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The Concept of the Principle of *Non-Refoulement* in Refugee Law

Keywords: refugee protection, the principle of non-refoulement, international refugee law, human rights

Summary. This article concerns a fundamental principle of the prohibition of refoulement in international refugee law, in reference also to European law and national regulations. In general, the principle of non-refoulement forbids expulsion of foreign nationals beyond borders of a state in which they are seeking protection on humanitarian grounds, and it is a fundamental standard of protection of refugees. The article presents how this principle functions as a standard for international protection, including its functions of guaranteeing comprehensive refugee protection. In the methodological aspect, a legal dogmatic method, a comparative legal method as well as the system analysis and the content analysis of legal texts, have been used. This article presents in an innovative way the approach to the principle of non-refoulement, not only as a standard of protection, but also, through the presentation of its function, by raising some questions concerning the modification of the form of refugee protection in favour of humanitarian protection on the basis of this principle. This issue is the main thesis of this article. This is of particular importance for the future development of refugee law as well as a migration and asylum policy.

Pojęcie zasady *non-refoulement* w prawie uchodźczym

Słowa kluczowe: ochrona uchodźców, zasada non-refoulement, międzynarodowe prawo uchodźcze, prawa człowieka

Streszczenie. Artykuł dotyczy fundamentalnej zasady zakazu *refoulemnet* w międzynarodowym prawie uchodźczym. Zasada *non-refoulement,* dotycząca najogólniej zakazu wydalania z przyczyn humanitarnych cudzoziemca poza granice państwa, w którym osoba ta poszukuje ochrony, stanowi fundamentalny standard ochrony uchodźców. Artykuł dotyczy ukazania istoty tej zasady w oparciu o przedstawienie celów jej ustanowienia w odniesieniu do jej genezy i ewolucji w międzynarodowym prawie uchodźczym. W artykule przedstawiono funkcjonowanie tej zasady jako standardu ochrony międzynarodowej, w tym jej funkcje w zagwarantowaniu kompleksowej ochrony uchodźczej.

Introductory Remarks

The principle of non-refoulement, which was established under Article 33 of the Convention of 1951 relating to the status of refugees, forms the basis of the international legal system, which was created to protect refugees[1]. It constitutes, therefore, an essential part in the protection of refugees.

From being a treaty standard, the principle of non-refoulement became a customary rule of international law of common nature[2] and "becamea cornerstone for the protection of refugees"[3], which, generally speaking, imposes a ban on any form of forcible return of refugees to the countries other than those in which they are seeking protection[4]. The term *non-refoulement* derives from the French word *refouler*, which means to drive back or to repel. In the context of immigration control, the term *refoulement* refers, in particular, to the immediate return of persons, who have illegally entered the territory of a state,to the frontiers of that territory, and the refusal of entry of persons without the required documents[5]. This means that there is a prohibition of a direct and indirect return of refugees and persons who are seeking protection to a country in which their life or health would be in danger. However, a refugee may be expelled or returned if they are a threat to national security or if they have been convicted by a final judgement of a particularly serious crime, and are regarded as a danger to the security of that country (Article 33 paragraph 2 of the Geneva Convention). In refugee law, as provided in the Article 33 paragraph 2 of the Geneva Convention, this rule is subject to restrictions with regard to safety and public order of a particular country[6]. Both the principle of non-refoulement and the exception to this principle concern not only recognised refugees, but also persons applying to be recognised as refugees. It should be emphasized that even if there is a departure from the principle of non--refoulement, which is possible under the three circumstances which are narrowly

[1] Article 33 paragraph 1 of the Geneva Convention relating to the status of refugees of 28 July 1951 (Dz. U. 1991 no. 119; *item*, 515).

[2] H. Nieć, *Prawa cudzoziemców prawami człowieka*, [in:] *Wybrane aspekty prawne obywatelstwa i problematyki imigracyjnej*, eds. A. Kiedrzyn, M. Madej, H. Nieć, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego", MLXXI, „Prace Polonijne", 117, Kraków 1993, p. 30.

[3] *Ibidem,* p. 29.

[4] P. Mahon, O. Bigler, *Les aspects constitutionels et conventionels du principe de non-refoulement en relation avec la migration*, [in:] *Le principe de non-refoulement.Fondaments et enjeux pratique*, ed. C. Amarelle, Bern 2010, pp. 16-17; J. Hathaway, T. Gammeltoft-Hansen, *Non-refoulement in the World of Cooperative Deterrence*, "Columbia Journal of Transnational Law", no. 2,2015, p. 237.

[5] See G. S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., Oxford 1996, p. 117.

[6] Article 33 of the Geneva Convention provides that the principle of non-refoulement does not apply to the refugee in respect of whom there are grounds for believing that the person may be a threat to national security of that country or that the person, who has been convicted for committing a particularly serious crime, is a danger to society of that country.

defined in Article 33 paragraph 2, the Convention does not allow for the revocation of refugee status in the event where is has already been granted[7].

Furthermore, apart from the above-mentioned Convention from 1951, this principle is also addressed by other instruments and regulations of international law and human rights – both at exterritorial and regional level – as well as by those which have a binding or soft law character[8], and, at times, also by the constitutional norms of some countries.[9]

One of the instruments at the regional level is the European Convention on Human Rights. The convention does not directly protect against non-refoulement. Pursuant to art. 2 and art. 3, the return of a person whose right to life has been violated or who could be subjected to torture or inhuman or degrading treatment or punishment is prohibited. In practice, these provisions of the Convention extend protection against refoulement to those who wish to apply for international protection or whose applications have been rejected.

The Principle of *Non-Refoulement* – Objectives and Functions

Humanitarian asylum is underpinning the protection of refugees and the application of the principle of non-refoulment. In the humanitarian approach, the fundamental question is whether a person needs protection, whereas the very causes and the responsibility of a state are less important[10]. Given the above, according to J. Hathaway, granting asylum has from the humanitarian point of view a palliative objective[11]. Therefore, a ban on return of persons to a country in which their life or health could be in danger and, possibly, offering them adequate protection can be treated as an act of protection, that is humanitarian asylum. Against this background, it is revealed that there is a two-pronged approach to the refugee issue.

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[7] https://www.ecre.org/wp-content/uploads/2016/12/Danger-to-the-security-of-the-state-which-granted-refugee-status-PL.pdf [access: 20.08.2020].

[8] Read more G.S. Goodwin-Gill, J. McAdam, *The refugee in International Refugee Law*, Oxford University Press 2007; O. Łachacz, *Zasada non-refoulement w międzynarodowym prawie uchodźczym – zwyczaj międzynarodowy czy też peremptoryjna norma prawa międzynarodowego?*, „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego", vol. 2017, p. 134.

[9] Article 25 paragraph 2 of the Constitution of the Swiss Confederation stipulates that "refugees may not be deported or extradited to a state in which they will be persecuted". And, according to paragraph 3, "nobody may be removed by force to a state where they are threatened by torture or other means of cruel and inhuman treatment or punishment". Z. Czeszejko-Sochacki, *System konstytucyjny Szwajcarii,* Warszawa 2002*,* p. 28.

[10] M.E. Price, *Rethinking Asylum. History, Purpose and Limits*, Cambridge University Press, 2009, p. 7.

[11] J.C. Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, "Journal of Refugee Studies" 1991, no. 4, p. 113.

On the one hand, there are the matters relating to policies and the security of the receiving states, on the other hand, the attention needs to be focused on ensuring protection for those who are seeking refuge[12].

The legal character in the doctrine of international refugee law is perceived in different ways. K. Hailbronner thinks that it is not possible to assume that there is no general or specific right of each individual to invoke this principle, except where the life or freedom of persons seeking protection would be in likely "danger of persecution based on race, religion, nationality, membership of a particular social group or political opinion"[13], as specified in Article 33 paragraph 1 of the 1951 Geneva Convention, because state practice (*opinio iuris*) in this regard is not uniform and is fragmented[14]. Against the background of national and European case law, and also given the fact that this principle is being introduced to the ever--larger number of conventions and national regulations, it has attained the characteristics of a "hard" international law.

Article 33 paragraph 1 of the Convention provides that "no Contracting State shall expel or return 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"[15]. According to international law, the principle of non-refoulement has a broader meaning which goes beyond the content of the above-mentioned Article 33 paragraph 1 of the Geneva Convention[16].

Particularly, Article 3 of the 1984 Convention against torture and other cruel, inhuman or degrading treatment or punishment, as well as other general norms and international law doctrine will be applicable in this respect[17]. The principle of non-refoulement is related to the principle of complementarity, which refers to a cumulative application of the provisions of international law, human rights law, humanitarian law and refugee law for the protection of refugees. The protection

[12] A. Florczak, *Uchodźcy w Polsce: między humanitaryzmem a pragmatyzmem*, Toruń 2003 , p. 9. About the subject of political and humanitarian concept of asylum in: M.E. Price, *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, "Harvard International Law Journal", vol. 47, no. 2, 2006, pp. 413-466.

[13] Article 33 paragraph 1 of the 1951 Geneva Convention.

[14] K. Hailbronner, *Non-Refoulement and „Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?*, [in:] *The New Asylum Seekers: Refugee Law in the 1980. The Ninth Sokol Colloquium on International Law*, ed. D.A. Martin, vol. II, Springer Netherlands, Dordrecht, Boston, London1988, p. 144 and J. Hathaway, *The Rights of Refugees under International Law,* Cambridge University Press, Cambridge 2005, p. 364.

[15] Article 33 paragraph 1 of the 1951 Geneva Convention.

[16] See more on the historical development and evaluation of this principle in T. Molnar, *The Principle of Non-Refoulement Under International Law: Its Inception and Evolution in a Nutshell*, "Corvinus Journal Of International Affairs", vol. 1, 2016, pp.51-62.

[17] See UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 2007.

offered by non-refoulement should therefore be of a complementary character and should be in addition to the protection of refugees stipulated in the 1951 Geneva Convention. It constitutes what can be called a complementary protection of refugees[18].

The principle of non-refoulement sets the framework for refugee protection by prohibiting expulsion of persons who are seeking protection. The prohibition on refoulement refers to persons who do not yet have a refugee status or who have lost their refugee status, and it protects them against persecution or serious harm[19].

Article 33 paragraph 1 of the Geneva Convention, which includes the principle of non-refoulement[20], may be treated as a norm that imposes on states unambiguous and clearly defined obligation and the right of an individual which they can invoke before state authorities[21]. In practice, though, in spite of the established international rules of interpretation of the Convention, these regulations are applied in various ways[22].

For example the Article 25 para 2 and 3 of the Federal Constitution of the Swiss Confederation[23]provides for the protection against expulsion, extradition or forced return to the frontiers[24].The principle of non-refoulement expressed in the Swiss Constitution[25] has the characteristics of the ius cogens norm[26], that is, it has an absolutely binding nature[27] and it corresponds to specific provisions of international

[18] J. Pobjoy, *Treating like alike: The principle of non-discrimination as a tool to mandate the equal treatment of refugees and beneficiaries of complementary protection*, Melbourne University Law Review, vol. 34, 2010, p. 181. Read more in: J. McAdam, *Complementary protection in International Refugee Law*, "Oxford Monographs in International Law", Oxford University Press, Oxford–New York 2007.

[19] For example: absolute prohibition on refoulement in cases of a risk of torture – ECtHR, Appl. No. 37201/06, Saadi v. Italy, 28.02.2008, http://hudoc.echr.coe.int [access: 07.08.2020].

[20] About the legal nature of the principle of non-refoulement, see J. Hathaway, *The Rights of Refugees under International Law,* Cambridge University Press, Cambridge 2005, p. 364; J. Allain, *The ius cogens nature of non-refoulement,* "International Journal of Refugee Law", vol. 13, 2001, pp. 533-558 and C. Lewis, *UNHCR and International Refugee Law: From Treaties to Innovation*, Routledge, New York 2012, p. 124; G. Goodwin-Gill, J. McAdam, *op. cit.*, pp. 201-267; E. Lauterpacht, D. Bethlehem, *The Scope and Content of the Principle of Non-refoulement*, [in:] *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, eds. E. Feller, V. Türk, F. Nicholson, Cambridge University Press, Cambridge 2003, pp. 78-177.

[21] See O. Delas, *Le principe de non-refoulement dans la juriprudence internationale des droits de l'homme. De la consecration a la contestation*, Bruxelles 2011.

[22] J. Hathaway, *The Rights of Refugees…, op. cit.*, pp. 364-365.

[23] The Federal Constitution of the Swiss Confederation of 18 December 1998 came into force on 1 January 2000.

[24] Article 25 para 2 and 3 of the Swiss Constitution.

[25] The principle of non-refoulement is also expressed in Article 5 of the Swiss Asylum Act of 1998.

[26] P. Mahon, J.F. Aubert, *Petit commentaire de la Constitution federale de la Confederation Suisse, art. 25,no. 7,* Zurich, Bern, Genève 2003.

[27] *Wielka Encyklopedia Prawa*, ed. B. Hołyst, vol. IV; *Prawo międzynarodowe publiczne*, eds. J. Symonides, D. Pyć, Warszawa 2014, pp. 132-134. The term *ius cogens* refers to peremptory norms –

law, i.e. Article 33 of the 1951 Geneva Convention, Article 3 of the ECHR, and Article 7 and Article 10 (3) of the Convention against Torture[28].

The principle of non-refoulement which, at the time of the adoption of the Geneva Convention, was merely a contractual norm in its character, and was binding only on the states parties concerned, has transformed over the years into a customary norm of international law which has a common character. The issues which determine the form of this principle are questionable, though. Firstly, it regards the subjective scope of this principle. Article 33 of the Geneva Convention uses the term *refugee*. As a rule, the prohibition of refoulement applies to the refugees within the definition of Article 1A of the Geneva Convention[29]. The declarative character of the act of determination as to whether an individual can be considered a refugee means that these individuals, who are still applying for a refugee status, and are, therefore, still to be officially designated as refugees, also fall under the prohibition of being refouled.

In a broader sense, the principle of non-refoulement also concerns those individuals who are seeking international protection, but who fall under the definition of the Convention refugee. This refers to refugees of war, also being called *de facto* refugees. Putting these persons under the ban of expulsion is of fundamental importance, especially in the situations characterized by a mass influx of displaced persons who are seeking protection[30]. It is not only its normative, but also its axiological aspect that should be considered in this regard, recommending "a realistic assessment of its use, taking into account the need to accommodate to the changing reality which presents new challenges to the international refugee law"[31]. This is particularly important when it comes to the observance of this principle, as well as in the context of the mechanisms of raising the level of states' responsibility for non-compliance with international refugee law[32].

Moreover, while interpreting the Geneva Convention, it was assumed that this principle should be applied to specific jurisdictions, which means to those areas

immutable and absolutely binding on all states, from which no derogation is permitted and which can be modified only by a subsequent norm having the same character – see Article 53 of the 1969 Vienna Convention on the Law of Treaties.

[28] See P. Mahon, F. Matthey, *La procédure d'asile II (conditions de la procédure accélérée, notamment les notions de pays tiers et pays d'origine sûrs),* [in:] *Droit d'asile suisse, normes de l'UE et droit international des réfugiés. Une étude comparative*, ed. UNHCR – Schweizerische Flüchtlingshilfe, Berne 2009, p. 309.

[29] Article 1A of the 1951 Geneva Convention.

[30] See M. Kowalski, *Pomiędzy uznaniowością a zobowiązaniem: podstawy prawnomiędzynarodowej ochrony uchodźców,* „Politeja", no. 1(5), 2006, p. 442.

[31] O. Łachacz, *op. cit.*, p. 134.

[32] See Article 38 of the Geneva Convention which provides for the resolution of conflicts as to the interpretation or application of the provisions of the Convention before the International Court of Justice, but only if such conflicts cannot be resolved in any other way.

where an individual falls under the effective control of state authorities, including the situations in which they would be apprehended by the military or border patrol, even if it happened to be in the open sea[33].

With reference to the axiological justification of the principle of non-refoulement, it should be emphasized that the prohibition of refoulement is recognised as a catalogue of norms, with the protection of certain fundamental freedoms for the international community as its main objective[34]. Therefore, by protecting certain interests, such as life, health, freedom and security, this principle serves a protective function. As emphasised in the doctrine, this principle also sets a standard of behaviour as well as commitments of different states towards refugees and persons who are seeking international protection. Therefore, the prohibition of refoulement also has a priority character when it comes to new developments in law.

Furthermore, this principle serves a preventive function, as it protects against potential violation of human rights, which could happen in future as a result of returning a foreign national to a country where they could be in danger of persecution and thus it also protects against the risk of finding oneself in this kind of situation. A violation of this prohibition is an indication of state responsibility, irrespective of whether or not human rights have been violated as a result of return of foreign nationals while protecting their specific interests[35].

The interpretation of this principle has therefore evolved toward a broadening of the standards of protection[36].

What is more, it is currently emphasised that the objective of refugee protection, including the principle of non-refoulement, is the provision of protection first and foremost to those individuals who are weaker and particularly vulnerable to the danger, and who need greater protection [so-called particularly vulnerable refugees], i.e. children without parental care, elderly people and people with disabilities[37]. The guarantee function consists in the provision of protection to persons seeking international protection who find themselves in specific circumstances,

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[33] M. Grześkowiak, *Transpozycja zasady non-refoulement do polskiego systemu ochrony uchodźców*, „Acta Iuridica", vol. 76, 2018, p. 202. See S. Trevisanut, *The Principle of Non-Refoulement And the De--Territorialization of Border Control at Sea*, "Leiden Journal of International Law", is. 3, vol.7,2014, pp. 661-675.

[34] O. Łachacz, *op. cit*., p. 140.

[35] *Ibidem*, pp. 140-141.

[36] B. Mikołajczyk, *Osoby ubiegające się o status uchodźcy. Ich prawa i standardy traktowania*, Wydawnictwo Uniwersytetu Śląskiego, Katowice, 2004, p. 111, T. Molnar, *op. cit.*, p. 52.

[37] See Raport UNHCR, *Response to Vulnerability in Asylum, 2013.* These regulations are allowed under French asylum law – Article L 723 -3 of the French code of entry and residence of foreigners and right of asylum, as well as Swiss legislation which provides for the protection of particularly vulnerable persons by protecting them on humanitarian grounds and prohibiting their expulsion – Art. 44 of the Swiss Asylum Act and Art. 83 and art. 84 of the Swiss Federal Act on Foreign Nationals and Integration.

often without documents or means of livelihood. The implementation of this type of construct is important insofar as any persons seeking international protection find themselves in a specific legal position and they may be viewed as a group of particularly vulnerable people, who require special treatment and protection[38]. The link between refugee protection standards and human rights is important as it allows to fully define states' obligations and influence the practice of different states with regard to refugees and persons seeking protection. Despite the fact that the ECHR is not focused on the protection of refugees, it forms a basis for the fundamental standards of international protection[39] by supplementing it[40]. This does not, though, offset all kinds of problems concerning the protection of refugees. It is true that by linking refugee law to human rights, its range becomes broader, but, as it is rightly stressed in the doctrine[41], it is basically focused on the principle of non-refoulement and the prohibition of return of foreign nationals to the states where their life, health or freedoms would be threatened, while ignoring, at the same time, the concept of the very rights of refugees[42].

Undoubtedly, the evolution of the principle of non-refoulement has been influenced by the standards set forth in international human rights law and in case law. For in human rights regime, this principle refers to foreigners in general, including cases of extradition or expulsion[43]. In the case of the international protection of human rights, the principle of non-refoulement results from Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading

[38] This refers to persons requiring special attention, e.g. unaccompanied minor aliens or lone parents, women, persons with disabilities, elderly or sick persons. See the UNHCR Report, *Response to Vulnerability in Asylum,* December 2013, available at http://www.unhcr-centraleurope.org [access: 01.09.2016].

[39] See, *inter alia*, ECtHR judgments: Amuur v. France of 25 June 1996 (M. Bossuyt, *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissand,* Bruylant, Bruxelles 2010, pp. 52-53), M.S.S. v. Greece and Belgium of 21 January 2011 (*idem*, Belgium condemned for inhuman or degrading treatment due to violations by Greece of EU asylum law: MSS v. Belgium and Greece, Case Analysis, "European Human Rights Law Review", no. 5, 2011, pp. 582-597).

[40] See J. McAdam, *Complementary protection in International Refugee Law*, *"Oxford Monographs in International Law",* Oxford University Press, Oxford–New York 2007; J. Hathaway, *The Rights Of Refugees..., op .cit.* ,pp. 34 -37.

[41] See, *inter alia*, J. Hathaway, *The Rights of Refugees…, op. cit.*, pp. 2-3. Linking human rights to refugee law means essentially invoking Article 31, 32 and 33 of the 1951 Geneva Convention. See also V. Chetail, *Are Refugee Rights Human Rights? An Unorthodox Questioning on the Relations between Refugee Law and Human Rights Law*, [in:] *Human Rights and Immigration*, ed. R. R. Marin, "Collected Courses of the Academy of European Law", Oxford University Press, Oxford 2014.

[42] See N. Oudejans, *Asylum – Aphilosophical Inquiry into the International Protection of Refugees*, [b.m.], 2011, doctoral dissertation, Tilburg University 28.09.2011, pp. 2-3.

[43] O. Łachacz, *Zasada…*, *op. cit.*, p. 136. L. Garlicki, *Komentarz do art. 3, nb 9*, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności,* Warszawa 2010; A Bisztyga, *Oddziaływanie Europejskiej Konwencji Praw Człowieka na wewnętrzny porządek prawny Zjednoczonego Królestwa*, Katowice 2008, pp. 145-146 and comments on the ECtHR judgment in the case of Soering v. United Kingdom.

Treatment or Punishment, Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention on Human Rights, and it has an absolute character. Incorporated into human rights, this principle differs from the one expressed in refugee law – not only in terms of its source, but also in terms of individuals who are covered by this principle and its range of protection. The protection against refoulement is described in literature as a so-called "ricochet effect"[44] of the provision of the European Convention[45], because in well-established case law of the ECtHR, this law results from Article 3 of the Convention, which provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment[46]. Especially, when given the fact that the current evolutionary interpretation has broadened the scope of the application of Article 3[47]. A foreign national cannot be removed from the country in which they could be in danger of treatment in violation of Article 3, or to the country where such risk does not exist, but where due to the ineffectiveness of its asylum system and/or the lack of codified laws, they may be expelled to the third country in which they face a real risk of the prescribed ill-treatment (*indirect refoulement*)[48]. The concept of the direct or indirect violation of the principle of non-refoulement refers to the prohibition of removal of a refugee both to the country of their origin, from which they escaped (*direct refoulement*), and to a different country, which does not guarantee that the refugee will not be expelled to the country in which they would be at risk of losing their life or health (*indirect refoulement)*[49]. The European Court of Human Rights has examined a number of applications regarding violations of the principle of non-refoulement[50], stating in its case law that the removal of a re-

[44] A. Pijnenburg, *Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control*, "Human Rights Law Review", vol. 20, 2020, pp. 306-332. It is referred also as "chain" refoulement. T. Molnar, *op. cit.*, p. 57.

[45] M.A. Nowicki, I. Rzeplińska, *Ochrona praw cudzoziemców w orzecznictwie organów Europejskiej Konwencji Praw Człowieka*, „Palestra", no. 9-10, 1998, p. 101.

[46] Article 3 of the European Convention on Human Rights. See more in: J. Wojnarowska-Radzińska, *Ochrona wydalanych cudzoziemców na podstawie art. 3 Konwencji o ochronie praw człowieka i podstawowych wolności*, „Studia Europejskie-Studies in European Affairs", is.1, 2013, pp.101-112.

[47] On the subject of the review of applications of refugees under Article 3, see A. Pûraité, *Right to Asylum: Short Overview of the Case-Law of the European Court of Human Rights*, "Internal Security", July-December 2012, no. 2, vol. 4, 2012, p. 50.

[48] ECtHR Judgment of 7 March 2000, Appl. No. 43844/98, in the case of T.I. v. United Kingdom and Judgment of 21 January 2011, Appl. No. 30696/09, in the case of M.M.S. v. Belgium and Greece and M. Bossuyt, Belgium Condemned for Inhuman Or Degrading Treatment Due to Violations by Greece of EU Asylum Law: M.S.S. v. Belgium and Greece, Grand Chamber, European Court of Human Rights, January 21, 2011, "European Human Rights Law Review" 2011, no. 5, pp. 582-597.

[49] N. Coleman, *European Readmission Policy: Third Country Interests and Refugee Rights*, Leiden, Boston 2009, p. 235; J. Hathaway, *The Rights of Refugees…*, *op. cit.*, p. 326. See F. Cherubini, *Asylum Law in the European Union*, London, New York 2014.

[50] M. Grześkowiak, *op. cit.*, p. 206.

fugee from the country in the territory of which they are present to the first safe country must be allowed only if the country of destination can guarantee that it will apply necessary procedures which will prevent their expulsion to their country of origin where they would be in danger of losing their life or health[51]. In recent years, which was certainly influenced by the existence of the migration crisis, we have been able to observe an upward trend in the number of ECtHR judgments concerning the violation of the principle of non-refoulement consisting in returning foreign nationals to the seemingly safe countries, but not necessarily having any effective asylum systems or systems that would maintain appropriate standards of refugee protection and the observance of human rights[52].

It is therefore very important to adopt an asylum policy that guarantees adequate standards of refugee protection and ensures that the principle of non-refoulement[53] is fulfilled, and that the fundamental rights of refugees are observed. Generally speaking, the principle of non-refoulement constitutes a ban on expulsion or return of a person to the territory where they would be persecuted and, as a result, their life and/or freedom would be threatened[54]. Hence, the European Union and its Member States have a fundamental responsibility to provide the appropriate international protection[55], and, at the same time, commit themselves to securing their borders and preventing illegal immigration.

Because of the European migration crisis, the problems that come to the fore are related to the sealing of borders and preventing illegal border crossing[56]. There is no doubt that this has a powerful effect on the asylum and migration policies of particular states. Furthermore, in many societies there is an increase of anti-immigrant resentment and behaviour. It results in the redefinition of the essence and the objectives of law and the refugee policy, which instead of providing the most effective protection of refugees, is concentrated on building border walls.

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[51] J. Hathaway, M. Foster, *The Law of Refugee Status*, Cambridge University Press 2014, p. 350.

[52] Compare ECtHR Judgment in the case of M.S.S. v. Belgium and Greece.

[53] Article 78 (1) of the TFEU. The principle of non-refoulement referred to in Article 33 of the Geneva Convention of 28.07.1951 relating to the status of refugees (Dz. U. 1991, no. 119, *item*, 515).

[54] More on this principle in B. Wierzbicki, *Uchodźcy w prawie międzynarodowym*, Warszawa 1993, pp. 75-92; V. Chetail, *Le principe de non-refoulement en droit international*, Genewa 1997 (master's thesis, unpublished, typescript); E. Lauterpacht, D. Bethlehem, *The scope and content of the principle of non-refoulement: Opinion* www.unhcr.org [access: 29.06.2020]; A. Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, "International Journal of Refugee Law", no. 3, vol. 20, 2008, pp. 373-390 and J. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press 2005, pp. 307-335, and also Judgments of the European Court of Human Rights in the cases of Jabari v. Turkey, Appl. No. 40035/98, of 11.07.2000 or Hirsi Jamaa v. Italy, Appl. No. 27765/09, of 23.02.2012.

[55] In respect of the state responsible for providing protection, the TSEU Judgment of 21.12.2011, in the case of N.S. (C-411/10), www.curia.europa.eu [access: 10.07.2020].

[56] See K. Szymielewicz, J. Białas, A. Walkowiak, *Uchodźcy pod szczególnym nadzorem,* Warszawa 2016.

The ongoing securitization of the asylum and migration policies occurs at the expense of a humanitarian approach to the issue of refugees.

Amended in 2011, the Directive on the qualification of refugees[57], has introduced into European Union law a set of common standards for the qualification of persons as refugees or persons in need of international protection. It includes the rights and obligations relating to this protection, the key element of which is the principle of non-refoulement under Article 33 of the 1951 Geneva Convention. Neither Article 33 of the Convention, nor Articles 17 and 21 of the Directive on the qualification of persons seeking international protection prohibit such refoulment. The above-mentioned regulations permit expulsion of refugees only in exceptional circumstances, that is when a person poses a threat to security or public order[58].

However, the question arises whether the principle of non-refoulement could become something more than just one of the most prominent of the many rights of refugees and other individuals at risk of ill treatment[59]. There are opinions in the doctrine about the possibility of recognition the principle of non-refoulement as a form of international protection, in addition to the refugee status and subsidiary protection, to which the regulations resulting from the European Qualification Directive contribute[60].

Article 18 of the European Union Charter of Fundamental Rights guarantees the right to asylum, which includes the observance of the principle of non-refoulement. Article 19 of the Charter provides that no one may be removed, expelled or extradited to a State where there is a serious risk that they would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. In the explanations relating to the Charter, it is provided that Article 19 incorporates the relevant case law of the European Court of Human Rights with regard to Article 3 of the ECHR[61]. As a result, according to EU law, every form of expulsion under the Return Directive must be compatible with the right to asylum and the principle of non-refoulement. This also applies to the transfer of a person to another European Union Member State under the Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for interna-

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[57] Directive 2011/95/EU, OJ L 337, 2011.

[58] *The Handbook on European law relating to asylum, borders and immigration*, Luxemburg 2014, p. 9 and p. 68.

[59] T. Messineo, *Non-Refoulement Obligations in Public International Law: Towards a New Protection Status?,* [in:] *The Ashgate Research Companion To Migration Law, Theory And Policy*, ed. S.S. Juss, London–New York 2013, pp. 129-155.

[60] *Ibidem*.

[61] *Ibidem*, p. 68. See also The EU Charter of Fundamental Rights (2007/C 303/02) and the ECtHR Judgments: Ahmed v. Austria, Appl. No. 25964/94 of 17 December 1996 or Soering v. United Kingdom, Appl. No. 14038/88 of 7 July 1989.

tional protection lodged in one of the Member States by a third-country national or a stateless person.

When considering the way refugee law functions, we can observe that there is a securitization tendency in that law and regarding the observance of the standards concerning the prohibition of refoulement in order to protect one's own national interests and on the basis of the principle of sovereignty narrowing refugee protection through misinterpretation or inconsideration of the criteria defined in international and European law, as well as in the case law related to the protection of refugees. When considering the protective function of migration law, the countries focus their attention on border control and protection and on return of persons who are seeking international protection, who are often treated as those who are posing a threat to the citizens of their own countries.

The solutions concerning the protection of refugees should be based on the principle of solidarity and a fair sharing of responsibility. This is related, according to Max Weber, to the so-called ethic of responsibility in politics, where personal and moral responsibility of politicians and their paying attention to the results of their decisions is of particular importance. This political responsibility must not be disclaimed. This is particularly difficult in the face of the ongoing migration crisis. Unfortunately, it should be assumed that in times of a massive influx of immigrants and the ensuing European crisis, which is also caused by the pandemic, countries will more likely move towards limiting of their obligations to take in persons who are seeking international protection at the expense of international refugee law and human rights[62]. It is clearly reflected in the way the principle of non-refoulement is perceived and in the way it functions in international refugee law, resulting in the increased border control and movement of people, the provision of national security or in fighting cross-border crime.

In the context of the Polish legal order[63], it should be noted that the principle of non-refoulement is realized in the Polish legal order through the system of subsidiary protection[64]. This protection is provided to persons faced with the risk of serious harm. The form of the institution of subsidiary protection is predominantly the result of the interaction of two systems of refugee protection with Polish law, namely the universal system, formed mainly by the Geneva Convention, as well as a number of treaties, which, in a way, compliment the standard of protection and cause its extension, and the European Union system, which by tightening up and refining international law, leaves Member States with some margin of their own

[62] O. Łachacz, *op. cit.*, p. 141.

[63] See Act of 12 December 2013 on foreigners (Dz. U. 2013, *item*, 1650) and Act of 13 June 2003 on granting protection to aliens within the territory of the Republic of Poland (Dz. U. 2003, *item*,1176).

[64] M. Grześkowiak, *op. cit.,* p. 215.

competence with regard to the formation of the practical implementation of the prohibition of refoulement[65].

In the situation where a foreign national does not meet the criteria of the refugee, the subsidiary protection applies. In cases where this institution cannot be applied, there are certain proceedings instituted to oblige a foreigner to return[66]. However, the principle of non-refoulement should be taken into account. In order to minimize the risk of violating this principle, the Polish asylum system provides a possibility to grant permission to stay on humanitarian grounds[67]and the "tolerated" stay[68]. The objective of the system that is built in this particular way is to minimize the risk of breaching the prohibition of refoulement by respective authorities. However, this translates into an arduous nature of the procedure which requires providing more details and eliminating the existing ambiguities. The Polish system of international protection does not seem to offer sufficient guarantee against return to a transitional country, from which refugees could be subjected to the so-called ricochet expulsion, that is sent to their country of origin[69].

However, it should be recognized that the Polish system of refugee protection, although in principle providing protection against refoulement, is not without flaws, which in some isolated cases may open up the field for potential violation by Poland of its international commitments[70], including principles of non-refoulement.It is worth recalling the precedent judgment of the ECtHR in the case of M.K. and others v. Poland[71]. Thirteen citizens of Russia (of Chechen origin) lodged three complaints with the ECtHR. The complaints were joined into one case because of the identity of the facts.

The applicants tried to ask for an international protection at the crossing border(The Polish-Belarusian)- Terespol. Each time they appeared at the border crossing, the Border Guard refused to accept the application for international protection, claiming that they did not submit the application and that they could not enter Poland without the documents allowing them to enter Poland (valid visa or residence card). The officers did not issue them a decision to refuse entry. One of the applicants - M.K. travelled the Polish-Belarusian border crossing at Terespol on approximately thirty times in the period from July 2016 until 8 June 2017. Each time when he appeared at the crossing border, he had expressly stated a wish to

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65 *Ibidem*.

66 *Ibidem*, pp.212-213.

67 Art. 348, the Act on Foreigners of 12 December 2013 (Dz. U. 2013, *item*, 1650 as amended).

68 Art.351, the Act on Foreigners.

69 M. Grześkowiak, *op. cit.*, pp. 212-213.See more about expulsion by transit States: A. Pijnenburg, *op. cit.*, pp. 306-332.

70 *Ibidem*, p. 215.

71 ECtHR judgment M.K. and others v. Poland of 23 July 2020.

lodge an application for international protection; on at least several of those occasions, he had presented that application in written form.

The ECtHR found that the Art. 3 The European Convention on Human Rights ordering protection against torture and inhuman or degrading treatment was violated. The applicants were in risk to be deported by the Belarusian authorities to the Russian authorities and thus the possibility of their further transfer to Chechnya (*indirect refoulement*), from where the applicants had left for fear of torture. The Polish Border Guard repeatedly refused to accept international protection applications which led to led to inhuman treatment. The court accepted the claim in the terms of violation of art. 4 of Protocol No. 4, which prohibits the collective expulsion of foreigners. The Border Guard ignored individual reasons to seek protection and did not examine each situation separately. That's why it was illegal to send them back to Belarus. The Court indicated this practice was part of a broader state policy. The ECtHR found the art. 13 in connection with art. 4 of Protocol No. 4 and Art. 3 of the Convention, i.e. failure to provide an effective remedy was violated. As the court explained the decision to refuse entry is executed immediately, which means that the appeal lodged against it with the Commander-in-Chief of the Border Guard does not suspend its execution and leads to the immediate return of the foreigner from the Polish border. The Court agreed as well there was a violation of art. 34 of the Convention in connection with art. 39 of the Rules of Court, i.e. the Polish authorities ignoring the interim measure issued by the Court prohibiting the return of the applicants to Belarus and the acceptance of the applicants' applications for international protection.

Summary

The principle of non-refoulement is one of the most important institutions of international law acting for the protection of people who escape persecution. This principle is of crucial importance in international refugee law. It provides that persons who have been denied refugee status may not be deported to a country where they could be in danger of losing their life, health or freedom. If this is the case, a state should offer such persons another form of protection[72]. It should be emphasized that the principle of non-refoulement encompasses all forms of international protection, not merely the status of refugees regulated by the Geneva

[72] J.-Y. Carlier, *Existe-t-il un droit à la migration? La cigogne et la Maison*, [in:] *Les migrations internationales contemporaines. Une dynamique complexe au coeur de la globalisation*, dir. F. Crepeau, D. Nakache, I. Atak, Montreal 2009, pp. 392-393. More on this principle in V. Chetail, *Le principe…*, *op. cit.*; Zimmermann A. (ed.*), The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A Commentary*, Oxford: Oxford University Press, 2011.

Convention[73]. It constitutes a standard of international refugee protection, the objective of which is to guarantee rights and provide protection of individuals against refoulement. It creates the standards of conduct towards migrants as part of refugee law, the effective *erga omnes*[74] and firms up specific commitments by influencing the effectiveness of international protection. Despite the fact that this principle is commonly accepted, in reality, though, states are currently likely to violate it in the name of securing their own interests and for the purpose of securitization of their migration policies. The functioning of this principle is a complex issue and it is a multifaceted problem, which requires a balance between refugee law, human rights and humanitarian law, as well as some vested interests of particular states and other subjects of international law[75].

Moreover, the protection of the rights of refugees and the principle of non--refoulement constitutes a system of universal values of international community which is treated as the common good.

The principle of non-refoulement has become more than the cornerstone and prominent rule of international refugee protection, since, having grown beyond this, it has been reinforced also as a human rights requirement[76].

References

Allain J., *The ius cogens nature of non-refoulement*, "International Journal of Refugee Law" 2001, vol.13.

Bisztyga A., *Oddziaływanie Europejskiej Konwencji Praw Człowieka na wewnętrzny porządek prawny Zjednoczonego Królestwa*, Katowice 2008.

Bossuyt M., *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissand,* Bruylant, Bruxelles 2010.

Bossuyt M., *Belgium condemned for inhuman or degrading treatment due to violations by Greece of EU asylum law: MSS v Belgium and Greece. Case Analysis,* "European Human Rights Law Review" 2011, no. 5.

Carlier J-Y., *Existe-t-il un droit à la migration? La cigogne et la Maison*, [in:] *Les migrations internationales contemporaines. Une dynamique complexe au coeur de la globalisation*, eds. F. Crepeau, D. Nakache, I. Atak, Montreal 2009.

Cherubini F., *Asylum Law in the European Union*, London, New York 2014.

Chetail V., *Le principe de non-refoulement en droit international*, Genewa 1997 (master's thesis, unpublished typescript).

Chetail V., *Are Refugee Rights Human Rights? An Unorthodox Questioning on the Relations between Refugee Law and Human Rights Law*, [in:] *Human Rights and Immigration*, ed. R. R. Marin, "Collected Courses of the Academy of European Law", Oxford: Oxford University Press 2014.

Coleman N., *European Readmission Policy: Third Country Interests and Refugee Rights*, Leiden, Boston 2009.

Czeszejko-Sochacki Z., *System konstytucyjny Szwajcarii*, Warszawa 2002.

Delas O., *Le principe de non-refoulement dans la juriprudence internationale des droits de l'homme. De la consecration a la contestation*, Bruxelles 2011.

[73] S. Peers, *EU Justice and Home Affairs Law*, 3rd ed., Oxford University Press 2011, p. 304.

[74] See O. Łachacz, *op. cit.*, p. 141.

[75] Similarly: O. Łachacz, *op. cit.*, p. 141 oraz M. Grześkowiak, *op.cit.*, pp. 215-216.

[76] T. Molner, *op. cit.*, p.56.

Duffy A., *Expulsion to Face Torture? Non-refoulement in International Law,* "International Journal of Refugee Law" 2008, no. 3, vol. 20.
Florczak A., *Uchodźcy w Polsce: między humanitaryzmem a pragmatyzmem*, Toruń 2003.
Garlicki L., Hofmański P., Wróbel A. (red.), *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz*, Warszawa 2010.
Goodwin-Gill G.S., McAdam J., *The Refugee in International Refugee Law*, Oxford University Press, Oxford 2007.
Goodwin-Gill G.S., *The refugee in International Law*, 2nd eds., Oxford University Press, Oxford 1996.
Grześkowiak M., *Transpozycja zasady non-refoulement do polskiego systemu ochrony uchodźców*, „Acta Iuridica" 2018, vol. 76.
Hailbronner K., *Non-Refoulementand „Humanitarian" Refugees:Customary International Law or Wishful Legal Thinking?*, [in:] *The New Asylum Seekers:Refugee Law in the 1980. The Ninth Sokol Colloquium on International Law*, ed. D.A. Martin, vol. II, Springer Netherlands, Dordrecht, Boston, London 1988.
Hathaway J., *Reconceiving Refugee Law as Human Rights Protection*, "Journal of Refugee Studies" 1991, no. 4.
Hathaway J., *The Rights of Refugees under International Law,* Cambridge University Press, Cambridge 2005.
Hathaway J., Foster M., *The Law of Refugee Statu*s, Cambridge University Press 2014.
Hathaway J., Gammeltoft-Hansen T., *Non-refoulement in the World of Cooperative Deterrence*, "Columbia Journal of Transnational Law" 2015, no. 2.
Kowalski M., P*omiędzy uznaniowością a zobowiązaniem: podstawy prawnomiędzynarodowej ochrony uchodźców,* „Politeja" 2006, no.1(5).
Lauterpacht E., Bethlehem D., *The Scope and Content of the Principle of Non-refoulement,* [in:] *Refugee Protection in International Law. UNHCR's Global Consultations on International Protection*, eds. E. Feller, V. Türk, F. Nicholson, Cambridge University Press, Cambridge 2003.
Lewis C., *UNHCR and International Refugee Law: From Treaties to Innovation*, Routledge, New York 2012.
Łachacz O., *Zasada non-refoulement w międzynarodowym prawie uchodźczym – zwyczaj międzynarodowy czy też peremptoryjna norma prawa międzynarodowego?*, „Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego" 2017, vol.15.
Mahon P., J.F. Aubert, *Petit commentaire de la Constitution federale de la Confederation Suisse, art. 25, nr 7,* Zurich, Bern, Genève 2003.
Mahon P., F. Matthey, *La procédure d'asile II (conditions de la procédure accélérée, notamment les notions de pays tiers et pays d'origine sûrs),* [in:] *Droit d'asile suisse, normes de l'UE et droit international des réfugiés. Une étude comparative*, ed. UNHCR – Schweizerische Flüchtlingshilfe, Berne 2009.
Mahon P., Bigler O., *Les aspects constitutionels et conventionels du principe de non-refoulement en relation avec la migration*, [in:] *Le principe de non-refoulement. Fondaments et enjeux pratique,*ed. C. Amarelle, Berne 2010.
McAdam J., *Complementary protection in International Refugee Law*, "Oxford Monographs in International Law", Oxford University Press, Oxford–New York 2007.
Messineo F., *Non-Refoulement Obligations in Public International Law: Towards a New Protection Status?*, [in:] *The Ashgate Research Companion To Migration Law, Theory And Policy*, ed. S.S. Juss, Ashgate, London–New York 2013.
Mikołajczyk B., *Osoby ubiegające się o status uchodźcy. Ich prawa i standardy traktowania*, Wydawnictwo Uniwersytetu Śląskiego, Katowice 2004.
Molnar T., *The Principle of Non-Refoulement Under International Law: Its Inception and Evolution in a Nutshell,* "Corvinus Journal Of International Affairs" 2016, vol.1.
Nieć H., *Prawa cudzoziemców prawami człowieka*, [in:] *Wybrane aspekty prawne obywatelstwa i problematyki imigracyjnej*, eds. A. Kiedrzyn, M. Madej, H. Nieć, „Zeszyty Naukowe Uniwersytetu Jagiellońskiego", MLXXI, „Prace Polonijne", is. 17, 1993.
Nowicki M.A., Rzeplińska I., *Ochrona praw cudzoziemców w orzecznictwie organów Europejskiej Konwencji Praw Człowieka*, „Palestra",1998, no.9-10.

Oudejans N., *Asylum – A philosophical Inquiry into the International Protection of Refugees*, [np], 2011, doctoral dissertation, Tilburg University 28.09.2011.
Peers S., *EU Justice and Home Affairs Law*, 3rd ed., Oxford University Press 2011.
Pijnenburg A., *Containment Instead of Refoulement: Shifting State Responsibility in the Age of Cooperative Migration Control*, "Human Rights Law Review" 2020, vol. 20.
Pobjoy J., *Treating like alike: The principle of non-discrimination as a tool to mandate the equal treatment of refugees and beneficiaries of complementary protection,* "Melbourne University Law Review" 2010, vol. 34.
Prawo międzynarodowe publiczne, ed. J. Symonides, D. Pyć, Warszawa 2014.
Price M.E., *Persecution Complex: Justifying Asylum Law's Preference for Persecuted People*, "Harvard International Law Journal" 2006, no. 2, vol. 47.
Price M.E., *Rethinking Asylum. History, Purpose and Limits*, Cambridge University Press 2009.
Pûraité A., *Right to Asylum: Short Overview of the Case-Law of the European Court of Human Rights*, "Internal Security", July-December 2012, no. 2, vol. 4.
Symonides J., Pyć D. (eds.), *Prawo międzynarodowe publiczne*, [w:] Wielka Encyklopedia Prawa, ed. B. Hołyst, vol. IV, Warszawa 2014.
Szymielewicz K., Białas J., Walkowiak A., *Uchodźcy pod szczególnym nadzorem,* Warszawa 2016.
The Handbook on European law relating to asylum, borders and immigration, Luxemburg 2014
Trevisanut S., *The Principle of Non-Refoulement And the De-Territorialization of Border Control at Sea,* "Leiden Journal of International Law" 2014, vol. 7 (3).
UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 2007.
Wierzbicki B., *Uchodźcy w prawie międzynarodowym*, Warszawa 1993.
Wojnarowska-Radzińska J., *Ochrona wydalanych cudzoziemców na podstawie art. 3 Konwencji o ochronie praw człowieka i podstawowych wolności*, „Studia Europejskie – Studies in European Affairs" 2013, is. 1.
Zimmermann A. (red.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A Commentary*, Oxford University Press, Oxford 2011.