

TEMPORARY PROTECTION AS AN EXCEPTIONAL MEASURE FOR AN INFLUX OF PEOPLE SEEKING INTERNATIONAL PROTECTION

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Abstract

The granting or refusal to grant asylum to a person is a sovereign right of the state. A state may allow the entry and residence on its territory for foreigners who have left their home country because of the persecution they were subjected. However, the State to which the asylum request is made has an obligation to respond favorably to a request for asylum that may be denied. The right to seek asylum is considered a fundamental human right provided by Article 14 of the Universal Declaration of Human Rights. Temporary protection is a form of protection granted collectively, under exceptional circumstances and for a strictly limited period of time in the case of a large number of persons seeking international protection.

Key Words: *international protection, migration issues, asylum, temporary protection, relocation, integration process.*

The development of asylum policy in recent years has obviously evolved in the European Union with the adoption of significant documents, but the fundamental basis regarding the asylum policy is still represented by the Geneva Convention of 1951 on the Status of Refugees and by the 1967 Protocol on the status of refugees. These include two key provisions in the field, namely, the refugee definition set out in Article 1 and the fact that a person who has applied for asylum on the grounds covered by the Convention cannot be sent to the country where he or she is the object of persecution and cannot be returned according to Article 33 of the Convention. Although there is the provision regarding non-refoulement, one cannot say that it guarantees the right of permanent residence in a country of receipt, following the provisions of the Convention. Any request for asylum submitted in a signatory state must be examined and treated in a fair way, no matter if the applicant entered the territory of that State lawfully or not, which reveals that according to the provisions of the Convention an unlimited number of asylum seekers may have access to asylum procedures once they have gained access to the territory, whether they entered legally or not.

During the 1990s, the conflicts in the former Yugoslavia, in Kosovo and in other areas of the world have demonstrated the need for special procedures to deal with massive flows of displaced persons.

In view of the U.N. High Commissioner for Refugees (UNHCR) the temporary protection is “a provisional protection in response to a situation of mass influx, offering immediate protection against refoulement”, without granting the refugee status. The term „provisional protection” is used in some countries to describe legal regimes, including

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other forms of protection, such as cases of people fleeing war or other crises.⁷⁵ The need for states to apply this protection comes naturally from the obligation of non-refoulement. It should be noted that this is not a complementary form of protection under the Geneva Convention, it is rather a form of temporary protection for people who may fall under the refugee definition, but owing to the destination may not have immediate access to the procedure for determining refugee status.

In these situations, the UNHCR Executive Committee stated that “asylum seekers should always receive at least temporary refuge”⁷⁶ and that people should be admitted without any discrimination on grounds of race, religion, political opinion, nationality, country of origin, or mental disability⁷⁷. In particular, these people “should not be penalized or exposed to any unfavorable treatment solely on the ground that their presence in the country is considered unlawful; they should not be subject to restrictions on freedom of movement, other than those required in the interest of health and public order”.

The temporary protection is a form of protection that is granted collectively in exceptional situation and for a strictly determined period of time. Principles and procedural guarantees: access to the asylum procedure, non refoulement, nondiscrimination, the unity of the family, the supreme interest of the child, confidentiality, the presumption of good faith, removing of criminal liability for entering or illegally being in the country.⁷⁸

In the European Union, the *Council’s Directive 55/2001 of 20 July 2001 on minimum standards for granting temporary protection in the event of a mass influx of displaced persons and measures promoting a balance of effort between Member States receiving such persons and bearing the consequences of their acceptance*⁷⁹, establishes procedures to provide immediate and temporary protection in the event of a mass influx of displaced persons from third countries who cannot return to their country of origin.

The Directive defines the procedure of taking the necessary decisions to trigger, extend or conclude temporary protection. Moreover it provides rights for the beneficiaries of temporary protection, including a residence permit for the whole duration of the protection (the protection granted must have a limited duration), providing appropriate information regarding temporary protection, access to labor market, accommodation or lodging, social assistance or allowance, access to medical treatment, education for children, opportunities for the families to reunite under certain circumstances and guarantees access to the normal asylum procedure.

⁷⁵ See A. Bulgaru, *Standarde și măsuri la nivel național și european privind protecția internațională în materia azilului*, Prouniversitaria Publishing House, 2013, p. 146 et seq. See also Guidelines on Temporary Protection or Stay Arrangements, UNHCR, February, 2014.

⁷⁶ Conclusions of UNHCR nr. 15(XXX), 1979. States that due to their location geographic or other reasons, face a large influx of people seeking asylum must necessarily receive immediately assistance from other countries in according with the principle of fair burden sharing.

⁷⁷ Conclusions of UNHCR nr. 22(XXXII), 1981.

⁷⁸ See I. M. Zlătescu, *Migration and Law*, IRDO, Bucharest, 2014, pp. 30 et seq. See also Irina Moroianu Zlătescu, *Human Rights. A dynamic and Evolving Process*, 2015 and *Guidelines on Temporary Protection or Stay Arrangements*, UNHCR, February, 2014.

⁷⁹ Published in the Official Journal of the European Union No L212 of 7 August 2001.

The Directive also contains provisions on the return of displaced persons to their country of origin, the exclusion from the benefit of temporary protection of persons who have committed serious crimes or who pose a threat to the security. Specific provisions have been drawn up for unaccompanied minors and for those who have suffered traumatic experiences in particular (such as rape, physical or psychological violence).

According to this Directive, the procedure will be triggered, particularly when there is a risk that the asylum system will not cope with this massive influx without an adverse effect on its efficient functioning to the benefit of the person concerned and of other persons seeking protection, which is currently happening as a result of the conflict in Syria, due to which nearly five million Syrians have left the country. In these circumstances the European Union faces a wide number of persons seeking international protection.

The beneficiaries of temporary protection may be „displaced persons”, “third country nationals or stateless persons who have been forced to leave their country or region of origin or have been evacuated, in particular in response to an appeal by international organizations, who are unable to return safely because of the situation prevailing in their country and that could come within the scope of Article 1A of the Geneva Convention or of other national or international instruments guaranteeing international protection”⁸⁰. This includes, among others, persons who have fled areas of armed conflict or endemic violence and people at serious risk or who have been victims of systematic or widespread violations of human rights⁸¹.

The temporary protection applies in a particular situation following a decision of the Council, as determined by a qualified majority on the Commission proposal, that there is a situation of mass influx of people seeking international protection. Once the decision has been taken, the Member States may offer this form of protection to additional categories of displaced persons in the cases when they are displaced for the same reasons and from the same country or region of origin⁸².

According to Article 4 of the Council Directive 55/2001, temporary protection lasts one year and shall be automatically extended by six month periods for a maximum period of one year unless terminated before that. The Council may request extension of this period up to one year.

In cases of mass influx of asylum seekers is quite obvious that additional protection is needed, not because of a shortage of refugee protection but because of circumstances which may prevent the State to provide immediate access to the asylum procedure. In these situations, non-refoulement compels states to provide temporary protection until the persons concerned may have access to the procedure for determining refugee status.

In case of massive influx of immigrants the national legislation states that the foreigners that arrived on the territory of Romania with a massive influx of immigrants benefit of temporary protection from the date provided by the decision of the European

⁸⁰ See Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of 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, art.2 et seq.

⁸¹ *Idem*, Article 2.

⁸² *Ibidem*, Article 7.

Union Council. Although this regulation of temporary protection transposes the EU norms, the Romanian state can be thus hold responsible for violating the disposition of the UN Convention of 1951 with regard to refugees.⁸³

Guaranteeing of human rights through international documents adopted at regional and national level ensures the rights of people who leave their country of origin. The fundamental rights must be recognized to all people, regardless of their migrant status. No one shall be deprived of fundamental rights recognized by international documents just because they entered or remained in a State or because they look like 'strangers', they are children, women or they do not speak the language of that territory.

Ever since 1999, the European Council meeting in Tampere, discussions took place at the level of Heads of State and Government on the establishment of a Common European Asylum System (CEAS), based on comprehensive and integrated application of the Geneva Convention. They reaffirm the principle of *refoulement* and ensuring that nobody is sent back or can be subjected to persecution. The asylum system should include, in the short term, common standards for fair and efficient asylum procedure in the Member States and long-term EU rules leading to a common asylum procedure in the European Union.⁸⁴ Common European Asylum System (CEAS) is part of the EU's objective of creating an area of freedom, security and justice in which asylum seekers are offered protection. The first stage of adopting a Common European asylum System (1999-2005) envisages legislative measures harmonizing common minimum standards and regulating asylum in general. There has been a series of directives which contain provisions on reception conditions of asylum seekers, asylum procedures and qualification standards. Also one of the aims of the Common European Asylum System is to create an efficient and effective solidarity mechanism to relieve the situation of countries receiving large inflows of asylum seekers and experiencing difficulties in terms of ensuring adequate reception conditions. Thus were adopted the Dublin Convention of 15 June 1990 instituting the principle of responsibility of examining applications for asylum submitted to a Member State of the European Union, Norway and Iceland by a third- country⁸⁵, national and the EU Council Regulation 2000/2725/EC of 11 December 2000 on the establishment of EURODAC⁸⁶ for the comparison of fingerprints under the implementation of the Convention⁸⁷.

Although norms were adopted and solidarity mechanisms were created, the strengthening of the European asylum system faces difficulties and coherent and

⁸³ See I. M. Zlătescu, *Migration and Law*, *op.cit.*, p. 54 et seq.

⁸⁴ See A. Bulgaru, *Standarde și măsuri la nivel național...op.cit.*, pp. 114-123.

⁸⁵ Until 21 February 2006 Denmark has applied the Dublin Regulation. Therefore, in this matter "Member States" means all EU Member States, except Denmark, plus Norway and Island.

⁸⁶ EURODAC database was established under Council Regula EC no. 2000/2725 of 11 December 2000 for the establishment of EURODAC for the comparison of fingerprints for the purposes of applying the Dublin Convention (cf. Journal Officiel vol . L 316/1 of 12.12.2000).

⁸⁷ EU Regulation . 603/2013 of the European Parliament and of the Council of 26 June 2013 concerning the establishment of Eurodac for the comparison of fingerprints for the effective application of EU regulation no. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third- country national or by a stateless person begins to apply two years after its entry into force and repeal Council Regulation 2725/2000 and Council Regulation 407/2002 implementing it.

comprehensive measures are needed to address the challenges arising from the migration phenomenon. Solidarity among countries and mutual interdependence remains a real concern in order to perfect the effective functioning of the Common European Asylum System. If in the first phase of the CEAS creation, one of the objectives aimed at establishing efficient mechanisms of solidarity, the present concern is now to streamline these mechanisms in order to receive and integrate the large number of persons seeking international protection in the Member States of the European Union.

Solidarity among Member States was encouraged by establishing the European Refugee Fund, which promotes a balance in the efforts of the States to receive the applications of asylum seekers, refugees and displaced persons. The main objective of the European Refugee Fund (ERF) was designed to support and encourage the efforts made by Member States in receiving persons seeking protection, taking into account the relevant European legislation. Also, it was meant to support Member States' actions in promoting social and economic integration of refugees and their return to their countries of origin if they wish so. By ERF the Member States were encouraged to: improve infrastructure and services for the reception of refugees, medical care, social assistance or administrative and legal formalities. The European Refugee Fund finances measures relating to: the receipt installation and allowances (including those concerning the provision of food and clothes), medical or psychological costs relating to staff and management in charge with the receipt and protection of individuals as well as the implementation of appropriate measures or costs relating to logistics and transport.

Considering that most of those seeking international protection come from countries in the developing world, it is important to take into account ways to support third countries in addressing problems related to asylum and refugees, in an effort to increase an effective protection and to find durable solutions for refugees, both in their region of origin, as well as in that of transit, the Commission developed the concept of regional and European protection programs as a complement to various types of EU assistance to third countries in the field of asylum .

Also, considering the importance of achieving durable solutions for refugees and asylum seekers, the Commission has in recent years undertaken to systematically integrate asylum in its strategy for development cooperation, as reflected in several recent national/regional strategy documents and allocated important financing for asylum from various external assistance instruments.

In this context, it is necessary to reflect on which types of action are most effective in supporting third countries to manage refugee situations, including addressing the needs of refugees and returnees and analyzing their potential to contribute to development in the countries which receive them, but also on how to enhance the coherence and effectiveness of EU action in relation to third countries and regions concerned⁸⁸.

The European Union is currently facing a major crisis regarding persons who have left their home country and are seeking international protection, the biggest after the Second World War. The European Union's external borders in recent years have been the scene of human tragedy to which the Union and its Member States are obliged to take

⁸⁸ Green paper on the future Common European Asylum System/Com/2007/0301.

immediate action. In this regard, the Union has intensified efforts to find solutions to this crisis.

Addressing migration has become a priority for the Commission, the European institution which should ensure the implementation of EU norms. It adopted the European Agenda on migration⁸⁹ which sets out a comprehensive approach to improve the management of migration, measures aimed at saving lives, protecting people in difficulty, border management and mobility, targeting criminal networks that smuggle migrants, creating a permanent system for sharing responsibility between Member States for the large number of refugees in the Union.

Also the Agenda sets four levels of action regarding the EU policy on migration: reducing the incentives for illegal migration (the cooperation and support of third countries being extremely important), securing the external borders, strengthening common policy on asylum (completion of common European Asylum system) and adopting a new policy on legal migration.

The reaction from the EU was immediate. The Union continues to promote solidarity and balance between the EU member states for the reception of persons seeking international protection. Given the fact that national asylum systems are facing a huge pressure, the European Commission proposes, as mentioned above, a compulsory transfer system for distributing the wide number of people in need of international protection. Relocation arrangements proposed by the European Commission would take into account distribution criteria and voluntary efforts of Member States. However, the quota system was challenged by several Member States of the European Union, situation in which the European Commission initiated infringement proceedings against 19 of them for failure to respect the asylum right.

Migration management is a shared responsibility, not only between EU Member States, but also for non-EU countries of transit and origin of migrants. By combining internal and external policies, the Agenda provides a new, comprehensive approach grounded on mutual trust and solidarity between EU member states and institutions.

The efforts at EU level to manage the challenges facing Member States that received a large number of persons seeking international protection involve closer cooperation between the European Support Office on Asylum, Frontex and Europol, aiming to direct the asylum seekers to a fast procedure and to return to their countries the migrants in irregular situations.

It was also sought immediate action to prevent further loss of lives by providing additional funding for Frontex operations of search and rescue and for safe and legal resettlement of persons in Europe. Moreover, the role of Europol was strengthened, as a center of information for the dismantling of criminal networks.

Also, other factors should be considered, such as the ability of Member States to process asylum applications and to offer long-term solutions to persons seeking international protection. The integration of asylum seekers requires efforts from both the Member States and the asylum seekers to adapt to the new society, without having to give up their cultural identity. In addition, there must be willingness on the part of

⁸⁹ European Agenda on migration adopted by the European Commission on May 13, 2015.

communities and public institutions to receive these people who have applied for international protection and to meet the needs of a diverse community.

In this sense, the cooperation of the United Nations High Commissioner for Refugees (UNHCR) and other relevant organizations is necessary to support the implementation the european schemes for relocation and resettlement, in accordance with current practices (identification, proposal, transfer, etc.). It will also have in mind involve the European Asylum Support Office within the mechanism.⁹⁰

The practical cooperation between Member States will play an important role in the development of the spirit of solidarity and responsibility sharing among Member States in order to meet these goals. The European Union must find sustainable solutions to resolve the increasingly more numerous situations involving persons seeking international protection. It is obvious that the Union cannot ignore these problems and it must approach them dynamically and efficiently.

⁹⁰ Communication from the Commission to the European Parliament, the Council, the European Economic, and Social Committee and the Committee at the Regions, A European Agenda of Migration, Bruxelles, 2015.