

# **IS THE 1951 GENEVA CONVENTION STILL RELEVANT?**

**Presented by Boldizsár Nagy,  
at the training course:  
Promoting effective refugee law education in the  
CIS+ region  
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**EVIDENCE OF THE  
CONTINUED RELEVANCE OF  
THE GENEVA CONVENTION**

# YES, RELEVANT – IT IS THE UNIVERSAL STANDARD

Wide participation: **148** parties to the Convention and/or the 1967 protocol **in January 2016**

Accessions in or after 2000: Afghanistan, Belarus, Mexico, Montenegro, Nauru, Moldova, Serbia, St. Kitts and Nevis, Swaziland, Timor-Leste, Trinidad and Tobago, Ukraine

But

Notable **absences:**

India

Indonesia

Jordan

Lebanon

Malaysia

Saudi Arabia

Tanzania

Thailand

**Geographic limitation:**

Congo

Madagascar

Monaco

Turkey

# UNIVERSAL STANDARD

Regional definitions incorporate the GC concept

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

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.

## **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 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.**”

# UNIVERSAL STANDARD

## European Union: „Qualification Directive”

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

Preamble, (3) speaks of the „**the full and inclusive application** of the Geneva Convention” (22) of „Member States ... **determining refugee status according to Article 1 of the Geneva Convention.**”

(23) Standards for the definition and content of refugee status should be laid down **to guide** the competent national bodies of Member States **in the application of the Geneva Convention.**

(24) It is necessary to introduce common criteria for recognising applicants for asylum as refugees **within the meaning of Article 1 of the Geneva Convention.**

(33) Subsidiary protection should be **complementary and additional to** the refugee protection enshrined in the **Geneva Convention.**

**Substantive law several times refers back to GC.** (5 § sur place, 9 § persecution, 12 § exclusion, 14 § minimum rights in case of revocation, 20 § rights of refugees without prejudice to GC, 25 § travel document)

## QD - RELATIONSHIP TO THE 1951 GENEVA CONVENTION

CJEU, Grand Chamber Judgment in the Bundesrepublik Deutschland v Y (C-71/11) and Z (C-99/11) cases (the Ahmadi case)

Para 47: „the **Geneva Convention** constitutes the **cornerstone of the international legal regime** for the protection of refugees and ... the provisions of **the Directive** ... were adopted **to guide** the competent authorities of the Member States **in the application of that convention** on the basis of common concepts and criteria

Para 48 „**The Directive must**, for that reason, **be interpreted** in the light of its general scheme and purpose, and in a manner **consistent with the Geneva Convention** and **the other relevant treaties** referred to in Article 78(1) TFEU. As is apparent from recital 10 in the preamble thereto, the Directive must also be interpreted in a manner consistent with the rights recognised by the **Charter**”.

# „LIVING INSTRUMENT” – RESPONSIVE TO CONTEMPORARY QUESTIONS

Key concepts of the Geneva Convention subject to constant (re-)interpretation

- What amounts to **persecution**?
- How should the **five grounds** be interpreted?
- When should protection **end**?
- Who are the excludable **(non-deserving) cases**?

**PERSECUTION**

**ACTS, ACTORS**



# 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

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**

Since the late 1970s: increased role of **non-state actors**

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

Insurgents in civil wars (e.g. in Latin America, Yugoslavia, Ukraine, Iraq and Syria)

Dominant group turning against its subgroup – see particular social group

## 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.

# 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

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graph TD; A[The five grounds of persecution] --- B[Race]; A --- C[Religion]; A --- D[Nationality]; A --- E[Political opinion]; A --- F[Particular social group];
```

Race

Religion

Nationality

Political  
opinion

Particular  
social group

*Only two grounds will be discussed!*

# 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

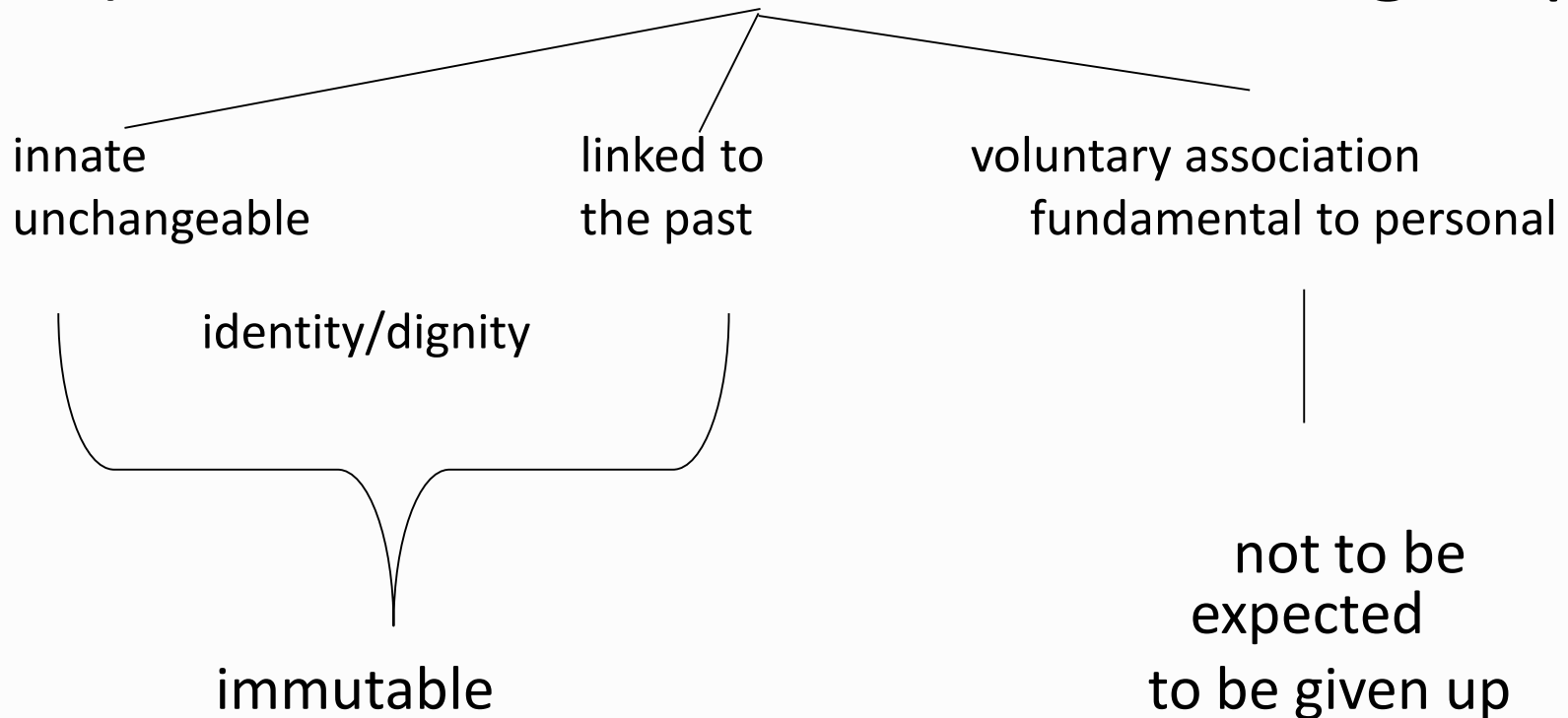
1. No
2. No
3. Yes
4. No

# 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”

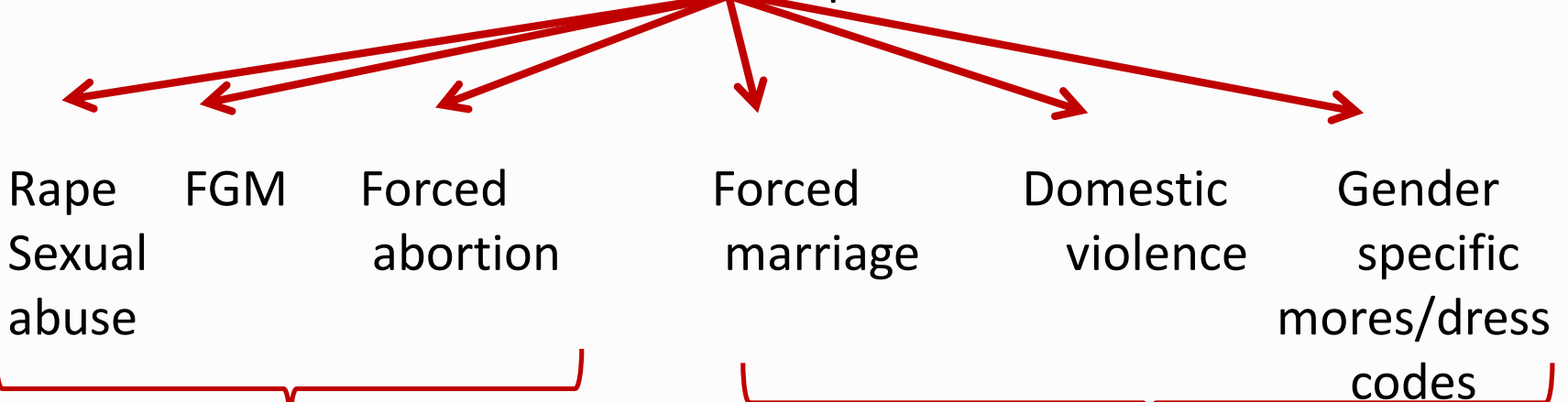
*(UNHCR Guidelines, para 3)*

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



Always persecution (if no protection)

May amount to persecution

# GENDER IDENTITY/SEXUAL ORIENTATION

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

„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

# GENDER IDENTITY/SEXUAL ORIENTATION

Humans should be entitled to live

- in their society
- without hiding their gender identity/sexual orientation (No „discretion“ to be expected! /See HJ and HT case, UKSC 2010/)

because that is part of one's identity, and so:

immutable and/or not be required to give up - it is a basic human freedom - personal integrity, freedom of expression, right to private life

Efforts **to change an individual's sexual orientation or gender identity by force or coercion** (forced institutionalization, forced sex-reassignment surgery, forced electroshock therapy and forced drug injection or hormonal therapy) constitute **torture, or inhuman or degrading treatment**.

Further forms of persecution: detention, forced marriage, forced pregnancy, marital rape, ostracisation, denial of certain rights (e.g. seeing the child)



# GENDER

**Gender-related** persecution = other grounds applied to women in a gender-related way

Race: genocide by sexual violence or birth control

Religion: denying mores/dress code may be seen as denial of religion

Nationality: the woman persecuted because of the nationality of the man

Particular social group: can all the women (or men) of a society constitute a group under threat of persecution? (UNHCR guidelines, Islam and Shah, UKHL: yes; US and others: no)

Political opinion: frequently „lesser role” (nursing sick rebels, feeding, hiding political opponents, being) persecuted for imputed views, actually of the husband or other family member

# GENDER

**Law envisaging** persecution (e.g. sterilisation) – question: **if actually** the fear is well-founded

**Law prohibiting** persecution (e.g. FGM) but **practice prevailing**: question: does the state protect or are there ways – without self denial – to avoid practical harm

## Mechanism of claim

- establish that the group exists (is distinct, not only created by the persecution)
- show that claimant is part of the group
- show that persecution is on account of that membership and not for another motivation

(see. E.g. Matter of W-G-R, p. 208,)

**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**

## X, Y AND Z V MINISTER VOOR IMMIGRATIE EN ASIEL, 2013

■ 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.**

## EXCLUSION – FUNDAMENTALS

**Paris attacks**, 13 November 2015 (ISIS (Daesh) - calls to exclude all terrorists

- exclude all who
  - are Muslim
  - come from a certain area

### GC response

**Exclusion – taxative list** (crime against peace, war crimes, crime against humanity, serious non-political crime prior to admission, acts contrary to the purposes and principles of the UN)

**Non-deserving cases should not get protection** (avoid abuse of the system). War criminals and other serious criminals should not remain unpunished

But: (see next slide)

## EXCLUSION – FUNDAMENTALS

Main command: exclusion **only after individual investigation** (status determination) **No exclusion of groups** as such!

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**Threshold:** „serious reasons for considering”

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

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**Exclusion ≠ removal**

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



# **CHALLENGES TO THE GENEVA CONVENTION**

# NOT BEING BOUND, GEOGRAPHIC LIMITATION, NARROWER NATIONAL PROTECTION

Syria's most important neighbours **not bound**  
(Turkey: geographic limitation)

- **Non-access to Convention rights**
- Turkey, Lebanon: **no access to labour market**
- Jordan: **no return after departure**

(Convention Travel Document would guarantee the right to return)

# 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**

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

**European influx in 2015** – would it justify?

## „CAPPING” THE NUMBER OF PERSONS IN NEED OF PROTECTION

- **Austria**, 20 January 2016.
- Chancellor Faymann: upper limit for the next four years - altogether - **130 000** (32500/year) 37500 for 2016 (+90 000 registered in 2015)
- These are „guidelines”

## NON-ARRIVAL AND NON-ACCESS TECHNIQUES

- **Visa** obligation
- **Pushback or diversion** at sea  
(Myanmarese refugees, Australia, Israel)
- **Carrier sanctions**
- **Safe third country**
- **Safe country of origin**

# DIVERSE INTERPRETATION OF THE CONVENTION

- **Lack of centralised interpretative body.**
  - CJEU - to some extent - but: refusal to interpret 31 as it was not part of QD

JUDGMENT OF 17. 7. 2014 — CASE C-481/13 QURBANI

- National courts: varied respect to each-other's judgment. (Common law countries: more cohesion)
- ECtHR: avoids interpreting GC51
- EXCOM Conclusions, UNHCR Guidelines, important, but soft. (Handbook stronger)

**WHERE FROM HERE?**



# MILESTONES OF A POSSIBLE WAY FORWARD

- **Resist** nationalist temptation to „close the country”
  - it is immoral
  - it is impossible
  - it is historically short-sighted
  - it is unfair with those states and communities to whom the responsibility to provide protection is shifted
- Consider and establish **genuine responsibility sharing**, first within sub-regions (like the EU) then at larger scale

## MILESTONES OF A POSSIBLE WAY FORWARD

- **Responsibility sharing has many forms**, relocating and resettling persons are only two of them
- Create **orderly ways of entry**, so smuggling can be avoided
  - establish routes for regular immigration
  - use humanitarian visas, providing entry for status determination
  - use protection visas after determination
- Introduce genuine and effective return of those who are **not in need** of protection
- Reinforce **integration** measures

# **THANKS!**

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