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Revisiting the Concept of Flexibility in Temporary Protection Practices at the Intersection of International Refugee and Human-Rights Laws: The Case of Türkiye

Neva Övünç Öztürk*

The absence of a comprehensive international law instrument regulating temporary protection has led to its flexible application, which has been deemed effective in managing large-scale forced migratory movements. By focusing on the intersection of international refugee law and human rights law, this article critically re-evaluates the concept of flexibility in temporary protection from a legal perspective, primarily based on current practices in Türkiye. By analysing the dual dimensions of flexibility – rule-making and implementation – it highlights how broad discretion can, when exercised without adequate legal safeguards to ensure legal certainty and consistency with the rule of law, risk disproportionately limiting fundamental rights and creating a legal limbo for displaced individuals. The analysis demonstrates that these challenges are exacerbated by the lack of effective international responsibility-sharing mechanisms and the reliance on temporary protection measures. These measures, which operate independently of the 1951 Refugee Convention, are designed to provide flexibility as a potential solution. Ultimately, by presenting the Turkish practice, the article argues that, while flexibility is essential in responding to emergencies, the unchecked application of flexibility risks threatening the integrity of the international protection regime, prioritising administrative convenience over legal accountability. This study underscores the need for a more balanced approach that aligns flexibility with robust legal safeguards, ensuring both state adaptability and the protection of individuals' rights.

Keywords: temporary protection, flexibility, responsibility sharing, Türkiye, international protection

* Ankara University Faculty of Law, Ankara, Türkiye. Address for correspondence: nevaozturk@gmail.com.

Introduction

Hervé Zwirn (2009) introduces the concept of 'empirical blindness' in the context of physics, describing it as the inability of a theory to perceive certain aspects of empirical reality. As a result of empirical blindness, the structured framework on which the theory relies remains silent on how these overlooked aspects behave. This limitation can prevent a theory from being adequately challenged, as its unexamined details may escape scrutiny, allowing flaws to persist due to a lack of empirical testing. While the interplay between physics and law, as explored by scholars like Tribe (1989) and Wright (1991), is a fascinating field of inquiry, it falls outside the scope of this article. Nevertheless, Zwirn's metaphor of empirical blindness serves as an effective framework for examining this study's objectives and methodology for 2 key reasons.

Firstly, the study seeks to question the flexibility feature often attributed to temporary protection as an asset (Ineli-Ciger 2018; UNHCR 1994, 2014) by examining its manifestations in legal practice. In so doing, it illuminates areas of relative blindness where this flexibility, when used in an excessive manner, might obscure crucial aspects of legal certainty and the international protection regime. Specifically, the article questions the boundaries of flexibility and critically assesses their alignment with the principles of the international protection and human rights framework, such as access to durable solutions and legal safeguards on the limitation of fundamental rights, with findings grounded in practical legal application.

Secondly, the study focuses on the practice of temporary protection in Türkiye – one of the 2 most significant contemporary practices of temporary protection – offering a perspective distinct from the other, which is shaped by the European Union (EU) and applied by EU member states. Although the EU adopted the Temporary Protection Directive (2001/55/EC) (TPD) in 2001, it was not implemented until 2022, following the Russian invasion of Ukraine. The European Union's *sui generis* legal and institutional framework introduces complexities that set it apart from solely state-led models. As a supranational entity, the EU employs a multi-level governance approach that relies on harmonisation between member states rather than merely the discretionary flexibility observed in national frameworks. However, certain EU member states, such as Poland, are argued to apply temporary protection in a manner that closely mirrors Türkiye's approach, demonstrating a similar reliance on state-driven discretion (Kosiel-Pająk and Sadowski 2023; Łysienia 2023). While this paper focuses on Türkiye, Poland's experience illustrates that, even within the EU, national-level adaptations can reflect similar patterns to the flexible and responsive protection mechanisms of non-EU states, as in the case of Türkiye. Nonetheless, Türkiye is used as the primary case study because the article specifically examines the flexibility of temporary protection in relation to its direct compatibility with (inter)national refugee law and (inter)national human rights law. A focus on an EU member state, such as Poland, would require a more layered analysis incorporating the additional dimension of the EU law, which extends beyond the direct scope of this study. Furthermore, limiting the analysis to Türkiye helps to mitigate the risk of empirical blindness – that is, the tendency to overlook the practical implications of flexibility in favour of abstract legal frameworks. By concentrating on a non-EU country operating outside supranational legal constraints, this paper provides a clearer assessment of the objective consequences of discretionary temporary protection policies. Türkiye has implemented temporary protection informally since 2012 and formally since the adoption of the Law on Foreigners and International Protection (LFIP) in 2014, making it a particularly relevant case for examining the operational realities of a state-driven approach to temporary protection.

Temporary protection encompasses various mechanisms but this article adopts the understanding of temporary protection as set out in the United Nations High Commissioner for Refugees (UNHCR)

Guidelines on Temporary Protection and Stay Arrangements. Within this context, temporary protection is viewed as a response to the sudden, large-scale arrivals of forced migrants. According to the guidelines, it is a pragmatic, interim and exceptional tool of international protection that embodies the commitment of states to offer refuge to individuals escaping humanitarian crises with a complementary function (UNHCR 2014). A key reason for relying on the above guidelines is that temporary protection does not have a content that is clearly and directly regulated in detail by a binding international legal instrument. The qualification of temporary protection (or temporary refuge) as a norm of customary international law has been discussed in the legal literature (Goodwin-Gill 2014; Ineli-Ciger 2018; Lambert 2017; Perluss and Hartman 1986) but there is no definitive consensus on the matter within academic discourse.

While international refugee law and human rights law establish binding obligations on *non-refoulement* and the protection of fundamental rights, these principles are not explicitly and universally mandated in the context of temporary protection. In the absence of a standardised and binding international framework, states retain significant discretion in how they implement temporary protection measures (Fitzpatrick 2000). In practice, the creation of an ideal temporary protection regime, one that aligns with international refugee law and international human rights law, depends solely on the effective measures taken by domestic legal systems to establish the necessary legal safeguards (Ineli-Ciger 2016a).

Although the history of practicing temporary protection as a response to mass forced migration flows dates back to earlier times, the emergence of this protection in the European context coincides with the 1990s for the EU member states that are parties to the 1951 Refugee Convention. During the crises in the former Yugoslavia, temporary protection was initially implemented on an *ad hoc* basis to address the urgent need for refuge (Joly 2002; Kjaerum 1994). This experience eventually led to its formalisation at the EU level, culminating in the adoption of the TPD, one of the Union's secondary legal instruments that comprise the EU's Common European Asylum System. The more-intensive focus of the legal scholarship on temporary protection started in this period and continued with Türkiye's application of temporary protection to the large numbers seeking asylum due to the civil war in Syria (Elçin 2016; Ineli-Ciger 2015; Lambert 2017; Öztürk 2017; Yılmaz 2016; Yılmaz Eren 2018), the EU's reluctance to apply temporary protection to the Syrians (Genç and Öner 2019; Ineli-Ciger 2016b; Koo 2018) and then the EU's activation of the TPD for those fleeing the war in Ukraine (Carrera and Ineli-Ciger 2023; Küçük 2023; Trauner and Valodskaite 2022).

The connection between temporary protection and flexibility has been previously addressed in both the legal scholarship and UNHCR sources, though not in depth. These discussions predominantly focus on the theoretical aspects of temporary protection and/or its potential applications (Fitzpatrick 2000; Ineli-Ciger 2015; Koo 2018; UNHCR 2014) rather than on its flexibility in practical implementation. While some analyses draw insights from practices during the Former Yugoslavia War (Joly 2002; Kjaerum 1994; Onken 2005), the *ad hoc* nature of temporary protection at that time, combined with the lack of formal codification within the EU framework, has led to these insights being framed in largely hypothetical terms. More-recent studies following the EU's adoption of the TPD and/or its activation, on the other hand, have shifted the focus towards addressing practical protection challenges (Carrera and Ineli-Ciger 2023; Hierro and Maza 2024; Küçük 2023) rather than directly exploring flexibility in implementation. Similarly, Peerboom (2023) critically examines the evolving concept of 'flexible responsibility' within the EU's asylum and migration policies, focusing on the draft Asylum and Migration Management Regulation that was under negotiation at the time (later adopted in 2024). However, his piece emphasises potential future challenges, not actual implementation. Biorklund

Belliveau and Ferguson's study (2023) on the other hand, can be regarded as a comprehensive analysis of implementation in Türkiye (and Mexico) that aligns with the focus of this article. However, their examination of Türkiye's approach to temporary protection successfully emphasises the impact of temporariness and uncertainty on individuals, interpreting it through the lens of the normalisation of exceptionalism rather than exploring the legal aspects of flexibility *per se*.

This article defines flexibility from 2 dimensions. The first dimension refers to the state's authority to design the rules governing the temporary protection regime, where flexibility denotes the state's ability to create adaptable legal frameworks. The second dimension of flexibility relates to the practical application of these rules, particularly the discretion available to those responsible for their implementation.

In essence, legal rules are intended to be applied to specific, real-world situations, which inherently requires a certain degree of flexibility. This flexibility allows legal rules to be adapted to the unique circumstances of each case, ensuring that the most fair and effective outcomes are achieved (Goldenziel 2014; Helfer 2012; Sobota 1991). However, flexibility is not a limitless virtue – when it lacks clear legal constraints and oversight, it turns into *excessive flexibility*, where adaptability shifts into unpredictability and unaccountability. Excessive flexibility occurs when the legal framework is so open-ended or discretionary that it undermines the predictability, consistency and rights-based nature of legal protections. In such cases, flexibility no longer serves as a tool for fair governance but, rather, as a means to evade legal obligations. If flexibility is not accompanied by clear limitations and oversight, it risks evolving into unfettered discretion, where decisions are made without adequate legal safeguards or accountability. While discretion is an essential feature of legal decision-making, ensuring adaptability in the application of law, excessive or unchecked discretion can undermine legal certainty, enabling arbitrary decision-making. Such arbitrariness poses a risk of shifting outcomes from being fair to being unlawful, thereby undermining the rule of law and principles of legal certainty (Helfer 2012; Super 2011; Wolff 2011).

Within the context of temporary protection, this dual-faceted concept of flexibility must be carefully balanced. While the ability of states to design adaptable legal frameworks is essential for addressing the dynamic nature of mass influxes, the discretion afforded to administrative actors in the implementation phase must be subject to legal safeguards (Durieux 2014; Fitzpatrick 2000). Without these safeguards, flexibility could be misused, leading to unpredictable and inconsistent practices that not only violate human rights but also challenge the integrity of the international protection regime (Peerboom 2023).

Against this backdrop, this article offers a comprehensive critique of the role and functioning of flexibility in the context of temporary protection. By analysing Türkiye's temporary protection regime as a case study, it provides a more nuanced and empirical understanding of how the theoretically identified risks of excessive flexibility are reflected in legal practice. In so doing, the article sheds light on how flexibility affects legal certainty, expands state discretion and shapes the protection of fundamental rights, thereby offering a grounded and practice-informed contribution to current academic debates.

The article is structured as follows. The first section defines the theoretical framework of flexibility in temporary protection through the positioning of temporary protection within the international protection regime. The second section outlines Türkiye's experience with temporary protection and its practical legal implementation before the final section presents a brief discussion of the broader implications of these findings.

Questioning the legitimacy and the extent of flexibility through the positioning of temporary protection within the international protection regime

The relationship between flexibility and temporary protection is perhaps best captured by Fitzpatrick's statement that 'temporary protection is like a magic gift, assuming the desired form of its enthusiasts' policy objectives' (Fitzpatrick 2000: 280). This description not only highlights the inherent flexibility of temporary protection but also reflects the dual dimensions of the relationship between flexibility and temporary protection, which shift depending on the underlying political objectives. These objectives may aim to address the *necessity* of filling a protection gap – often by maintaining the balance between freedom and security – or to actively shift this balance point in accordance with political preferences. In this sense, *flexibility* becomes a powerful instrument, a 'gift' that can either fulfil an urgent need or facilitate a preference-driven policy shift.

Given this dynamic, assessing the legitimacy and limits of flexibility requires an examination of the necessity that justifies its use (Sobota 1991). Therefore, the evaluation in this section focuses on the concept of necessity as it relates to temporary protection and addresses it through 2 key dimensions. First, it explores how temporary protection is positioned in relation to international protection by examining the theoretical and practical justifications for their interrelationship. Second, this analysis informs a discussion of the potential risks regarding excessive flexibility related to findings reached in relation to the first dimension.

From a theoretical legal perspective

An evaluation of scholarly debates and UNHCR sources concerning the theoretical positioning of temporary protection reveals that the most prominent justification for this protection is its role in *filling a protection gap* and its complementary nature (Ineli-Ciger 2016c; Türk 2015; UNHCR 2014). The concept of a protection gap is often linked to claims that the existing international refugee law regime, rooted in the 1951 Refugee Convention, does not explicitly address critical issues such as the protection of mass influxes, the displacement of people caused by armed conflicts or the role of the principle of *non-refoulement* in the context of mass influx (Edwards 2012; Fitzpatrick 1996; Ineli-Ciger 2016c; Türk and Dowd 2014).

Building on this conceptualisation of the protection gap, several fundamental questions remain open to debate: Why does this protection gap exist? What is the role and nature of temporary protection in filling this gap? Central to this debate is the characterisation of the protection gap itself. Is it a normative gap (legal *lacuna*) or does it stem from practical concerns? The way in which this question is answered has significant implications for understanding the scope and limits of flexibility in the application of temporary protection. If the gap is perceived as a normative gap – an absence of applicable legal norms under international refugee law, a legal *lacuna* – the resulting flexibility may be justified as a necessary response to an unregulated area. However, if the gap is caused by limitations in practice rather than a legal *lacuna*, then flexibility in the application of temporary protection is subject to greater scrutiny, as it could be viewed as a means of circumventing existing legal obligations. This distinction underscores the importance of identifying whether temporary protection addresses a true normative deficiency or simply offers a pragmatic response to operational challenges posed by large-scale displacement.

The limitations regarding the applicability of the 1951 Refugee Convention to situations of mass influx or displacement caused by armed conflicts are not solely inherent in the Convention's normative framework but are also a consequence of interpretive methods and tendencies adopted by states and

legal actors. Scholarly perspectives suggest that the emphasis on individual status determination and the narrow definition of a refugee, based on limited grounds of persecution, reflects a particular interpretive approach rooted in textual formalism and strict construction (Durieux and McAdam 2006; Fitzpatrick 1996; Ineli-Ciger 2018). This method prioritises an individualised, case-by-case assessment of refugee status, thereby sidelining the possibility of a broader, group-based approach. Similarly, the applicability of convention rights to individuals in mass-influx situations is ultimately a matter of interpretation. Hathaway and Neve (1997: 158–160) contend that, in light of the 1951 Refugee Convention's declaratory definition of a refugee and the degree of an individual's attachment to the asylum country, even those whose status has not yet been formally recognised would be entitled to certain rights under the convention. Within the framework of temporary protection, such individuals would be regarded as asylum-seekers and, accordingly, would benefit from convention-based rights until their status is officially determined. This approach illustrates that the declarative nature of the refugee definition under the 1951 Refugee Convention allows for inclusive interpretations, enabling a direct link between convention-based rights and individuals seeking asylum in mass-influx situations, even in the absence of a formal recognition of refugee status. Likewise, the argument that the principle of *non-refoulement* does not impose an obligation on states to admit large groups of displaced persons is tied to an interpretive tendency to frame *non-refoulement* narrowly as a duty of non-return rather than as an obligation to grant entry (Durieux and McAdam 2006). As Gammeltoft-Hansen and Hathaway (2015) argue, such restrictive interpretations are often influenced by state interests and the desire to limit obligations under the 1951 Refugee Convention. This interpretive discretion illustrates how the perceived *gaps* in the 1951 Refugee Convention's coverage of mass-influx situations are, to a significant extent, constructed through the interpretive lens applied to the convention, rather than being a reflection of a normative *lacuna* in the legal framework itself. As Koskenniemi (2006: 8) explains, 'meaning is not (as we commonsensically assume it to be) inherent in the expression itself'. Instead, interpretation is an active process of constructing meaning rather than revealing hidden meaning from the text (Tobin 2010: 5). This perspective also underpins the understanding of human-rights treaties, including the 1951 Refugee Convention, as *living instruments* – legal texts whose application evolves through dynamic and context-sensitive interpretation (Ineli-Ciger 2018).

For states which are party to the 1951 Refugee Convention, the existence of a normative gap requires more than mere uncertainty (Koskenniemi 2016: 372, Lauterpacht 2016[1958]: 441; Siorat 1958) regarding the applicability of the convention's provisions to specific situations. A true normative gap exists only where there is a complete absence of an applicable legal norm. As Hernández (2014: 241–252) explains, as long as ambiguity can be resolved through the process of interpretation, it cannot be classified as a *lacuna* signalling the absence of a legal norm. In this context, the perceived gap in the relationship between the 1951 Refugee Convention and the protection of mass influxes through temporary protection, which the UNHCR has described as 'unclear' (2001: 3), does not arise from a normative deficiency in the convention itself. Instead, it stems from an implementation gap created by interpretive ambiguity. The absence of explicit provisions on mass-influx protection does not necessarily signify a lack of legal norms; rather, it reflects the challenge of operationalising the 1951 Refugee Convention's principles in response to large-scale, complex displacement scenarios (Durieux and McAdam 2006).

From a practical perspective

The fact that the need for temporary protection does not stem from a normative gap but from a practical gap calls into question what this practical need is all about. Essentially, this practical gap derives from the absence of a fair and effective system for sharing the responsibility for international protection (Durieux 2014). While the 1951 Refugee Convention establishes a comprehensive legal framework for refugee protection, it does not impose binding obligations on states to equitably distribute the responsibility for protection. The convention's preamble acknowledges that 'the granting of asylum may impose an undue burden on some countries' and emphasises that effective protection requires 'international cooperation'. However, beyond this recognition, the convention fails to specify how this cooperation should be implemented (Hathaway and Neve 1997), thereby leaving a crucial gap in practice (Türk and Garlick 2016). Fitzpatrick (1996) argues that the lack of enforceable obligations for responsibility-sharing reduces the 1951 Refugee Convention's capacity to function as a comprehensive framework for responding to contemporary refugee crises.

This shortcoming becomes especially pronounced in situations of mass influx, where the need for large-scale, immediate protection exposes the limitations of the 1951 Refugee Convention's individualised status determination model. In practice, states are often reluctant to bear the weight of protection obligations alone, especially in the absence of international support or the prospect of early return for displaced persons. As Field (2010) and Ineli-Ciger (2016c) emphasise, the absence of a system for fair responsibility-sharing leaves host states vulnerable to disproportionately large burdens. Without mechanisms to distribute responsibilities among states, host countries face administrative, financial and political pressures.

In this case, the main question to be asked in terms of the necessity of temporary protection and its position in the international protection regime should be the following: How is temporary protection envisaged to address this concern about responsibility-sharing? In its simplest form, this question can be answered through 2 alternatives. The first alternative is that temporary protection can alleviate this concern by having a positive effect on the sharing of responsibility for international protection. The second is that it can reduce this concern by creating a wide area of flexibility, allowing states to shape the obligations that may arise from elements of the international protection regime – such as rights, guarantees and access to durable solutions, in line with their own political preferences. This approach was evident in Europe during the 1990s, where states introduced *ad hoc* temporary protection mechanisms to manage the influx of displaced persons from the Yugoslav Wars (Roxström and Gibney 2003). As Kjaerum (1994) explains, this shift reflected a preference for flexibility and efficiency over strict compliance with the individualised status-determination procedures of the 1951 Refugee Convention. An examination of the UNHCR (2014) guidelines also suggests that this approach has been adopted in promotion of the temporary protection as a pragmatic 'solution'.

The UNHCR guidelines build on international consultations held, *inter alia*, at 2 Round Tables on Temporary Protection in 2012 and 2013 – which aimed to define the scope and minimum standards of temporary protection – and an Expert Meeting on International Cooperation for Burden-Sharing and Responsibility-Sharing in 2011. The 2011 Consultation emphasised that 'international cooperation' is a principle underlying international law but confirmed that the sources containing this principle do not specify how international cooperation should be implemented (UNHCR 2011). As a matter of fact, this background is summarised in the guidelines, which emphasise that responsibility-sharing is essential for the effectiveness of temporary protection. However, what remains unclear is how temporary protection, as structured within the guidelines, serves as a concrete mechanism to alleviate the

responsibility-sharing problem. While the guidelines stress the necessity for international cooperation, they do not explicitly articulate how temporary protection itself operates as a tool to facilitate or enhance responsibility-sharing beyond a general recognition of its importance. Therefore, it is understood that the temporary protection framework outlined in the guidelines does not promise a function in eliminating the issues related to international responsibility-sharing, which constitute the primary cause of the practical gap that 'necessitates' temporary protection.

On the other hand, the guidelines emphasise *flexibility*, *pragmatism* and *context-specific interventions* as key components of temporary protection (UNHCR 2014). Thus, at its core, the temporary protection regime structured in the guidelines seems to focus on the second alternative mentioned above, i.e., mitigating the problems arising from the lack of international protection responsibility by giving states a wide range of manœuvrability. This approach, however, calls into question the position of the limits of this leeway for states *vis-à-vis* the binding framework of international-refugee and human-rights law. The guidelines appear to be quite *flexible* in favour of states in this regard. The guidelines underline that temporary protection should be 'without prejudice' to the obligations under the 1951 Refugee Convention, the 1967 Protocol and human-rights treaties. However, this safeguard is not operationalised in a concrete manner. For instance, while the guidelines identify minimum standards for the treatment of persons under temporary protection, they do not firmly establish that these standards are legally binding under refugee or human-rights law. Instead, the guidelines frame the minimum standards as *prescribed* recommendations, allowing states to interpret and apply them according to their capacity and context by referring to the UNHCR Executive Committee Conclusion No. 22, a non-binding instrument, to set out these standards (UNHCR 2014). Additionally, the guidelines frame temporary protection as an emergency-driven mechanism designed to address large-scale displacement caused by humanitarian crises where conventional refugee-protection frameworks are inadequate (UNHCR 2014). Emphasising the need for speed, flexibility and immediate implementation, the guidelines highlight temporary protection as a pragmatic tool, an interim solution for crisis management rather than a long-term solution. The guidelines further express the possible challenges that states may face in situations of mass influx as concerns, such as protection costs, security, ensuring orderly border management and the difficulty or impossibility of status determination. These challenges are framed within the broader discourse of emergency-driven responses to mass displacement, where the guidelines emphasise the necessity for flexibility in state responses to large-scale movements (UNHCR 2014). When these concerns are read in conjunction with the emergency and crisis framing, along with the emphasis on flexibility, they may be considered to allow states to justify deviations from established protection and human-rights standards (Roxström and Gibney 2003).

In light of this analysis, certain conclusions can be drawn. First, the necessity for temporary protection arises not from a normative gap in international refugee law but from a practical gap linked to the absence of a fair and enforceable system of responsibility-sharing for international protection. Second, rather than functioning as a mechanism to ensure responsibility-sharing, temporary protection addresses practical concerns by introducing flexibility into international obligations. This flexibility allows states to have a wide area of manœuvrability in shaping their responsibilities related to rights, guarantees and access to durable solutions according to their preferences. Third, the characterisation of temporary protection as an *exceptional* and *emergency* measure positions it as an interim solution designed to provide immediate relief in response to urgent crises. The way in which temporary protection is framed allows states to justify suspending full compliance with the 1951 Refugee Convention by presenting it as an emergency response. Rather than establishing a clear and binding link

between the convention's obligations and temporary protection, the framework leaves this connection to the discretion of individual states, potentially leading to gaps in legal protection.

Finally, by portraying temporary protection as a pragmatic solution, its legitimacy within the international protection regime is justified on functional grounds rather than based on legal norms.

The risks regarding (excessive) flexibility

As highlighted in the previous subsection, the defining characteristic of temporary protection as a solution is its flexibility. In theory, when applied in a balanced manner, flexibility mechanisms allow states to uphold their human-rights commitments by adapting their obligations to the specific demands of a given situation rather than outright disregarding them (Goldenziel 2014; Helfer 2012). Indeed, flexibility and discretion should not be regarded as inherently detrimental features of international protection regimes. As Hathaway underscores, because the refugee status is explicitly conditioned on the continuation of a risk for refugees in the state of origin, the refugee protection was never intended to guarantee the permanent integration of refugees into a new political community; rather, it seeks to ensure protection grounded in dignity and rights until conditions in the country of origin permit a safe return (Hathaway 1997: 551, 554–555). Within this understanding, a calibrated degree of discretion may be both necessary and legitimate, particularly in the early stages of a mass influx, allowing states to respond rapidly to humanitarian emergencies. The challenge lies in ensuring that such discretion remains rule-bound and proportionate: just as rigid, onerous rules can lead to violations due to implementation hardship, excessive flexibility can similarly result in deviations from legal obligations, particularly when states face economic, political or social pressures. If flexibility mechanisms are too easily invoked, they may incentivise self-serving decision-making (Helfer 2012), ultimately distorting the fundamental purpose of human-rights protection. Granting states excessive discretion in implementing temporary protection measures has profound implications for the intersection of forced migration and human rights. When political expediency takes precedence over legal commitments, unchecked flexibility risks compromising the coherence and effectiveness of human-rights safeguards, ultimately eroding the integrity of the broader human-rights framework. This concern is particularly acute in contexts where extreme flexibility amplifies state control over migration governance, exposing international migration – especially forced migration – to the risks of discretionary and inconsistent state practices. This vulnerability stems from 3 interconnected factors that make international migration particularly susceptible to state action in highly flexible legal environments. These factors are equally relevant to forced migration and even more pronounced for individuals in need of international protection.

First and foremost, the management of migration is intricately linked to economic, political and social determinants, which shape the scope of state action within its sovereign jurisdiction. In this context, a state's sovereign jurisdiction over its territory can sometimes be used as a scythe to curtail the rights of non-citizens, especially in cases of forced or irregular migration. Costello uses the term 'statist assumption' to connote that states have a sovereign right to exclude aliens without justification. She rightfully indicates that although the 'statist assumption' seems out of place in an age of human rights, it remains stubbornly ingrained in the context of migration (Costello 2016: 10). Indeed, the wide margin of appreciation regarding migration afforded by the European Court of Human Rights (ECtHR) could clearly reflect this situation. The term 'margin of appreciation' refers to the leeway that the Strasbourg organs are willing to grant national authorities in fulfilling their obligations under the European Convention on Human Rights (ECHR) (Greer 2010: 2). A review of the ECtHR case law shows that states

have a wide margin of appreciation in the area of migration control. While the ECHR does not recognise migration control as a legitimate aim *per se*, the ECtHR has consistently interpreted it as falling within the aims enumerated in paragraph 2 of Article 8, that is, the grounds on which a state may lawfully limit the right to respect for private and family life, most notably the protection of public order and the economic well-being of the country[1] and has applied similar reasoning under other provisions. In *Abdulaziz, Cabales and Balkandali v. United Kingdom*[2] and *Moustaquim v. Belgium*,[3] the court affirmed that decisions concerning the entry, residence and expulsion of non-nationals fall primarily within states' sovereign competence, subject only to ECHR safeguards. In subsequent expulsion and border-control cases, such as *Saadi v. Italy*,[4] *Hirsi Jamaa and Others v. Italy*[5] and *N.D. and N.T. v. Spain*,[6] the court acknowledged states' legitimate interest in maintaining the integrity of their migration systems, while emphasising that such control must be exercised compatibly with absolute rights such as the prohibition of torture or degrading treatment (ECHR, Art 3). Under the right to liberty and security (ECHR, Art. 5), the court has repeatedly held that the necessity or proportionality of immigration detention need not be examined in the same manner as for criminal detention,[7] thereby granting states broader latitude in depriving migrants of liberty for purposes of removal or entry control. Likewise, the court has consistently found that deportation and removal proceedings do not engage with the right to fair trial (ECHR, Art. 6) on the grounds that such measures concern the entry, stay and expulsion of aliens and are therefore matters of immigration control rather than the determination of civil rights or criminal charges.[8] Taken together, these strands of jurisprudence confirm that migration control, though not a stand-alone legitimate aim, has come to represent a domain of broad state discretion, reflecting both the absence of European consensus and the court's deference to national authorities in matters closely tied to sovereignty and public policy.

Secondly, a reason that makes migration vulnerable to excessive flexibility is that it is open to instrumentalisation in close connection with domestic or international political dynamics (Castles, de Haas and Miller 2014; Galloway 2021). Hence, it can also fall within – or at least be related to – the scope of social, economic or security-related policies, which may constitute legitimised reasons for the state's freedom of action (Altunbaş and Memişoğlu 2024; Garcés 2022; Guild 2009).

Thirdly, the lack of international cooperation is another reason that makes forced migration, in particular, vulnerable to overly flexible state action. At this point, it is possible to characterise international cooperation in terms of both monitoring the implementation of human-rights law and the reaction of the international community to violations, as well as its role in sharing the responsibility to protect. It is argued that, unless there are special circumstances leading to human-rights cooperation, states that are not inclined to protect human rights for domestic political reasons may have a tendency to not fulfil their human-rights obligations (Goldsmith and Posner 2005: 115).

Bearing in mind these vulnerabilities of (forced) migration, when the position of temporary protection, as shown earlier, is considered, it is inevitable that the risks arising from excessive flexibility become evident. As a matter of fact, the emergency and interim nature of temporary protection carries the risk of placing the protected population in an 'exceptional' position, especially due to security concerns. Designating a subject as a 'security' issue, on the other hand, can lead to its prioritisation on the political agenda (Altunbaş and Memişoğlu 2024: 36; Buzan, Waever and de Wilde 1998: 21–26). The perception and extent of the threat are constructed through discourse, engendering a sense of emergency that justifies actions aimed at addressing the perceived threat (Buzan, Waever and de Wilde 1998: 21–26).

Evaluating temporary protection in a manner detached from 1951 Refugee Convention obligations, emphasising its *flexibility* as an advantage precisely by drawing attention to the ambiguity of its

relationship with the convention, may risk arbitrary state actions in practice. It can be argued that at the core of this risk lies the perception of protection as a preference or favour rather than being based on the binding obligations of international refugee law. Indeed, the fact that the admission of a mass influx is *disconnected from the 1951 Refugee Convention* reinforces the impression that the mass is admitted to the country only at discretion (Akram and Rempel 2004: 13–15). Hence, rather than being based on the fulfilment of an obligation, the fundamental rights and freedoms of the 'tolerated' or 'discretionary' community also face the risk of being restricted in a disproportionate and arbitrary fashion.

This situation also risks the status of individuals under temporary protection to be characterised as 'quasi-legality' (Perez 2016)[9] owing to the exceptional and interim nature of such protection. The detachment of temporary protection from the 1951 Refugee Convention may result in individuals under this status not being classified as *applicants* for international protection unless otherwise indicated in the national laws, as states are not obliged to proceed with status determination procedures during the time of temporary protection. The UNHCR suggests imposing a time limit on this form of protection (UNHCR 2014). However, if responsibility cannot be shared effectively, the underlying reasons for urgency persist, leading to uncertainty regarding the status of the population when the time limit expires. Hence, the legal status of the mass may be termed as a state of 'quasi-legality' when the definitive boundaries of the transitory nature of this interim state are ambiguous.

Questioning the extent of flexibility based on the practice of temporary protection: The case of Türkiye

Background

In the early 2000s, Turkish asylum law underwent significant changes as Türkiye aimed to become a full member of the EU. The European Council's Accession Partnership Document in 2001 and its revision in 2003 marked the beginning of a period of 'EU-isation' (İçduygu 2007) in the development of Türkiye's asylum system. This period led to the coming into force of Türkiye's first legal framework directly addressing international protection, the Law on Foreigners and International Protection (LFIP), in April 2014. In the same year, the Temporary Protection Regulation (TPR) was published to clarify the scope and the procedure of temporary protection available for people in mass-influx situations. Since then, temporary protection is provided to the citizens of the Syrian Arab Republic, stateless persons and refugees who have arrived at or crossed Turkish borders coming from the Syrian Arab Republic since 28 April 2011 (provisional art. 1 of the TPR). Due to a later amendment on 7 April 2016 following the EU–Türkiye Statement of 18 March 2016, the TPR was amended to also be applicable to Syrian citizens who irregularly reached Aegean islands from Türkiye after 20 March 2016 but were subsequently readmitted to Türkiye. According to the latest statistics of the Presidency of Migration Management (PMM 2024), the number of temporarily protected persons under temporary protection in Türkiye is 2,920,119.

Furthermore, Türkiye is a party to the 1951 Refugee Convention, International Covenant on Civil and Political Rights (ICCPR) and the ECHR. However, Türkiye maintains a geographical limitation on its application of the 1951 Refugee Convention, meaning that it only applies to refugees whose protection claims are derived from events happening in European countries. Despite this limitation, Turkish law on temporary protection, as established under Article 91 of the LFIP, applies without distinction to the country of origin of the displaced population. The TPR, which operationalises the LFIP, also makes no reference to the geographical limitation and the only provision linked to Syria is a *provisional article*

relating to the activation of temporary protection. Importantly, the same regulatory framework would apply if Türkiye were to activate temporary protection for populations fleeing from a European country, such as Ukraine (Öztürk 2022a). This demonstrates that the legal framework of temporary protection in Turkish law is not subject to a geographical limitation, contrary to what was assumed by some scholars at first glance (Durieux 2014: 245; Ineli-Ciger 2016c: 432; Lambert 2017: 726).

Flexibility in rule-making

Article 91, as the single article in the LFIP that addresses temporary protection, recognises this protection in relation to mass influx by stating that

> *temporary protection may be granted to foreigners who have been forced to leave their country, who are unable to return to the country they left, who arrive at or cross borders en masse in order to seek urgent and temporary protection.*

In the same provision, the president is authorised to issue a regulation to manage temporary protection. The TPR, which is the main source governing temporary protection in Turkish law, was put into force based on this authorisation. Therefore, the substantial and procedural matters of this protection are not regulated by an Act of Parliament (law in the strict sense). Instead, these issues are covered within a Regulation (TPR), which is of the nature of an administrative regulatory act, a secondary legal source. According to the relevant article of the LFIP, the matters that are authorised to be regulated by a regulation include: the measures to be taken for the reception and prevention of mass influx; the rights, obligations, stay and exit of persons within the scope of the influx; cooperation and coordination between (inter)national institutions; and the determination of the duties and powers of central and provincial institutions.

In Turkish law, the relationship between laws and regulations is clarified by the Constitution (Const.). Under the Constitution, the President of the Republic, ministries and public legal entities (in general the administration/administrative authorities) may issue regulations to ensure the implementation of laws and presidential decrees concerning their respective fields of activity, provided that they do not contradict with the laws (Arts. 104 and 124, Const.). Hence, it is essential that the authority of the administration to regulate is in accordance with the law (*intra legem*) and that this authority is based on the law (*secundum legem*). The functions of the principle of reliance on law include democracy and legitimisation, ensuring legal certainty and quality of law and effective judicial review, as well as the rule of law and the prevention of arbitrariness (Sever 2021). Sever points out that general authorization rules, in which the administration is completely free to make case-by-case evaluations without any criteria, are considered unacceptable when it comes to legal certainty and the limitation of powers in the rule of law (Sever 2021: 81). In fact, weak norms that do not contain sufficient detail, the tendency towards framework provisions using open-ended concepts or practices such as symbolic law-making, where the administration is given wide powers to determine the content, are factors that increase the possibility of arbitrariness in terms of the principle of the administration's reliance on the law (Sever 2021: 81). The risk posed by such practices is rooted in the extensive flexibility granted to the administration. Moreover, it is important to highlight that the constitution explicitly mandates that fundamental rights and freedoms may only be restricted by statutory law (Arts. 13 and 16 of the Const.). Consequently, any attempt to impose limitations on these rights and freedoms through regulations and or presidential decrees (Const., Art. 104) would amount to a breach of constitutional law.

When the relevant provision of the LFIP on temporary protection (Art. 91) is analysed, it is seen that the administrative agencies are granted an overly broad and flexible power in the field of rule-making and that this power lacks sufficient detail. This situation also raises doubts in terms of the fact that this broad authority may pave the way for regulations that result in the restriction of fundamental rights and freedoms (Elçin 2016: 34; Öztürk 2015: 426; Yılmaz 2016: 136; Yılmaz Eren 2018).

Indeed, the questionable impact of the administrative authorities' broad authority under the TPR can be observed through 2 key dimensions. The first pertains to the extent to which temporary protection aligns with its intended role as an interim, exceptional and complementary form of protection, while the second concerns its implications for access to fundamental rights and freedoms for those under temporary protection.

Firstly, the TPR's approach to temporary protection shows a separation from the international protection system, functioning as an independent framework largely governed by administrative discretion (Öztürk 2015: 426, 427; Yılmaz 2016: 134). The TPR stipulates that international protection applications will not be processed for individuals under temporary protection (Art. 16 TPR). While this restriction may appear logical within a short-term emergency framework, it becomes increasingly problematic in light of the regime's indefinite duration. Unlike the EU's Temporary Protection Directive (TPD), which sets a clearly defined temporal framework – initially valid for 1 year and extendable up to a maximum of 3 (Art. 4 TPD) – Türkiye's temporary protection regime contains no statutory upper limit. Consequently, individuals may remain under 'temporary' protection indefinitely, as in the case of Syrians in Türkiye. This open-ended structure diverges from the TPD's design, which links temporary protection to the principles of temporariness and gradual transition toward durable solutions. The contrast also extends to the scope of rights and procedural guarantees. Under the TPD, beneficiaries retain the right to apply for international protection at any time (Art. 17 TPD), thereby preserving the possibility for those with well-founded claims to obtain international protection statuses. The TPR, in contrast, explicitly suspends the processing of such applications (Art. 16 TPR), effectively closing this channel and reinforcing the regime's exceptional and exclusionary nature. Furthermore, the TPD establishes objective and collectively determined criteria for the termination of temporary protection, which may only end when conditions in the country of origin allow for safe and durable return and, in any case, cannot exceed 3 years (Art. 6 TPD). Under the TPR, however, the decision to terminate temporary protection rests solely with the President of the Republic and is not guided by substantive criteria (Art. 11 TPR). This absence of both temporal and substantive limits transforms an emergency-oriented mechanism into a tool of long-term governance, undermining its foundational logic of exceptionality and temporariness. By contrast, the EU's time-bound and criteria-based framework, despite its imperfections, introduces an essential safeguard against indefinite displacement, ensuring that flexibility operates within predictable and legally constrained boundaries. Türkiye's open-ended model, conversely, risks normalising what was originally conceived as a temporary and extraordinary response, leaving beneficiaries in a sustained state of uncertainty that ultimately erodes the *exceptional and transitional character* of temporary protection itself. This lack of legal certainty raises serious concerns about the regime's effectiveness as a complementary and interim protection mechanism and blurs the expected (Ineli-Ciger 2018: 41) normative clarity between emergency relief and long-term protection (Biorklund Belliveau and Ferguson 2023).

Furthermore, the absence of a secure legal link between temporary protection and the international protection system has significant consequences for individuals under temporary protection, particularly regarding their access to durable solutions. A secure link would involve a legal safeguard that ensures individuals under temporary protection can transition to individual (international)

protection statuses, at least following the expiration of a designated time-limit for temporary protection. Such a mechanism would provide a clear procedural pathway to long-term protection, reducing legal uncertainty and preventing an indefinite reliance on temporary protection measures if the protection need continues after the anticipated time limit. However, under the current Turkish framework, no such safeguard exists, leaving beneficiaries dependent on discretionary state decisions regarding their future status.

By its very nature, temporary protection is designed as an emergency response to provide immediate refuge without establishing permanent residency pathways. While it may grant access to employment and education, these measures are intended to support self-sufficiency during the temporary stay, not to facilitate permanent local integration. Local integration, as a durable solution, involves a legal process leading to permanent residence rights and, potentially, citizenship, an economic process towards sustainable livelihoods and a social process fostering harmonious coexistence with the host community (Crisp 2023). Temporary protection frameworks typically do not encompass these comprehensive processes, thereby not serving as a pathway to durable local integration (Bratanova van Harten 2003; Crisp 2023). Since temporary protection in Türkiye does not provide clear pathways to individual protection statuses that would allow for local integration or resettlement, voluntary return is the only viable, durable solution left (Ihlamur-Öner 2022). Hence, the prolonged period of temporary protection raises broader concerns about the role of temporary protection in situations of protracted displacement, keeping displaced persons in legal limbo, with their rights and status subject to administrative discretion (Gökalp Aras and Şahin Mencütek 2021; Öztürk 2017: 254; Yılmaz Eren 2019).

Secondly, the TPR provides excessive flexibility for the access to and the limitation of fundamental rights. One of the most striking manifestations of this is the broad permission granted to the administrative authorities to impose detention measures. The TPR (Art. 8) authorises the detention of persons who are excluded from temporary protection without requiring a formal administrative detention decision. This provision fails to establish clear rules on the duration, conditions or review mechanisms for such detention, nor does it provide access to appeal mechanisms. The absence of procedural safeguards violates key principles enshrined in international human-rights law, particularly the right to liberty and security under Article 5 of the ECHR and relevant standards secured under the Turkish Constitution (Arts. 13, 16, 19) (Öztürk and Öztürk 2023).

A similarly problematic provision is found in Article 35 of the TPR, which authorises administrative authorities to impose partial or total restrictions on the enjoyment of rights – except for education and emergency health services – on individuals under temporary protection who fail to fulfil their obligations despite receiving an official warning. Under the TPR (Art. 20), temporarily protected individuals are required to comply with various legal and administrative duties, including residing in designated areas, providing updated information on their employment, income and family status and adhering to reporting obligations set by the authorities. If they fail to fulfil these obligations within the required timeframe, they are first formally warned by the relevant administrative units and subjected to judicial or administrative proceedings. If the non-compliance persists, pursuant to Article 35 of the TPR, authorities may restrict their access to certain rights, including the revocation of their right to remain outside temporary accommodation centres, either temporarily or indefinitely. The problem with this provision is that it lacks the legal safeguards typically required for such restrictive measures – namely, proportionality, necessity and legal certainty. Additionally, it contravenes the constitutional requirement that such restrictions be established by statutory law rather than by a regulation (Öztürk 2017: 253; Yılmaz 2016: 136). Moreover, the scope of the administration's discretion under this article

is so broad that it raises doubts about potential infringements on the essence of fundamental rights, further reinforcing its incompatibility with constitutional principles.

Another critical issue is the lack of protection against deportation for persons under temporary protection. Article 32 of the 1951 Refugee Convention guarantees that refugees cannot be expelled except on grounds of public order or national security. Importantly, this protection applies not only to formally recognised refugees but also to asylum-seekers who are legally present in the country, even if their status has not yet been formally determined. This guarantee is further codified in Article 54(2) of the LFIP, which extends this protection to individuals seeking international protection. However, the same safeguard is notably absent in the TPR. Instead, persons under temporary protection may be issued deportation decisions,[10] provided that *non-refoulement* is effective, on any of the broader grounds for deportation under Turkish domestic law.

Flexibility in the application of rules

As demonstrated in the preceding sub-sections, Türkiye's regulatory framework for temporary protection is structured in a manner that leaves the limits of flexibility somewhat ambiguous and undefined. This ambiguity is particularly evident in a legal climate where the state's capacity is limited (Öztürk 2022b). In such a context, granting broad discretionary authority to the administration is often seen as a pragmatic management strategy, as it enhances the administration's ability to respond swiftly and effectively to emerging challenges. However, this broad flexibility also introduces significant legal risks.

One key factor influencing the implementation of flexibility is the international community's reluctance to share responsibility. A notable example of this is the EU's approach to the mass influx of refugees from Syria. While the EU's contribution to financial responsibility-sharing is viewed as a positive development, the EU–Türkiye Statement of 18 March 2016 highlights that this support is contingent on containment measures (Öztürk 2020; Ulusoy, Yigit-Aksu, Ineli-Ciger and Ovacik 2025). This suggests that the financial contribution serves more as a means of externalising responsibility rather than genuinely sharing it (Roman 2022). Furthermore, the lack of a balanced approach to physical responsibility-sharing reinforces this perspective. This situation has prompted the Turkish administration to prioritise control and management over adherence to refugee protection standards (Öztürk 2022b).

In relation to the lack of effective responsibility-sharing, domestic political factors may have also played a significant role in shaping how flexibility is exercised. The growing prominence of anti-immigrant political discourse and the corresponding public demand (Balta, Elçi and Sert 2022) for stricter migration controls may have influenced the state's use of its flexible powers. In response to rising public pressure, the administration has tended to rely on these broad discretionary powers as a means to control the presence and movement of displaced persons. This dynamic is likely to contribute to the institutionalisation of excessive flexibility in administrative practices, often resulting in measures that are more focused on migration control than on refugee protection.

One of the most notable examples of this is the restriction on the freedom of residence and movement of individuals under temporary protection. Following the implementation of the temporary-protection regime, a non-public circular was issued requiring persons under temporary protection to obtain a *travel permit* in order to leave their designated province of residence. Although this requirement has no explicit legal basis in either the TPR or the LFIP, it has been enforced in practice as a binding rule. This additional requirement lacks legal certainty and predictability, as it was introduced without a formal

regulatory basis. Failure to obtain the travel permit may result in restrictions on the access to rights for those under temporary protection (TPR, Art. 35). Considering that temporary protection does not have an upper time limit, this measure poses a risk of disproportionately restricting an individual's freedom of movement and residence for an indefinite period. Prolonged restrictions of this nature, without clear legal safeguards or review mechanisms, contradict established principles of necessity, proportionality and legal certainty under international human-rights law. In particular, the UN Human Rights Committee's General Comment No. 27 on Article 12 of the ICCPR underscores that any restriction on freedom of movement must be lawful, necessary to achieve a legitimate aim and proportionate to that aim (paras 14, 15 and 16). It further emphasises that such measures must be the least-intrusive option available and must not impair the essence of the right itself (para. 13). Article 12 of the ICCPR explicitly protects the right to freedom of movement for individuals who are lawfully present in a country, including foreigners with regularised legal status. Given that temporarily protected individuals reside in the country with state-issued permission based on their *legally* recognised temporary protection status, they fall within the scope of this provision and are entitled to the safeguards established therein. These principles are equally relevant in Turkish constitutional law (Const. Arts 13 and 16), reinforcing the need for safeguards against arbitrary restrictions on movement for individuals who are legally present in the country. However, the inconsistent application of such safeguards and the lack of clear legal avenues for challenging restrictions raise concerns as to whether the legal status of temporarily protected persons may, in practice, amount to a form of *quasi-legality*, wherein rights are formally acknowledged but not meaningfully guaranteed.

Another example of the consequences of excessive flexibility relates to the practice of voluntary return. In the absence of an effective system of physical responsibility-sharing, voluntary return is effectively promoted as the only feasible durable solution for those under temporary protection. However, the concept of voluntary return must be critically assessed within this context. When the return is framed not as a durable solution but as a means to reduce administrative burdens and manage migration more efficiently, the voluntariness of such returns becomes questionable. In this context, the concept of voluntary return risks being distorted, shifting from a durable solution based on free will to a mechanism that serves as a tool for migration control. Evidence from judicial decisions reveals that some return processes have been initiated or carried out without providing the affected individuals with the necessary legal safeguards.[11] Such practices raise significant concerns about the risk of violating the principle of *non-refoulement*, which prohibits returning individuals to situations where they may face torture and inhuman or degrading treatment.

These examples illustrate how the already flexible structure of temporary protection becomes even more expansive in practice, especially in a context where physical responsibility-sharing is ineffective. While the regulations governing temporary protection are already marked by broad discretion, the way in which they are implemented in practice demonstrates a significant intensification of flexibility. This highlights how flexibility, initially justified as a mechanism to address emergency situations, has been operationalised to prioritise administrative control over legal accountability. As such, the risks posed by excessive flexibility extend beyond the regulations themselves and are magnified during their implementation.

The overall effects of excessive flexibility within the broader international protection regime

The legal consequences of an overly flexible application of temporary protection can extend beyond the domestic framework of the implementing state, potentially impacting on the international protection regime as a whole by creating a precedent for lower protection standards.

Firstly, highlighting the flexibility of temporary protection as a solution risks diverting attention from the core issue driving its practical necessity: the absence of meaningful responsibility-sharing for international protection. The EU–Türkiye case exemplifies how states continue to evade equitable and effective responsibility-sharing, underscoring a persistent unwillingness to address this fundamental challenge. Consequently, the extent to which temporary protection can genuinely serve as a viable solution becomes increasingly questionable. In this scenario, it becomes inevitable that the flexibility associated with temporary protection – which is intended to offer adaptability as an emergency and interim response – is expanded beyond its legitimate scope. This development raises a fundamental question about the role of temporary protection: Is it truly an *interim solution* for individuals needing protection? This question takes on particular significance when viewed from the perspective of the durable solutions that underpin the international protection regime. International protection is traditionally oriented towards achieving durable solutions such as resettlement, local integration or voluntary return. However, in practice, the overly flexible implementation of temporary protection which hinders the access to international protection statuses, risks narrowing the range of possible solutions, often leaving voluntary return as the only available option, as seen in the Turkish case. In such a context, voluntary returns may occur prematurely, driven not by the free will of the individuals *per se* but by the pressure to relieve administrative burdens or to demonstrate political control over migration.

Another example that highlights the risks of excessive flexibility is the interplay between Türkiye's temporary-protection regime and the concept of a safe third country. Türkiye's system, which does not permit transitions to individual international protection statuses, has been included by some EU member states, such as Greece, on their lists of safe third countries for Syrian asylum-seekers (AIDA 2023: 157, 158; Pirello 2024; Tsiliou 2018). While the Court of Justice of the European Union (CJEU) has not yet ruled definitively on whether Türkiye meets the criteria for such designation under the EU law, Türkiye's inclusion into safe-third-country lists for Syrian asylum-seekers carries significant implications (Strik 2019).

Under EU law, a country can only be deemed a safe third country if it provides protection aligned with the 1951 Refugee Convention.[12] However, Türkiye's temporary protection framework falls short of these standards (Poon 2016; Roman, Baird and Radcliffe 2016; Şimşek 2017; Ulusoy 2016), as it limits access to individual protection statuses and lacks essential procedural safeguards (Öztürk 2015). Despite these shortcomings, Greece's decision to designate Türkiye as a safe third country effectively legitimises this excessive flexibility. By accepting Türkiye's temporary-protection regime as meeting 1951 Refugee Convention standards, deviations from international legal obligations are normalised and justified. This represents a risky trend for a troubling shift in the approach to protection, where adherence to international law is increasingly compromised in favour of pragmatic considerations.

While the foregoing analysis identifies the dangers of excessive flexibility, it is equally important to recognise that an overly restrictive interpretation of state discretion may produce adverse systemic effects. In an era marked by recurrent and large-scale displacement, states that perceive their capacity for responsive action as unduly constrained may resort to deterrence policies or border closures, thereby undermining the protective aims of the international refugee regime itself. A measured and legally framed flexibility, anchored in transparency, proportionality and accountability, can therefore

operate as a stabilising element, preserving states' willingness to cooperate within the protection system. The sustainability of the international protection framework ultimately depends on striking this delicate balance: flexibility sufficient to ensure functionality yet constrained enough to safeguard rights and legal certainty.

Conclusion

This study examined the interplay between flexibility and temporary protection, analysing both its theoretical underpinnings and its practical implications. The main argument explored is that temporary protection, often presented as an effective response to emergencies caused by mass influxes, relies heavily on the notion of flexibility. To assess this argument, the study first questioned the necessity and function of flexibility as one of the core features of temporary protection. This assessment was grounded in an analysis of the role and status of temporary protection within the international-protection regime, with particular attention to its relationship with the 1951 Refugee Convention.

The study concludes that the often-cited *gap-filling* function of temporary protection does not address a normative gap in international refugee law but, instead, addresses a practical gap. This practical gap primarily arises from the absence of a binding, enforceable system for the fair and effective sharing of responsibility for international protection. In essence, it reflects the difficulty that states face in shouldering the responsibility for protection when dealing with large-scale influxes of displaced persons. Rather than addressing this structural challenge through responsibility-sharing mechanisms, temporary protection offers a pragmatic and interim solution which emphasises flexibility as a way in which to ease the pressures on states. However, this dominant framing reflects a form of *empirical blindness*, as it prioritises flexibility as a virtue without critically assessing its real-world consequences. This approach shifts the focus away from long-term, durable solutions and towards a system that relies on state discretion and administrative control, with implications for accountability and legality. The Turkish case serves as a key empirical test of this assumption, demonstrating how excessive flexibility in the application of temporary protection can create systemic gaps in both domestic law and the international-protection regime.

The crux of the issue is not that states lack guidance on how to implement a temporary-protection regime that is in line with the 1951 Refugee Convention and international human-rights law. Rather, it stems from the fact that states seek to avoid the binding obligations imposed by the 1951 Refugee Convention and related human-rights treaties. The presentation of temporary protection as a *non-convention* mechanism serves to legitimise this avoidance strategy. This is another manifestation of empirical blindness: the assumption that states require greater flexibility to ensure protection when, in reality, this flexibility often functions as a tool for circumventing binding legal commitments. By framing temporary protection as distinct from the 1951 Refugee Convention, states can position it as a more flexible and discretionary tool, allowing them to circumvent the obligations they would otherwise face under international law. This approach is further reinforced by the way in which obligations are framed as mere recommendations, as is the case for the UNHCR guidelines, rather than enforceable legal requirements. Such framing creates a perception that adherence to refugee and human-rights standards in temporary protection is optional rather than mandatory, thereby perpetuating the belief that a temporary-protection regime fully compliant with the 1951 Refugee Convention and human-rights instruments is unrealistic or utopian.

While this study highlights the dangers of excessive flexibility, it also recognises that a complete curtailment of state discretion could inadvertently weaken the international protection system. States

confronted with recurring large-scale displacement may respond to rigid legal frameworks by adopting restrictive or exclusionary measures. A calibrated balance between flexibility and legal accountability is therefore essential to sustain the functionality of the regime and to preserve states' willingness to cooperate within it.

It is important to clarify that this analysis does not rest on a simplistic or naïvely idealistic view that mere recognition of 1951 Refugee Convention-based obligations would instantly resolve the challenges observed in practice. Ensuring that temporary protection is implemented in a lawful and rights-compliant manner requires a comprehensive, multidimensional approach that addresses the broader structural issues and systemic gaps within the refugee-protection regime. This involves tackling existing challenges related to responsibility-sharing, access to rights and accountability mechanisms. However, it is equally evident that promoting temporary protection through its flexible notion only serves to entrench these problems further. If flexibility is framed as a justification for non-compliance, it reinforces the *empirical blindness* that legitimises arbitrary discretionary governance over displaced persons rather than the rule of law.

Notes

1. See for instance, *M.A. v. Denmark* App No 6697/18 (Grand Chamber, ECHR, 9 July 2021), para. 143; *Biao v. Denmark* App No 38590/10 (Grand Chamber, ECHR, 24 May 2016), para. 117; *B.F. and Others v. Switzerland* App No 13258/18 and 3 others (ECHR, 4 July 2023), para. 96.
2. *Abdulaziz, Cabales and Balkandali v. United Kingdom* App No 9214/80 9473/81 9474/81 (ECHR, 28 May 1985), para. 67.
3. *Moustaquim v. Belgium* App No 12313/86 (ECHR, 18 February 1991), para. 43.
4. *Saadi v. Italy* App No 37201/06 (Grand Chamber, ECHR, 28 February 2008), paras. 124, 125.
5. *Hirsi Jamaa and Others v. Italy* App No 27765/09 (Grand Chamber, ECHR, 23 February 2012), para. 179.
6. *N.D. and N.T. v. Spain* App No 8675/15 8697/15 (Grand Chamber, ECHR, 13 February 2020), para. 167.
7. *Saadi v. United Kingdom* App No 13229/03 (Grand Chamber, ECHR, 29 January 2008), 72.
8. *Maaouia v. France* App No 39652/98 (Grand Chamber, ECHR, 05 October 2000), paras 38-40.
9. Perez's work is referred to only for the terminology.
10. In practice, numerous deportation decisions have been issued concerning Syrians, with the majority citing public order as the justification. However, some decisions have been based on other grounds as well. Notably, a significant proportion of these deportation decisions that were subjected to judicial review have ultimately been annulled, highlighting the judiciary's critical role in scrutinising and overturning such measures. The following decisions can be given as examples: İzmir 1. Administrative Court 2020/469 E. 2020/1426 K.; İstanbul 1. Administrative Court 2019/3136 E. 2020/798 K.; Edirne Administrative Court 2022/153 E. 2022/568 K.; İstanbul 1. Administrative Court 2021/1327 E. 2021/2949 K.
11. See, for instance, İstanbul 1. Administrative Court 2019/2674 E. 2020/2194 K.; *Akkad v. Türkiye* App No. 1557/19 (ECHR, 21 June 2022); Abdulkerim Hammud, App. No. 2019/24388 (Constitutional Court, Individual Application), 02 May 2023; *Avad Elhammud*, App. No. 2020/5628 (Constitutional Court, Individual Application), 11 June 2024; *Ali ElHüseyin*, App. No. 2020/5730 (Constitutional Court, Individual Application), 12 June 2024.

12. See Art. 38 of the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (Asylum Procedures Directive).

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ORCID ID

Neva Övünç Öztürk https://orcid.org/0000-0002-8282-5430

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