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# REVISTA INCLUSIONES

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**THE APPLICATION OF THE “NON-REFOULEMENT” RULE ACCORDING  
TO THE EUROPEAN AND BULGARIAN LAW**

**APLICACIÓN DE LA NORMA “NON-REFOULEMENT”  
SEGÚN LA LEY DE LA COMUNIDAD EUROPEA Y DE LA REPÚBLICA DE BULGARIA**

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**Abstract**

The paper explores and discusses the application of the 'non-refoulement' rule (Geneva Convention relating to the status of refugees). At the time of massive inflows of refugees from the Middle East, the European states are put under enormous pressure. The unregulated movement of persons between the country of origin, the country, which provided protection and other countries is a challenge to the flexibility of the system of international protection in the European Union. Being signatories of the main refugee treaties, the European member states should avoid automatic repatriation of asylum seekers. In order to avoid such violations, it is necessary to incorporate the main Geneva articles into European national legal systems.

**Keywords**

International refugee law – Principle of Non-Refoulement – Right of Asylum – Geneva Convention

**Resumen**

El artículo explora y discute la aplicación de la regla de "no devolución" (Convención de Ginebra relativa al estatuto de refugiados). En el momento de las entradas masivas de refugiados de Oriente Medio, los estados europeos se ven sometidos a una enorme presión. El movimiento no reglamentado de personas entre el país de origen, el país que proporcionó protección y otros países es un desafío a la flexibilidad del sistema de protección internacional en la Unión Europea. Como signatarios de los principales tratados de refugiados, los Estados miembros europeos deben evitar la repatriación automática de los solicitantes de asilo. Para evitar tales violaciones, es necesario incorporar los principales artículos de Ginebra en los sistemas jurídicos nacionales europeos.

**Palabras Claves**

Derechos Internacional de Refugiados – Principio de No Devolución – Derecho de Asilo  
Convención de Ginebra

## Introduction

The debates on refugees and the asylum seekers have never been more significant in international relations and international humanitarian cooperation than they are nowadays. In the year 2014 three major refugee crises- the South-Sudanese, the Syrian and the Central-African reached their peaks and at the same time exert unprecedented pressure on the entire international community as well as the Office of the High Commissioner of the United Nations for Refugees (UNHCR). They caused serious budget breakdown for the organization. The number of refugees assisted by the UNHCR is approaching 39 million, a 5.8 million growth within one year.<sup>1</sup> It is of a great significance to discuss the topic of refugees and their protection, and to ensure that the principle of " non-refoulement " is an active policy of the host countries.

At the end of 2013, the continuing influx of Syrian asylum seekers in the Schengen area questioned the capacity and the willingness of member states of the European Union to ensure the principle " non-refoulement ".<sup>2</sup> The pressure on the European countries, caused by the refugee crisis is still greater than ever. The European Union continues to be the main target destination for asylum seekers from Africa and the Middle East.

## The right to asylum and the principle of "non-refoulement"

The issue of access to the territory of the countries which can provide protection for asylum seekers is crucial. In order to enjoy the rights provided by the international and the European law, asylum seekers have to leave the borders of their home country and fall under the jurisdiction of a country that can provide them with protection.

Countries, that are attractive destination and that can provide good conditions for the reception of refugees, have measures that make the access to their territory difficult or impossible. Examples of such measures are the visas and the sanctions against the non-legal carriers. These non-entrée measures block the asylum seekers in countries where they face persecution or armed conflict or in neighboring countries. The European Union (EU) measures aim strict control of the external borders of the Union, including these non-entrée measures and are closely related to the abolition of the internal borders within the EU.<sup>3</sup> The starting point for examining the requests for asylum / international protection is the Geneva Convention of 1951 and the Protocol of 1967<sup>4</sup> which is now largely covered by the EU law through the Qualification Directive (2011/95 / EC).<sup>5</sup> Article 33, paragraph 1 of the Geneva Convention provides: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to 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."

<sup>1</sup> UNHCR, [www.unhcr-centraleurope.org](http://www.unhcr-centraleurope.org) (2013).

<sup>2</sup> Cintia Balogh, International Refugee Law and the European Union's Refugee Protection Protocol: A Study on the *ius Cogens* Norm of Non-Refoulement [http://www.ipeberlin.org/fileadmin/downloads/working\\_paper/ipe\\_working\\_paper\\_49.pdf](http://www.ipeberlin.org/fileadmin/downloads/working_paper/ipe_working_paper_49.pdf)

<sup>3</sup> Valerija Ilarieva, Refugee law collection studies, <http://refugees.farbg.eu/sbornik-po-bejansko-pravo>

<sup>4</sup> Convention Relating to the Status of Refugees, Geneva, Protocol Relating to the Status of Refugees (New York: 1967). <http://www.unhcr.org/3b66c2aa10>

<sup>5</sup> Directive (2011/95 / EC), <http://eur-lex.europa.eu/legal-content/BG/TXT/?uri=CELEX:32011L0095>.

The principle of "non-refoulement" is the cornerstone of the refugee protection. This means that, in practice, refugees should not be returned to a country where they have reason to fear persecution. According to the international law on human rights, the importance of the principle of "non-refoulement" is beyond the scope of Article 33, paragraph 1 of the Geneva Convention of 1951, as the non-refoulement rule is also clear from Article 3 of the United Nation Convention against torture and other cruel, inhuman or degrading treatment or punishment, as well as the general international law.

The prohibition of refoulement is absolute –it does not allow any derogation or exception. The principle of non-refoulement bans not only a return to the country of origin (direct refoulement) but also a transfer to countries where individuals are exposed to the risk of onward removal to the country of origin (indirect or onward refoulement). This means, for example, that returning an asylum seeker to a country neighbouring the EU in which he or she previously stayed (for example, Serbia or Turkey) is only possible if –after assessing the individual’s personal circumstances– the authorities are satisfied that he or she will be readmitted by the third country and protected from unsafe onward removal. Return to a third country is not allowed if there is a real risk that the individual would be subjected to inhuman or degrading treatment, including, for example, in detention facilities. International refugee law further requires that the person concerned be allowed to access asylum procedures in the third country<sup>6</sup>. All Member States of the EU and the Council of Europe are members of the Geneva Convention of 1951, but Turkey apply the Convention only to refugees from Europe.

Once asylum seekers are under the control of the authorities of the country (including border police), they may express their desire to apply for protection. The host country exercises jurisdiction over them and is responsible for compliance with the prohibition of the rule of ‘non-refoulement’. This, itself does not mean that the country is directly obliged to allow the asylum seekers in its territory. But, in practice, to enable these countries to comply with the prohibition on returning, it is necessary to conduct a procedure for processing requests for protection. From the moment this procedure begins, the asylum seekers are legally residing in the territory of the host country and, pending completion of this procedure, they can not be deported. It should be added that the countries have introduced additional mechanisms to avoid the examination of asylum applications, even after asylum seekers are under their jurisdiction and have expressed their need for protection. Examples of such mechanisms are the principles of safe country of origin and safe third country and the Dublin mechanism within the EU. The Dublin mechanism leads to the return of many asylum seekers in countries like Bulgaria, which are located at the external border of the EU. This in turn forces these countries to take more stringent measures to protect its borders and prevent their illegal crossing.

### **Legal framework of the principle of "non-refoulement"**

According to the EU law, Article 78 of the Treaty on the Functioning of the European Union,<sup>7</sup> “the EU should offer policy on asylum, subsidiary protection and temporary

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<sup>6</sup> Asylum and migration into the EU in 2015, Annual report  
[http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2016-fundamental-rights-report-2016-focus-0\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2016-fundamental-rights-report-2016-focus-0_en.pdf)

<sup>7</sup> Treaty on the Functioning of the European Union, <http://eur-lex.europa.eu/legal-content/BG/TXT/?uri=celex%3A12012E%2FTXT>

protection, such as to ensure respect for the principle of non-refoulement.” This policy must be consistent with the Geneva Convention of 1951 and its Protocol, and other relevant treaties, as the European Convention for the Protection of Human Rights and Fundamental Freedoms, the UN Convention on the Rights of the Child, the UN Convention against torture and other cruel, inhuman or degrading treatment or punishment. The measures in the acquis of the EU in the field of asylum were adopted in the framework of this policy, including the Dublin Regulation (Regulation (EU) № 604/2013)<sup>8</sup> the Qualification Directive (2011/95 / EU), the Procedural directive (2013/32 / EU) and the Directive on reception conditions (2013/33 / EU). Denmark, Ireland and the United Kingdom are not bound or are only partially bound by the acquis of the European Union's asylum and international protection - ie. acquis on asylum.<sup>9</sup>

Article 33 of the Convention relating to the Status of Refugees enshrines the prohibition against returning (refouler) a refugee – and hence also a person seeking asylum – to a risk of persecution. The prohibition of refoulement is also reflected in primary EU law, specifically in Articles 18 and 19 of the EU Charter and Article 78 of the Treaty on the Functioning of the EU (TFEU). The 28 EU Member States accepted this obligation when ratifying the EU treaties.

The Qualification Directive, revised in 2011, introduced into EU law a set of common standards for the qualification of persons as refugees or as such in need of international protection. This includes the rights and obligations associated with this protection, a key element of which is the prohibition on return under Article 33 of the Geneva Convention of 1951. However, neither Article 33 of the Geneva Convention of 1951 or Articles 17 and 21 of the Qualification Directive, not impose an absolute prohibition on forced return. These articles allow a refugee to be removed in very exceptional circumstances, in particular when the person is a danger to the security of the host country or when after committing a serious crime the person constitutes a danger to the community.

According to the Charter of Fundamental Rights of the EU<sup>10</sup>, Article 18 guarantees the right to asylum, which includes the respect of the principle of "non-refoulement". Article 19 of the Charter states “No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.” The Charter states that Article 19, paragraph 2, incorporates the relevant well established case law of the European Court of Human Rights. So, any kind of forced removal or transfer of a person to another Member State of the EU must be done according to the Return Directive (2008/115 / EC) in respect of the right to asylum and the principle of "non-refoulement".

According to the EU law, the Qualification Directive governs the protection against refoulement. Persons are entitled to refugee status, if they are subjected to acts of persecution within the meaning of Article 1 letter "A" of the Geneva Convention of 1951. Article 9 of the Qualification Directive states that " acts of persecution should be: actions enough serious in nature or repetition, which constitute serious violations of fundamental human rights, in particular rights from which it is permissible to be restricted in any way by

<sup>8</sup> Dublin Regulation (Regulation (EU) № 604/2013)

<http://eur-lex.europa.eu/legal-content/BG/TXT/?uri=CELEX%3A32013R0604>

<sup>9</sup> EU law handbook on asylum, migration and borders, [http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded\\_bg.pdf](http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_bg.pdf)

<sup>10</sup> Charter of Fundamental Rights of the European Union; <http://eur-lex.europa.eu/legal>

virtue of Article 15, paragraph 2 of the European Convention on Human Rights<sup>11</sup>; accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a manner comparable with that in the above.” According to the European Convention on Human Rights eviction is strictly prohibited when the country may put a person at a real risk to their life in violation of Article 2 of the convention or of torture or inhuman or degrading treatment or punishment in violation with Article 3. It is not necessary to prove persecution on “reason arising from the Geneva Convention of 1951”.

Among the principles applied under EU law and those applying under the European Convention on Human Rights, there is considerable overlap with regard to the risk of assessment after returning. This is due to the standards of the *acquis* of EU on asylum (*acquis* asylum), which are determined largely by the case law of the European Court of Human Rights and the Office of the High Commissioner of the United Nations for Refugees (UNHCR) guidelines. These principles include the fact that assessments should be individual and based on all relevant and applicable norms circumstances, documents and evidence. This includes information on the situation in the country of origin.

### **The prohibition of return according to the Bulgarian law**

According to Article 4, paragraphs 3 and 4 of the Law on Asylum and Refugees (LAR)<sup>12</sup> “foreigners, who have entered into Republic of Bulgaria to seek protection, or who has received protection can not be returned to the territory of the country in which are threatened their life or freedom on account of race, religion, nationality, membership of a particular social group or political opinion and / or conviction or they are at risk of torture or other cruel, inhuman or degrading treatment or punishment.”

When a citizen of a third country is granted the status of a refugee, he or she acquires the rights and the obligations of a Bulgarian citizen. They have the right to acquire real estate on the territory of Republic of Bulgaria under the conditions and in accordance with the procedures laid down for foreigners. They may acquire Bulgarian citizenship under the conditions and in accordance with the procedure laid down in the Law on the Bulgarian citizenship. There is a right to work and vocational training. These rights are granted to the individuals, who benefit from the temporary protection as well.

These rights cannot be exercised by foreigners seeking or having received protection, of whom there are grounds for believing that they are a danger to national security or who, having been convicted by a final judgment of a serious crime, who constitutes a danger to society.

Article 12 of LAR provides in details the exclusion clauses, according to which a refugee status is not granted to a foreigner:

- to whom there are serious grounds for believing that they has committed an act which according to the Bulgarian laws and the international treaties to which Bulgaria is a member,
- is defined as a war crime or a crime against peace and humanity;

<sup>11</sup> European Convention on Human Rights; [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>12</sup> Law on Asylum and Refugees (LAR), <http://lex.bg/bg/laws/ldoc/2135453184>



- to whom there are serious grounds to believe that they had committed serious non-political crime outside the territory of the Republic of Bulgaria;
- to whom there are serious grounds for believing that they commit or incite acts in violation against the purposes and principles of the United Nations;
- who benefits from protection or assistance from organs or agencies of the United Nations other than the High Commissioner of the United Nations for refugees and that protection or assistance is not stopped and the situation had not been established in accordance with the relevant resolutions of the United Nations;
- to whom the competent authorities in the country of residence recognized the rights and obligations of citizenship of this country.

It is evident by the systematic place of the “exclusion provisions” of Article 12 of LAR after the “including provisions” - Articles 8 and 9 of LAR on the refugee and humanitarian status, as well as the systematic place of Articles 1 D- F after Article 1A of the Geneva Convention relating to the Status of Refugees, that the determining authority must first answer the question whether the person meets the criteria for granting international protection and only then assess whether there is any exclusion clauses. This situation is of great practical importance for compliance with the absolute prohibition on returning at serious risk of torture or inhuman or degrading treatment or punishment.

Although LAR provides the so called “exclusion clauses”, a widespread practice in Bulgaria at present is “shutdown before exclusion”. In this case a person who would fall under the exclusion clause is not given an access to the procedure. In other words the relevant authority remains inactive on the registration of their application for protection or the procedure is interrupted before ruling on the request and the person is detained to enforce a deportation order, without a formal reference to the exclusion clauses in the context of LAR. If there is a subsequent disclosure of legally relevant facts concerning the exclusion, the procedure for withdrawal of the protection provided under LAR is not used, but instead the person who received a status is detained to comply with a deportation order. There is illegal ignorance of the rules of the procedure of the refugee law.

## Conclusion

The main instruments of international refugee law and other European treaties on human rights focused on issues related to the refugees are binding for all the European countries, which have signed them. Unfortunately, Member States of the European Union have only partially incorporated the basic principles of the Geneva Convention of 1951 and the Protocol of 1967 and they are free to apply them in their domestic law in their own way. So overall, the Geneva Convention gives Member States a degree of flexibility. The preamble of the Convention speaks of the heavy load that asylum can put on some countries and the need for international cooperation to prevent refugees from becoming a source of tension between the countries.<sup>13</sup> In addition to all this, the European treaties on human rights can not be regarded as part of the instruments related to refugee law due to their limited focus and qualification, related to the protection.

The unregulated movement of persons between the country of origin, the country, which provided protection and other countries is a challenge to the flexibility of the system

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<sup>13</sup> Peers, Steve, The Refugee Crisis: What should the EU do next? <http://eulawanalysis.blogspot.bg/2015/09/the-refugee-crisis-what-should-eu-do.html>

of international protection in the European Union. With Europe facing increased migratory pressure in 2015, it is particularly important for the EU and its Member States to remain vigilant and ensure that their border and migration management policies do not violate the principle of non-refoulement. There is a general understanding in the EU that the prohibition of refoulement should be respected, but law evolving in this field causes legal uncertainties, as pointed out at the 2014 FRA Fundamental Rights Conference in Rome<sup>14</sup>. The absolute nature of the prohibition of refoulement needs to be respected both when devising legislative or policy measures and during their implementation by the authorities. Only a systematic approach of finding a lasting solution to the refugee problem for the individuals to whom the EU has provided and will provide international protection could respond to the complex challenges they face.

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<sup>14</sup> Asylum and migration into the EU in 2015, Annual report

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