

INTERNATIONAL REFUGEE LAW

Presentation by
Boldizsár Nagy
ELT HR LLM
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„I urge you, Secretary-General, to initiate negotiations on sharing this burden at a global level. All major stakeholders of international politics will have to take some of the migrants to their countries as part of a global quota system.”

*Statement by H.E. Mr. Viktor Orbán Prime Minister of Hungary
at the High Level Side Event on “Strengthening cooperation on migration and refugee movements
in the perspective of the new development agenda” 30 September 2015 United Nations
New York at*

http://un.newyork.gov.hu/accessibility/download/5/02/21000/Statement_of_Viktor_Orb%C3%A1n_High-Level_Meeting_on_Migration.pdf (20170208)

The orders of magnitude

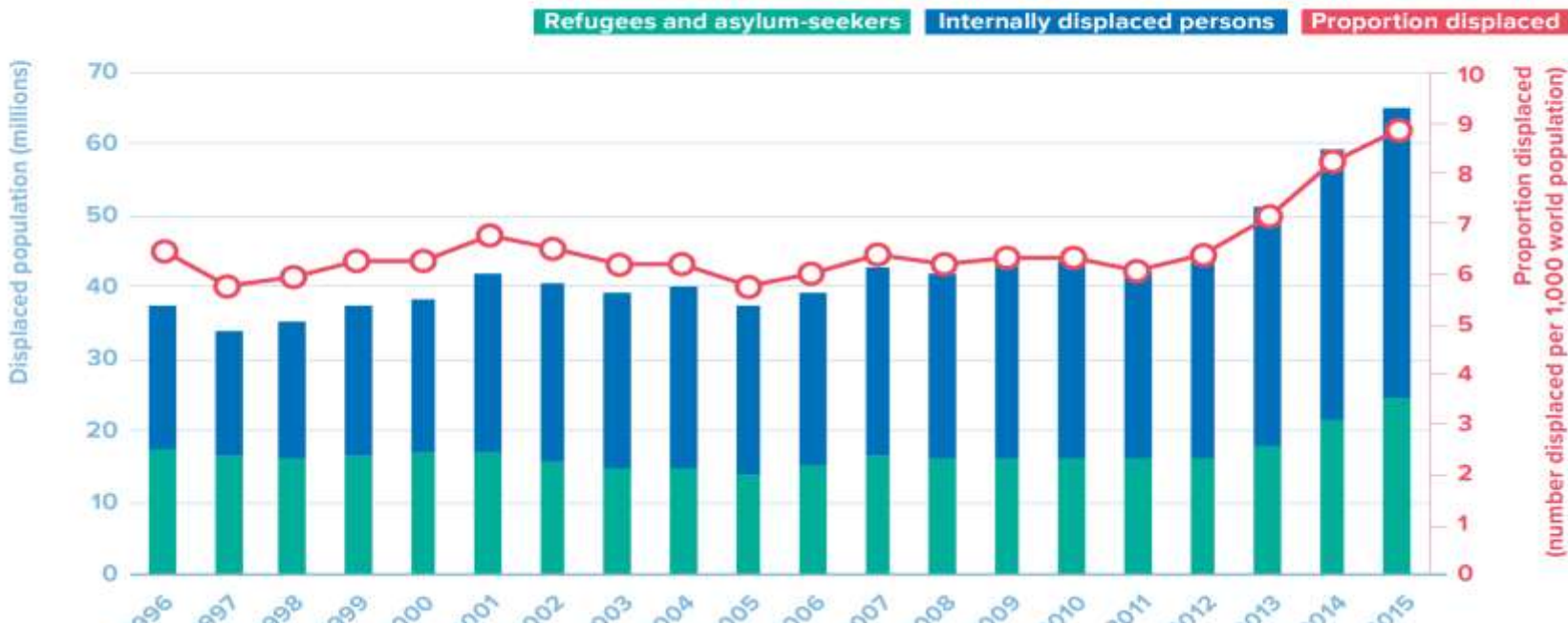
Major trends, 2015, (flow data)

During 2015

12,4 million persons were forced to flee from home. Of them 8,6 million were internally displaced and 1.8 new refugees crossing an international border. Beyond them there were 2 million new applications submitted by persons who left home earlier.

- On a daily average 34,200 persons had to flee (In 2010-ben the number was :10 900)
107,100 refugees were resettled from the country of first asylum to another state
- 201,400 returned home (since 1994 altogether 18,4 million)

Fig.1 Trend of global displacement & proportion displaced | 1996 - 2015 (end-year)



Forrás:
UNHCR
, Global
Trends
Forced
Displacement
2015,
Geneva,
2016, p.
6

Stock data

At the end of 2015

- There were **65,3 forced migrants**
- Of these
 - **21,3 million** were refugees. Of the refugees **5,2 million were the Palestinian** and **16,1 million** of other nationality
 - **40,8 million internally displaced persons**
 - **3,2 million** asylum seekers
 - Of all the refugees **50 %** is below the age of 18.
 - **Syria (4.9 million) Afghanistan (2,8 million) and Somalia (1,1 million)** are the three countries wherefrom more than half of the refugees came

Recognition rates – within the decisions on the merits

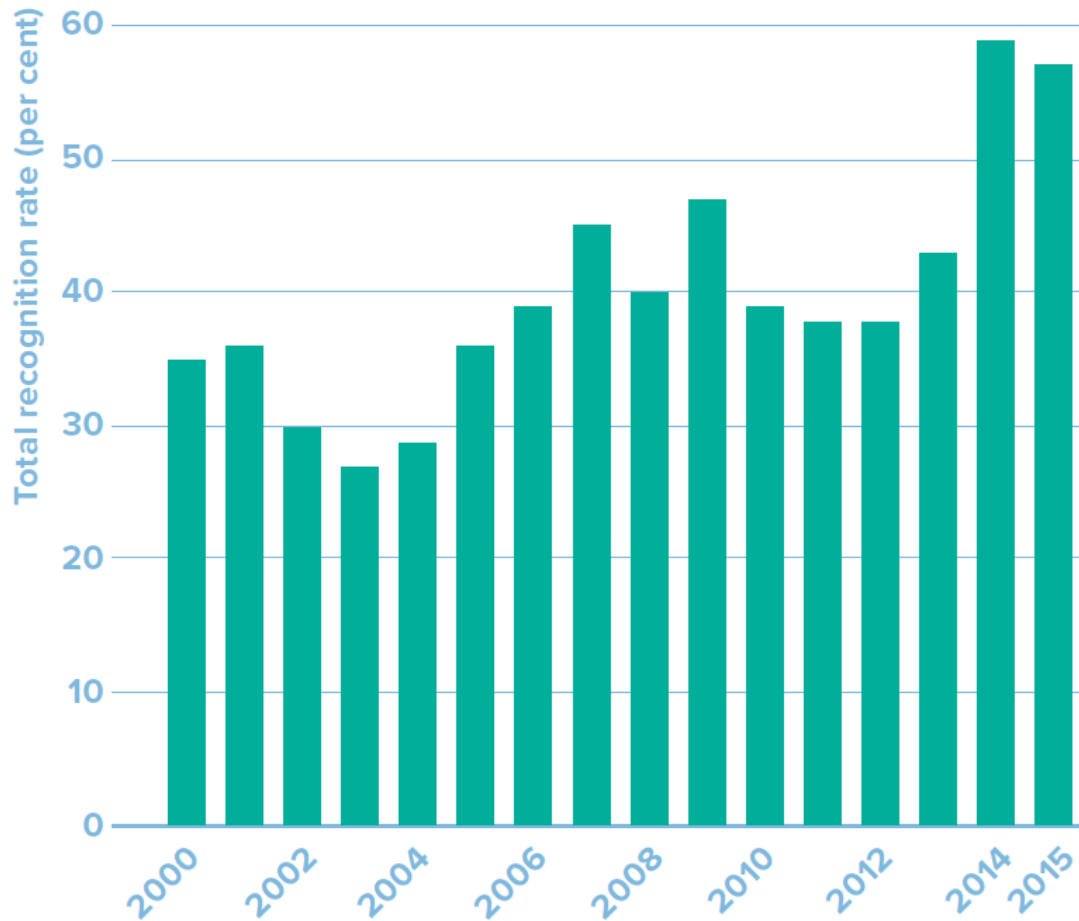
Between 2000 and 2012 yearly 0,6 - 1,0 million applications were submitted

Recognition rate within the decisions on the merit oscillated between 27% and 47 %.

In 2015-ben decision on the merit was taken on 1,18 million applications

In 2014-2015- recognition rates were above 50%

Fig.18 Global Total Recognition Rates | 2000-2015



Source: UNHCR, Global Trends Forced Displacement 2015, Geneva, 2016.

Syria! (January, 2017)

Total Persons of Concern

4,862,778

Last Updated 05 Jan 2017

Source - UNHCR, Government of Turkey

Registered Syrian Refugees

4,862,778

Last Updated 05 Jan 2017

Source - UNHCR, Government of Turkey

This figure includes 2 million Syrians registered by UNHCR in Egypt, Iraq, Jordan and Lebanon, 2.8 million Syrians registered by the Government of Turkey, as well as more than 29,000 Syrian refugees registered in North Africa.

Regional demographic breakdown below is based on available data from Egypt, Iraq, Jordan and Lebanon

Total Syrian Asylum Applications in Europe

884,461 between Apr 2011 and Oct 2016

137,798 in 2014 only

Note - Data for 37 European countries which provide monthly information to UNHCR. To the extent possible, the figures reflect first time asylum applications, but some of the statistics are likely to include repeated applications (same or different country).

Top Countries



Evolution of Asylum Applications

Sources: <http://www.migrationpolicycentre.eu/migrant-crisis/focus-on-syrians/> (20170109)

<http://data.unhcr.org/syrianrefugees/regional.php> (20161107) author's assemblage

Egypt: 115,204

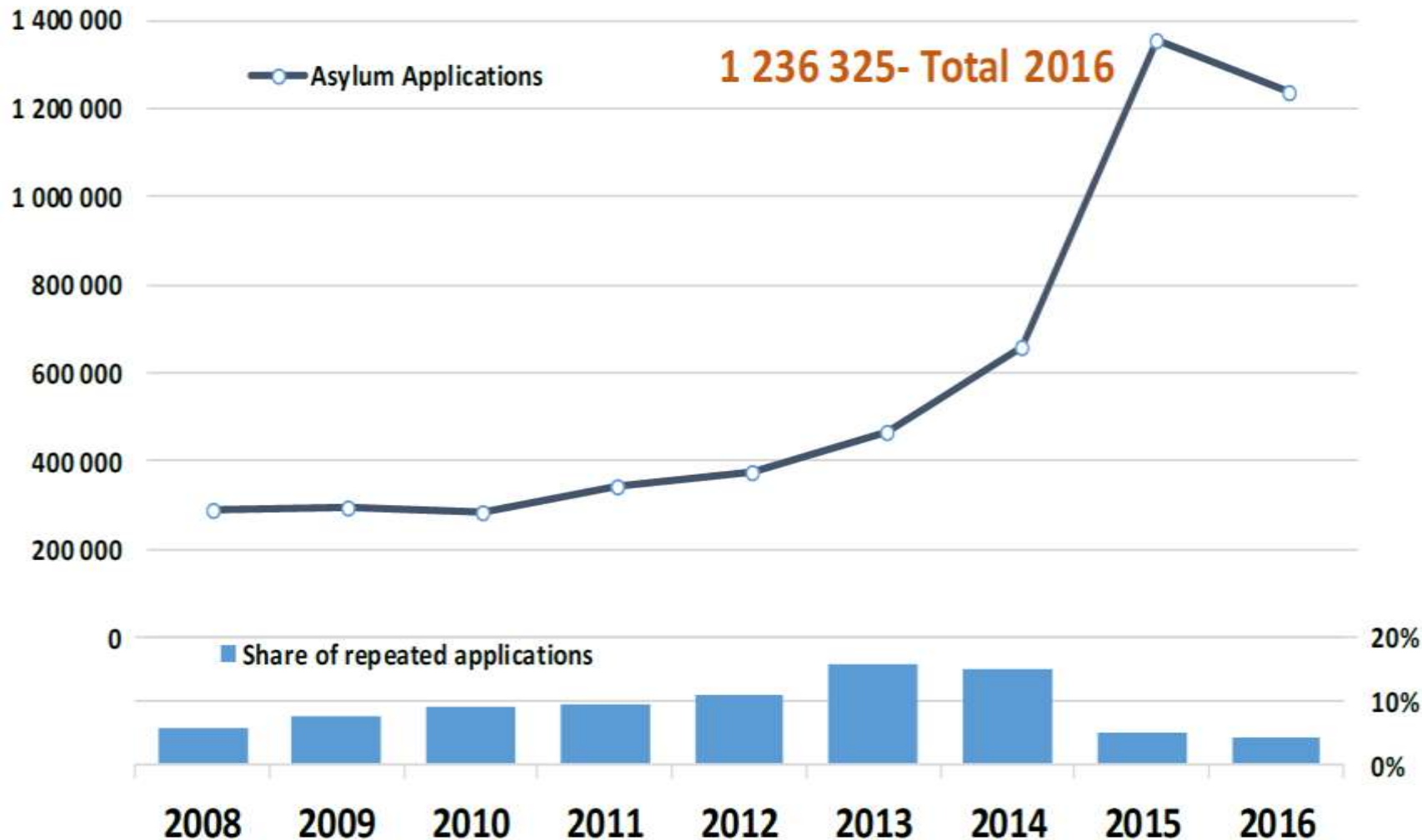
Iraq: 230,836

Jordan: 655,399

Lebanon: 1,017,433

Turkey: 2,814,631

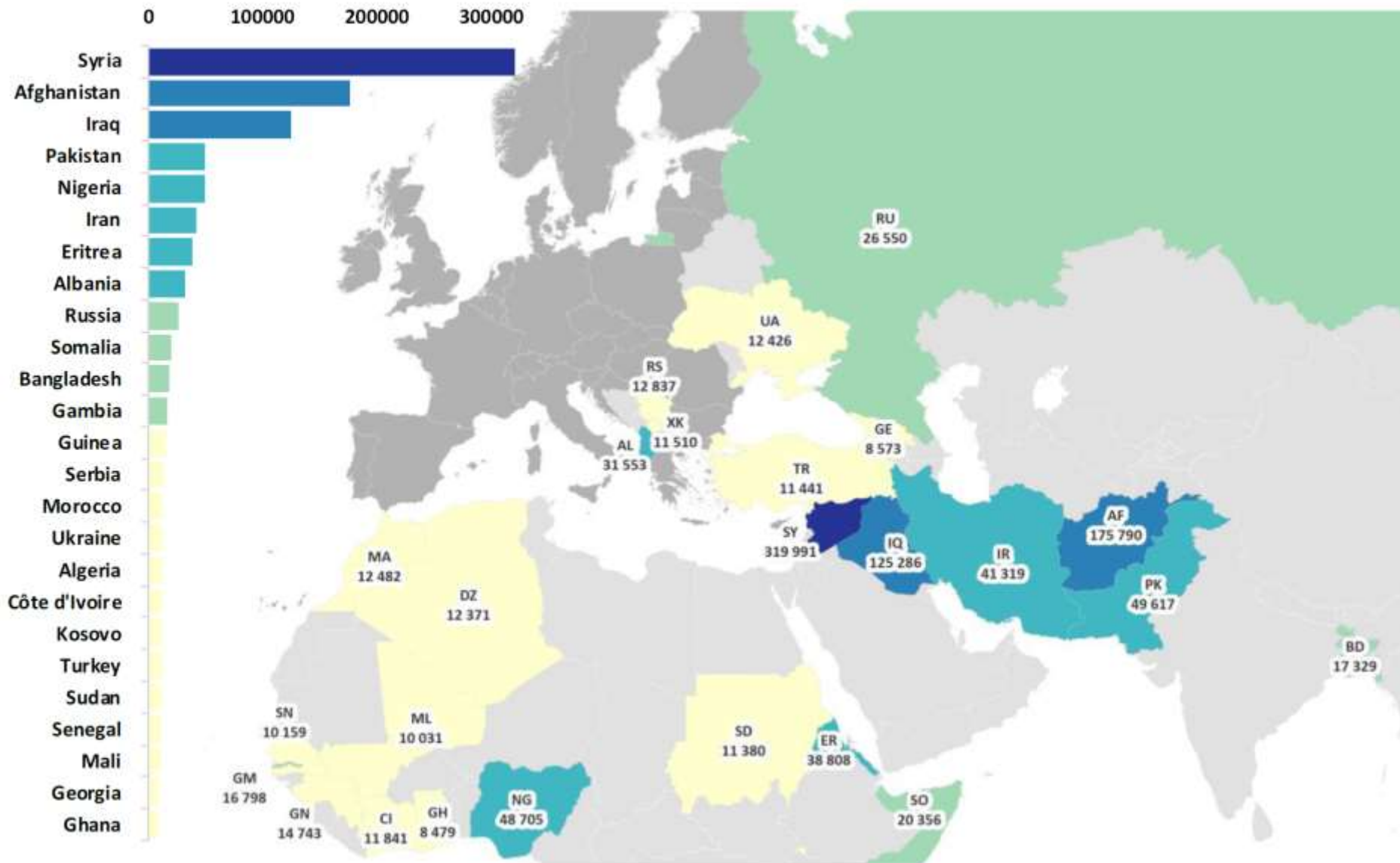
Number of asylum applications in EU+ EU 28 + Norway and Switzerland



Source: Latest asylum trends – 2016 overview, p. 1

<https://www.easo.europa.eu/sites/default/files/Latest%20Asylum%20Trends%20Overview%202016%20final.pdf>

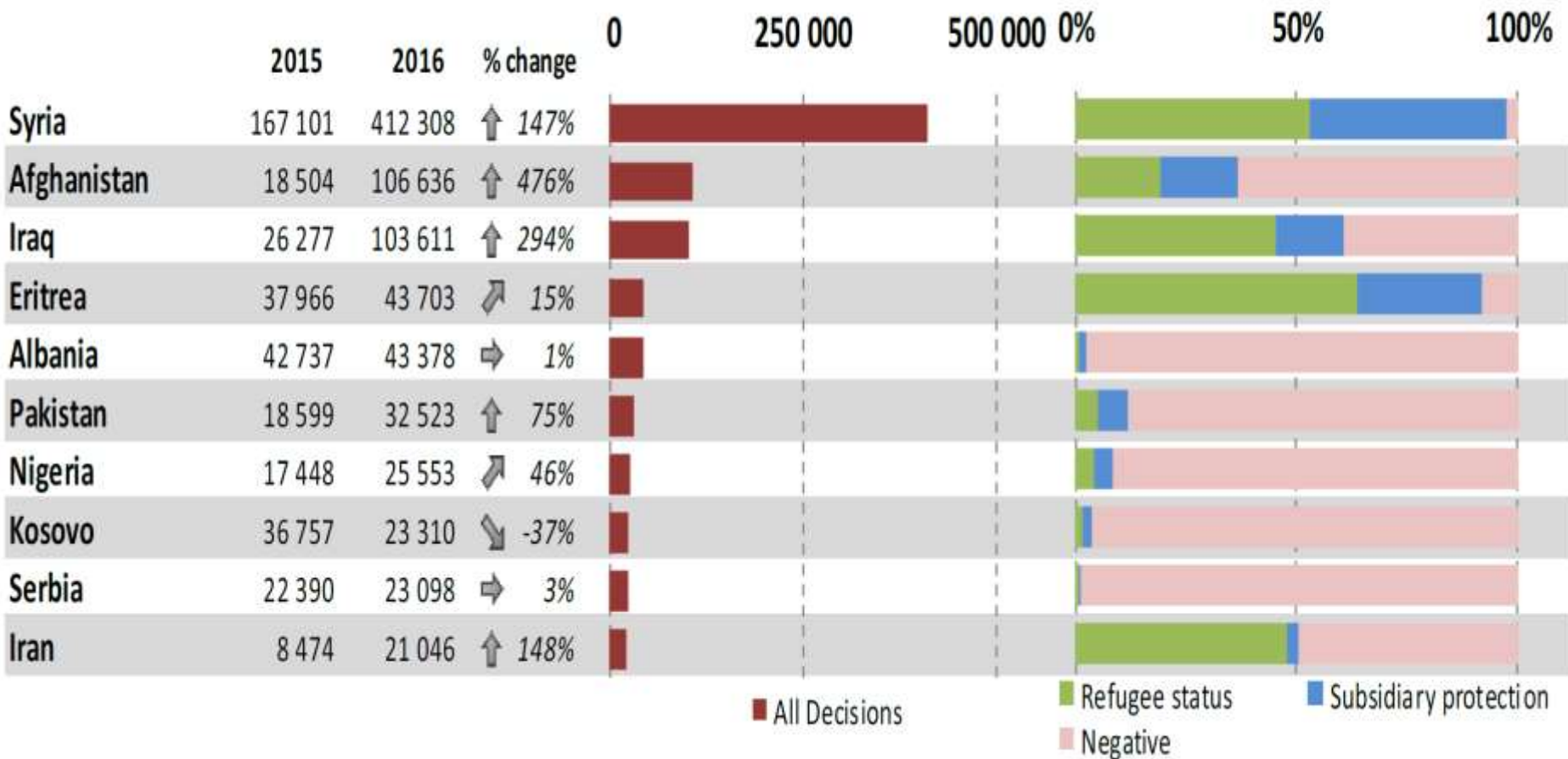
Main countries of origin of applicants in the EU+ in 2016



Source: Latest asylum trends – 2016 overview, p. 1

<https://www.easo.europa.eu/sites/default/files/Latest%20Asylum%20Trends%20Overview%202016%20final.pdf>

Decisions - recognition - numbers and rates, EU+, 2016



Source: Latest asylum trends – 2016 overview, p. 3.

<https://www.easo.europa.eu/sites/default/files/Latest%20Asylum%20Trends%20Overview%202016%20final.pdf>

TERMS, DEFINITIONS – A CLOSER LOOK

Categories of foreigners

(internally displaced)

Migration

International

Domestic

Regular

Irregular

A longer than 1 year
presenc/absence, in
accrodance with the
law

No right to
enter/stay
„Illegal”

Forced migration

Regular migrant
(Worker, student, family
unifier, etc.)

Undocumente
d foreigner,
Persons with
no right to
enter and/or
stay

Refugee

Internally
displaced
person, IDP

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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.

Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969

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

Definitions – EU

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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, 18.05.2004)

EU Qualification Directive 2004/2011

DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

Art 2 2004:(e) 2011: (f)

„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 (in both)

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**”

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)

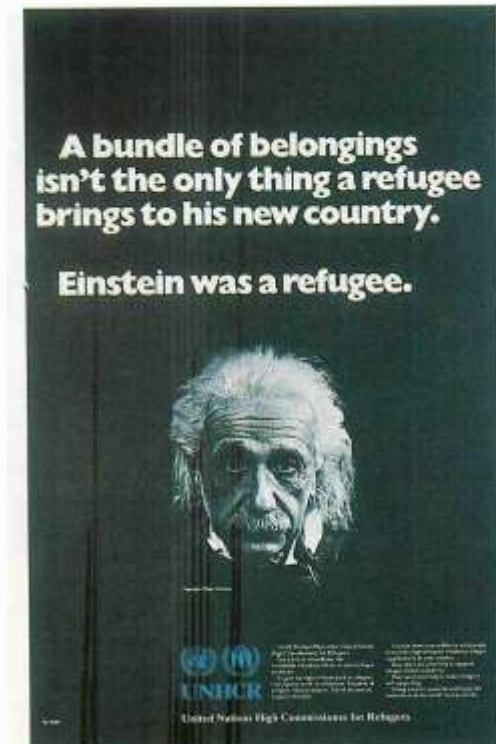
–See also UNHCR, *'Handbook Voluntary Repatriation: International Protection'*, 1996,

–*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 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,

- **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.,,
- Global consultations, 2001:
 - 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.

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

WELL-FOUNDED FEAR

WELL FOUNDED FEAR

Two approaches

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graph TD; A[Two approaches] --> B[Mixed]; A --> C[Objective];
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Mixed (subjective and objective)

Handbook (§37, 40)

probability
of persecution

+

state of mind

Objective

Hathaway

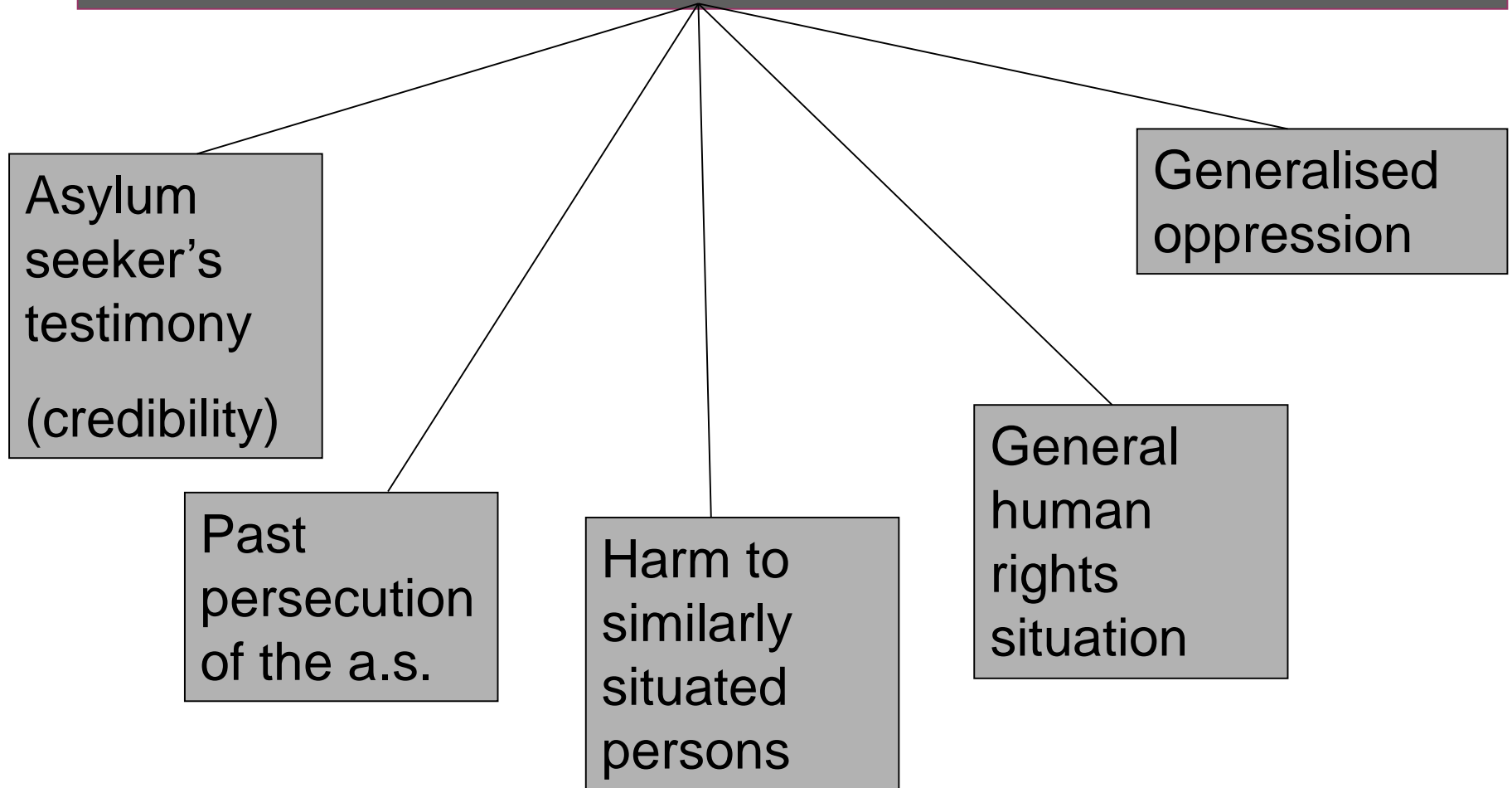
probability
of persecution

Purely **forward looking: what would happen** upon return home?

(except for interwar categories and IRO who may „invoke compelling reasons arising out of previous persecution for refusing to avail” themselves of the protection GC 1§ C (6))

WELL FOUNDED FEAR - EVIDENCE / PROOF / CREDIBILITY

Tools to establish the well-founded nature of the fear



WELL FOUNDED FEAR – TIME AND PLACE

Time: not necessarily at departure

- refugees *sur place*

- at the moment of decision (*Said v Netherlands*, ECHR, Appl. 2345/02)

Place: territory of future persecution

- not necessarily state of nationality

+

- stateless persons

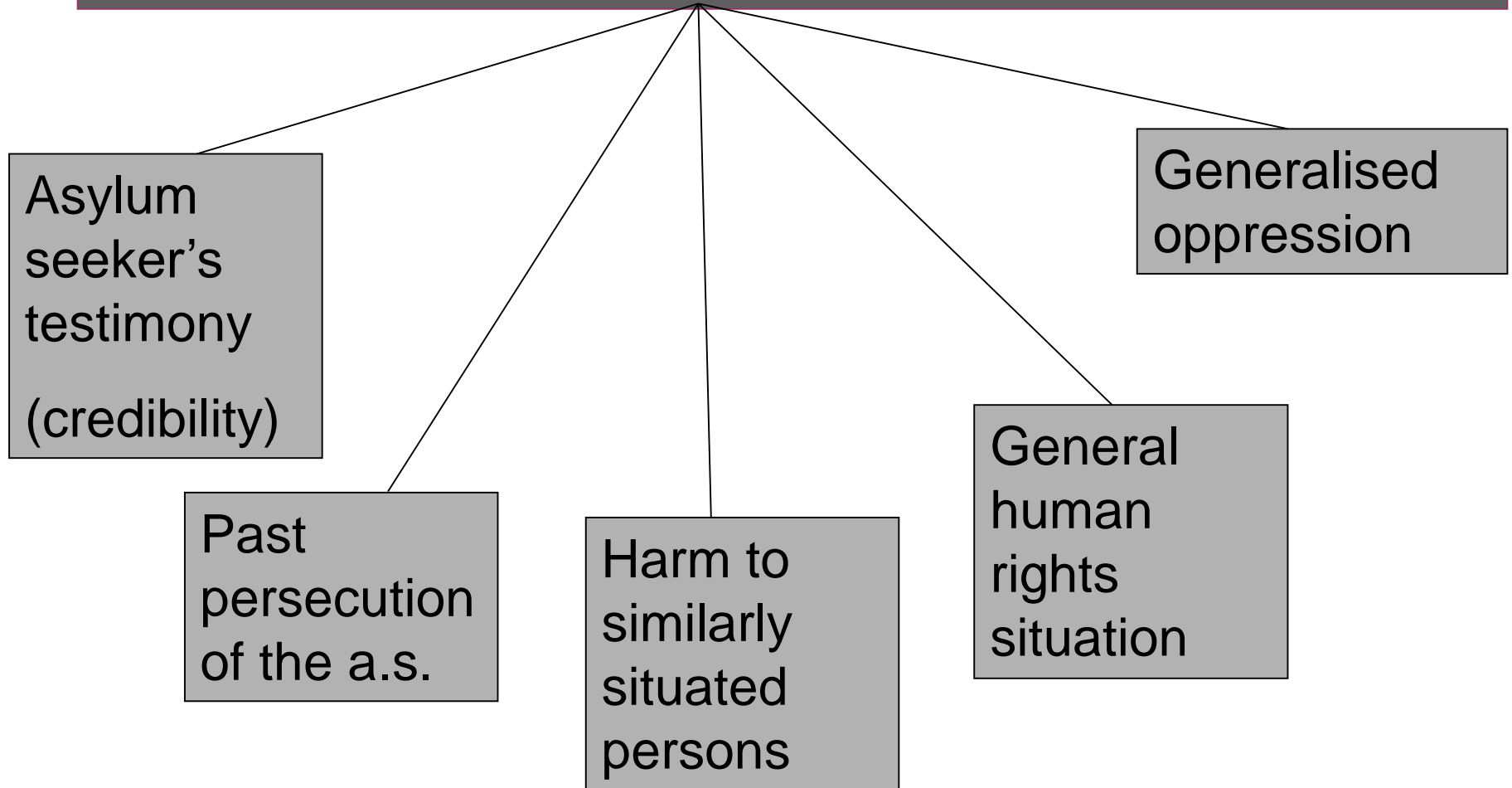
WELL FOUNDED FEAR - EVIDENCE / PROOF / CREDIBILITY

„Because the **risk** of persecution will **never be definitely measurable**, decision-makers should ask only **whether the evidence as a whole** discloses a risk of persecution which would cause a **reasonable person** in the claimant's circumstances **to reject** as insufficient **whatever protection her state of origin is able and willing to afford her**”

Hathaway: The Law of Refugee Status, 1991, at p. 80

WELL FOUNDED FEAR - EVIDENCE / PROOF / CREDIBILITY

Tools to establish the well-founded nature of the fear



WELL FOUNDED FEAR - EVIDENCE / PROOF / CREDIBILITY

Credibility

The asylum seekers account („plausible, credible, frank”)

False assumptions of the interviewer

The role of the interpreter

The causes of inconsistencies

- Difference of cultures
- PTSD
- Groups with special needs (torture victims, women, minors, others)

Benefit of the doubt



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See: G.Noll ed.: Proof, Evidentiary Assessment
and Credibility in Asylum procedures,
Martinus Nijhoff, Leiden, 2005

Well-founded fear – evidence – country of origin info

(Country of origin information, COI)

Reliability of sources

- UNHCR (*Refworld!*)
- International NGO-s
- UN (and regional) human rights bodies
- National, governmental reports

(Said v Netherlands, ECHR, 2005 – separate opinion of Judge Loucaides)

web-based - www.ecoi.net

Requirements on COI

Relevance of the COI

It relates to the legal issue reinforcing or denying the danger of the future persecution

Reliability and balance of sources

Objective, impartial, coming from a variety of sources

Accurate Research and Selection of Up-to-date Information

Current and not distorted

Transparent Processing and Communication of Information

Identifying the source, controlling possible translation

PERSECUTION. ACTORS, ACTS, GROUNDS

PERSECUTION ACTS, ACTORS

What constitutes persecution?

GC does not interpret persecution

Handbook: § 51: **Threat to life and freedom** on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other **serious violations of human rights** – for the same reasons – also constitute persecution.

§ 52: The subjective element - depends on the perception by the victim

§ 53: Cumulative ground



<http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>

HB on specific issues: Discrimination (54-55); punishment (56-60); „Republikflucht“ (61); economic hardship – in certain circumstances

Persecution - prosecution difference

NOTION OF PERSECUTION

Deborah Anker:

Persecution - universal and flexible meaning

Serious harm, not limited to physical harm or threat to life and freedom

The state fails to protect

Guy Goodwin Gill: unacceptable interference with the integrity or inherent dignity of the human being

J. Hathaway: the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.

THE ACTOR

Historic aspects of the system – Nazi Germany, totalitarian Soviet Union, Communist systems in eastern Europe, authoritarian states worldwide – the persecutor is the state, its **authorities**

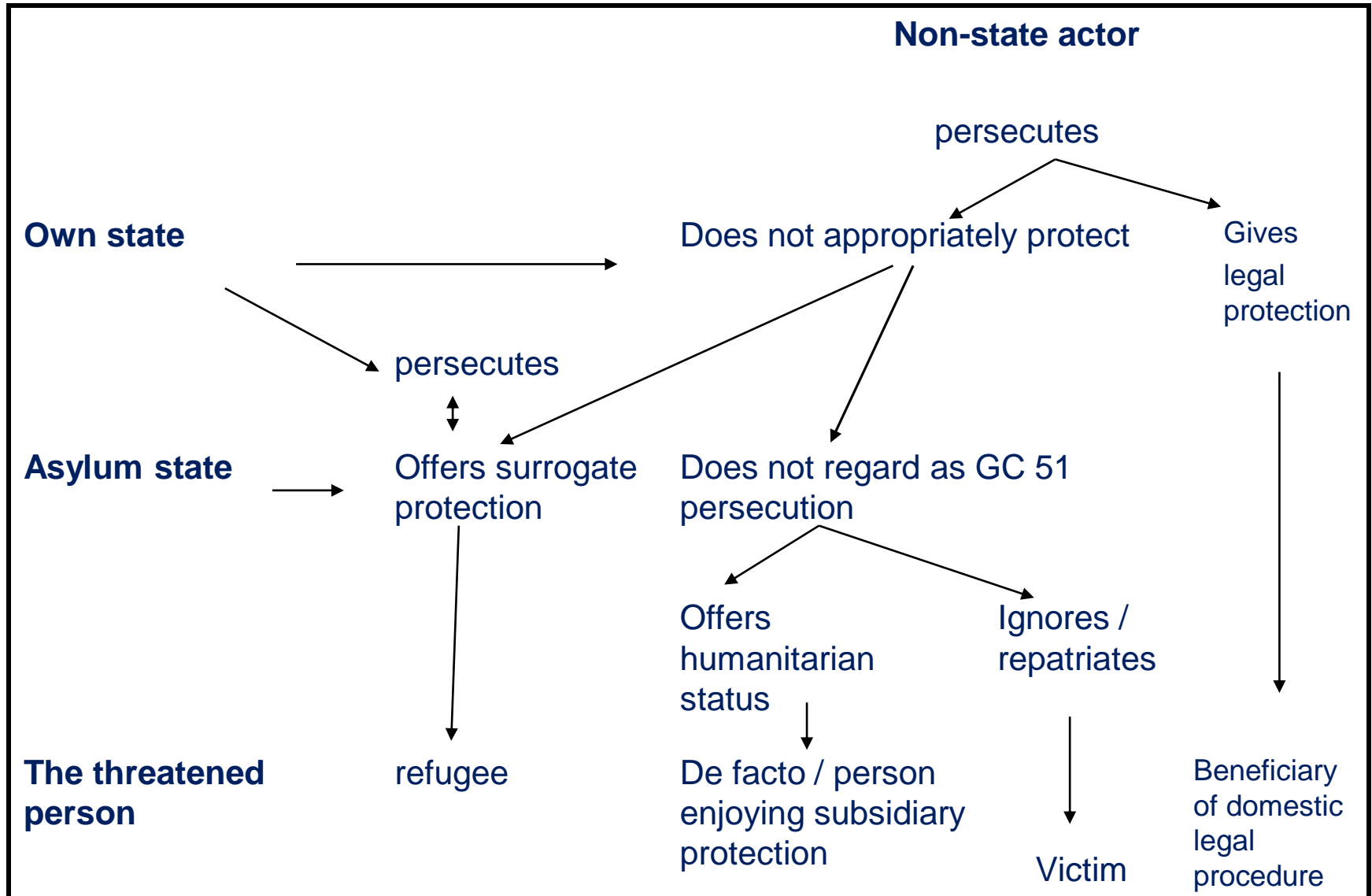
Increased role of **non-state actors**

„**new tribalism**”, **nationalism**, **religious** fights

Insurgents in civil wars (e.g. in Latin America)

Dominant group turning against its subgroup –
see particular social group

ROLES IN CASE OF STATE PERSECUTION AND NON-STATE ACTOR ACTION



THE HORVATH CASE

HORVATH V. SECRETARY OF STATE FOR THE HOME DEPARTMENT

[2001] 1 AC 489*

Facts:

Applicant: H. Slovak national, Roma person from the village Palin arrives to the UK in 1997

The subject of the complaint:

- Skinhead threats, police do not protect
- Refused employment for Roma ethnicity
- His child is discriminated against in the school system

Procedure:

Application refused by Secretary of State.

The Special Adjudicator did not find him to be credible and dismissed the appeal.

The Immigration Appeal Tribunal reversed finding on credibility but concluded that, while he had a well-founded fear of violence by skinheads, he had not shown that he was unable to avail himself of the protection of the state.

The Court of Appeal dismissed the appeal against the determination of the tribunal

Decision of the Lords: no recognition, because although threat of persecution real, there is state protection against it.

*Reproduced in: IJRL, vol. 13 (2001), No 1 / 2, 174 - 201

HORVATH - PROTECTION BY THE STATE

Two issues:

The **relation** of state
protection and persecution

The required **level of**
state protection

Protection and persecution

Of the 5 lords, 4 opine that persecution = serious harm + lack of state protection

Starting point: the purpose of GC 51: protection and fair treatment = protection by asylum state is a surrogate of the protection of the country of origin if that persecutes

But what if the persecutor is a non-state actor?

Lord Craighead makes lack of protection part of persecution,
Lord Clyde makes lack of protection part of well founded fear (Lord Browne Wilkinson agrees with both, Lord Hobhose of Woodborough only with Lord Clyde)

(Fear from) persecution is well founded, if the applicant fears persecution which
"consist of acts of violence or ill-treatment against which the state is unable or unwilling to provide protection"

Lord Lloyd of Berwick denies the unity of fear/persecution and lack of protection and considers it a separate element of the definition

Holistic approach

Gradual

Horvath - state protection

The required levels of state protection

All the three decision making levels (IAT, CoA, HoL) agree that Slovakia has offered appropriate protection

When is protection appropriate?

"there must be in force ... a **criminal law** which makes the violent attacks by the persecutors **punishable by sentences commensurate with the gravity of the crimes.**

...

There must be a **reasonable willingness by the law enforcement agencies**, that is to say the police and courts, **to detect, prosecute and punish** offenders."

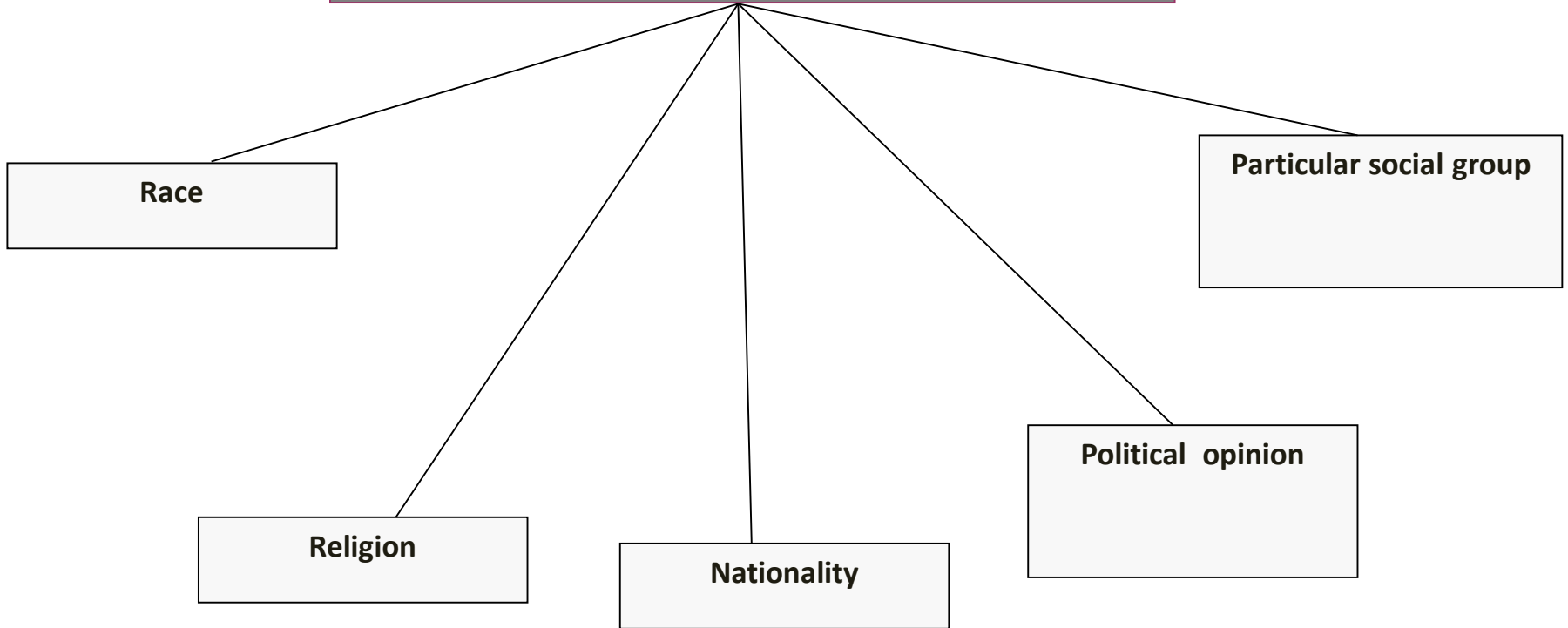
= **subsequent punishment** (+ preventive effect)

Practical State protection is of such high level that fear does not occur

This would entail **an obligation to prevent**

GROUNDS FOR PERSECUTION

The five grounds of persecution



RACE

International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965

Article 1

1. In this Convention, the term "racial discrimination" shall mean any **distinction, exclusion, restriction or preference** based on **race, colour, descent, or national or ethnic origin which has the purpose or effect** of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

HB, § 68: broadest meaning including any ethnic group

RELIGION

International Covenant on Civil and Political Rights

Article 18

1. Everyone shall have **the right to freedom of thought, conscience and religion**. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, **to manifest his religion or belief in worship, observance, practice and teaching**.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. **Freedom to manifest** one's religion or beliefs **may be subject only to such limitations** as are prescribed **by law** and are necessary to protect **public safety, order, health, or morals** or the fundamental **rights and freedoms of others**.

Theistic – non-theistic – atheistic

RELIGION – UNHCR GUIDELINES 2004

Travaux préparatoires of the 1951 Convention – no attempt to define r.

It encompasses freedom of thought, conscience or belief as reflected by the human rights instrument .

It may mean

- a) religion as belief (including non-belief);
- b) religion as identity;
- c) religion as a way of life.

“**Belief**”, = theistic, nontheistic and atheistic beliefs. It is convictions or values about **the divine or ultimate reality** or the **spiritual destiny** of humankind.

Claimants may be seen by their environment as heretics, apostates, schismatics, pagans or superstitious

“**Identity**” is less a matter of theological beliefs than **membership of a community** that observes or is bound together by common beliefs, rituals, traditions, ethnicity, nationality, or ancestry

“**Way of life**” = how they relate, either completely or partially, to the world. Wearing of distinctive **clothing** or observance of particular religious practices, including observing religious **holidays or dietary requirements**.

Sincerity of belief, identity and/or a certain way of life is not central - the persecutor may impute or attribute this religion, faith or practice to the individual or group.

BUNDESREPUBLIK DEUTSCHLAND v Y (C-71/11), Z (C-99/11) – THE AHMADI (RELIGION) CASE

GRAND CHAMBER JUDGMENT OF 5 SEPTEMBER 2012

Facts: Y and Z Pakistani nationals members of the **Muslim Ahmadiyya community**. Arrive in Germany in 2004 and 2003

Claimed persecution:

Y: beaten up in his village by non-state actors, stones thrown at place of prayer, **death threats** (and threat of reporting to the police) **Z: mistreatment and imprisonment** for his religious beliefs

+ **Pakistani Criminal Code** criminalises if Ahmadi people claim to be Muslim, describe their faith as Islam, preach or propagate their faith or invite others to accept it. Defiling the name of Prophet Mohamed entails serious punishment, even death penalty.

Issues:

1. Is **any interference** with religious practices persecution?
2. Can „**core areas**” and „**external aspects**” of religious freedom be **separated** (and only give protection to the core areas)?
3. Is the **nature of the repression inflicted** on the individual and its consequences determinative of persecution?
4. **Should persons abstain** from religious practices in public in order to avoid persecution?

Court's answers

1. No
2. No
3. Yes
4. No

NATIONALITY

Includes ethnic or language groups, may coincide with minorities, stateless.

POLITICAL OPINION

Not: activity!

Genuinely held - imputed

Government

- probably will learn about it
- probably will not tolerate it

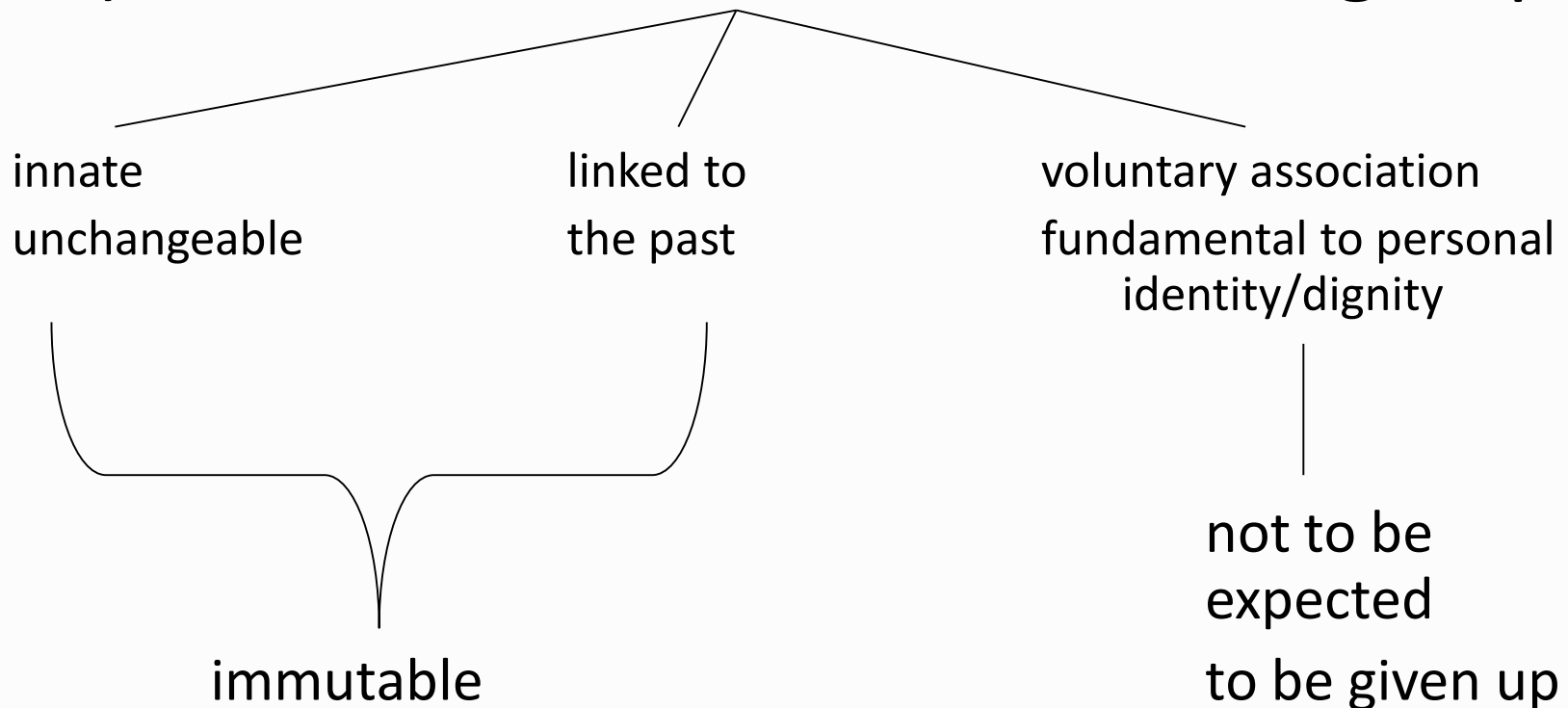
Issues: Republikflucht, desertion, conscientious objection, exclusion clauses

PARTICULAR SOCIAL GROUP

HB § 77 “A `particular social group` normally comprises persons of similar background, habits or social status”.

The two ways of defining a group

A) *Protected characteristics* of the group



PARTICULAR SOCIAL GROUP

B/ *Social perception*: perceived by the society as a separate group within the society

Key issue: either is enough or conjunctive



UNHCR 2002*:
Alternatives

EU Qualification Directive
Both needed (conjunctive)

UK House of Lords, 2006 *SSHD v K, Fornah v SSHD* (UKHL 46) - No need to meet the dual test

US BIA 2014: *Matter of W-G-R-* (26 I&N Dec. 208) (BIA 2014) Requires characteristics + social distinction

Persecution alone does not create a group (but may indicate the perception as a group)

No need for every member of the group to be threatened with persecution

No need for cohesion (knowing each other)

* Guidelines on International Protection, Membership of a Particular Social Group

GENDER

UNHCR: GUIDELINES ON INTERNATIONAL PROTECTION: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention ... HCR/GIP/02/01 7 May 2002

Gender - Sex

„the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another”

(UNHCR Guidelines, para 3)

sex is a biological determination.

See also the national guidelines: Australia, Canada, Sweden, UK, US

Gender specific „as woman” „as man” Gender related „because she is a woman/man”

Gender specific persecution

- Rape Sexual abuse
- FGM
- Forced abortion
- Forced marriage
- Domestic violence
- Gender specific mores/dress codes

Always persecution (if no protection)

May amount to persecution

GENDER IDENTITY/SEXUAL ORIENTATION

„Gender identity refers to each person’s deeply felt **internal and individual experience of gender**, which may or may not correspond with the sex assigned at birth, including the **personal sense of the body**, and other expressions of gender, including **dress, speech and mannerisms.**”

UNHCR GUIDANCE NOTE ON CLAIMS FOR REFUGEE STATUS UNDER THE 1951 CONVENTION RELATING TO SEXUAL ORIENTATION AND GENDER IDENTITY 2008

„sexual orientation refers to a person’s **capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender, or more than one gender**”

UNHCR Note, quoting the 2007 *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* § 5

„**gay**” to refer to men, who is physically, romantically, and emotionally attracted to men - “**lesbian**” refers to women - “**Bisexual**” is used to a person attracted by both men and women - “**Transgender**” refers to men and women whose gender identity does not align to their assigned sex. Transgender does not imply any specific form of sexual orientation and may include transsexuals and cross-dressers - „**Intersex**” or "disorders of sex development" (DSD) - refers to a condition in which an individual is born with reproductive or sexual anatomy and/or chromosome patterns that do not seem to fit typical biological notions of being male or female

UNHCR Guidelines in International protection No.9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention relating to the Status of refugees
HCR/GIP/12/09, 23 October 2012

**X, Y AND Z v MINISTER VOOR IMMIGRATIE EN ASIEL CJEU,
C-199/12, C-200/12, C-201/12, JUDGMENT OF 7 NOVEMBER 2013**

Facts: three men, all claim refugee status (between 2009 and 2011) for being persecuted for **homosexuality in Sierra Leone, Uganda and Senegal**. In each country homosexuality is a crime

Their **homosexuality and credibility not in dispute** in front of the Raad van Staade

Preliminary questions addressed to CJEU:

1. Do persons with a homosexual orientation form a **particular social group**?

If they do:

2. **Which homosexual activities fall within the scope of the Directive** and (in case of persecution) can that lead to of refugee status? Subquestions:

- (a) Can homosexuals be expected **to conceal their orientation from everyone** in their [respective] country of origin in order to avoid persecution?
- (b) If not, can they be **expected to exercise restraint**, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?
- (c) If a distinction can be made between forms of expression which relate to the core area of the orientation and forms of expression which do not, **what should be understood to constitute the core area of the orientation** and in what way can it be determined?

3. Do the **criminalisation of homosexual activities** and the threat of imprisonment in relation thereto, constitute an act of persecution? If not, under what circumstances would that be the case?'

CJEU

- Interpretation of the QD should be **in conformity with G51** and with **the Charter** of F.R.
- Well founded fear of „**personally**” being subject to **persecution** (§ 43)
- Ad Q 1 (**Do homosexuals constitute a p.s.g.?**) Yes!
 - Homosexuality: **protected characteristics**, not to be renounced as it is „fundamental to ... identity” (§ 46)
 - **Criminal punishment** makes them **perceived as a separate group**
- Ad Q 3 (!) (Is criminalisation persecution?)
 - Persecution = serious interference with human right
 - Homosexual acts = family and private life = **may be subject to derogation**
 - **Mere criminalisation** does **not violate** QD, but
 - Long term imprisonment may be „**disproportionate or discriminatory**” (58)
 - If such, it must be shown that **applied in practice**

Yes!

- **If actually applied**
- **So severe as to be discriminatory or disproportionate**

■ Ad Q 2: (Should homosexuality be concealed or restraint exercised if no persecution before departure occurred? What is core area?)

No concealment or restraint may be required!

- „Sexual orientation cannot be understood to include acts considered to be **criminal** in accordance with national **law of the [EU] Member States**”
(Universalist – relativist debate! - BN)
- No, *a contrario* argument: „in public” mentioned in connection with religion but not with sexual orientation
- If a person can not be expected to renounce homosexuality then he **can not be required to conceal** it as that would be **„incompatible” with the non-renunciation entitlement**
- Assessment of risk of persecution is independent from restraint i.e. abstention from certain behaviour.

• No need to answer what is core. **Anything should be allowed what is not prohibited in the EU Member States.**

RIGHTS OF THE REFUGEES

-

END OF REFUGEE STATUS

-

EXCLUSION FROM PROTECTION STATUS

-

PROTECTION ELSEWHERE

The matrix of rights

Treatment	Simple presence	Lawful Presence/Stay	Lawful residence
The same treatment (S) (or at least as favour-able /AF/) as is accorded to nationals	4 § Religious freedom (AF) 20 § Rationing (S) 21 § (1) Elementary education (S) 29 § Fiscal charges (S)		14 § Artistic rights and industrial property 16 §(2) Access to courts (legal assistance, etc.) 23 § Public relief and assistance 24 § Labour legislation and social security
The most favourable treatment accorded to nationals of a foreign country , in the same circumstances			15 § Right of (non-political and non-profit-making) associations and trade unions 17 § Right to engage in wage-earning employment
Treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally	7 § (1) /sets as general standard/ 13 § Movable and immovable property 22 § (2) Non-elementary (higher) education	18 § Self-employment 26 § Freedom of movement within the country	19 § Liberal professions 21 § Housing
In countries other than that in which he has his habitual residence , the treatment granted to a national of the country of his habitual residence	14 § Artistic rights and industrial property 16 §(3) Access to courts (legal assistance, etc.)		
General obligations	2 § Conformity to law of asylum country 3 § Non-discrimination 27 § Identity papers ↔ 33 § Non – refoulement danger to security or crime to community	32 § shall not expel a refugee national security or public order	25 § Administrative assistance 28 § Travel document

Non-application of the Convention

Cessation clauses

Exclusion clauses

Protection by others

Cessation clauses

**Voluntary
act of the
refugee**

**Changed/ceased
circumstances**

**Re-availment
of
protection**
1 § C (1)

**Re-
establishment
in country of
origin**
1 § C (4)

Re-
acquisition
of **(old)
nationality**
1 § C (2)

Acquisition of
new nationality
1 § C (3)

CESSATION CLAUSES

Re-availment of protection 1 § C (1)

Voluntary and intentional

Passport

Registering with authorities of the country left (acquiring documents through diplomatic missions)

Re-establishment in country of origin 1 § C (4)

Voluntary and intentional

Length of stay (short visit : not)

Information on circumstances

Voluntary re-acquisition of (old) nationality 1 § C (2)

What if state (re)-extends, but refugee does not want?

Acquisition of new nationality 1 § C (3)

Where? – state of asylum or resettlement – clear

- successor state of persecuting state extending -???

CESSATION - CHANGED CIRCUMSTANCES - CLAUSE

GC 1 § C (5)

He can **no longer, because the circumstances** in connection with which he has been recognized as a refugee **have ceased to exist**, continue to **refuse** to avail himself of **the protection** of the country of his nationality

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality

CHANGED CIRCUMSTANCE CLAUSE ASSESSMENT OF THE CHANGE

Executive Committee Conclusion No. 69 (XLIII) (1992),
[I]n taking any decision ... States must carefully assess the
fundamental character of the changes ... including the **general
human rights situation**, as well as the **particular cause of fear** of
persecution...an essential element in such assessment by States
is the **fundamental, stable and durable character of the changes**,

CHANGED CIRCUMSTANCE CLAUSE ASSESSMENT OF THE CHANGE

Fundamental

„complete political change“, genuine end of hostilities =
elimination of root causes

Enduring

longer observation before return (*Vilvarajah!*); 12-18 months
real peace, reconciliation starting

Protection restored

more than mere physical security or safety. Existence of a
functioning government and basic administrative structures.

CESSATION CLAUSES – PROCEDURE, EXCEPTION

Individual procedure should apply – except in mass influx and temporary protection

Burden of proof on the government

„**Compelling reasons**” exception:

In case of atrocious forms of persecution:

ex-camp or prison detainees, survivors or witnesses of violence against family members, including sexual violence, as well as severely traumatised persons frequently suffering from local population.

See: EU Qualification Directive, §11 (3) adopting this approach

„Application of the ‘compelling reasons’ exception is interpreted to extend beyond the actual words of the provision to apply to Article 1A(2) refugees. This reflects a general humanitarian principle that is now well-grounded in State practice.” UNHCR Guidelines, 2003, point 21

Exclusion clauses

```
graph TD; A[Exclusion clauses] --> B[Crime Against Peace  
War Crime  
Crime Against Humanity]; A --> C[Serious non-political crime prior to admission]; A --> D[Acts contrary to the purposes and principles of the UN];
```

Crime Against Peace

War Crime

Crime Against
Humanity

Serious non-
political crime
prior to
admission

Acts contrary to
the purposes and
principles
of the UN

EXCLUSION CLAUSES – FUNDAMENTALS

Rationale in 1950-51: Non-deserving cases should not get protection (avoid abuse of the system)

War criminals and other serious criminals should not remain unpunished

Threshold: „serious reasons for considering”

- less than balance of probabilities!? (G. Goodwin-Gill, p, 97) –still debated

Inclusion before exclusion? – debate

Exclusion ≠ removal

Protection against torture, etc („broad non-refoulement”)
remains!

CRIME AGAINST PEACE, WAR CRIME, CRIME AGAINST HUMANITY

There is no accepted definition (Geoff Gilbert, p. 434)

Crime Against Peace (Nürnberg, IMT Charter) = planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties...

ICC: definition of aggression (see next slide)

War Crime (IMT, Geneva Conventions and 1977 protocols, ICC, Tribunals /ICTY, ICTR/)

violations of the laws or customs of war

murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity – IMT

Now: much wider, grave breaches of the Geneva Conventions ICC: 50 crimes (see separate sheet)

Crimes against Humanity (as in ICC):

murder, severe deprivation of physical liberty, torture, rape, and other inhumane acts of similar character. ... if „... committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack,” defined to mean „a course of conduct involving the multiple commission of acts referred to... against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.”

AGRESSION AS DEFINED BY STATE PARTIES TO THE ICC, 2010

THE CRIME OF AGRESSION

Article 8 *bis* of the Rome Statute: Crime of aggression = committing an act of aggression

1. ... means the planning, preparation, initiation or execution, **by a person** in a position effectively to exercise **control over or to direct the political or military action** of a State, of an **act of aggression** which, by its **character, gravity and scale**, constitutes a **manifest violation of the Charter** of the United Nations.

2. For the purpose of paragraph 1, “*act of aggression*” means the **use of armed force by a State against** the sovereignty, territorial integrity or political independence of **another State**, or in any **other manner inconsistent with the Charter** of the United Nations.

Any of the following acts, regardless of a declaration of war, shall ... qualify as an *act of aggression*

(7 major groups of acts)

SERIOUS NON-POLITICAL CRIME PRIOR TO ADMISSION

No need for proof sufficient for a criminal trial, but there should be **serious reasons for considering**.

It includes **inchoate offences such as attempts**, conspiracies and incitement.

Difficulty: **Is mere membership of a group** adequate to exclude? **Are all members complicit?**

Is **constructive knowledge** adequate to impose individual criminal responsibility?

What **if already served a punishment** or long time passed?

SERIOUS NON-POLITICAL CRIME PRIOR TO ADMISSION

Outside the country of refuge prior to [the individual's] admission to that country as a refugee

Terrorism

UNGA Res.53/108 on Measures to Eliminate International Terrorism

“criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstances unjustifiable, whatever the considerations of political, philosophical, ideological, racial, ethnic, religious or other nature that might invoked to justify them”.

Work in the UN on a comprehensive treaty still in progress

Debates: self determination - state forces in armed conflict

TERRORISM –EU DEFINITION
COUNCIL FRAMEWORK DECISION OF 13 JUNE 2002 ON COMBATING TERRORISM
(2002/475/JHA)

Art. 1 Terrorist offences and fundamental rights and principles

1. ... acts referred to below in points (a) to (i), ..., which, given their nature or context, may seriously damage a country or an international organisation where committed with the aim of:

- seriously intimidating a population, or
- unduly compelling a Government or international organisation to perform or abstain from performing any act, or
- seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation,

shall be deemed to be terrorist offences:

/see next slide/

TERRORISM –EU DEFINITION

THE ACTS

/IF COMMITTED WITH THE AIM AND CONSEQUENCES AS IN PREV. PARAS/

- (a) attacks upon a **person's life** which may cause death;
- (b) attacks upon the **physical integrity** of a person;
- (c) **kidnapping or hostage** taking;
- (d) causing **extensive destruction** to a Government or public **facility**, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property **likely to endanger human life or result in major economic loss**;
- (e) **seizure of aircraft, ships** or other means of public or goods transport;
- (f) manufacture, possession, acquisition, transport, supply or **use of weapons, explosives or of nuclear, biological or chemical weapons**, as well as research into, and development of, biological and chemical weapons;
- (g) **release of dangerous substances, or causing fires, floods or explosions** the effect of which is to endanger human life;
- (h) **interfering with or disrupting the supply** of water, power or any other fundamental natural resource the effect of which is to endanger human life;
- (i) **threatening to commit any of the acts listed in (a) to (h).**

ACTS CONTRARY TO THE PURPOSES AND PRINCIPLES OF THE UN

Only state leaders – or private persons (non- state actors)

Terrorism here as well: what definition?

any national legal definition? ↔ UN definition?

„Crimes capable of affecting international peace, security and peaceful relations between States, as well as serious and sustained violations of human rights, would fall under this category.” UNHCR Guidelines, 2003

PROTECTION BY OTHERS

GC 1 § C (5) D. (1)

„ This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.”

UNRWA = United Nations Relief and Work Agency
(established in December 1949, by a GA resolution, operational since 1 May 1950)

“We (the United Nations Relief and Works Agency for Palestine Refugees in the Near East, UNRWA) provide assistance and protection for some 5 million registered Palestine refugees to help them achieve their full potential in human development” <http://www.unrwa.org/who-we-are> (20151007)

Territory	Gaza	West Bank	Syria	Lebanon	Jordan
Number of registered 2015 refugees	1.258.559	762.288	526.744	449.957	2.097.338
2016	1,3 million	774.167	Same /0,45 mill	Same	2.117.361

Source: <http://www.unrwa.org/where-we-work> (20151007) and (20161121)

THE BOLBOL CASE

JUDGMENT OF THE (GRAND CHAMBER) OF 17 JUNE 2010
(REFERENCE FOR A PRELIMINARY RULING FROM THE FŐVÁROSI
BÍRÓSÁG (REPUBLIC OF HUNGARY)) — NAWRAS BOLBOL V
BEVÁNDORLÁSI ÉS ÁLLAMPOLGÁRSÁGI HIVATAL
(CASE C-31/09)



Ms Bolbol's claim: coming from Gaza to Hungary, unable to return there she ought to be recognised automatically as a Convention refugee under 1 D 2nd para. – The authority denies that the para entitles to automatic recognition – it only entitles to application for status and makes the GC applicable

GC 1 D 2nd para:

„When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.”

„According to Ms Bolbol, the purpose of Article 1D is to make clear that **where a person** registered or entitled to be registered with UNRWA **resides, for any reason, outside UNRWA's area** of operations **and**, for good reason, **cannot be expected to return there**, the States party to the Geneva Convention **must automatically grant him refugee status.**” para 31 of the judgment

The authority denies automatic entitlement and insists that the case must be subjected to RSD (if not excluded right away)

BOLBOL

For the purposes of the Qualifications non-applicability rule

A person receives protection or assistance from an agency of the United Nations **other** than the United Nations High Commissioner for Refugees,

when that person **has actually availed himself of that protection or assistance**

In essence: middle road (closer to H. authorities: if not actually availing of the UNRWA assistance then the Convention is applicable as to an asylum seeker – without automatic recognition)

**MOSTAFA ABED EL KAREM EL KOTT,
CHADI AMIN A RADI,
HAZEM KAMEL ISMAIL
V BEVÁNDORLÁSI ÉS ÁLLAMPOLGÁRSÁGI HIVATAL (HUNGARY)
CASE C-364/11
CJEU GRAND CHAMBER JUDGMENT, 19 DECEMBER 2012
UNHCR AND 5 MS, INCLUDING GERMANY, UK, FRANCE INTERVENING**

Facts

Three Plestinians from UNRWA camps in Lebanon (represented by the Hungarian Helsinki Committee)

El Kott: lived in Ein El-Hilweh UNRWA refugee camp in Lebanon. His house had been burned down and he had been threatened;

Radi: Home destroyed in Nahr el Bared UNRWA camp (Lebanon) once in Beirut police mistreated them, arrested them arbitrarily, tortured and humiliated them

Ismail: lived with his family in the Ein El-Hilweh camp. During armed clashes between the Islamic Fatah and the Jund el-Sham, extremists wanted to use the roof of his house. When he refused, he was threatened with death and suspected as an 'enemy agent'. After his departure his was vandalised.

All the three got non-refoulement or subsidiary protection status from BAH but appealed for refugee status

KOTT, RADI, ISMAIL - C-364/11

Main question: interpretation of the exclusion clauses of the Geneva Convention and of the Qualification Directive and its consequences

Essence of the judgment:

-voluntary departure does not open the road to ref. status (end exclusion) (§ 49) Exclusion (enjoying the protection of other agency) also extends to those who „shortly before submitting an application” were under UNRWA protection (§ 52)

-When does protection by UNRWA cease? (Main question: effectivity of the protection, not mere existence of UNRWA)

-if UNRWA ceases to exist

-Circumstances beyond the personal control and unconnected to the person's will (beyond his volition) force the person to leave (§ 58)

-„a Palestinian refugee must be regarded as having been forced to leave UNRWA's area of operations if his personal safety is at serious risk and if it is impossible for that agency to guarantee that his living conditions in that area will be commensurate with the mission entrusted to that agency.”

KOTT, RADI, ISMAIL - C-364/11

-Whether departure was for reasons

Beyond his control

and

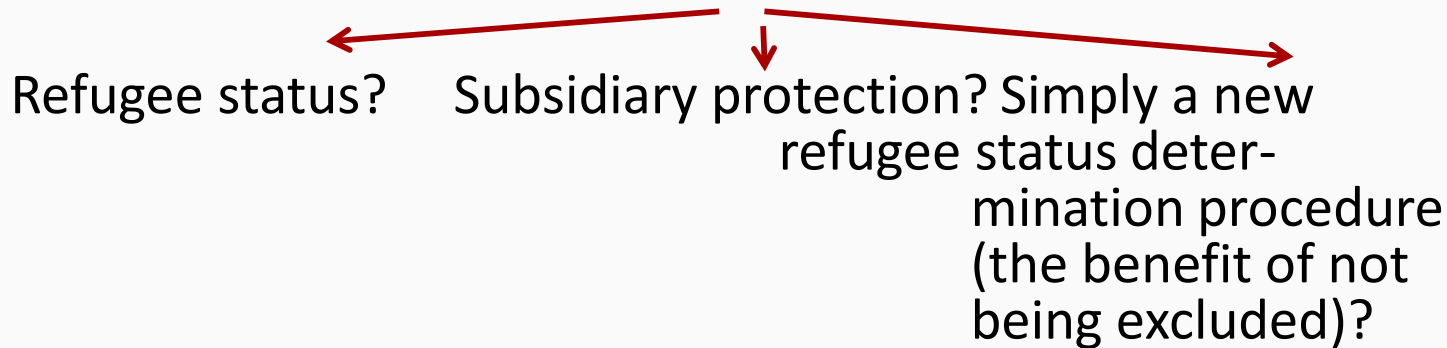
Independent of his volition

must be determined in a full individual procedure (§ 64)

„The second sentence of Article 12(1)(a) of [the Qualification Directive] must be interpreted as meaning that **the cessation of protection or assistance** from organs or agencies of the United Nations other than the High Commission for Refugees (HCR) **‘for any reason’ includes** the situation in which a person who, after actually availing himself of such protection or assistance, **ceases to receive it for a reason beyond his control and independent of his volition**. It is for the competent national authorities of the Member State responsible for examining the asylum application made by such a person to ascertain, **by carrying out an assessment of the application on an individual basis**, whether that person was forced to leave the area of operations of such an organ or agency, which will be the case where that **person’s personal safety was at serious risk and it was impossible** for that organ or agency **to guarantee that his living conditions in that area would be commensurate** with the mission entrusted to that organ or agency.” (§ 82 (1))

KOTT, RADI, ISMAIL - C-364/11

What is the consequence of finding that UNRWA protection is no longer available for the person?



„where ... the condition relating to the cessation of the protection or assistance provided ...(UNRWA) is satisfied as regards the applicant, the fact that that **person is ipso facto 'entitled** to the benefits of [the directive' means that that **Member State must recognise him as a refugee** within the meaning of Article 2(c) of the directive and that person **must automatically be granted refugee status**, provided always that he is not caught by Article 12(1)(b) or (2) and (3) of the directive.”
(§ 86 (2))

THANKS!

BOLDIZSÁR NAGY

E-mail: nagyboldi@elte.hu

www.nagyboldizsar.hu