

THE CONCEPT OF TEMPORARY PROTECTION AS A REFUGEE PROTECTION MECHANISM IN INTERNATIONAL LAW

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ABSTRACT

Existing security challenges, armed conflicts, especially civil wars, create enormous displacements. Clear and effective protection mechanisms are necessary to make sure the displaced persons receive suitable protection and states receiving the influx are able to cope with the pressure. Not all persons displaced by an armed conflict can be protected within the Convention Relating to the Status of Refugees, but states have an obligation under customary international law to provide refuge to persons fleeing persecution, torture and immediate harm to their life and physical integrity. This thesis demonstrates that temporary protection can provide a viable background to respond to large scale influx of persons fleeing armed conflict that will cover the protection gaps in the 1951 Convention and the state obligation to provide refuge.

Key words: protection, non-refoulment, Convention, refugees



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1. INTRODUCTION

Armed conflict, violence and human rights violations usually create mixed flows that involve both refugees and migrants (UNHCR:2014). The International Organization for Migration (IOM) defines mixed flows as “complex population movements including refugees, asylum-seekers, economic migrants and other migrants”.

The flight of people crossing the Mediterranean in boats in the past few years is a clear example of mixed flows since those attempting to reach the European shores involve persons with different level of protection needs - in other words, refugees as well as migrants (Euromed :2009).

UNHCR explains this difference: “Migrants, especially economic migrants, choose to move in order to improve their lives. Refugees are forced to flee to save their lives or preserve their freedom.”

Different from asylum seekers and refugees, migrants “decide to migrate freely for reasons of “personal convenience” and without intervention of an external compelling factor (IOM: 2004).”

The difference between migrants and refugees is important since they are subjected to different legal regimes.

2. METHODOLOGY AND SCOPE

As the nature of the research is doctrinal, the study does not include any empirical research methods. The examination of the treaties is limited to the 1951 Convention, Convention against torture (CAT), the International Covenant on Civil, Political and Rights (ICCPR), and European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), and the refoulement related provisions in these treaties.

Other treaties related to protection of persons fleeing armed conflict such as the Geneva Convention and its protocols, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1989 Convention on

the Rights of the Child (CRC), will only be mentioned briefly throughout the thesis, where they are particularly relevant.

The state practices will focus on a restricted number of cases in Europe, the US, Turkey and Asia. Although there are other significant temporary protection practices including the Australian Temporary Protection visas and the African practice on temporary protection, they are not included to the scope of the thesis.

3. THEORETICAL BACKGROUND

According to Goodwin-Gill and McAdam “In ordinary usage [refugee] has a broader, looser meaning, signifying someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable (G. S. Goodwin, Gill, J. McAdam, 2007: 15).”

Yet, under international refugee law, especially in the context of the 1951 Convention, the meaning of the term ‘refugee’ is clear; Article 1 A 2 of the 1951 Convention defines a refugee as “Any person owing to 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 refugee definition provided by the 1951 Convention is universally accepted as the legal definition of a refugee although different regional and national instruments define the term ‘refugee’ differently (D. Kugelmann, 2015: 7).

The term ‘asylum seeker’ implies that “the person is awaiting decision on his/her application for refugee status under relevant international and national instruments.”

Having clarified briefly the meaning of these terms, considering not all persons who are forced to flee armed conflict are refugees, the thesis introduces the term ‘persons fleeing armed conflict.’

4. INTERNATIONAL HUMANITARIAN LAW AND REFUGEE LAW

International humanitarian law refers to two different types of armed conflict: international armed conflict and non-international conflict.

With reference to Common Article 2 of the 1949 Geneva Conventions, an international armed conflict can be defined as an inter-state conflict. Whereas a non-international armed conflict can be defined with reference to Common Article 3 of the 1949 Geneva Convention and Article 1 of 1977 Additional Protocol II to the 1949 Geneva Conventions. International Crime Tribunal of Yugoslavia (ICTY) in Tadić Case noted, “An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence a State.”

International Committee of the Red Cross (ICRC) Commentary defines non-international armed conflict as, “Protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization (Tadić P., Dusko T.,1999:70)”.

International Refugee Law debates on the definition of armed conflict has

a different focus. For example, European Court of Justice (ECJ) noted in view of the Article 15 of the 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 (European Council, 2004).

Zimmermann and Mahler argue that indiscriminate violence occurs when there is a lack of distinction between military and civilian targets or when the military violence is specifically directed against the civilian population (Zimmermann, S. J., 1951).

Holzer notes that “Both the terms indiscriminate and widespread violence indicate that the violence is untargeted widespread, random and affects persons alike (V. Holzer, 1951).”

In contrast, Durieux notes that “Generalized violence and indiscriminate violence do not have the same meaning; generalized and widespread may also include discriminate violence (J. F. Durieux: 2012).

5. HISTORICAL DEVELOPMENT OF TEMPORARY PROTECTION

The 1951 Convention that introduces a clear definition of temporary protection or reflects a consensus on what it entails as a protection framework (D. Sopf, 1990'). The history of temporary protection goes back to England and France giving temporary refuge to Spanish people who fled the Spanish Civil war in the 1930's, and Austria granting temporary refuge to Hungarian and Czech refugees between 1956 and 1968 (M. J. Gibney, 1995).

Temporary refuge, which can be seen as a basic form of temporary protection, is defined by Coles as “protection characterized by the principle of non-refoulement which is accorded a person and which is temporary pending

the obtaining of a durable solution (G. J. L. Coles, 1998).” Temporary refuge places emphasis on the admission of persons seeking refuge to a host state without elaborating the rights that they are entitled to in the host states (A. Edwards, 2012). One of the well-known state practices on temporary refuge is the Comprehensive Plan of Action (CPA).³⁶ Under the CPA arrangements more than one million people that were fleeing Vietnam, Laos and Cambodia were granted temporary refuge in Indonesia, Hong Kong, Philippines, Thailand and Malaysia.

ExCom Conclusion no 19 noted “In cases of large-scale influx, persons seeking asylum should always receive at least temporary refuge (ExCoM Conclusion, 1979).”

The term temporary protection replaced the term temporary refuge in the 1990s. This

change in rhetoric meant that, temporary protection at the time began to denote a comprehensive framework that encompasses, not just admission to the host states, but also minimum standards of treatment.

In 1992, the concept of temporary protection was introduced by the UNHCR as an element of the ‘Comprehensive Response to the Humanitarian Crisis in Former Yugoslavia’ to encourage states to keep their borders open and to provide protection to Bosnian refugees (UNHCR, 1992).

Similarly, temporary protection and Humanitarian Evacuation Programs were implemented to remedy border closures and to grant protection to persons fleeing the conflict and violence in Kosovo. Following the Kosovar refugee crisis, in 2001, the EU adopted the Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection (the Temporary protection directive, the Directive, TPD) which is the only formalized form of temporary protection at supranational level. A significant number of states have been implementing national temporary protection practices for the protection of Iraqis and Syrians fleeing war

and violence. For example, Turkey has been implementing temporary protection to protect Syrians since 2011 (UNHCR, 2015).

Although each state practice on temporary protection has different features, analysis of the various state practices, instruments adopted by UNHCR and the ExCom, and academic literature on temporary protection shows that temporary protection has been regarded as an umbrella concept to describe time limited protection of different groups seeking refuge. It has been generally implemented as a group-based protection and introduced as a response to mass influx situations. Large scale displacement caused by armed conflict, violence, human rights violations and even environmental disasters can give rise to the introduction of temporary protection regimes. Temporary protection regimes usually guarantee admission of the persons seeking refuge to the host states when individual status determination is impracticable or inapplicable and provides basic minimum treatment in accordance with human rights, until durable solutions are available (UNHCR to UNGA, 1994 :306). Following the outlined criteria and definition provided by the UNHCR, the thesis defines temporary protection as “a response to the large-scale movement of persons fleeing armed conflict, providing immediate protection from refoulement and basic minimum treatment.”

6. TEMPORARY PROTECTION V.S. COMPLEMENTARY PROTECTION

McAdam defines complementary protection as “protection granted by States on the basis of an international protection need outside the 1951 Convention framework” and an individual counterpart of temporary protection (J. McAdam, 2007:43). Similar to temporary protection, “complementary protection can be introduced to protect persons who cannot qualify as refugees under the 1951 Convention but who nevertheless cannot be returned to their country of origin.”

Despite this similarity, unlike temporary protection regimes, complementary protection regimes usually require individual status determination and do not secure access of persons seeking refuge to the territories of host states (Goodwin-Gill and McAdam :1989).

7. TEMPORARY PROTECTION IN THE LIGHT OF 1951 CONVENTION

The principal instrument for the protection of refugees is the Convention Relating to the Status of Refugees.

The 1951 Convention was drafted between 1948 and 1951 by multiple UN organs, Ad Hoc committees and a Conference of Plenipotentiaries. Once the temporal and geographical restrictions in the refugee definition were abolished by the 1967 Protocol Relating to the Status of Refugees, the 1951 Convention became the cornerstone of universal refugee protection.

Article 1 A 2 of the 1951 Convention defines a refugee as a person who, owing to 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 (UNHCR, 1951).

According to Article 1 A 2 of the 1951 Convention, a refugee is expected to show a well-founded fear of persecution however, the 1951 Convention does not define the terms ‘persecution’ (J. C. Hathaway, 1992: 91) or, ‘well-founded fear of persecution’ and throughout the preparatory work, there were different views on the meaning of these terms.

Due to absence of an agreed and clear definition of these terms, states have developed their own interpretations over time. Sometimes states

have interpreted these terms restrictively by requiring a higher intensity threshold for harm that amounts to persecution or by requiring a person to be singled out for persecution which in effect denies refugee status to a number of persons fleeing armed conflict.

The restrictive reading of the refugee definition adopted by a number of national courts and commentators dictates that a mere victim of an armed conflict or a person who is not singled out for persecution is not a refugee (Mandal R., 2005). This approach was once even endorsed by the UNHCR Handbook and Guidelines on Procedures issued in 1979. The Handbook noted, “Persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees under the 1951 Convention or 1967 Protocol”(UNHCR, 1992: 134).

This approach has created serious hurdles for persons fleeing armed conflict when existence of armed conflict brings general insecurity, without the individual persecution element being present. When states apply the requirement of being singled out for determining who is a refugee, a significant number of persons fleeing armed conflict, for example, unintended victims of crossfire and bombings who face indiscriminate violence, fall outside of the 1951 Convention’s scope (Goodwin-Gill and McAdam, 1989:126).

However, despite this protection gap, states cannot return persons fleeing armed conflict to a country where their life and security would be at risk.

8. CONCLUSION

Clarifying the legal basis of temporary protection is crucially important. By identifying the legal basis of temporary protection, this investigation has established that temporary protection is not another pragmatic policy response to mass influx situations but is a protection regime which has a solid legal basis under international treaty and customary law. Clarification of this legal basis indicates that, although states can decide, mindful of the limitations provided by the 1951 Convention, whether they wish to grant refuge to persons fleeing armed conflict on a permanent or on a time limited basis; however, providing refuge to persons fleeing armed conflict who otherwise would be subjected to immediate harm to their life and physical integrity is clearly governed by customary international law.

Temporary protection enables persons seeking refuge to access the territories of host states, provides them with basic shelter, food, medical treatment and the means of subsistence and protects them from refoulement until durable solutions are available. It does not require individual status determination and it provides an appealing protection option because it generally offers a more limited category of rights compared rights of the refugees secured under the 1951 Convention. It is also an appealing protection regime for states since it is time limited and repatriation is the preferred durable solution following the end of the temporary protection regime. Moreover, when burden sharing measures are incorporated to the temporary protection regimes, this leads to a more equitable burden-sharing and improves the protection level offered to temporarily protected persons. It has been argued that a temporary protection regime which possesses these features provides an efficient and practical protection framework tailored to mass influx situations.

States are expected to implement the proposed temporary protection regime with due respect for universal human rights and fundamental freedoms;

observe the principle of nondiscrimination and freedom of religion; and adhere to universal human rights standards. Host states are supposed to provide temporary residence permits, travel and identity documents, basic minimum treatment and access to education.

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