(GENERAL ASPECTS CONCERNING) THE LEGAL REGIME OF FOREIGNERS IN INTERNATIONAL LAW, ACCESSIBLE TO EVERYONE

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Abstract

Given the freedom of movement of people, in general, the regime of foreigners in international law has been recently acquiring a very special importance. This importance will inevitably increase if we relate our existence to the natural tendencies of such freedom. It is the normality that presupposes the evolution of interpersonal relations, with overcoming formal, non-spiritual boundaries. Additionally, there are, however, the unwanted situations that refer to certain categories of foreigners, such as asylum seekers, but especially refugees, and that are stimulated, consciously or not, with or without permission, by exceptional cases such as conflicts, catastrophes or, as we see happening more and more often, by wars, closer or farther away from us.

Keywords: *foreigner – notion, legal regime, international law, extradition, expulsion.*

1. Notion. Conceptual limitations

As far as we are concerned, we consider that the person who is in the territory of a state without having its citizenship is considered a "foreigner". From the study of the specialized doctrine, from the country, but especially from abroad, it results that, not infrequently, the concept of citizenship is assimilated to that of nationality. Undoubtedly, "the two concepts refer to the condition or status of the natural or legal person in his/her relationship with the state. Often, the two notions are used as having the same meaning, even if, in Romania, nationality represents the identification element of the legal person, next to the headquarters, as opposed to the citizenship which is assigned to the natural person, as an identification element, next to the domicile"[1].

The status of "foreigner" may change during a person's lifetime, as long as he or she can obtain the nationality of the "host" state.

Pursuant to art. 2 para. a) of the GEO no. 194/2002 on the regime of foreigners in Romania, republished[2], with subsequent amendments and completions, *foreigner* is "a person who does not have Romanian citizenship, the citizenship of another Member State of the European Union or the European Economic Area or the citizenship of the Swiss Confederation". A foreigner who is at one particular moment in the territory of a state, may have the citizenship of another state or may have the status of stateless[3] person or refugee[4].

Upon careful analysis, we have found that, during the stay in the territory of the host state, the foreigner enjoys a number of rights, but at the same time, their correlative obligations are also opposed to them, according to the domestic law of that state. "As underlined in the legal doctrine "human rights concern the universal identity of the human being and are underlying on the principle of equality of all human beings", therefore all individuals have the right to complain if the domestic authorities, natural or legal persons violate their individual rights under the Convention in certain conditions"[5].

Foreigners legally residing in Romania benefit from the general protection of persons and property, as guaranteed by the Constitution and other laws, as well as by the rights provided in the international treaties to which Romania is a party. At the same time, they can move freely[6] and can establish their residence or, as the case may be, their domicile anywhere in Romania. Also, if the foreigners have their residence or domicile in Romania, they benefit from social protection measures from the state, under the same conditions as the Romanian citizens. Foreigners included in all levels

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[1] Augustin Fuerea, *Dreptul Uniunii Europene – principii, acțiuni, libertăți*, Universul Juridic Publishing House, Bucharest, 2016, p. 193.

[2] Official Gazette of Romania, Part I, no. 421 of 5 June, 2008.

[3] Pursuant to art. 1 para. (1) of the Convention relating to the Status of Stateless Persons, adopted in New York on 28 September 1954, *a stateless person* "is a person who is not considered a citizen of any state under its national law".

[4] The term *refugee* is defined in the Convention relating to the Status of Refugees, concluded in Geneva on 28 July 1951, but also in the Protocol on the Status of Refugees, concluded in New York on 31 January 1967.

[5] Laura-Cristiana Spătaru-Negură, *Human beings trafficking in the European Court of Human Rights case-law*, LESIJ - Lex ET Scientia International Journal, no. 2/2017, p. 96.

[6] "Man is born free, this is a universally valid truth, it does not need to be argued, no matter which way you choose to prove this truth" - Elena Emilia Ștefan, *Răspunderea juridică. Privire specială asupra răspunderii în dreptul administrativ*, Pro Universitaria Publishing House, Bucharest, 2013, p. 19.

of education have unrestricted access to school and training activities in society[7].

During their stay in Romania, foreigners are compelled to comply with the Romanian legislation, regarding all the correlative rights they enjoy.

2. The main legal regimes granted to foreigners

If in the Middle Ages, at the creation of the Romanian feudal states, "foreigners had a special legal regime, (...), characterized by tolerance, especially if they were Christians"[8], now, at international level, the following legal regimes granted to foreigners are regulated:

a. *The national regime*. Under this regime, foreigners are granted all the rights of the citizens of the state in which territory they are, except for their political rights. The doctrine states that the phrase "national regime" is ambiguous, as long as it is considered that "foreigners should enjoy all the rights granted to nationals"[9]. It is true that the only rights that foreigners cannot enjoy under this regime are the political rights, but it should be noted that "their access to certain professions and industries remains restricted. The doctrine of the national regime considers, first of all, the obligations of a foreigner towards a host state, not the rights granted by the host state. It has been characterized as a means of protecting a state from a foreigner, rather than protecting a foreigner from acts or omissions attributable to a state"[10].

b. *The special regime or reciprocity regime*. Under this regime, the host state grants certain rights to foreigners on grounds of reciprocity;

c. *The regime of the most-favoured-nation clause*. According to the International Court of Justice, "(...) the purpose of the most-favoured-nation clause was to establish and maintain at all times, a fundamental equality without discrimination[11] between all the countries concerned"[12]. The right of all persons to equality before the law and to protection against discrimination is a fundamental right recognized by the Universal Convention, the Universal Declaration of Human Rights, by the United Nations through a number of conventions, such as the Convention on the Elimination of All Forms of Discrimination against Women or the International Convention on the Elimination of All Forms of Racial Discrimination, etc.[13] The regime of the most-favoured-nation clause presupposes that a State extends to the nationals of another State, rights at least equal to those granted to the national of any third State, pursuant to international agreements. In other words, a most-favoured-nation clause is a provision of a treaty whereby one State undertakes to grant to another state, the most-favoured-nation treatment in an agreed field of relations. The fields that may be the subject of the clause are: customs duties, transit, imports and exports, the regime of natural and legal persons, copyright, the regime of diplomatic and consular missions, etc[14].

Pursuant to art. 5 of the *Draft Articles on the Most-Favoured-Nation Clauses*[15], drafted by the International Law Commission in 1978, "the most-favoured-nation treatment is the treatment granted by the State granting the aid to the beneficiary State or to persons or property in a particular relationship with that State which is no less favourable than the treatment granted by the State granting the aid to a third State; persons or property in the same relationship with the third State concerned".

d. *The mixed regime*. This type of regime is a combination between the national regime and the most-favoured-nation clause regime, often encountered in international law relations.

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[7] Pursuant to art. 3 of GEO no. 194/2002, republished, with subsequent amendments and completions.

[8] Cornelia Ene-Dinu, *Istoria statului şi dreptului românesc*, Universul Juridic Publishing House, Bucharest, 2020, p. 101. According to the Law of the Land, foreigners had the right to live in fairs and cities, to trade, to organize in their own communities, and to have their own churches. Foreigners could take roots by "becoming boyar" (granting the title of boyar), as a result of services rendered to the state, or by marrying a native woman ("earthling"), after having previously converted to the religion of their future wives. After having taken roots, foreigners acquired all civil and political rights" (Cornelia Ene-Dinu, *op. cit.*).

[9] Jean-Pierre Laviec, *Protection et promotion des investissements. Étude de droit international économique*, Graduate Institute Publications, Genève, 2015, pp. 79-115 (available at https://books.openedition.org/iheid/4195#ftn4, accessed on March 25, 2022).

[10] *Ibidem.*

[11] In terms of the normative definition of "discrimination", we hereby state that both the national law maker, and the community law maker defined "discrimination" as representing "different treatment applied to individuals in a comparable situation". In other words, to discriminate means to make a difference or distinction, to distinguish, reject or apply arbitrary or unequal treatment, in an unjustified way, between two persons or situations in comparable positions. Furthermore, differences, restrictions, exclusions or preferences related to an individual's characteristics are discriminatory if their purpose or effect is the reduction or exclusion of rights, opportunities or freedoms" (Marta Claudia Cliza, *What means discrimination in a normal society with clear rules*?, LESIJ no. XXV, vol. 1/2018, p. 90).

[12] *Affaire relative aux droits des ressortissants des États-Unis d'Amérique au Maroc*, Judgment of August 27, 1952, C.I.J. Recueil 1952, p. 192.

[13] According to Elena Emilia Ștefan, *Opinions on the right to non-discrimination*, Challenges of the Knowledge Society, Bucharest, p. 540.

[14] Alexandru Burian, Oleg Bălan, Olga Dorul (editors-coordinators), *Drept internațional public*, 5th ed., revised and added, Chisinau, 2021, p. 184.

[15] Available at https://legal.un.org/ilc/texts/instruments/french/commentaries/1_3_1978.pdf (accessed on March 25, 2022).

3. Expulsion and extradition

The interruption of the stay of foreigners in the territory of the host state can be accomplished in different ways. This is the case for *expulsion* or *extradition.*

a. *Expulsion* is "the act whereby a state compels one or more foreigners found in its territory to leave it, when they become undesirable, for committing acts of violation of the law or of the interests of the host state"[16]. The institution of expulsion has the following characteristics:

- it is a discretionary act of the state which has no obligation to justify it. In practice, however, the host state having adopted that measure, shall inform the state of which the foreigner is a national, of the reasons for which he/she was compelled to leave its territory;
- it is a coercive measure;
- through expulsion, the stay of a foreigner in the territory of a state is forcibly terminated, by forcing him/her (regardless of whether he/she is a foreign national or stateless) to leave the territory of the state that took that measure;
- the foreigner to whom this measure applies, must be declared undesirable for violating the law or the interests of the host state;
- leaving the territory must be done as soon as possible.

The measure of expulsion concerns only the foreigner who committed an act provided by the criminal law, but not his family. Expulsion is usually done to the country of which one is a citizen or, in the case of a stateless person, to the country where one is domiciled.

The measure of expulsion is usually taken for an indefinite period. There are also situations when it can be taken for a certain period, "when the cessation of the state of danger is related to a future event that is going to lead to the disappearance of circumstances that made the presence of"[17] the foreigner on the territory of the host state to be considered a state of danger".

Pursuant to art. 1 of Protocol no. 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[18], a foreigner who has "his/her lawful residence in the territory of a state may be expelled only on grounds of the enforcement of a sentence given by law and must be able to: present the reasons supporting the pleading against his/her expulsion; request an examination of his/her case and request that he/she is represented for that purpose before the competent authorities or by one or more persons designated by that authority".

The Convention relating to the Status of Refugees, concluded in Geneva on July 28, 1951[19], provides, in art. 38, that "contracting States may expel a refugee who is lawfully in their territory only for reasons of national security or public order".

Pursuant to art. 4 of Protocol no. 4 in addition to the European Convention for the Protection of Human Rights and Fundamental Freedoms[20], "collective expulsions are prohibited".

b. *Extradition* is "the act by which a state delivers[21], at the request of another state and under certain conditions, a person in its territory who is presumed to be the perpetrator of a crime, to be on trial or to serve a sentence for which he/she has been previously convicted"[22].

The characteristics of extradition are the following: it is carried out pursuant to the agreement of free will expressed by each state involved, "respecting its sovereignty and independence"[23]; it is a bilateral, conventional act; it is a judicial act.

Depending on the role of the states involved in this procedure, extradition may be *active* - when requested or *passive* - if granted.

Depending on the position of the person whose extradition is requested, extradition may be *voluntary* - when the requested person agrees to the extradition or *forced* - when the extradition decision is taken despite the opposition of the extradited person[24].

Extradition is required under a multilateral or bilateral convention. It should be noted that, at EU

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[16] Dumitra Popescu, Felicia Maxim, *Drept internațional public*, vol. 1, Renaissance Publishing House, Bucharest, 2011, p. 100.

[17] Aurel Teodor Moldovan, *Expulzarea, extrădarea și readmisia în dreptul internațional*, 2nd ed., revised and added, Hamangiu Publishing House, Bucharest, 2021, p. 131.

[18] Signed in Strasbourg, on November 22, 1984. Romania became a party to the protocol, by Law no. 30/1994 on the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and of the Additional Protocols to this Convention, published in the Official Gazette of Romania, Part I, no. 135 of May 31, 1994.

[19] Romania became a party to the Convention, by Law no. 46/1991 for the accession of Romania to the Convention on the Status of Refugees, as well as to the Protocol on the Status of Refugees, published in the Official Gazette of Romania, Part I, no. 148 of July 17, 1991.

[20] Signed in Strasbourg, September 16, 1963. Romania became a party to the Protocol, by Law no. 30/1994 on the ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and of the Additional Protocols to this Convention, published in the Official Gazette of Romania, Part I, no. 135 of May 31, 1994.

[21] At European Union level, surrender procedures between Member States are based on the Council Framework Decision of 13 June 2002 on the European arrest warrant and surrender procedures between Member States. "The decision improves and simplifies judicial procedures to speed up the return from another EU Member State of persons who have committed a serious crime" (Alina Mihaela Conea, *Politicile Uniunii Europene*, Universul Juridic Publishing House, Bucharest, 2019, pp. 96-97).

[22] Dumitra Popescu, Felicia Maxim, *op. cit.*, p. 100.

[23] Aurel Teodor Moldovan, *op. cit.*, p. 201.

[24] Dan Lupașcu, Mihai Mareș, *Extrădarea pasivă. Aspecte teoretice și practice*, Universul Juridic Premium no. 10/2017 (https://www.universuljuridic.ro/extradarea-pasiva-aspecte-teoretice-si-practice/, accessed on October 20, 2021).

level, "the European arrest warrant replaces the extradition system. Under this, each national judicial authority has the obligation to recognize and act, with a minimum of formalities and within a certain timeframe, following requests made by the judicial authority of another Member State of the European Union"[25].

In order for a person, located on the territory of Romania, to be extradited to the state requesting extradition for the purpose of criminal prosecution, trial or execution of a sentence, it is necessary to meet the conditions provided by Law no. 302/2004 on international judicial cooperation in criminal matters[26], republished with subsequent amendments and completions.

Romanian citizens can only be extradited if the following conditions are met:

- there must be a multilateral international convention, to which Romania is a party and on grounds of reciprocity, if at least one of the following conditions is met: the extraditable person resides in the territory of the requesting state at the date of the extradition request; the extraditable person also has the nationality of the requesting state; the extraditable person committed the act in the territory or against a national of a Member State of the European Union, if the requesting State is a member of the European Union;

- if the extraditable person resides in the territory of the requesting State at the time of the extradition request or the extradited person committed the act in the territory or against a national of a Member State of the European Union, if the requesting State is a member of the European Union and extradition is requested in order to be prosecuted or on trial, an additional condition is that the requesting State provides sufficient assurance that, if convicted of a custodial sentence by a final judgment, the extradited person will be transferred for the execution of the sentence in Romania.

Romanian citizens may also be extradited under the provisions of bilateral treaties and on grounds of reciprocity.

4. The right to asylum

The right to asylum is "the right of a sovereign state to grant entry and establishment in its territory of foreigners, pursued in their country for political, scientific, religious activities (which are not in accordance with the rule of law of that state)"[27]. The right to seek and enjoy asylum cannot be invoked by persons for whom there are serious grounds for believing that they have committed a crime against peace, a war crime or a crime against humanity, within the meaning of international legal instruments developed in this direction[28].

Art. 14 para. 1 of the Universal Declaration of Human Rights of 1948 proclaims the right of any person who is a victim of persecution "to seek asylum and to enjoy asylum in other states".

"The kind of ambiguous wording of the article (because receiving the right to asylum is not in question) is the result of a compromise between the states that considered this form of protection as an aspect of their territorial sovereignty and those that supported the idea that people had the right to be granted asylum"[29].

Therefore, the right of the state to grant asylum in its territory, to foreigners who are politically, racially or religiously persecuted in their country of origin derives from the exclusive character of its territorial jurisdiction, which means that *we are not in the presence of a person's right to claim asylum protection or of a proper obligation on States to grant asylum.*

The asylum is different from the refugee status, as the former is the institution of protection, while the latter refers to one of the categories of persons, among others, who benefit from such protection.

In international law, a distinction is made between *territorial asylum* and *diplomatic asylum*.

a. *Territorial asylum* - is the form of asylum by which a state grants to a person, under certain conditions, protection in its territory. Granting asylum is tantamount to refusing to extradite the person to whom it is granted.

In 1967, the UN General Assembly adopted the *Declaration on Territorial Asylum*[30]. The preamble to the Declaration states that the granting of asylum by a state is "a peaceful and humanitarian act and, as such, cannot be regarded as "an unfriendly act, unfavourable to another state. The 4 articles of the Declaration constitute as many features of the territorial asylum. Thus:

- granting asylum is a manifestation of the sovereignty of the state, and its decision must be complied with by all other states;

[25] Alina Mihaela Conea, *op. cit*., pp. 96-97.
[26] Published in the Official Gazette of Romania, Part I, no. 594 of July 1, 2004.
[27] Adrian Năstase, Bogdan Aurescu, *Drept international public. Sinteze*, 9th ed., C.H. Beck Publishing House, Bucharest, 2018, p. 154.
[28] Pursuant to art. 1 para. 2 of the *Declaration / Projet de Convention sur l'asile territorial* (available at https://www.unhcr.org/en/4f5f12929.pdf, accessed on January 4, 2022).
[29] According to Guy S. Goodwin-Gill, Directeur de recherche et professeur de droit international des réfugiés (All Souls College, Oxford), *Déclaration de 1967 sur l'asile territorial*, available at https://legal.un.org/avl/pdf/ha/dta/dta_f.pdf; accessed on January 4, 2022).
[30] Adopted by UN General Assembly Resolution no. 2312 (XXII) of December 14, 1967.

- asylum cannot be granted to persons prosecuted, "for ordinary crimes or crimes against humanity, within the meaning of international instruments drawn up for the prosecution of such crimes"[31];

- each state has the power to determine, by internal rules, the reasons for granting asylum;

- in the event that a state "encounters difficulties in granting or continuing to grant asylum, states shall consider, individually or jointly or through the United Nations, the measures to be taken, in a spirit of international solidarity, to ease the task on this state"[32];

- the person to whom asylum has been granted, "may not be the subject of measures such as refusal of entry at the border or, if he/she has already entered the territory in which he/she has applied for asylum, of measures of expulsion or deportation in any state where there is a risk of persecution"[33]. Exceptions may be admitted only for exceptional reasons of national security or for the protection of the population or in the event of a "massive influx of persons"[34];

- "states granting asylum must not allow asylum seekers to engage in activities contrary to the purposes and principles of the United Nations"[35].

b. *Diplomatic asylum* - consists in the reception and protection granted in the premises of embassies or consular offices in a state, of some citizens of this state pursued by their own authorities or whose lives are in danger due to internal events. Although diplomatic asylum is not recognized as a legal institution in international law, it "has been practiced, as a local custom or pursuant to international conventions, between some Latin American states"[36].

In this regard, we mention the Asylum Convention, concluded in Caracas on March 28, 1954. It entered into force on December 29, 1954, with the deposit of the second instrument of ratification with the General Secretariat of the Organization of American States. The Convention regulates the possibility of granting asylum in "any headquarters of a diplomatic mission, in the residence of the Heads of Mission and in the spaces which they have allocated for the accommodation of asylum seekers when their number exceeds the normal capacity of asylum seekers. According to the Convention, each state has the discretionary right to grant asylum, without being obliged to grant it or to explain why it refused it. Pursuant to art. 3, asylum cannot be granted "to persons who, at the time of application, are charged or prosecuted for common law offenses or who have been convicted by the competent courts and have not served their sentence".

The Havana Pan American Convention on the Right to Asylum[37] also stipulates that, under certain conditions, asylum may be granted in foreign embassies to a political refugee who is a national of the territorial state. In this regard, for example, we draw attention to the ruling of the International Court of Justice in the *Colombian-Peruvian Asylum Case*[38]: in this case, the Colombian Embassy in Lima granted to Mr. Haya de la Torre - a Peruvian citizen, diplomatic asylum. He was a politician accused of provoking a military rebellion. The dispute between Peru and Colombia was settled by the ICJ. The dispute focused on the question whether the State of Colombia, as a State granting asylum, had the right to "qualify" by itself, obligatorily for the territorial State, the nature of the refugee's offense, that is, to determine whether the offense was of political nature or of common law. In addition, the Court was called upon to decide whether or not the territorial state was obliged to provide the necessary guarantees to allow the refugee to leave the country, safely. In its judgment of November 20, 1950, the Court answered those two questions in a negative manner, stating at the same time that Peru had not proved that Mr. Haya de la Torre was a common law offender. It finally accepted a counterclaim from Peru, alleging that Mr. Haya de la Torre had been granted asylum in violation of the Havana Convention. The day after the ruling of November 20, 1950, Peru asked Colombia to hand over Mr. Haya de la Torre. Colombia refused to do so, arguing that neither the law in force nor the Court's ruling required to hand over the refugee to the Peruvian authorities. The Court upheld that argument in its judgment of June 13, 1951. The Court found that the issue was new and that, while the Havana Convention expressly required the surrender of common law offenders to local authorities, there was no obligation whatsoever for political criminals. Although it confirmed that the diplomatic asylum had been granted irregularly and that Peru was therefore justified in seeking its cessation, the Court stated that the State of Colombia was not obliged to surrender the refugee. These two conclusions that the Court stated,

[31] Art. 1 para. (2).
[32] Art. 2 para. (2).
[33] Art. 3 para. (1).
[34] Art. 3 para. (2).
[35] Art. 4.
[36] Adrian Năstase, Bogdan Aurescu, *op. cit.*, p. 155.
[37] Adopted at Havana, on February 20, 1928, and entered into force on May 21, 1929.
[38] Judgment of November 20, 1950, C.I.J. Recueil 1950, p. 266.

are not contradictory, because there are also other ways to end asylum than handing over the refugee[39].

5. Conclusions

The importance and significance of the legal regime for foreigners, in domestic and international law, is constantly being strengthened. It is permanently related to the evolutions registered, both by the domestic society, but also, necessarily correlatively, by the international society. Therefore, it is expected that such a consolidation will materialize in the approach of new dimensions in which man occupies the central position, with all the inevitable technical-scientific developments.

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[39] ICJ judgment in the *Haya de la Torre case*, June 13, 1951 : C.I.J. Recueil 1951, p. 7.