

# Considerations on the Right to Asylum

Florica Brasoveanu

*Universitatea Ovidius din Constanta, Facultatea de Drept si Stiinte Administrative*  
[floriordache@yahoo.com](mailto:floriordache@yahoo.com)

## Abstract

*Hugo Grotius, considered one of the fathers of public international law, was the one who tried since 1625 to define the concept of asylum in the legal sphere in his writings, especially in his work "De jure belli ac pacis."*

*While internationally there is no concrete definition of the term asylum, the application for asylum is considered a fundamental human right that emerges from legal instruments related to this matter, adapted to the goal of cooperation of states at intergovernmental level and even national level, according to art. 14 of the Universal Declaration of Human Rights, which stipulates that "in case of persecution, everyone has the right to seek and enjoy asylum in other countries. This right may not be invoked in the case of prosecutions genuinely arising from a crime or from acts contrary to the purposes and principles of the United Nations".*

**Key words:** fundamental rights, the right to asylum seekers, the right to receive.

**J.E.L. classification:** K33.

## 1. Introduction

Regionally, the right to asylum is regulated by European legal systems, namely the European Court of Human Rights (ECHR), where, according to art. 3 of the Convention, "no one shall be subjected to torture or to inhuman or degrading treatment or punishment", nor may remove a stranger from their territory to a country where they risk exposing themselves to danger

Also, states must take into account the provisions of art. 8 of the Convention which refers to respect for private and family life. Paragraph 1 provides that „Everyone has the right to respect for his private and family life, his home and his correspondence. ", and paragraph 2 of the same article provides that "There shall be no interference by a public authority with the exercise of this right except such as it is required by law and constitute a democratic society, a necessary measure to national security, public safety or economic well-being country, prevention of disorder or crime, for the protection of health or morals, rights and freedoms of others. " States have the right to control the entry and stay of foreigners and the possibility to take action to remove those affecting public order and security. (European Convention on Human Rights, 1950)

The issue of asylum and the recognition as a refugee was under discussion by the European Union as well, because the free movement of persons is an important pillar of it, not only with regard to free movement of workers, but also citizens, stating their conditions of entry and residence, as well as their rights and obligations.

Member States have not been prevented from taking measures they thought necessary on asylum and immigration control. (Nastase et al, 2009, p. 180)

## 2. Historical aspects

The Dublin Convention of 15 June 1990, entered into force in 1997, ratified by 15 countries, is a multilateral treaty concluded between the EU Member States who establishes the principle that a single Member State is responsible for examining applications for asylum submitted by the same person, the tendency being to create a common view of keeping a record of asylum claims.

This procedure stops and prevents refugees to submit multiple applications for asylum to several states.

EURODAC was established by Council Regulation nr.2725 / 2000 for the comparison of fingerprints for the effective application of the Dublin Convention. This should create a database on asylum seekers in countries of the Schengen area. Database can be accessed by any member of the Schengen area to verify the accuracy of the data provided by asylum seekers.

Common rules of the European Union established criteria under which Member States should decide when and if they can handle a request for asylum: to the country in which the family members of the applicant live, the country living in at the time of submission, the country that issued the visa or where the point of entry into the EU was.

With the Maastricht Treaty signed in 1992 and entered into force in 1993, the concept of European citizenship was introduced, nationals of Member States are considered EU citizens. This concept has been used to support the free movement of citizens and members of their families, regardless of nationality, but retained immigration and asylum policies and the settlement of border crossings through issues of common interest, under the third pillar of the treaty, emphasizing on the concern for the security of states.

The Amsterdam Treaty, signed by EU countries in 1997 and entered into force in 1999, gave new powers to borders, immigration and asylum fields in the European Union, including the visa. Thus, with the entry into force of the Treaty, the asylum moved towards the first pillar of the European Community.

According to the Universal Declaration of Human Rights, the United Nations General Assembly adopted on 14 December 1967, the Declaration on Territorial Asylum which established the principles on which the states must base their practices relating to territorial asylum, as follows.

- Member States are obliged to respect asylum granted by a State in the exercise of its sovereignty ;
- each State assesses the legal ground of the asylum, respecting relevant international instruments ;
- if a state can not grant asylum or continuation of asylum, other countries must take steps to comply with its obligation;
- asylum seekers will not be turned away at the border, and if they entered the territory, they will not be sent to another State where there is a risk of persecution ;
- States will not permit persons to whom they have granted asylum to commit acts contrary to the principles of the United Nations.

In theory, the notion of asylum in public international law, can be defined as "the right of a sovereign state to grant entry and establishment on its territory of foreign persons prosecuted in their country for political activities, scientific, religious etc., that it is not in line with the legal order of the State". (Gheorghe I. et al, 2015, p. 18)

National legislation on asylum aims to establish the appropriate procedures through which asylum seekers can receive international protection or who are those that can be sent back to their countries of origin. The efficiency of the asylum system is essential in the process of protection.

If this system is fast, accurate and efficient, every asylum seeker who is truly refugee will receive refugee status, while those who do not need international protection will not benefit from it. (Adrian Năstase et al, 2009, p. 120)

The Romanian Constitution provides in Article 18, para. (1) that asylum is granted and withdrawn under the law, but such a law has not yet been adopted. Romania complies with international treaties and conventions on asylum to which it is part, namely the Universal Declaration of Human Rights and the UN Declaration on Territorial Asylum. (Adopted by the General Assembly on 14 December 1967)

According to Article 1. para. 2 of the Refugee Convention in Geneva in 1951, complemented by the Protocol on Refugees, signed at New York on 31 January 1967, a refugee is „*A person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*”

The two concepts have many similarities and differences that customize them and do not allow to carry out any confusion. (Gheorghe et al, 2015, p. 20)

Among the similarities we can mention that the two represent forms of humanitarian protection of foreigners and are granted to the same type of people or foreigners persecuted for their opinions, beliefs, their political affiliation or social group, race, religion, nationality or those who are watching or if they have committed political offenses. Another similarity is that neither of the two forms of protection can not be granted to persons who have committed crimes against peace and humanity, war crimes or other crimes directed against the purposes and principles of the UN.

Tot o asemănare o constituie și faptul că cele două categorii de beneficiari ai celor două forme de protecție primesc din partea statului de primire, regimul național pe care îl dețin cetățenii proprii și se bucură de aceleași drepturi și obligații. De asemenea, nici azilanții și nici refugiații nu pot fi expulzați. Another similarity is the fact that the two categories of beneficiaries of the two forms of protection receive from the receiving state, the national regime their own citizens hold and enjoy the same rights and obligations. Also, no asylum seekers or refugees can be expelled. (Gheorghe et al, 2015, p. 23)

Because the two are more different than similar, the differences between them are more significant.

The two institutions differ historically. Thus, asylum began to take shape in the sixteenth century, while refugee status was barely mentioned by the UN Convention on Refugees in Geneva 1951.

Different is also the duration of the two forms of protection: the asylum is permanent, when the refugee is one immediate counter to an imminent danger, but temporary.

Concluzionăm că un refugiat poate să rămână cu acest statut fără să dobândească și pe cel de azilant, întrucât statul care a recunoscut unei persoane fizice statutul de refugiat este suveran să decidă dacă va acorda sau nu dreptul de azil aceleiași persoane. We conclude that a refugee can maintain this status without acquiring the asylum, whereas the state that recognized the individual refugee status is sovereign to decide whether or not to grant asylum to the same person.

### **3. The institution of asylum procedure**

The Regulation (EU) no. 604/2013 of the European Parliament and of the Council of 26 June 2013, known as the Dublin Regulation is applied in 32 European countries and was designed to establish which Member State should examine the asylum application lodged by nationals of third countries.

Thus, a citizen of a third country or a stateless person may submit first a request for international protection in the Member States in Romania. Filed application is analyzed by the Romanian authorities, and during its analysis, the citizen leaves the Romanian territory illegally and reaches Austria. The person is applying for international protection in Austria. At the time this person appears with a request for international protection lodged in both Romania and Austria. Given that the application for international protection lodged in Romania was the first application, Romania will be the Member State which has jurisdiction to consider the request for international protection lodged by third-country national or stateless person in Austria. Therefore, the citizen in question will be transferred to Romania.

According to EU law, the 4<sup>th</sup> Article of the Dublin Regulation, asylum seekers have the right to information regarding: applying for asylum only in one Member State, movement from one Member State to another during the process examination of the application for international protection, the right to a personal interview, the possibility of transmitting information to family members, relatives or other persons in a relationship of familiar nature with them, the opportunity to challenge a transfer decision and submitting, where appropriate, an application to suspend the transfer, the right of access to personal data, and to request that inaccurate data relating to the person be deleted if they have been illegally processed and procedures to be followed for the exercise of such data.

This information is communicated in writing in a language that the applicant understands or is supposed to understand.

The Dublin procedure takes from two weeks to two months. The Third-country national will be transferred to a period of 6-18 months to the Member State which has assumed responsibility,

where the procedure for international protection of that country will take place. (<http://igi.mai.gov.ro/detalii/pagina/ro/Procedura-Dublin/108> accesat 11 aprilie 2016)

The Eurodac system is a tool that works since 2003 following the adoption of Regulation (EC) no. 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.

It has been improved by the adoption of Regulation (EU) no. 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 Regulation (EU) no. 604/2013 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 a stateless person and the demands of the law enforcement Member States and Europol for comparisons with EURODAC data to ensure law enforcement and amending Regulation (EU) no. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, which entered into force on July 20, 2015.

The asylum application must be examined under the procedural provisions, under Directive 32/2013 / EU on common procedures for granting and withdrawing international protection, and on the basis of Directive 95/2011 / EU minimum standards.

Applicants for international protection are entitled to free legal and procedural information under Directive 32/2013 / EU on asylum procedures and in the case of a negative decision at first instance, Member States shall provide, on request, additional information to clarify the reasons for such decisions, and how to appeal.

Legal assistance and representation are granted free of charge, both at first instance and on appeal procedures. They may be refused if a court or other competent authority considers that the applicant's appeal has no tangible prospect of success. In the latter case, under Article 20 of Directive 32/2013 / EU, Member State shall ensure that the applicant is entitled to an effective remedy against that decision before a court

#### **4. Conclusions**

Analyzing from a political perspective the asylum, we conclude that it shows a number of benefits and drawbacks. Thus, the expulsion of any refugee seems odious given that his life or personal liberty would be threatened on account of race, religion, nationality, membership of a particular social group or political opinion, but sometimes it is necessary and mandatory, if put in threatening the national security and safety of the state, the European Union and prejudices purposes and principles of the United Nations.

However, no matter how positive or negative the asylum is, attention should be directed on the obligation of each Member State to provide hospitality and to restore the civil rights of asylum seekers.

At European level, it is necessary to adopt concrete and effective measures at the EU border for the management of migration flows. Meanwhile, it is necessary to improve the response capacity of the EU to external borders issues through consultation with Member States, in accordance with current national and international legislation.

Astfel statele membre ale UE trebuie ajutate în eforturile lor de a consolida capacitatea de primire, sistemul de azil și de gestionare a frontierelor externe cu respectarea deplină a drepturilor omului și cerințele de siguranță, resurse financiare adecvate și logistica necesară întăririi capacităților țărilor din Balcani, de a gestiona frontierele pentru primirea azilanților și asigurarea în mod corect a fluxurilor viitoare de azilanți. Să se instituie pe viitor cooperarea cu țările lider din zona din afara UE, de exemplu Turcia, care este o veritabilă țară de tranzit.

Thus the EU Member States should be assisted in their efforts to strengthen reception capacities, the asylum system and management of external borders in full respect of human rights and safety requirements, to find adequate financial resources and provide logistics capacity building of the Balkan countries, to manage borders for receiving asylum seekers and ensuring correct future flows of asylum seekers and to establish future cooperation with leading countries in the area outside the EU, for example Turkey, which is truly a transit country.

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