



**Principle of *Non-Refoulement* and Its Implementation
in National Legal Systems of Georgia and Hungary**
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HUMAN RIGHTS LL.M. THESIS
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Executive summary

The paper discusses the principle of *non-refoulement* as provided for under international law and its implementation at national level on the examples of two selected countries – Georgia and Hungary. The purpose of the research is to identify the standards relating to the principle of *non-refoulement* under international law and see the level of compatibility of the national legal systems of the selected countries with these identified international standards.

When discussing the principle of *non-refoulement* under international law, it is viewed in the international refugee law context under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees as well as in the broader context of international human rights law under the instruments such as the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Although viewed in both contexts, the bigger emphasis is placed on the discussion of the principle in the refugee law context considering the increased level of displacement in the world today.

Examination of implementation of the principle of *non-refoulement* in national legal systems of Georgia and Hungary is focused on looking at the guarantees under the constitutions, laws on asylum and legislation relating to aliens of the selected countries, again with bigger focus on implementation of the principle in refugee law context. When reviewing the national legal systems, the selected legislations of the countries and *non-refoulement* guarantees provided for there are examined against the international standards. Compatibility assessment of the national legal systems of the chosen states with international standards regarding the principle of *non-*

refoulement is carried out this way. As the result of the compatibility assessment, the protection gaps existing in the national legal systems are identified and recommendations made.

Thus, the aim of the research is achieved by carrying out a two-stage analysis: the first-stage analysis entails identifying the international standards relating to the principle of *non-refoulement* through examination of the selected international instruments; and the second-stage analysis involves assessing the compatibility of the national legal systems of Georgia and Hungary with the international standards through examination of the selected legislations of the countries against these standards.

Introduction

Principle of *non-refoulement* constitutes one of the fundamental principles of international law. Developed in international refugee law under 1951 Convention Relating to Status of Refugees (hereinafter the 1951 Convention) and the 1967 Protocol Relating to the Status of Refugees (hereinafter the 1967 Protocol)¹, it has also been supplemented by human rights instruments like, *inter alia*, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter the Torture Convention)² and European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR).³ Viewed in two different contexts – refugee law context and human rights law context in broader sense, the principle as defined under international instruments referred to above, constitutes cornerstone of the refugee protection as well as serves as an important protection mechanism from removal to places of torture or other form of ill-treatment.

Apart from the fact that the principle of *non-refoulement* is enshrined in the international legal instruments, the principle is also viewed as a part of customary international law. In spite of a controversy about the nature of the *non-refoulement* principle and whether or not it has acquired status of customary norm, definitional elements of the principle have been well established through interpretation and practice under the international law. These elements set the scope and content of the *non-refoulement* protection under international law and constitute guiding standards for states for implementation of the principle at national level. That is why clear

¹ Texts of the both documents available at: <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> (accessed 25 November 2007)

² Text of the document available at: <http://www.hrweb.org/legal/cat.html>, (accessed 25 November 2007)

³ Text of the document available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (accessed 25 November 2007)

definition of the standards regarding the principle of *non-refoulement* is very important for implementation of the principle at national level.

Implementation of the principle of *non-refoulement* at national level is of great importance since protection afforded under international law can only be exercised by persons qualified for the protection through national legal systems. Level of compatibility of national legal systems with standards set under the international law regarding *non-refoulement* is an indicator of the strength and adequacy of mechanisms of *non-refoulement* protection in the given jurisdiction. Inadequate national protection mechanisms and incompatibilities of the national legal system with international standards of *non-refoulement* may make persons genuinely in need of protection exposed to *refoulement* and lead to state breaching its international obligation.

Considering all above-mentioned, the purpose of this research is to review the principle of *non-refoulement* under international law in order to set out the standards of protection it provides. And then, in order to view its application at national level, study and examine legal systems of two selected countries against these standards to see the level of compatibility and sufficiency of mechanisms of protection from *refoulement* in the selected national legal systems.

The aim of the exercise is to once again point out the breadth of protection of the principle of *non-refoulement* and importance of its adequate implementation by states which have international obligation to observe the principle. Considering the increasing level of displacement in the world today,⁴ the emphasis will be on discussion of the principle and its

⁴ See briefing notes of United Nations High Commissioner for Refugees (UNHCR) of 19 June 2007 on increase of refugee numbers first time for past five years and general increase in number of displaced during 2006, available at <http://www.unhcr.org/news/NEWS/4677b14d4.html> (accessed 28 November 2007)

implementation in the refugee law context, although principle will be viewed in broader context of human rights protection as well.

For laying down the standards of the principle of *non-refoulement* under international law, international instruments referred to above, namely 1951 Convention and 1967 Protocol as well as the Torture Convention and ECHR, will be discussed. In order to view what the standards of protection from *refoulement* are under international law, personal scope, state responsibility, acts covered, extent of protection afforded, exceptions to the principle as well as nature of the principle of *non-refoulement* will be discussed as provided for by these international instruments.

Discussion of the implementation of the principle at national level will cover national legal systems of Georgia and Hungary, both countries being parties to the aforementioned international legal instruments. In order to see the way of implementation and level of compatibility of the selected jurisdictions with the international standards set regarding *non-refoulement* as provided for in the aforementioned instruments, personal scope, acts covered and extent of protection granted under the Constitutions as well as legislation on asylum and aliens of the countries will be examined. Considering the possible gaps in protection from *refoulement* afforded under the national legal systems to be seen, attempt will also be made to propose recommendations for strengthening the protection mechanisms in these jurisdictions.

As for the methodology of the research, it will involve a two-stage analysis. Firstly, study and analysis of different aspects of the *non-refoulement* protection under the international instruments referred to above will be carried out. As the result of this exercise, international standards of *non-refoulement* protection will be identified. Secondly, on the basis of analysis of

the selected legislation legal system of each country of research will be studied in order to see the mechanisms of protection from *refoulement* foreseen there. The second stage of analysis will also involve a comparative analysis of mechanisms of national legal systems of Georgia and Hungary against the international standards identified in regard with the principle of *non-refoulement*. As already mentioned above, at both level of analysis, bigger emphasis will be made on principle of *non-refoulement* and its implementation in refugee law context although content and application of its broader meaning will also be discussed to lesser extent. As the result of the two-level analysis, the conclusions will be drawn and recommendations made where possible.

As regards the structure of the paper, the paper is divided into two parts and four chapters. There are two chapters in each part. First part of the paper discusses the principle of *non-refoulement* under international law and the second part covers national legal systems of Georgia and Hungary. The principle of *non-refoulement* in two different contexts is respectively discussed in two separate chapters of the first part. Similarly, national legal systems of Georgia and Hungary are reviewed in separate chapters of the second part. Each part and chapter has its introduction and conclusion summarizing the issues covered and findings reached. Each chapter is divided into sections and in some cases also into subsections. Each section and subsection covers certain subtopic of the chapter it belongs to. Overall findings of the research are summarized and recommendations made in the conclusion of the paper.

Part 1: Principle of *Non-Refoulement* under International Law

Introduction for the part 1

The principle of *non-refoulement* has evolved as one of the fundamental principles of international law. Although the principle is viewed primarily as a part of international refugee law under the 1951 Convention and 1967 Protocol, it is also endorsed by general international human rights instruments including, *inter alia*, the Torture Convention and ECHR. These international instruments will be discussed in this part of the paper in order to view the principle of *non-refoulement* in two different contexts, with bigger emphasis on refugee law context.

Moreover, the principle of *non-refoulement* is believed to be a part of international customary law. Customary nature of the principle entails that even if the state has not acceded to the international instrument prohibiting *refoulement*, it is still bound to observe the principle under the customary international law.⁵ There is a bit of controversy regarding the customary nature of the principle. This will also be discussed in the present part.

Finally, after discussing the principle of *non-refoulement* in two different contexts and reviewing the nature of the principle, main characteristics and elements of the principle will be identified and summarized in the conclusions. Hence, after this exercise, general standards governing the principle of *non-refoulement* under international law will be laid down and national legal systems of the selected countries will then be examined against these standards in the part 2.

⁵ Guy S. Goodwin-Gill, *The Refugee in International Law*, 127 (2nd ed., 1996)

Chapter 1: Definition of the principle under the 1951 Convention

1.1. Introduction for the chapter 1

Principle of *non-refoulement* is provided for in the 1951 Convention and 1967 Protocol, the latter incorporating the majority of the provisions of the 1951 Convention, including article 33 on *non-refoulement* of the 1951 Convention.⁶ The 1951 Convention also enshrines principle of equality and non-discrimination in the application of its provisions, including *non-refoulement* rule.⁷

Article 33 of the 1951 Convention reads as follows:

1. 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.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Hence, article 33 provides for the definitional elements of the principle as well as sets exceptions from the protection granted under the principle. These elements will be further discussed in the following sections.

1.2. Who is protected?

Article 33(1) of the 1951 Convention explicitly mentions refugees as persons who should be protected from *refoulement*. However, it makes no reference to asylum seekers. Thus, the issue

⁶ 1967 Protocol Relating to the Status of Refugees, at article 1, available at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> (accessed 25 November 2007)

⁷ 1951 Convention Relating to the Status of Refugees, at article 3, available at <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> (accessed 25 November 2007)

in this regard is whether the protection granted under the article 33(1) is limited to recognized refugees or extends to asylum seekers as well.

Just to clarify the difference between these two categories, asylum seeker is the person who has requested refugee status although has not yet been formally recognized as one, his/her refugee claim being under consideration. And refugee is a person who has formally been granted asylum (i.e. recognized as refugee) following the refugee status determination procedure. In other words, the main difference is in formal recognition – all asylum seekers have potential to be recognized as refugees.

As mentioned above, article 33(1) itself refers only to refugees. The refugee definition on the other hand is provided for in the article 1(A)2 of the 1951 Convention, which stipulates that refugees are persons who are outside their country of origin or habitual residence and because of well founded fear of being persecuted on one of the five different grounds listed (race, religion, nationality, membership of a particular social group or political opinion) are unable or unwilling to return to their countries of origin or habitual residence.⁸

It can be concluded from the refugee definition above that article 1(A)2 of the 1951 Convention does not require a person to be formally recognized as refugee in order to qualify for the protection under the 1951 Convention. According to the Handbook of the United Nations High Commissioner for Refugees (hereinafter the UNHCR) on Procedures and Criteria for Determining Refugee Status which constitutes an authoritative interpretation of the 1951 Convention,

⁸ 1951 Convention Relating to the Status of Refugees *supra*, at article 1

[a] person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.⁹

From it follows that being a refugee is a factual state and formal recognition is not a decisive element, which means that protection of the 1951 Convention, including the protection granted under article 33(1), also extends to asylum seekers not yet formally recognized as refugees. The Executive Committee of the UNHCR has also affirmed that both refugees and asylum seekers should be protected from *refoulement* under article 33 of the 1951 Convention.¹⁰

Another argument in support of the view that the protection extends to asylum seekers relates to the concept of non-penalization for illegal entry as provided for in the article 31 of the 1951 Convention. Article 31 prohibits states to penalize refugees fleeing persecution on the grounds of their illegal entry or presence in the country.¹¹ The argument suggests that just like the 1951 Convention affords protection to refugees entering illegally the country and not being yet recognized from penalization for illegal entry, similarly it should be read to afford protection from *refoulement* to asylum seekers, i.e. persons not yet recognized as refugees.¹²

⁹ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, § 28, HCR/IP/4/Eng/REV.1 1979 (Reedited January 1992)

¹⁰ UNHCR, Executive Committee, Conclusion No. 6 (XXVIII) 1977, Conclusion No. 79 (XLVII) 1996 and Conclusion No. 81 (XLVIII) 1997

¹¹ 1951 Convention Relating to the Status of Refugees *supra*, at article 31(1)

¹² Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in Refugee Protection in International Law, UNHCR's Global Consultations on International Protection 87, 117 (Erika Feller et al. eds., 2003)

As a conclusion for this section, in spite of the fact that article 33 refers only to refugees, the article 33 protection from *refoulement* has been interpreted to extend not only to persons formally recognized as refugees, but to asylum seekers pending recognition as well.

1.3. Who has the obligation to protect and what is the extent of the protection?

The principle of *non-refoulement* is binding on state parties to the 1951 Convention and/or 1967 protocol. The 1967 Protocol, as mentioned above, incorporates, *inter alia*, article 33 of the 1951 Convention and thus acceding to the 1967 Protocol suffices for the states to become bound by the principle.

As for the binding force of the principle within the state, it is binding on all state organs and subdivisions of the government. It is straightforward that acts of *refoulement* carried out by state agents in their official capacity will entail responsibility of the state for infringing the principle of *non-refoulement*, no matter whether the act of *refoulement* is a part of the state's open or hidden policy.¹³ Moreover, states can also be held responsible for the actions of non-state agents (e.g. air carriers). When it comes to the act of *refoulement*, the decisive element is whether the non-state agent carries out functions generally fulfilled by the state organs and being delegated to it by the state and/or the conduct of the non-state agent is due to the requirements set by the state organs (e.g. carrier sanctions).¹⁴ Thus, state responsibility in this regard is not linked only to direct acts of removal executed by state officials, but states are also accountable for "... encourage[ement of] non-state actors to drive refugees back...".¹⁵

¹³ James C. Hathaway, *The Rights of Refugees under International Law*, 317 (2005)

¹⁴ Sir Elihu Lauterpacht and Daniel Bethlehem *supra*, at 108-109

¹⁵ James C. Hathaway *supra*

State responsibility for acts of *refoulement* carried out by non-state agents derives from the positive obligation of the state to ensure observance of the principle of *non-refoulement* by all under its jurisdiction.¹⁶ Further to this point, it is argued that refusal to review refugee claim, provided that the consequence of such refusal would be putting the individual in question under the risk of *refoulement*, may also constitute violation of the principle of *non-refoulement* by the state.¹⁷ It is also important to mention that some forms of *refoulement* may not involve an act of either a state or a third party on its surface. According to James C. Hathaway, voluntary repatriation of refugees to countries of their origin caused by deliberate policies or coercive measures carried out by the host country/community with the intent to force refugees back would also constitute *refoulement*, deeming the return in essence involuntary.¹⁸

As for the territorial application of the principle, it is also believed that principle of *non-refoulement* is among those rights implementation of which cannot be attached to the territory of a particular state.¹⁹ Hence, state responsibility in regard to acts of *refoulement* is not strictly limited to its territory. A state may exercise jurisdiction beyond its official territory by, for example, having effective control over an individual; and if the act of *refoulement* occurs in relation to the individual in question the state would bear responsibility for the act.²⁰

In other words, an important question when determining the state responsibility under article 33(1) is whether the act of *refoulement* can be attributed to the state. And the issue of state responsibility can be raised if the conduct in question can be attributable to the state concerned

¹⁶ *Id.*

¹⁷ *Id.*, at 319

¹⁸ *Id.*, at 318

¹⁹ *Id.*, at 339

²⁰ Sir Elihu Lauterpacht and Daniel Bethlehem *supra*, at 110

notwithstanding where the conduct takes place – inside or outside the national boundaries.²¹ At the same time, the act of *refoulement* carried out outside its territory can be attributable to the state if in a particular case the state “... exercises effective or de facto jurisdiction ... [or] exercises some significant public power...”,²² and provided that the act is conducted under instructions and control of the state, either directly through its agents or a third party contracted by the state.²³

Another relevant issue here concerns the responsibility of the state over “transit zones” or otherwise called “international zones”. Despite the fact that these zones are usually located on the state territories, people being physically there are believed to be outside the country until they formally cross the state border. The transit or international zones have raised the issue of interpretation in relation to the principle of *non-refoulement*. The issue is whether the state in question could be held responsible for the acts occurring in such zones.

In this relation as well states will be held responsible for the acts that can be attributable to them. The fact that “formally” a person might not be on the state territory does not preclude the states from being held responsible in case the *refoulement* takes place. Guy S. Goodwin-Gill explains that the core element of the principle

“... is prohibition of return *in any manner whatsoever* of refugees to countries where they may face persecution. The scope and application of the rule are determined by this essential purpose, thus regulating State action wherever it takes place, whether internally, at the border, or through its agents outside territorial jurisdiction.”²⁴

²¹ *Id.*, at 111

²² James C. Hathaway *supra*, at 339-340

²³ *Id.*

²⁴ Guy S. Goodwin-Gill *supra*, at 143

Thus, again the decisive element is whether the conduct in question can be attributable to the state.

Furthermore, it should be noted that the prohibition of *non-refoulement* under the article 33(1) of the 1951 Convention not only covers the *refoulement* to countries of individuals' origin where they may face persecution, but also prohibits states to send persons to third countries from where they may be subjected to onward *refoulement* to such countries. In other words, prohibition of *refoulement* provided for in the article 33(1) includes both direct and indirect *refoulement*.²⁵

Hence, states are held responsible for the acts of *refoulement* occurring within as well as outside their official territory, in the latter case provided that the act can be attributable to the state concerned. The state responsibility for the violation of the principle of *non-refoulement* is involved no matter whether the act constitutes direct or indirect *refoulement*.

1.4. Protected from what, i.e. what acts would constitute refoulement?

Article 33(1) formulates in general terms that no state should *refoule* a person in “any manner whatsoever”, i.e. any act of return, sending back a person where s/he would face a risk of persecution on five convention grounds would constitute *refoulement*. Although the form of *refoulement* is formulated in general terms in the article 33(1), it is clear that unjustified return of recognized refugees or asylum seekers already on the state territory would lead to finding the state in violation of article 33(1) of the 1951 Convention.

²⁵ Sir Elihu Lauterpacht and Daniel Bethlehem *supra*, at 122-123

More ambiguous has been the issue whether rejection at the frontier is also covered by the article 33 of the 1951 Convention. In other words, the question is whether the principle also extends its protection to people not yet on the state territory, indirectly providing for guarantees for admission of asylum seekers on the state territory. In spite of the fact that the 1951 Convention does not provide for the right to asylum, the article 33(1) has been construed in a way that it “... applies to the moment at which the asylum seekers present themselves for entry”.²⁶ Thus, the concept of the *non-refoulement* provides for protection from return as well as rejection at the frontiers.²⁷

This is not to say that principle of *non-refoulement* equals or establishes the right to asylum. The principle constitutes a ban for states to return persons to territories where their life, liberty or physical integrity may be at risk; considering the personal scope of the principle covering asylum seekers as well, the only way for the state to determine whether the risk of persecution is real for person arriving in the country being sent back, is to admit him/her on its territory. Hence, in order to diminish the chance of *refoulement* in cases of sending people back without allowing them to enter the state territory, the principle creates *de facto* obligation on the part of the state to admit asylum seekers/refugees on its territory. However, there is no such obligation, either *de facto* or *de jure*, for the state to grant asylum to such individuals subsequent to granting leave for entry.²⁸

It should be noted that such a construction of the principle is also related to the notion already mentioned above. Namely, when it comes to state responsibility in regard with *refoulement*, the

²⁶ Guy S. Goodwin-Gill *supra*, at 124

²⁷ *Id.*

²⁸ James C. Hathaway *supra*, at 301

decisive element is whether the act can be attributable to the state, making the individual in question falling under the jurisdiction of the state concerned.²⁹

A further important element here is that article 33 of the 1951 Convention does not require the places of return to be countries. In fact the article refers to “frontiers of territories”. Thus it is irrelevant where a person is *refouled*. The decisive element is the existence of the risk of being persecuted at the place where the person is being sent back.³⁰

It has also been argued whether the extradition also falls within the ambit of the article 33(1). The formulation of the article itself is broad to cover any act resulting in *refoulement*. It has been asserted that the broad wording of the provision itself – “any manner whatsoever”, does not support any other way of interpretation rather than to conclude that “... the concept of *refoulement* must be construed expansively and without limitation.”³¹ Following this line of argument, the article 33(1) also applies to extradition in spite of no explicit mentioning of it in the text itself.

Moreover, in its Conclusions on Problems of Extradition Affecting Refugees, the UNHCR Executive Committee re-affirming the fundamental character of the principle of *non-refoulement*, stated that extradition of refugees should not take place to countries where they have well-founded reasons to fear persecution on the five convention grounds.³² It is also asserted that no extradition treaty can trump on duty of *non-refoulement* under the 1951

²⁹ Sir Elihu Lauterpacht and Daniel Bethlehem *supra*, at 114

³⁰ *Id.*, at 122

³¹ *Id.*, at 112

³² UNHCR, Executive Committee Conclusion No. 17 (XXXI) 1980, § (c)

Convention and the latter will always prevail, notwithstanding whether protection from *refoulement* is explicitly mentioned in the extradition treaty concerned.³³

Such interpretation of the article 33(1) of the 1951 Convention is of great importance in view of the refugee protection. It is an important aspect of the principle since if the extradition was left beyond the limits of the article 33 protection, it would allow states to deviate from the prohibition of *refoulement* by means of extraditing people. Such reading of the article 33(1) would not be in line with the humanitarian spirit of the 1951 Convention.³⁴

Applicability of the principle to the mass influx situations is another issue creating controversy. The wording of article 33 suggests that while reviewing the issues of *refoulement*, individual assessment of each particular case should take place. But some believe that it should not be read in a manner to exclude mass influx situation from the scope of the principle of *non-refoulement*.³⁵ It has been asserted that the principle should apply in any situations, including mass influxes "... unless its application is clearly excluded".³⁶ And the 1951 Convention does not mention mass influx situations as one of the grounds for exception to the principle.³⁷

The UNHCR Executive Committee has endorsed in its Conclusions that in mass influx situations states have the obligation to admit people at least on a temporary basis and not to reject them at

³³ Sibylle Kapferer, *The Interface between Extradition and Asylum* 80, available at <http://www.unhcr.org/protect/PROTECTION/3fe84fad4.pdf> (accessed 28 November 2007)

³⁴ Sir Elihu Lauterpacht and Daniel Bethlehem *supra*, at 112

³⁵ *Id.*, at 119

³⁶ *Id.*

³⁷ 1951 Convention Relating to the Status of Refugees *supra*, at article 33(2)

the frontiers. It also affirmed that the reception of people in mass influx situations should be carried out with full observance of the principle of *non-refoulement*.³⁸

Hathaway however argues that duty of *non-refoulement* is qualified in relation to mass influx situations. According to him, in mass influx situations where the receiving state is unable to engage in individual screening of the cases, the duty of *non-refoulement* implies limitation. The implied limitation in such situation derives from the risk that mass influx poses to the national security and/or public safety of the given state. Hathaway believes that states in mass influx situations still have the obligation to admit refugees on their territory and then have right to request assistance from international community under the principle of burden-sharing also endorsed in the preamble of the 1951 Convention; however, in very limited and exceptional circumstances when mass influx puts under danger national security and/or public safety of the country, the state may refuse to admit refugees on its territory.³⁹

Hence, it follows from the above that during mass influx situations, states have duty to admit refugees at least on temporary basis; only in strictly exceptional circumstances when national security and public safety of the state is at stake, may they deny refugees entry.

To summarize this section, actual removal from a country's territory as well as rejection at the frontiers may amount to *refoulement*. Furthermore, for the act to qualify as a *refoulement* it is not necessary that the place of removal be a state but rather it suffices that the destination is a territory where person will be at risk. And the states have the obligation to adhere to the principle of *non-refoulement* when extraditing refugees/asylum seekers or faced with mass influx situations (in the latter case possibly with certain exceptional limitations).

³⁸ UNHCR, Executive Committee Conclusion No. 22 (XXXII) 1981

³⁹ James C. Hathaway *supra*, at 357-359

1.5. Exceptions to the prohibition under article 33

Under the 1951 Convention, no reservations can be made to the article 33.⁴⁰ However, protection granted under the article is not absolute since the article 33(2) provides for the exceptions to the protection from *refoulement*. It stipulates that the protection of the principle does not cover the people who pose a threat to the national security of the country of asylum or have been convicted by the final court judgment for committing a particularly serious crime and are dangerous for the community.

The wording of this provision leaves up to states' discretion to define what constitutes danger either to national security or the community. The wording of the provision makes it clear though that the danger should be prospective and should be directed to the state and/or community hosting the refugee, not the refugee's country of origin or habitual residence. As to the nature of the danger, it has been asserted that the danger should be very serious putting under threat the constitutional order, territorial integrity, and/or peace of the country concerned. In this regard the danger to the community is believed should entail threats of similar gravity.⁴¹ In other words, the threshold requirement for the return to qualify as an exception under article 33(2) is high.

Moreover, the article 33(2) does not provide a clear definition of the "particularly serious crime" either. As it has been interpreted, the offences that would fall under the scope of the article 33(2) would include serious crimes like murder, rape, armed robbery, etc. A principal element in this regard is that the person convicted for such a crime should be posing a danger to the host

⁴⁰ 1951 Convention Relating to the Status of Refugees *supra*, at article 42

⁴¹ Sir Elihu Lauterpacht and Daniel Bethlehem *supra*, at 135-136

community. The existence of conviction is an indicator or pre-condition for the existence of danger:

“The commission of, and conviction for, a particularly serious crime ... constitutes a threshold requirement for operation of the exception. Otherwise the question of whether the person concerned constitutes a danger to the community will not arise for consideration”.⁴²

Important element here is that the person must be convicted for a crime of high gravity by court’s final judgment all appeal mechanisms being exhausted and provided the criminal proceedings have been conducted with full observance of the law in place; although the place of committing the crime is irrelevant, it is decisive that the person in question poses a threat to the host community.⁴³

When deciding on whether a particular person should be subjected to the article 33(2) exception could be returned, a balancing exercise is usually carried out by the states. The issue of proportionality also comes into play in this exercise. In other words, the decision on return would be made after examining the nature of the crime and level of danger to the host community on the one hand and the level of risk of persecution in case of return on the other. The more serious the crime is and the less serious the risk, the more probable that the person will be returned.⁴⁴ It should be noted in general that there is a trend of restrictive interpretation and practice of the exceptions under the article 33(2) of the 1951 Convention.⁴⁵

Thus, protection from *refoulement* under the 1951 Convention is non-derogable but non-absolute: article 33(2) defines the categories of refugees/asylum seekers excluded from the

⁴² *Id.*, at 139

⁴³ James C. Hathaway *supra*, at 350-351

⁴⁴ Guy S. Goodwin-Gill *supra*, at 140

⁴⁵ Sir Elihu Lauterpacht and Daniel Bethlehem *supra*, at 130

protection. The threshold requirement in relation to the nature of the national security threat or gravity of the crime/threat to community is high and for the refugees/asylum seekers to be excluded from the protection, the threat they pose and/or the crime they have been convicted for should be of serious gravity; the threat should be directed against the host country/community. Exceptions set forth in article 33(2) are subject to strict and narrow interpretation/practice.

1.6. Conclusion for the chapter 1

Non-refoulement rule under the international refugee law is provided for in the article 33 of the 1951 Convention which should be applied to all qualifying for protection without discrimination of any kind. In determining the state responsibility for the act of *refoulement*, the decisive element is whether the act itself can be attributable to the state concerned, even if the act occurs beyond the state's actual territory and even if the act itself is not carried out by agents of the state. Moreover, the principle prohibits any form of *refoulement*, including extradition to any territory where the person may face persecution on five convention grounds. The prohibition covers both direct and indirect *refoulement* and although generally it presupposes an individual approach when assessing the case, it is also applicable in mass influx situations (possibly with certain exceptional limitations). Finally, although no reservation is permissible to the article 33, the article 33(2) sets strictly applicable exceptions to the prohibition rendering the principle of *non-refoulement* under the 1951 Convention non-absolute.

Chapter 2: Principle of Non-refoulement under the Torture Convention and ECHR

2.1. Introduction for the chapter 2

Principle of *non-refoulement* is also enshrined in other human rights instruments supplementing the prohibition of *refoulement* under the 1951 Convention. Torture Convention and ECHR are among such international human rights instruments upholding the principle of *non-refoulement*. These two instruments will be briefly discussed in the present chapter.

The aim of this exercise is to view the principle in the broader context of human rights law on the example of the selected two international instruments to which both countries of research are parties. Considering the scope and limits of the present research, these two international instruments were selected due to the following considerations: the Torture Convention is a universal treaty directly mentioning and prohibiting *refoulement*; and ECHR is one of the most effective regional instruments which has created substantial case law on the subject.

2.2. Non-refoulement under Torture Convention

Similar to the 1951 Convention, the Torture Convention also contains a provision that explicitly provides for the principle of *non-refoulement*: It prohibits states to "... expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".⁴⁶

The second part of the *non-refoulement* provision of the Torture Convention provides for some sort of guidance as to what should be taken into consideration while determining the existence of

⁴⁶ *Id.*, at article 3

“substantial grounds”.⁴⁷ Regard should be had to the considerations whether at the place of destination there is “... a consistent pattern of gross, flagrant or mass violations of human rights.”⁴⁸ It is important to mention that under Torture Convention, for the act to qualify as *refoulement*, there must be a risk of torture; no less serious form of ill-treatment would suffice.⁴⁹ Hence, standard requirement for granting protection under the article 3 of the Torture Convention is rather high.

The personal scope of the protection from *refoulement* under the Torture Convention is wider than the scope of the 1951 Convention, the latter being limited to refugees and asylum seekers. Article 3 of the Torture Convention refers to any individual who may be at risk of torture, if sent back, “regardless of either status or conduct” of the individual concerned.⁵⁰ As for the acts prohibited under the Torture Convention, extradition is explicitly mentioned among such acts: article 3 directly refers to it as one of the forms of *refoulement*, provided the risk of torture when extraditing is present.

When it comes to assessment of the risk of torture in the receiving country, grounds for concluding that the risk exists should be “... beyond mere theory or suspicion. ... [but] does not have to meet the test of being highly probable.”⁵¹ It should be shown that grounds to fear torture is “...substantial ... personal and present.”⁵² The most important aspect of the protection afforded under the Torture Convention is that no derogation or exception exists in relation to

⁴⁷ *Id.*, at article 3(2)

⁴⁸ *Id.*

⁴⁹ Helene Lambert, *Protection against Refoulement from Europe: human rights law comes to the rescue*, International and Comparative Law Quarterly 515, 533 (1999)

⁵⁰ Sir Elihu Lauterpacht and Daniel Bethlehem *supra*, at 159

⁵¹ Brian Gorlick, *The Convention And The Committee Against Torture: A Complementary Protection Regime For Refugees*, 11 International Journal of Refugee Law 479, 485 (1999)

⁵² *Id.*

article 3 prohibition of *refoulement*. Hence, in spite the Torture Convention requiring higher standard – risk of torture – for the *non-refoulement* rule to be operative, when applicable, the nature of *non-refoulement* protection granted under the Torture Convention is broader and somewhat stronger than the protection from *refoulement* afforded by the 1951 Convention.⁵³

To summarize present section, *non-refoulement* protection under the Torture Convention is not limited to certain categories of individuals and covers everyone who risk to be subjected to torture if sent back (including if returned through extradition proceedings); and no state can derogate or subject the prohibition under the article 3 to exceptions, which deems protection from *refoulement* under the Torture Convention absolute.

2.3. Non-Refoulement under ECHR

Unlike the 1951 Convention and Torture Convention, prohibition of *refoulement* is not explicitly provided for in ECHR. The principle has rather been developed in the case law of the European Court of Human Rights (hereinafter the ECtHR). Article 3 of the ECHR prohibits torture or inhuman or degrading treatment or punishment in general terms.⁵⁴ This prohibition has been construed by the ECtHR to cover *refoulement*. ECtHR has established that protection from *refoulement* is “inherent” to article 3⁵⁵ and that this protection includes protection from being removed to a place “... where substantial grounds have been shown for believing that the person

⁵³ Tom Clark, *Rights Based Refuge: The Potential of 1951 Convention and Need for Authoritative Interpretation*, 16 International Journal of Refugee Law 584, 592 (2004)

⁵⁴ Convention for the Protection of Human Rights and Fundamental Freedoms, at article 3 which stipulates: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (accessed 25 November 2007)

⁵⁵ Case of Soering v. The United Kingdom, application no. 14038/88, judgment dated 7 July 1989, §88, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=SOERING&sessionid=3014732&skin=hudoc-en> (accessed 28 November 2007)

in question, ... would face a real risk of being subjected to treatment contrary to Article 3...”.⁵⁶

Similar to the 1951 Convention and Torture Convention, provisions of the ECHR, including article 3 should be applied with observance of the principle of non-discrimination.⁵⁷

Unlike the Torture Convention, ground for invoking protection from *refoulement* under article 3 ECHR is not limited to a risk of torture upon return, but a risk of ill-treatment of less serious gravity than torture would also be sufficient ground for availing the article 3 protection. Moreover, the risk of such treatment should be “real” not just a mere possibility; and the individual in questions should be an immediate target of the risk,⁵⁸ s/he being “... singled out from generalized violence...”.⁵⁹ Standard requirement for assessing how real the risk is has been set at rather high level of probability; although it does not require prove of absolute certainty that the acts proscribed by article 3 ECHR will occur.⁶⁰

Similar to the Torture Convention, personal scope of the protection under article 3 ECHR extends to everyone within the state’s jurisdiction, including rejected asylum seekers or persons excluded from protection under the 1951 Convention.⁶¹ And here as well the conduct of the

⁵⁶ Case of Cruz Varas and others v. Sweden, application no. 15576/89, judgment of the European Court of Human Rights dated 20 March 1991, §74, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=CRUZ&sessionid=3014771&skin=hudoc-en> (accessed 28 November 2007)

⁵⁷ Convention for the Protection of Human Rights and Fundamental Freedoms *supra*, at article 14

⁵⁸ Katharina Röhl Katharina Röhl, *Fleeing Violence and Poverty: Non-Refoulement obligations under the European Convention of Human Rights* 18 available at: <http://www.unhcr.org/research/RESEARCH/41f8ef4f2.pdf> (accessed 29 November 2007)

⁵⁹ Helene Lambert *supra*, at 539

⁶⁰ Prohibition of Torture and Inhuman or Degrading Treatment or Punishment under the European Convention for Human Rights (article 3), Interights Manual for Lawyers 47-48, (Maxim Ferschtman et al eds., 2006), available at [http://www.interights.org/Publication/Interights%20Art3%20Manual%20\(Dec%202006\).pdf](http://www.interights.org/Publication/Interights%20Art3%20Manual%20(Dec%202006).pdf) (accessed 28 November 2007)

⁶¹ Helene Lambert, *The European Convention for Human Rights and Protection of Refugees: Limits and Opportunities*, 24 Refugee Survey Quarterly 39, 40

individual is irrelevant.⁶² According to the established ECtHR case law, the acts covered by article 3 ECHR include extradition and expulsion as well as rejection at the border;⁶³ under ECHR direct as well as indirect form of *refoulement* is prohibited.⁶⁴ Prohibition of torture or inhuman or degrading treatment or punishment enshrined in article 3 ECHR is an absolute prohibition not subject to either derogation or exception.

Hence, the states cannot resort to removing persons from their territories even for the considerations of national security or public safety, provided the conditions set forth in the present section are present.⁶⁵ Similar to the Torture Convention, it could be concluded here that prohibition of *refoulement* under ECHR affords broader protection than under the 1951 Convention.

Thus, in spite of no specific reference to *refoulement* in ECHR itself, *non-refoulement* protection has evolved in the article 3 jurisprudence of the ECtHR. As interpreted by the ECtHR, *non-refoulement* protection under ECHR prohibits states to remove individuals under their jurisdiction to places where they will face a real risk of torture or inhuman or degrading treatment or punishment or would face onward *refoulement* to such places. Article 3 prohibition being absolute and covering any individual under the state jurisdiction deems protection from *refoulement* under ECHR broader than protection granted under the 1951 Convention, provided

⁶² Case of Chahal v. The United Kingdom, application no. 22414/93, Judgment of the European Court of Human Rights dated 15 November 1996, §80, available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=CHAHAL&sessionid=3015352&skin=hudoc-en> (accessed 28 November 2007)

⁶³ Prohibition of Torture and Inhuman or Degrading Treatment or Punishment under the European Convention for Human Rights (article 3), Interights Manual for Lawyers, *supra* at 45

⁶⁴ Sir Elihu Lauterpacht and Daniel Bethlehem *supra*, at 122

⁶⁵ Prohibition of Torture and Inhuman or Degrading Treatment or Punishment under the European Convention for Human Rights (article 3), Interights Manual for Lawyers *supra*, at 49

rather high threshold requirement for the risk being real is met. Prohibition of *refoulement* under article 3 should be applied without discrimination.

2.4. Nature of the Principle of Non-refoulement

Principle of *non-refoulement* is enshrined in different conventions. However, as already stated above, it is believed to be a part of international customary law as well, be it viewed either in the context of refugee law or human rights law in broader sense. It has been argued that through consistent practice, support and general acceptance of the *non-refoulement* rule by the states the principle has reached the level of customary rule of international law.⁶⁶

Moreover, in its General Conclusions on International Protection, the Executive Committee of the UNHCR has even stated that the principle “was progressively acquiring the character of a preemptory rule of international law”.⁶⁷ The Summary Conclusions on the principle of *non-refoulement* drafted as the result of the roundtable meeting in the framework of the UNHCR Global Consultations on International Protection⁶⁸ also refers to the principle of non-refoulement as being a customary rule of international law.⁶⁹

This contention has been challenged. According to Hathaway, *non-refoulement* rule has not evolved to the level of custom due to lack of uniform rule by which states “... effectively agree to be bound through the medium of their conduct”.⁷⁰ And moreover, there is no “near-universal

⁶⁶ Sir Elihu Lauterpacht and Daniel Bethlehem *supra*, at 146-148

⁶⁷ UNHCR, Executive Committee, Conclusion No. 25 (XXXIII) 1982, §(b)

⁶⁸ UNHCR, *Summary Conclusions: the principle of non-refoulement*, Global Consultations on International Protection, Expert Roundtable organized by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, University of Cambridge, UK, 9–10 July 2001, available at <http://www.unhcr.org/publ/PUBL/419c76592.pdf> (accessed 28 November 2007)

⁶⁹ *Id.*, at paragraph 7

⁷⁰ James C. Hathaway *supra*, at 363

respect among states for the principle of non-refoulement”, which is necessary for the rule to become a custom. Hence, according to Hathaway, principle of *non-refoulement* is still just subject of conventional law and has not reached the standard of a custom.

Nevertheless, considering that the prohibition of torture or inhuman or degrading treatment or punishment is believed to be a customary norm,⁷¹ it could be stated that at least in cases when persons risk facing torture or other form of ill-treatment upon return, *non-refoulement* protection acquires status of customary norm of international law.

2.5. Conclusion for the chapter 2

Principle of *non-refoulement* is enshrined in the Torture Convention and ECHR. *Non-refoulement* protection under these human rights instruments protects any person without discrimination of any kind who risk to be subjected to torture (the Torture Convention) or torture or inhuman or degrading treatment or punishment (ECHR), if sent back. Acts covered include return through extradition proceedings or indirect *refoulement*.

Considering the absolute nature of the prohibition of torture, no derogation or exception from the principle of *non-refoulement* as enshrined in these human rights instrument is permitted. Thus, although *non-refoulement* principle having absolute nature sets rather high threshold requiring threat of torture for the protection to be operative, it affords broader protection from *refoulement* to everyone, provided the threshold requirement is met. In this sense non-refoulement protection afforded under the Torture Convention and ECHR supplement protection under the 1951 Convention.

⁷¹ Sir Elihu Lauterpacht and Daniel Bethlehem *supra*, at 153

Prohibition of torture or inhuman or degrading treatment or punishment is also believed to be a part of international customary law. Respectively, in spite of existing controversy about the customary nature of the principle of *non-refoulement*, it could be concluded that at least in cases when persons risk facing torture or other form of ill-treatment as the result of act of *refoulement*, *non-refoulement* protection acquires status of customary norm of international law.

Conclusion for the part 1

Principle of *non-refoulement* is viewed in two different contexts: refugee law and human rights law more generally. In both contexts the principle of *non-refoulement* should be applied with observance of the rule of non-discrimination. To summarize the elements of the principle discussed above in these two different contexts, it follows that principle of *non-refoulement* prohibits states to reject at the border, return, extradite or remove in any other form refugees or asylum seekers to territories where they may fear persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion (the 1951 Convention definition); or expel, return, extradite or otherwise return any person (including but not limited to asylum seekers/refugees) when there are substantial grounds to believe that the person may be subjected to torture (definition under the Torture Convention) or face real risk of torture or inhuman or degrading treatment or punishment (definition under ECHR) upon return; the *non-refoulement* prohibition also extends to indirect *refoulement*, i.e. sending person to a place from where s/he may be subjected to onward *refoulement* to places proscribed by the principle.

As for the exceptions to the principle, exceptions are permitted only in refugee law context when asylum seekers and/or refugees being returned pose danger to national security of the sending state or having been convicted for a particularly serious crime constitute a danger to the host community. Such asylum seekers/refugees are exempted from the *non-refoulement* protection. Protection from *refoulement* is absolute when return involves a risk of torture or inhuman or degrading treatment or punishment. Duty of *non-refoulement* is non-derogable in both contexts.

Finally, although there is certain controversy whether *non-refoulement* is part of a customary law, it could be contended that at least when it comes to the risk of torture or inhuman or degrading treatment or punishment, the *non-refoulement* duty is a customary norm.

Part 2: Implementation of the principle of non-refoulement in the national legal systems of Georgia and Hungary

Introduction for the part 2

Although the principle of *non-refoulement* has emerged and developed in international law, it is subject for implementation by the states through their domestic legal systems. Since persons entitled to protection can only exercise their right not to be subjected to *refoulement* at national level, actual application of the principle can only be viewed on the examples of and in the framework of the national legal systems. For this reason, the legal systems of Georgia and Hungary will be examined in this part.

Considering the breadth of the applicability of the principle of *non-refoulement* and limits of the present research, examination of the implementation of the principle of *non-refoulement* in the selected legal systems will be carried out with emphasis on asylum legislation of the two countries. The major focus of the research will be on implementation of the principle at domestic level as viewed in the refugee law context to see the degree of compatibility of the national legal systems with the standards set under the 1951 Convention.

Before turning to the discussion of the national legal systems of the selected countries, the reasons for their selection should be pointed out. Choice was based on the different considerations. First country to be studied is Georgia which is the country of origin of the author. Concerns have already been raised regarding the insufficiency of mechanisms for protection

from *refoulement* in Georgia.⁷² The concerns relate to both legal as well as practical aspects of implementation of the *non-refoulement* prohibition. Apart from pointing at legal gaps in protection from *refoulement*, the actual acts of removal have also been reported.⁷³ Therefore, Georgia has been selected as one of the countries for research due to issues with *non-refoulement* that exist there. The country's national legal system will be studied in order to see what is the actual level of compatibility with the international standards regarding *non-refoulement* and what the most problematic issues are in this regard.

As for the reasons for choosing Hungary as the second country to be researched together with Georgia, they are as follows. Georgia and Hungary share a Communist past in spite of Hungary's less strong ties with the Soviet Union. Hungary has already become a member-state of the European Union (hereinafter the EU) and has been harmonizing its legislation, including asylum legislation with the EU law. The EU membership and European integration in general is a long-term objective of Georgia. Within the framework of the European Neighborhood Policy (hereinafter ENP) there is an attempt to improve Georgian legislation in different fields to meet

⁷² See article by Vakhtang Shevardnadze, *The Compatibility of Georgian National Legislation on Asylum Seekers and Refugees with Norms and Principles of Public International Law: Some Aspects*, 13 International Journal of Refugee Law 518-532 (2001), available at: <http://ijrl.oxfordjournals.org/cgi/content/abstract/13/4/518> (accessed 29 November 2007), or UNHCR Background Note on Protection of Refugees and Asylum Seekers in Georgia (2004), available at: <http://www.unhcr.org/publ/RSDLEGAL/43a6878d4.pdf> (accessed 29 November 2007)

⁷³ See report by Human Rights Information and Documentation Center (HRIDC): "Silence Kills: Abuse of Chechen Refugees in Georgia" which contains facts of illegal expulsion and extradition of recognized refugees from Georgia, available at http://www.humanrights.ge/files/Chechen_report_eng-Silence_kills.pdf (accessed 29 November 2007)

the European standards.⁷⁴ Substantial element of the EU legal framework is asylum system⁷⁵ and principle of *non-refoulement* is the cornerstone of the refugee protection.

Hence, in the process of approximation with the EU through establishing adequate legal standards, considering the similarities in history and the fact that Hungary has made political/legal advancement Georgia is also striving to achieve, studying the Hungarian experience in regard with the issue of *refoulement* seems interesting and might serve as a guiding example for Georgia to follow in the process of improving its legal framework in this particular field.

It is true that Hungary is not the only country that shares communist past and has recently acceded to the EU. Nevertheless, out of those so called post-communist countries having recently joined the EU, Hungary was chosen as being somewhat representative of the region. Moreover, in spite of the harmonization process and EU accession, the concerns were raised in relation to protection from *refoulement* in Hungary in terms of practical aspects of its implementation in the past.⁷⁶ Although guarantees for protection from *refoulement* have improved and seem to be stronger under Hungarian law than under Georgian law, some concerns still remain. These concerns mostly related to issues deriving from the general context of the EU

⁷⁴ European Neighborhood Policy Action Plan (ENP AP) for Georgia sets priority areas for cooperation between the EU and Georgia. Among other priorities such as strengthening rule of law and improving economic climate in the country enhancing asylum system in the country is also listed as one of the priority areas for cooperation. ENP AP for Georgia available at <http://www.delgeo.ec.europa.eu/en/trade/Booklet%20A4-2.pdf> (accessed 29 November 2007)

⁷⁵ The Hague Programme adopted on 4 November 2004 setting objectives for implementation in the area freedom, security and justice in the EU envisages development of Common Asylum System as one of the objectives under the programme. Certain measures have already been taken in this direction and creation of the Common Asylum System under the Hague Programme is expected by 2010. Information available at http://ec.europa.eu/justice_home/fsj/asylum/fsj_asylum_intro_en.htm (accessed 28 November 2007)

⁷⁶ See papers by Hungarian Helsinki Committee: Recent Developments in Refugee Protection in Hungary (2005), available at: <http://www.helsinki.hu/eng/indexm.html> (accessed 29 November 2007) or Detention and Refoulement of Asylum Seekers in Hungary (2004), available at: <http://www.helsinki.hu/eng/indexm.html> (accessed 29 November 2007)

common asylum policy also applicable to the country. In this sense as well studying Hungarian experience seems interesting.

In this part national legal systems of Georgia and Hungary will be discussed in order to see the ways of implementation of the principle of *non-refoulement* in these countries. Apart from seeing application of the general principle of *non-refoulement* in concrete jurisdictions, the purpose of the exercise is to see what legal safeguards of *non-refoulement* exist in the selected countries and what aspects/elements of the principle set out in the preceding part of the paper are overseen. Such examination of the national legal systems will lead to carrying out compatibility assessment. Seeing the level of compatibility of the national asylum systems with international standards set regarding *non-refoulement*, will allow drawing certain conclusions and making recommendations where possible.

Before turning to discussion of the national legal systems, it would be useful to give a brief description of the two countries as countries of asylum. According to the official statistics, Georgia hosts 1,334 recognized refugees majority of them being ethnic Chechens from the Russian Federation⁷⁷ who were recognized on *prima facie* basis.⁷⁸ Actual number of asylum seekers arriving in the country annually remains very low. Georgia is more a transit country for asylum seekers than the country of final destination.

⁷⁷ Official statistics of the Ministry of Refugees and Accommodation of Georgia being results of the 2006 registration, 1,320 out of 1,334 registered refugees are Chechen refugees from the Russian Federation, information available at <http://www.mra.gov.ge/index.php?m=2002&tid=113&e=1> (accessed 28 November 2007)

⁷⁸ During mass influx of ethnic Chechens from the Russian Federation in 1999, they were recognized as *prima facie* refugees (Chechens were recognized refugees as a group and were given refugee status without conducting individual screening) and their status remains the same to date, although the number of the Chechen refugees has decreased due to the fact many who arrived in 1999 have left the country through different channels; and number of new arrivals remains very low.

Hungary also used to be considered as a transit country for majority of asylum seekers arriving there but asylum trends have changed and Hungary is more seen now as a country where asylum seekers arrive in order to stay.⁷⁹ Number of asylum seekers annually arriving in the country is not very high although statistics have shown that there is a noticeable increase in number in 2006 if compared to the year before.⁸⁰ Hungary is currently hosting over 8,000 refugees from different countries.⁸¹

As for the structure of the discussion of national legal systems, each national legal system will be studied and examined in separate chapters against the standards set regarding the principle of *non-refoulement* as defined in the part 1. The chapters will have similar structure. First, they will discuss protections under the constitution, then will see the protection of the principle under the asylum system of the country as well as see the protection guarantees given in the legislation on aliens. As mentioned above, purpose of the exercise is to see how the principle of *non-refoulement* is implemented and whether such implementation complies with the requirements of the principle provided for under international law, with major focus being on implementation of the principle as seen in refugee law context. Subsequent to the examination of the national legal systems conclusions will be drawn and recommendations made.

⁷⁹ European Refugee Fund: Final evaluation of the first phase (2000-2004), and definition of a common assessment framework for the second phase (2005-2010), *National Report on Hungary* 6 (March 2006) available at http://ec.europa.eu/dgs/justice_home/doc/dg_eval_Hungary_0306_en.pdf (accessed 29 November 2007)

⁸⁰ According to data from UNHCR Regional Statistics for Eastern EU Border States, in 2006 number of asylum applications in Hungary reached 2,177 which constitutes a 37% increase in number of asylum seekers if compared to the number of asylum seekers in 2005, information available at http://www.unhcr-rrbp.org/images/stories/2004_2006statistics.pdf (accessed 29 November 2007)

⁸¹ Number of recognized refugees, also including those holding humanitarian status, constituted 8,048 by end 2005; during 2006 there were almost 200 recognitions, information available respectively at <http://www.unhcr.org/statistics/STATISTICS/4641be5712.pdf> and http://www.unhcr-rrbp.org/images/stories/2004_2006statistics.pdf (both sites accessed 29 November 2007)

Chapter 3: National legal system of Georgia

3.1. Introduction for the chapter 3

Present chapter will review the guarantees of *non-refoulement* protection in the national legal system of Georgia. For these purposes, the Constitution of Georgia (hereinafter Georgian Constitution),⁸² Georgian Law on Refugees (hereinafter Law on Refugees)⁸³ and Law on Legal Status of Aliens (hereinafter Law on Aliens)⁸⁴ will be reviewed. Reference will also be made to other legislation regulating the issues related to principle of *non-refoulement* such as border crossing or extradition.

Considering the major focus on implementation of the *non-refoulement* principle seen in refugee law context, the bigger part of the discussion will be on asylum legislation of the country, also supplemented by discussion on Law on Aliens and other relevant legislation. Examination of this legislation will allow seeing the level of compatibility of the national legal system with international standards set in this field pointed out in the part 1 of the present paper.

3.2. Constitutional framework and guarantees

Georgian Constitution sets general legal framework of the country. It is the supreme law of the land and stipulates that the international legal instruments to which Georgia is a party prevail over domestic legislation, provided they are in line with Georgian Constitution.⁸⁵ Georgian

⁸² Constitution of Georgia of 24 August 1995, English version of the text available at http://www.parliament.ge/files/68_1944_216422_konst.pdf (accessed 25 November 2007)

⁸³ Georgian Law on Refugees of 18 February 1998 as amended through 27 April 2007, Georgian text of the law available at <http://kanoni.justice.gov.ge/tbrowser.asp?ID=324>, (accessed 25 November 2007)

⁸⁴ Georgian Law on Legal Status of Aliens of 27 December 2005 as amended through 29 June, Georgian text of the law available at <http://kanoni.justice.gov.ge/tbrowser.asp?ID=12546> (accessed 25 November 2007)

⁸⁵ *Id.*, at article 6(2)

Constitution guarantees universally recognized human rights and gives them direct effect.⁸⁶ Protection from torture or inhuman or degrading treatment or punishment is explicitly provided for in Georgian Constitution, among other fundamental rights.⁸⁷ It is also noteworthy that Georgian Constitution refers to other universally recognized rights not explicitly mentioned in the body text but which are implied or derive from the principles of supreme law of the land.⁸⁸

Moreover, Georgian Constitution provides for the right to asylum stipulating that the country grants asylum to foreign citizens and stateless persons in conformity with the norms of the international law and as per procedure prescribed by the domestic legislation.⁸⁹ Georgian Constitution also contains protection from *refoulement* in a narrow sense – it prohibits handing over individuals “having found shelter” in Georgia to a state where s/he is being persecuted on political grounds or because of the action which is not a crime under the Georgian legislation.⁹⁰

Specification of the Georgian legal system is that there are two avenues for acquiring asylum: under Georgian Constitution and under the Law on Refugees. Georgian Constitution gives discretionary power to the President of Georgia to “grant asylum”⁹¹ to a certain category of individuals and grounds for granting asylum in this sense differs from and is narrower than the

⁸⁶ *Id.*, at article 7

⁸⁷ *Id.*, at article 17

⁸⁸ *Id.*, at article 39

⁸⁹ *Id.*, at article 47(2)

⁹⁰ *Id.*, at article 47(3)

⁹¹ *Id.*, at article 73(1)

grounds for recognition as a refugee under the 1951 Convention.⁹² Another way of getting protection is acquiring refugee status as per Law on Refugees to be discussed in the following section. The latter way of seeking asylum corresponds to the 1951 Convention definition of asylum system and persons mostly seek asylum through this system.

Since the status of the international legal instruments under Georgian Constitution is significant, it is noteworthy to mention here that Georgia has acceded to the 1951 Convention and 1967 Protocol⁹³ as well as has ratified the Torture Convention⁹⁴ and ECHR.⁹⁵ These legal instruments come after Georgian Constitution and prevail over laws of the land in the field. Moreover, respective national legislation should be in compliance with these instruments and if any norm of the domestic legal system contradicts with the norm of these instruments, the latter prevails. Hence, due to their constitutional status these legal instruments are directly applicable in Georgia. Nevertheless, incorporation of the norms of the international instruments into national law is of great importance since level of compliance of the national legislation with international standards is an indicator of how well the state meets its international obligations under international instruments.⁹⁶

⁹² Regulation on Granting Asylum to Foreigners of 25 June 1998, article 1(2) which reads as follows (author's translation):

“ ...

2. President grants asylum to persons who do not hold Georgian citizenship and are persecuted because of their activities aimed at human rights protection and peace or for their progressive social-political, scientific or other creative activities.

...”

Georgian text of the document available at <http://kanoni.justice.gov.ge/tbrowser.asp?ID=9639> (accessed 25 November 2007)

⁹³ Georgia acceded to both instruments on 9 August 1999, *States Parties to the 1951 Convention and 1967 Protocol* available at <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (accessed 25 November 2007)

⁹⁴ Georgia acceded to the Torture Convention on 26 October 1994, *Status of Ratifications of Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, available at <http://www.ohchr.org/english/bodies/ratification/9.htm> (accessed 25 November 2007)

⁹⁵ Georgia ratified ECHR on 20 May 1999, *Chart of Signatures and Ratifications for ECHR*, available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=7&DF=11/13/2007&CL=ENG> (accessed 25 November 2007)

⁹⁶ Vakhtang Shevardnadze *supra*, at 532

Thus, Georgian Constitution provides for important guarantees also relevant to *non-refoulement* protection in the country: it grants right to asylum and protects from removal to places of political persecution; Georgian Constitution also enshrines human rights and fundamental freedoms, including absolute freedom from torture, which is also important in relation to *non-refoulement* protection; and due to their status under Georgian Constitution, international instruments to which Georgia is a party are of great importance and directly applicable in the legal system of the country, which also constitutes important legislative mechanism for protection of the principle of *non-refoulement* at national level.

3.3. Guarantees under asylum law

Apart from relevant provisions in Georgian Constitution, Law on Refugees is the principal document that regulates asylum system in Georgia. Law on Refugees was adopted in 1998 before Georgia had acceded to the 1951 Convention. Since then several amendments were made to the law, but the amendments were mostly of cosmetic nature and did not change the principal provisions of the law to be discussed further in this section. Law on Refugees will be discussed to see the *non-refoulement* protection under the asylum law of the country.

As already mentioned above, asylum system under Law on Refugees corresponds to the system of refugee protection under the 1951 Convention and is more operative than system of “granting asylum” by the President of the country as persons mostly seek asylum in Georgia through system under the Law on Refugees. For these reasons, discussion of asylum system in Georgian will be carried out by examination of Law on Refugees. In this section, apart from discussing

Law on Refugees, reference will also be made to other legislation of the land regulating issues relevant to seeking asylum in the country not regulated by the Law on Refugees.

As already mentioned, Law on Refugees defines asylum system in Georgia. Therefore it is not surprising that *non-refoulement* protection is also provided for there. Article 8(2) of the Law on Refugees bans forceful return of refugees to countries of their citizenship or habitual residence before circumstances referred to in the article 1 (definition of refugee) of the Law on Refugees cease to exist.⁹⁷ It is obvious that this definition of the principle of *non-refoulement* lacks certain crucial elements that the 1951 Convention definition of the principle provides for. In order to view the differences and existing gaps in the national system of Georgia in this regard, issues like who and to what extent are protected from *refoulement* under the Georgian asylum legislation will be examined in the following subsections.

3.3.1. Personal scope

Personal scope of the *non-refoulement* protection under Law on Refugees has to be seen in the wording of the *non-refoulement* rule of the law itself. As it was mentioned above, article 8(2) of the law refers to refugees, similar to article 33 of the 1951 Convention. Hence, when examining the personal scope of the *non-refoulement* rule under the national law on asylum, it is important to see the refugee definition under the national law and whether or not it complies with the definition set by the 1951 Convention.

⁹⁷ Georgian Law on Refugees *supra*, at article 8(2). The entire article 8 reads as follows (author's translation): "Legal Guarantees of the Refugee

1. The State protects right of the refugee.
2. It is inadmissible, before the conditions provided for in the article 1 of the present law ceases to exist, to return a refugee against his/her will to his/her country of citizenship or permanent residence.
3. Decisions of the state agencies or officials that violate rights of the refugee guaranteed under Georgian legislation may be appealed in court as per procedure prescribed by the law."

Concerns have already been raised that the refugee definition given in the Law on Refugees is not fully in compliance with the 1951 Convention definition. Article 1(1) of the Law on Refugees reads as follows:

The refugee shall be the person who, having no citizenship of Georgia, has entered the territory of Georgia for whom Georgia is not the country of origin and who has been forced to leave the country of his/her citizenship or permanent residence as a result of persecution on the grounds of race, religion, nationality, membership of a social group or political creed and cannot or is unwilling to take refuge in his/her country because of such danger.⁹⁸

The refugee definition given in the above provision is more restrictive than the convention definition due to the fact that it requires experience of persecution by those applying for refugee status. “Well-founded fear of persecution” stipulated in the refugee definition under the 1951 Convention would not suffice for acquiring refugee status as per this definition.

Moreover, in order to be recognized as a refugee, the person should enter the territory of Georgia subsequent to already having experienced persecution. This restrictive definition excludes from protection so called refugees *sur place*⁹⁹ (i.e. persons who have arrived in Georgia before grounds for their recognition as refugees existed in their countries of origin but who may have refugee claims due to changes in situation in their countries of origin occurring subsequent to their arrival in Georgia) covered under the 1951 Convention definition. These concerns still remain to date.¹⁰⁰

⁹⁸ *Id.*, at article 1(1), (author’s translation)

⁹⁹ UNHCR, *Comments by the UNHCR Representation in Georgia to proposed changes to the law of Georgia on Refugees*, by-monthly bulletin of the UN Association of Georgia and UNHCR on Refugees, March 2005, 1st issue.

¹⁰⁰ In spite of changes that were made to the Law on Refugees subsequent to the issuing of comments by UNHCR in 2005, the refugee definition still remains the same.

Important question is whether national protection from *refoulement* extends to asylum seekers. Some believe that in its current wording the article 8(2) protection from *refoulement* covers only refugees officially recognized by the state due to a simple fact that it only refers to refugees and there is no express mentioning of asylum seekers being entitled to *non-refoulement* protection under the said article of the Law on Refugees.¹⁰¹ In spite of lack of clear reference to asylum seekers in the law, in our view the *non-refoulement* provision, when viewed in general context of Law on Refugees or Georgian legislation at large, could be interpreted to also cover asylum seekers.

Two “categories” of asylum seekers should be distinguished here due to certain features of refugee status determination procedure under Law on Refugees. Namely, mechanism of prescreening of asylum seekers draws distinction between asylum seekers already on the territory of Georgia having been officially registered and those not having been registered yet (either being at the border or already on the territory of Georgia). Current Law on Refugees we believe treats these two categories of asylum seekers differently deeming the latter group of asylum seekers more vulnerable to and less protected from *refoulement*.

Right to seek asylum is provided for in Georgian Constitution. Under Law on Refugees exercise of the right to asylum entails possibility to undergo refugee status determination procedure upon arrival, provided person goes through prescreening and gets registered as an asylum seeker. In other words, after personally filing application for getting refugee status with the respective authority – Ministry of Refugees and Accommodation of Georgia (hereinafter MRA), the authority has maximum three days for either registering the person in question as an asylum

¹⁰¹ Vakhtand Shevardnadze *supra*, at 526

seeker or deny him/her registration.¹⁰² The denial in registration is subject for appeal in the judiciary.¹⁰³ Only after getting formally registered as an asylum seeker the refugee status determination procedure starts and the person has the right to claim all entitlements that exist for the asylum seekers under the Law on Refugees. Within four months the decision is made either on recognition as a refugee or rejection of the asylum application. The MRA decision on refugee claim can also be appealed in judiciary.¹⁰⁴

Interpretation of the law leads to conclude that those asylum seekers already on the territory of Georgia having registered with MRA are also protected under the *non-refoulement* rule of the article 8(2) of the Law on Refugees for the reasons as follows. Apart from the necessity of physical presence on the territory of Georgia for filing asylum application, refugee status determination procedure under Georgian law requires physical presence of the registered asylum seekers in the country throughout the procedure.¹⁰⁵ Moreover, Law on Refugees envisages certain entitlements for registered asylum seekers which also presuppose physical presence of the asylum seeker in the country (asylum seeker is entitled, *inter alia*, to freely move within the country's territory, reside at designated place of temporary residence; asylum seeker children are entitled to attend secondary schools and preschool classes, etc.).¹⁰⁶ And if [registered] asylum seekers were not covered by the *non-refoulement* rule under article 8(2) of the Law on Refugees, these entitlements as well as right to seek asylum as applied through Law on Refugees would be impossible to exercise and hence would be deemed useless.

¹⁰² Georgian Law on Refugees *supra*, at article 2(2)

¹⁰³ *Id.*, at article 3(6)

¹⁰⁴ *Id.*, at article 4(5)

¹⁰⁵ *Id.*, at article 2(1) (requirement to personally file application for acquiring refugee status with MRA), article 4 (as an example, refugee status determination procedure includes interviews of asylum seekers with MRA; asylum seekers should be ready at any time to go to MRA for interviews, provided three-day advance notice rule is observed by MRA)

¹⁰⁶ *Id.*, at article 3

Article 8(2) protection is more difficult to interpret as applicable to the asylum seekers not formally registered yet: those being at the border or having crossed the border pending registration. Due to the fact that the legal requirement gives great importance to formal registration as an asylum seeker for the access to entitlements referred to above, those asylum seekers who lack such formal registration are more vulnerable to *refoulement*, especially those at the border checkpoints and/or arriving illegally in the country (since those arriving legally usually hold visas for the period of time enough for registering as asylum seekers). Considering requirement of crossing the state border and registration as an asylum seeker, it could be concluded on its surface that non-registered asylum seekers are not entitled to any benefits, including protection from *refoulement* as interpreted above.

Nevertheless, there are certain provisions in Georgian legislation supporting the reading of article 8(2) as also covering asylum seekers not formally registered. Specifically, Georgian criminal law upholds the principle of non-penalization for illegal entry in case a person enters country illegally with the purpose to seek asylum.¹⁰⁷ The criminal law provision on non-penalization for illegal entry seems to be a guarantee for asylum seekers to enter the country in order to have access to the rights and entitlements the asylum seekers can opt for under the national legislation even in case of arriving illegally.

¹⁰⁷ Criminal Code of Georgia of 22 July 1999 as amended through 4 July 2007, article 344 relevant parts of which read as follows (author's translation):

“Illegal Crossing of Georgian State Border

1. Illegal crossing of the Georgian state border shall be punishable ...
2. ...

Note: This article shall not apply to a foreign citizen or a stateless person who in accordance with the Georgian Constitution seeks asylum in Georgia, provided no signs of other crime are observed in his/her action....”

Georgian text of the law available at <http://kanoni.justice.gov.ge/tbrowser.asp?ID=649> (accessed 28 November 2007)

Moreover, for the aforementioned exemption from criminal responsibility for illegal border crossing to operate, the asylum seeker has just to express the intention of seeking asylum and no formal registration as an asylum seeker is necessary under this provision.¹⁰⁸ It leads to conclude that in this case the factual state of the person being asylum seeker suffices as a ground for affording the person protection. Again, it would deem useless affording such protection if non-registered asylum seekers were not covered by the *non-refoulement* rule under the article 8(2) of the Law on Refugees.

To sum, personal scope of the *non-refoulement* protection under the Law on Refugees is limited and not in line with the 1951 Convention requirements of protection from *refoulement* due to restrictive definition of refugee provided for in the law; in spite of the lack of clear reference in law, the rule on non-penalization for illegal entry enshrined in the criminal law read in conjunction with the provisions on refugee status determination procedure referred to in this subsection allow for reading that the article 8(2) protection from *refoulement* also extends to all asylum seekers.

Nevertheless, although current law allows for broad reading of the personal scope of the article 8(2) protection, it is still subject to complex interpretation described above, deeming overall protection under 8(2) weak. Restrictive definition of refugees, lack of explicit mentioning of asylum seekers as being covered under the article 8(2) protection from *refoulement* and existence of two “categories” of asylum seekers that the Law on Refugees creates through its prescreening mechanism in totality form a fallback in protection from *refoulement* of individuals who would genuinely qualify for *non-refoulement* protection under the 1951 Convention.

¹⁰⁸ Actual wording of the provision in Criminal Code exempting asylum seekers from penalization for illegal entry does not contain requirement of official registration of the asylum application for the exemption to be applicable.

3.3.2. Acts constituting *refoulement* and extent of protection

Article 8(2) of the Law on Refugees proscribes forceful return of refugees to countries of their nationality or permanent residence, provided the grounds for refugee status have not ceased to exist. If compared to the acts prohibited under article 33 of the 1951 Convention, again acts covered under the Law on Refugees is more limited. Acts that would constitute *refoulement* as per definition given in the Law on Refugees is limited to actual removal of refugees already on the territory of Georgia. The fact that this definition extends to returns only to countries of refugees' origin/habitual residence constitutes another limitation of the protection under the national law.

It should be noted from the beginning that the *non-refoulement* rule stipulated in article 8(2) of the Law on Refugees lacks the key phrase given in article 33 of the 1951 Convention which prohibits expulsion or return “in any manner whatsoever”. As seen in the chapter 1, this phrase made it possible to broadly interpret the acts prohibited under the *non-refoulement* principle. Article 8(2) refers only to “return” as a prohibited act, provided other conditions for banning such act are also present. Hence, the actual wording of the article 8(2) of the Law on Refugee makes broad interpretation of the acts covered by the said provision difficult, if not impossible.

The contention that “return” in the said provision covers only actual removal derives again from the refugee definition under the Law on Refugees and refugee status determination procedure existing in the country. As per refugee definition stipulated in the article 1(1) already referred to, refugees are persons who, among other requirements, have entered the territory of Georgia. Such

formulation of the *non-refoulement* rule and refugee definition make it doubtful whether rejection at the frontiers could also constitute *refoulement* under the national law.

But if we derive from the point of view that the *non-refoulement* protection extends to asylum seekers as well and take into consideration the arguments linked to right to asylum and concept of non-penalization for illegal entry pointed out in the preceding subsection, it could be contended that rejection at the frontiers has also to constitute an act proscribed under article 8(2), otherwise it would be impossible to exercise right to asylum. But since the law is not that straightforward in relation to asylum seekers being protected under article 8(2), the contention about rejection at the frontiers being among the acts proscribed by the said article is again subject to interpretation, which is hard to be viewed as adequate protection in line with the 1951 Convention standards.

Even if the rejection at the frontiers is read to be proscribed under the article 8(2), certain conditions make it extremely difficult for those seeking asylum at the border not holding valid documents for entering the country to be effectively protected from *refoulement*. In spite of the analysis based on right to asylum and concept of non-penalization for illegal entry advanced in preceding subsection as an argument for supporting the reading of the article 8(2) as also covering asylum seekers (both registered and non-registered), in fact under the current law there is no legal mechanism/procedure guaranteeing entry into the country and access to refugee status determination procedure for such asylum seekers.

As mentioned above, there is a legal requirement to personally file application for acquiring refugee status with MRA. Due to the fact that MRA does not have representatives at the border

checkpoints and that border police does not have legal obligation to accept asylum applications and refer cases to the refugee authority, it becomes impossible for certain group of genuine asylum seekers to exercise their right to asylum and are in *de facto* position of being *refouled* (i.e. rejected at the frontiers), unless they hold valid documents for entering the country on other grounds.¹⁰⁹

Although Law on Aliens will be discussed in the following section, it should be mentioned here that provision in the Law on Aliens also applicable to refugees and asylum seekers could serve as the legal ground for elaboration of mechanism for avoiding rejection at the frontiers of genuine asylum seekers lacking valid documents for entering the country. The provision stipulates that in exceptional cases defined by the Ministry of Internal Affairs (hereinafter MIA), the National Border Police under the Ministry of Internal Affairs has the right to grant leave of entry and stay for up to three months to persons not holding valid travel documents.¹¹⁰ But to date the norm is not operative in practice due to the fact that the MIA has not adopted the regulation defining those exceptional cases.¹¹¹

Another important element making the extent of protection under the article 8(2) more restrictive is that the prohibition applies to return to “countries” as opposed to “territories” provided for in the article 33 of the 1951 Convention. Moreover, the return under article 8(2) is prohibited not to any country but to country of origin or habitual residence of the person being returned. Such

¹⁰⁹ Law on Legal Status of Aliens *supra*, at articles 4(2) and 4(4) which stipulate that for entering the country aliens should hold valid travel documents and a document constituting leave for stay in Georgia such as visa, residence permit in Georgia or refugee card issued by the Georgian authorities.

¹¹⁰ *Id.*, at article 4(3)

¹¹¹ To date no MIA has not adopted any legal act specifying/defining exceptional cases referred to in article 4(3) of the Georgian Law on Legal Status of Aliens. On 13 November 2007 during the phone conversation with the author, representative of the Legal Department of the Border Police under MIA confirmed that no such document has been adopted yet and not even a draft of such document has been or is being under consideration.

wording excludes from the scope of the article 8(2) removal to transit zones, to “no man’s lands”, and to third countries, which is not in line with the standards of the *non-refoulement* protection under the 1951 Convention as described in the chapter 1. Limiting acts constituting *refoulement* to the return to countries of origin or habitual residence and considering the omission of the element “in any manner whatsoever” effectively deems indirect *refoulement* beyond the ambit of the article 8(2) protection as well.

Return, i.e. actual removal in practical terms under Georgian law can be carried out by means of expulsion or extradition. General expulsion procedure is regulated by the Law on Legal Status of Aliens. However, the part on expulsion procedure of the law is not applicable to refugees and asylum seekers.¹¹² There is no special legal instrument regulating grounds and procedure for expulsion of refugees/asylum seekers.¹¹³ Such legislative gap leaves room for arbitrariness and puts refugees/asylum seekers in a situation when no legal mechanisms of protection exist to which they could resort, in case need arises.

As for extradition, the issue is regulated under the Criminal Procedure Code of Georgia¹¹⁴ which sets general conditions for extradition. The law foresees extradition of a person to his/her country of origin or to a third country, provided conditions for extradition are met.¹¹⁵ It is important to mention here that Criminal Procedure Code exempts refugees from extradition.¹¹⁶ Similar to *non-refoulement* provision in the Law on Refugees, here as well asylum seekers are not

¹¹² Georgian Law on Legal Status of Aliens *supra*, at article 1(3), the provision lists parts of the law applicable to asylum seekers and refugees; part of the law on expulsion procedure is not listed as also applicable to refugees and asylum seekers (for the list of the parts that are applicable to refugees see footnote 23)

¹¹³ Georgian Law on Refugees constituting the only special law regulating issues related to asylum seekers and refugees in the country, does not regulate expulsion matters.

¹¹⁴ Criminal Procedure Code of Georgia dated 20 February 1998 as amended through 11 July 2007, document in Georgian available at <http://kanoni.justice.gov.ge/tbrowser.asp?ID=13441> (accessed 28 November 2007)

¹¹⁵ *Id.*, at article 256(1)

¹¹⁶ *Id.*, at article 257(a)

mentioned among those protected from extradition, which again makes asylum seekers less protected and more exposed to the risk of *refoulement* through extradition.

As a conclusion for this subsection it should be noted that wording of the article 8(2) of Law on Refugees being not in compliance with the wording of the article 33 of the 1951 Convention does not allow for broad interpretation of the acts constituting *refoulement*. Limited scope of the acts covered and legislative gaps on expulsion and extradition increase the risk of *refoulement* of asylum seekers and/or refugees to places not covered by the national *non-refoulement* rule through procedure not containing adequate legal safeguards for the protection from *refoulement*.

3.3.3. Conclusion for this section

Thus, to summarize the discussion in the present section, in spite of possibility of extensive interpretation of the *non-refoulement* rule, personal scope as well as acts covered and extent of *non-refoulement* protection under the national asylum law is restrictive and not in line with the 1951 Convention standards.

3.4. Guarantees under law on aliens

In addition to the Law on Refugees, Law on Aliens also regulates important issues relevant to principle of *non-refoulement*. As for its relevance to asylum system, the bigger part of the Law on Aliens is not applicable to refugees, including procedure on expulsion.¹¹⁷ Nevertheless, it still regulates important aspects of asylum system in the country (e.g. the part on rights of aliens of

¹¹⁷ Georgian Law on Legal Status of Aliens of 27 December 2005 *supra*, at article 1(3) which stipulates that the Law on Legal Status of Aliens with the exception of parts stipulated in this provision are not applicable to refugees and asylum seekers. The parts applicable to refugees and asylum seekers are articles 4(3) and 4(4) – grounds for entering Georgia, article 16 – grounds for staying in Georgia, chapter five – rights of aliens in Georgia.

the law is also applicable to refugees) and also provides for right to asylum.¹¹⁸ Law on Aliens also contains *non-refoulement* guarantees stipulating that

- [n]o foreigner shall be expelled to a country where
- a) s/he is persecuted on political grounds or because of committing an act which does not constitute a crime under Georgian legislation;
 - b) s/he is persecuted for his activity aimed at protection of human rights and peace or for their progressive social-political, scientific or other creative activities;
 - c) his/her life or health is at risk.¹¹⁹

The above provision is not applicable to refugees and asylum seekers and its application in this sense is limited. Although considering that it applies to rest of the foreigners in the country who are not covered by *non-refoulement* rule under the Law on Refugees, the *non-refoulement* rule of the Law on Aliens could still be viewed as supplementing mechanisms of protection from *refoulement* in broader sense. Law on Aliens will be discussed in this section to see what additional *non-refoulement* guarantees, if any, available to foreigners (excluding refugees and asylum seekers) it provides. For this purpose the personal scope, acts covered and extent of *non-refoulement* protection under the Law on Aliens will be discussed in subsequent subsections.

3.4.1. Personal scope

As seen above, *Non-refoulement* provision of the Law on Aliens makes reference to foreigners in general. In spite of such broad formulation, as already stated, refugees and asylum seekers are still excluded from the protection under this provision due to the fact that this provision does not belong to the part of the Law on Aliens also covering refugees and asylum seekers.

¹¹⁸ 2007Georgian Law on Legal Status of Aliens *supra*, at article 48 which reads as follows (author's translation): "Granting asylum

Aliens may be granted asylum in Georgia in accordance with the Constitution, international agreement and Georgian legislation."

¹¹⁹ *Id.*, at article 58(2) (author's translation)

Persons covered under this rule include those already on the territory of Georgia facing expulsion¹²⁰ and who will be subjected to acts stipulated in the provision in the country of destination. Persons covered include those facing risk of persecution on political grounds, or whose life or health will be threatened, or who are facing persecution on grounds of different types of creative work. In this sense the personal scope of the *non-refoulement* provision is positively extensive covering certain category of persons not covered under the Law on Refugees. Nevertheless, the provision excludes from *non-refoulement* protection those foreigners (not being refugees or asylum seekers) at the border. And *non-refoulement* rule does not refer to persons risking to face torture or other forms of ill-treatment upon return as also protected from expulsion, restricting even more already limited personal scope of the provision.

Thus, in spite of the fact that wording of the *non-refoulement* provision brings in additional categories of people within the ambit of *non-refoulement* protection, its personal scope still remains limited: apart from refugees and asylum seekers, it also excludes foreigners at the border and those who face risk of torture or other form of ill-treatment in the country of expulsion. Although the provision brings positive element by extending application of *non-refoulement* rule to those limited category of foreigners not covered by Law on Refugees, it still cannot be viewed as protecting persons who would qualify for *non-refoulement* protection in broader sense under international law.

3.4.2. Acts constituting refoulement and extent of the protection

¹²⁰ Expulsion procedure in Georgia under Law on Aliens foresees expulsion as act executed against a foreigner already on the territory of Georgia, not including rejection at the frontiers as form of expulsion.

Non-refoulement provision of the Law on Aliens proscribes expulsion to countries where the person in question will face persecution on political grounds or for the reasons of his/her creative work or where his/her life and health will be threatened.

Similar to *non-refoulement* prohibition under the Law on Refugees, acts proscribed under the *non-refoulement* rule of the Law on Aliens are limited to expulsion to “countries” not “territories”. In spite of this limitation, *non-refoulement* rule under the Law on Aliens still constitutes certain mechanism for protection from *refoulement* during expulsion procedure. But again, the provision proscribes expulsion, but does not protect from rejection at the frontiers. And among proscribed places of expulsion the non-refoulement rule provided for in Law on Aliens does not mention countries where person in question may risk being tortured or ill-treated otherwise.

Thus, in spite of establishing certain protection mechanism, *non-refoulement* provision of the Law on Aliens is still limited and is hard to be viewed as providing adequate protection from *refoulement* in broader sense to those genuinely qualifying for such protection as per international standards.

It should be briefly mentioned here that concerns are also raised because of insufficiency of mechanisms in national legal system of Georgia at large for protection from *refoulement* when there is a risk of torture or inhuman or degrading treatment or punishment upon return.¹²¹ It is believed that no domestic legal mechanism is put in place to prevent removal of a person (including asylum seekers, rejected asylum seekers, refugees, and persons having their refugee

¹²¹ Human Rights Watch, *Georgia: Areas of Concern*, available at http://hrw.org/backgrounder/eca/georgia0605/2.htm#_Toc110402270 (accessed 29 November 2007)

status revoked) to places where the person may face torture or inhuman or degrading treatment or punishment.¹²² Such a gap in protection is not in line with the obligations of Georgia under international instruments such as the Torture Convention and ECHR.

3.4.3. Conclusion for this section

In conclusion of this section it should be stated that although *non-refoulement* rule under the Law on Aliens brings in some positive elements and in a limited way supplements *non-refoulement* protection afforded under the Law on Refugees, it still does not qualify as an adequate mechanism of implementation of the principle of *non-refoulement* in its broader meaning.

3.5. Conclusion for the chapter 3

Fact of illegal expulsion of two asylum seekers which occurred in Georgia in spring 2005 illustrates well the problems and risks the system creates for genuine asylum seekers/refugees to date. This case also summarizes well most of the issues of concern described in this chapter. Two brothers, newly arrived asylum seekers being ethnic Chechens and holding citizenship of the Russian Federation went to MRA to file refugee application and get registered as asylum seekers. At MRA they were asked to go back later on the same day due to the fact that the person in charge of the asylum applications was not in the office at that moment. The brothers left without filing the application. As they went back to MRA later that day, they were apprehended by people from law enforcement agencies and were taken and forcibly expelled to “no-man’s land” in between land borders of Georgia and Azerbaijan. As asylum seekers, they tried to re-enter Georgia as well as tried to get leave for entry into Azerbaijan. Authorities of Azerbaijan would agree to their admission only on the conditions that the brothers would afterwards go back

¹²² Konstantine Korkelia et al, *Compatibility of Georgian Legislation with the Standards of the European Convention on Human Rights and Its Protocols* 355 (2005)

to the Russian Federation without staying in Azerbaijan. The asylum seeker brothers found these conditions unacceptable.

In the end, after staying in “no-man’s land” for several days the brothers managed to re-enter Georgia by illegal means due to the fact that Georgian border police would not allow them to re-enter country through border checkpoints, in spite of their expressed will to apply for refugee status in the country. Subsequent to their re-entry the brothers were registered as asylum seekers due to involvement of Georgian Public Defender, UNHCR and different human rights NGOs. Subsequently they were recognized as refugees by MRA.¹²³

Thus, the brothers were genuine asylum seekers who due to prescreening requirement were unable to get formally register their refugee claim right away and get formal access to better protection; their expulsion was completely arbitrary constituting *refoulement*; they were expelled to “no-man’s land” and being stuck in between the states they risked to be forced to accept the conditions of Azerbaijani authorities and thus be subjected to indirect *refoulement* carried out against them by Georgia; lastly, in spite of the explicit wording of the Georgian Constitution on right to asylum and existence of rule on non-penalization of asylum seekers for illegal entry, they were unable to re-enter Georgia through border checkpoints.

In spite of possibility of extensive interpretation of the *non-refoulement* protection under the national asylum law, the system of protection still remains incompatible with the standards set under the international law and specifically under the 1951 Convention. Major areas of concern in this regard are the restrictive wording of the *non-refoulement* provision coupled with

¹²³ Information regarding the case available at <http://web.amnesty.org/library/index/engneur010122005> and <http://hrw.org/english/docs/2006/01/18/georgi12229.htm> (both sites accessed 29 November 2007)

insufficient definition of refugee in Law on Refugees, which deems certain group of genuine asylum seekers and refugees without sufficient protection from *refoulement*; prescreening of asylum seekers and non-existence of mechanisms for accepting asylum applications at the border checkpoints add to the insufficiency of the *non-refoulement* protection under the national law on asylum.

As for the implementation of the principle of *non-refoulement* in its broader meaning, *non-refoulement* protection under the Law on Aliens provides poor and inadequate protection in this sense. In general lack of national legal mechanisms for observing *non-refoulement* rule in case of risk of torture or other form of ill-treatment upon return applicable to all constitutes fallback in implementation of the principle of *non-refoulement* in the national legal system of Georgia, in spite of absolute prohibition of torture under the Georgian Constitution

Chapter 4: National legal system of Hungary

4.1. Introduction for the chapter 4

In this chapter the national legal system of Hungary will be examined in order to view the implementation of the principle of *non-refoulement* in the given country. For this purpose, legal framework and guarantees under the Constitution of the Republic of Hungary (hereinafter Hungarian Constitution)¹²⁴ as well as guarantees under Hungarian Act on Asylum (hereinafter Asylum Act)¹²⁵ and Hungarian Act on the Admission and Right of Residence of Third-Country Nationals (hereinafter Alien Act)¹²⁶ will be discussed in the sections to follow.

The bigger part of the discussion will be on Asylum Act as the major document regulating issues of asylum in the country, given the focus on implementation of the principle of *non-refoulement* at national level in the context of refugee law. Alien Act is also discussed as containing *non-refoulement* protection mechanisms supplementing the protection guarantees under the Asylum Act. These laws will be examined in order to see the level of implementation of and compliance to the international standards set forth in regard with the principle of *non-refoulement* described in the part 1 of this paper.

¹²⁴ The Constitution of the Republic of Hungary of 1949, document in English available at <http://www.mkab.hu/en/enpage5.htm> (accessed 29 November 2007)

¹²⁵ Hungarian Act on Asylum of 2007, document in English acquired through personal contacts

¹²⁶ Hungarian Act on the Admission and Right of Residence of Third-Country Nationals of 2007, document in English acquired through personal contacts

4.2. Constitutional framework and guarantees

Hungarian Constitution defines the general legal framework of the country and is the Supreme Law of the land.¹²⁷ In accordance with Hungarian Constitution, the domestic legal system should be in compliance with the international obligations undertaken by Hungary under the international law.¹²⁸ Hungarian Constitution guarantees human rights and fundamental freedoms,¹²⁹ including freedom from being tortured which is absolute.¹³⁰

Hungarian Constitution also provides for the right to asylum. According to the supreme law of the land, the country grants asylum to

... foreign citizens who, in their native country or the country of their usual place of residence, are subject to persecution on the basis of race or nationality, their alliance with a specific social group, religious or political conviction, or whose fear of being subject to persecution is well founded.¹³¹

Hence, grounds for granting asylum under the Hungarian Constitution is similar to the grounds for granting refugee status under the 1951 Convention. As for the prohibition of *refoulement*, Hungarian constitution contains certain form of protection from *refoulement*. Namely it is more a procedural guarantee stipulating that deportation of the foreigners legally residing in the country shall only be possible as per decision reached due to the law.¹³² This procedural guarantee constitutes protection generally applicable to every foreigner, including refugees and asylum seekers.

¹²⁷ The Constitution of the Republic of Hungary of 1949 *supra*, at article 77(1)

¹²⁸ *Id.*, at article 7(1), according to the provision, the country accepts generally recognized principles of international law and undertakes to harmonize its national legal system with the international law

¹²⁹ *Id.*, at article 8(1)

¹³⁰ *Id.*, at article 54(2) which contains prohibition of torture and article 8(3) prohibits suspension or restriction, *inter alia*, of the article 54 even for the considerations of national security or public safety deeming the article 54 protection absolute

¹³¹ *Id.*, at article 65(1)

¹³² *Id.*, at article 58(2)

Considering the constitutional undertaking to harmonize national legislation with the obligations undertaken under the international law,¹³³ international legal instruments hold significant position in Hungarian legal system with special place given to the EU and its legislation. Therefore it is important to mention here that Hungary has acceded to the 1951 Convention and its 1967 Protocol¹³⁴ as well as the country is a party to the the Torture Convention¹³⁵ and ECHR.¹³⁶

As for the significance of the EU, under Hungarian Constitution, the country may delegate its certain constitutional powers to the EU.¹³⁷ Moreover, in the context of asylum legislation, great importance is attached to the EU common asylum policy and legislation adopted by the organization in this field.¹³⁸ Due to EU membership, EU asylum legislation should be reflected in the Hungarian national legal system on asylum. Therefore, transposition in the domestic legislation of the EU asylum law has been ongoing.

Thus, Hungarian Constitution provides for the right to asylum which is important in relation to *non-refoulement* protection in the country; it also contains procedural safeguard from *refoulement* of any person legally residing in Hungary, including refugees and asylum seekers.

¹³³ *Id.*, at article 7(1)

¹³⁴ Country has acceded to both the 1951 Convention and 1967 Protocol on 14 March 1989, *States Parties to the 1951 Convention and 1967 Protocol* available at <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf> (accessed 25 November 2007)

¹³⁵ Hungary ratified Torture Convention on 15 April 1987, *Status of Ratifications of Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, available at <http://www.ohchr.org/english/bodies/ratification/9.htm> (accessed 25 November 2007)

¹³⁶ Hungary ratified ECHR on 5 November 1992, *Chart of Signatures and Ratifications for ECHR*, available at <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=7&DF=11/13/2007&CL=ENG> (accessed 25 November 2007)

¹³⁷ Constitution of the Republic of Hungary of 1949 *supra*, at article 2/A

¹³⁸ The EU asylum legislation comprises directives and regulations issued by the Council of the European Union covering different aspects of asylum system in the EU and its member-states, including issues of granting temporary protection, asylum procedure, minimum standards of reception of asylum seekers, minimum standards of qualification as refugee or beneficiary of other form of protection, procedure on determining the EU member state responsible for conducting asylum procedure, etc.

Guarantees of protection from *refoulement* contained in international instruments, including the EU asylum law, is of great importance and relevance when discussing the national protection from *refoulement* in Hungary, due to the Constitutional requirement of harmonization of the national legal system with the international norms country has agreed to abide by.

4.3. Guarantees under the law on asylum

As a part of the process of harmonization with and transposition of the EU legislation, Hungary has adopted new Asylum Act in 2007 that shall come in force on 1 January 2008.¹³⁹ Hence, when reviewing the *non-refoulement* protection under the national asylum law, the new Asylum Act will be the major document to be discussed in this section. Present section will review the law to see what the guarantees under the Asylum Act are, who are beneficiaries of the protection under these guarantees and what is the extent of this protection.

It is worth mentioning here that although subject of the present research is not to review the EU legislation against the *non-refoulement* requirements of the 1951 Convention, taking into consideration that the act transposes the EU law¹⁴⁰ and reflects principal elements of the EU common asylum policy, the issues that will be discussed in this section in relation to national protection from *non-refoulement* to some extent will also refer to or even derive from the EU asylum law.

Asylum Act provides for that the *non-refoulement* prohibition applies if a person in question will be

¹³⁹ Hungarian Act on Asylum of 2007 *supra*, at section 89(1)

¹⁴⁰ See *New Asylum Laws Bring Good News and Bad News for Refugees* available at <http://www.unhcr-rrbp.org/content/view/101/72/> (accessed 29 November 2007)

“...exposed to the risk of persecution or the death penalty, torture, cruel, inhuman or degrading treatment or punishment in his/her country of origin for racial or religious reasons or due to his/her ethnicity, affiliation to a specific social group or political conviction, and there is no safe third country which would receive him/her.”¹⁴¹

Hence, the Asylum Act provides for broad protection from *refoulement* covering all the elements of protection from *refoulement* existing in the refugee law context as well as broader context of human rights law, in addition also covering situations with risk of capital punishment upon return. Nevertheless, the *non-refoulement* rule of the Asylum Act is formulated somewhat differently from the article 33 of the 1951 Convention. The former conditions the *non-refoulement* prohibition on non-existence of a safe third country as an alternative place of return. The issues related to such formulation of the *non-refoulement* rule and notions related to this definition will be further discussed. However, before turning to the discussion of the content and extent of the *non-refoulement* protection, first, personal scope of the *non-refoulement* protection under the Asylum Act should be seen.

4.3.1. Personal scope

As a starting point for the discussion of the personal scope of the protection from *refoulement* under the Asylum Act, it should be noted here that the act defines asylum in Hungary as “grounds for residing in the territory of the Republic of Hungary and simultaneous protection against *refoulement*, expulsion and extradition”.¹⁴² Thus, those having acquired asylum in the country are protected from *refoulement* and this protection also covers acts of extradition. Asylum can be acquired in the country through recognition as a refugee or as a beneficiary of the subsidiary or temporary protection.¹⁴³

¹⁴¹ Hungarian Act on Asylum of 2007 *supra*, at section 43(1)

¹⁴² *Id.*, at section 2(c)

¹⁴³ *Id.*, at section 3(2)

Refugee definition in the act corresponds to the 1951 Convention definition. It also explicitly provides for that this definition covers refugees *sur place*.¹⁴⁴ Moreover, refugee authority has discretionary power to grant refugee status to persons who do not meet the requirements of the refugee definition but are ought to be recognized as such due to humanitarian considerations, provided they are not excludable.¹⁴⁵

As for beneficiaries of subsidiary or temporary protection, grounds for recognition are as follows. Subsidiary protection is granted to a person who does not qualify as a refugee but still there is "... risk that in the event of his/her return to his/her country of origin, s/he would be exposed to serious harm and is unable or, owing to fear of such risk, unwilling to avail himself/herself of the protection of his/her country of origin".¹⁴⁶ In order to see fully what category of people is protected under the subsidiary protection regime, the notion of the "serious harm" should be seen.

The notion of subsidiary protection is a part of the EU common asylum policy provided for in the Qualifications Directive.¹⁴⁷ Definition of the "serious harm" can also be found there as well as in the Asylum Act¹⁴⁸ itself. Under these definitions, death penalty, torture or inhuman or degrading treatment or punishment, serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict

¹⁴⁴ *Id.*, at section 6

¹⁴⁵ *Id.*, at section 7(4)

¹⁴⁶ *Id.*, at section 11(1)

¹⁴⁷ Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML> (accessed 25 November 2007)

¹⁴⁸ Hungarian Act on Asylum of 2007 *supra*, at section 60

constitute “serious harm”.¹⁴⁹ It follows that those persons under risk of being subjected to such acts upon return are protected from *refoulement* under the national asylum law.

As for the temporary protection, it is granted to displaced persons when they arrive in the country *en masse* and are recognized either by the Council of the European Union under the procedure set in the Temporary Protection Directive¹⁵⁰ or the government of Hungary as eligible for temporary protection on specified grounds.¹⁵¹ To summarize the definitions given both in Temporary Protection Directive and Asylum Act, beneficiaries of temporary protection in Hungary are, displaced persons, i.e. third-country [non-EU] nationals or stateless persons who have fled from their country or region of origin or have been evacuated due to existing situation there and are unable to return; these persons may include those covered by the 1951 Convention as well as those fleeing “...areas of armed conflict or endemic violence [and] persons at serious risk of, or who have been the victims of, systematic or generalized violations of their human rights”,¹⁵² specifically of torture, cruel, inhuman or degrading treatment.¹⁵³

It follows from the aforementioned that the range of persons qualifying for granting asylum is broad under the Hungarian Asylum Act covering persons fleeing countries (and in some cases regions) of their origin due to persecution on five grounds stipulated in the 1951 Convention or because of being under risk of enduring serious harm as defined above or having been displaced *en mass* are unable to return due to armed conflicts, generalized violence or mass and systemic

¹⁴⁹ Council Directive 2004/83/EC of 29 April 2004 *supra*, at article 15

¹⁵⁰ Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_212/l_21220010807en00120023.pdf (accessed 25 November 2007)

¹⁵¹ Hungarian Act on Asylum of 2007 *supra*, at section 17

¹⁵² Council Directive 2001/55/EC of 20 July 2001 *supra*, article 2(c)

¹⁵³ Hungarian Act on Asylum of 2007 *supra*, at section 17(b)

violation of human rights in countries or regions of their origin. Due to the fact that Asylum Act defines asylum as, *inter alia*, protection from *refoulement*, persons qualifying for acquiring asylum similarly qualify for *non-refoulement* protection.

Moreover, *non-refoulement* rule is further elaborated in the Asylum Act as stipulated above. The said rule refers to “persons seeking recognition” as being protected from *refoulement*, provided the conditions set out in the provision are present.¹⁵⁴ Unaccompanied minors are also entitled to special protection from *refoulement* in case family reunification or provision of institutional care would not be available for such minors in the country of return.¹⁵⁵ Moreover, even if the person is found by the refugee authority as not being qualified for *non-refoulement* protection, s/he may still be protected from removal from Hungary at least temporarily due to considerations of health.¹⁵⁶ Hence, as it is explicitly provided for in the act, personal scope of the *non-refoulement* protection is not only limited to persons already recognized but also extends to those seeking recognition as refugees or beneficiaries of subsidiary or temporary protection; special mechanism of protection exists for unaccompanied minors; and in exceptional cases temporary limitation applies even to removal of those not qualifying for *non-refoulement* protection.

Thus, personal scope of the principle of *non-refoulement* under the Asylum Act is quite extensive as explained in this subsection. Nevertheless, there are some issues regarding certain aspects of the asylum procedure which raise concerns in relation to *non-refoulement* protection.

¹⁵⁴ *Id.*, at section 43(1)

¹⁵⁵ *Id.*, at section 43(2)

¹⁵⁶ *Id.*, at section 43(8)b which stipulates that imposition of the obligation to leave Hungary may be withheld if the person found not to qualify for *non-refoulement* protection “...is in a condition at the time of the adoption of the decision that the execution of the obligation of leaving the country would result in a serious, irreversible or permanent deterioration in his/her state of health or would result in a life threatening condition”. And as per section 43(9), this rule shall apply until such medical conditions of the person in question exist.

These concerns relate to the notions of safe country of origin and safe third country deriving from the EU common asylum policy.

Concerns have been raised in relation to blanket exclusion of citizens of other EU member-states from asylum procedure as provided for in the Asylum Act. Under the act, during the preliminary assessment procedure,¹⁵⁷ applications for refugee status or subsidiary protection lodged by the nationals of the EU states should be deemed inadmissible for in-merit review of the refugee claim.¹⁵⁸ Argument has been made that such a blanket exclusion of the EU nationals from asylum procedure is against the individual responsibility of Hungary (also being the EU member-state) to provide access to the asylum procedure to all without discrimination under the 1951 Convention; such policy may also leave certain category of nationals of a EU member-state being in need of protection without option to seek asylum in Hungary as a EU member-state; and subsequently such exclusion might also leave them exposed to *refoulement*.¹⁵⁹

Similar criticism has been expressed in relation to the rules determined by the Dublin II regulation¹⁶⁰ and also provided for in the Hungarian Asylum Act. Namely, during the preliminary assessment procedure, if it is determined that there is another member-state which the person in question entered first, the status determination procedure is suspended in Hungary and the person is sent back to that member-state as to the country being responsible for status

¹⁵⁷ *Id.*, at section 45 which provides for the commencement of the preliminary assessment procedure of asylum claims upon submission of the claims to refugee authority

¹⁵⁸ *Id.*, at section 49(2)a

¹⁵⁹ Geoff Gilbert, *Is Europe Living Up to Its Obligations to Refugees?*, 15 European Journal of International Law 963, 971 (2004). Discussing in general terms the rule enshrined in the EU law on excluding EU citizens from asylum procedure in EU member-states, the author of the article refers to Roma in some newly joined EU members that might be in need of international protection and due to this rule remaining without an option to seek asylum within EU.

¹⁶⁰ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_050/l_05020030225en00010010.pdf (accessed 25 November 2007).

determination.¹⁶¹ Concerns have also been raised that such rule might as well leave certain individuals qualifying for protection without even access to asylum procedure and adequate protection, including protection from *refoulement*: it has been contended, *inter alia*, that not all member-states have national asylum systems flexible enough to accommodate needs of each and every asylum seeker returned under Dublin II regulation.¹⁶²

Moreover, Asylum Act deems conditions for recognition as a refugee or beneficiary of the subsidiary protection absent if the country of origin of the applicant is considered to be a safe country or if the applicant has arrived through a safe third country where s/he had the opportunity to seek asylum.¹⁶³ In spite of the rather strict specific conditions for regarding country as “safe” are laid down, it has been contended that these mechanisms for excluding certain category of people from getting refugee status or being recognized as beneficiaries of subsidiary protection in Hungary (and in EU at large) weakens protection of asylum seekers/refugees, including protection from *refoulement* and constitutes an area of concern as well.¹⁶⁴

In conclusion of the present subsection it should be stated that although concerns raised in relation to certain mechanisms/notions applied in the national asylum system of Hungary seem not without reason, in general personal scope of the *non-refoulement* protection under the Asylum Act is rather broad. As seen above, the act covers recognized refugees and beneficiaries of subsidiary or temporary protection as well as those seeking such recognition; in circumstances

¹⁶¹ Hungarian Act on Asylum of 2007 *supra*, at section 47

¹⁶² Madeline Garlick, *The EU Discussions on Extraterritorial Processing: Solution or Conundrum?*, 18 International Journal of Refugee Law 601, 604 (2006). As an example the author mentions Greece which refuses to review asylum applications of those persons return under Dublin II regulation who have been absent from the country for more than three months.

¹⁶³ Hungarian Act on Asylum *supra*, at section 57(1)a, b

¹⁶⁴ Madeline Garlick *supra*, at 601

stipulated by law, special protection is also available to unaccompanied minors and persons with serious health conditions.

4.3.2. Acts constituting *refoulement* and extent of the protection

When discussing the acts covered by the *non-refoulement* rule stipulated in the Asylum Act, it should be first noted that from the definition of the asylum given in the same act referred to at the beginning of the preceding subsection it is clear that *non-refoulement* protection covers acts of return, expulsion and/or extradition.¹⁶⁵ Special procedure contained in the Asylum Act in relation to submission and preliminary review of asylum applications at airport entry points leads to conclude that asylum seekers arriving in Hungary are also protected from rejection at the frontiers (at least at airport entry points).¹⁶⁶

The special procedure entails placement of the asylum seeker at the designated place in the airport transit zone and subsequent to going through preliminary screening, admission to the territory of Hungary. Although submission of the asylum application at the border does not automatically guarantee admission to the territory, it still provides for protection from immediate *refoulement* and access to first stage of asylum procedure, namely preliminary assessment procedure for determining whether the case qualifies for in-merit review.

Preliminary assessment procedure is an important stage in relation to airport cases as well as status determination procedure under the Asylum Act in general.¹⁶⁷ Preliminary assessment procedure is the tool for screening out those cases that do not qualify for in-merit review of their

¹⁶⁵ Hungarian Act on Asylum *supra*, at section 2(c)

¹⁶⁶ *Id.*, at section 71

¹⁶⁷ *Id.*, at section 45, general term of preliminary procedure is 15 days; in case of procedure carried out at airport, the time limit is 8 days as per section 71(4)

asylum claims and may end up with ordering the asylum seeker to leave Hungary.¹⁶⁸ Those whose applications are found to be admissible during the preliminary assessment procedure undergo in-merit review of their asylum claims.¹⁶⁹

Preliminary assessment procedure first of all entails determination whether Dublin II regulation applies.¹⁷⁰ In case of discontinuation of the preliminary assessment procedure¹⁷¹ or rejection of application for in-merit review as the result of preliminary assessment procedure,¹⁷² asylum seekers lose their entitlements in Hungary, provided limited opportunity of appeal is exhausted.¹⁷³ Denial of in-merit review however does not automatically lead to lifting of *non-refoulement* prohibition and it can still be subject for decision by the refugee authority whether the prohibition applies.¹⁷⁴

As already referred to at the beginning of this section, principle of *non-refoulement* in more elaborate term is provided for in the section 43 of Asylum Act which reads that prohibition of *refoulement* applies when there is a risk that in his/her country of origin or habitual residence the

¹⁶⁸ *Id.*, at section 50(3) which provides for the power of the refugee authority to order person in question to leave the country following the discontinuation of the preliminary procedure

¹⁶⁹ *Id.*, at section 53(1)

¹⁷⁰ *Id.*, at section 47 which provides that the preliminary assessment procedure is suspended if other EU member-state is found to be responsible for the asylum seeker and subsequently is discontinued by transferring the asylum seeker in question to that state; asylum seekers have no option of appeal in relation to decision of the suspension of the preliminary assessment procedure although may request court review of the decision of the refugee authority on transfer to another EU member-state; the court review in the latter case has no suspensive effect on execution of the decision on the transfer.

¹⁷¹ *Id.*, at section 50(2) which provides that the preliminary assessment procedure may be discontinued by the refugee authority if asylum seeker withdraws application in writing, does not give statements and makes it impossible to access the admissibility of his/her claim, does not appear for the interview in spite of being summoned in due course and/or leaves the country for unknown destination.

¹⁷² *Id.*, at section 51(1)

¹⁷³ *Id.*, at section 50(4) (in case of discontinuing the preliminary assessment procedure, asylum seeker may request the refugee authority to resume preliminary procedure); and section 51(2), (3) (in case of rejection of in-merit review as the result of undergoing preliminary assessment procedure, asylum seeker may request court review which has suspensive effect on the decision of the asylum authority).

¹⁷⁴ *Id.*, at section 52 which stipulates that existence of determination by the refugee authority that *non-refoulement* prohibition is not applicable is necessary for the resubmission of the asylum application not have suspensive effect on, *inter alia*, procedure of expulsion or extradition of the person in question

person in question will be persecuted on grounds of race, nationality, religion, membership of a particular social group or political opinion, or may face capital punishment, torture or inhuman or degrading treatment or punishment, provided there is no safe third country accepting him/her.¹⁷⁵

Certain elements from the given definition are to be discussed in this subsection. One of the elements is that, similar to *non-refoulement* rule in the Georgian legislation, the *non-refoulement* provision in the Asylum Act mentions “countries” as opposed to “territories” provided for in article 33 of the 1951 Convention when referring to proscribed places of return of the person in question. Moreover, reference is made not just to any country but to countries of origin of those being protected under the provision. In this regard the *non-refoulement* definition in the Asylum Act seems somewhat limited when compared to the 1951 Convention definition of the principle: it seems to exclude prohibition of *refoulement* to any other place rather than the country of origin of the person in question, leaving beyond the ambit of the *non-refoulement* rule return to places like transit zones, “no-man’s lands” or territories with undefined status (e.g. secessionist regions).

Another element of the definition provided for in Asylum Act that is distinctive from the 1951 Convention definition of the *non-refoulement* rule is that prohibition of return is conditioned on non-existence of safe third country as an alternative place of return. Notion of safe third country is also used in relation to status determination procedure when person does not qualify for recognition if s/he has arrived in Hungary through a safe third country where s/he could have sought asylum. It is not clear whether in *non-refoulement* prohibition reference is made to safe

¹⁷⁵ *Id.*, at section 43(1)

third country also being a transit country for persons seeking recognition or any country meeting requirements of being safe as provided for in the Asylum Act where return would be possible.

Specifications of the safe third country are given in the Asylum Act itself. For a third country to qualify as safe the following conditions should be present there:

- the [person's] life and liberty are not jeopardised for racial or religious reasons or on account of his/her ethnicity, affiliation to a social group or political conviction and the applicant is not exposed to the risk of serious harm;
- the principle of non-refoulement is observed in accordance with the Geneva Convention;
- the rule of international law, according to which the applicant may not be expelled to the territory of a country where s/he would be exposed to the death penalty, torture, cruel, inhuman or degrading treatment or punishment, is recognised and applied, and
- there is protection available in accordance with the Geneva Convention.¹⁷⁶

These specifications apply for determining safe third country (being a transit country for the person seeking recognition in Hungary) in course of the status determination procedure. The definition of safe third country is of great importance since *non-refoulement* prohibition under the Hungarian Asylum Act is in a sense authorization of return to a safe third country. Taking the specifications of the safe third country into consideration, the concerns remain that blanket application of this rule might leave some unprotected from *refoulement*. In spite of the specific conditions that the country should meet in order to qualify as safe third country, it is unclear in practical terms what would be the mechanisms for judging whether country meets the said requirements.¹⁷⁷ This lack of clarity might leave room for the countries which might not have

¹⁷⁶ *Id.*, at section 58(2)a,b,c,d

¹⁷⁷ For example, the criteria or tools for assessment that e.g. the national legal system of the country affords protection as provided for in the 1951 Convention are not provided for.

adequate protection mechanism or good record of protecting refugees/asylum seekers from *refoulement*, to be determined as safe third countries, which increases risk of onward *refoulement* from that country of persons being sent there by Hungary.

Beyond the guarantees and issues discussed already, there are some additional guarantees of protection from *refoulement* in the Asylum Act that strengthen the mechanisms of *non-refoulement* protection in the country. One of these guarantees is mechanism of authorization for stay in Hungary of those not qualifying for recognition as refugees or beneficiaries of subsidiary or temporary protection. Upon determination of the refugee authority that in spite of lack of recognition grounds *non-refoulement* prohibition is still applicable to such persons, authorization of stay in Hungary is issued to the persons in question by the respective authority.¹⁷⁸ And even those not qualifying for *non-refoulement* protection and ordered to leave the territory of Hungary may be authorized to stay if their health condition does not permit removal, at least until the medical conditions of the person in question improve.¹⁷⁹

To summarize present subsection, principle of *non-refoulement* as provided for in the Asylum Act covers return, expulsion or extradition as well as rejection at the frontiers (at least at airport entry points) as acts proscribed by the *non-refoulement* prohibition. Certain elements of the wording of *non-refoulement* prohibition in the Asylum Act differ from the formulation of the *non-refoulement* rule in the 1951 Convention. And concerns also relate to certain notions applied in *non-refoulement* prohibition as well as Asylum Act in general. In spite of these concerns, taking into consideration the acts covered and additional mechanisms of protection from

¹⁷⁸ Hungarian Asylum Act of 2007 *supra*, at section 43(3), (4)

¹⁷⁹ *Id.*, at section 43(8)b

refoulement, extent of overall protection from *refoulement* under the Asylum Act seems rather broad.

4.3.3. Conclusion for this section

Considering the discussion in this section it could in general be concluded that rather broad personal scope and acts covered under the *non-refoulement* rule deem *non-refoulement* prohibition under the Asylum Act as rather strong mechanism of protection. Nevertheless, there are areas which have been argued to differ from and not fully comply with the 1951 Convention requirements, which constitute room for improvement for the *non-refoulement* mechanisms under the Hungarian asylum law.

4.4. Guarantees under law on aliens

Another national law to be discussed in this chapter is Alien Act. It regulates admission and stay of third country (non-EU) nationals on the territory of Hungary as well as issues such as expulsion. Alien Act also contains *non-refoulement* prohibition somewhat supplementing the *non-refoulement* rule provided for in the Asylum Act.

Non-refoulement provision of the Alien Act stipulates that

(1) [t]hird-country nationals may not be turned back or expelled to the territory of a country that fails to satisfy the criteria of safe country of origin or safe third country regarding the person in question, in particular where the third-country national is likely to be subjected to persecution on the grounds of his/her race, religion, nationality, social affiliation or political conviction, nor to the territory or the frontier of a country where there is substantial reason to believe that the expelled third-country national is likely to be subjected to the death penalty, torture or any other form of cruel, inhuman or degrading treatment or punishment (non-refoulement).

(2) Any third-country national whose application for refugee status is pending may be turned back or expelled only if his application is refused by final and executable decision of the refugee authority.¹⁸⁰

Hence, given formulation of principle of *non-refoulement* is in certain terms broader than the *non-refoulement* rule provided for in the Asylum Act, the former containing certain elements missing from the definition of the latter. In order to view what the additional elements are, personal scope and extent of the *non-refoulement* protection under the Alien Act will be discussed in the subsequent subsections.

4.4.1. Personal scope

Apart from protection mechanism available to those seeking asylum in Hungary provided for in the prohibition of *refoulement* given in the Alien Act, *non-refoulement* prohibition provided for above also refers to any third country national who may face the risk of being subjected to the acts stipulated in the given definition upon non-admission or return by Hungary. The personal scope of the given formulation is extensive in a sense that it covers everyone, not just recognized refugees and beneficiaries of subsidiary protection or persons seeking such recognition.

Moreover, the present rule seems to explicitly protects not only those on the territory of Hungary, but also those at the border.¹⁸¹ Considering the scope of the law it belongs to and general rule of exclusion of EU nationals from the scope of asylum law and *non-refoulement* protection in the legislation of Hungary (as an EU member-state), here as well the personal scope is limited to third-country (i.e. non-EU) nationals.

¹⁸⁰ Hungarian Act on the Admission and Right of Residence of Third-Country Nationals of 2007^{supra}, at section 51(1)

¹⁸¹ The reference in *non-refoulement* rule is made independently to “turning back” and “expulsion” which makes it possible to contend that “turning back” in this case constitutes rejection at the frontier

Thus, although the *non-refoulement* rule of the Alien Act is still limited to non-EU nationals, supplementing the personal scope of the Asylum Act, it covers all third-country nationals, being on the territory of Hungary as well as at the border entry points of the country, in case of existence of risk of acts proscribed as provided for in the provision.

4.4.2. Acts constituting *refoulement* and extent of the protection

As for the acts covered under the *non-refoulement* rule of the Alien Act, as mentioned above, it explicitly provides for rejection at the border as well as actual expulsion to constitute *refoulement*, provided other conditions set forth in the rule are also present. Moreover, it bans return to a country not qualifying as a safe third country or a safe country of origin, not just return to the country of origin or habitual residence of the person in question. And in the context of threat of death penalty, torture and other form of ill-treatment, ban applies to return to “territories”, not just “countries”. In this sense extent of protection from *refoulement* is broader than the protection afforded by the Asylum Act, the latter limiting to countries of origin or habitual residence returns proscribed under the *non-refoulement* rule. Broader scope of the acts proscribed given in the *non-refoulement* prohibition in the Alien Act supplements the protection mechanisms of Asylum Act in this sense as well, which in turn makes up better compliance with the *non-refoulement* standards under international law described in the part 1.

Alien Act also provides for further procedural guarantees for protection from *refoulement*. It contains procedural guarantees for those seeking recognition as refugees or beneficiaries of subsidiary or temporary protection requiring that for the expulsion of persons belonging to these

categories, final and enforceable decision of the refugee authority is necessary.¹⁸² Furthermore, Alien Act provides in general terms that in expulsion procedures the regard should be head to the *non-refoulement* prohibition. And persons ordered to be expelled may appeal to the court on suspension of the expulsion because of threat of *refoulement*; and execution of expulsion is suspended until the court hearing on the matter is concluded.¹⁸³

Thus, acts proscribed under the *non-refoulement* rule of the Alien Act and extent of protection it affords in this sense contains certain elements that are missed out in the *non-refoulement* rule of the Asylum Act, also containing additional procedural guarantees of protection. Hence, *non-refoulement* rule of the Alien Act supplements and ads to the protection from *refoulement* granted under the Asylum Act.

4.4.3. Conclusion for this section

Considering the discussion in the section, it should be concluded here that Alien Act contains *non-refoulement* rule that supplements the protection guarantees provided for in the Asylum Act in this field, which in turn contributes to better implementation and compliance with the standards of protection from *refoulement* provided for under international law. In spite of certain limitations which are similar to limitations of *non-refoulement* rule stipulated in Asylum Act, Alien Act provides for broader scope (both personal and in terms of acts covered) and extent of *non-refoulement* prohibition together with additional procedural guarantees of protection that strengthen *non-refoulement* protection in Hungary.

¹⁸² Hungarian Act on the Admission and Right of Residence of Third-Country Nationals of 2007^{supra}, at section 51(2)

¹⁸³ *Id.*, at section 52

4.5. Conclusion for the chapter 4

Guarantees provided for in the Asylum Act supplemented by guarantees under Alien Act and Hungarian Constitution make it possible to conclude that country affords broad *non-refoulement* protection through its national legal system: mechanisms exist for protection from *refoulement* in the refugee law context as well as broader context of human rights law, in addition also covering situations with risk of capital punishment in case of return. *Non-refoulement* protection covers every third country (non-EU) nationals, including refugees, asylum seekers and those seeking subsidiary or temporary protection, from rejection at the frontiers, return, expulsion or extradition, if exercise of such acts by Hungary would place the persons in question under risk of persecution on five grounds provided for in the 1951 Convention, or risk of death penalty or torture or inhuman or degrading treatment or punishment. Extending on its own broad formulation of the scope of *non-refoulement* protection, national legislation also foresees additional protection guarantees for those in need of special treatment and protection (e.g. unaccompanied minors, person with serious medical conditions being ordered to leave the country) as well. Procedural mechanisms provided for in the national legal system also add to the level and extent of protection from *refoulement*.

Nevertheless, formulation of the *non-refoulement* rule under national law somewhat differently from the article 33 of the 1951 Convention raises certain concerns. Concerns also relate to exclusion of EU citizens from the ambit of *non-refoulement* protection as provided for in the legislation discussed in the present chapter and notions of safe country of origin or safe third country utilized in the wording of the *non-refoulement* prohibition raise concerns on compatibility of Hungarian national legal system with the *non-refoulement* standards set forth in the part 1 of the present paper. Although overall protection mechanisms seem strong, these concerns constitute room for improvement.

Conclusion for the part 2

Having discussed implementation of the principle of *non-refoulement* protection under concrete jurisdictions of Georgia and Hungary, with bigger emphasis on implementation of the principle in asylum legislation of the countries, the following conclusions are to be drawn.

It has been seen in this part of the paper that mechanisms of protection from *refoulement* are stronger in Hungary than in Georgia. It has been shown that legal system of Georgia lacks very important elements necessary for observance of the *non-refoulement* duty undertaken by the country under the 1951 Convention and lacks adequate mechanisms necessary for implementation of the principle of *non-refoulement* in its broader meaning, as enshrined, *inter alia*, in the Torture Convention and ECHR. Thus, overall compatibility with standards set regarding the principle of *non-refoulement* under international law discussed in part 1 is rather poor and low, leaving much room for improvement.

As for Hungary, legal system of the country affords rather broad and strong protection from *refoulement* in refugee law context as well as broader context of human rights law. Hungarian national legal system foresees diversified avenues for acquiring protection from *refoulement* for different categories of people on varied grounds, including situations with risk of capital punishment in case of return. It also provides for procedural and special mechanisms of protection for those qualifying. In spite of overall protection mechanisms in Hungary being much more satisfactory and in compliance with international standards than mechanisms available in national legal system of Georgia, some concerns still remain regarding full compatibility of the principle of *non-refoulement* in Hungary with standards set under the 1951 Convention, the Torture Convention and ECHR discussed in the part 1.

Conclusion and recommendations

Being one of the fundamental principles of international law, principle of *non-refoulement* is viewed in two contexts: international refugee law context supplemented by broader context of international human rights law. Standards set in regard with the principle of *non-refoulement* in these two contexts under international instruments discussed in present paper can be summarized as follows.

International refugee law context: The 1951 Convention definition – principle of *non-refoulement* prohibits states to reject at the border, return, extradite or remove in any other form refugees or asylum seekers to territories where they may fear persecution on grounds of race, religion, nationality, membership of a particular social group or political opinion; prohibition proscribes direct as well as indirect *refoulement*; the principle of *non-refoulement* is non-derogable, although subject to exceptions. Thus, protection from *refoulement* under 1951 Convention is not absolute.

Broader context of international human rights law supplementing the refugee law context: Definition under the Torture Convention and ECHR – principle of *non-refoulement* prohibits states to expel, return, extradite or otherwise return any person (including but not limited to asylum seekers/refugees) when there are substantial grounds to believe that the person may be subjected to torture (the Torture Convention) or face real risk of torture or inhuman or degrading treatment or punishment (ECHR) upon return; the *non-refoulement* prohibition also extends to indirect *refoulement*; no exemptions from *non-refoulement* duty may apply. Thus, protection from *refoulement* under the Torture Convention and ECHR is absolute.

As provided for in the international instruments discussed in the paper, principle of *non-refoulement* should be applied without discrimination of any kind. As for the nature of the principle, although there is certain controversy whether *non-refoulement* constitutes a customary rule of international law, it could be contended that at least when it comes to the risk of torture or inhuman or degrading treatment or punishment, the *non-refoulement* duty is a customary norm.

Having examined the national legal systems of Georgia and Hungary against these identified standard features of the principle of *non-refoulement* under international law, the implementation of the principle in these countries has been shown. Conclusions were made that implementation of the principle of *non-refoulement* in national legal system of Georgia lacks crucial elements of the international standards of *non-refoulement* protection stipulated in paragraphs above. Major areas of concern in this regard are incompliances of *non-refoulement* rule and refugee definition in the asylum legislation of the country with the respective provisions of the 1951 Convention and certain areas of status determination procedure, leaving outside the ambit of national protection from *refoulement* those genuinely qualifying for *non-refoulement* protection under the 1951 Convention to the places and through the acts/procedures proscribed by the principle of *non-refoulement* under international refugee law. Notwithstanding constitutional guarantee of absolute protection from torture, non-existence of mechanisms of protection from *refoulement* to places entailing risk of torture or inhuman or degrading treatment or punishment constitute major fallback in implementation of the principle of *non-refoulement* in its broader meaning in compliance with the Torture Convention and ECHR in Georgia.

As for implementation of the principle of *non-refoulement* in the national legal system of Hungary, protection mechanisms afforded by the country in this sense have been seen as being

rather broad and strong, covering elements of *non-refoulement* protection in both contexts: diverse mechanisms exist for protection from *refoulement* in the refugee law context as well as broader context of human rights law, in addition also covering situations with risk of capital punishment in case of return. In spite of overall strong implementation of the principle of *non-refoulement* in the country, areas of concern still remain in relation to implementation of the principle of *non-refoulement* in the country in full compliance with individual obligations of Hungary under international law. The concerns relate to formulation of the *non-refoulement* rule under national law somewhat differently from the article 33 of the 1951 Convention, singling out the EU citizens from the ambit of national *non-refoulement* protection and notions of safe country of origin or safe third country utilized in the wording of the *non-refoulement* prohibition. These concerns constitute remaining areas of further improvement of implementation of the principle of *non-refoulement* in Hungary.

Considering the discussions in this paper, concerns raised and degree of incompatibilities in relation to implementation of the principle of *non-refoulement* in selected jurisdictions, the following recommendations could be made for improving implementation of the principle of *non-refoulement* in legal systems of Georgia and Hungary.

Recommendations for Georgia

- *Non-refoulement* rule in the Law on Refugees would be advisable to be formulated similar to the wording of article 33 of the 1951 Convention, explicitly including asylum seekers as being covered by the *non-refoulement* provision.
- Definition of refugee would be advisable to be formulated similar to the wording of the 1951 Convention definition.

- Abolishing of prescreening of asylum seekers would make it possible to start asylum procedure and make benefits/protections under the law available to asylum seekers immediately after submission of the application.
- Standard procedure of accepting asylum applications and subsequently referring them to MRA by the Border Police would be also advisable to be put in place.
- In order to make the provision in the Law on Legal Status of Aliens on the authority of the Border Police in exceptional cases to grant leave for entry and stay for up to 3 months to persons without valid travel documents operative, those exceptional cases would need to be specified and defined by law/regulation.
- Special legal procedure for expulsion of refugees/asylum seekers would be advisable to be worked out which should be very narrow and in line with exceptions to *non-refoulement* rule provided for in the 1951 Convention.
- Provision of the Criminal Procedure Code on exemption of refugees from extradition would be good to amend to include asylum seekers as well.
- Legal mechanisms for protection from removal to places where persons returned may be under risk of torture or inhuman or degrading treatment or punishment would be necessary to be put in place.

Recommendations for Hungary

- Acknowledging the difficulty with applying in practice this recommendation, it would be still advisable from the point of view of the considerations of non-discrimination and individual responsibility of the state for implementation of the principle of *non-refoulement* as enshrined in the 1951 Convention and also supplemented by the Torture Convention and ECHR to include EU nationals within the ambit of national protection from *refoulement*.

- Reformulation of the *non-refoulement* rule in the Asylum Act and Alien Act to include “territories” as proscribed places of return and lifting the limitation to return to countries of origin would also help to strengthen the *non-refoulement* protection in the country and make national legal system more compatible with the 1951 Convention.
- Again acknowledging that due to EU context it will be hard to remove notions of safe country of origin and safe third country, ban on the blanket application of these notions and existence of more concrete/strict practical mechanisms allowing for in-depth examination of the country in question would contribute to better protection from *refoulement*.

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