TALLINN UNIVERSITY OF TECHNOLOGY

Faculty of Social Sciences

Tallinn Law School

Triin Väli

Impact of the Qualification Directive on the Refugee Determination in EU Member States

Master Thesis

Supervisor: Kari Käsper, MA

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I hereby declare that I am the sole author
of this Master Thesis and it has
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university of examination.

Triin Väli
“ ..... “ 2014

The Master Thesis meets the established requirements

Supervisor Kari Käsper
“ ..... “ 2014

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Table of Contents

List of abbreviations

CAT	Convention Against Torture
CEAS	Common European Asylum System
CJEU	Court of Justice of European Union
COI	Country of Origin Information
EASO	European Asylum Support Office
EC	European Commission
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ELENA	European Legal Network on Asylum
EP	European Parliament
ESC	European Social Charter
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
IHL	International Humanitarian Law
OSCE	Organization for Security and Co-operation in Europe
QD	Qualification Directive
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations Higher Commissioner of Refugees

Introduction

The situation in the field of asylum is constantly changing across the world. According to UNHCR, the number of refugees worldwide was more than 1.5 million in the first half of 2013, being the highest since 1999; the number of asylum applications has grown to 456 000 in the first half of 2013.[1]

The increasing number of refugees globally has influenced the situation in EU, bringing the number of asylum applications significantly up. The most common reasons for this are the systematic violence in many parts of the world - for example, the situation in Syrian Arab Republic and Central African Republic. EU has a very important role in providing asylum, for example, Germany was the largest single recipient of new asylum claims in the world during the first half of 2013. Sweden is the fourth one on this ranking list, being strongly affected by Syrians, the largest group of current asylum seekers worldwide.[2] According to Statistics Unit of UNHCR, the number of asylum applications in Europe during 2013 was 386 264 against 300 632 during 2012. This means that nearly 85% of world asylum applications are targeting EU. In addition, the distribution of asylum applicants differs significantly within EU as well. For example, the number of applications submitted to the old Member States (13) is 278 551 and to the new Member States (15) 22 081 applications,[3] respectively.

Although the differences across EU Member States treating the issues of asylum and the difference in the number of asylum applications granted may be unavoidable in near future, attention has been paid to the harmonisation of the respective legislation in Member States by some of the EU institutions. The purpose of the harmonisation process is to avoid randomness in the topics that are crucial to a person in the need of refuge, for example, being entitled to the status of refugee. One of the reasons for creating a Common European Asylum System (CEAS) is to avoid situations in which a person under similar circumstances would be regarded as a refugee in one Member State and not in another.

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1 UNHCR, *UNHCR Mid-Year Trends 2013*, available from: http://www.unhcr.org/cgi-bin/texis/vtx/search%5C?page=&comid=4148094d4&cid=49aea93aba [last accessed 12 May 2014] (2013). New information will be released in June 2014.

2 *Ibid.*

3 UNHCR, *Asylum Levels and Trends in Industrialized Countries 2013, Annex Tables*, available from: http://www.unhcr.org/pages/49c3646c4d6.html [last accessed 12 May 2014]

The regulation of the right for asylum in EU is a combination of Member States' national law, EU law, the European Convention of Human Rights (ECHR), the European Social Charter (ESC) and other international obligations that apply in the Member States. EU cooperation between the Member States in the area of immigration and asylum has gradually developed from a bilateral and multilateral cooperation to a general cooperation at the EU level[4] with CEAS as one of the examples. The first stage of CEAS contained five core legal instruments. Three of those are directives, and the most relevant of those is the Qualification Directive with the objective to define the requirements for getting the status of refugee. Although it is a regional instrument, it reiterates the importance of international obligations in its preamble according to which the Convention Relating to the Status of Refugees (hereinafter referred to as the 1951 Convention)[5] and the Protocol Relating to the Status of Refugees[6] provide a cornerstone of the international legal regime for the protection of refugees.

For Member States this creates a complex situation meaning that they have to implement European law into their legislation, and at the same time ascertain that international obligations are fulfilled. In addition, while implementing EU law, Member States have to follow the provisions of the EU Charter of Fundamental Rights. After the Treaty of Lisbon came into force on 1 December 2009, the Charter became legally binding and is now a primary source for human rights in EU.[7] As it is reiterated with the judgment on joined cases *Digital Rights Ireland and Seitlinger and Others,*[8] the directives have to be in conformity with the Charter.

In the thesis the influence of the harmonisation process on a Member State's legislation from the aspect of the divergence between two main legal instruments (1951 Convention and Qualification Directive) which give a directive for the national legislation in the matter of

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4 O. F. Sidorenko, *The Common European Asylum System. Background, Current State of Affairs, Future Direction*, at page 2 (2007)

5 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, Vol. 189, at page 137, available at: http://www.refworld.org/docid/3be01b964.html [accessed 14 April 2014]

6 UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, Vol. 606, at page 267, available at: http://www.refworld.org/docid/3ae6b3ae4.html [accessed 14 April 2014]

7 D.-S. Sionaidh, *The European Union and the Human Rights after the Treaty of Lisbon*. 11 Human Rights Law Review 645, at page 648 (2011)

8 *Digital Rights Ireland Ltd (C-293/12) v. Minister for Communications, Marine and Natural Resources, Minister for Justice, Equality and Law Reform, Commissioner of the Gards Siochàna, Ireland, The Attorney General and Kärtner Landesregierung (C-594/12), Michael Seitlinger, Christof Tschohl and Others*, *Digital Rights Ireland and Seitlinger and Others*, European Union: Court of Justice of the European Union, 8 April 2014 (2014)

asylum application will be analysed. Although the number of asylum applications in some of the EU Member States is much lower than the overall mean in EU, it is crucial to offer rightful protection on similar bases to every asylum seeker regardless of their total number in a Member State. In addition, all Member States should be prepared to handle an abruptly increasing number of asylum applications in the future as acts of violence in the world are continuously emerging and every Member State should be ready to share international responsibility in the EU.

Offering protection begins from defining who is entitled to the status of refugee. The Qualification Directive is referred to as the cornerstone of the harmonising process's legal instruments. Dean[9] has alleged that the current system is like a lottery – being entitled to the refugee status in one Member State does not ensure that in another. This, in turn, creates a situation where asylum seekers are forced to travel from country to country until they find one where they obtain the refugee status that they are entitled to.[10] In order to solve this problem, the Qualification Directive has been created.

The relevance of timing of the study is related to two aspects: firstly, the first package as a minimum standards were approved in 2004, which gives enough time for the necessary analysis about their effect; secondly, the Member States were supposed to adopt revised Qualification Directive into national legislation by 21 December 2013, which gives a new impulse to the development and shows if the shortcomings of previous legislative instruments have been effectively fixed. The research is based on analysis of peer-review papers, textbooks and legislation.

The hypothesis of this thesis is that provisions concerning the refugee status definition and determination in the Qualification Directive render it possible to violate the respective international obligations given by the Convention Relating to the Status of Refugees, *inter alia* the principle of *non-refoulement*. The principle of *non-refoulement* is the cornerstone of the international asylum and refugee law, which increases the relevance of analysing this subject.

As legal instruments analysed in this thesis are chosen from the perspective of the refugee status, the Qualification Directive will be in the focus, accompanied by the 1951 Convention and the

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9 M. Dean, *Bridging the Gap: Humanitarian Protection and the Convergence of Laws in Europe*. 20 European Law Journal 34, at page 51 (2014)

10 *Ibid.*

Charter of Fundamental Rights of the European Union and other pieces of legislation relevant in this matter. The importance of the 1951 Convention in this thesis is not only derived from the preamble of the Qualification Directive but obligation to act accordingly is clearly stated in Article 18 of the Charter. Therefore, the importance of the 1951 Convention may not be underestimated.

In Chapter One, an overview of different aspects and the scope of the 1951 Convention will be given. As the refugee definition originates from the 1951 Convention and is referred to in the most important legal instruments as the bases for further interpretations, it is relevant to discuss the scope and content of this definition. In addition, the core legal instruments concerning European asylum system where the Qualification Directive is placed in, are analysed. The definition and determination of the refugee status and the respective obligations on the international and European level provide the necessary ground for discussing the importance of convergence of Member States' obligations in Chapter Two. Although the main focus in this thesis is on the refugee status, determination and corresponding obligations; the subject of subsidiary protection is also briefly discussed in this chapter. In Chapter Three, the implementation of the Qualification Directive is taken under closer look with discussion about different approaches on the monitoring.

1 Common Interpretation of Refugee Qualification in EU Member States

The state in the field of asylum is differing widely within the European Union (EU) causing situation, where the geographic location determines the success for gaining refugee status.[11] The situation of asylum in EU is influenced by several factors. Not only violent conflicts that occur in different areas in the world; for example it is also affected by the fact that encouragement and support in providing protection and assistance to refugees in countries outside the industrialised world is insufficient, thus the numbers of asylum seekers in countries with better economic situation remains high.[12] The efficiency of respective system for the region is crucial to guarantee the right to asylum to the high number of asylum seekers.

In order to have a fair asylum system it is relevant that the geographic location of an asylum seeker has no decisive role in whether the person in need of protection gets help. The first and most important step in the process of offering protection to the asylum seekers is defining who precisely are entitled to the status of refugee. It is important to have not only homogenised legal acts but common interpretations of those as well. In case of asylum procedures, interpretation of the refugee definition is the key to the whole process deciding whether or not the benefits of the refugee are provided to the asylum seeker.

One way of explaining the differences Member States have in their approaches when developing the asylum legislation, is based on the division of interests. If the motivation is based on human-centred interests, the definition of refugee is broad rather than narrow. If the motivation derives from state-centred interests, the definition of refugee is narrow, possibly leaving persons in need of protection without help.[13] Of course, it would be more effective if the Member States tried to find a balance between the approaches. A purely state-centred approach is too restrictive, taking away future prospects from many persons in real need of protection; the human-centred approach seems to be more fair at the first glance, but may cause doubts whether the state is able to offer sufficient protection to all persons it has given asylum to.

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11 M. Dean, *Bridging the Gap: Humanitarian Protection and the Convergence of Laws in Europe*. 20 European Law Journal 34, at page 47 (2014)

12 UNHCR. *The State of the World's Refugees 2000: Fifty Years of Humanitarian Years,* at page 183 (2000)

13 W. T. Worster, *The Evolving Definition of the Refugee in Contemporary International Law*. 30 Berkeley Journal of International Law 101, at page 101 (2012)

Allowing a person to enter country's territory for the purpose of protection is not equivalent to granting asylum, but allegedly it is often understood so in the practice of the nations, not sensing the whole picture in the 'context and meaning of international law'.[14] The admission to a country does not solely guarantee that a person in need of protection has been granted the status he or she is entitled to. The incapability of providing protection at a proper level may be hindered by simple things as the country may not be able to provide proper conditions for living, the decision-making institutions are overburdened, making the process long (lengthy procedures mean a long time of uncertainty for applicants regarding their legal position[15]) and there is a high possibility that the status granted to asylum seekers may end up being lower and more limited than it should.

As McAdam[16] points out, the increasing number of persons who have gained help through 'non-Convention protection' does not necessarily indicate a reduction in the number of applicants entitled to the refugee protection, meaning it may happen that although there are persons entitled to refugee status, they have been taken under subsidiary protection. The high number of individuals admitted into a country does not necessarily mean that all these persons have been offered protection on a satisfactory level.[17] In addition, there are wide differences between the practices of Member States in decisions about which status to grant to the persons in similar situations. Dean has critically called the situation of asylum seekers 'status lottery' expressing thus unreliability of guarantees.[18] According to McAdam, it is 'well documented' that the refugee definition in the 1951 Convention is being interpreted 'extremely narrowly' by some countries which offer subsidiary protection to the majority of applicants for international protection. The reason might be connected to subsidiary protection being regulated outside the international law regime, thus leaving greater discretion to States.[19]

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14 G. S. Goodwin-Gill, *The Dynamic of International Refugee Law*. 25 International Journal of Refugee Law 651, at page 655 (2014)

15 M. Reneman, *Speedy Asylum Procedures in the EU: Striking a Fair Balance Betweem the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy*. 25 International Journal of Refugee Law 717, at page 718 (2005).

16 J. McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 17 International Journal of Refugee Law 461, at page 464 (2005)

17 *Ibid.*

18 M. Dean, *Bridging the Gap: Humanitarian Protection and the Convergence of Laws in Europe*. 20 European Law Journal 34, at page 47 (2014)

19 J. McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 17 International Journal of Refugee Law 461, at page 464 (2005)

The broadened interpretation of the definition of refugee is justified if it entails broader application of the 1951 Convention refugee status instead of broadening the 1951 Convention interpretation to escape from granting refugee status. Although the latter may result in offering protection to more people, the level of granted status is lower. The broadening has to be from qualitative perspective as the growth of quantity does not indicate higher efficiency in implication of the law.

Differences in approaches between Member States depend not only on the preferences of the Member State but on their capability to offer help, which is undoubtedly different. Nevertheless, this does not free any country from responsibility in the situation where a person who is legally entitled to protection does not have access to it. According to the United Nations High Commissioner for Refugees, the practises of refugee protection among different Member States diverge vastly regarding the recognition rates of asylum seekers with similar profile.[20] In order to have harmonised asylum legislation, EU has developed CEAS and adopted the Qualification Directive, which is strongly dependant on the 1951 Convention.

The importance of the 1951 Convention is emphasised not only in the Qualification Directive but in other legal acts as well. Namely, Article 78(1) of the Treaty on the Functioning of the European Union (TFEU) stipulates that a common policy on asylum, subsidiary protection and temporary protection, providing uniform status must be developed and that in accordance with the 1951 Convention, continuing with laying this obligation to the European Parliament and the Council.[21] In addition, Article 18 of the Charter of Fundamental Rights of the EU provides that the right to asylum shall be guaranteed with due respect for the rules of the 1951 Convention and its 1967 Protocol and in accordance with the Treaty Establishing the European Community. Therefore, interpretation of refugee definition in general is inseparable from the 1951 Convention and needs to be handled in the light of their interaction. Meanwhile, it has to be borne in mind that the 1951 Convention does not give all the answers itself, the meaning of

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[20] UNHCR, *UNHCR Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted*, at page 2 (2009)

[21] EU, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, Art. 78. Available at: http://www.refworld.org/docid/4b17a07e2.html [accessed 15 April 2014]

human rights principles depend on the values of the persons and institutions involved and on the particular case.[22]

1.1 The 1951 Convention and 1967 Protocol

1.1.1 History of refugee definition

The 1951 Convention was the first human rights treaty adopted by the UN after the Second World War. Courts interpreting the 1951 Convention have increasingly admitted that "particular assistance is likely to be gleaned" from the drafting history. On the other hand, refugee law principles should be seen in connection to the broader system of general human rights obligations.[23] As treaties are 'living instruments', taking historical intent into consideration should be in balance with more contemporary approach. It needs to be taken into account that the need of interpretation derives first of all from the current situation where the results of analyses are going to be implemented.[24]

The purpose of the 1951 Convention was not to provide for specific national or international procedures for recognising if a person is in fact a refugee. A person is not made a refugee by recognising her/his refugee status but the latter declares her/him to be as one – a person does not become a refugee because of recognition but is recognised as he or she is a refugee. Determining the status of refugee makes it possible to establish the scope of all rights and obligations of the person.[25] Originally there was a time limit in the 1951 Convention applying the term only to those who "acquired such status as a result of events occurring before 1 January 1951."[26] The time limit was suggested by Ad Hoc Committee on Statelessness and Related problems describing the situation as if without the specification governments were about to sign a blank cheque and to undertake obligations related to refugees in future. Problematic was the fact that in

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22 J. Pirjola, *Shadows in Paradise – Exploring Non-Refoulement as an Open Concept*. 19 International Journal Refugee Law 639, at page 644 (2007)

23 J. C Hathaway, *The Rights of Refugees Under International Law*, at page 48 (2005)

24 *Ibid,* at page 62

25 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.refworld.org/docid/4f33c8d92.html [accessed 6 April 2014], para 28

26 Art. 1B of the 1951 Convention

such case they were also binding themselves in respect of all categories of refugees with unknown origin and number.[27] From different possible solutions time limit was applied.

According to the 1951 Convention's Article 1B(1), two different possibilities to define refugee are provided in Article 1(A) with the words "events occurring before 1 January 1951" and thus giving opportunity for a country to choose its obligations regarding the refugees. The first possibility is to limit geographically the events causing the asylum need by offering protection only to those who are refugees after events happening in Europe. The second possibility gives wider definition by "within Europe or elsewhere" and thereby looses the spatial restriction from the original definition. The Protocol Relating to the Status of the Refugees expressly abolished these limitations and offered a new and broader definition in Article 1, General Provision. However, only four of the countries remained bound by the alternative of Para 1(a) – Congo, Madagascar, Monaco and Turkey, considering as eligible only refugees due to events in Europe. Nevertheless, the opportunity for a State Party to maintain the existing declarations about geographical restrictions in the 1951 Convention is written also to the 1967 Protocol.

Relying on the fact that new refugee situations have arisen since the Convention was adopted and considering that these refugees may not fall within the scope of the Convention[28], Article 1 of the Protocol reads: "For the purpose of the present Protocol, the term 'refugee' shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words " As a result of events occurring before 1 January 1951 and ..." and the words "... as a result of such events ", in article 1(A)(2) were omitted." With the changed wording, the original definition of refugee in the 1951 Convention was expanded.

From previous analysis of the history of the refugee definition it can be concluded that although the definition has changed in time, the interpretation has been widened during process and changes have not been in restrictive from the perspective of refugee.

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27 UN Ad Hoc Committee on Refugees and Stateless Persons, *Report of the Ad Hoc Committee on Refugees and Stateless Persons,* available at:
http:// http://www.unhcr.org/print/3ae68c280.html [accessed 29 March 2014]

28 UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, at page 267, available at:
http://www.refworld.org/docid/3ae6b3ae4.html [accessed 1 April 2014]

1.1.2 Interpretation of refugee definition in the 1951 Convention

As concerns the Convention in general, in case of interpretation it has to rely upon the Vienna Convention on the Law of the Treaties. The latter confirms that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[29] Paragraph 2 of Article 31 defines the 'context' relevant to treaty interpretation. Paragraph 3 requires that this understanding of a treaty's context should not only comprise the text, its preamble and annexes but also interpretative agreements between the parties, subsequent practices in application of the treaty, and relevant rules of international law applicable in the relations between the parties. Paragraph 4 validates special meanings to be given to treaty terms if established and so intended by the parties.[30]

In case of the 1951 Convention, the treaty's context as defined in Articles 31(2) and by 31(3) of the Vienna Convention provides relevant interpretative support. For example, the Final Act of the conference, which adopted the Refugee Convention,[31] is a clear example of an "agreement relating to the treaty, which was made between all the parties in connection with the conclusion of the treaty". Although the most important document regarding the 1951 Convention is the 1967 Protocol, it should not be considered as a new legal instrument granting rights and benefits as the initial concept of refugee is co-defined and the same rights and benefits incorporated from the 1951 Convention.[32]

1.1.3 Dispute settlements

Several bodies have the competence of interpreting the 1951 Convention. The International Court of Justice (ICJ) has direct institutional competence under Articles 36(2) and 65 of its

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29 UN, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, at page 331, Art. 31(1). Available at: http://www.refworld.org/docid/3ae6b3a10.html [accessed 2 April 2014]

30 *Ibid.*

31 UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: http://www.refworld.org/docid/40a8a7394.html [accessed 2 April 2014]

32 A. Skordas, *Article 5 – Rights Granted 'Apart from this Convention'*, in A. Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, at page 684 (2011)

statute, while some of the refugee related issues may be raised indirectly before the UN Human Rights Committee Against Torture. Yet, the ICJ would be the preferred one from these two for resolving disputes about the interpretation of the 1951 Convention for several reasons. For example, its judicial expertise, international character and institutional competence as the UN court have been named.[33] In addition, pursuant to Articles 38 of the 1951 Convention and 94(1) of the UN Charter, the ICJ may rule on disputes between parties to the 1951 Convention over its interpretation or application which cannot be settled by other means. As regards the 1967 Protocol, according to Article 4, any disputes between States Parties to the 1967 Protocol relating to its interpretation or application which cannot be settled by other means "shall be referred to the International Court of Justice at the request of any one of the parties to the dispute."[34]

The jurisdiction of the ICJ has never been invoked, thus the effect of its being used is remote. It can be argued that countries and even the UNHCR (at present, the UNHCR is not authorised to request an advisory opinion, but this could be permitted by a resolution of the UN General Assembly) have not and are not likely to take the trouble and also expenses of starting complicated proceedings over interpretation-based issues.[35] Member States have been noticed to interpret the 1951 Convention's definition of refugee to some extent quite differently[36]. The reason might be that the Convention has developed through domestic courts and tribunals as there is no international refugee tribunal providing definitive interpretations. Although the courts refer to each other's decisions, the interpretations have still been divergent and that even in fundamental matters[37]. Since the 1951 Convention serves as the basis for interpreting the Qualification Directive, this gives even more reason to thoroughly deliberate the interaction between the 1951 Convention and the Qualification Directive.

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33 A. M. North, & J. Chia, *Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees*. 25 Australian Year Book of International Law 105, at page 119 (2006)

34 Art. 4 in 1967 Protocol

35 A. M. North & J. Chia, *Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees*. 25 Australian Year Book of International Law 105, at page 119 (2006)

36 K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union*, at page 374 (2000)

37 G. Gilbert, *Is Europe living up to its Obligations to Refugees?*, 15 The European Journal of International Law 963, at page 974 (2004)

1.2 European Asylum Law instruments – framework and interaction

Three main impact-owing regional organisations in Europe concerning refugee protection are the Council of Europe, the European Union and the Organisation for Security and Cooperation in Europe (OSCE). Only the Council of Europe and European Union have developed legal standards for the protection of refugees to the instrumental level. OSCE has focused on preventive actions, specifically in the context of minorities and post-conflict societies.[38] European Convention on Human Rights, which is also applicable to refugees and asylum seekers, is the most important and legally binding instrument by the Council of Europe. Although CEAS has not yet been conclusively established, the leading role in these matters belongs to EU.[39]

The Treaty of Amsterdam has transferred the issues of borders, immigration and asylum including visas and returns to the supranational pillar.[40] With the enforcement of the Amsterdam Treaty on 1 of May 1999, the deadline of 5 years was set up in order to transform the EU asylum acquis into a body of binding Community instruments.[41] Using the possibilities created with the Amsterdam Treaty, the European Council established the plan to develop the CEAS. A special meeting of the European Council was held in Tampere on 15 to 16 October 1999 to discuss the creation of an area of freedom, security and justice in the European Union.[42] During the 'Tampere Summit' the harmonisation was proposed by stating that a common policy on asylum is a constituent part for establishing an area of freedom, security and justice open to people legitimately seeking protection in the EU. It was also established to adopt the minimum standards with respect to the qualification as refugee for nationals of third countries.

According to Klaaw, although the main reasons for developing the EU asylum acquis have been creation of a common area for freedom of movement and respect for the basic rights residing in

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38 A. Klug, *Regional Developments: Europe*, in A. Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, at page 122 (2011)

39 *Ibid.*

40 G. Gilbert, *Is Europe living up to its Obligations to Refugees?*, 15 The European Journal of International Law 963, at page 969 (2004)

41 J. van der Klaaw, *The Asylum Acquis Handbook,* at page 9 (2000)

42 EP, *European Parliament legislative resolution on the proposal for a Council directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection* (COM(2001) 510 – C5- 0573/2001 – 2001/0207(CNS)), available from: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A5-2002-333&language=EN#title2 [last accessed 12 May 2014]

it or seeking access to it, external factors have its role as well. *Inter alia* the increasing complexity of the refugee problem in EU and the pressures on Member States' asylum systems.

Harmonisation of asylum policy was not the purpose itself but rather a measure to equip Member States with common instruments to deal with illegal immigration and abuse of the asylum procedure. Harmonisation of asylum policies was seen more specifically as a logical step towards allowing Member States to have a mutual trust in the quality and efficiency of each other's asylum systems.[43] The importance of an effective regional system is even wider than that as regional mechanisms have been alleged to inform the jurisprudence of other regional and UN bodies. For example, the case law in areas like the right to family life in expulsion cases or forced disappearance of one human rights tribunal can be cited to influence the interpretation of similar rights both inside and outside Europe.[44]

During the first stage of the harmonisation process, between 1999 and 2005, several legislative measures establishing minimum standards for refugees were adopted. The first directives were supposed to be introduced into Member State's national legislations by 10 October 2006. As an outcome of analyses of the impact of the directives on the asylum law legislation, new, revised directives were adopted. The first of those, revised Qualification Directive, has already been transposed into Member States' legislation, taking the asylum legislation to the next level. As CEAS does not entail all the measures concerning refugees, it is necessary to observe other accompanying main legal instruments which have influence on refugees in Member States as well.

1.2.1 European Convention on Human Rights

Council of Europe's most important document in question of refugees is ECHR. It was adopted in 1950 in order to provide legal regional recognition of most of the rights enshrined in 1948 UDHR and to provide international mechanisms to police their implementation. However, it had no express provision[45] to reflect Article 14 of the UDHR, which guarantees the right to seek and

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43 J. van der Klaaw, *The Asylum Acquis Handbook,* at page 14 (2000)

44 J. M. Fitzpatrick, *Human Rights protection for Refugees, Asylum Seekers and Internally Displaced Persons: A Guide to International Mechanisms and Procedures,* at page 431 (2002)

45 N. Mole & C. Meredith (Eds.), *Asylum and the European Convention on Human Rights*. Council of Europe. Available at: http://www.refworld.org/pdfid/4ee9b0972.pdf (2010).

enjoy asylum from persecution.[46] According to Pirjola during the drafting period of ECHR the impact of its articles to the immigration policies of the states were not probably foreseen as the migration policy fell traditionally within states sovereignty;[47] the relevance has grown through the court practices, especially with regarding to the Article 3.

The EHCR does not enshrine a right to asylum or establish any specific rights for refugees. Most referred article in ECHR in concept with asylum law is its Article 3, which reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The ECHR contains no specific provisions for the right to asylum specifically or lawful entry to another country. Nevertheless, the ECtHR in *Chahal v. United Kingdom*[48] has enshrined a principle of *non-refoulement* where deporting would result in a breach of Article 3. Thus, the Article 3 has become "a powerful shield against certain expulsion, extradition, or deportation orders".[49]

Protection from Article 3 is especially important for asylum-seekers whose application have been rejected. According to Fitzpatrick cases where a breach of Article 3 of ECHR 'will occur on return' impose an absolute obligation on states not to expel or extradite even if there is national interest. Though it has to be deliberated whether it has been shown that there are substantial grounds for believing that the person concerned would in case of extradition face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. Whereas a 'real' risk is not a certainty, rather a fact very likely to occur, judged from an objective standpoint. It has been alleged to be generally easier to establish a real risk in an expulsion case when the receiving state is not a member of the ECHR.[50] If an applicant has already expelled, the Court will primarily analyze the facts known to the state at the time of

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46 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III) Art. 14:
(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.
Available at: http://www.refworld.org/docid/3ae6b3712c.html [accessed 3 May 2014]

47 J. Pirjola, *Shadows in Paradise – Exploring Non-Refoulement as an Open Concept*. 19 International Journal Refugee Law 639, at page 641 (2007)

48 *Case of Chahal v. The United Kingdom*, 22414/93, Council of Europe: European Court of Human Rights, 15 November 1996, para. 107 (1996)

49 J. M. Fitzpatrick, *Human Rights Protection for Refugees, Asylum Seekers and Internally Displaced Persons: a Guide to International Mechanisms and Procedures*, at page 376 (2002)

50 *Ibid.*

extradition to see if they indicated a real risk. As the ECtHR found in its decision,[51] the protection afforded by Article 3 is thus wider than protection by Articles 32 and 33 of the United Nations 1951 Convention.

Qualification Directive contains a reference to ECHR in Chapter III Article 9(1)(a) when establishing the conditions for an act to be called persecution: "sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under the Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

Article 19 of ECHR establishes the sole task of ensuring the observance of the obligations undertaken by the Contracting Parties in the Convention and the Protocol.[52] The ECtHR, functioning on permanent basis, will provide protection to all individuals within the jurisdiction of the member states of the Council of Europe, including refugees. The evolving jurisprudence of ECtHR has been mentioned in the Commission's Policy Plan as one of the constant reference in the strategy of harmonising and developing asylum policy.[53] In addition its importance due to the jurisprudential dialogue between the ECtHR and CJEU has been indicated.[54] Consequently, although ECHR itself has no direct reference to rights of refugees or asylum, the practices in what regards Article 3 and other articles[55] relevant to asylum questions have given important role to ECHR from the asylum perspective.

1.2.2 European Social Charter

The provisions of the European Social Charter (ESC), adopted in 1961 and revised in 1996, complement the ECHR provisions in relation to social rights. Whereas the 1950 ECHR protects against violations of civil and political rights, the 1961 ESC protects economic, social and

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51 *Case of Vilvarajah and others v. The United Kingdom*, 13163/87; 13164/87; 13165/87; 13447/87; 13448/87, Council of Europe: European Court of Human Rights, 30 October 1991, at page 80 (1991)

52 N. Mole & C. Meredith, *Asylum and the European Convention on Human Rights*, at page 8 (2010)

53 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions Policy Plan on Asylum an Integrated Approach to Protection Across the EU*, 17 June 2008, COM(2008) 360, at page 4

54 M. Dean, *Bridging the Gap: Humanitarian Protection and the Convergence of Laws in Europe*. 20 European Law Journal 34, at page 44 (2014)

55 Art. 2 (right to life), Art. 4 (prohibition of slavery, servitude and compulsory labour), Art. 5 (right to liberty and security of a person), Art. 6 (right to fair trial), Art. 8 (respect to family and private life), Art. 9 (right to freedom of thought, conscience and religion) in ECHR

cultural rights.[56] Although the refugees, asylum seekers and internally displaced persons could use the rights provided with ESC, the latter has never been regarded as a binding legal instrument in the same way as the ECHR[57]. According to Fitzpatrick[58], it has been argued that wording of these legal instruments 'obviously did not foresee' that application in the field of asylum. Rights such as access to health care, work and social security can be of vital importance, particularly as the ESC does not apply to lawful residents, but to everyone within the jurisdiction of the state party.[59] The Charter's appendix contains a special provision applicable to refugees by stating that "Each Contracting Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed at Geneva on 28th July 1951, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Contracting Party under the said Convention and under any other existing international instruments applicable to those refugees."[60]

The rule in the 1961 Charter concerning its application *ratione personae* applies to its 1988 Additional Protocol. The exception is that the provision concerning refugees in the 1961 Charter is extended in the Protocol appendix, where the scope of the Protocol is determined, to stateless persons[61] obliging Parties to treat refugees and stateless persons as favourably as possible, taking into account obligations derived from international instruments. Although during the revising period it was suggested that the 1961 Charter rule should be extended beyond nationals of other contracting parties who are lawful residents or working regularly within a contracting party to other foreigners, the Revised Charter retained the same extending of the rule concerning the application of the Charter to refugees to stateless persons.[62]

The ESC does not provide for a court, though the independent experts based committee - the European Committee of Social Rights (ECSR), was established by the Art 25 of ESC. ECSR

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56 Preamble, Council of Europe, *European Social Charter*, 18 October 1961, ETS 35, Available at: http://www.refworld.org/docid/3ae6b3784.html [accessed 7 April 2014]

57 S. S. Caballero, *The European Social Charter As an Instrument to Eradicate Poverty: Failure or Success*, 64 Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol 157, at page 159 (2008)

58 J. M. Fitzpatrick, *Human Rights Protection for Refugees, Asylum Seekers and Internally Displaced Persons: a Guide to International Mechanisms and Procedures*, at pages 421-422 (2002)

59 *Ibid.*

60 Appendix, Council of Europe, *European Social Charter*, 18 October 1961, ETS 35, available at: http://www.refworld.org/docid/3ae6b3784.html [accessed 7 April 2014]

61 Council of Europe, *Additional Protocol to the European Social Charter*, 5 May 1988, ETS 128, available at: http://www.refworld.org/docid/3ae6b37a0.html [accessed 7 April 2014]

62 D. Harris, *The European Social Charter*, at page 387 (2001)

judges if States Parties are in conformity with law and in practice with the provisions of the European Social Charter within the framework of two procedures: the reporting procedure under which States submit national reports with regular intervals; and the collective complaints procedure, which allows organisations to lodge complaints. 15 States of 43 which have ratified ESC, have accepted the collective complaints procedure.[63] The ECSR adopts conclusions in respect of national reports and adopts decisions in respect of collective complaints. The ESC has been ratified by 43 Member States of the Council of Europe (total 47) as of April 2014.[64]

1.2.3 EU Charter of Fundamental Rights

European Union had never included the right to seek and enjoy asylum from persecution among basic and legally binding instruments. The right to asylum was defined for the first time at the European level in the EU Charter of Fundamental Rights.[65] After the Treaty of Lisbon entered into force, the Charter acquired the rank of primary legislation and subsequently the validity and legality of EU secondary legislation depends on its being in compliance with the Charter. Despite its lack of treaty nature in international law, the Charter's provisions have the same legal value with treaties as a matter of EU legislation. In addition, the Charter does not bind Member States to provide rights it enshrines to every individual in the Member States as its application scope is limited to those Member States' activities which are ruled by EU law itself.[66]

The Charter includes a number of guarantees which are not covered[67] by the ECHR, while the ESC has been adopted to remedy partially the shortcomings of the ECHR regarding the first category.[68] However, the main importance of the Charter of Fundamental Rights regarding refugees is inherited from Article 18, which states: "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31

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63 List of Member States of the Council of Europe and the European Social Charter as of 26 March 2013, http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp, [last accessed 10 May 2014]

64 *Ibid.*

65 EU Agency for Fundamental Rights. *Handbook on European Law Relating to Asylum, Borders and Immigration*, at page 21 (2013)

66 M.-T. Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law*. 27 Refugee Survey Quarterly 33, at page 34 (2008)

67 Rights, which are not covered by the ECHR are "namely social and economic rights, as well as 'third generation rights'" in G. Di Federico (Ed.) *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, at page 40 (2011)

68 G. Di Federico (Ed.) *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, at page 40 (2011)

January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union".[69] Although it imposes an obligation to guarantee the right to asylum, it does not specify if it is the right of Member States to be granted as an exercise of its sovereignty or the right of individuals to be received. While the States' right to provide asylum is well-covered by international law, the right of individual to be granted asylum is not explicitly established by any international instruments with universal scope.[70] Hence, increasing the value of the Charter for persons in need of protection even more, it has been stated that as all the provisions in the Charter enshrine rights of individuals and there is an explicit reference to the 'international human rights instruments and fundamental freedoms of constitutional rank', the Charter is indeed concerned with the recognition of individual's right to be granted asylum.[71]

The *non-refoulement* principle is ensured with Article 19, which reiterates the prohibition to return a person to a situation where he or she has a well-founded fear of being persecuted or runs a real risk of torture or inhuman and degrading treatment or punishment.[72] In addition, certain rights for subsidiary protection are provided in the EU Charter of Fundamental Rights as long as these rights are derived "from the constitutional traditions and international obligations common to the Member States".[73]

As regards the relationship between the EU Charter of Fundamental Rights and the ECHR, coexistence of two binding instruments of human rights protection is considered admissible both under the Convention and under the EU law. Their complementary nature derives from Articles 52(3) and 53 of the Charter, where the meaning and scope of the rights guaranteed therein are declared to be the same. These are declared to be the minimum standards as more extensive protection is approved. Article 52(3) of the Charter does not in itself preclude conflicting

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69 Art. 18 in EU, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: http://www.refworld.org/docid/3ae6b3b70.html [accessed 7 April 2014]

70 M.-T. Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law*. 27 Refugee Survey Quarterly 33, at page 37 (2008)

71 *Ibid*, at page 41

72 Art. 19, European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: http://www.refworld.org/docid/3ae6b3b70.html [accessed 7 April 2014]

73 Preamble, European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: http://www.refworld.org/docid/3ae6b3b70.html [accessed 7 April 2014]

decisions between the Luxembourg and Strasbourg judges. It is possible to derogate from the rights contained in the Charter provided that the customary principles of legality, necessity and proportionality are respected. Moreover, limitation will be tolerated inasmuch as they "meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms to others".[74]

The EU Charter of Fundamental Rights has a significant role for the Member States when they are interpreting and implementing the EU law. In addition, as asylum is not recognised in international treaties which Member States are parties to and the Charter reflects the existing rights, "the content of the right to asylum in the constitutional traditions common to the Member States in order to determine the content of the right to asylum in the Charter" has to be examined, as this is where Charter 'has found its inspiration'.[75]

According to CJEU in *Joined Cases C-411/10 N.S. & C-493/10 M.E. & Others (21 December 2011),*[76] Member States should interpret their own national law consistently with the EU law, but also make sure their interpretation of a secondary legislation instrument is not "in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law". Although the compliance with the Charter is a requirement for EU secondary legislation's legality and validity, it will not affect the international obligations that Member States have obliged to follow under international law.[77] Accordingly, both international obligations and those derived from the EU Charter of Fundamental Rights and its principles have to be borne in mind when interpreting and implementing the regional legal acts concerning refugees.

1.2.4 Qualification Directive as the cornerstone of CEAS

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74 G. Di Federico (Ed.) *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument,* at pages 41-42 (2011)

75 M.-T. Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law*. 27 Refugee Survey Quarterly 33, at page 34 (2008)

76 *N. S. (C 411/10) v. Secretary of State for the Home Department and M. E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform* , C-411/10 and C-493/10, European Union: Court of Justice of the European Union, 21 December 2011 (2011)

77 M.-T. Gil-Bazo, *The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law*. 27 Refugee Survey Quarterly 33, at page 34 (2008)

After moving asylum and immigration from national to EU competence, several developments took place. The basis for the most important one came from the Tampere Summit[78] where the need to develop Common European Asylum System (CEAS) was established. It was decided to be based on the full and inclusive application of the 1951 Convention supplemented by the 1961 Protocol.[79] The Tampere conclusions provide that CEAS should include the rules on the recognition on refugees, the content of refugee status and measures on subsidiary forms of protection.[80]

The proposal[81] for the Qualification Directive was analysed also by UNHCR and ECRE, whereas several suggestions were made which were not taken into account. Also, the negotiations between Member States resulted in the lowering of some of the standards outlined in the original draft of the directive proposed by the Commission; the main issue is that many of the adopted provisions are lower than the current practice of many Member States.[82] In addition, the low level of harmonisation may result going below the minimum level protection foreseen in international treaties Member States have undertook to ensure.[83]

Similarly, during the drafting period, the European Parliament, which generally welcomed the Qualification Directive, approved the proposal with amendments. Negotiations between Member States in the Council of European Union had to overcome several difficulties. Eventually, the consensus on the text was achieved by the Justice and Home Affairs Council in June 2003.[84] The Qualification Directive among other minimum standards adopting legal instruments was established and directives transposed into Member States' legislation. Nonetheless, it was

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78 see Chapter 1.2, Tampere Summit

79 Preamble (2) in QD 2004

80 Preamble (4) and (5) in QD 2004

81 European Union: European Commission, *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, 12 September 2001, COM(2001) 510 final, available at: http://www.refworld.org/docid/47fdfb1ad.html [accessed 9 April 2014]

82 ECRE, *ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, at page 4 (2004)

83 J. Vedsted-Hansen, *Common EU Standards on Asylum – Optional Harmonisation and Exclusive Procedures*,7 European Journal of Migration 369, at page 370 (2005)

84 ECRE, *ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, at page 2 (2004)

pointed out that harmonisation was far from sufficient[85]. Relevance of the latter stands according to Vedsted-Hansen in consequences of adopting too low minimum standards – insufficient harmonisation may allow standards of Member States below the minimum level from the perspective in international treaties.[86] After careful deliberation new directions were taken in the form of 'Green Paper' whereby the Commission launched a comprehensive consultation process.[87] As the next step, the Policy Plan on Asylum was agreed on, based on the issues raised during the public consultations and suggestions made.[88]

New directives have now been adopted within the next stage in developing CEAS. Directives which have been revised are the Qualification Directive 2011/95/EU (came into force on 21 December 2013), the Dublin III Regulation 604/2013 (came into force on 1 January 2014), the Eurodac Regulation 603/2013 (will come into force on 20 July 2015), the Reception Conditions Directive 2013/33/EU (will enter into force on 20 July 2015) and the Asylum Procedures Directive 2013/32/EU (will enter into force on 20 July 2015).[89]

The Qualification Directive as the most prominent one of the CEAS first stage directives was adopted to guide the authorities on national level[90] in the application of the 1951 Convention in order to ensure that common criteria are applied by the Member States. It also clarifies the grounds for granting international protection. In the interpretation a more favourable approach should be used.[91] Similarly to the 1951 Convention, interpretation of the Qualification Directive

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85 J. Vedsted-Hansen, *Common EU Standards on Asylum – Optional Harmonisation and Exclusive Procedures*,7 European Journal of Migration 369, at pages 370-371 (2005)

86 *Ibid*.

87 European Commission, *Green Paper on the Future Common European Asylum System*, 6 June 2007, COM(2007) 301, at page 2

88 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions Policy Plan on Asylum an Integrated Approach to Protection Across the EU*, 17 June 2008, COM(2008) 360, at page 2

89 The Qualification Directive applies to all EU Member States; the exceptions are UK, Ireland and Denmark. When Denmark is not bound to Qualification Directive at all, the UK and Ireland will continue to be bound by Directive 2004/83/EC. The arrangements concerning United Kingdom and Ireland are settled in the Protocol number 21 annexed to the Treaty of European Union and the Treaty of Functioning of the European Union. According to this protocol the United Kingdom and Ireland are not going to take part in the adoption of measures proposed in Title V (Area of Freedom, Security and Justice) of the Chapter Union Policies and Internal Actions. The position of Denmark is deriving from the Protocol 22.

90 *Minister voor Immigratie en Asiel* v. *X (C-199/12), Y(C-200/12), and Z* v. *Minister voor Immigratie en Asiel (C-201/12)*, 25 International Journal of Refugee Law 779, at page 787 (2014)

91 *Directive 2011/95/EU of the European Parliament and of the Council of 13 december 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast)* [2011] OJ L337/9

may often be inseparable from the concrete assessment of every individual case where all specific evidentiary issues have a major role. This may have caused reducing of transparency of the implementation process of the Qualification Directive,[92] since when the main focus will be on the specific issues coming up from concrete cases it might happen that these are not compared to similar issues from other countries' practices. It has to be observed, that there is possibility that problems occurring during assessment of a case may be more general in nature and not derived from the particular situation.

From many perspectives it seems that in the Qualification Directive too general provisions are used without providing more specific guidelines for required actions. For example, it provides a national list of 'safe countries of origin' below the level of EU criteria, and a 'safe third country' and 'super safe third country' rule, which in case of the latter would automatically exclude access to prospective asylum seekers coming through certain countries.[93] Although there may be countries which are safe enough to include them into respective list, it should be taken into consideration that there are always exceptions and the overall situation in countries might change rapidly as well.

In order to have a truly harmonised refugee law in EU and in addition, to enforce CEAS, the refugee definition in the Qualification Directive should be in conformity with the previously named acts and documents as the Member States are not only bound with the Qualification Directive but also with international agreements. Meanwhile the attention has been brought to the negative influence of the domestic norms and practices. The reason is that if they limit judicial review, the transparency problem may arise. This, in turn, will complicate proving the deviation from minimum standards about the persons entitled to protection provided in the Qualification Directive[94]. The next Chapter will analyse whether the Qualification Directive makes it possible to harmonise the asylum legislation in the European Union considering the international obligations taken by Member States.

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92 J. Vedsted-Hansen, *Common EU Standards on Asylum – Optional Harmonisation and Exclusive Procedures*,7 European Journal of Migration 369, at page 374 (2005)

93 G. Troeller, *Asylum Trends and Their Impact on Protracted Refugee Situations*, In: G. Loescher, J. Milner, E. Newman & G. Troeller (Eds.) *Protracted Refugee Situations: Political, Human Rights and Security Implications*, at page 48 (2008)

94 J. Vedsted-Hansen, *Common EU Standards on Asylum – Optional Harmonisation and Exclusive Procedures*,7 European Journal of Migration 369, at page 374 (2005)

2 Importance of Convergence in Granting Refugee Status

From the Member State's point of view, the convergence in crucial questions between the 1951 Convention and the Qualification Directive is a prerequisite in order to have a possibility to harmonise the asylum legislation within EU. Also, if different legal regimes make contact in the same area, divergent interpretations may appear resulting in 'fragmentation of legal systems'.[95] A common asylum system should rely on common understandings of interpretation and application of the refugee definition. An agreement on who qualifies as a refugee is a starting point of the whole process;[96] subsequently it is relevant to have not only a common approach to legislation but to practices as well. CEAS, creating bases for the latter by stating the minimum standards and having developed those already further, is a great step further in this matter. Nevertheless, it has to be taken into account that the Qualification Directive, which is the cornerstone of the whole harmonising process, is based on the 1951 Convention in its preamble concerning the definition of refugee.

The obligation to follow the responsibilities arising from the international treaties is only one of the reasons for assuring convergence between the Qualification Directive and the 1951 Convention. For example, the CJEU has clearly stated[97] that it is committed to the primacy of international refugee law in understanding the nature of EU directives.[98] In case of divergence, the Member States are placed in the position where they are forced to implement broader measures not to offer just more favourable conditions but in order to avoid violation of international obligations. Although it has been pointed out[99] that international law provides for refugee status but not for the right to asylum (in case asylum means the grant of permanent residence in a country) and thus the right to asylum still lies in the discretion of the country; the current situation raises the question whether the countries should be responsible for guaranteeing

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95 M. Dean, *Bridging the Gap: Humanitarian Protection and the Convergence of Laws in Europe*. 20 European Law Journal 34, at page 34 (2014)

96 P. J. van Krieken (Ed.). *The Asylum Acquis Handbook*, at page 19 (2000)

97 *Aydin Salahadin Abdulla (C-175/08), Kamil Hasan (C-176/08), Ahmed Adem, Hamrin Mosa Rashi (C-178/08), Dler Jamal (C-179/08) v. Bundesrepublik Deutchland*, *Abdulla and Others*, European Union: Court of Justice of the European Union, 2 March 2010 (2010)

98 J. C. Hathaway, *E.U Accountability to International Law: the Case of Asylum*, 33 Michigan Journal of International Law 1, at page 5 (2011)

99 G. Gilbert, *Is Europe living up to its Obligations to Refugees?*, 15 The European Journal of International Law 963, at page 965 (2004)

human rights. It is possible that if the divergence is solved before divergent practices are created by Member States, many of the violations of human rights would be prevented.

Of course, convergence between laws will include some divergences, for example, those deriving from differentiations between jurisdictions.[100] According to Skordas,[101] this is from where the interpretation should start: with identification of legal regimes which might be in the "application field of provision, scope of the provision and of related regimes and rule clusters, interpretation of the 'rights and benefits' granted to beneficiaries and comparative analysis with those provided by the 1951 Convention and reference to individual refugee-specific provisions in other instruments of international human rights law and humanitarian law." Regardless of the differences inherited from the nature of legal systems, the principles and practices of defining and granting the refugee status should avoid divergences in order to provide legal certainty and stability to persons in need of refuge.

2.1 The collision between the international and EU regimes

Although the complexity of refugee-related decisions is not completely avoidable, it is crucial that the whole process of granting or refusing the refugee status is based on clear grounds. To ensure this the legislation that the decision is based on should not entail ambiguity. This is important to both, the asylum seeker and the decision maker as well. According to Guild, refugee protection must be provided to all asylum applicants until they are recognised or declined recognition giving the declaratory nature to recognition of the refugee status under the 1951 Convention.[102] To decline recognition it has to be made sure that the person does not meet the requirements of the definition named in Article 1 A, para. 2[103], amended in the 1967 Protocol. Probably there may appear complex situations in the course of determination of a person's qualification as refugee and many of those may be avoidable if the legislation in crucial points is

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100 M. Dean, *Bridging the Gap: Humanitarian Protection and the Convergence of Laws in Europe*. 20 European Law Journal 34, at page 36 (2014)

101 A. Skordas, *Article 5 – Rights Granted 'Apart from this Convention'*, in A. Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, at page 682 (2011)

102 E. Guild, *The Developing Immigration and Asylum Policies of the European Union, Adopted Conventions, Resolutions, Recommendations, Decisions and Conclusions. Compilation and Commentary by Elspeth Guild, Introduction by Jan Niessen*, at page 117 (1996)

103 UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, at page 137, available at: http://www.refworld.org/docid/3be01b964.html [accessed 2 April 2014]

in convergence between the international and regional level. According to Vienna Convention on the Law of Treaties, a country may not justify its failure to perform a treaty with provisions of national law.[104]

If the regional level legislation concerning refugees is in accordance with the international level law, it diminishes the possibility that countries transpose regional legislation into national legislation in a way that results in jeopardising fulfilment of international obligations by Member States when implemented. The contrary view is supported by the fact that EU is not a contracting party to the 1951 Convention and thus has no direct obligation to implement the provisions of the Convention separately from Member States.[105] According to Pirjola the doctrine of a margin of appreciation should be relied on. This expresses an opinion, that because national differences and interpretations when interpreting human rights conventions must be allowed, the human rights conventions are 'open to different interpretations'.[106]

To continue with a critical point of view, it should be added that there is no internationally recognised right to be 'granted asylum' in the narrow sense as it is still left to be a decision of a country while international law provides for the refugee status.[107] Based on the latter, the right to asylum is in the discretion of the country, and therefore it may be argued that it should take the whole responsibility for that as well. Nonetheless a reasonable balance should be found. Regardless of the lack of direct obligations it should be considered that if the responsibility is entirely with the Member State, it is more likely that persons in need of refuge (while being entitled to it) are left without help.

Additionally, it has to be understood that the protection of refugees and asylum seekers is not just about the admission of them to the country. Even if admission to the country is the only way of ensuring non-violation of person's rights, the distinction has to be made.[108] The critical distinction between *non-refoulement* and the right to asylum has been drawn by stating that *non-*

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104 Art. 27 in Vienna Convention

105 A. Skordas, *Article 5 – Rights Granted 'Apart from this Convention'*, in A. Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, at page 690 (2011)

106 J. Pirjola, *Shadows in Paradise – Exploring Non-Refoulement as an Open Concept*. 19 International Journal Refugee Law 639, at page 644 (2007)

107 G. Gilbert, *Is Europe living up to its Obligations to Refugees?*, 15 The European Journal of International Law 963, at page 967 (2004)

108 G. S. Goodwin-Gill, *The Dynamic of International Refugee Law*. 25 International Journal of Refugee Law 651, at page 654 (2014)

refoulement is a function to be used when there is a risk of persecution if the person is sent back to country of origin. Nevertheless it does not oblige a country to allow a refugee staying in its territory in case the risk has ended, giving it temporary nature.[109] Yet, protection to the person in flight has to be granted and the way States respond is counted to be a 'matter of international law'. Goodwin-Gill has differentiated this from a 'matter of international concern' as the States must make sure that international obligations are implemented in effective way while being in accordance with the rule of law.[110] In the context of the European Union asylum law, it means that Member States have to follow the international obligations[111], *inter alia* those deriving from the 1951 Convention, while acting in accordance with national level legal instruments. This in turn lays an obligation to Member States to be critical while transposing the Qualification Directive into national law in order to follow the responsibilities.

The first possible collision between the 1951 Convention and Qualification Directive may originate from the fact that there is no effective solution for persons who do not qualify for refugee status according to the 1951 Convention but who might qualify for subsidiary protection. The legal distinction between the protection of refugees under the 1951 Convention and subsidiary protection for additional categories of persons under regional or national regimes is justified as it sets condition for the effective operation of the adjudicatory decision-making system.[112] Firstly, it should be decided if the requirements set out in the 1951 Convention Article 1 A, Paragraph 2 are fulfilled to make sure if the asylum seeker qualifies as a refugee. If the person does not meet the respective requirements, there is still a chance that the person might be entitled to subsidiary protection.[113] As long as there is any possibility of making the situation of the person in need of protection easier, respective measures should be used.

Although the 1951 Convention is focused on refugees, it has been argued that its provisions may be extended to persons otherwise entitled to subsidiary protection. If the 1951 Convention's definition were interpreted from the perspective of the persons in need of subsidiary protection,

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109 J. C Hathaway, *The rights of refugees under international law*, at page 302 (2005)

110 G. S. Goodwin-Gill, *The Dynamic of International Refugee Law*. 25 International Journal of Refugee Law 651, at page 654 (2014)

111 "This means that in cases of contradictory provisions between international law and Community law, these contradictions must be resolved in favour of international law." in H. Lambert, *The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law*, 55 International and Comparative Law Quarterly 161, at page 191 (2006)

112 G.S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, at page 296 (2007)

113 M. Dean, *Bridging the Gap: Humanitarian Protection and the Convergence of Laws in Europe*. 20 European Law Journal 34, at page 55 (2014)

for example, victims of war, it would allegedly still be in consistence with the three main goals of the UN Charter[114]: (1) maintaining peace through the monitoring and elimination of human rights violations; (2) advancing and expanding human rights and fundamental freedoms; and (3) recognising a multicultural approach in international law in the world of equal nations.[115] In an adverse opinion, it has been stated that the possibility of expanding is not used in practice and therefore should not be considered as an option. According to Worster, it appears from the fact that EHCR, EU law, Convention Against Torture (CAT) and International Covenant on Civil and Political Rights (ICCPR) have expressly created subsidiary bases for protection instead of amending the 1951 Convention, their drafters intention was to preserve the 1951 Convention refugee definition as a separate institution. In this case, it can be said that the definition of refugee was not meant to be expanded – the *non-refoulement* principle will be provided at the minimum level with these above-mentioned legal instruments.[116]

Another opinion also in favour of this approach argues that the reason why the Convention is alleged[117] to be practically incapable of guiding the interpretation of the distinction in the Qualification Directive, is that the Directive offers two different kinds of protections to the asylum seeker differentiating those by 'persecution' and 'serious harm'. The first one according to the Chapter 3 Article 9 of the Directive, is the qualification for a refugee based on acts of 'persecution'[118] and the second originates from Chapter 5, Article 15 on the status of subsidiary protection granted for 'serious harm'[119]. Although the term 'persecution' is used in both legal instruments, the above-described distinction does not exist in the 1951 Convention. It refers to the "lack of operational workable normative hierarchy" as a reason why collisions may appear in the first place between the 1951 Convention and the system of the EU Qualification Directive. The same author notes that distinction offered by the Qualification Directive leads to the interpretation of the meaning of 'persecution' back to the 1951 Convention.[120]

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114 Art. 1 in *Charter of the United Nations and Statute of the International Court of Justice*, 24 October 1945, 1 UNTS XVI, San Fransisco, 1945

115 I. R. Gunning, *Expanding the International Definition of Refugee: A Multicultural View*, 13 Fordham International Law Journal 35, at page 69 (1989)

116 W. T. Worster, *The Evolving Definition of the Refugee in Contemporary International Law*. 30 Berkeley Journal of International Law 101, at page 126 (2012)

117 A. Skordas, *Article 5 – Rights Granted 'Apart from this Convention'*, in A. Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, at page 682 (2011)

118 Chapter 3 Art 9 in QD 2004

119 Chapter 5 Art 15 in QD 2004

120 A. Skordas, *Article 5 – Rights Granted 'Apart from this Convention'*, in A. Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, at page 682 (2011)

Article 5[121] of the 1951 Convention clearly determines the prohibition to diminish any rights and benefits granted by a Contracting State to refugees out of the scope of the Convention, thus becoming "a rule of interpretation of inter-regime relationships".[122] Article 5 regulates collisions between regional regimes and the 1951 Convention, favouring the refugees. Also, it can be interpreted as a reference to the above-mentioned first possibility of divergences. It offers legal bases to solve the problem for persons in need of protection, for those who do not qualify as refugees according to the 1951 Convention, but may be entitled to it according to the subsidiary protection clauses in the Qualification Directive.

Meanwhile, if to look at the drafting history and the intention of the drafters of the 1951 Convention, which is in the focus of this discussion, the contrary will be brought out. It has been stated that the drafters of the 1951 Convention must have realised that the existing definition did not encompass all persons in need of protection as most likely the definition was result of the compromise on political grounds. According to Gunning, the historical practices of the UNHCR suggest strongly that the ultimate intention was to expand the definition.[123] Even when following a more restrictive approach, it is still not possible to claim that offering subsidiary protection in the Qualification Directive is not in conformity with the 1951 Convention, as according to its Article 5, any rights and benefits of persons entitled to subsidiary protection may not be impaired even if those are granted apart from the 1951 Convention. Therefore it may be concluded that offering a possibility of subsidiary protection is approved by the 1951 Convention.

The second possibility is that asylum seeker does not qualify as a refugee according to the national law. It might be due to too narrow interpretation of refugee definition in the transposition of the Qualification Directive. If a too narrow definition of refugee is implemented compared to the Qualification Directive it may result in a person being sent back to his or her country of origin regardless of serious risk of persecution, it means a possibility of breaching the principle of *non-refoulement.* This, in turn, would be violation of the 1951 Convention, ECHR and the Charter of Fundamental Rights of the European Union. In addition to breach of Article

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121 Art. 5 in 1951 Convention: "Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention"

122 A. Skordas, *Article 5 – Rights Granted 'Apart from this Convention'*, in A. Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, at page 682 (2011)

123 I. R. Gunning, *Expanding the International Definition of Refugee: A Multicultural View*, 13 Fordham International Law Journal 35, pp. 50-51 (1989)

19[124], it would violate Article 51 of the Charter of Fundamental Rights of the European Union, which determines the field of application by stating that the Member States, when implementing the EU law, should take into account the rights and principles promoting the application thereof in accordance with their respective powers.

Member States' approach to asylum should also be in accordance with the Treaty of the Functioning of the EU[125], in which Article 78(1) declares EU's obligation to develop a common policy of asylum, subsidiary protection and temporary protection which is in accordance with the 1951 Convention and 1967 Protocol, and other relevant treaties. This brings us to the third possibility when even a proper transposition of the Qualification Directive might result in too narrow interpretation of refugee definition and a possibility that asylum seeker does not qualify as a refugee according to the regional standards. In this situation it has to be taken into account that although the person does not qualify as a refugee in the sense of the Qualification Directive, there is possibility that the person still fulfils the requirements of the 1951 Convention in Article 1 A, Paragraph 2. Yet, it can be argued that the Qualification Directive invites Member States to use more favourable conditions for persons in need of protection and has therefore opened a possibility for Member States to follow all the above-mentioned obligations by adopting more favourable provisions when transposing the Qualification Directive into the national legislation.

The Commission has described the importance of the European asylum policy growing with greater expectations for the role of EU within the global refugee protection system.[126] Although regional approaches to migration and asylum have high value, it has been alleged that they might be counter-productive if they undermine global approaches to these issues.[127] In the context of

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124 Art. 19 in Charter of Fundamental Rights of the European Union:
1. Collective expulsions are prohibited.
2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment

125 Art. 78(1) in TFEU:
The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.

126 EC, *Green Paper on the Future Common European Asylum System*, 6 June 2007, COM(2007) 301, pp. 14-15

127 UNHCR. *The State of the World's Refugees 2000: Fifty Years of Humanitarian Years,* at page 183 (2000)

defining a person entitled to the refugee status in EU it means that provisions of the Qualification Directive should not contradict the purposes of those provided in the 1951 Convention.

2.2 The minimum standards stage of CEAS

The goal of the first stage of CEAS was to establish minimum standards for the whole process of seeking asylum, thus harmonising the legal frameworks and ensuring fairness, efficiency and transparency. The cornerstone of the CEAS is the Qualification Directive, which, according to its preamble, is based on a full and inclusive application of the 1951 Convention, supplemented by the 1967 Protocol, creating the need for careful deliberations if the Qualification Directive is in conformity with the legal instrument it is based on. Subsequently, many analyses followed the proposal of the Qualification Directive, for example, notes composed by the European Parliament, UNHCR and ECRE.

It has been claimed that the level of protection provided by the Qualification Directive is too low, as the established standards were below the ones already established in many Member States,[128] speaking only in general terms. In this light it is regretful that one month before formally adopting (29 April 2004) the Qualification Directive, Member States agreed to lower the level of minimum rights of beneficiaries of subsidiary protection even more. The discretion granted to Member States in the process of recognising refugee has also been increased.[129] The practices of Member States differentiated even more by increasing the right to interpret the Qualification Directive more inconsistently. Another critical view alleged that there are major gaps between the international law and EU minimum standards concerning asylum, hindering the lawful implementation[130] of the Dublin regime.[131] As an alternative to changing the Qualification Directive, it was suggested that the CJEU interpretations would force conformity between

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128 H. Lambert, *The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law*, 55 International and Comparative Law Quarterly 161, at page 171 (2006)

129 ECRE, *ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification of Third Country Nationals and Stateless Persons or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*. at page 2 (2004)

130 According to the Hathaway, international law allows each person to determine where to engage the process of protection. Subsequently he states that as long as refugees according to 1951 Convention are treated this way, honoring all rights derived from international law, „an assignment of protective responsibility effected before a refugee is lawfully present is legally sound".

131 Council Regulation (EC) 343/2003 of 18 February 2003 *establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* [2003] OJ L50/1

international standards and EU directives.[132] To balance the critique about the Qualification Directive it has to be emphasised that standards in the Directive are only at a minimum level and more favourable provisions are welcome. Next, some of the main aspects of the Qualification Directive will be analysed.

Applicants

During the drafting period, the European Parliament generally welcomed the Qualification Directive and approved the proposal with amendments, but unfortunately these were not taken into account. The purpose of the amendments[133] was aimed to the first major point of limitation which UNHCR and others have also pointed out for expanding the scope of the Qualification Directive to apply to all persons and not only third country nationals and stateless persons. The limitation to 'third country nationals' is incompatible with the 1951 Convention. Article 42 of the 1951 Convention allows reservations to the Convention if reservations are made other than to Articles 1, 3, 6, 16(1), 33, 36-46, meaning that from the definition of refugee, which is provided in Article 1, no reservation is allowed. Article 45 provides a possibility to any State Party to request revision of the 1951 Convention at any time by way of notification to the UN Secretary-General, which has never been used.[134] Therefore, the obligations derived from the current wording of the refugee definition in the 1951 Convention have to be followed.

The circle of persons entitled to apply asylum is closely connected to the 'safe countries of origin' concept. European States consider EU Member States to be 'safe countries of origin' based on the 'level of protection of fundamental rights and freedoms' in the EU.[135] This involves a great risk to leave the persons in need of refuge without protection. For example, the at-risk members of the Roma community in EU countries have no effective means to secure refugee status in Europe (it has been pointed out that with admission of new Member States this risk has

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132 J. C. Hathaway, *E.U Accountability to International Law: the Case of Asylum*, 33 Michigan Journal of International Law 1, at page 4 (2011)

133 EP, *European Parliament Legislative Resolution on the Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection* (COM(2001) 510 – C5-0573/2001 – 2001/0207(CNS)) available from: http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P5-TA-2002-494 [last accessed 12 May 2014]

134 G.S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*. at page 62 (2007)

135 J. Allain, *The* jus cogens *Nature of* non-refoulement,13 International Journal of Refugee Law 533, at page 550 (2001)

increased[136]). Irrespective of above, the UNHCR has recommended a more aggressive application of the 'safe country of origin' concept by Member States.[137]

Such a situation is a consequence of the 'manifestly unfounded' concept. While by itself the 'manifestly unfounded' concept gives countries a possibility to meet their obligations regarding genuine refugees who need protection, in line with the obligation to ensure that at least certain basic rights are provided even before determining the status.[138] Nonetheless, as there appear to be divergences in practice, it is necessary to look at the subject more thoroughly. Originally the 'manifestly unfounded' claims were meant to be those "clearly fraudulent or not related to the criteria for the granting of refugee status".[139] In reality, there appear to exist two kinds of practices – the first contains the cases where a person would not qualify under the law even if the facts were proven; in the second one the 'manifestly unfounded' approach is taken because there is not enough evidence. It has been brought out by Courts that the 'manifestly unfounded' policy is not applicable in situations where the only reason for using that is mere lack of evidence.[140] Hence, the last mentioned basis for 'manifestly unfounded' approach is omitted from the following analysis.

According to the Qualification Directive Paragraph 13 the Directive is "without prejudice to the Protocol on asylum for nationals of Member States of the European Union (Protocol 22) as annexed to the Treaty Establishing the European Community". As it is stated in the Protocol 22,[141] the level of protection concerning fundamental rights and freedoms provided by the Member States, Member States „shall be regarded as constituting safe countries of origin in

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136 G. Gilbert, *Is Europe living up to its Obligations to Refugees?*, 15 The European Journal of International Law 963, at page 975 (2004)

137 J. C Hathaway, *The Rights of Refugees Under International Law*. at page 297 (2005)

138 *Ibid*, at page 160

139 "Considered that national procedures for the determination of refugee status may usefully include a special provision for dealing in an expeditious manner with applications which are considered to be so obviously without foundation as not to merit full examination at every level of the procedure. Such applications have been termed either "clearly abusive" or "manifestly unfounded" and are to be defined as those which are clearly fraudulent or not related to the criteria for the granting of refugee status laid down in the 1951 United Nations Convention relating to the Status of Refugees nor to any other criteria justifying the granting of asylum" in UNHCR, *The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum*, 20 October 1983, No. 30 (XXXIV) - 1983, available at: http://www.refworld.org/docid/3ae68c6118.html [last accessed 12 May 2014]

140 W. T. Worster, *The Evolving Definition of the Refugee in Contemporary International Law*. 30 Berkeley Journal of International Law 101, pp. 160-161 (2012)

141 EU, *Protocol on Asylum for Nationals of Member States*, 16 December 2004, available at: http://www.refworld.org/docid/4a54bbccd.html [accessed 5 May 2014]

respect of each other for all legal and practical purposes in relation to asylum matters". In addition, the Protocol names the reasons why every application for asylum made by EU national may be taken into consideration or regarded admissible by another Member State. The first three provide procedures for a drastic course of events, for example, in case suspension of Member State's rights deriving from membership of the EU has been initiated or in case the respective decision has already been made; as well as in the situation where the Member State has proceeded to take measures to derogate itself from the obligations under the ECHR. The one which should be looked more closely into states that if a Member State should unilaterally decide to take into consideration or regard admissible an application of a national of another Member State, the application shall be dealt with „on the basis of the presumption that it is manifestly unfounded". It is also clearly expressed that the decision making power of Member States is not to be affected.

According to Worster, the Qualification Directive attempts to redefine the meaning of 'refugee' thus excluding some of the individuals who would otherwise qualify as refugees under the 1951 Convention.[142] On the other hand, the Qualification Directive has been alleged to be based on 'restrictive interpretation of existing practices' instead of creating a new regime, bringing this also to reason why it will probably not lead to granting protection to more persons in EU.[143] In either case it is regrettable that the Qualification Directive has not provided any provisions concerning nationals of Member States but just excluding them by limiting the circle of applicants to third country nationals. The Member States are regarded as 'safe country of origin' for each other and applications of their nationals are treated assuming these are 'manifestly unfounded'. If latter approach is applied, there is possibility to exclude individuals in need of protection from the scope of refugee definition.

Contrary to the above analysis, it has been noted that although the very liberal use of 'manifestly unfounded' has been criticised, "UNHCR appears to have accepted the manifestly unfounded assessment practice", still considering these as unlawful if they operate to refuse asylum applications because of evidentiary concerns.[144] Yet, it should not be too easily accepted that the

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142 W. T. Worster, *The Evolving Definition of the Refugee in Contemporary International Law*. 30 Berkeley Journal of International Law 101, at page 154 (2012)

143 J. McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 17 International Journal of Refugee Law 461, at page 465 (2005)

144 W. T. Worster, *The Evolving Definition of the Refugee in Contemporary International Law*. 30 Berkeley Journal of International Law 101, at page 161 (2012)

Member States use accelerated asylum procedures in case of 'manifestly unfounded' claims, as speedy procedures have in addition to shorter time limits often fewer procedural safeguards. For Member States it enables to deal with these in an efficient and cost-effective way[145], which may be considered positive if the claims are truly manifestly unfounded. Although speedy asylum procedures may be in the interest of both parties in the process, it has to be taken into consideration that short time limits "may undermine the effective exercise of asylum applicant's rights," which are granted by the Qualification Directive and thus may be incompatible with the EU law.[146]

Sur place

Article 5 in conjunction with Article 4 of the Qualification Directive set the common standards for treatment of *sur place* claims, being the second example after non-state actors where the Qualification Directive has made great efforts to reduce inconsistencies.[147] According to Lambert, the Qualification Directive is not in conformity with the international law as it does not oblige Member States to examine carefully the situation where authorities in the country of origin are aware (and their view) of the activities in question regarding the cases of refugees *sur place.* The second attention-needing aspect is the situation of asylum seeker acting in bad faith while genuinely being afraid of persecution if sent back to country of origin.[148] There has been criticism that the Qualification Directive authorisation[149] of denial of those *sur place* claims which are based on the applicant's own actions taken after filing in the first asylum claim, is unlawful.[150] The issue is that in the 1951 Convention there is no regulation about not offering

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145 M. Reneman, *Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy*, 25 International Journal of Refugee Law 717, at page 717 (2013)

146 *Ibid*, at 737

147 H. Storey, *Consistency in Refugee-Decision Making: a Judicial Perspective*, 32 Refugee Survey Quarterly 112, at page 118 (2013)

148 H. Lambert, *The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law*, 55 International and Comparative Law Quarterly 161, at page 172 (2006)

149 Qualification Directive Article 5(3): "Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin."

150 J. C. Hathaway, *E.U Accountability to International Law: the Case of Asylum*, 33 Michigan Journal of International Law 1, at page 4 (2011)

protection to the person whose refugee status has something to do with this person's own actions. According to UNHCR, there is no explicit or implicit provision in this regard.[151]

Differing the statuses

The Qualification Directive 2004 grants two different sets of rights and benefits to refugees and beneficiaries of subsidiary protection. According to the Commission "Green Paper", harmonisation on higher level would be possible by developing, first, uniform status for refugees, and second, for beneficiaries of subsidiary protection. An adverse opinion was presented by ECRE[152] alleging that the Qualification Directive differentiates those with the refugee status from those with subsidiary protection by allowing Member States to withhold rights, or grant significantly lower levels of rights, to beneficiaries of subsidiary protection. According to ECRE suggestions, any rights afforded to 1951 Convention refugees should also be granted to all persons who have been afforded subsidiary protection, as both categories of protected persons have similar needs and circumstances.[153]

Persecution

According to the handbook of UNHCR, there is no universally accepted definition of persecution and attempts to define it have not been successful.[154] Moreover, the handbook describes the definition of persecution varying due to variations in the psychology of people and unique nature of each situation.[155] Article 9 of the Qualification Directive defines 'persecution' as a 'severe violation of basic human rights' suffered in connection with one of the reasons mentioned in Article 10 of the Qualification Directive. An individual will be considered to be persecuted if

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151 UNHCR, *UNHCR Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted*, at page 16 (2009)

152 ECRE, *ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification of Third Country Nationals and Stateless Persons or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted. European Council on Refugees and Exiles*, at page 4 (2004)

153 *Ibid*, at page 4

154 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, HCR/IP/4/Eng/REV.1, available at: http://www.refworld.org/docid/3ae6b3314.html [accessed 14 April 2014] Point 51 at 10.

155 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, January 1992, HCR/IP/4/Eng/REV.1, available at: http://www.refworld.org/docid/3ae6b3314.html [accessed 14 April 2014] Point 52 at 10

acts of persecution are committed for one or more of the reasons of persecution, which are: race, religion, nationality, political opinion or membership of a particular social group. A person is also considered to be persecuted if there is no protection against acts of persecution[156]. Article 9 of the Qualification Directive defines the elements supporting the acts constituting persecution in the meaning of Article 1(A) of the 1951 Convention. From the provisions set by Article 9 it may be concluded that there is a need for sufficiently serious violation of fundamental rights in order to constitute persecution.[157]

As the provisions on persecution are vague, Court interpretations and recommendations should be used. In the case of *Germany v. Y and Z*, the CJEU dealt with the definition of 'persecution' in the Qualification Directive for the first time.[158] The Court has stated that not all interferences into the right to freedom of religion which violate Article 10(1) of the Charter of Fundamental Rights of the EU are on a sufficient level to be regarded as acts of persecution[159] and regards it being apparent from the wording of Article 9(1) as the violation of religious freedom must be severe and have significant effect on the person concerned.[160] On the basis of the Court interpretation[161] it has been concluded that as the individual's right to express religious beliefs is not absolute, "limitations in accordance with these provisions cannot be considered as an act of persecution".[162]

Yet, according to Lehmann, CJEU did not solve the problems the Qualification Directive entails concerning defining of 'persecution'[163]. There has been more criticism about this case, alleging

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156 L. Leboeuf & E. L. Tsourdi, *Towards a Re-Definition of Persecution? Assessing the Potential Impact of Y and Z*. 13 Human Rights Law Review 402, at page 405 (2013)

157 *Minister voor Immigratie en Asiel* v. *X (C-199/12), Y(C-200/12), and Z* v. *Minister voor Immigratie en Asiel (C-201/12)*, 25 International Journal of Refugee Law 779, at page 789 (2014)

158 J. M. Lehmann, *Persecution, Concealment and the Limits of a Human Rights Approach in (European) Asylum Law – The Case of Germany v Y and Z in the Court of Justice of the European Union*, 26, International Journal of Refugee Law 1, at page 1 (2014, in press)

159 *Bundesrepublik Deutchland v. Y (C-77/11) and Z (C-99/11), Germany v. Y and Z*, European Union: Court of Justice of the European Union, 5 September 2012, para. 58 (2012)

160 *Germany v. Y and Z*, para. 59

161 *Ibid*, para. 60: „Acts amounting to limitations on the exercise of the basic right to freedom of religion within the meaning of Article 10(1) of the Charter which are provided for by law, without any violation of that right arising, are thus automatically excluded as they are covered by Article 52(1) of the Charter."

162 L. Leboeuf & E. L. Tsourdi, *Towards a Re-Definition of Persecution? Assessing the Potential Impact of Y and Z*. 13 Human Rights Law Review 402, at page 406 (2013)

163 J. M. Lehmann, *Persecution, Concealment and the Limits of a Human Rights Approach in (European) Asylum Law – The Case of Germany v Y and Z in the Court of Justice of the European Union*, 26 International Journal of Refugee Law 1, at page 1 (2014, in press)

that the CJEU reasoning was not free from ambiguity when referring to "genuine risk, *inter alia,* being prosecuted"[164], there is no indication of which are the rest of the fundamental rights violations that should be taken into account. Therefore, as a basis for interpretation, Advocate General Yves Bot's 'ground breaking analyses'[165] should be used, as he provides more clarity[166] limiting the concept of persecution to breach of non-derogable rights. According to him, Article 9(1)(a) of the Qualification Directive should be interpreted in the sense that a severe infringement of freedom of religion is likely to result in an act of persecution where the asylum seeker runs a real risk of being executed or subjected to torture, or inhuman or degrading treatment, of being reduced to slavery or servitude or of being prosecuted or imprisoned arbitrarily by exercising that freedom (or infringing the restrictions placed on the exercise of that freedom) in his country of origin.

Another aspect of persecution is when it concerns a 'particular social group'. The definition of that is provided in Article 10(1) of the Qualification Directive. According to the latter, two conditions are to be met: firstly, the members of the group should share an innate characteristic or unchangeable common background or belief fundamental enough to identity or conscience "that a person should not be forced to renounce it". Secondly, the 'particular social group' should have a distinct identity in the country of origin as it is distinguished by the surrounding society.[167]

The vagueness of the definition and thereafter following provisions concerning 'persecution' have also been pointed out. For example, while talking about the religious basis, Advocate General Yves Bot has proposed departure from an abstract definition of persecution as "an act that violates the core of the right to freedom of religion" and suggested adopting a concrete

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164 Joined Cases 77/11 (Y) and C-99/11 (Z), Judgment of the Court 05/09/2012, para. 67: "Accordingly, a violation of the right to freedom of religion may constitute persecution within the meaning of Article 9(1)(a) of the Directive where an applicant for asylum, as a result of exercising that freedom in his country of origin, runs a genuine risk of, inter alia, being prosecuted or subject to inhuman or degrading treatment or punishment by one of the actors referred to in Article 6 of the Directive"

165 In the question of defining persecution in what regards violation of religious freedom, German *Bundesverwaltungsgericht* - Federal Administrative Court - referred questions to the CJEU, who answered with Advocate General Yves Bot opinion. Available at: http://www.refworld.org/pdfid/503s4fa292.pdf [last accessed 14 May 2013]

166 L. Leboeuf & E. L. Tsourdi, *Towards a Re-Definition of Persecution? Assessing the Potential Impact of Y and Z.* 13 Human Rights Law Review 402, at page 411 (2013)

167 *Minister voor Immigratie en Asiel* v *X (C-199/12), Y(C-200/12), and Z* v *Minister voor Immigratie en Asiel (C-201/12)*, 25 International Journal of Refugee Law 779, at page 788 (2014)

approach, which should focus on the nature of the harm feared by individuals who, when returning to their country of origin, would exercise their faith.[168]

Serious harm

Article 15 of the 2004 Qualification Directive explains the meaning of "serious harm" consisting of three possibilities – death penalty or execution, torture or inhuman or degrading treatment or punishment or serious and individual threat to civilian's life or person. Serious harm is being used for determining the qualification for subsidiary protection. This article has gained a lot of criticism and different opinions about it, most of these concerning 15(c). For example, according to Durieux, the wording of Article 15(c) is 'nonsensical'. Additional criticism was addressed to CJEU, which, according to him, has not 'disentangled' the wording of Article 15(c).[169] One more critical remark was aimed against CJEU Grand Chamber, which in its decision of 17 February 2009 in the *Case Elgafaji*[170] concluded that 15(c) should be interpreted in conjunction with Article 2(e), which defines the person eligible for subsidiary protection, also referring to a "serious harm".

According to the Court findings, the interpretation rule for Article 15(c) is not to consider a serious and individual threat to the life or person of an applicant for subsidiary protection as subject to the condition that the applicant provides evidence about being specifically targeted by reasons or factors specific to applicant's circumstances. Secondly, the Court has noted that such a threat is considered to exist if the level of violence of armed conflict reaches so high that "substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face real risk of being subject to that threat".[171] Degree of violence has to be assessed by competent national authorities or by courts of Member States.

The Court has been criticised for drawing attention away from the real question by focusing on individual threat while the main focus should be on the nature of the risk originating from

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168 L. Leboeuf & E. L. Tsourdi, *Towards a Re-Definition of Persecution? Assessing the Potential Impact of Y and Z.* 13 Human Rights Law Review 402, pp. 406-407 (2013)

169 J.-F. Durieux, *Of War, Flows, Laws and Flaws: a Reply to Hugo Storey*, 31 Refugee Survey Quarterly 161, at page 172 (2012)

170 *Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie*, *Elgafaji*, C-465/07, European Union: Court of Justice of the European Union, 17 February 2009

171 *Elgafaji*, para 43 (2009)

indiscriminate violence.[172] According to Lambert[173], armed conflict has been alleged to have an autonomous meaning in the EU law, focusing less on the parties involved in the conflict in question and more on the intensity of violence. Thus, the International Humanitarian Law (IHL) in assessment of an armed conflict is regarded as not necessary in order to determine its qualification as a reason for gaining subsidiary protection.[174] From the opposing position, it has been argued that IHL, as *lex specialis* when it comes to armed conflicts, should be taken as a starting point in this matter; to determine and characterise the nature and level of the armed conflict in question.[175] This in turn means that if there is a disagreement about the character of conflict, it may jeopardise the application of Article 15(c), as its protection is available only when an armed conflict exists.[176]

According to Durieux[177], the problem is in the causal chain connecting an objective situation of armed violence to a true need for international protection against the violation that is not described as persecution. In his opinion, it is not only violence that is indiscriminate but its effects as well (e.g. epidemics, collapse of public services, loss of livelihoods) that may endanger their lives or persons[178]. Adding 15(c) to the list of subsidiary protection grounds, EU has affirmed that people in such circumstances should not be sent back to their home countries.[179] It is relevant not to consider only specific situations of armed violence to qualify it for persecution but its impact as well.

Another critical aspect of Article 15 is a lack of reference to slavery or servitude, as this might leave open possibilities to torture or other inhuman or degrading treatment or punishment.[180]

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172 J.-F. Durieux, *Of War, Flows, Laws and Flaws: a Reply to Hugo Storey*, 31 Refugee Survey Quarterly 161, at page 174 (2012)

173 H. Lambert, *The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence*, 25 International Journal of Refugee Law 207, at page 228 (2013)

174 *Ibid,* at page 228

175 H. Storey, *Armed Conflict in Asylum Law: The "War-Flaw"*, 31 Refugee Survey Quarterly 1, at page 27 (2012)

176 J. McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 17 International Journal of Refugee Law 461, at page 487 (2005)

177 J.-F. Durieux, *Of War, Flows, Laws and Flaws: a Reply to Hugo Storey*, 31 Refugee Survey Quarterly 161, at page 174 (2012)

178 *Ibid.*

179 *Ibid*

180 G. Gilbert, *Is Europe Living Up to Its Obligations to Refugees?*, 15 The European Journal of International Law 963, at page 979 (2004)

Non-state actors

Article 6 of the Qualification Directive enlists actors of persecution or serious harm, including non-state actors, with a limitation that it must be proved that the state and parties or organisations controlling the state (or substantial part of the territory) are unable or unwilling to provide protection. Before the Qualification Directive was adopted, Member States were in disagreement on whether the non-state actors could be potential actors of persecution; on one side of the argument were Germany, France, Netherlands, Switzerland opposing UK and several others on the other side.[181] Non-state actors' involvement can be considered as a very positive development, since the refugee definition is thus broadened in countries where such protection against persecution was not provided prior to the Qualification Directive.

Internal protection

One of the problematic provisions concerning internal protection is provided in Article 7 of the Qualification Directive, which stipulates that protection can be provided by "parties or organisations, including international organisations, controlling the state or substantial part of the territory of the state". The Directive also specifies that if an asylum seeker can find protection provided by an international organisation in the country of origin, the criteria for refugee status are considered to be not met. This provision can be considered illegitimate under international law[182] for the following reasons. Firstly, due to the fact that state-like authorities cannot be parties to international human rights instruments since it would not be possible to hold them accountable for non-compliance with international and human rights obligations.[183]

ECRE, in its note, has recommended stronger reference to the national protective measures as non-state authorities cannot be held responsible for violation of international obligations. On the other hand, the irrelevance of the way protection is achieved has been referred to. This view indicates that a person, when protected in the country of origin, has no grounds for a fear of

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181 H. Storey, *Consistency in Refugee-Decision Making: a Judicial Perspective*, 32 Refugee Survey Quarterly 112, at page 118 (2013)

182 G. Troeller, *Asylum Trends and Their Impact on Protracted Refugee Situations*, In: G. Loescher, J. Milner, E. Newman & G. Troeller (Eds.) *Protracted Refugee Situations: Political, Human Rights and Security Implications*. at page 48 (2008)

183 ECRE, *ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification of Third Country Nationals and Stateless Persons or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted. European Council on Refugees and Exiles*, at page 7 (2004)

persecution regardless of the source that protection originates from.[184] Secondly, there is a danger that an asylum seeker is sent back to the country of origin even if available protection concerns only part of the state.[185] According to Article 8(3), technical obstacles may be considered as a factor that does not influence legality of the return to the country of origin. This is a severe danger to the asylum seeker even in the case when the protection is provided in the country of origin as it does not necessarily mean that the person in question has access to it. Access to the safe area in home country would probably be considered under the technical obstacle notion. ECRE's position in this question is strict: "if such efforts by a State do not in fact reduce a risk of persecution below the well-founded fear threshold then there is no protection in reality".[186]

Key criteria for assessing whether an internal protection alternative is properly available are needed as a ground for common, harmonised and fair bases for the persons responsible for this decision. It is not reasonable to place a person in a need of protection in the situation where being obliged to provide information might cause new acts of persecution against an individual or might even be impossible without putting life on stake. In addition it means that Member States have to have up-to-date information about the country of origin as this might decide the future of the asylum applicant. The use of COI (Country of Origin) database has been inconsistent[187] meaning that in different Member States the decisions may vary a lot even if they are based on the safety-assessment of the same country of origin. This shifts a great responsibility to EASO, who is developing this database while there is always a risk that large data is difficult to keep up-to-date. As developments in hazardous regions may escalate abruptly, there should be always an obligation for Member States to double-check the information of COI.

In Article 8, a possibility to use an internal protection alternative to deny refugee status is provided. Member States are allowed to refuse international protection if they decide that there is a part of the country of origin where no persecution occurs according to Article 8. However,

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184 H. Lambert, *The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law*, 55 International and Comparative Law Quarterly 161, at page 173 (2006)

185 G. Gilbert, *Is Europe Living Up to Its Obligations to Refugees?*, 15 The European Journal of International Law 963, at page 976 (2004)

186 *ECRE, ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification of Third Country Nationals and Stateless Persons or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, at page 7 (2004)

187 H. Storey, *Consistency in Refugee Decision-Making: A Judicial Perspective*, 32 Refugee Survey Quarterly 112, at page 121

there is no reference to certain key criteria that should be considered during the assessment process whether internal protection is available to the applicant or not.[188] ECRE's position in this question is strict, stating that if efforts made by the country of origin do not actually reduce the risk of persecution below the well-founded fear threshold, it may be concluded that there is no protection in reality,[189] giving thus the decisive role to the assessment of protection. Some grounds for assessment were provided by the CJEU. According to the Court's interpretation of the Qualification Directive, there must be "an effective legal system for the detection, prosecution and punishment of acts constituting persecution and the national concerned will have access to such protection if he ceases to have refugee status". The presence of a multinational force in that territory can be considered as the actor of protection.[190]

The relevant directives also include restrictive measures which may be in conflict with the 1951 Convention. It may be argued that these acts of the EC do not indeed grant rights and benefits 'apart from the Convention', but merely 'implement' the 1951 Convention's obligations. However, the EU is not a contracting party to the 1951 Convention, and is therefore not under any direct obligation to implement its provisions separately from Member States. By creating an additional supranational refugee regime, the EU offers refugees and asylum seekers additional safeguards of EU law and its institutions.[191]

Exclusion clauses

There are two main opposing views concerning the subject of exclusion. One emphasises the possibility to have 'tremendous' consequences when applying the exclusion clause to asylum seekers and calling for adoption of the 'inclusion before exclusion' approach, while the opposite side relies on the national security concerns.[192]

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188 *ECRE, ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification of Third Country Nationals and Stateless Persons or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, at page 7 (2004)

189 *ECRE, ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification of Third Country Nationals and Stateless Persons or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, at page 7 (2004)

190 *Abdulla and Others,* para. 76 (2010)

191 A. Skordas, *Article 5 – Rights Granted 'Apart from this Convention'*, in A. Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, at page 690 (2011)

192 D. Kosar, *Inclusion before Exclusion or Vice Versa: What the Qualification Directive and the Court of Justice Do (Not) Say*. 25 International Journal of Refugee Law 87, at page 88 (2013)

Article 12 of the Qualification Directive lists the reasons for exclusion from being the refugee for the third-country nationals, which are broadly similar to the ones in 1(F) in the 1951 Convention. According to the Article 12(1)(a) a person is excluded from being a refugee if he or she falls within the scope of Article 1(D) of the 1951 Convention relating to the protection from UN agencies other than UNHCR. According to the Judgment of the Court in Case C-31/09, *Nawras Bolbol v. Bevándorlási és Állampolgársági Hivatal,*[193] an individual receives protection or assistance from an agency of the United Nations other than UNHCR if that person has actually availed himself of that protection or assistance. The Member States may not simply assume from the presence of international agency in the country of origin, that the protection against persecution has been established.

Qualification Directive Article 12(2)(b) is regulating the exclusion in the case of serious non-political crimes outside the country of refuge, which corresponds to the Article 1(F)(b) in the 1951 Convention. In addition, Article 12(2)(c) regulates exclusion due to violation of principles and purposes of UN. The Court has stated in Judgment of Joined Cases C-57/09 (B) and C-101/09 (D)[194] that Articles 12(2)(b) and (c) should be interpreted as persons' membership in an organisation which is because of its involvement in terrorist acts on the list in the Annex of 2001/931/CFSP[195] and that the person has actively supported the armed struggle supported by that organisation does not automatically count as a serious reason to consider that person in question has committed 'a serious non-political crime' or 'acts contrary to the purposes and principles of the United Nations'.

In addition, according to the Court, assessment of specific facts is important in order to determine if the acts committed by the concerned organisation meet the conditions in those provisions and to make sure that the person has carried out acts attributed to that person. The standard of proof is set under Article 12(2) of the Qualification Directive. The Court's interpretation of Qualification Directive Articles 12(2)(b) or (c) is that exclusion is not to be considered conditional on the person in question being currently dangerous to the host Member State and on an assessment of proportionality in relation to the particular case.

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193 *Nawras Bolbol (C-31/09) v Bevándorlási és Állampolgársági Hivatal,* European Union: Court of Justice of the European Union, 17 June 2010, para. 54 and 55 (2010)

194 *Bundesrepublik Deutchland v B (C-57/09), D (C-101/09)*, *Joined cases C-57/09 and C-101/09*, European Union: Court of Justice of the European Union, 9 November 2010, para. 99 (2010)

195 Council Common Position of 27 December 2001 *on the Application of Specific Measures to Combat Terrorism*, [2001] OJ L344/93

Additional discretion is left to Member States with Article 3 of the Qualification Directive[196], which is to be interpreted so that Member States may grant a right of asylum under their national law to a person who is excluded from refugee status pursuant to Article 12 (2) of the Directive, if that other kind of protection includes no risk of confusion with refugee status within the meaning of the directive.[197]

Cessation of refugee status

The cessation clauses in the Qualification Directive are provided in Article 11, (a)–(f), in which the first four[198] are notably similar to the ones in the 1951 Convention (Articles 1(C)(1)-(6)[199]). The differences appear between Article 1C(5), (6) of the Convention and Article 11(1)(e), (f) of the Qualifications Directive.

Article 11(1)(e) determines the conditions for cessation of refugee status for a third country national or a stateless person if he can no longer continue to refuse to avail himself of the protection of the country of nationality, the ground for it being the cease in circumstances under which the refugee status was granted. It was a step back from the perspective of international practice due to restrictive wording.[200] In judgment of the *Abdulla and others* the Court stated that the refugee status may be considered to cease if the changes in circumstances are significant and non-temporary in nature[201]. In addition, the circumstances which justified the person's fear of

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196 Art. 3 in QD 2004: "Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive"

197 *Joined cases C-57/09 and C-101/09,* p 121 (2010)

198 (1) He has voluntarily re-availed himself of the protection of the countryof his nationality ; or
(2) Having lost his nationality, he has voluntarily reacquired it ; or
(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality ;
(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution

199 (a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or
(b) having lost his or her nationality, has voluntarily re-acquired it; or
(c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or
(d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution

200 H. Lambert, *The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law*, 55 International and Comparative Law Quarterly 161, at page 176 (2006)

201 *Abdulla and Others,* para. 76 (2010)

persecution on the ground brought in Article 2(c), which defines 'refugee', should no longer exist and that person should have no reason to be afraid of persecution.

Previously described provisions in Qualification Directive are in convergence with the 1951 Convention. According to Article 1C(5) in the 1951 Convention, refugee status will cease, when the person can no longer continue to refuse to avail itself of the protection of the country of his nationality on the ground that the "circumstances in connexion with which the person has been recognized as the refugee have ceased to exist". The need of changes to be effective is also emphasised by the UNHCR in its note on the cessation clauses[202] in the 1951 Convention by stating that the change in refugee's country of origin is taken into account as fundamental, durable and effective only if they "remove the basis of the fear of persecution".

Another question is if the changes restoring peace, security and effective national protection involve the whole country or only part of it. It has been pointed out that UNHCR has given seemingly conflicting guidelines in this regard.[203] The first example[204] about the applicability of Article 1C(5) and (6) in case only part of the country is included in the change states that the cessation clauses may be applicable to certain regions of a country of origin if the national protection is effective. The second source[205] suggests that changes in the refugee's country of origin affecting only part of the territory should not, in principle, lead to cessation of refugee status.

Changes in circumstances have to be assessed by competent authorities of Member States, verifying that one of the actors of protection named in the Qualification Directive Article 7(1) has taken relevant steps to prevent persecution.[206] Under the 1951 Convention, States Parties have committed to weigh the 'compelling reasons'[207] from the previous acts of persecution, which justify the refugee's refusal from protection of the country of nationality. The latter is

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202 UNHCR, *Note on Cessation Clauses*, 30 May 1997, EC/47/SC/CRP.30, para 19, available at: http://www.refworld.org/docid/47fdfaf1d.html [last accessed 10 May 2014]

203 J. Fitzpatrick & R. Bonoan, *Cessation of Refugee Protection*. In: E. Feller, V. Türk & F. Nicholson (Eds.), *Refugee Protection in International Law – UNHCR's Global Consultations in International Protection*, at page 497 (2003)

204 UNHCR, *Note on Cessation Clauses*, 30 May 1997, EC/47/SC/CRP.30, paras 25-26, available at: http://www.refworld.org/docid/47fdfaf1d.html [last accessed 10 May 2014]

205 UNHCR, *The Cessation Clauses: Guidelines on Their Application*, 26 April 1999, para 29, available at: http://www.refworld.org/docid/3c06138c4.html [last accessed 10 May 2014]

206 *Abdulla and Others*, para. 76 (2010)

207 Arts. 5 and 6 in the 1951 Convention

unfortunately not determined in the Qualification Directive. If there are compelling reasons to refuse from returning to the country of nationality deriving from the act of persecution that was the ground for gaining the refugee status and there is no obligation for the Member State to take these into consideration, means that the Member State is put in a position where precise implementation of the Qualification Directive would result in violating the 1951 Convention. There is a possibility that it may even result in a breach of *non-refoulement* principle.

According to UNHCR the general consensus among lawyers is that cessation clauses are applicable only if the nature of change is fundamental, durable, effective but also the fear of persecution is removed.[208] Therefore, the developments must be assessed "in light of the particular cause of fear". This puts stronger emphasis on the need of 'compelling reasons' to be taken into account as the ground for not ceasing the status of refugee. It also indicates the need for the same provision to be included in the Qualification Directive. A very similar interaction is between the 1951 Convention's Article 1C(6) and the Qualification Directive's Article 11(1)(f) where a similar situation regarding stateless persons is regulated.

According to Article 11(2) of the Qualification Directive, the Member States have to evaluate if the change of the circumstances in the country of origin is of significant and non-temporary nature and that refugee's fear is not well-founded anymore. According to the Court, when assessing a well-founded fear of persecution, it is necessary to ascertain if the established circumstances constitute such a threat that an individual may reasonably fear being a subject to the act of persecution. In addition, it is also necessary to assess the possibility to avoid persecution by the applicant.[209] This provision is controversial to the declared harmonising nature of the Qualification Directive as it creates substantial differences in the practices of the Member States. The whole process in deciding if the changes are significant and non-temporary varies from country to country and depends entirely on the quality and contemporaneity of Member State's information about the country of origin.

Bases for assessment should be similar on different levels: if compared to those between different Member States; in one Member State, and also within one specific case throughout the

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208 UNHCR, *Note on Cessation Clauses*, 30 May 1997, EC/47/SC/CRP.30, para 19, available at: http://www.refworld.org/docid/47fdfaf1d.html [last accessed 10 May 2014]

209 *Minister voor Immigratie en Asiel* v *X (C-199/12), Y(C-200/12), and Z* v *Minister voor Immigratie en Asiel (C-201/12)*, 25 International Journal of Refugee Law 779, at page 792 (2014)

process. The Court expressed that although the different nature of every situation must be taken into account, the rules for assessment procedure should be on similar basis and the standard of probability for assessing the risk of circumstances (in the case the refugee status has been ceased to exist) must be the same as when the refugee status was granted in the first place.[210]

Revocation

Article 14(4) of the Qualification Directive, which gives a permit to Member States to refuse granting the refugee status by governmental, administrative, judicial or quasi-judicial bodies, when there are reasonable grounds to consider presence of this individual in a Member State as a danger to the Member State's security. The 1951 Convention Articles 1(E) and 1(F) introduce the exclusion clauses, but do not foresee exclusion on the national security grounds.[211] The provision of allowing national security grounds to be used for denying refugee status before an asylum claim has been determined. Those terms have been used for widening the exclusion clauses in the 1951 Convention. This has been brought out as a potential breach of Member States' obligations under the 1951 Convention.[212] The 1951 Convention provides possibilities for exceptions from *non-refoulement* principle in Article 33(2),[213] but as the 1951 Convention does not provide 'revocation' on the national security grounds as a possibility for ending refugee status, the Qualification Directive's respective clause is not in convergence with the 1951 Convention. The 1951 Convention's exclusion clauses are narrower in this respect.

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210 *Abdulla and Others,* para. 98 and 100 (2010)

211 (E) This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.

(F) The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that :

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes ;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee ;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations

212 *ECRE, ECRE Information Note on the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification of Third Country Nationals and Stateless Persons or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, at page 11 (2004)

213 „The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

In Article 33(2) of the 1951 Convention, which provides the grounds for exception from the *non-refoulement* principle, clear limits are set with the wording "having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country". Although a similar provision is in the Qualification Directive, it keeps the provisions vague by offering another possibility, and by allowing the Member States, according to Article 14(4)(a), to revoke the status of refugee if there are „reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present". Although the expression 'reasonable grounds' itself entails vagueness, it would not be problematic if the scope of this principle was explained further. As the purpose of the Qualification Directive is to harmonise the legal basis of asylum policy, an obstacle to achieving the main goal can be noted in these provisions of Article 14.

According to the European Legal Network on Asylum (ELENA)[214], the above-mentioned broadening of the exclusion clauses may entail significant consequences as an individual whose refugee status is revoked, loses the substantive rights granted in the 1951 Convention (employment, housing, etc.) whereas a refugee who loses only the Convention guarantee to *non-refoulement* still has the other rights in case he or she is staying in the host country. ECHR has been brought as an example of instruments that might independently prohibit refoulement.

Non-refoulement

It has been emphasised that by itself, the international law does not provide the right to asylum (in a sense of permanent residence in a country), but provides the refugee status. This means that they acquire the right of *non-refoulement* under Article 33 of the 1951 Convention.[215] Although the actual scenarios diverge due to difficulty of harmonising the refugee status granted across different jurisdictions, the State may well be insisted to permit a person enter its territory on the 'purpose of protection'.[216] Returning an individual from a Member State to a place, where they would suffer torture, inhuman or degrading treatment or punishment, would be breach of the Member State's international human rights law obligations. The importance for a Member State to follow the principle of *non-refoulement* is reiterated by the statement that possible breach of

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214 ELENA, *The impact of the EU Qualification Directive on International Protection*, at page 23 (2008)

215 G. Gilbert, *Is Europe living up to its Obligations to Refugees?*, 15 The European Journal of International Law 963, at page 966 (2004)

216 G. S. Goodwin-Gill, *The Dynamic of International Refugee Law*. 25 International Journal of Refugee Law 651, at page 655 (2014)

international law by EU in the field of refugee protection is measured by the *non-refoulement* principle standards, which are brought in different international legal instruments (e.g. the 1951 Convention, UDHR, CAT, ECHR).[217]

In order to compare the provisions for protection from *refoulement* in the Qualification Directive and Articles 21 and 33(2) of the 1951 Convention, they can be regarded broadly similar. Nevertheless, among the above analysed principles in this chapter, several divergences from the 1951 Convention were detected. It may be that these following provisions, divergent from the 1951 Convention give Member States a possibility to breach the *non-refoulement* and therefore their international obligations.

The most obvious example how the Qualification Directive may provide possibilities to violate the principle of *non-refoulement* allowing the applications of the nationals of the EU Member States to be treated as 'manifestly unfounded', offering protection only to third country nationals. As the statistics indicate[218] there are many countries which are referred to as safe but in reality sending a person back to these countries and might therefore create a breach of the *non-refoulement* principle. The same might happen in several other Articles of the Qualification Directive 2004, for example, Article 8(3) may end up breaching the *non-refoulement* principle.

2.3 The second stage of the harmonisation process – Qualification Directive 2011

The goal of the second stage of harmonisation was to achieve a higher common standard of protection, adopting an integrated, comprehensive approach to asylum. Equality in protection in EU on the higher level, thus ensuring a higher degree of solidarity between EU Member States, was also in plan.[219] According to the Hague Program,[220] the second stage of developing a common policy in the area of asylum, migration and borders should be based on solidarity and

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217 G. Gilbert, *Is Europe living up to its Obligations to Refugees?*, 15 The European Journal of International Law 963, at page 966 (2004)

218 Further analysed in Chapter 2, 2.3, infra 210

219 European Commission, *Green Paper on the Future Common European Asylum System*, 6 June 2007, COM(2007) 301, at page 3

220 Chapter III, Art 1, point 1.2, European Union, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 13 December 2004, 2005/C 53/01, available at: http://www.refworld.org/docid/41e6a854c.html [accessed 12 April 2014]

responsibility shared between Member States. It includes financial implications and closer cooperation in practical aspects between those.[221]

The purpose of developing CEAS is partly fulfilled. The directives have been adopted and recast, the Qualification Directive had already been transposed into national legislations of Member States by the end of 2013. The Qualification Directive among other directives has reduced some divergences between the Member States in interpretation of refugee status. Nonetheless, there has been criticism that it contains the same inherent limitations as the 1951 Convention what concerns the possibility to anticipate all future scenarios to provide future guidance and is not comprehensive, while speaking in general terms only.[222] At the same time, Pirjola has argued that it is necessary to speak in general terms, in order to include the concepts of future methods and practises of the forms of persecution, which might happen in future.[223]

The Qualification Directive has been accused in raising three significant limitations. The first one is geographic - it cannot be exported outside the EU; secondly, the potential for regional interpretations to undermine a universal regime is also problematic; thirdly, the method of achieving convergence is by political negotiation and compromise rather than by proper construction of the 1951 Convention, using the accepted tools of legal reasoning.[224] The scale of the latter flaws is wide, only the second one can be considered to be recoverable. This may be achieved through critical analysis by Member States during the process of transposition of the Qualification Directive into national legislation. Member States should consider their international obligations when changing their legislation and also when implementing the provisions of the Qualification Directive in practice. Nevertheless, in a perfect version the Qualification Directive should be already in conformity with the 1951 Convention or at least it should not provide possibilities to violate it by Member States. The following section will

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221 According to the Hague Program, it includes: „technical assistance, training, and exchange of information, monitoring of the adequate and timely implementation and application of instruments as well as further harmonisation of legislation"

222 A. M. North & J. Chia, *Towards Convergence in the Interpretation of the Refugee Convention: a Proposal for the Establishment of an International Judicial Commission for Refugees*, 25 Australian Year Book of International Law 105, at page 117 (2006)

223 J. Pirjola, *Shadows in Paradise – Exploring Non-Refoulement as an Open Concept*. 19 International Journal Refugee Law 639, at page 646 (2007)

224 A. M. North & J. Chia, *Towards Convergence in the Interpretation of the Refugee Convention: a Proposal for the Establishment of an International Judicial Commission for Refugees*, 25 Australian Year Book of International Law 105, at page 117 (2006)

discuss problematic aspects from this perspective - the 2004 Qualification Directive will be compared to the 2011 recast Qualification Directive.

Applicants

Several reviewers have expressed their concern regarding the limitations for nationals of EU countries, meaning that they may still not seek asylum according to the Qualification Directive. Nonetheless, this limitation was included in the final version of the 2004 Qualification Directive and the proposal of the revised Qualification Directive as well. In its comments[225] to the Proposal of Revised Qualification Directive UNHCR recommends to widen the definition of 'applicant' so it would apply to anyone applying for international protection. Regardless of all the criticism, the 2011 Qualification Directive is still following its initial approach.

This means that the definition of refugee in the Qualification Directive is still in breach with the 1951 Convention as its Article 3 includes prohibition to discriminate the refugees *inter alia* based on the country of origin. If one looks at the numbers, the exclusion of Member States' nationals seems to be a potential cause for situations where persons in real need of protection are outside the scope of the Qualification Directive. According to the UNHCR[226], many of the Member States are not only offering asylum but are a 'country of origin' in the asylum statistics. Some examples of the countries of origin of the individuals who have already gained status of refugee taken from 2013 mid-year data are: Romania (2498), Bulgaria (2055), Poland (1654), Hungary (1276), Czech Republic (945), Estonia (379), Slovakia (304), Lithuania (254), Germany (180), United Kingdom (154), France (107), Greece (96), Belgium (87), Netherlands (62), Spain (51).

A good example is Croatia (49 987) where the number of persons who have already gained the refugee status shows the situation in the first half of 2013, just before joining EU (the number of pending cases in mid-2013 is 1116). After joining EU on 01 July 2013, asylum applications connected to Croatia as the 'country of origin' should be, according to the Qualification Directive' provisions (and 22. Protocol on Asylum for Nationals of Member States), dealt with the presumption that these are 'manifestly unfounded' due to "given the level of protection of

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225 UNHCR, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted* (COM(2009)551, 21 October 2009), page 4 (2009)

226 Table 2 in UNHCR, *Mid-year trends 2013*, at page 18 (2013)

fundamental rights and freedoms" in EU Member States. These should be regarded as 'safe countries of origin'. More detailed conclusions could be reached after seeing the changes and directions in the statistics gathered after Croatia's admission to EU and actions taken in order to solve the situation by Croatia itself and EU. In addition, the activities by Member States towards Croatian refugees should be observed and analysed in the future.

Differing the statuses

The lack of consistency in the approach to determine the refugee status was one of the problems identified by the EU and addressed in the Qualification Directive.[227] Various interpretations of the Qualification Directive regarding statuses have created a situation where a person may qualify as a refugee in one country but not in another. This has also been referred to as 'status lottery', which would not exist if there was convergence in interpretations.[228] Moreover, not every Member State uses the term 'subsidiary protection'; for example, the United Kingdom has introduced the term 'humanitarian protection'.[229] The Commission offered,[230] as one possible solution, to provide one uniform status to refugees and another to those to whom subsidiary protection is granted. A reasonable solution was suggested by offering two possible sets of solutions for asylum applicant. In the beginning, subsidiary protection was aimed to benefit persons from non-EU countries who fell out of the scope of the 1951 Convention. In the EU subsidiary protection, which was introduced in the Qualification Directive 2004, was a key tool for asylum seekers suffering from conflicts and violence. As the approach in available practises based on restrictive interpretation, the scope of beneficiaries of subsidiary protection was narrowed down after the drafting period.[231]

Persecution

Persecution is not defined in the 1951 Convention or in any other international instrument.[232] The interpretations may thus vary widely. Therefore any specification in this regard is valuable

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227 N. Mole & C. Meredith, *Asylum and the European Convention on Human Rights*, *at page* 17 (2010)

228 M. Dean, *Bridging the Gap: Humanitarian Protection and the Convergence of Laws in Europe*. 20 European Law Journal 34, at page 47 (2014)

229 ELENA, *The impact of the EU Qualification Directive on International Protection*, at page 27 (2008)

230 European Commission, *Green Paper on the Future Common European Asylum System*, 6 June 2007, COM(2007) 301, at page 6

231 H. Lambert, *The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence*, 25 International Journal of Refugee Law 207, at pages 210-211 (2013)

232 G.S. Goodwin-Gill & J. McAdam, *The Refugee in International Law*, at page 90 (2007)

in order to determine if there has been an act of persecution or not. Amendment to Article 10(1)(d) adds a possibility that a particular social group might include a group, which has common characteristics based on sexual orientation. The gender related aspects, including gender identity, have been mentioned as a possible basis for being a member of a particular social group. The initial intention was to protect known categories of social groups from known forms of harm; it is less clear whether the notion of a social group was expected or intended to apply generally to then unrecognized groups, who may face new forms of persecution.[233]

Internal protection

Several changes were made to Article 8, which regulates the assessment of internal protection in the country of origin of an applicant. Article 8 of the Qualification Directive 2004 may be considered having many contradictions, enabling a real possibility of breach of the 1951 Convention and the principle of *non-refoulement.* In the recast version this hazardous provision was removed. This amendment is necessary first of all to persons whose country of origin provides internal protection, but not in the all parts of the country. When treating technical obstacles as irrelevant, a person might be sent back to persecution danger since there is always a possibility that the individual in question has no access to the region, where he or she would be safe. The 2011 Qualification Directive contains a separate clause for this – Article 8(1)(b) obligates Member States to determine if the individual in question will have access to protection against persecution or serious harm; the ground for assessment is provided in Article 7. In addition, the person must be able to travel safely and legally to this part of the country where protection is provided if access to the country of origin in general is not located within the protected area. Furthermore, it should be determined whether there is a possibility to gain admittance to the protected area.

Another positive amendment regarding internal protection assessment was the obligation put on Member States – they are obliged to ensure precise and up-to-date information gathered from relevant sources. Good examples are UNHCR and EASO, who are responsible for the Country of Origin database.

Actors of protection

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233 *Ibid*, at page 74 (2007)

In the recast Qualification Directive, amendments have been made regarding absence of protection from persecution. In the new Directive, Article 9(3), a causal link is regarded to be the ground for determining whether there is a case of persecution. The absence of protection against persecution is regarded as sufficient basis for qualifying as refugee, thus equalising persecution to an absence of protection.

It has been noted that this amendment strengthens the protection of persons in a situation where persecution derives from non-state actors, for example, gender-based persecution, which may be derived from long-term traditions.[234]

Cessation of refugee status

Cessation of refugee status is regulated by Article 11 of the Qualification Directive. Article 11(3), in which the focus is on the 'compelling reasons', has been added to the recast Directive. This has been done in order to ensure convergence on a higher level with the 1951 Convention. Compelling reasons have to be linked to the first act of persecution, which was the reason for qualifying the person in question as a refugee. In addition, the burden of proof is put on the host country. Both changes were truly needed, as firstly, the 'compelling reasons' provide apart from a greater convergence, more efficient protection to the refugee; and secondly, the burden of proof, being on the Member State, forestalls putting a refugee in danger by obliging to provide a requisite proof. Member States also have better access to up-to-date and unbiased information. This ensures a fairer process to the person in need of protection. One more positive amendment is guaranteeing similar protection provisions to the persons entitled to subsidiary protection in Article 16(3), bringing this form of protection closer to the refugee.

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234 ECRE, *ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast)*, at page 8 (2011)

3 Refugee Status after Implementation of the Qualification Directive by Member States

3.1 Qualification Directive in Member States National Law

The Treaty of Amsterdam obligates the Council to adopt within a period of five years minimum standards for refugee qualification of nationals of third countries.[235] Declaration 17 to the Final Act of the 1997 Treaty of Amsterdam provides for consultations with the UNHCR in the area of harmonisation of asylum policies. Although CEAS' first stage was a step forward in harmonising the asylum legislation, there were still differences between Member States in the decisions to recognise or reject asylum seekers. The scope of differences allowed to assume there was a flaw in the first stage of CEAS. According to the Commission, the lack of common practice, differing traditions and diverse country of origin information[236] sources made it clear that a change is needed. After numerous suggestions legal instruments of the new stage were adopted, taking the standards to a higher level. Enough time has passed, making it possible to see the influence of the first set of directives and the first directive of the last stage has already passed the transposing deadline (December 2013).

While analysing the practices concerning determination and granting of refugee status, it is relevant to discuss the matter of monitoring as well. When focusing on the supervision, there seems to be rather different views. According to Türk, implementation of the Qualification Directive can be seen as a concrete implementation by EU Member States of their responsibility to cooperate with UNHCR in exercising its supervisory responsibility,[237] whereas there are views that actual monitoring by UN does not exist. What seems to be more widely agreed on is the subject and scope of monitoring. It has been agreed on that when the decision-makers implement the refugee law, deciding if individuals qualify for international protection, the results should not be based on the values of the primary decision-maker. Instead, the international protection has to

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235 EU, *Treaty on European Union (Consolidated Version)*, *Treaty of Amsterdam*, 2 October 1997, available at: http://www.refworld.org/docid/3dec906d4.html [accessed 5 May 2014]

236 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions Policy Plan on Asylum an Integrated Approach to Protection Across the EU*, 17 June 2008, COM(2008) 360, at page 3 (2008)

237 V. Türk, *The UNHCR's Supervision of International Refugee Law*, In: J. C. Simeon (Ed.) *The UNHCR and the Supervision of International Refugee Law*, at page 44 (2013)

rely on objective criteria. In order to ensure this, the international treaties must be interpreted in the light of general rules and norms of international law.[238]

It has to be assured that asylum procedures are legitimate and efficient. There might be cases that raise the question of whether national procedural provisions make the application of EU law impossible or difficult. For these cases, a suggestion has been made to national courts to discuss the matter with various national instances viewing it as a whole, assessing the role of that provision in the procedure, its progress and its special features. This implies that in the need of fairness of a national procedure rule 'should be not assessed in vacuum' but as a whole.[239] It has to be borne in mind also that effectiveness and fairness of asylum legislation is expressed not only in numbers. It may happen that the countries that grant protection to high number of refugees do not always guarantee the protection on sufficient level.

An example is the Nordic countries, as their governments have for some time granted subsidiary status to a very large number of applicants and been extremely restrictive in granting the refugee status. According to Troeller[240], this practice, although affording often generous protection, can give rise to the impression on domestic and international level that there are few real refugees and most of those granted protection are objects of discretionary charity. These factors not only point to disparities in harmonisation, but, as more and more countries apply refugee recognition criteria restrictively, hitherto generous countries not wishing to receive the overflow of redirected asylum seekers looking for a better chance for recognition elsewhere, are pushed to become more restrictive themselves.[241]

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238 H. Storey, *Armed Conflict in Asylum Law: The "War-Flaw"*, 31 Refugee Survey Quarterly 1, at page 2 (2012)

239 M. Reneman, *Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy*, 25 International Journal of Refugee Law 717, at page 738 (2013)

240 G. Troeller, *Asylum Trends and Their Impact on Protracted Refugee Situations*, In: G. Loescher, J. Milner, E. Newman & G. Troeller (Eds.) *Protracted Refugee Situations: Political, Human Rights and Security Implications*, at page 49 (2008)

241 *Ibid.*

3.2 Recommendations for implementation

Applicants

The most questionable aspect in the Qualification Directive lies in Article 2(c), limiting the definition of refugee to the third country nationals, thus violating Article 3 of the 1951 Convention. Member States may not redefine application of the 1951 Convention by restricting its scope based on the country of origin.[242] Subsequently, one of the most important recommendations by UNHCR in its comments[243] to the proposal of revised directive was about the definition of "applicant". UNCHR put the burden of not breaching the 1951 Convention to the Member States, implying that they should replace "a third country national or a stateless person" with "person who is not a citizen of the Member State in question" when incorporating Article 2(i) into the domestic legislation. A similar suggestion was made by ECRE, who advised to use the term 'any person'.[244]

Regarding 'manifestly unfounded' claims, the Member States should not take too general positions about whole regions. There are always exceptions and in the current way of handling the procedures in case of claims which are in advance deemed manifestly unfounded, there is a possibility that persons entitled to protection are treated unfairly. The use of accelerated procedures is widely used in Europe according to Reneman[245], moreover, in case of 'manifestly unfounded' claims most Member States use accelerated procedures[246]. UNHCR has brought attention to this, cautioning Member States to use accelerated procedures only in cases which are 'clearly abusive' or 'manifestly unfounded'[247]. Moreover, 'manifestly unfounded' should never be used in case the reason for this would be lack of evidence**.**

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242 G. Gilbert, *Is Europe Living up to its Obligations to Refugees?*, 15 The European Journal of International Law 963, at page 975 (2004)

243 UNHCR, *UNHCR Comments on the European Commission's Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted*, at page 4 (2009)

244 ECRE, *Comments from the European Council on Refugees and Exiles on the European Commission Proposal to Recast the Qualification Directive*, at page 15, (2010)

245 M. Reneman, *Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy*, 25 International Journal of Refugee Law 717, at page 720 (2013)

246 *Ibid*,at page 717

247 UNHCR, *UNHCR public statement in relation to Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration pending before the Court of Justice of the European Union*, 21 May 2010, p. 3. Available at: http://www.refworld.org/docid/4bf67fa12.html [accessed 5 May 2014]

Sur place

Regarding *sur place* refugees it is important that Member States assess carefully the whole situation, the one in the country of origin and as well as what regards to the person in question. The implementation of Article 5(3) should be assessed critically as it can breach the obligations derived from the 1951 Convention.

Differing the statuses

It has been brought out that Member States tend to narrow the refugee definition of the 1951 Convention making it possible to provide subsidiary protection to most of the applicants. As subsidiary protection is regulated out of the scope of international law regime, the Member States' discretion in this perspective is wider. The practices differ in the interpretation of subsidiary protection widely and thus it can be recommended to ensure that this is used only if a person does not qualify for refugee status. Although the Qualification Directive includes no status hierarchy, the suggested sequential hierarchy in order not to violate the obligation in the 1951 Convention, should start with determining if the person is a refugee under the 1951 Convention; if not, eligibility for subsidiary protection should be checked. If the person does not qualify for neither, the ECHR should be used to determine if expulsion of person would result in breaching its principles.[248] It has to be reiterated that the process should start with determining if the person is qualifies under the refugee status.

Persecution

It is important to bear in mind that limiting persecution to infringements of non-derogable rights would contradict both primary and secondary EU law; in addition, it would not be in conformity with the 1951 Convention.[249] While assessing a possible persecution, the facts relevant to the asylum seeker must be determined. In case there is a requirement of expulsion, the possibility of facing persecution must be identified. Simple existence of a law is not enough as 'persecution' requires human intervention and assessment of risk.[250]

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248 M. Dean, *Bridging the Gap: Humanitarian Protection and the Convergence of Laws in Europe*. 20 European Law Journal 34, at page 55 (2014)

249 L. Leboeuf & E. L. Tsourdi, *Towards a Re-Definition of Persecution? Assessing the Potential Impact of Y and Z*. 13 Human Rights Law Review 402, at page 411 (2013)

250 G. S. Goodwin-Gill, *The Dynamic of International Refugee Law*. 25 International Journal of Refugee Law 651, at page 664 (2014)

Persecution may be constituted by violating the right to freedom of religion. In this case, the infringements have to be dealt with following provisions of Article 9 of the Qualification Directive, depending on the interpretation of 'severe violation'. International human rights law does not help identify severe violation of basic human rights, but offers two approaches. Narrow approach restricts relevant sanctions to violations of absolute or non-derogable rights whereas a broad approach does not differentiate protected activity and human rights related sanctions, but rather equalises harm with human rights cost. The lack of perfect abstract test to assess the limits for being 'persecuted' for the right to freedom of religion has been pointed out.

Instead, acts named in Article 9(2) should be used as guidance when assessing if the limitation of the right to freedom of religion is severe enough to be counted as an act of persecution.[251] By the opposite opinion, its inclusion if used for guidance to those who are determining the refugee status may cause concern.[252] Yet, it should be taken into consideration, that religious acts not protected under human rights law or limitations of rights which are covered by international human rights law would hardly count as 'exercise of religious freedom'.[253] To be counted as persecution, there has to be connection between the reasons for persecution and the acts of persecution.[254]

Serious harm

In interpretation and implementation of the definition of serious harm in Article 15(c), particularly serious divergences have been noted between the Member States. The recognition rates differ hugely as well. Based on this, the questionability of the Qualification Directive's ability to treat 'like case alike' has been noted.[255] This may originate from the fact that 'individual' in the wording of this article may give a wide discretion to Member States and

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251 J. M. Lehmann, *Persecution, Concealment and the Limits of a Human Rights Approach in (European) Asylum Law – The Case of Germany v Y and Z in the Court of Justice of the European Union*, 26 International Journal of Refugee Law 1, pp. 10-11 (2014, in press)

252 Problematic would be also using it for "setting out the limit of persecution, then it runs the risk of underestimating the human ability to devise new means to inflict harm on fellow humans": in G. Gilbert, *Is Europe living up to its Obligations to Refugees?*, 15 The European Journal of International Law 963, at page 975 (2004)

253 J. M. Lehmann, *Persecution, Concealment and the Limits of a Human Rights Approach in (European) Asylum Law – The Case of Germany v Y and Z in the Court of Justice of the European Union*, 26 International Journal of Refugee Law 1, at page 16 (2014, in press)

254 *Bundesrepublik Deutschland v Y (C-71/11), Z(C-99/11), Germany v Y and Z*, European Union: Court of Justice of the European Union, 5 September 2012, para 55 (2012)

255 H. Storey, *Armed Conflict in Asylum Law: The "War-Flaw"*, 31 Refugee Survey Quarterly 1, at page 29 (2012)

encourage them to ask a person in need of protection to prove the threat being targeted specifically towards the person in question.

Also the notion 'armed conflict' has raised different opinions. It should be more widely followed in practice that not only the armed conflict itself but its impact as well should be taken into account when assessing the situation in the country of origin. Cases of serious harm cannot be reduced to a International Humanitarian Law paradigm[256], as the approach should be focused more on the intensity of violence. One possible resolution offered is to equip the decision makers with proper tools for understanding and analysing the specific conflict which is referred to as a source of risk of persecution; also to give a 'proper and dynamic' interpretation of persecution,[257] making it possible to assess the whole situation in its complexity. Thus the burden is placed on the asylum officers and judges in Member States as there is still strong scepticism [258] about the chance to resolve the situation by changing the wording of Article 15(c).

Non-State actors

According to ELENA,[259] the interpretation and implementation of Article 6 should be in accordance with Article 1(A)(2) in the 1951 Convention.

One important side which should be taken into account concerning Article 6(c) in the Qualification Directive is the situation where there is no functioning state authority. In this regard, all Member States should accept a similar approach considering the absence of a functioning state authority as a sufficient proof of state authority not being able/willing to protect against persecution or serious harm.

Internal protection

Although the Qualification Directive does not provide specific guidelines how to decide whether internal protection is sufficient to avoid breach of *non-refoulement*, a four-step approach has

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256 J.-F. Durieux, *Of War, Flows, Laws and Flaws: a Reply to Hugo Storey*, 31 Refugee Survey Quarterly 161, at page 161 (2012)

257 *Ibid*, at page 166

258 „I remain deeply sceptical about *any* rational way of resolving the contradictions inherent in the wording of Article 15(c). While I appreciate that asylum officers and judges in EU Member States have no choice but to try and mae sence of this bizarre provision...": in J.-F. Durieux, *Of War, Flows, Laws and Flaws: a Reply to Hugo Storey*, 31 Refugee Survey Quarterly 161, at page 173 (2012)

259 ELENA, *The Impact of the EU Qualification Directive on International Protection*, at page 15 (2008)

been alleged to be accepted by general consensus. Firstly, genuine accessibility to domestic protection should be examined. Secondly, it should be assessed if there is safety from persecution and then, thirdly, safety from serious harm. Lastly, it should be assessed whether the basic human rights are provided.[260]

One of the reasons to refuse from protecting asylum seeker is that it may be possible to get protection in the country the person comes from. This means the situation in the country of origin must be well-known to the persons who decide it. An aim to help Member States with the compiling, assessing and applying information on countries of origin was set in the Hague Program.[261] Chapter III Article 1 point 1.3. As UNCHR has stated,[262] the use of Country of Origin Information varies greatly. Country of Origin Information is a database which should be used by Member States when giving assessments to the safety of the homeland of asylum seeker or deciding if it is possible to gain protection there. In order to have harmonised bases for making decisions influenced strongly by the situation in asylum seekers' country of origin, European Asylum Support Office[263] (EASO) has made an effort to developing COI and has gathered up-to-date information, which is essential for asylum officials during the whole process of asylum determination.

Protection offered by the country of origin

As the Qualification Directive provides in Article 7, protection against persecution/serious harm can only be provided by the state or parties or organisations in case they are willing to offer protection, which must be effective and permanent. Article 7(2) obliges Member States to assure that 'reasonable steps' are taken in order to prevent persecution, possibly creating a situation where implementation of this Article varies strongly. It has to be considered that higher standards in this matter are needed. In the countries of origin reasonable steps taken do not necessarily mean those are available to the person in need.

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260 H. Lambert, *The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law*, 55 International and Comparative Law Quarterly 161, at page 166 (2006)

261 EU, *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 13 December 2004, 2005/C 53/01, available at: http://www.refworld.org/docid/41e6a854c.html [accessed 12 April 2014]

262 ELENA, *The Impact of the EU Qualification Directive on International Protection*, at page 5 (2008)

263 Information about EASO, available from http://easo.europa.eu/about-us/tasks-of-easo/country-of-origin/ [last accessed on 5. May 2014]

Actors of protection

It has been argued that provision regarding non-state actors of protection should not be used on the basis that non-state organisations are not parties in international human rights instruments.[264] In addition, the assessment of the durability of protection by non-state actors is questionable.

3.3 Monitoring the refugee protection

Supervision is not only about detecting violations but also about constructive engagement and dialogue with coordination to ensure the resolution of issues.[265] The importance of monitoring does not only derive from the need to make sure if the Member States implement the law properly but it also gives a possibility to observe if different countries treat asylum seekers similarly. As asylum applicants are considered a particularly underprivileged and vulnerable population group, they are referred to as 'in need of special protection'.[266] Therefore, it is important to guarantee that the whole process is fair, effective and based on the same grounds in all Member States in order to prevent a situation where the only possibility to gain entitled protection is to travel until they find a country where it is provided.

In addition, the Member States' different implementations have not only a decisive role in refugees' lives but also in shaping of the actual content of the norms of the treaty. This lays a great responsibility to the Member States to interpret those norms authentically. International organisations' statements on the interpretation of a treaty, for example, by the Office of UNHCR and the Executive Committee of the High Commissioner's Programme, may be important but those statements have been stated to be not replaceable by the national practices.[267]

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264 ELENA, *The Impact of the EU Qualification Directive on Internatinal Protection*, at page 17 (2008)

265 E. Feller, V. Türk & F. Nicholson (Eds.), *Refugee Protection in International Law – UNHCR's Global Consultations in International Protection*, at page 669 (2003)

266 M. Reneman, *Speedy Asylum Procedures in the EU: Striking a Fair Balance Between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy*, 25 International Journal of Refugee Law 717, at page 742 (2013)

267 K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union*, at page 373 (2000)

It is important to ensure that NGOs have a proper role in the process of supervision. The establishment of specialised NGOs in the field of refugee rights should be fostered, along with information dissemination, advocacy, and legal aid.[268]

It has been said by Storey[269] that "like cases should be treated alike" in order to provide certainty about the way rules are applied and to avoid undermining of the rule of law more generally. Concerning asylum seekers, there is a possibility that those who have already been granted protection do not have to worry about it anymore if the system is a just one, leaving this problem to the rejected asylum seekers.[270] In reality, it probably still concerns them both – the ones who have been granted refugee status and the ones who have been rejected; because the person who have already been granted refugee status might have close ones who have applied on the same grounds, hoping for a similar decision, but might be rejected..

3.3.1 UNHCR's role in supervising protection of refugees in EU Member States

Although the 1951 Convention has no formal international supervision procedure to review the decisions of individual cases of recognition or refusal of refugee status, UNHCR observes the way national authorities execute their international obligations.[271] When the UN General Assembly decided on UNHCR to be the successor of the International Refugee Organisation, it opted for a subsidiary organ providing international protection. The function of supervising the international conventions application was included even though UNHCR has alleged to have no binding authority for the interpretation of the 1951 Convention[272]. In Articles 34 and 35[273] of the European Convention on Human Rights admissibility criteria for the individual applications have been set.

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268 E. Feller, V. Türk & F. Nicholson (Eds.), *Refugee Protection in International Law – UNHCR's Global Consultations in International Protection*, at page 669 (2003)

269 H. Storey, *Consistency in Refugee-Decision Making: a Judicial Perspective*, 32 Refugee Survey Quarterly 112, at page 115 (2013)

270 *Ibid*, at page 115

271 N. Mole & C. Meredith, *Asylum and the European Convention on Human Rights*, *at page* 17 (2010)

272 G. S. Goodwin-Gill, *The Dynamic of International Refugee Law*. 25 International Journal of Refugee Law 651, at page 655 (2014)

273 Articles 34 and 35 in ECHR

The 1951 Convention assumes that the States Parties of the Convention shall co-operate with the Office of UNHCR in order to exercise its functions, and would be able to facilitate its duty of supervision in the application of the provisions of the Convention.[274] Articles 35 and 36 of the 1951 Convention include the respective treaty obligations. The obligation to co-operate with UNHCR by providing the information and statistical data requested in the questions about the condition of refugees, implementation of the Protocol and legal acts, which are in force in relation to the refugees, derives also from Article II of the Protocol.[275]

Specified in Articles 35(2) and 36 of the 1951 Convention, the States have to provide UNHCR information about the condition of refugees and implementation of the 1951 Convention, including laws, regulations, and decrees related to refugees. Pursuant to Article 36, the States Parties have an obligation to communicate to the UN Secretary General about the laws and regulations which they may adopt in order to ensure the application of the Convention.[276] In practice, this type of communication is directed to UNHCR.[277] Although Article 36 designates the States Parties to communicate to the UN Secretary General, Article 22 of the UN Charter appoints UNHCR as the principal body within the UN system being responsible for the refugee matters and a subsidiary organ of the UN General Assembly.

The fact that UNHCR monitors refugee protection means that it also monitors granting of a refugee status, *inter alia* in European Union Member States. This, in turn, helps to draw attention to the question whether the interpretation and implementation of the refugee status is being too narrowly derived from transposing or implementing the Qualification Directive and without considering the international obligations.

According to Türk, the commitment regarding Member States' obligation to cooperate with UNHCR derives from the implementation of international refugee law instruments. In addition, a reflection of the UNHCR's supervisory responsibility is also contained in the recommendation II (e) of the 1984 Cartagena Declaration and the Preamble to the 1957 Agreement Relating to

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274 Article 35(1) in 1951 Convention

275 UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, at page 267, available at: http://www.refworld.org/docid/3ae6b3ae4.html [accessed 1 April 2014]

276 Art. 36 in The 1951 Convention

277 V. Türk, *The UNHCR's Supervision of International Refugee Law*, In: J. C. Simeon (Ed.) *The UNHCR and the Supervision of International Refugee Law*, at page 44 (2013)

Refugee Seamen.[278] Since supervision as such refers to the knowledge of important norms related to the precise scope of the States Parties' obligations, the interpretation of relevant norms by UNHCR has an important role in establishing the meaning of those norms.[279] A contrary opinion is based on the non-binding nature of the statements on the interpretation of the 1951 Convention.[280] Deriving from an authoritative but yet non-binding nature of UNHCR, Goodwin-Gill has made recommendations including that guidance should be given only in those areas where the clarification by UNHCR is evidently necessary. Guidelines should be based on international law basic principles and the reasoning and approaches of courts, recognised, closely analysed and understood by UNHCR.[281]

The examination of the state reports has been called 'key mechanism', which is established at the universal level in order to monitor the implementation of treaty obligations by States Parties. Initial reports must be submitted within two years after the ratification; periodic reports usually in every four or five years thereafter. In addition, the state reporting procedure has become one of the two truly universal monitoring mechanisms.[282] Submission of the reports by States Parties and the appearance of the representatives of the States Parties for answering questions relating to the situation in their countries' human rights practices creates "a system of international accountability for states' human rights practices and policies."[283]

UNHCR's extensive presence enables active monitoring of the protection, rights, and well-being of refugees at country level. This, in turn, contributes to ensuring the States taking necessary actions for determining and protecting those who are regarded to need international protection. Nonetheless, the effectiveness of UNHCR is influenced by its dependency on the states in

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278 V. Türk, *The UNHCR's Supervision of International Refugee Law*, In: J. C. Simeon (Ed.) *The UNHCR and the Supervision of International Refugee Law*, at page 44 (2013)

279 M. Zieck, *Commentary on Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of the 1967 Protocol relating to the Status of Refugees*, in A. Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, at page 1499 (2011)

280 K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union*, at page 374 (2000)

281 G. S. Goodwin-Gill, *The Dynamic of International Refugee Law*, 25 International Journal of Refugee Law 651, at page 657 (2014)

282 The second one brought up by Keller and Ulfstein is the Universal Periodic Review of the HR Council: H. Keller & G. Ulfstein, *UN Human Rights Treaty Bodies. Law and Legitimacy*, pp. 16-17 (2012)

283 D. Kretzmer, *The UN Human Rights Committee and International Human Rights Monitoring*, Strauss Institute Working Paper 12/10, at page 35 (2010). Available from: http://www.iilj.org/courses/documents/2010Colloquium.Kretzmer.pdf

various aspects, requiring their ongoing consent for being present in their territory and being dependent on their funding of its programmes.[284]

The UNHCR actions have a role in monitoring the Qualification Directive as well. The sole criterion for UNHCR's supervision is whether or not a particular norm affects the status and entitlements of refugees under the 1951 convention and 1967 protocol regardless of its designation.[285] As the Qualification Directive has been transposed into Member States' legislation, thus regulating the status determination and granting of refugees in Member States, it may be concluded to have great importance from the 1951 Convention's perspective.

3.3.2 Monitoring the implementation of Qualification Directive

Since there is no one single model used by treaty monitoring bodies which can be simply replicated and applied to supervising implementation of the 1951 Convention,[286] it is not realistic to count on this solution from the perspective of the Qualification Directive. In addition, the absence of supervisory tribunal for the 1951 Convention has given Member States the possibility to adopt their interpretations of refugee law independently.[287] Although the Member States have showed their willingness to offer protection by ratifying the 1951 Convention, supplemented by the 1967 Protocol, and moreover, by introducing the directives into national legislations, it is still necessary to monitor the whole process. It means that the external control and help should be provided from the interpretation of the legal instruments to the actual transposition of legal acts.

It has been underlined that Member States have shown 'marked reluctance' to amend the directives in order to lose the divergence between the directives and international law.[288] The opposite view is based on the fact that international law provides for a refugee status which is not necessarily permanent, but asylum as 'the grant of permanent residence in a state' still lies in the

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284 M. Zieck, *Commentary on Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of the 1967 Protocol relating to the Status of Refugees*, in A. Zimmermann (Ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol*, at page 1500 (2011)

285 *Ibid*, at page 1506

286 E. Feller, V. Türk & F. Nicholson (Eds.), *Refugee Protection in International Law – UNHCR's Global Consultations in International Protection*, at page 669 (2003)

287 G. Gilbert, *Is Europe living up to its Obligations to Refugees?*, 15 The European Journal of International Law 963, at page 969 (2004)

288 J. C. Hathaway, *E.U Accountability to International Law: the Case of Asylum*, 33 Michigan Journal of International Law 1, at page 4 (2011)

states' discretion.[289] Therefore, the Member States should have a greater right to discretion and not be obliged to have so high goals in harmonisation. In addition, the importance may not be in choosing the right level where the harmonisation is carried out. It has been alleged that the greatest impact on asylum seekers lies in the way that a majority of individuals seeking refuge are treated based the statement on higher importance of 'establishing custom' rather than finding a way in which to define 'refugee' in reference to the importance of actual implementation of legislation.[290] Implementation of the legislation starts from the interpretation and in this regard court interpretations would be helpful. It may be still seen that although CJEU rendering interpretations would force conformity between the directives and international standards, remedying the shortcomings in asylum directives implementation of international law[291] it is doubtful if the supervisory role of the CJEU can be counted on to remedy the accountability deficit. The reasoning stands in the limited power of CJEU as it may only interpret the standards, but not to revise them.[292]

It has to be considered that even if the Member States want to offer protection at highest possible level it does not always mean that they have the skill to analyse and measure its actual efficiency, which is much easier from aside. Moreover, even if the content of the regional legislation might offer more than satisfactory protection to the refugees at the moment, its consistency has to be assured as well. In addition, the situations change on both sides, recipient and countries of origin, creating the need for changes in the implementation of legislation in order to be able to offer most efficient help to the persons in need of protection.

It has been argued that the 'governance' expresses an idea of how international obligations should be understood and enforced, but "sidelines the increasing importance of regional and local regimes of refugee protection, removes from the discussion the broader category of persons entitled to international protection, and subtly shifts the focus away from the enjoyment of rights by refugees".[293] The idea that the focus should be on the persons in need and not moved far from

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289 G. Gilbert, *Is Europe living up to its Obligations to Refugees?*, 15 The European Journal of International Law 963, at page 965 (2004)

290 W. T. Worster, *The Evolving Definition of the Refugee in Contemporary International Law*. 30 Berkeley Journal of International Law 101, at page 117 (2012)

291 J. C. Hathaway, *E.U Accountability to International Law: the Case of Asylum*, 33 Michigan Journal of International Law 1, at page 3 (2011)

292 *Ibid*, at page 5

293 M. Jones, *The Governance Question*, In: J. C. Simeon (Ed.) *The UNHCR and the Supervision of International Refugee Law*, at page 95 (2013)

them has more supporters. It entails a purpose to keep the 'grass-roots activism' close to persons seeking refuge in order to not take it to the level of remote gatherings of distant experts and former judges far from the real problems faced by asylum seekers. Any mechanism distant from the ground level has been assessed having a risk for a regressive impact.[294] Accordingly, the persons in charge of developing the concept for monitoring the implementation of the Qualification Directive should have large-scale experiences in the field of asylum in order to stay realistic and effective in their suggestions and demands. Though, it does not necessarily mean that no monitoring at all higher than in the Member State itself is needed to assure that rights of the refugees are secured.

The monitoring presupposes similar grounds for interpreting the provisions concerning refugees. As regards the term 'refugee', the EU Council of the ministers responsible for Justice and Home Affairs adopted 'Joint Position' on the Harmonised Application of the Definition of the Term Refugee in 1951 Convention.[295] The Joint Position is to provide guidelines for administrative bodies dealing with qualification to refugee status. It answers the questions arising while interpreting the 1951 Convention's refugee definition. The Joint Position has acknowledged the value of the UNHCR Handbook as a useful tool for answering these questions.[296]

The Joint Position's main weakness is the lack of a legally binding effect for the legislature and the judiciary of the Member States. The major critical point has alleged to be the absence of supervisory mechanisms and until Joint Position has no legally binding effect it is incapable of solving the problem of the absence of judicial supervisory mechanisms. The Joint Position's binding nature would not replace the problem entirely as an efficient implementation could only be assured through judicial enforcement mechanisms.[297]

The opposite view supports the guidance only on a lower level. This way it would be nearer to the real problems and persons. Goodwin-Gill offers a solution – provide greater support to those who are daily representing the interests of asylum seekers. This should be done by "funding for

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294 G. S. Goodwin-Gill, *The Dynamic of International Refugee Law*. 25 International Journal of Refugee Law 651, at page 657 (2014)

295 K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union*, pp. 372-373 (2000)

296 P. J. van Krieken (Ed.), *The Asylum Acquis Handbook*, at page 224 (2000)

297 K. Hailbronner, *Immigration and Asylum Law and Policy of the European Union,* at page 381 (2000)

the legal work, political and material support for practitioners and non-governmental organisations, and more strategic litigation at national and regional level".[298]

[298] G. S. Goodwin-Gill, *The Dynamic of International Refugee Law*. 25 International Journal of Refugee Law 651, at page 657 (2014)

Conclusions

In this thesis impacts of the Qualification Directive on the refugee determination in EU Member States have been analysed. The legislation of EU asylum protection and impact of harmonisation on the determination and granting of refugee status in Member States have been analysed. The source of the definition of refugee status being the 1951 Convention amended by the 1967 Protocol, these legal instruments are a crucial part of the analysis of convergence of provisions in the Qualification Directive and Member States' international obligations.

In order to analyse possible contradictions between the Qualification Directive and 1951 Convention, the study was conducted from the perspective of the persons in need of protection and their rights in the matter of granting asylum. The analysis proved that there are a number of articles in the Qualification Directive in which the rights, originally granted by the 1951 Convention, might be interpreted in a restrictive way.

The hypothesis of this thesis is that provisions concerning the refugee status definition and determination in the Qualification Directive render it possible to violate the respective international obligations given by the Convention Relating to the Status of Refugees, *inter alia* the principle of *non-refoulement*. In order to prove the hypothesis, an analytical comparison between the Qualification Directive and the 1951 Convention was carried out. An overview of the 1951 Convention, background of EU asylum legislation, and more specifically, the Qualification Directive, was provided to determine the basis of the analysis. As the common interpretation of the definition of refugee is crucial for harmonised refugee determination in practices of Member States, it has been discussed in Chapter One. This serves as a basis for analysing the importance of convergence in granting refugee status in Chapter Two.

Within this study several contradictions between the provisions in the Qualification Directive and 1951 Convention were found, whereas some of those entail a possible breach of international obligations. A short overview of the main diverging aspects is following.

The Qualification Directive limits the circle of applicants to the third country nationals. The 1951 Convention, amended by the 1967 Protocol, clearly prohibits limiting of the circle of applicants *inter alia* on geographical grounds. In addition, the applications from EU nationals'

are treated as ‘manifestly unfounded’ and therefore may leave persons entitled to protection according to 1951 Convention without it. As no reservations to Article 1 defining refugee in the 1951 Convention are allowed, the obligations derived from the current wording of the definition have to be followed.

The provisions regarding *sur place* in the Qualification Directive are not in conformity with the 1951 Convention as it denies those *sur place* claims which are based on circumstances created by applicants’ own decisions after leaving the country of origin. Although the 1951 Convention has no regulation about persons who are in risk of persecution due to their own decisions, it has to be reiterated that the Convention’s Article 5 prohibits diminishing any rights and benefits granted by a Contracting State to refugees out of the scope of the Convention.

Provisions regarding non-state authorities as actors of protection in Article 7 of the Qualification Directive can be considered illegitimate under international law as non-state authorities cannot be reliable parties to international human rights instruments and in addition, involves a risk where asylum seeker is sent back to the country of origin regardless of inefficient protection.

The provision regulating revocation on the national security grounds in the Qualification Directive is not in conformity with the 1951 Convention as the latter does not restrict refugee definition on the national security basis.

Although the specific provisions regarding *non-refoulement* are broadly similar in the Qualification Directive and 1951 Convention, divergence between the above analysed provisions create a possibility for Member States to breach the *non-refoulement* principle. Limiting the circle of applicants under the Qualification Directive to the third country nationals; denying *sur place* claims based on own actions; regarding non-state authorities as actors of protection and revocation on the national security grounds create a possibility to breach the principle of *non-refoulement.* This indicates that the provisions of the Qualification Directive enable to breach international obligations of Member States.

The importance of monitoring handled in Chapter Three, has been underestimated in the EU in the current situation. More precise wording and narrower discretion in provisions is important to

make the monitoring process more efficient as then there would be more precise grounds to compare the actions of the Member States with the provisions of the Qualification Directive. In addition, more clarity in provisions will already lower the need for monitoring, as there would be less divergence in interpretation of the refugee definition and determination by the Member States.

Several important aspects were not analysed due to the limited scope of this thesis and should be studied further in the future. For example, as EU has been a role model by adopting the regional instrument according to refugees with this significance, the responsibility reaches beyond the EU borders and therefore the extraterritorial impact of the Qualification Directive should be analysed in detail. Also, impact of the Qualification Directive on Denmark, which is not bound to the Qualification Directive, should be analysed.

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