnia-Hercegovina in 1993, which were to prevent flight in the first place, by enabling refugees to remain inside Bosnian territory. Unwillingness to provide asylum was clearly the main motivation, but the officially stated rational was that keeping Bosnians inside Bosnia-Hercegovina meant to "oppose ethnic cleansing". This unconvincing notion suggests that the opposite would have been to stimulate ethnic cleansing, when it is simply recognition of the protection needs of a certain group, as rightfully pointed out at the time by USCR, see Argent 1992, p. 19.

[155] *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, p. 98.

hence not affect the customary status of a rule. There is thus a resulting tendency of authors to view irregular practice as breaches of a current rule which *confirm* the rule, rather than indicate its ending or evolution into a new rule.[156] The main reason for this lenient attitude towards inconsistency is probably the view that an overly strict test would jeopardize the formation of custom; that examining instances of state practice in too much detail would go against the general, flexible nature that is characteristic of customary international law.[157] It must be said that this is a matter of opinion, and moreover one which seems paradoxical, as the consequence of this approach to inconsistency is that an international custom is particularly hard to do away with once established, hence all but flexible.

Difficult, but not impossible. Qualifying contrary practice as permissible breaches of an existing rule is the predominant finding and first reaction, but it does not exclude the opposite. Much is unclear with regard to the application of the requirement of consistency, only that it is a matter of discretion with a considerable amount of freedom.[158] Closest to a working definition, for lack of more direction in literature and case law, would be that this requirement is fulfilled as long as practice is not *too* inconsistent; does not include breaches which are *too serious*. Only past a certain threshold does a violation render practice inconsistent. Making use of this degree of freedom that such subjective, and therefore even potentially opportunistic, interpretation of the requirement offers, a possible finding would then be that, yes, the *refoulement* by Croatia and FYR Macedonia constitute violations which are sufficiently serious to declare practice inconsistent. In the present cases the threshold or dividing line of "seriousness" is presented by "protest", while absence of protest means implicit *approval* by the international community. The factor that caused the overspill is thus the lack of reaction by the international community.

Following the ICJ in the *Nicaragua* case, the decisive factor for the interpretation of a violation as a permissible breach is whether the violating state forwards an exception as justifying its (irregular) behaviour.[159] Translated to the present cases, mass influx and resulting danger to national security could be viewed as the appeal to exception and justification by Croatia and FYR Macedonia. This would also form a justification for the lack of protest on part of the international community. Such an interpretation would, contrary

[156] For examples with regard to *non-refoulement*, see Stenberg 1989, p. 278; Goodwin-Gill 1996, pp. 130–133, 141–145, 170.

[157] As expressed by Villiger, Villiger 1985, p. 23.

[158] Brownlie 1990, p. 5. See also Villiger 1985, p. 22. For an example of an ICJ finding of inconsistency, see the *Asylum* case, Judgement, ICJ Reports 1950.

[159] *Military and Paramilitary Activities in and against Nicaragua*, ICJ Reports 1986, p. 98.

to the above, prove the continued existence of the unconditional customary norm of *non-refoulement*. However, such reasoning leads to a strange situation, which ends with the premise – and leads back to the object of this research – that *the exception has in fact become the rule*. Namely, according to accepted standards valid at the time (and perhaps valid still), mass influx is not a circumstance which warrants *refoulement*.[160] This was true for the treaty norm as well as the customary norm. Croatia and FYR Macedonia appealed to a non-existing exception, one which could not justify their actions. This does not render the argument invalid, because what counts in this context is the "attempt at" a justification. But, the consequence nevertheless is that accepting mass influx as a justification for the contrary practice for purposes of proving that it shows merely a permissible exception to the existing (unconditional) customary norm of *non-refoulement*, unavoidably means accepting mass influx as an exception to the principle of *non-refoulement* and therefore indicates a *conditional* norm.

This illustrates what already pervades from the factual events, which point less towards the termination of the customary norm, and more towards the incorporation of a certain conditionality into the existing norm. The two Balkan refugee crises are not the only cases which exemplify this trend in state practice. Stepping for a moment outside the European context, one may also mention rejection at the Pakistani border of Afghan refugees, Haitian interdiction,[161] and the rejection of Kurds at the Turkish border following the Gulf War. Although arguably in the latter two cases mass influx in and of itself was not forwarded as the exception that permitted *refoulement* – justifications concerned the non-applicability of the 1951 Refugee Convention on the high seas, and the presence of an internal flight alternative in Iraq, respectively – these examples all clearly signal that the attitude of states towards the principle of *non-refoulement* changes in the face of a mass influx.

Showing actual fulfilment of the requirement of consistency for this new practice of allowing exception to *non-refoulement* in case of mass influx is, however, another matter. The mere existence of exceptions to a rule – Articles 33(2) and 1(f) for example – does not prevent a rule from attaining customary status.[162] But distinguishing consistency of application of a rule to which exceptions are allowed is harder, and in principle necessarily *in*consistent,

[160] Whereas the non-applicability of the 1951 Refugee Convention and the presence of a safe area, for example, such as in the Haitian interdiction case and the 1991 rejection of Kurds at the Turkish border, *would* provide valid and accepted justification, as they are recognised as conditions not requiring the granting of protection.

[161] The US policy of interdicting Haitian asylum seekers on the high seas and their subsequent return stretched over a protracted period, which concerned certain periods of mass influx.

[162] *Supra*, n. 150.

because sometimes it will be applied and sometimes not. In this more difficult case of a possible exception to the rule *qua rule* similar behaviour can still arise, however, if the exception is applied in similar situations and according to similar standards. Following this view of consistency – similar behaviour in similar circumstances[163] – state practice in the present cases perhaps shows a sufficient similarity. "Mass influx", as a concept, however, is a complicating factor here. One may ask whether its malleable nature does not stand in the way of being able to distinguish similar situations, and make it susceptible to different standards. What constitutes a mass influx depends on the country involved, its size and internal situation. Different countries will claim threats to national security at different degrees of influx. Even in the clear and objective mass influx situations discussed in this article, FYR Macedonia's limit, for example, was reached earlier than might have been the case for other countries, due to its subjective situation in terms of ethnic balance.[164]

Secondly, there is the question of whether two instances of practice on the European continent are sufficient to establish a newly consistent practice. Although no particular number of instances of practice, or any particular duration,[165] are required for a practice to be recognized as custom, it does of course play a role in being able to distinguish consistency. However, as noted, the Balkan crises fit within the wider trend of state practice distinguishable also outside the European region. Also, insofar as an "attitude" of the international community may be measurable or distinguishable, what lay behind the hesitation in protesting against *refoulement* by Croatia and FYR Macedonia seems to be the feeling that, under the circumstances, full compliance with the principle of *non-refoulement* could not be expected of these countries. One thus expects that a next crisis will bring a similar response.

Finally, the fulfilment of the requirement of *uniformity* of practice of the conditional norm of *non-refoulement* may also be contested, partly due to the same arguments. The incorporation of an insufficiently delineated exception renders the content of what would be a new customary norm less well defined. In addition, Article 33 of the 1951 Refugee Convention is no longer the basis for the modified customary norm of *non-refoulement* under examination here. The previous insurance that states were applying the same rule

163 Meijers 1979, pp. 16–17.

164 Arguably, existing exceptions to the principle of *non-refoulement* in Articles 33(2) and 1(f) equally contain subjective concepts (relating to "national security"), but which have not stood in the way of the principle being considered as custom in the past. These clauses, however, are applied to individuals on a case by case basis. The interests involved here are thus far less great for a state than they are in a mass influx situation, and therefore less prone to significant deviations in interpretation.

165 Brownlie 1990, p. 5. ILA Statement of principles of customary international law 2000, p. 20.

due to adherence to the same international instrument is therefore not valid. In other words, the guarantees that states are applying the same rule with similar content and meaning have been reduced.

6.2.4. Opinio juris

One could argue that the importance of *opinio juris* as a requirement of customary international law is receding. The accompanying conviction on the part of a state that it is complying with a binding norm when exercising certain behaviour[166] is increasingly simply assumed when a practice can be distinguished. Its remaining active role now lies more with *dis*proving any development in the customary regime – with demonstrating an *opinio non juris*.[167]

In fair assessment, it cannot be said that there exists an *opinio juris* on the European continent, opposing the principle of *non-refoulement* (*opinio non juris*). Disregarding for a moment the relative silence in response to Croatian and Macedonian *refoulement* of refugees, European states continue to proclaim their adherence and support to the principle of *non-refoulement*. The Balkan refugee crises are, however, indicative of an *opinio juris* with regard to the incorporation of a mass influx exception.

Firstly, when accepting the above argumentation of the presence of a general European practice allowing exception to the principle in situation of mass influx, a corresponding (*communis*) *opinio juris* may be derived. Secondly, when regarding *opinio juris* separately from practice, absence of sufficient protest is of importance. Absence of publicly voiced dissent, when dissent is expected and required, gives the impression that the *refoulement* of refugees under these circumstances was deemed to be in accordance with the rules. In other words, it shows an *opinio juris* that *refoulement* is justified in situation of mass influx.[168] Thirdly, besides meaningful silence, there was also active expression of state opinion on the part of Croatia and FYR Macedonia and, albeit less clearly, by certain sections of the international community.[169]

In summary of the above application of the requirements of customary international law, a case can be made for the presence of a general practice and *opinio juris* in favour of a mass influx exception to the *non-refoulement* norm. There is doubt, however, with regard to the fulfillment of the requirement of uniformity and consistency of practice as of yet. For the sake of

[166] Meijers 1979, p. 7. Brownlie 1990, p. 70. ILA Statement of principles of customary international law 2000, p. 32.

[167] ILA Statement of principles of customary international law 2000, pp. 30–34, 39.

[168] Or, *a contrario*, protest would have provided an *opinio non juris* as to the proposed change in the customary regime to include an exception to the principle of *non-refoulement*.

[169] *Supra*, notes 29, 69, 82, 86.

forwarding a classification, this latter finding means that it is possible to consider the new norm as one of insufficient maturity, requiring additional confirming practice with the passage of time. In other words, it might qualify as customary law *in statu nascendi*.

6.3. *Necessity*

A few final words are reserved here for a discussion of the case studies of this article in terms of the doctrine of necessity. The dissenting practice by Croatia and FYR Macedonia and their respective explanations for their actions could arguably be interpreted as invokations of a circumstance precluding wrongfulness within the meaning of Article 25[170] of the draft articles on Responsibility of States for internationally wrongful acts.[171] This could shed a different light on events. It would explain the actions of Croatia and FYR Macedonia as resulting from necessity, instead of the mass influx exception to the principle of *non-refoulement*. However, it is not certain whether the two cases qualify as successful invokations of necessity, as the following application of draft Article 25 will indicate.[172] Secondly, the argument will be made that accepting derogation from the principle of *non-refoulement* in situations of mass influx as necessity implies recognition of the conditional customary norm of *non-refoulement*.

[170] Article 25

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
   (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
   (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
   (a) The international obligation in question excludes the possibility of invoking necessity; or
   (b) The State has contributed to the situation of necessity.

[171] International Law Commission, "Draft articles on Responsibility of States for internationally wrongful acts", *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), ch.IV.E.1, November 2001.

[172] An elaboration on the status and binding nature of the articles on state responsibility, as they stand and if and when finally adopted, falls outside the scope of this article. The point of relevance is that the ICJ has made specific references to the draft article concerning necessity (now Article 25), and has made clear that its content reflects a rule of customary international law (*Gabčíkovo-Nagymaros Project* case, Judgement, ICJ Reports 1997, pp. 40–41) The content of draft Article 25 can thus be applied in determining whether a plea qualifies as necessity.

The preclusion of wrongfulness of a breach of an international obligation by invoking necessity will only be accepted in rare cases. This exceptional nature is reflected in the negative phrasing of Article 25 and the strict conditions it contains.[173] Overall, the presence of an "irreconcilable conflict"[174] is required between an essential interest of a state and one of its obligations. The International Law Commission points out that this can only be the case if there are no "other (otherwise lawful) means available, even if they may be more costly or less convenient",[175] and after all other means have failed.[176] In other words, the breach of the obligation must be 'the only way', as formulated in Article 25(1)(a).

Such irreconcilable conflict existed in the view of Croatia and FYR Macedonia between the obligation to adhere to the principle of *non-refoulement* and their national security, which was being threatened by economic pressure and potential social or ethnic unrest due to a mass influx of refugees. Looking at the Macedonian situation one can argue that the rejection of refugees at the border was not applied as the last resort option which Article 25 requires. Admittedly, the authorities did not close the border until after the previously stated capacity had been exceeded, but Macedonian officials had always made clear that border closure would be their response to a Kosovar refugee crisis. Periodical border closure indeed took place immediately at the beginning of the mass exodus, and moreover, without a sufficient attempt at the alternative means; the traditional first asylum approach of entry and subsequent international assistance. This option was explicitly refused by Macedonian authorities during negotiations over the refugee situation, as well as publicly. Secondly, when further considering the requirements of Article 25(1)(a), the presence of a situation constituting a "grave and imminent peril" is in question. The International Law Commission comments that such peril has to be objectively established and not merely apprehended as possible, and is not solely at the judgement of the invoking state.[177] It then adds that "a measure of uncertainty about the future does not necessarily disqualify (. . .) necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time",[178] which formulates the minimum requirement. The criticism of Amnesty International,[179] pointing out that there was little analysis or evidence of potential destabilization of the country in the

[173] Commentaries to the draft articles, pp. 194–195, 200–202.
[174] *Ibid*., p. 195.
[175] *Ibid*., p. 203.
[176] *Ibid*., p. 199.
[177] *Ibid*., pp. 202–203
[178] *Ibid*., p. 203.
[179] *Supra*, n. 62.

case of temporary stay of Kosovar Albanians allowing for the arrangement of transport to third countries, suggests that fulfilment of this requirement is disputed.

Stronger arguments opposing a successful invokation of necessity exist with regard to Croatia. Croatia's actions, considering the lack of international assistance and the many thousands of refugees it had hosted before it closed its borders and returned refugees, came closer to constituting last resort measures in light of its economic situation and the potential "social explosion"[180] it was facing. However, there was an additional element to the Croatian situation which is relevant here, namely that Croatia was a party in the war with Serbia that caused the refugee flow. Of decisive importance in this regard is the consideration of Croatia's other motive for the rejection and return of Bosnian refugees: the increase of persons under arms in the Bosnian forces to fight the common Serbian aggressor. Committing *refoulement* to relieve economic and social pressure on a country is one thing, but committing *refoulement* in order to benefit pro-actively from its consequences by increasing the military capacity of an ally is quite another.[181] Relating this military motivation to Article 25, it can be argued that the return of refugees by Croatia to serve a self-interest of this kind in a situation which was partly created by Croatia would ensure any appeal to necessity would be invalid. More accurately, it creates tension with paragraphs (1)(a) and (2)(b) of draft Article 25.

While the preservation of one's nation is an essential interest, and the increase of the military capacity of an ally in time of war would arguably serve – safeguard – that interest, the *refoulement* of refugees to achieve that increase can not qualify as the only way. It is superfluous to state that *refoulement* and the increase of persons under arms in a neighbouring country are not intrinsically linked in such a relationship of dependency. Hypothetically speaking, only in the event that the increase in capacity consisting of potential or returned refugees would tip the balance in the war could this be considered as qualifying as a last resort measure in the formal sense, but such does not form a credible argument and is impossible to establish. An "irreconcilable conflict" between the preservation of Croatia and its obligation not to *refoul* in this context can not be distinguished.

With regard to paragraph (2)(b), it can be argued that creating the need for a maximum number of persons under arms under total allied forces by waging war, would form a contribution to the situation of necessity of returning

[180] *Supra*, n. 29.

[181] It constitutes an "invalid" use of an own violation of *non-refoulement* so to speak, something the drafters of the 1951 Refugee Convention could not have foreseen.

refugees to, or containing refugees in, a country of persecution to increase this maximum, if such necessity would objectively arise. This excludes Croatia from the possibility of invoking necessity for the *refoulement* of refugees.

In summary, there are obstacles to qualifying both cases as successful invocations of necessity under draft Article 25. Returning to the context of customary international law, however, necessity does characterize the *attempt* at justification which was made by Croatia and FYR Macedonia. It classifies the appeal to exception after a violation, which is relevant to the consistency of practice of a customary norm and the accompanying *Nicaragua* rule as discussed above.[182] Recalling the ICJ reasoning, it is the attempt at justification alone that confirms an existing customary rule; it qualifies the violation of that rule as permissible in the sense that it does not affect its customary status. However, I reiterate the argument made in this regard that application of the *Nicaragua* approach would confirm the conditional customary norm of *non-refoulement*, as it implies recognition of the mass influx exception to *non-refoulement*. This reasoning does not change when rephrasing the appeal to exception in terms of a necessity plea, as the content of the appeal – mass influx and resulting danger to national security – remains the same. Also in the event that the actions and statements of Croatia and FYR Macedonia could be considered valid necessity pleas, the existing customary norm of *non-refoulement* would still be affected. To qualify a mass influx of refugees and the danger this poses to national security as a circumstance precluding the wrongfulness of *refoulement* would standardize the mass influx exception to *non-refoulement*. It would make the exception part of the rule. To accept that a mass influx is a situation in which *refoulement* may be necessary would sanction this state practice in future cases, and implies the incorporation of the mass influx exception in the customary norm of *non-refoulement*.

7. Conclusions

Following the natural evolution of humanitarian principles which place a burden upon states, the principle of *non-refoulement* has been losing ground from the start. Restrictive state policies in the field of asylum have continuously tested the boundaries of the 1951 Refugee Convention in attempting to identify the minimum obligations contained therein.[183] As a result, *non-refoulement*, already the bare core of international refugee protection, is increasingly stripped of its non-essentials. Within this race to the bottom fits

[182] *Supra*, section 6.2.3.

[183] Byrne and Shacknove 1996, p. 185.

a changing perception of the absolute nature of *non-refoulement*. The refugee crises in the Balkans and their responses show the emerging opinion that strict adherence to the principle of *non-refoulement* can perhaps not always be expected of states. On the part of states, who are awaiting longer term results of the increasing general criticism of the 1951 Refugee Convention as no longer fitting to the time,[184] one can distinguish an interim desire for a principle of *non-refoulement* which is more 'reasonable' in its application; one that is pragmatic, practical, flexible, and more considerate of state interests. This is reflected in the current opinion and practice that some situations, such as a mass influx of refugees, warrant exception.

It is necessary to forward a sophistication of the mass influx exception, which has hitherto been ignored, but which can equally be deduced from the events described in this article. Namely, that "burden sharing" introduces a further element of conditionality into the principle of *non-refoulement* in situations of mass influx. The principle of first asylum does not posit the obligation to protection as contingent upon the carrying out of burden sharing, as has been made clear.[185] There is now, however, indication that within state practice such contingency has become accepted. Protection-before-burden-sharing may have turned into protection-*if*-burden-sharing. Both cases show European practice and *opinio* that aberration from the principle of *non-refoulement* was considered acceptable under the circumstance that burden sharing was inexistent or faulty, or, in the case of FYR Macedonia, clearly necessary. This indicates that, although no binding international obligation of burden sharing yet exists, states do feel committed to it. They feel committed to such a degree, that if the obligation of burden sharing is not (yet) fulfilled, resulting derogation from the principle of *non-refoulement* by states afflicted by a mass influx is considered acceptable – a to be expected repercussion.

Absolute adherence to the principle of *non-refoulement* would thus be conditional upon the absence of a mass influx situation, and in case a mass influx situation arises, upon the presence of burden sharing.

In summary, this article has attempted to give a more realistic reflection of the current situation of *non-refoulement* within the customary international law context. Far from presuming that the application of the requirements of customary international law in this article can be considered conclusive, its findings have not been able to unequivocally argue for the existence of a newly modified customary norm of *non-refoulement* on the European continent. On the whole, however, the degree of fulfillment of the require-

[184] See, for example, *Strategy paper on immigration and asylum*, 9809/98 LIMITE CK4 27, Brussels, 1 July 1998 (forwarded by the Austrian Presidency).
[185] *Supra*, notes 71, 72.

ments nevertheless provides strong indication towards the incorporation of a mass influx exception into the regional customary norm. Consequences of this finding go beyond its declaratory significance. It is arguable that *if any* customary norm of *non-refoulement* exists on the European continent, it is a conditional norm allowing exception in situations of mass influx.

As the treaty origin of the current customary norm of *non-refoulement* in Article 33 of the 1951 Refugee Convention does not allow for exception in situations of mass influx – and therefore neither does the customary norm which developed from Article 33[186] – the finding of a mass influx inclusive norm would necessarily mean its discontinued existence. Whether one sees this as a strict replacement or as evolution of the previous norm into a new form, which would be an interpretation more in line with the nature of continuity of customary international law, the norm in its original form is no longer applied. This does not mean that an *inconclusive* finding of the existence of a new customary norm, as in the present case, absolves the previously recognised norm and guarantees its continued existence. The degree of evidence of a new norm equally indicates the desuetude of the former. It is possible that evidence towards the unconditional customary norm of *non-refoulement* is no longer sufficient. The argument can be made that, in any case, facts and the requirements of customary international law no longer point to the existence of the original norm of *non-refoulement*. If one then considers the conditional norm of *non-refoulement* as yet insufficiently matured, this would mean that the European continent is left without a customary norm of *non-refoulement* for now.[187]

A final deduction from these conclusions is that only if Article 33 of the 1951 Refugee Convention can be re-interpreted to include the mass influx exception, and thus accommodate practice resulting from situations such as in Croatia and FYR Macedonia, would such practice be able to leave the status of the principle of *non-refoulement* as customary international law unaffected. In this sense, strangely enough, it is the confines of Article 33 that prevents the continued existence of a European customary norm of *non-refoulement*.

[186] Villiger 1985, p. 192.

[187] For recognition of the possibility of a situation of the non-existence of an "old" customary norm without the formation of a replacing new norm, see the Joint Separate Opinion in the *Fisheries Jurisdiction* case (*United Kingdom* v. *Iceland*), Judgement, ICJ Reports 1974.

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