

# Non-refoulement and the EU in 2020

Presentation by Boldizsár Nagy  
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## Vincent Chetail:

„Indeed, the archetypal balance between **state sovereignty and human rights** has reached its breaking point **in favour of the latter**”

Vincent Chetail: *International Migration Law*, OUP, 2019, p198

**Is this true at the end of 2020**

- in law?

- in practice?

# THE PRINCIPLE OF NON- REFOULEMENT

An overture to it in 2020

## 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, CUP, 3rd ed. 2007, 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

## THE CONCEPTUAL GAP

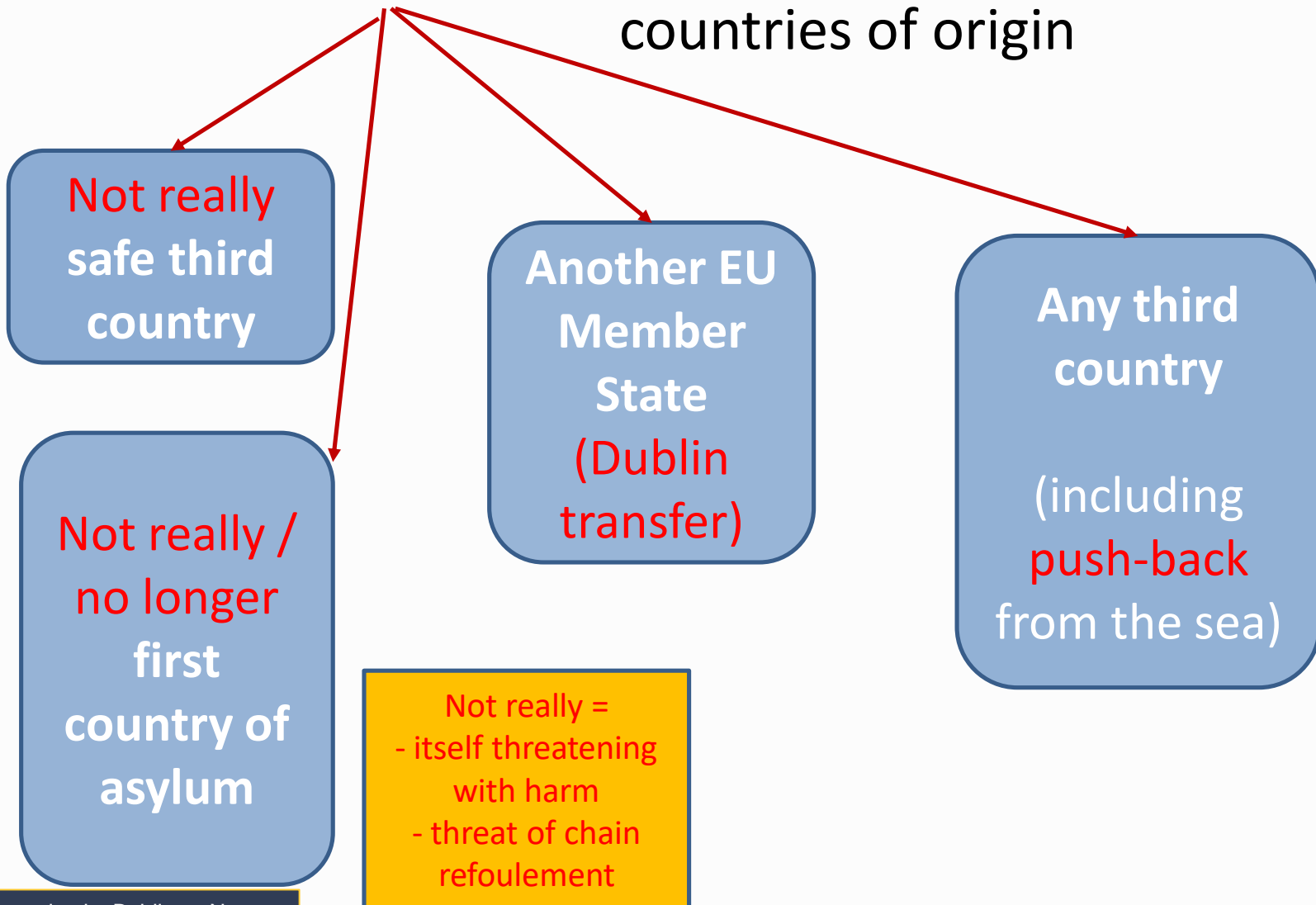
Non-refoulement  $\neq$  (territorial) asylum  
(the right to stay)  
right of the individual      prerogative of the state

Incessant **efforts** of states **to not grant a right to stay**  
without an open breach of the **non-refoulement** rule.

- Safe third country
- First country of asylum
- Summary removal to uncertainty

# THE ROLE OF THIRD COUNTRIES

„Refoulement” or transfer to other than the countries of origin



# EXPOSING TO ILL-TREATMENT

**Not really safe third:** Serbia's changing assessment in Hungary.  
Libya!!!

+ Hungary's new category of safe transit country – subject to CJEU scrutiny

**Not really first country of asylum:** Turkey, Lebanon, Jordan?

**Transfer under Dublin regulation threatening with treatment contrary to Article 3 ECHR :** Greece, Hungary, Bulgaria, Italy

National policies on individual guarantees in Dublin cases	
Dublin Unit	Countries from which guarantees are requested
DE	GR, HU
CH	IT
NL	GR
PL	GR, HU, BG
HU	BG
SI	GR, IT

Source: ECRE: *The implementation of the Dublin III Regulation in 2019 and during COVID-19, 2020, , p. 23*

Source: AIDA.



## Spreading practice

Spain – Ceuta and Melilla – N.D. and N.T v Spain  
– a judgment subject to criticism but

**not licencing refoulement**

Italy – Libya

Greece – Turkey

Croatia – Bosnia-Herzegovina

Hungary – Serbia, Ukraine

Poland – Ukraine

Lithuania -Belarus

„It is crucial to observe in this regard that the prohibition of refoulement includes the protection of asylum-seekers in cases of both nonadmission and rejection at the border...” § 178

Does the law-breaking state practice harden into new customary law?!

# 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, Greece 2020)

## 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

## 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 Sweden, Greece, Lebanon, Jordan, or Turkey entitled to admit no more refugees?

European influx in 2015 – would it justify?

# RETURN FROM THE SEA (PUSH-BACK)

## Seas

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

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

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

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

Hirsi Jamaa  
sustained  
even in  
N.D and N.T.!

## 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)

## 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

# EVALUATION OF THE EU PRACTICE

**Direct refoulement** to the country of origin still **rare**

More removals to countries claimed to be safe

Formal **efforts to re-write the rules** by accepting practices aimed at keeping asylum seekers away from the national/EU territory - **a new wave of non-access policies**

It is a **direct shift of responsibility for protection**, expecting less developed countries to provide protection and assistance

**Laying the (shaky) legal foundation for** forceful hot returns from the border, without any legal procedure - **pushbacks**

# THANKS!

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