LEGAL PROTECTION OF REFUGEES IN PUBLIC INTERNATIONAL LAW

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ABSTRACT
This study aims to highlight the provisions of The Geneva Convention on the Refugee Status, which is determinant for defining the notion of refugee and the right to asylum as a fundamental right of the European Union. The special significance of the Charter in this field is reflected by the fact that it raises the right to asylum at the rank of a norm in EU primary law, since according to Article 6 of the Treaty regarding the European Union, the Charter “has the same juridical value as that of the treaties”.

Key-words: asylum law, codification in international refugee law, Geneva Convention, the asylum seeker.


The starting point for understanding asylum law and the legal position of refugees is the Geneva UN Convention Relating to the Status of Refugees, also known as the Refugee Convention of 28 July 1951 and the Protocol on the Status of Refugees approved in New York on 31 January 1967. The Convention is the first comprehensive codification in international refugee law and establishes the main conceptual distinctions of the right to asylum1.

Being influenced by previous conventions in this field, such as the Convention of 28 October 1933 and the Universal Declaration of Human Rights (UDHR), the Geneva Convention has great importance for the protection of fundamental rights and freedoms of all persons.2

However, compared to the Universal Declaration of Human Rights, the Convention starts from a narrow meaning of the term “refugee” 3. If this treaty provided a temporal limitation of its field of application, this limitation was removed by the 1967 Protocol.

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Thus it is no longer necessary that the acts of persecution that justify the application of the Convention to have taken place before 1951. 4

However, its scope remains limited in terms of people who may apply for refugee status: the Convention is based on the concept of refugee in its strictly legal sense5, leaving out large groups of persecuted people such as war refugees, outside the scope of the treaty.6

Art. 1 A pt. 2 of the Geneva Convention begins from the term of “refugee” based on four characteristic elements: 7 First of all, the asylum seeker should be outside his or her state of origin.8 He or she cannot ask the protection of the state of origin because justified fear of being persecuted.9

Also the feared persecution must occur for reasons of race, religion, nationality, membership to a particular social group or sharing a certain political opinion10.

In case of stateless persons a justified fear should be related to a possible persecution occurring in the state of habitual residence.

Based on this definition, the term of refugee delineates from other legal notions and concepts of the right to asylum, such as that of the asylum seeker and that of the economic migrant. The asylum seekers are those participants to the asylum procedure, who have already submitted an application for recognition of their status as asylum seekers.11

From this perspective the asylum seeker status can be viewed as a preliminary stage before obtaining the refugee status.

In the case of economic migrants, these leave their state of origin from economic reasons such as poverty or unemployment. The Right of Refugees does not refer to this latter category.

Although debated and concluded as an international public law treaty by sovereign states in part, the relevance of the Geneva Convention is also reflected in European Union law12.

9 See Art. 1 A Cif. 2, of 1951 Geneva Convention.
Article 78 of the Treaty of the Functioning of the European Union which stipulates the Union’s competency in the field of the Right to Asylum, makes reference to the special importance of the Geneva Convention.\(^\text{13}\)

Thus the policy of the Union must be “in accordance with the Geneva Convention of 28 July 1951, with its Protocol of 31 January 1967 and with other treaties in this field \(^\text{14}\) regarding the status of refugees”.

2. The right to asylum, a fundamental human right

2.1 The non-refoulement principle

The importance of asylum as a human right was anchored over time in a series of international treaties. We note in this regard, by way of example, the Treaty of Amsterdam, through which the creation of a common asylum system was established in Europe. It is worth mentioning, however, that a universal subjective right of asylum has not yet been recognized.\(^\text{15}\)

The right to asylum is regarded rather as a component of the host State sovereignty but it does not unconditionally grant subjective rights\(^\text{16}\) to the applicant.

In a broader sense, the right to asylum also comprises the non refoulement principle.\(^\text{17}\) Stipulated in Art. 33 of the Geneva Convention, this contains the prohibition of a state to expel a potential refugee in a country in which his or her life or freedom might be jeopardized on reasons of race, religion, citizenship, of belonging to a political group, or on reasons of political opinion.\(^\text{18}\) The doctrine also outlined the opinion according to which the principle of non-refoulment has at the same time the character of customary norm of international public law, thus representing an universal obligation of the international community, regardless of whether the State concerned is or is not part of a treaty to that effect.\(^\text{19}\)


\(^{14}\) See Art. 78 Alin. 1 TFEU.


\(^{17}\) See A. Epiney et al., Die Anerkennung als Flüchtling im europäischen und schweizerischen Recht, ein Vergleich unter Berücksichtigung des völkerrechtlichen Rahmens, in: Freiburger Schriften zum Europarecht Nr. 4, Freiburg im Üechtland, 2008, p. 19.


However, neither from this principle does derive that there can be any subjective rights of access or residence on the territory of a particular state. The principle can be regarded rather as a limitation on the sovereignty of the host State: The freedom of the respective state to reject or expel potential refugees at its sole provision is thus restricted. The principle of non-refoulement, as it is understood in the light of art. 33 of the Geneva Convention may be viewed as representing the very foundation of the asylum right.

Compared to other rules of international law on asylum, art. 33 of the above-mentioned Convention has a broader field of application: the legal protection is not limited to persons who have already been recognized as refugees under Art. 1A pt. 2 of the Convention, but also refers to potential refugees. Thus this article provides other additional obligations of the host state such as the need to implement a procedure for analyzing the fulfillment of the conditions mentioned in Art A pt 2 of the Convention.

Another source of international law for asylum is represented by the Universal Declaration of Human Rights. Although it was not reached until today a consensus on the legal value of this document, the Declaration is undoubtedly an inspiration for subsequent treaties in this field. Art. 14 of the Declaration provides that "in case of persecution, everyone has the right to seek and enjoy asylum in other countries". But the right to asylum is viewed in this context too, as a component of the host state sovereignty and it does not confer to the individual a subjective right to asylum. What is guaranteed is the individual’s right to start seeking asylum and in case the asylum is granted by the host State, the right to accept it. However, Art. 14 para 2 of UDHR also states the admissibility of a restriction of this right. Those persons whose prosecution "genuinely results from a criminal act or from actions which are contrary to the purposes and principles of the United Nations" are exempted from the protection of this right.

At regional-European level, the Convention for the Protection of Human Rights and Fundamental Freedoms neither explicitly provides the right of asylum and nor does stipulate the non-refoulement principle. However, the expulsion of

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20 See D. Fröhlich, Das Asylrecht im Rahmen des Unionsrechts, Tübingen, 2001, p. 16.
21 Idem, p. 15.
24 See A. Epiney et al., Die Anerkennung als Flüchtling im europäischen und schweizerischen Recht, ein Vergleich unter Berücksichtigung des völkerrechtlichen Rahmens, in: Freiburger Schriften zum Europarecht Nr. 4, Freiburg im Üechtland, 2008, p. 11.
28 See Art. 14 para. 2 UDHR
a person in a state where there is a risk of persecution may be a breach of art. 3 of
the Convention.\textsuperscript{30}

From the jurisprudence of the European Court of Human Rights it clearly
emerges that the expulsion in a state where there is a risk of inhuman treatment
may represent a breach of Art. 2 of the Convention by the expelling state which is
party to the Convention, because the act of expulsion is an action imputable to the
expelling state which thus makes possible the torture and the inhuman treatment
in the state of origin.\textsuperscript{31} Compared to art. 33 of the Geneva Convention, whose para.
2 allows a restriction of non-refoulement in cases related to public safety,
prohibition of refoulement developed under Art. 3 of the European Convention by
the European Court of Human Rights is an absolute one, any restriction
admissible.\textsuperscript{32}

2.2 \textit{The right to asylum, a fundamental human right in the European Union}

Respect for human rights is one of the fundamental principles of the European
Union.\textsuperscript{33} The initial treaties that led to the creation of the European Communities
did not provide any provision in this regard. Their codification occurred in 2000
with the adoption of the \textit{Charter of Fundamental Rights of the European Union}\textsuperscript{34}. However, the \textit{Court of Justice of the European Union} long before recognized the
fundamental rights as general principles of the Union law.\textsuperscript{35}

It is worth mentioning the limited scope of this treaty: according to Article 51
"the provisions of this Charter are addressed to the institutions, bodies, offices and
agencies, with respect of the principle of subsidiarity and to the Member States
only when they are implementing the Union law".

Among the rights under the Charter there is also the right to asylum. Thus,
Article 18 stipulates that "the right to asylum is guaranteed with respect for the
on the status of refugees according to the Treaty regarding the European Union
and to the Treaty on the Functioning of the European Union".

\textsuperscript{30} See L. Burgorgue-Larsen, La Convention européenne des droits de l’homme, 2e éd.,
Issy-les-Molineaux, 2015, p. 67; J. Meyer-Ladewig, Europäische Menschenrechtskonvention,
\textsuperscript{31} See ECHR, Cauza 1403/88 (\textit{Soering contra Regatului Unit}) N. 91; J. A. Frowein, in: J. A. Frowein,
W. Peukert (Hrsg.), Europäische Menschenrechtskonvention, EMRK-Kommentar, 3. Auflage, Kehl am
\textsuperscript{32} See ECHR, Cauza 1403/88 (\textit{Soering contra Regatului Unit}) N. 88.
\textsuperscript{34} This started to produce juridical effects only since 2009, by entering into force of the \textit{Lisbon
Treaty}. Until then, the Charter had only a soft-law character.
\textsuperscript{35} See CEJ, C-29/69, \textit{Stauder}, ECLI:EU:C:1969:57, N 7; CEJ, C-11/70, Internationale
Handelsgesellschaft, ECLI:EU:C:1970:114.
The Geneva Convention on the Refugee Status is determinant for defining the notion of refugee and the right to asylum as a fundamental right of the European Union. The special significance of the Charter in this field is reflected by the fact that it raises the right to asylum at the rank of a norm in EU primary law, since according to Article 6 of the Treaty regarding the European Union, the Charter "has the same juridical value as that of the treaties". Thus the EU Charter of Fundamental Rights together with the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, takes over the role of one of the most important protection mechanisms in the field of asylum right at regional-European level.

As in the case of the Geneva Convention and of the other instruments mentioned, Article 18 of the Charter aims at mediating a right of residence on the territory of the host state. So the principle of non-refoulement remains at the center of juridical protection as conferred by Article 18. Although the Charter does not generally guarantee any right to enter or to stay on the territory of the host state, according to Article 18, a number of procedural guarantees can be put in place. It should be noted that, contrary to the Geneva Convention, the Charter includes under the notion of persecution not only the potential danger for the life or freedom of the refugee, but also other possible serious human rights violations.

3. Conclusions

The legal protection of refugees has widely developed over the last century. The freedom of the host State, to reject asylum claims and expel potential refugees in their home states was increasingly restricted by the treaties of public international law, dedicated to protecting this category of persons.

Initially it was established through international cooperation, either within the United Nations (Geneva Convention on Refugees) or in the Council of Europe (Convention for the Protection of Human Rights and Fundamental Freedoms).

With the the passing of time and the creation of European integration organizations, the asylum policy gradually moved towards these new paths, thus intensifying the powers of the European Community in this area: the first regulations occurred within the cooperation between certain Member States outside the Community framework.

37 See FRA, Handbook of European Law in the field of asylum, borders and migration, p. 23.
39 Idem, Art. 18 GrC N 4.
40 Idem, Art. 18 GrC N 7.
The first Schengen Agreement started from the premise that a well functioning internal market based on the principles of free movement of persons, goods, services and capital depends on the abolition of border controls between Member States.

It is from this idea that the need for a common policy was born, a policy for the access of third countries citizens on the territory of states that are parties to the agreement, for instance the access of asylum seekers. The first regulation of asylum right in the European Union law can be traced beginning with the entry into force of the *Maastricht Treaty*, namely as part of the third pillar that is still remaining subject of cooperation between Member States.

It was not until the *Treaty of Tampere* that asylum was transferred from the third to the first pillar. In 1999, the European Council, in an extraordinary meeting in Tampere established the creation of an area of freedom, security and justice. The main aspect of the conclusions of the Tampere consisted of creating a common European asylum system, in the spirit of the *Geneva Convention*. The development of this system took place in two stages. The first stage consisted in establishing minimum standards, the competencies in the field being mainly the attributes of the Member States.

After the entry into force of the *Lisbon Treaty* the laws adopted in the first phase of the common European asylum system were reformed and the minimum standards were developed into unitary standards aimed at establishing a consistent legal status for refugees and persons enjoying subsidiary protection.

Thus, it should be noted that the legal protection of refugees in international law can be seen and analyzed as a whole only through all the existent instruments dedicated to the protection of this group of people. Various treaties either by their differences or by their similarities guarantee a complexity of rules that provide both physical protection and a certain security to the refugee during the legal procedures, both before and after the recognition of his or her legal status.

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