

FUNDAMENTAL CONCEPTS
(causes of flight, reasons to protect
refugees, durable solutions)
PRINCIPLES

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CEU

CAUSES OF FLIGHT

CAUSES OF FLIGHT

Political roots

fight for control of state/society

Cold War (Afghanistan, Vietnam, Cambodia, Horn of Africa, Mozambique)

Economic roots

more than 1 billion live in poverty –less than 1% are refugees

ethnic and communal tension over resources

aftermath of war! (ensuing famine etc.)

Environmental roots

demographic pressure on scarcer resources

destruction of habitat

Ethnic tensions

(200 states – 5000 ethnic groups! – fantasy of ethnically homogenous states)

Human rights/minority rights violations (religious right, domestic violence, etc.)

Are countries of origin legally responsible?

with respect to returning refugees

to the host states

to compensate lost property of non-returning refugees

WHY TO PROTECT REFUGEES?

WHY PROTECT REFUGEES?

Shared identity (imagined community)

global: altruism – member of human race

ethnically/culturally determined „one of us”

repaying historic debt (remembering past refugees of own community)

Reciprocity

Today’s refugee may become tomorrow’s asylum provider and vice versa

Europe, last 70 years:

Spanish, French, Germans, Baltic people, Italians, Polish, Greek, Hungarians, Czechs and Slovaks, Romanians, Russians, Moldavians, Armenians, Azerbaijanis, Georgians, Croats, Bosnians, Serbs, Albanians, (and other nationalities) had to flee

Difference-based

Constructing the self by helping the refugee (the other) or the refugee as one of us escaping „the other”

indigenous – foreigner (hospitality)

rich – poor

democratic, law respecting – persecutory, totalitarian

WHY PROTECT REFUGEES?

Political opportunism

- window dressing
- conflict prevention / domestic political pressure

Purely legalistic

- legal obligation
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Exclusion of refugees

- consequently egoist (welfare chauvinist)
- no historic memory
- blindly trusts stability
- realist (willing to violate law if in the perceived interest and/or no sanctions threaten)

DURABLE SOLUTIONS

DURABLE SOLUTIONS

Durable
solutions

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graph TD; A[Durable solutions] --- B[Voluntary repatriation]; A --- C[Integration]; A --- D[Resettlement];
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Voluntary
repatriation

Integration

Resettlement

VOLUNTARY REPATRIATION (RETURN)

Most preferred solution

statist perspective: tool to remove

liberal: best for the refugee (is it?)

(D.Joly: Rubicon/Odysseus – type)

Questions:

- relationship to termination of threat of persecution- cessation (see, e.g. Hathaway, *The Rights of refugees under i.l.*, 917-963)
- individual or organised

Preconditions:

safety and dignity

being well-informed

chance to re-start life at home

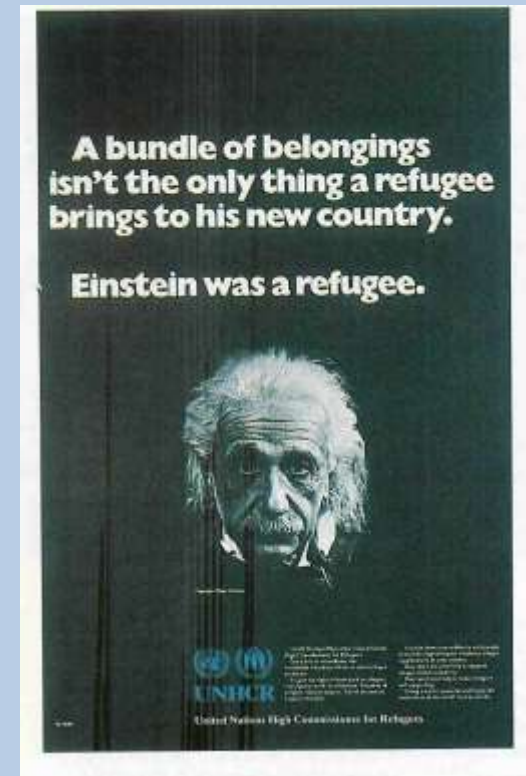
re-integration to local community (tensions between those who fled and those who endured)

- See also UNHCR, *'Handbook Voluntary Repatriation: International Protection'*, 1996,
- *Handbook for Repatriation and Reintegration Activities*, UNHCR, 2004

INTEGRATION

The basic modes of the relationship between the refugees and the host society

Integration	Isolation
Assimilation	Segregation



RESETTLEMENT

Long practice, still alive (Canada, US, Australia, New Zealand, Norway, Ireland receive)

Dual reading: solidarity or burden-shifting

May be the only alternative (e.g. when states maintain geographic reservations, as Turkey.)

1994 – 2003 average: 26 700 persons*

EU considering

Dilemma: intra regional or across continents?

*UNHCR : Statistical Yearbook, 2003, Geneva 2005, p. 27

TERMS, DEFINITIONS – A CLOSER LOOK

TERMS - DEFINITIONS

asylum seeker – refugee

asylum – refuge

(others) of concern (to UNHCR)

returned refugees

internally displaced persons

returned IDPs

stateless persons

other various groups

DEFINITIONS

Geneva Convention relating to the status of refugees – 1951

Article 1. *Definition of the term “refugee”*

A. For the purposes of the present Convention, the term “refugee” shall apply to any person who:

- (1) Has been considered a refugee ...[according to the interwar arrangements and the IRO constitution]
- (2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

DEFINITIONS

Convention Governing the Specific Aspects of Refugee Problems in Africa

Article 1

Definition of the term "Refugee"

1. [Geneva definition]
2. The term "refugee" shall also apply to every person who, **owing to external aggression, occupation, foreign domination or events seriously disturbing public order** in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

DEFINITION

Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama

Adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19-22 November 1984.

The Colloquium adopted the following conclusions:

.....

3. To reiterate that, in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee, bearing in mind, as far as appropriate and in the light of the situation prevailing in the region, the precedent of the OAU Convention (article 1, paragraph 2) and the doctrine employed in the reports of the Inter-American Commission on Human Rights. Hence the definition or concept of a refugee to be recommended for use in the region is one which, **in addition** to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened **by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.**

DEFINITION

EU Temporary Protection Directive (Council Directive 2001/55/EC OJ L 212/14) Article 2

For the purposes of this Directive:

- (a) 'temporary protection' means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return to their country of origin, immediate and temporary protection to such persons, in particular if there is also a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection;
- (b) ...
- (c) 'displaced persons' means third-country nationals or stateless persons who have had to leave their country or region of origin, or have been evacuated, in particular in response to an appeal by international organisations, and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:
 - (i) persons who have fled areas of armed conflict or endemic violence;
 - (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights

DEFINITION

EU Qualification Directive 2004

Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304/12 2004 09 30,)

Art 2 (e)

„person eligible for subsidiary protection” [means someone], „who **does not qualify as a refugee** but in respect of whom **substantial grounds have been shown** for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, **would face a real risk of suffering serious harm** as defined in Article 15,is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

Art 15

Serious harm consists of:

- (a) **death penalty or execution**; or
- (b) **torture or inhuman or degrading treatment or punishment** of an applicant in the country of origin; or
- (c) **serious and individual threat** to a civilian's life or person by reason of **indiscriminate violence in situations of international or internal armed conflict**”

CONCEPTS, DEFINITIONS

<i>International standard</i>	<i>National standard</i>
UNHCR statute	Convention status
1951 Geneva Convention and 1967 Protocol	
OAU Regional Convention, 1969	B status, humanitarian or <i>de facto</i> status, In the EU since 2006: subsidiary protection
Cartagena declaration, 1984	
EU: subsidiary protection, 2004	
EU: temporary protection, 2001	
Prohibition of torture and inhuman and degrading treatment (ECHR 3§)	Tolerated (Duldung), exceptional leave to stay, non-refoulement protection

FUNDAMENTAL PRINCIPLES

FUNDAMENTAL PRINCIPLES OF REFUGEE LAW

Fundamental
principles

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graph TD; A[Fundamental principles] --> B[Family unity]; A --> C[Non-discrimination]; A --> D[Non-refoulement];
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Family
unity

Non-
discrimination

Non-refoulement

FAMILY UNITY

Final Act of the 1951 Conference

Declarations:

B.

THE CONFERENCE,

- > CONSIDERING that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and
- > NOTING with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems (E/1618, p. 40) the rights granted to a refugee are extended to members of his family,
- > RECOMMENDS Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:
 - > (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country:
 - > (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."

FAMILY UNITY – GLOBAL CONSULTATIONS CONCLUSION, 2001

11. Requests for family reunification should be dealt with in a positive, humane and expeditious manner, with particular attention being paid to the best interests of the child. While it is not considered practical to adopt a formal rule about the duration of acceptable waiting periods, the effective implementation of obligations of States requires that all reasonable steps be taken in good faith at the national level. In this respect, States should seek to reunite refugee families as soon as possible, and in any event, without unreasonable delay. Expedited procedures should be adopted in cases involving separated and unaccompanied children, and the applicable age of children for family reunification purposes would need to be determined at the date the sponsoring family member obtains status, not the date of the approval of the reunification application.

12. The requirement to provide documentary evidence of relationships for purposes of family unity and family reunification should be realistic and appropriate to the situation of the refugee and the conditions in the country of refuge as well as the country of origin. A flexible approach should be adopted, as requirements that are too rigid may lead to unintended negative consequences. An example was given where strict documentation requirements had created a market for forged documents in one host country.

FAMILY UNITY

Council Directive 2003/86/EC of 22 September 2003
on the Right to Family Reunification
(OJ L 252/12, 3.10.2003)

Chapter V. Family Reunification of Refugees

Only applicable to Convention status refugees (not to asylum seekers, or persons enjoying subsidiary or temporary protection)

- may be constrained to pre-existing family
- state may admit more remote family members if dependents of the refugee
- less stringent requirements on documentation of family bond
- if request within 3 month from recognition: no requirement of proving housing, income, sickness insurance

NON-DISCRIMINATION

GC 51, Article 3. *Non-discrimination*

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

discrimination - reasonable differentiation

Practice:

political preferences (Haitians v Cubans in US in 1980's)

ethnic preferences (Hungary early 1990)

THE PRINCIPLE OF NON- REFOULEMENT – ARTICLE 33 AND BEYOND

NON-REFOULEMENT

The principle of non-refoulement describes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution or torture

Guy Goodwin-Gill: The refugee in international law, 2nd ed. p.117

NON-REFOULEMENT

Three possible meanings

- (Recognised) refugee

- Within the country

- Asylum seeker + refugee

- At the border or within the territory

- Anyone

- Anywhere

Against persecution

On five grounds

Against torture, inhuman or degrading treatment or punishment

On any ground

NON-REFOULEMENT

Geneva Convention Art 33:

Article 33. Prohibition of expulsion or return ("refoulement")

- 1. No Contracting State shall **expel or return ("refouler")** a refugee in **any manner whatsoever** at 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.*
- 2. The benefit of the present provision may not, **however**, be claimed by a refugee whom there are **reasonable grounds** for regarding as a **danger to the security of the country** in which he is, **or** who, having been convicted by a **final judgment** of a **particularly serious crime**, constitutes a **danger to the community** of that country.*

LEGAL STATUS –CUSTOMARY LAW?

Yes, both for refugees and those protected by human rights treaties (e.g. Lauterpacht - Betlehem, Goodwin-Gill-McAdam, Kälin)

UNHCR : several ExCom conclusions: non-derogable principle

States: Declaration of States Parties to The 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees, 2001:

Acknowledging the continuing relevance and resilience of this international regime of rights and principles, including at its **core the principle** of *non-refoulement*, whose applicability **is embedded in customary international law**

Doubting: Hathaway (as an obligation beyond the Convention) (HR treaties protect from different threats + some specifically affected states not parties to GC)

Real question: what is the role of state practice of refoulement

- violation of the principle (confirming the rule)
- evidence of lack of uniform state practice

(see further mass influx)

NON-REFOULEMENT –INTERPRETATION

1. Who is bound?
attribution to the contracting state
2. Who is protected?
3. What is prohibited?
return in any manner whatsoever
4. The place to which refoulement is prohibited
5. Threat to life and freedom

WHO IS BOUND?

ATTRIBUTION TO THE CONTRACTING STATE

Rules of attribution (based on the 2001 UN ILC Draft articles on responsibility of states for internationally wrongful acts,)

1. state organs at all levels of centralized, federal, or local
2. individuals acting in an official capacity even if they are exceeding their official authority;
3. private persons or entities empowered to perform public functions;
4. person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities (de facto state organs)
5. actors put at the disposal of the Contracting state by another state or international organisation if they exercise elements of governmental authority
6. non-State actors in an armed conflict taking place in another state if they are *de facto* agents of the Contracting State (*i.e.* under its control or direction)
7. private actors whose acts are subsequently acknowledged and accepted by a State as its own;
8. insurgent groups if, they take over control of the State or manage to create a new one.

WHO IS BOUND?

ATTRIBUTION TO THE CONTRACTING STATE

Territory – border – jurisdiction – control

Acts committed outside the territory and beyond the border also are attributable

- If within jurisdiction
- If exercising effective (overall) control
 - (Amuur v. France, Loizidou v Turkey, Ilascu and others v Moldova and Russia, T.I v U.K.)

- Diplomatic representation: not territory, - asylum seeker is not outside the country – not a refugee
- Diplomatic asylum – not customary law

- „Excision of territory” - irrelevant from the international legal point of view – still responsible

WHO IS PROTECTED?

a) Asylum seekers and recognised refugees

Convention does not use the term „asylum seeker” –
asylum seeker = refugee not yet recognised by the
state

Simple presence is enough! (not: „lawful”)

See also broader (human rights based) meaning -
everyone!

b) Individual procedure on denying / withdrawing the benefit of non-refoulement

- individualised procedure (no group refoulement)
- procedural guarantees, including effective remedy

WHO IS PROTECTED?

c) Mass influx situations ExCom conclusion No 100, 2004

„mass influx situations may, inter alia, have some or all of the following characteristics:

- (i) **considerable numbers** of people arriving over an international border;
- (ii) a **rapid rate** of arrival;
- (iii) **inadequate absorption or response capacity** in host States, particularly during the emergency;
- (iv) **individual asylum procedures**, where they exist, which are **unable to deal** with the assessment of such large numbers”

Who is protected? Is mass influx an exception from non-refoulement?

Exception

- National security or public order arguments at the 1951 Conference
- Some authors (.e.g. Coleman, 2003;)
- „refoulement” –always individual step
- Incidents in state practice (Thailand before 1979, Turkey, 1991, Macedonia, 1999, Pakistan, 2000)

Not an exception

- Convention text does not include reference
- Prevailing doctrinal view: not an exception to non-refoulement (exception as to the rights to be guaranteed)
- 33/2 refers only to individual threats to national security
- EU Temporary protection Directive: duty to admit
- ExCom Conclusion 22 (1981) Non-ref. even in mass influx
- Contradicting state: excuse

WHO IS PROTECTED? IS MASS INFLUX AN EXCEPTION FROM NON-REFOULEMENT?

Possible resolution of the dilemma:

- Non-refoulement applies – duty to admit is unconditional, but
 - Legal claim to assistance by the international community
 - Entitlement to withhold certain rights of refugees
 - In cases when the survival of the nation is at stake: arguing state of necessity

WHAT IS PROHIBITED? RETURN IN ANY MANNER WHATSOEVER

Extradition

- To potentially persecuting: prohibited (unless GC 33/2 applicable and no absolute prohibition to return)
 - GC lex specialis + principles of extradition law
 - *aut dedere aut judicare* helps against non-extraditable criminals
- To third countries - allowed unless danger of *refoulement* from there

WHAT IS PROHIBITED?

RETURN IN ANY MANNER WHATSOEVER

Expulsion – return –refoulement

Expulsion – formal order to leave territory
(and prohibiting return)

Return – in any form –factual

Refouler (French and Belgian
administrative law – measure of bringing
back to the frontier of a neighbouring
country)

Rejection: see next slide on border

WHAT IS PROHIBITED? RETURN IN ANY MANNER WHATSOEVER

Border

Grahl-Madsen: not included

But: an asylum seeker who gets into contact with the border guard is within the jurisdiction of the state to be entered – no longer in the persecuting country

Turning away = returning to (the frontiers) of a territory

Duty of letting entry \neq asylum

WHAT IS PROHIBITED?

RETURN IN ANY MANNER WHATSOEVER

Seas

Distress or not? (Right to visit: only flag state)

Prevailing view: non-refoulement applies even in distress rescue
(Sale v Haitian Council, US Supreme Court: bad decision)

Question: flag state should conduct RSD or first port of call (Tampa, 2001)!

„The non-refoulement obligations prohibit European border officials from turning back, escorting back, preventing the continuation of a journey, towing back or transferring vessels to non-EU coastal regions in the case of any person in potential need of protection, as long as the administrative and judicial examination of the asylum application has not been completed on European territory. European border officials are bound by this obligation even when operating extraterritorially. In the case of measures at sea, this applies inside the 12 mile zone, as well as in the contiguous zone, on the high seas and inside the coastal waters of third countries.”

A Fischer-Lescano, T Löhr, and T Tohidipur, p. 296

THE PLACE TO WHICH REFOULEMENT IS PROHIBITED

Frontier of territory

- not necessarily a state (Gaza?!)
- not necessarily country of origin (threat to life or freedom in country of /first/ refuge)

Debates on the concept of safe third country

- not more than rebuttable presumption
- European list never adopted

THREAT TO LIFE OR FREEDOM

Persecution - threat to life or freedom
Same?

Prevailing view (e.g. Weis, Grahl-Madsen, Kälin) : **yes**
(otherwise some refugees not protected from
refoulement)

Drafters: not only to refer where well founded
fear but anywhere

Standard of probability – also the same

Would be threatened = well founded fear of
persecution

NON-REFOULEMENT - BROAD MEANING

Art. 3 ECHR, Art 3 CAT

Broader, because

Protects every person, not only refugees

There are no exceptions → It can apply even in case GC 33/2 would allow *refoulement*

The threatening harm is not linked to any ground (race, religion, nationality, political opinion, belonging to a particular social group)

Question: absolute or not? *Chahal v UK* (1996) and *Saadi v Italy* (2008)
UK in *Saadi* ↔ *Suresh* (Supreme Court of Canada) (2002), intervention of

SAADI V. ITALY ECTHR, 2008

„ Article 3, which prohibits in absolute terms torture and inhuman or degrading treatment or punishment, enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15, even in the event of a public emergency threatening the life of the nation” (para 127)

SAADI – INHUMAN TREATMENT TORTURE

Inhuman or degrading treatment or punishment = „the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment”

Torture: „deliberate inhuman treatment causing very serious and cruel suffering”

(paras 135-136)

SAADI V. ITALY, 2008

„[E]xpulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, **where substantial grounds have been shown** for believing that the person concerned, **if deported**, faces a **real risk of being subjected to treatment contrary to Article 3**. In such a case **Article 3 implies an obligation not to deport** the person in question to that country”

Para 125

No balancing between severity of ill treatment and threat to host country allowed

Para 139

WHY NOT REFOULE

Not only because of the absolute legal
obligation

but

because **it is part of our moral convictions!**

We protect our chosen values by not
exposing persons to refoulement, by not
handing them over to torturers and
persecutors

THANKS!

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