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INTERNATIONAL PROTECTION BEYOND THE REFUGEE CONVENTION – ANALYSIS OF TEMPORARY AND SUBSIDIARY PROTECTION IN THE EU AND THE REPUBLIC OF SERBIA

ABSTRACT: This article explores the discretionary application of temporary and subsidiary protection mechanisms in the European Union and the Republic of Serbia, set against the backdrop of intensifying global migratory flows. The analysis uncovers a pronounced selectivity in the approach to international protection, which is primarily shaped by political and security considerations. This is most evident in the divergent treatment: the automatic and selective granting of temporary protection is sharply contrasted with the individualized assessment required under regular asylum procedures, despite both situations involving mass influxes of refugees. Through a comparative examination of the EU and Serbian legal frameworks, the paper evaluates the key legal challenges and the scope of political discretion in safeguarding refugee rights. This inherent inconsistency calls into question the coherence of international refugee and human rights law, underscoring the urgent need for harmonized regional responses. By identifying legal inconsistencies, the ultimate goal of this paper is to formulate possible recommendations for future improvements and greater legal consistency in protection mechanisms.

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1. Introduction

1.1. Mass Displacement and the Need for Complementary Protection Regimes

The international refugee law is shaped by the 1951 Convention Relating to the Status of Refugees (189 UNTS 137) and its 1967 Protocol (606 UNTS 267), which established the foundational principles for protecting individuals fleeing persecution (hereinafter: the Convention). While the Convention offers a robust framework for those meeting the definition of a "refugee", its inherent limitations became apparent with the rise of mass influxes, particularly those fleeing generalized violence rather than individualized persecution. Consequently, complementary forms of protection were developed to fill the gaps left by the Convention.

The Refugee Convention and its Protocol form the cornerstone of international refugee law. Its Article 1A(2) defines a "refugee" as an individual with a well-founded fear of persecution based on specific grounds, who is outside their country of origin and unable or unwilling to seek its protection. However, the Convention in its Article 1F also includes exclusion clauses that can deny international protection to those who have committed grave acts, in order to prevent abuse of the asylum system and ensure legal accountability. Although this stems from the moral principle of *suum cuique tribuere* meaning that each person must be given what they deserve (Simeon, 2022, p. 34), the exclusion clauses must be interpreted restrictively and applied based on a full assessment of individual circumstances. The diverse interpretations of these clauses often lead to inconsistent application across jurisdictions (UNHCR, 2003).

Furthermore, refugee law is built on the fundamental principle of *non-refoulement,* established by Article 33(1) of the Convention, which prohibits states from returning refugees to territories where their life or freedom would be threatened. While the Convention provides for certain exceptions, the absolute ban on torture and inhuman or degrading treatment under Article 3 of the European Convention on Human Rights (CETS No. 5, 1950, hereinafter: ECHR) underpins this principle. This ensures that, even if an individual does not meet the specific criteria for refugee status, the state remains obliged to refrain from expelling them to a place where they would face inhumane treatment.

The limitations of the Convention's strict definition and the complexities of its exclusion clauses have created a need for a broader approach to international protection. Consequently, complementary forms of protection were developed to fill in these gaps. These mechanisms extend the protection to individuals who fall outside the scope of the Convention, yet still face serious harm or are part of a mass influx of displaced persons.

1.2. Development of the Concept of Complementary Protection

In response to the challenges of mass displacement, complementary protection mechanisms in the form of subsidiary protection and temporary protection were designed to offer safeguards in circumstances not addressed by the Convention (Chetail, De Bruycker & Maiani, 2016, p. 5). This development was based on sources complementary to the Convention, particularly human rights treaties like the International Covenant on Civil and Political Rights (ICCPR, 1966, Article 7) and the Convention Against Torture (CAT, 1984, Article 3), as well as and the fundamental principle of *non-refoulement* (McAdam, 2021, p. 661).

An important moment in expanding refugee protection was marked by the Convention Governing the Specific Aspects of Refugee Problems in Africa (36400-SL-OAU) of 1969 (hereinafter: the OAU Convention) which broadened the refugee definition beyond individualized persecution, encompassing individuals fleeing "generalized forms of violence" within Africa. The Cartagena Declaration on Refugees from 1984 (Conclusion III) further solidified the concept of complementary protection in Latin America. While these regional instruments might have been better suited to respond to regional mass displacement in the past, they led to the fragmentation of refugee law and their utility became challenged by the globalized nature of forced displacement, which demands more unified and comprehensive international responses and instruments (UNHCR, 2006; Arboleda, 1991, pp. 185–186; Audebert & Dorai, 2010, p. 7).

Against this backdrop, complementary forms of international protection have evolved in both the European Union and the Republic of Serbia. The following sections will examine the contours of this development, its practical implications, and the extent to which these two legal systems converge or diverge in their approach to persons in need of international protection beyond the Convention framework.

2. Comparative Analysis of International Protection in the European Union

2.1. The EU Legal Framework: Subsidiary Protection

The European Union (hereinafter: EU) has developed a comprehensive Common European Asylum System (hereinafter: CEAS) that sets harmonized standards for determining eligibility for international protection and defining the rights to be granted to beneficiaries. The development of CEAS entails progressive legislation, leading to a shift from "voluntary" to "mandatory" aiming for a "full" harmonization of procedures, criteria, and standards (Velluti, 2022, p. 26). Article 78 of the Treaty on Functioning of the European Union (C 326, 26.10.2012.) legally mandates the EU to implement this common asylum policy, ensuring compliance with the principle of *non-refoulement*, the Refugee Convention, and other relevant treaties.

Subsidiary protection was formally introduced by the 2004 Qualification Directive which complemented the Convention and established it as a distinct legal status (Council Directive (EC), 2004/83). The 2011 recast (hereinafter: the Qualification Directive), further harmonized and clarified the conditions for granting international protection across the EU (Council Directive (EU), No. 2011/95). The Qualification Directive is widely recognized for integrating refugee law with broader human rights protection (Lambert, 2006, pp. 161–162).

The Article 15 of the Qualification Directive states that a person eligible for subsidiary protection is a third-country national or a stateless person who does not qualify as a refugee but for whom there are substantial grounds to believe they would face a real risk of suffering serious harm if returned to their country of origin. The "serious harm" refers to death penalty or execution; torture or inhuman or degrading treatment, and a serious individual threat from indiscriminate violence in international or internal armed conflict. This notion must be understood in relation to third-country nationals or stateless persons who are at risk of such harm (Tiedemann, 2012, p. 126). The Qualification Directive elaborates on the concept of persecution by including a non-exhaustive list of acts constituting persecution providing a more detailed framework for a concept not explicitly defined in the Convention.

The Qualification Directive's approach to complementary protection presents several challenges. Its individualistic methodology and demanding proof of personal risk create a disjunction in the treatment of those seeking safety. Beyond this, its discretionary exclusion grounds, extending beyond the

Convention's exhaustive list (e.g., security risks or serious crimes), lead to troubling divergences in the application of exclusion clauses between refugee and subsidiary status. Furthermore, by merely setting minimum standards for subsidiary protection, the Qualification Directive fosters varied national protections (Tsourdi, 2021). When subsidiary protection confers a less robust status, policy incentives may favor granting this diminished protection over full refugee status (Hathaway, 2021, p. 691). However, the Qualification Directive generally formalizes subsidiary protection status, closely aligning beneficiaries' rights with those under the Convention. The Court of Justice of the European Union (hereinafter: CJEU) affirmed this approximation in the *Alo and Osso* case[1] stating that rules on international protection apply equally to refugees and subsidiary protection beneficiaries unless explicitly stated otherwise by the Qualification Directive.

2.2. The EU Legal Framework: Temporary Protection

The EU's international protection framework also includes temporary protection as a response to large-scale arrivals. It aims to offer swift relief and alleviate the significant administrative burdens of acute crises. This concept gained prominence in the early 1990s, catalyzed by the ex-Yugoslav wars. Facing unprecedented displacement, the 1997 Treaty of Amsterdam (C 340, 10.11.1997) established "minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection" (UNHCR, 1992; Roxström & Gibney, 2003).

Following these events, the Temporary Protection Directive (hereinafter: TPD) came into force in 2001, establishing the EU's legal framework for responding to mass influxes (Council Directive (EC), 2001). While the TPD establishes criteria for activating and terminating temporary protection, it notably lacks a precise definition for "mass influx" or "large number of people." By focusing on objective country conditions rather than individual persecution, it employs an automatism that contrasts with the individual assessment of subsidiary protection. Despite its establishment, the TPD remained inactive for over two decades. Its significance was finally demonstrated in 2022 when the EU triggered the TPD in response to the mass displacement caused by the armed conflict in Ukraine. This allowed for a harmonized EU response, providing immediate protection to displaced persons without the need for

[1] Alo and Osso, Joined Cases C-92/09 and C-93/09, 01.03.2016, ECLI:EU:C:2016:127.

individual asylum procedures. The TPD's prolonged non-implementation prior to 2022, even when the EU faced a serious migration crisis between 2015 and 2017, can be attributed to a multifaceted array of reasons. These include the intricate procedural requirements for instituting a temporary protection scheme, which often presented significant political hurdles for Member States.

Moreover, the indeterminacy of the concept of "mass influx" contributed to reluctance in the TPD's activation, as Member States held differing interpretations. A pervasive political concern was also the widely discussed "pull factor" argument, which posited that activating the TPD might inadvertently "invite" more displaced persons to seek protection within the EU (Ineli-Ciger, 2022, p. 160). The differing responses to the Ukrainian and Syrian displacement crises highlight the influence of political and geostrategic factors on temporary protection activation. Ukraine's geographical and cultural proximity to the EU, coupled with strong geopolitical alignment, fostered greater political will and a unified EU response. Conversely, the Syrian conflict's complex geopolitics, perceived higher security risks, and discriminatory narratives shaped a different perception of Middle Eastern displaced persons (Gluns & Wessels, 2017). The New Pact on Asylum and Migration, effective in 2026, will replace the current temporary protection framework with "immediate protection." This new mechanism, designed for swift crisis response, is envisioned as equivalent to subsidiary protection. It can be granted immediately to predefined groups, particularly those facing an exceptionally high risk of indiscriminate violence from armed conflict in their home country (European Commission, 2020).

3. The principle of Non-Refoulement in Subsidiary and Temporary Protection Regimes

The Qualification Directive, despite encompassing broad exclusion clauses, explicitly prohibits under Article 21 the return of individuals who are at real risk of suffering serious harm in their country of origin. Due to *non-refoulement* being a *jus cogens* norm, even those excluded from international protection cannot be returned if such removal would violate obligations under the ECHR. In practice, this often results in *de facto* protection or a tolerated stay, which leaves individuals in legal limbo without any rights and may incentivize the use of irregular migration routes through smuggling.

On the other hand, the TPD in its Article 28 permits Member States to exclude individuals who have committed serious non-political crimes or

acts contrary to the principles of the UN. However, these terms are vague and broadly defined. The TPD lacks explicit provisions for national security assessments, such as exclusion based on a threat to the community or the security of the Member State as found in the subsidiary protection regime, despite the Commission's guidelines on implementing national security measures (European Commission, 2022). The limited and imprecise scope of the exclusion clauses underscores the TPD's function as a rapid, collective protection mechanism that prioritizes immediate protection over the detailed individual assessments required in refugee or subsidiary protection procedures.

3.1. Relevant Jurisprudence of the CJEU and ECtHR

The CJEU and the European Court of Human Rights (hereinafter: ECtHR) case law demonstrates their pivotal roles in shaping the practical application of temporary and subsidiary protection within the European asylum framework. The CJEU authoritatively interprets EU asylum law, thereby harmonizing protection standards and guiding future legislative developments, for instance, by clarifying key concepts such as "serious harm". In this role, the Court has determined that a crime may be deemed "particularly serious" when it threatens the community's legal order.[2]

The *Elgafaji* case[3] marked the CJEU's first interpretation of the Qualification Directive. In its ruling, the Court adopted a broad reading of the term "individual threat", affirming that a person may face a genuine individual risk even amid indiscriminate violence, provided that the overall intensity of violence in the area is sufficiently severe to endanger civilians. This interpretation rejects strict individual targeting and provides protection for situational risks. Also, it aligns with human rights law mitigating potentially restrictive interpretations of the Qualification Directive. However, the CJEU's characterization of such a threat as "exceptional" still permits the broad interpretation, posing a challenge to consistent application.

Beyond the Qualification Directive, the CJEU has consistently reinforced the *non-refoulement* principle in broader contexts related to EU asylum and return procedures. In the *N.S. v Secretary of State for the Home*

[2] B and D v Asylum and Immigration Appeal Tribunal, Joined Cases C-57/09 and C-101/09, 09.11.2010., ECLI:EU:C:2010:659, para 5.

[3] Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie, Case C-465/07, 17.02.2009, ECLI:EU:C:2009:94.

Department judgment[4] the CJEU ruled that Member States cannot transfer an asylum seeker under the Dublin Regulation if there are substantial grounds for believing that the asylum procedures and reception conditions in the responsible Member State pose a real risk of a *non-refoulment* violation (Regulation (EU), 604/2013). Moreover, in *Aydin Salahadin Abdulla et al. v. Bundesrepublik Deutschland*[5] the CJEU provided guidance on the burden of proof in assessing *non-refoulment* concerning conditions of detention upon return, further strengthening procedural safeguards.

Furthermore, in *K. and Others v. Staatssecretaris van Justitie en Veiligheid*[6] the CJEU confirmed the *non-refoulement* obligation under EU Charter of Fundamental Rights, reaffirming that individuals cannot be removed to a country where there is a serious risk of ill-treatment. These judgments[7] collectively affirm that a third-country national facing a return decision must have a genuine opportunity to submit any facts that could justify refraining from a return decision, including those related to *non-refoulement* risks. The *Alo and Osso* case also contributed to *non-refoulement* by clarifying that the rules on the content of international protection in the Qualification Directive apply equally to both refugees and beneficiaries of subsidiary protection.

The ECtHR establishes minimum human rights standards under the ECHR, which directly shape the obligations of EU Member States as all of them are also signatories to the ECHR. The ECtHR's jurisprudence based on Article 3 ensures protection against inhuman or degrading treatment even for those excluded for security reasons. In *Chahal v. United Kingdom*[8] the ECtHR ruled that this protection is absolute, irrespective of the individual's conduct or security threat, prohibiting return to a country with a real risk of serious harm. This stance was further reinforced in *Saadi v. Italy*[9] where the ECtHR reiterated that the *non-refoulement* obligation stemming from Article 3 is unconditional, serving as an ultimate protection even for individuals deemed a danger to national security or otherwise denied formal protection status.

Moreover, the ECtHR's jurisprudence on the *non-refoulement* extends to inter-state transfers within the Dublin system. A pivotal case, *M.S.S. v.*

[4] N.S. v Secretary of State for the Home Department judgment, Joined Cases C-411/10 and C-493/10, 21.12.2011, ECLI:EU:C:2011:865.

[5] Aydin Salahadin Abdulla et al. v. Bundesrepublik Deutschland, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, 02.03.2010, ECLI:EU:C:2010:105.

[6] K. and Others v. Staatssecretaris van Justitie en Veiligheid, Case C-18/16, 14.09.2017.

[7] See also Khaled Boudjlida v Préfet des Pyrénées, Case C-249/13, 11.12.2014, EU:C:2014:2336.

[8] Chahal v. United Kingdom (1996) Application No. 22414/93, 15.11.1996.

[9] Saadi v. Italy, Application No. 16644/08, 28.02.2008.

Belgium and Greece[10] found violations of Article 3 when Belgium transferred an asylum seeker to Greece due to systemic deficiencies in Greek reception conditions and asylum procedures. This established that a transferring Member State is responsible under Article 3 if it sends an individual to another state where they face a real risk of inhuman or degrading treatment.[11] Furthermore, the case of *M.G. v. Bulgaria*[12] illustrated the paramountcy of *non-refoulement* when protection status is not uniformly recognized across jurisdictions. The ECtHR found that Bulgaria's attempt to extradite a Chechen man with refugee status in Germany would violate Article 3, explicitly noting the issue of lack of mutual recognition of positive asylum decisions.

Regarding temporary protection, the CJEU's jurisprudence on the TPD is limited, while the ECtHR jurisprudence is absent as it only interprets the ECHR provisions. The CJEU has not adjudicated cases on the granting or rejecting of the temporary protection status. Instead, CJEU jurisprudence concerns the interpretation of rights conferred by temporary protection or its procedural implementation by Member States.[13] This limited judicial oversight underscores the political and collective nature of temporary protection mechanism, contrasting with the individualized nature of subsidiary protection.

4. Comparative Analysis of International Protection in the Republic of Serbia

4.1. Serbian Legal Framework: The Asylum Law and Alignment with EU Acquis

The violent disintegration of Yugoslavia and mass displacements in the 1990s prompted the Republic of Serbia (ex-Federal Republic of Yugoslavia) to enact the 1992 Refugee Law (Law on Refugees, 1992). While not a "temporary protection" mechanism in the modern sense, it served as an *ad hoc* legal instrument to address the mass influx of persons fleeing armed conflict, functionally resembling today's temporary protection in its purpose to offer a rapid response to a crisis. A key distinction lay in its status-granting

[10] M.S.S. v. Belgium and Greece, Application No. 30696/09, 21.01.2011.

[11] See also Salah Sheekh v. the Netherlands (Application No. 1948/04, 11.01.2007) where the ECtHR affirmed that the Article 3 "real risk' assessment" must thoroughly consider Country of Origin Information and individual circumstances, especially in situations of generalized violence.

[12] M.G. v. Bulgaria, Application No. 59297/12, 25.03.2014.

[13] Krasiliva, Request for a preliminary ruling from Czech Republic, Case C-753/23, 18.03.2024.

mechanism: while formally requiring an individual approach, the institutional arrangement of the Commissariat for Refugees, focused on reception and care, allowed for a *de facto* automatism in practice, differing from conventional individualized asylum procedures.

Building on this historical context, Serbia's asylum system is legally bound by the international refugee protection framework. The Serbian Constitution establishes this by unequivocally stating that general principles of international law and all ratified international agreements are an integral, directly applicable part of domestic law (Constitution of the Republic of Serbia, 2006). The Constitution specifically grants the right to asylum and protection from *refoulement*. These legal commitments are further operationalized by the 2018 Asylum and Temporary Protection Law, which defines the conditions for granting both subsidiary and temporary protection in Serbia (Law on Asylum and Temporary Protection, 2018).

4.2. Practical Implementation of Subsidiary Protection in Serbia

Subsidiary protection, as regulated by Serbian legislation, is generally aligned with EU's and international standards. While the first instance Asylum Office's employs comprehensive individualized assessments, which involve interviews, evidence gathering, and Country of Origin Information analysis, persistent inconsistencies undermine the decision-making process. The Asylum Office frequently sets a high threshold for proving persecution, potentially denying protection despite credible grounds. Practical observations reveal an inadequate and selective use of COI, contradicting the established ECtHR practice.

The Asylum Office's inconsistent decision-making creates significant legal uncertainty. This is evident in subsidiary protection cases involving healthcare, such as those from Cuba, Nigeria, Bangladesh, Cameroon, and Afghanistan. For instance, in 2022, subsidiary protection was granted to an HIV-positive Cuban citizen due to inadequate healthcare, constituting inhuman and degrading treatment. Yet, in 2024, another HIV-positive individual was denied protection based on the illogical reasoning that their condition was not life-threatening.[14] Such reasoning is ill-founded, as decisions on health conditions for HIV-positive individuals should be

[14] Republika Srbija, Ministarstvo unutrašnjih poslova, Uprava granične policije, Kancelarija za azil [Republic of Serbia, Ministry of Interior, Directorate of Border Police, Asylum Office]. Rešenje br. 26-3283/22, 2024.

consistently based on objective criteria. This approach also contradicts established ECtHR practice regarding medical cases, which generally applies a low threshold for interpretation of Article 3 ECHR. The Court has underlined that removing a seriously ill person to a receiving country where the absence or inaccessibility of appropriate treatment would cause a real risk of a serious, rapid, and irreversible health decline, resulting in intense suffering or significantly reduced life expectancy, amounts to an Article 3 violation.[15] Moreover, the Serbian asylum system's effectiveness is hampered by the Asylum Commission's inoperability and passivity. As a second-instance body, it almost exclusively rules on procedural matters and avoids deciding on case substance. The Commission's record of granting subsidiary status only four times since its establishment is self-indicative (Kovačević & Šemić, 2025). Even though Serbian Asylum Law mirrors Article 17 of the EU Qualification Directive and Article 1F of the Refugee Convention regarding exclusion grounds, significant challenges persist in applying these exclusion clauses in subsidiary protection cases. For instance, while Syrian nationals often receive subsidiary status, they are frequently subjected to security-based exclusion clauses, which are largely applied inadequately due to a lack of evidentiary thresholds.[16] A significant procedural concern is that decisions rejecting asylum applications on national security grounds lack sufficient information or explanation, as these documents are signed as "confidential" under the Law on Data Protection (Law on Personal Data Protection, 2018). This practice legally deprives the beneficiaries of their right to an effective remedy, equality before the law and the ability to dispute negative asylum decisions. It also contradicts established UNHCR guidelines on due process and transparency and is contrary to international standards, especially the ECtHR established practice in *Gaspar v. Russia*[17] which reveals that countries must provide effective opportunities to challenge negative security decisions, ensuring compliance with the Convention rights, particularly right to an effective remedy under Article 13. As previously noted, and not unique to Serbia, a common shortcoming of subsidiary protection is that this practice often results in (only) *de facto* protection or a tolerated stay.

[15] N. v. United Kingdom, Application No. 26565/05, 27.05.2008; Paposhvili v. Belgium, Application No. 41738/10, 13.12.2016.

[16] Republika Srbija, Ministarstvo unutrašnjih poslova, Uprava granične policije, Kancelarija za azil [Republic of Serbia, Ministry of Interior, Directorate of Border Police, Asylum Office]. Rešenje br. 26-3134/23, 2025.

[17] Gaspar v. Russian Federation, Application No. 23038/15, 08.10.2018.

4.3. Practical Implementation of Temporary Protection in Serbia

Serbia's Asylum Law, mirroring the TPD, conceptualizes temporary protection as a collective response to mass displacement, prioritizing immediate relief over extensive individual assessments. Serbia activated temporary protection for displaced Ukrainians in 2022, thereby signaling geopolitical alignment with the EU (Decision on Granting Temporary Protection to Displaced Persons Arriving from Ukraine, 2022). These beneficiaries gained significant practical advantages, including immediate access to private accommodation (if able to secure it) and the labor market, contrasting sharply with asylum seekers in Serbia who face initial reporting obligations to asylum centers and a six-month waiting period for a right to work.

A key distinction between temporary and subsidiary protection in Serbia, consistent with other legal instruments mentioned, lies in their exclusion clauses. For subsidiary protection, these grounds are more explicitly defined, including international crimes, serious non-political crimes, acts contrary to UN principles, and posing a danger to the community or national security while national security assessments exclusively rely on confidential decisions. In contrast to subsidiary protection, the Serbian Asylum Law does not contain specific exclusion clauses when granting temporary protection. However, according to Article 75(4), temporary protection can be terminated if reasons for denying a right to asylum are subsequently identified. This means that the same grounds for exclusion used for refugee or subsidiary status are applicable to temporary protection, but they serve as reasons for revocation rather than initial denial. This procedural distinction implies that temporary protection is granted as an automatic, collective response, with *a posteriori* scrutiny of potential security risks. It remains unclear when and how the Asylum Office determines if an individual already enjoying temporary protection status poses a security risk, which can lead to inconsistencies and potential legal ambiguities.

Furthermore, Serbian law allows individuals to apply for asylum once temporary protection has expired, thereby offering a pathway to a more durable status. The decision to activate temporary protection for Ukrainians clearly illustrates the strong impact of political and geostrategic considerations on national responses to mass displacement. It may be argued that the challenges encountered during earlier crises, when temporary protection was not implemented, served as an important lesson and contributed to the decision to activate it in 2022. Quantitatively, divergence in granted protection in Serbia is stark, highlighting hurdles within asylum and subsidiary protections

compared to the near absence of such for temporary protection beneficiaries: from 2008 to mid-2023, combined asylum and subsidiary protection grants totaled 244 persons, whereas temporary protection in Serbia from March 2022 to May 2024 was granted to approximately 5,300 individuals (UNHCR, 2025).

Finaly, a critical feature of Serbia's temporary protection implementation is the significant legal conflict between statutory limitations and executive practice concerning its duration. While the Asylum Law states that temporary protection may be granted for a maximum of one year, with a potential extension of an additional six months not exceeding one year in total, the Government's subsequent decisions have repeatedly extended this period well beyond this statutory limit (Decision on the Extension of Temporary Protection for Displaced Persons from Ukraine, 2023). The Government's decision, valid until 18 March 2024, remains actively applied in practice as long as "there are such circumstances", despite the legal framework not explicitly providing for such continuous use. This reliance on discretionary government decisions, which effectively overrides the letter of the law, highlights both flexibility and a potential for legal inconsistency in managing prolonged mass influxes. This reveals a fundamental shortcoming of temporary protection: its inherent susceptibility to the state's political will and reliance on political discretion. Within the EU, this is evidenced by Article 4 of the TPD which details the political and procedural mechanisms for activation, underscoring that the final decision remains discretionary for Member States. Likewise, the allocation of decision-making power for temporary protection activation to the Serbian Government highlights its susceptibility to political will.

5. Conclusions and Recommendations

This article demonstrates that both the EU and Serbia apply temporary and subsidiary protection with significant political and security-driven discretion. This selective approach is evident in the stark contrast between the collective activation of temporary protection for Ukrainian refugees and its non-activation for Middle Eastern refugees. Serbia's application of subsidiary protection further highlights critical inconsistencies. Decisions based on security-related exclusion clauses lack transparency and access to effective legal remedies. These practices, coupled with nationality-based disparities, inconsistent outcomes in similar cases, high evidentiary thresholds and unclear extensions of temporary protection, collectively reveal a divergent application of international protection criteria, which leads to legal uncertainty and

heightened risks of *refoulement*. A lack of inherent awareness of *refoulement* risks by Serbian authorities is apparent, as their decisions rely on procedural rather than substantial grounds. To counter these issues and prevent arbitrary outcomes, greater transparency in national security exclusions, lower evidentiary thresholds and consistent use of COI are essential. While universal jurisdiction for the most serious crimes may seem like a logical solution to prevent *de facto refoulement*, it faces practical barriers due to a lack of political will. By reducing political discretion in granting international protection and ensuring greater transparency for effective legal remedies, the integrity of the asylum system can be strengthened, thereby upholding fundamental human rights and refugee law.

Conflict of Interest
The author declares no conflict of interest.

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MEĐUNARODNA ZAŠTITA VAN OKVIRA IZBEGLIČKE KONVENCIJE – ANALIZA PRIVREMENE I SUPSIDIJARNE ZAŠTITE U EVROPSKOJ UNIJI I REPUBLICI SRBIJI

APSTRAKT: Ovaj rad analizira diskrecionu primenu instituta privremene i supsidijarne zaštite u državama članicama Evropske unije i Republici Srbiji, u kontekstu sve izraženijih globalnih migracionih kretanja. Kritička analiza ukazuje na značajnu selektivnost u proceni prava na međunarodnu zaštitu, koja je motivisana političkim i bezbednosnim razlozima. Ovaj fenomen nedvosmisleno proizlazi iz automatske i selektivne primene privremene zaštite, u poređenju sa supsidijarnom zaštitom koja podleže strogoj proceni individualnih okolnosti koja je karakteristična za redovan postupak azila, iako se u oba slučaja radi o masovnim prilivima izbeglica. Takva neusklađenost dovodi u pitanje doslednost međunarodnog izbegličkog prava i prava ljudskih prava, te ističe hitnu potrebu za

harmonizovanim regionalnim odgovorima. Rad komparativno analizira pravne okvire Evropske unije i Republike Srbije, sagledavajući ključne pravne izazove i obim političke diskrecije u pogledu prava na međunarodnu zaštitu. Kroz identifikaciju pravnih nelogičnosti, rad nudi konkretne preporuke za buduće unapređenje sistema međunarodne zaštite.

Ključne reči: *međunarodna zaštita, privremena zaštita, supsidijarna zaštita, izbegličko pravo, pravo ljudskih prava.*

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