

FUNDAMENTAL CONCEPTS: DURABLE SOLUTIONS PRINCIPLES

**Presented by Boldizsár Nagy,
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DURABLE SOLUTIONS

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**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)

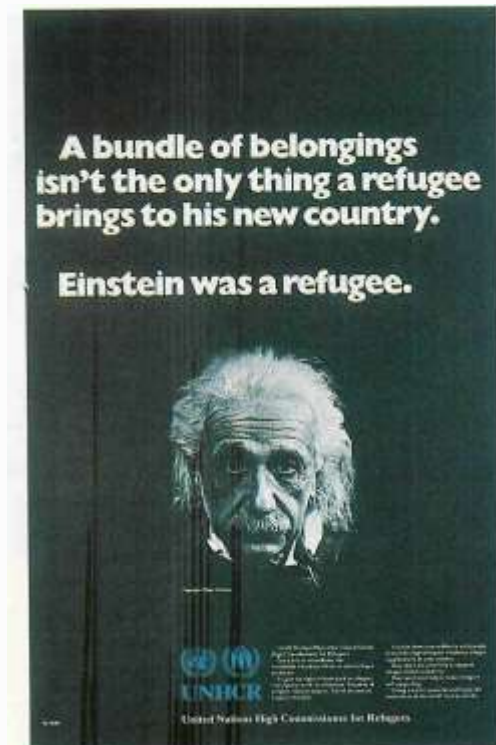
–See also UNHCR, *'Handbook Voluntary Repatriation: International Protection'*, 1996,

–*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 decided in 2015 to resettle 20 000

Canada, US. Increased pledges for Syrian refugees

Dilemma: intra regional or across continents?

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

FUNDAMENTAL PRINCIPLES

DURABLE SOLUTIONS

**Fundamental
principles**

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

Non-discrimination

Non-refoulement

FAMILY UNITY

Final Act of the 1951 Conference
Declarations:

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, ... 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 prescribes, broadly, that no refugee should be returned to any country where he or she is likely to face persecution, other ill-treatment, or torture

Guy Goodwin-Gill-Jane McAdam: The refugee in international law, 3rd ed. p.201

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

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.

WHO IS BOUND?

ATTRIBUTION TO THE CONTRACTING STATE

Issues of **attribution to the state** (for whose acts is the state responsible?)

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; Al-Skeini and others v UK)

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

- **Diplomatic asylum – not** customary law

- „Excision of territory” (Australia) - 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? 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

Is Lebanon, Jordan or Turkey entitled to admit no more refugees?

European influx in 2015 – would it justify?

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 extritorially. 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 Löhrr, 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

The issue of returns within the EU under the Dublin regulation

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), Saadi v Italy(2008) ↔ *Suresh (Supreme Court of Canada) (2002), intervention of UK in Saadi*

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)

For further details see the Annex

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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Annex

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

HIRSI JAMAA AND OTHERS V. ITALY

APPL. No. 27765/09

GRAND CHAMBER JUDGMENT OF 23 FEBRUARY 2012

Facts

Eleven Somali nationals and thirteen Eritrean nationals left Libya aboard vessels with the aim of reaching the Italian coast.

On 6 May 2009, when the vessels were 35 nautical miles south of Lampedusa (Agrigento) they were intercepted by ships from the Italian Revenue Police and were transferred onto Italian military ships and returned to Tripoli. The applicants alleged that during that voyage the Italian authorities did not inform them of their real destination and took no steps to identify them.

On arrival in the Port of Tripoli, following a ten-hour voyage, the migrants were handed over to the Libyan authorities. According to the applicants' version of events, they objected to being handed over to the Libyan authorities but were forced to leave the Italian ships.

The Italian Minister of the Interior stated that the operation to intercept the vessels on the high seas and to push the migrants back to Libya was the consequence of the entry into force on 4 February 2009 of bilateral agreements concluded with Libya, Between 6 and 10 May 2009, more than 471 irregular migrants had been intercepted on the high seas and transferred to Libya

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Legal issues



Jurisdiction

Art 3 treatment

Jurisdiction

Applicants' claim

Boarding the Italian vessels put them under the exclusive jurisdiction of Italy. According to Italian law vessels flying the flag of Italy fall within Italian jurisdiction

The government's claim

Italy denied that it had exercised "absolute and exclusive control" over the applicants. The operation was a „rescue on the high seas of persons in distress" and not a maritime police operation. The rescue in itself did not create jurisdiction over the saved persons.

As regards the applicants' "rescue", which in total had lasted no more than ten hours, the authorities had provided the parties concerned with the necessary humanitarian and medical assistance and had in no circumstances used violence; they had not boarded the boats and had not used weapons.

Third party interveners (UNHCR HRW, AI, Aire centre and others together) Decisive is if under the authority and effective control of the state (not territory)

The Court

General principles governing jurisdiction

- Rights and freedoms to be „secured” to everyone „within their jurisdiction”
- Jurisdiction is essentially **territorial** - but there are **exceptions**
 - Lawful or unlawful military action *Loizidou* (but not if” only an instantaneous extra-territorial act is at issue” (*Banković*)
- Whether **exceptional circumstances** exist leading to extra-territorial jurisdiction must be determined with reference to the particular facts, for example **full and exclusive control over a prison or a ship**
- State agents operating outside the state’s territory but exercising „**control and authority over an individual** „ = **jurisdiction** = an obligation to secure those right which are „relevant to the situation”
- In this sense **Convention rights can be divided and tailored**

Application to the case

- The events at issue occurred on the **high seas**, on board **military ships flying the Italian flag** - even Italy admits that **the ships were within Italian jurisdiction** – that means exclusive jurisdiction of the flag state.
- The case was **not** an example of **extra-territorial** exercise of jurisdiction
- Italy **cannot circumvent its “jurisdiction”** under the Convention by describing the events at issue as **rescue operation**
- That the control exercised was allegedly **minimal does not matter** either
- Between boarding the ships of the Italian armed forces and being handed over to the Libyan authorities, the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities. ... Accordingly, **the events giving rise to the alleged violations fall within Italy’s “jurisdiction” within the meaning of Article 1 of the Convention.**

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Article 3 issues

Two claims of breaching art 3:

- Treatment in Libya
- Potential refoulement to Eritrea and Somalia

Treatment in Libya

Applicants (and third party interveners) : inhuman and degrading conditions in which irregular migrants, notably of Somali and Eritrean origin, were held in Libya and the precarious living conditions experienced by clandestine migrants in that country. Torture, physical violence, rape was widespread. Libya never granted any formal status to those whom UNHCR recognised in Libya as refugees

Government:

Could not sufficiently prove past treatment contrary to art 3.

EU encouraged migration co-operation between Mediterranean countries

As this was a rescue operation Italy was under no duty to identify potential refugees

The applicants resistance to be handed over to Libyan authorities could not be interpreted as a request for asylum

Libya was a safe host country (sic-BN) Although not a party to the 1951 Geneva Convention. It authorised UNHCR and IOM to operate in Tripoli

UNHCR could recognise refugees in Tripoli – another proof that return to Libya did not entail danger

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The Court

General principles

- States control – subject to „their treaty obligations” – the entry, the residence and the expulsion of „aliens”. There is no right to asylum in the Convention
- If the person to be removed faces a **real risk of being subjected to treatment contrary to Article 3** in the receiving country then states are **obliged not to expel** the individual to that country
- As the proscribed ill treatment would be the „direct consequence” of expulsion the **Court must assess the situation** in the receiving country (not party to the Convention)
- Assessment is based on material presented to it and on the basis of „material obtained *proprio motu*”
- The Court must examine the **foreseeable consequences** of the removal in the light of **the general situation** there as well as the affected individual’s **personal circumstances**

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Court, general principles (continued)

- Where an applicant alleges that a group is systematically exposed to a practice of ill-treatment, then Art. 3 applies when „there are substantial grounds for believing in the existence of the practice” in question and his or her membership of the group concerned
- Article 3 rights are absolute
- Danger of its violation may stem from non state agents („persons who are not public officials”) – then „ it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.”
- Decisive moment: the time of removal - risk = facts known or „ought to have been known” to the Contracting State (diligence standard!)

Application to the case

- Difficulties of states forming the external border acknowledged, but that can not absolve the states of their obligations under Art 3 as they are absolute obligations
- Libya did not comply with the rules on protecting refugees. Asylum seekers and other irregular migrants were not distinguished

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Court, Application to the case (continued)

- Torture, poor hygiene lack of appropriate medical care and refoulement were reported
- The existence of domestic laws and international treaty obligations are not sufficient to ensure adequate protection where reliable sources have reported practices manifestly contrary to the principles of the Convention
- Italy can not evade its responsibility by relying on its obligations arising out of bilateral agreements with Libya
- UNHCR's activity in Tripoli did not lead to any safety of the recognised persons
- Italian authorities knew or should have known that, as irregular migrants, they would be exposed in Libya to treatment in breach of the Convention
- The national authorities have to find out what expects the returnees – it is immaterial whether they have applied for asylum or not.
- Neither rescue at sea nor fight against illegal migration justify refoulement
- The Vice president of the Commission of the EU expressly warned against refoulement in the context of operations at high sea
- The fact that many were threatened with ill treatment in Libya „does not make the risk any less individual”

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Potential refoulement to Eritrea and Somalia

Applicants and third party interveners:

- Breach of article 3 threatens in Eritrea and Somalia – many of them recognised as refugees by UNHCR
- Libya frequently conducted collective expulsions

Government:

- According to their bilateral treaty Libya was bound by the principles of the UN Charter and the universal Declaration of Human Rights
- UNHCR could recognise refugees and they were not „arbitrarily expelled”

The Court:

- **Indirect removal** of an alien **leaves the responsibility** of the Contracting State **intact**, and that State is required...to **ensure** that the person in question **would not face a real risk of being subjected to treatment contrary to Article 3** in the event of repatriation
- The returning state must ensure that the intermediary state „offers sufficient guarantees” against refoulement
- Individuals forcibly repatriated to Eritrea face being tortured and detained in inhuman conditions merely for having left the country irregularly.

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GRAND CHAMBER JUDGMENT OF 23 FEBRUARY 2012

Potential refoulement to Eritrea and Somalia

- **The Court** (continued):
- As regards Somalia, ... the Court noted the **serious levels of violence in Mogadishu** and the **increased risk to persons because of the transit** through areas affected by the armed conflict + **living conditions** were appalling in camps for displaced persons or refugees are **appalling**.
- Consequently, the applicants could arguably claim that their repatriation would breach Article 3 of the Convention.
- When the applicants were transferred to Libya, **the Italian authorities knew or should have known that there were insufficient guarantees** protecting the parties concerned **from the risk of being arbitrarily returned** to their countries of origin.

The Grand Chamber's UNANIMOUS decision:

Italy had jurisdiction

Return to Libya violated art 3

because of the treatment in Libya
and also

because of the risk of refoulement