



## Migration and Right to Asylum

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**Abstract:** International migration is a complex process involving displacements of persons, whether alone or in groups, outside national borders, based on some political, economic or social considerations that have volunteered or involuntarily led to massive movements of persons or families outside the countries of origin. It involves a simultaneous move in the physical and socio-cultural space, which involves not only a mere movement from one community to another, but also the destruction of the bindings in the area of departure and cultural assimilation of the reception environment. In the area of asylum, legislation and practices have experienced unexpected changes in Romania, starting from alignment with the European *acquis* and ending with the fulfilment of international standards in the field, in order to support those in need of international protection. At the same time, the most useful means to prevent and combat the abuse of asylum facilities by some Asian or African immigrants were found, thus striking a balance between legal migration and asylum.

**Keywords:** right to asylum; refugee; international protection

### 1. Considerations Concerning the Phenomenon of International Migration and Right to Asylum

The international migration is a complex process which presupposes movements of persons, alone, or in groups, outside the national borders, having as basis some reasons of political, economic or social type, which led voluntarily or involuntarily to massive movements of persons or families outside the countries of origin. It presupposes a simultaneous movement in the physical and social and cultural space, which involves not only a simple movement from one community to another, but also the destruction of structural connections from the departure area and the cultural assimilation of the arrival environment.

It can be done a classification of the international migration in *intercontinental*

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(between the countries from various continents), for example the migration of Asian countries towards Europe and USA and *intracontinental* (between the countries of the continent), as the case of seasonal migration between the countries from Europe. The specialty literature consecrates the fact that it would represent a social and demographic event which involves the movement of personal individually or integrated in a group, outside his residence community, during a given reference period, in order to change the permanent domicile and/or job.

In contrast to migration, the asylum occurs due to an unpredictable event, of the type to create the persecution of a person or of a group, which determines the involuntary leave of the country of origin and does not give the possibility of choosing the country of destination.

It is known the fact that the international migration of the human resources lies on the decision of a person to leave voluntarily the country of origin with the purpose of finding better living conditions, to satisfy his/her personal requirements. This involves a movement of persons outside the national territorial areas, *uncontrolled*, which due to this cause cannot benefit of international protection, taking cover of certain eventual abuses. The international migration of the human resources can be *controlled*, as it can be given as example the European Union, which the Incorporation treaties of Rome installed the principle of free movement of the human resources, or, within the European northern market or the migration which takes place between two or more states based on some bilateral or multilateral agreements. (Albu & Hamzescu, 1987)

Within the international migration, to which I referred above, two processes which are strongly connected between them are met: *emigration* and *immigration*.

**Emigration** represents the oscillating movement between the residence country (country of origin) and the job (receipt country). The first one is characterized by a relatively reduced degree of economic development, a high weight of youth and, generally, of population capable to work from the total of population, due to a long period of high natality, lack of possibilities to use nationally the available human resources, lack of investment efforts in some economic sectors and, there creation of new jobs. (Pescaru, 1969)

**Immigration**, on the other side, is the process of receiving the population which travels in the country of destination, temporary or permanently.

*The causes which determine the international migration* have their support either in the conditions of economic order from that country, or in the general conditions of

political, religious, cultural, ideological, national, geographical type or of any other type. In addition, the asylum occurs, a legalized right at international level, but which can be abused, the economic migrants trying to solve some personal problems this way.

Our country is considered a country of destination.

In conclusion, we distinguish two categories of migratory movements - voluntary movements and forced movements. The first ones are characterized by the fact that the respective persons continue to enjoy the diplomatic protection of their state, and the movement is done to solve some personal problems. Instead, the persons from the second category, once they emigrated, they have no national protection, but they will get international protection. In the last category the following persons can be found:

- those who are victims of an individual persecution (meaning, refugees);
  - those threatened by the effects of some internal and international armed conflicts;
  - those of whom human rights were violated flagrantly;
  - those who leave their country due to overpopulation, disastrous economic policy, social discrimination and other forms of exploitation;
  - those who emigrate due to some sudden or progressive natural calamities.
- (Cloșcă & Suceava, 2003, p. 406)

In the field of asylum, the legislation and practices suffered unexpected modifications in Romania, beginning with the alignment with the European acquis and ending with the fulfilment of certain international standard in the field, to support the persons in need of international protection. Also, the most useful methods were found to prevent and fight against the abuse at the asylum institution, exercised by some Asian and African immigrants, finding a balance between the legal migration and the field of asylum.

## **2. General Aspects Concerning Asylum**

By *asylum*, in the international right we understand *the right of a sovereign state to grant the entry and settlement on its territory of some foreign persons, followed in their country for political, scientific, religious, etc. activity which is not in*

*accordance with the internal legal norms, contravenes the de jure order of the respective state*<sup>1</sup>.

Proclaimed in 1789 by the Bourgeois Revolution of France, the right to asylum obtained the recognition from other states too.

The Romanian constitution (art. 18 align. 2) provides that the right to asylum is granted and withdrawn within the law conditions, observing the international treaties in which Romania is part of.

In 1967, the General Assembly of United Nations adopted a Special declaration on the right to asylum which mentions and develops a series of aspects related to the right to asylum. This proves that any person subject to persecution has the right to ask for and enjoy asylum in other countries, excepting the persons prosecuted for common law offences or for actions opposed to the United Nations purposes and principles. Based on these provisions, the General Assembly of the United Nations adopted on 14<sup>th</sup> December 1967 the *Declaration on territorial asylum*<sup>2</sup> according to which:

- the states are obliged to observe the asylum granted by a state;
- if a state cannot grant asylum, other states have to take measures to facilitate the difficulties of that state;
- the persons who ask for asylum will not be refused at the border, if they already entered on the territory of the state where they ask for asylum and they will not be sent to other state in which there is the risk to be persecuted;
- the states do not allow the persons to whom they granted asylum to commit actions contrary to the United Nations purposes and principles.

First of all, it is imposed to make a clear difference between the asylum applicant, respectively persons who obtained a form of protection (status of refugee, subsidiary protection or, as the case may temporary protection) and other categories of migrants.

The simplest differentiation consists of the fact that while the asylum applicant, respectively the person who received a form of protection **was forced** to leave the

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<sup>1</sup> For example, for religious activity, Salman Rushdie, the author of the “Satanic verses” refuged in 1993 in England, as consequence of his persecution in Iran, but also in England against him being ruled the sentence to death conviction by the former spiritual leader of Iran, ayatollah Khomeiny.

<sup>2</sup> Resolution no. 2312 (XXII).

country of origin whereas his/her life or freedom were threatened, the migrants **choose**, from various reasons, to leave their countries of origin and to settle temporary or permanently on the territory of another state, these reasons can be of economic, social, cultural, family, etc. type.

Starting from these grounds, by the international documents to which Romania is part of, it was established the states obligation to assure unrestricted access to the procedure of asylum and the observance of the non-returning principle (forbidding the return measures, expulsion, extradition, etc. of an asylum applicant or of a person who received a form of protection), as well as by giving the correspondence assistance for these categories of persons during the procedure of asylum and after this in the case of those who receive a form of protection.

At European level a series of concepts, measures of legislative and institutional order were developed, by which it was wanted that a part of the persons who need international protection to have the effective protection and a corresponding standard of assistance, and on the other side **any form of abuse to the asylum institution to be discouraged**, measures adopted also by Romania within the context of accession to the European Union structures. (Pirvu, 2016)

Even though the right to asylum is recognized by many international legal instruments for the safeguarding of human rights<sup>1</sup>, in their content is no normative definition of this concept.

From etymological point of view, the term of *asylum* comes from the Greek *asylum* (*a* = no, *sylum*= catch), consequently this prerogative assures the protection of a person against a certain entity.

A clearer approach of the concept of asylum comes indirectly from the definition which is given by the **Directive 2005/85/EC concerning the minimum standards in the procedures of the member states for granting or withdrawing the refugee status** to the phrase of *asylum application*, and namely: *application done by a citizen of a third party country or by a stateless persons which can be considered as an application of international protection from the part of a member state according to the Convention of Geneva. Any international protection application is presumed to be an asylum application, besides the case in which a person requests expressly another form of protection for which he can apply separately*. Consequently, the right to asylum represents the faculty of requesting a

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<sup>1</sup> To see within this meaning art.14 of the Universal Declaration of Human Rights and art.18 of the Fundamental Rights Charter in the European Union.

form of protection from a state, other than that of which citizenship the requesting person has or on which territory he/she has the common domicile.

Within the context in which the occurrence of a right within a society has as basis a causality and presupposes the performance of a consensus between individuals within this meaning, we can say rightfully that the rights are exercised with good faith, according to their purpose. But, exceptionally, sometimes it is done their misappropriation from the purpose they have, from various reasons, whereas it is wanted the benefit of their content, without taking into consideration the purpose for which they were recognized.

This problem is omnipresent within each society which created a set of rights for the good functioning and more that it can be presented concerning the recognized rights of third parties who are not part of the collectivity and, by default, did not agree to the system of values which it built. Thus, this is the case of right to asylum, a prerogative which is not granted to the citizens of a state, due to obvious reasons (you cannot request protection from the authority which persecutes you), but by which it is assured the protection of third parties.

### 3. Refugees

Within the context of efforts done by the international community for the creation of the adequate legal framework, of protection of one of the most disadvantaged categories of persons, the refugees, the United Nations adopted on 28<sup>th</sup> July 1951 **the Convention of Geneva concerning the status of refugees**, international legal instrument, which had as objective the establishment of some clear concepts to assure the effective protection of persons who moved from their countries of origin. This is how the desideratum expressed in the Universal Declaration of Human Rights concerning the **right to asylum** was performed, being regulated by an universal manner the problem of international legal protection granted to refugees.

The Convention of 1951 has to be considered an **unique protection instrument of human rights as it is, which contains not only legal elements, but also moral of a high humanism**. Within their centre the fundamental principle of non-

refoulement which does not allow derogation is found (*non-refoulement principle*)<sup>1</sup>, the quintessence of international protection.

The Convention represents a major achievement in the field of international law of refugees because it gives a general definition to the term of “refugee”, contains the non-refoulement principle, establishes the minimum standards of the refugees’ treatment, contains provisions concerning the legal status, the right to work and wellbeing, concerning the identity and travel documents or other matters of administrative type.

According to art. 1A of the Convention of Geneva of 1951, a refugee is a person who “*After some events which took place before 1<sup>st</sup> January 1951 and of a well-grounded fear to be persecuted due to race, religion, nationality, belonging to a certain social group or political opinion, is found outside the country of which citizenship he/she has and who cannot or, due to this fear does not want to be put under the protection of this country, or who, not having a citizenship and being found outside the country in which he/she had the common domicile as consequence of some events, cannot or, due to the respective fear, does not want to return*”.

On 31<sup>st</sup> January 1967 the **Protocol of New York** was adopted, by which the states engaged in applying the substance provisions of the Convention without taking into account the due date of 1<sup>st</sup> January 1951.<sup>2</sup>

The occurrence of the Protocol represented an important achievement which obliged the states to recognize the disadvantaged category of refugees, anytime it is registered in the provisions of the Convention of 1951 and is the object of the international protection. It has to be remembered that the Protocol as it was typed, is an independent document to which the states can adhere without being obliged to be part of, at the same time, and the Convention of Geneva of 1951 concerning the status of the refugees.

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<sup>1</sup> The non-refoulement principle is contained in article 33 align. 1 of the Convention of Geneva of 1951 concerning the refugees’ status.

<sup>2</sup> The Protocol of New York of 1967 removed an injustice done by the Member States of the United Nations when they drafted the Convention of Geneva of 1951, extended the application of the latter on an indefinite period within the actual context of the refugees’ flow. The draft and approval of the Protocol by the General Assembly of the United Nations took into consideration the fact that after 1951 situations similar to the occurred after the World War II took place on the entire planet, proving the perennality of the refugees’ phenomenon and of the permanent need of protection of these persons.

The Convention of Geneva of 1951 and the Protocol of New York of 1967 assure the general protection framework of the category of refugees, but the way in which the provisions of the two documents are observed depends on the governments of the party states. These have the obligation not to deviate from the adopted provisions and to apply them as objectively as possible and as closest as possible to protection needs of the refugees. Therefore, the internal legislation of each state in the field of asylum has to take into consideration the provisions of the two international documents, not to deviate or fall away from them, to be in the spirit and substance of those wanted by the original creators of the protection instruments.

The term of *migrant persons* appeared and developed, mostly after 1990, when due to the armed conflicts, the economic lack, natural calamities, strikes and massive violations of human rights, many persons began a so called migratory phenomenon. The persons mentioned above cannot be associated to refugees within the meaning of the Convention of 1951, because we do not deal with a persecution factor. (Velişcu, 2011, p. 84)

However, the migrant persons were also called *de facto refugees* or *economic refugees*, those who left their country not because they would be persecuted, but for better economic life conditions; or *ecological refugees*, those who leave their country as consequence of some natural calamities, or as consequence of armed conflicts, but without being persecuted. These persons cannot be protected by the Convention concerning the refugees' status of 1951.

**The migrant persons** can be defined as those persons who have the intention of leaving permanently from the origin state to settle in another state and who leave effectively the territory of the origin state. (Scăunaş, 2007, p. 230)

Thus, the foreign persons who succeeded, by migration, to settle legally the residence on the territory of another state, enjoy all the civil rights recognized to humans, as well as of many economic, social and cultural rights, less the political ones. (Scăunaş, 2007, p. 231)

Lately, this phenomenon developed a lot and these international documents are exceeded, the problem being solved by each state partly imposing some restrictions, sometimes in the field of immigration or access on labour market, all these in the virtue of their exclusive competence to regulate the regimen of entry and stay of foreign on their territory.

#### 4. Legal Regimen of Refugees in Romania

The legal regimen of refugees in Romania has as basis the provisions of art. 18 of the Romanian Constitution, in the virtue of:

- (1) the foreign and stateless citizens who live in Romania enjoy the general protection of persons and heritages guaranteed by the Constitution and by other laws;
- (2) the right to asylum is granted and withdrawn within the law conditions, observing the treaties and international conventions to which Romania is part of”.

This regimen results from the application of provisions of the Convention concerning the refugees status of 1951 and of the protocol of 1967, to which Romania adhered by Law no. 46/1991, as well as from the provisions of the Government Ordinance no. 102/2000, as it was modified by the Ordinance no. 13/2002 and by the Ordinance no. 43/2004. Broadly, these legal instruments correspond also to the *community acquis*, having provisions similar to the legislation of the member states of the European Union. According to the present legislation, the forms of protections of which foreign people from our country can enjoy are: refugees status, subsidiary protection (priority called conditioned humanitarian protection and temporary protection.

The **refugee status** represents the highest form of protection and it is granted, upon request, to the foreign person who, after a well-grounded fear to be persecuted on race, religion, nationality, belonging to a certain social group or political opinion reasons, is found outside the country of origin and cannot receive or, as consequence of this fear, does not want to receive the protection of this country.

Art. 23 align. (1) of Law no. 122/2006, with the subsequent modifications and completions, provides that the **refugee status** is recognized, upon request, to the foreign citizen who, after a well-grounded fear to be persecuted on race, religion, nationality, political opinion or belonging to a certain social group, is found outside the country of origin and cannot receive or, due to this fear, does not want to receive the protection of this country, as well as to the person without citizenship who, being outside the country in which he/she had the usual domiciled due to the same reasons mentioned above, cannot or, due to the respective fear, does not want to return.

From the analysis of the definition of **refugee** term, it results that there is a number of 4 inclusion clauses:

- the asylum applicant is found outside his/her country of origin;
- the existence of a persecution fear;
- the persecution fear is well-grounded;
- the persecution has as basis a race, religion, nationality, belonging to a certain social group or political opinion reasons.

### **Subsidiary protection<sup>1</sup>**

The subsidiary protection can be granted to the foreign or stateless citizen who does not fulfil the conditions for the recognition of the refugee status and concerning to whom there are grounded reasons to believe that, in the case of returning to the country of origin, respectively in the country where he/she had the common domicile, he/she will be exposed to a serious risk and who cannot or, due to this risk, does not want the protection of that country.

By *serious risk*, it is understood:

- conviction to death punishment or performance of such punishment; or
- torture, inhuman or degrading treatments; or
- a serious individual threatening, to the life or integrity address, as consequence of the generalized violence in situations of internal or international armed conflict, if the applicant is part of the civil population.

According to the Romanian law, the refugee status is refused to the foreign person found in one of the following situations:

1. committed an offence against peace and human kind or an offence to which the international convention of which Romania is part of refer;
2. committed a severe common law offence outside Romania, before being approved on its territory;
3. committed facts which are contrary to the purposes and principles enunciated in the United Nations Charter.

**Temporary humanitarian protection** takes into consideration the protection from the consequences of military conflicts of persons who moved, among the civil population, coming from conflict areas. The protection is granted only during the

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<sup>1</sup> For details see: (Pirvu, 2012, pp. 55 and subsequent).

conflict and concerns only the persons who moved, among the civil population, after some conflicts in which Romania is not engaged.

The procedure for granting the refugee status, knows two main forms and many derogations from the standard procedure. These are:

- ordinary procedure;
- accelerated procedure;
- border procedure;
- procedure of the safe third-party country;
- procedure to settle the application for granting the access to a new procedure of asylum;
- procedure to establish the member state responsible for the analyse of the asylum application;
- procedure of family reunification;
- procedure of cessation;
- procedure of cancellation.

**The ordinary procedure** to settle the asylum applications of Romania is structured in two phases, administrative and legal. In the administrative phase the asylum applications are analysed by the administrative authorities, based on the interview done with the asylum applicant, the documents from the personal file and the information from the country of origin. In the legal phase, the asylum applicants of which applications were rejected can exercise two appeals, their situation following to be analysed by the court of law.

Since the adherence date of Romania to the European Union the procedure of establishing the member state responsible for the examination of the asylum application applies (Dublin regulation).

**The accelerated procedure<sup>1</sup>** applies if:

- the asylum applications have not grounds;
- the applications of the persons who, by their activity or belonging to a certain group, present a danger for the national safety or for the public order in Romania;

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<sup>1</sup>For details see: (Pirvu, 2012, pp. 59 and subsequent).

- the applications of persons who come from a safe country of origin.

An asylum application is **obviously groundless** when it has no substance problem, in accordance with the Convention of Geneva of 1951, either due to the fact that the persecution fear in the country of origin, supported by the applicant, lacks of substance, or because the application is based on providing deliberately false data, or because it is the abusive use of the asylum procedure.

Thus, the application for granting the refugee status is considered obviously groundless if it is found the lack of basis to invoke a persecution fear in the country of origin and misleading, deliberately, the competent bodies in the matter of refugees or using, abusively, the procedure of granting the refugee status.

In the accelerated procedure, the analysis of the application and the rule of the decision has to be done within 3 days. In the case of submitting a complaint against the refusal to grant the refugee status, the court of law has to take a motivated decision within 10 days. The court of law decision is permanent and irrevocable.

The rights and obligations of the persons who obtained one of the form of protection provided by the Romanian law refer to: assurance, for the refugees, of the necessary means for a decent living supporting the finding, first of all, of a job, assuring the access to the social services programs, medical services programs, various forms of state education, social housing, support for the reunification of family, learning Romanian language and profession, or the beginning of a business. The Romanian law grants to the refugee the right of free movement, of practicing his/her own religion, the right to access to justice, within the equality conditions with Romanian citizens.

The foreign person who obtains the refugee status in Romania is obliged to subject to the Romanian legislation and to the international conventions referring to the refugee status, to which Romania is part of.

If after the cessation, withdrawal or cancellation of one of the granted form of protection, the former beneficiary remains on the territory of Romania, he/she subjects to the legal provisions concerning the legal regimen of foreign persons in our country.

## 5. Comparison between the Refugee Status and the Right to Asylum<sup>1</sup>

From the **comparison of the right to asylum content and that of the refugee status**, results a series of similarities, but also differences, which do not allow the confusion between the two notions. (Delcea, 2002)

**Concerning the similarities**, the most important is the one that both institutions are forms of humanitarian protection of foreign persons.

The granting of asylum or refugee status is of the competence of the receipt state, in the virtue of its sovereignty.

There are also other similarities, namely both are granted only to persecuted foreign persons for their beliefs, opinions or political belonging or belonging to a social, race, religion, nationality belonging or to those who are prosecuted or who committed political offences.

The right to asylum and refugee status are not granted in the case of offences against peace and humanity, of a war offences or facts against the purposes and principles of the United Nations.

In both cases, the receipt state will grant the national regime to asylum seekers or refugees equal with one of its citizens.

Neither in the case of right to asylum nor in the case of refugee, the beneficiary person of one of these forms of protection cannot be expelled.

**The differences are** many more and they create the difference of regimen between the content of the right to asylum and that of the refugee status, whereas they are not equivalent notions, but different from historical, and legal point of view. (Pirvu, 2016, p. 131)

From historical point of view, the right to asylum occurred prior to the refugee status.

The refugee status involves an immediate protection against an imminent danger or a danger plausible to occur, in comparison with the right to asylum which involves, usually, a permanent protection.

Also, a refugee can remain under this form of protection without obtaining that of asylum seeker.

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<sup>1</sup> For details see: (Pirvu, 2012, pp. 18 and subsequent).

It is not compulsory that a form of protection attracts the other one, even though are rare the cases in which the right to asylum was not granted, after the recognition of the refugee status.

The rights and obligations of the asylum beneficiary are not identical to the one of the refugee.

The procedures to grant the two forms of protection are different.

The cessation, withdrawal or cancellation methods, which are regulated in the case of refugee status, are not found in the case of right to asylum.

The beneficiary of the right to asylum cannot be extradited, in comparison with the refugee who can be extradited in certain exceptional situation, determined by the protection of national safety or maintenance of the public calm.

The law of his/her state applies to the refugee status, the national law, nevertheless that the receipt state has to take the measures for the assimilation and naturalization of refugees.

The granting of the form of protection for the refugee does not effect on the family members.

Internationally, there are institutions for the implementation of the refugee status, in comparison with the asylum, if no such bodies exist.

## **6. Conclusions**

As a Member State of the European Union, Romania has established full rights and obligations as any other Member State, which entails interconnections with the Union's constituent bodies. It can be pointed out that Romania is one of those Member States of the European Union that participate proactively in the concerted effort of the international bodies deployed in order to approach and solve exceptional situations (in this case in the field of migration); this has been highlighted a few times in the reports drawn up by the structures and bodies of the Union, our country being one of the reference pillars in observing and applying the principles of solidarity and responsibility, which safeguard the good functioning of the European Union. A convincing and effective way to manage the migration phenomenon is modifying the legislative package of the European Union governing the asylum activities. Currently, this package is being negotiated, with some disagreements between the Member States of the European Union. In fact,

negotiations have been taking place on the amendments to this package of legal acts since 2016, and preconditions for the setting of a moment when they will be completed do not exist. Romania will have to take into account the principle of cooperation, which is and will remain a principle governing relations between Member States, as well as between Member States and international bodies, and this principle will govern the entire activity carried out by our country in the coming period. The Romanian authorities have as a permanent concern the development of migration management in close correlation with elements such as: Romania's geographical position, the trends of the migration phenomenon in the Southeastern region of Europe, the quality of our country as an EU member state, the evolution of the *acquis communautaire* in the field. If in the past Romania has mainly played a role as a transit country for migratory flows from the eastern states on their way to Western countries with a high level of economic development, Romania is now also a destination country. In this context, the Romanian authorities with attributions in the field of migration have taken measures to improve the management of this phenomenon at the level of similar institutions in the EU Member States, the importance of these measures being even greater as Romania is a state at the eastern border of the Union European.

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\*\*\* Convention of Geneva of 1951 concerning the refugees' status.

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