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HUMAN RIGHTS**

**EXCLUSION AND PRINCIPLE OF *NON-REFOULEMENT*:
EU MEMBER STATES BETWEEN EU ASYLUM
LEGISLATION AND INTERNATIONAL REFUGEE AND
HUMAN RIGHTS LAW**

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HUMAN RIGHTS LL.M. THESIS

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EXECUTIVE SUMMARY

Current global threats to the national security, such as terrorism, have a strong impact on the asylum policy of EU Member States and it seems that Refugee Convention expulsion clauses are no longer a sufficient safeguard against terrorism. Analysis of the compatibility of exclusion clauses under the Qualification Directive, as implemented by the Member States, with international refugees and human rights law show several incoherencies that can even lead to the exclusion of a person who is a refugee under Refugee Convention. This newly established “category” of refugees suffers from deprivation of their secondary rights, if they remain in Member States.

The directive however cannot be declared invalid, since it only sets minimum standards of protection and Member States are free to set higher standards in conformity with their obligations under international law. Unfortunately several member States do not do that. Those questionable national measures implementing the Qualification Directive should not remain unchallenged. Several provisions of Qualification Directive need further interpretation and referring preliminary references to the European Court of Justice is necessary. If the Court will rule in accordance with international refugee and human rights law remains to be seen. If not, bringing the case to ECtHR should not be neglected.

Due to the elevated concerns about national security, the principle of *non-refoulement* was also put into question. Some States are arguing that removal to ill treatment can sometimes be allowed in order to protect national security. Fortunately, according to the jurisprudence of European Court of Human Rights the prohibition of torture, at least in Europe, still remains absolute.

I. Introduction

No one can deny that terrorism is a serious problem and that governments are entitled and even encouraged taking up special measures for combating it. However, another question is how far they can limit human rights in the name of protecting national security. The main existing human rights treaties implicitly preclude terrorist activities, while providing that the rights contained in the treaties cannot be interpreted in a way as to destruct or to extensively limit any other rights guaranteed by the treaties.¹ Despite those international guarantees, states multiplied policies, legislation and practice in the name of the fight against terrorism, affecting negatively the enjoyment of human rights.²

This trend is particularly affecting the refugee protection. Governments are frequently invoking a link between international terrorism and asylum systems, as if the asylum system represents a shelter to foreigners engaged in terrorist activities. The consequence is that already restrictive policies become even more exacerbated. Elevated concerns about security result in tightening of border controls, in expanding grounds for denying admission and for removing those suspected of threatening national security.³

I do not suggest that asylum systems are immune from abuse or that asylum seekers never engage in criminal activity. But it has to be taken into consideration that asylum processes are among the most closely regulated and therefore the least likely to be used for those wishing to enter a country without undue attention. Asylum seekers are routinely finger-printed, checked on security databases, detained and monitored upon

¹ Article 17 of ECHR, Article 30 UDHR, Article 5 of ICCPR.

² UN document, E/CN.4/2004/4, Annex 1 (June 2003).

³ Ninette Kelley, *International Refugee Protection Challenges and Opportunities*, International Journal of Refugee Law 2007, Volume 19, No.3, p.401-439.

release, rendering them among the most tightly scrutinized entrants to any country. This makes it less likely that persons engaged in terrorist activities would choose to enter the country as asylum seekers. But even if they would, a Refugee Convention⁴ provides a safeguard mechanism called exclusion clauses, which enables the countries to deny refugee protection to persons who are engaged in the most serious crimes.

In the European Union (EU), the harmonization of Member States' asylum law and practices began with the Amsterdam treaty,⁵ which transferred competence over asylum matters from the intergovernmental third pillar⁶ to the first supranational (Community) pillar. A new title IV was inserted to the European Community Treaty (EC Treaty) which requires adopting legally binding measures concerning asylum and other forms of international protection. Article 63(1) of EC Treaty specifies that all the measures must be in accordance with Refugee Convention and its Protocol and other relevant treaties.

Just few months after the entry into force of Amsterdam treaty, the European Council held the meetings of the heads of the States of the EU in Tampere, Finland. They set up a new goal for the EU, the establishment of a Common European Asylum System (CEAS). The European Council emphasized two key principles: (1) the harmonization of asylum law at a common minimum standard level and (2) the principle of mutual recognition of

⁴ Geneva Convention of 28 July 1951 and Protocol of 31 January 1967, relating to the status of refugees.

⁵ Adopted on 1 May 1999, now Consolidated Version of the Treaty Establishing the European Community, OJ 2002 C 325/33.

⁶ Third pillar was created by Maastricht Treaty in 1993. It contained justice and home affairs, among which were also immigration, asylum and border issues. Its characteristics were lack of parliamentary oversight, weakness of judicial control and the opaqueness of its working and measures. With the Lisbon Treaty, signed on 13 December 2007, the system of three pillars will be abolished, if the Lisbon Treaty will be ratified.

acts of states.⁷ Five measures were consequently adopted: the Qualification Directive,⁸ the Procedural Directive,⁹ the Directive on reception conditions,¹⁰ the Temporary protection Directive¹¹ and Dublin II Regulation.¹² The objective of harmonization was to ensure that the same entitlements, criteria and procedures would guarantee the same protection in all Member States and reduce secondary movements of asylum seekers within the EU.¹³

Regarding European asylum legislation, the present work will only focus on Qualification Directive, since it is the one that contains exclusion clauses. Further on the scope is limited on the exclusion from refugee status and not from subsidiary protection, since the later form of protection falls outside the scope of Refugee Convention. The comparison with exclusion clauses under Article 1F of Refugee Convention will be made, because EU Member States, besides increasing the use of it, also expanded them beyond the context of the Convention. It seems that today Member States consider Refugee Convention exclusion clauses as no longer adequate for the purpose of combating

⁷ The concept of mutual recognition seeks to reinforce the legitimacy of state actions vis-à-vis individual and is problematic, because there is no control to ensure that the actions are consistent with rule of law and international human rights obligations (Elspeth Guild, *The Europeanization of Europe's Asylum Policy*, Oxford University Press, 2006).

⁸ Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted adopted on 29 April 2004, OJ L304/12.

⁹ Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status, adopted on 13 December 2005, L 326/13.

¹⁰ Council Directive 2003/9/EC on minimum standards for the reception of applicants for asylum in Member States adopted on 27 January 2003, OJ L31/18.

¹¹ Council Directive 2001/55/EC on minimum standards giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof adopted on 20 July 2001, OJ L 212/12.

¹² Council Regulation 343/2003 of 25 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, OJ L50/1.

¹³ Madeline Garlick, *The EU Discussions on Extraterritorial Processing: Solution or Conundrum?* Oxford University Press, 2006.

terrorism and ensuring the exclusion from refugee protection of those who had engaged in terrorist acts.

One of the reasons for this can be found in UN Security Council resolutions (UNSC) that call upon all States to take appropriate measures to ensure that the refugee status is not abused by the perpetrators, organizers or facilitators of terrorist acts, and that claims of political motivation are not recognized as grounds for refusing requests for the extradition of alleged terrorists. UNSC also declared that terrorism and financing, planning and inciting terrorist acts is contrary to the purposes and principles of UN.¹⁴

UNSC resolutions have had an impact on the substantive and procedural content of international protection. For example, in Germany, the UNSC resolutions play a predominant role in the application of Article 1F(c) exclusion clause, which states that a person can be excluded from refugee status if he has been guilty of acts contrary to the purposes and principles of the United Nations. Already before the implementation of the Qualification Directive, the Federal Office applied 1F(c) exclusion clauses to all possible acts of support of terrorism; sometimes even psychological support of terrorism is deemed to be sufficient for the application of the exclusion clause.¹⁵

Too often, counter-terrorism practices can be used to get rid of “unwanted refugees”. While terrorism can, indeed, be against principles of UN and, therefore, a basis for exclusion from Refugee Convention, Article 1F(c) can only be applied when there are serious reasons to consider that the individual has committed an offence specifically

¹⁴ UN Security Council Resolution 1373 (2001) of 28 September 2001 and Resolution 1377 (2001) of 12 November 2001.

¹⁵ ECRE, *The impact of the EU Qualification Directive on International Protection*, October 2008.

identified by the international community as one which must be addressed in the fight against terrorism, and only by the way of due process.¹⁶

Focusing on the exclusion clauses under Qualification Directive, I will explore whether the Directive complies with international refugee and human rights law and, if this is not the case, whether it could be declared invalid by the European Court of Justice (ECJ). Since the Directive is an act that needs to be transposed into national legislation, it is of crucial importance to analyze how the Member States have implemented it and how their national courts are applying and interpreting their national law and the Directive. Although the Directive does not preclude Member States from keeping higher standards of protection, there seems to be a tendency for Member States to lower their existing standards when implementing the Directive. Several domestic applications of exclusion provisions appear indeed incompatible with the Refugee Convention. It is thus important to find out whether the Directive itself constraints Member States to default their international obligations, or whether it simply does not preclude it?

While addressing exclusion clauses, the *principle of non-refoulement* cannot be omitted. Under the Refugee Convention this principle is a primal guarantee that a State has to assure to the asylum seeker – that he will not be returned to the territory, where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹⁷ However, the consequence of exclusion is normally the deportation to the country of origin, since no Refugee Convention guarantees apply to the excluded persons. But under the international law this principle

¹⁶ Guy S. Goodwin-Gil and Jane McAdam, *The Refugee in International Law*, 3rd edition, Oxford University Press, 2007.

¹⁷ Principle of *non-refoulement* is contained in Article 33 of Refugee Convention.

has a broader meaning. It precludes states from returning a person to a place where he might face serious violations of human rights, such as for example deprivation of life, torture, or other ill treatment. I will explore whether the practice of States comply with the principle of *non-refoulement*, as understood under Refugee Convention and under international human rights instruments. It seems that some States stopped considering prohibition of torture an absolute right and some balancing is allowed.

I will examine how Member States handle the obligation to respect international refugee and human rights law while implementing the EU asylum legislation and which one prevails in case of conflicts between them. Should it be EU law, because the Refugee Convention has no formal international supervision procedure to review the correctness of individual decisions to recognize or not a refugee status, or should it be international obligations? Furthermore, I will explore the possible remedies that could be used in order to see this question addressed by the competent judicial organs.

The literature that I used for the present work can be separated into two groups. First group is the literature that does not directly address the European asylum law, but address the characteristics of the European Law in general. Those are the works of Sacha Perchal - *Directives in EC law* and of Craig and De Burca - *EU Law: texts, cases and materials*. The second group of the literature directly addresses the international refugee law and/or European asylum law. This second group can be further separated into two parts. One part is the works of several prominent experts in refugee law, such as Hemme Battjes, Steve Peers, Geoff Gilbert, Jane McAdam, Madeline Garlick, Maria Teresa Gil-Bazo, Elspeth Guild, Dr H  l  ne Lambert, etc. which are directly addressing the issues of

compliance of EU asylum law with international refugee law, and others, such as, A. Grahl-Madsen, K. Hailbronner, J.C. Hathaway and G. Goodwin-Gill, that focus on the international refugee law and the interpretation of the Refugee Convention. The other part of sources that I used was UNHCR and European Council for Refugees and Exiles (ECRE) documents and studies. Although not binding, UNHCR's positions on interpretation of Refugee Convention or Qualification Directive are important sources, since UNHCR mandate is to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide.¹⁸ ECRE is a pan-European network of 68 refugee-assisting non-governmental organizations that promotes a human and generous European asylum policy and its positions on exclusion clauses and Qualification Directive were crucial for obtaining a critical view of the subject. UNHCR and ECRE's studies on implementation of Qualification Directive, served as an important source for examples of countries' legislation and practice.

One of the sources that I used was also case law from ECJ, European Court of Human rights (ECtHR) and national courts. In this respect the book of Nuala Mole, *Asylum and the European Convention on Human Rights*, was of particular relevance as a source of ECtHR jurisprudence relevant for the refugee protection. None of the less, an important contribution to the present work were also my attendances on three international conferences: ELENA course on Cessation and Exclusion clauses, National Security and *non-refoulement*; Cuenca Colloquium on International Refugee law and Refugee law reader conference on The dynamics of refugee protection in an era of globalization.

¹⁸ www.unhcr.org/basics.html

As just explained in the brief literature review, the compliance of Qualification Directive's exclusion clauses and international refugee and human rights law was already addressed by several prominent experts, UNHCR and ECRE. What I believe is the main contribution of the present work, besides answering all above mentioned research questions, is that I am trying to draw attention on refugees, which were excluded from refugee status contrary to the Refugee Convention, but in compliance with Qualification Directive and cannot be removed to their country of origin, because the principle of *non-refoulement* applies. I am trying to show how Member States do not guarantee all the secondary rights that those persons are entitled to under the Refugee Convention and therefore they do not have normal conditions for living and personal development. Although those persons present a very small part of refugees, they are still human beings and their situation in the country of refuge should be improved. I am also trying to present some solutions that those persons can use in order to challenge the national legislation.

The present work consists of five parts. In the first part, I address the meaning of the minimum standards' Directive and its implementation, as well as Directive's compliance with international law and possible challenging of its legality. In the second part, I explain the theoretical underpinnings of the Refugee Convention rights, exclusion clauses and principle of *non-refoulement*. In a third part, the principle of *non-refoulement* is analyzed through the lens of international human rights instruments. The recent attempts by states to change the meaning of the principle are also addressed. The fourth part contains an analysis of the compatibility of exclusion clauses under the Qualification Directive, as implemented by the Member States, with international refugees and human

rights law. It also contains a number of case studies, highlighting questionable Member States practices. The last part contains the reflections on challenging the national measures implementing the Qualification Directive and the role of ECJ and ECtHR as potential remedy providers.

II. Minimum standards Directives and their compliance with international refugee and human rights law

In this chapter I will discuss the meaning of minimum standards for the implementation of the Directives and the compatibility of minimum standards Directives with international law.

1. Implementation of EU Directives granting minimum standards

The Directive is one of the secondary legal acts of European Community. Article 249 of EC Treaty states that: “A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” The Directives thus do not have direct application as national law in the Member States, but the Member States must transpose them by a deadline laid down in the Directives. Since Directives impose upon Member States an obligation of result, the measures taken by the Member States must be such as to ensure that Directives are fully effective, in accordance with the objective which they pursue.¹⁹

The implementation of a Directive is a very demanding process. It entails the understanding of the legal meaning of the provisions of the Directive and an ability to interpret the meaning of national legislation in the light of the Member States’ own legal and administrative practice.²⁰ The content of the implementing measure must be clear and

¹⁹ Case 14/83 *Von Colson*, (1984) ECR 1891, 10 April 1984.

²⁰ Sacha Prechal, *Directives in EC Law*, 2nd ed., 2005, p. 31.

precise, particularly when the Directive is intended to create rights and duties for individuals.²¹ The second stage is the application of the Directive, which means the administration of the Directive in a concrete case. In a third stage, the Directive must be enforced, meaning that it must be observed, either as such or as the national measures transposing it. A system of effective judicial protection is vital for the enforcements of norms resulting from a Directive and it is one of the principles underlying the requirements posed by the ECJ concerning the implementing measures.²²

Articles 63(1), (2) and (3) of EC Treaty set a requirement that rules on qualification, procedure and secondary rights must be minimum standards. Therefore if, for example the Qualification Directive does not set minimum standards, it is not in accordance with the Treaty. So we can assume that all the provisions of the Directives are minimum standards.

The Directives therefore adopted only minimum standards of protection, instead of aiming for the higher standards afforded by some Member States. What is the meaning of minimum standards in relation to the implementation of the Directive? Minimum standards rule means that Member States need to observe the relevant Community legislation, but can adopt higher standards,²³ if the domestic measure does not undermine the coherence of Community action and if they are in conformity with the EC Treaty.²⁴ We could see that since Community decided to adopt only minimum standards

²¹ C-131/88, *Commission v. Germany*, (1991) ECR I-825, 28 February 1991.

²² Sacha Prechal, *Directives in EC Law*, 2nd ed., 2005, p. 91.

²³ For example C-84/94, *United Kingdom v. Council*, (1996) ECR, 12 November 1996; C-2/97, *Societa Italiana petroli SpA v. Borsana Srl.*, (1998) ECR, 17 December 1998.

²⁴ Conclusions drawn by Battjes, referring to the case law on the minimum requirements of Article 137 of the EC Treaty (Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.162).

Directives, it left a certain margin of appreciation granted to the states, while implementing the Directives and choosing the standards to apply. It is exactly this margin of appreciation that can lead to conflicts with international refugee and human rights law.

There are various views on the meaning of the minimum standards Directives. In UNHCR's view minimum standards Directives essentially permit Member States to retain or introduce standards more favorable for the asylum seeker at their discretion. In this view, the standards contained in the Directive can only have mandatory effect in the sense of ensuring that all Member States apply standards at least as favorable as these. The Directive can never be utilized to impose more stringent standards than those currently applied by their national law.²⁵

Battjes reasons in the same direction, arguing that Member States can always adopt more favorable standards of protection, because this will not undermine the coherence of Community actions. Secondary law on asylum serves two objectives: (1) precluding secondary movements and (2) safeguarding rights of third country nationals.²⁶ One could argue that adopting higher standards of protection would cause secondary movements and therefore undermine the coherence of Community action. But inflow of applicants from other Member States into the Member States with higher standards is not a secondary movement which EC seeks to prevent. Besides, when the EC wants to

²⁵ UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*, January 2005.

²⁶ Some of the authors are of the opinion that only the first objective is the one the EU is really concerned of. For example Maria Teresa Gil-Bazo wrote: "The process of European integration in the field of asylum is related to the establishment of a Single Market without borders. With the establishment of a space without internal borders, the need to protect external borders becomes obvious in order to prevent undesired freedom of movement. The EU concern with asylum is therefore not driven by the wish to improve protection standards for refugees across Member States, but rather from the wish to control who enters the European economic space." (*The Protection of Refugees under the Common European Asylum System. The Establishment of a European Jurisdiction for Asylum purposes and Compliance with International Refugee and Human rights Law*, Cuadernos Europeos de Deusto, No. 36/2007).

preclude secondary movements, it endeavors to do it in the scope of second objective – safeguarding rights of third country nationals. Higher domestic standards that are in accordance with international law therefore do not undermine the coherence of Community actions.²⁷

The critics to those views are that it is difficult to see why Article 3 of the Qualification Directive includes the words “in so far as those standards are compatible with this Directive” without differentiating between higher or lower standards.²⁸ It is also difficult to see why the legislators did not seek to add a clause, explicitly precluding Member States from lowering their domestic standards when implementing the Directive, as they have seen fit to do in certain other recent EU Directives affecting social policy.²⁹

Another interesting observation is that some provisions of Qualification Directive do not seem to settle only minimum standards. For example it results from the Article 12(2)³⁰ that if the conditions of exclusion are fulfilled the exclusion is obligatory.³¹ Is Article 12(2) therefore still a minimum standard provision? It seems that the provision requires a mandatory exclusion also when the standards in domestic law of Member States are

²⁷ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.203.

²⁸ Hugo Storey, *EU Refugee Qualification Directive: a brave new world?* International Journal of Refugee Law, March 2008.

²⁹ For example, Council Directive on equal treatment in employment of 27 November 2000, 2000/78/EC [2000] OJ L303/16 and Council Directive on equal treatment irrespective of racial or ethnic origin of 29 June 2000, 2004/43/EC [2000] OJ L180/22.

³⁰ A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

(a) he or she 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 or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
 (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

³¹ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.267.

higher than minimum ones from the Directive. Or can the exclusion provision still be interpreted in a way to allow the adoption of higher standards of protection by Member States? According to Battjes the answer is yes, because if for example a Member State nevertheless decides to grant a refugee status to a person who would otherwise have to be excluded under Article 1(F) of Refugee Convention, the Member State exceeds its obligation under the Refugee Convention and acts on discretionary ground. Such domestic legislation falls outside the scope of the Qualification Directive and is therefore not affected by Article 12(2).³² In summary, Article 12(2) of Qualification Directive does not preclude Member States from adopting or maintaining more favorable domestic standards of protection, that are in accordance with their obligations under international law. Community minimum standards cannot entail an obligation to take a negative decision, and Community legislation must be interpreted accordingly.³³

However this view can be criticized. If a provision of the Directive sets down common criteria on key elements of the refugee definition, such as the definition of exclusion, then it is difficult to see how it can be correct for Member States to adopt a more favorable standard in relation to who is considered to be a refugee, without undermining the coherence of the Community policy. Besides, the Legal Service to Asylum Working Party states that any deviation in national law from the definitions laid down in Article 2 of the proposed Directive and the related articles 6, 7, 9, 11, 12, 13, 15, 16 and 17(1) would be incompatible with the objective of harmonizing the contents of those notions, unless the definition itself allows for the inclusion or exclusion of a certain group of

³² Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.558.

³³ K. Hailbronner, *Immigration and asylum law and the policy of the EU*, Kluwer 2000.

persons as part of a wider category.³⁴ Can we conclude that Member States which had higher standards of protection before implementation of the Directives can now reduce them in the spirit of harmonization?³⁵

2. Can the Directive legality be challenged if it allows national implementing measures to go beyond international standards?

The grounds for invalidating the Directives are lack of competence to adopt a Directive, infringement of an essential procedural requirement, infringement of the Treaty or any rule of law relating to its application (including general principles of administrative law and fundamental rights) and misuse of power.³⁶ Can the ECJ declare a Qualification Directive to be invalid because it contains the norms that are not the same as the international law norms?

In general, international treaties cannot serve as a source for review of the legality of the Community acts, since until now, Community did not accede to any of the international instruments relevant to the asylum.³⁷ However international law influences Community law in several ways. First, according to well established case law of the ECJ, the

³⁴ During the negotiations on Qualification Directive, the Council legal service was called to give an opinion on the legal meaning of the concept of minimum standards and how far Member States were allowed to develop or retain more favorable standards. The Council legal service noted that Member States remain free to legislate in the areas which are outside the scope of the Directive, but in order not to annihilate the objective of harmonization, the possibility to introduce more favorable standards could not be unlimited. Any deviation in national law from the definitions laid down in the Qualifications Directive and the related provisions that develop their content would be incompatible with the objective of harmonizing the content of those notions (14348/02 JUR 449 ASILE 67, 15 November 2002).

³⁵ Jane McAdam, *The Qualification Directive: An Overview*, p.8; in *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, edited by Karin Zwaan, Wolf Legal Publishers, 2007.

³⁶ Craig and De Burca, *EU Law: texts, Cases and Materials*, 4th ed., OUP, 2008.

³⁷ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.78.

Community law must comply with general principles of Community law that reflect international human rights law.³⁸ These principles are inspired by the constitutional traditions common to Member States and from the international treaties on human rights.³⁹

Second, Article 51 of the EU Charter of Fundamental Rights (CFR)⁴⁰ provides that the provisions of this Charter are addressed to the institutions and to the Member States when they are implementing Community law. Community institutions and Member States shall respect the rights, observe the principles and promote the application of the Charter rights. Although CFR is not yet in force, it is a source of inspiration for the protection of EU fundamental rights by the ECJ.⁴¹ Particularly relevant is Article 18, which provides that the right to asylum shall be guaranteed with due respect for the rules of the Refugee Convention and its Protocol. The reference to the Refugee Convention in this provision implies that the right to asylum is the right to a durable solution and encompasses a claim to secondary rights. However, right to asylum does not mean obligation to grant asylum. Member States must only guarantee that a refugee can ask for asylum. This in practice means that a refugee can still be expelled, but the Member State must guarantee that he will have a right to claim asylum in a country where he will be expelled. If the Member

³⁸ Article 6(2) of EU Treaty reflects the preexisting case law and provides that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

³⁹ Although Article 6(2) of EU Treaty refers only to the ECHR and constitutional traditions as a source of human rights law, ECJ still invokes provisions from other human rights treaties. Therefore all rules of international law on asylum that Member States are bound by, may serve as a source of inspiration for general principles of Community law.

⁴⁰ Charter of Fundamental Rights of the European Union, 14 December 2007, OJ 2007/C 303/01.

⁴¹ CFR will become binding with the entry into force of the Lisbon Treaty. The CFR will have a status of primary Community law and will serve as a standard for validity and legality of secondary Community legislation.

States do not expel a refugee, then they have to provide a durable solution by themselves, including secondary rights.⁴²

Third, Article 63(1) of EC Treaty requires that measures on asylum be in accordance with Refugee Convention and other relevant treaties. Therefore the primacy of international refugee and human rights treaties applies to EC secondary legislation, whose legal basis is Article 63(1). International refugee and human rights law therefore serves as a direct standard of decision on legality.

Finally there is another theory under which the Community law can be bound by the international law. This is the so called substitution theory, under which the Community may take over rights and obligations from the treaties to which the Member States are parties. Two conditions need to be fulfilled: (1) Member States have to show willingness to bind the Community to the international treaty and (2) other states party of the international treaty need to accept Community as a party.⁴³ Regarding asylum field, the opinions of authors are different whether we can speak of that kind of substitution. According to Battjes, although the Article 63(1) of EC Treaty requires that measures on asylum be in accordance with Refugee Convention and other relevant treaties, the Community is only competent to adopt minimum standards and the Member States remain competent to adopt additional domestic standards. Article 63(1) therefore does not indicate the will of Member States to impose upon Community the obligations that they have under international asylum law, for example to respect the principle of *non-refoulement*. And as for the second condition, there is no indication whatsoever, that the

⁴² Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.112.

⁴³ C-21-24/72, *International Fruit Company NV and others v. Produktschap voor Groenten en Fruit*, (1972) ECR, 12 December 1999.

third states accepted substitution of the Member States obligations under international asylum law to the Community.⁴⁴ On the contrary, Dr. Helene Lambert argues that the subject-matter covered by the Refugee Convention has been completely transferred to the Community and bases its argument on the last paragraph of Article 63 of EC Treaty, which suggests that measures adopted by the EU Council under points (1) and (2) shall prevent the Member States from maintaining or introducing national provisions in the areas concerned.⁴⁵ We need to await a decision of the ECJ for a final take on this academic debate.

The ways that international law works within the Community law are therefore through general principles of Community law, through the CFR, through the Article 63(1) and arguably also through the way of substitution. However, the Directive still cannot be declared invalid, even if reviewed through the international law, because it sets only minimum standards of protection. If the protection offered by a Community falls short of the level required by international asylum law, the Member States are free to set higher protection standards in conformity with their obligations under international law.

States by adopting the common asylum law did not cease to comply with obligations under other international law treaties. According to Article 307 of EC Treaty, Community law does not affect anterior agreements of which the states are parties. However, the same Article in its second paragraph imposes an obligation on Member States to take all appropriate measures to eliminate the incompatibilities between them and EC law. According to the ECJ case law an obligation to denounce preexisting agreement cannot

⁴⁴ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.79.

⁴⁵ Dr Hélène Lambert, *The EU asylum Qualification Directive, its impact on the jurisprudence of the United Kingdom and international law*, *ICLQ*, Volume 55, January 2006, p 161-192.

be excluded.⁴⁶ But this is not relevant for the present work, since the States cannot denounce international refugee and human rights instruments incompatible with EC law, because Article 63(1) of EC Treaty establishes that Community secondary asylum legislation must comply with the Refugee Convention and other international treaties. Article 63 is therefore *lex specialis* to Article 307 as regards the legal effect of international refugee and human rights treaties.⁴⁷ The validity of the provision of minimum standards is therefore affected by the requirement of accordance with international law in an indirect way⁴⁸ and as long as the objective of harmonization does not preclude Member States to comply with higher international standards, the Directive is not invalid.

ECJ already made a judgment about compatibility of Community law with international human rights standards in asylum issue. Parliament challenged compatibility of the Family reunification Directive with human rights standards. The ECJ stated that the Directive does not infringe the right to family life as recognized in European Convention of Human Rights (ECHR), because it merely states the minimum standards, therefore leaving a margin of appreciation to the Member States that requires them to weight competing interests in each situation.⁴⁹

Therefore minimum standards required by the Directives that do not comply with international asylum law, cannot mean that the European Community is in breach of its obligation from Articles 6(2) of EU Treaty and 63(1) of the EC Treaty. As a

⁴⁶ C-62/98 *Commission v. Portugal* (2000) ECR I-5171, 4 July 2000.

⁴⁷ Maria-Teresa Gil-Bazo, *Refugee status, subsidiary protection, and the right to be granted asylum under EC law*, Research Paper No. 136, Refugees Studies Centre, Oxford University, November 2006.

⁴⁸ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.556.

⁴⁹ C-540/03, *Parliament v. Council and Commission*, ECR I-5769 65–6, 68, 27 June 2006.

consequence, insofar as European asylum law provisions state minimum standards they cannot be invalid because of lack of accordance with international asylum law.⁵⁰

What is the purpose of adopting minimum standards that are not in compliance with international law? It seems that the policy of the EU benefits from the fact that the Refugee Convention has no monitoring mechanism and therefore Member States that will apply minimum standards that are in breach of the Convention (but in conformity with EU law) will not be sanctioned. Did Member States use the opportunity and transposed only minimum standards that are not in conformity with their international refugee and human rights law obligations? In such case, are there any remedies that can be used to assure the compliance with international law obligations?

⁵⁰ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.167.

III. Secondary rights, principle of *non-refoulement* and exclusion clauses under Refugee Convention

In this chapter I will look at the explanations concerning the application of secondary rights under Refugee Convention and I will address the declaratory and constitutivist theories concerning the nature of the refugee status determination procedure. Further I will provide the interpretation of exclusion clauses under Article 1(F) of Refugee Convention, as established by UNHCR, ECRE and several refugee law experts. At the end I will address the relation between exclusion clauses and exceptions to the principle of *non-refoulement* from Article 33(2) of Refugee Convention.

1. Secondary rights under the Refugee Convention

The Refugee Convention sets out a number of rights for refugees in Articles 2 to 34. The aim of the Convention is to strike a balance between the needs of refugees and those of the host state.⁵¹ The provisions laying down substantive rights for refugees use different standards of treatment. With regard to some rights, refugees have to be treated the same as nationals;⁵² most favored aliens;⁵³ or aliens generally,⁵⁴ while other articles lay down absolute rights for refugees.⁵⁵

⁵¹ It follows from the preamble to the Convention that the object and purpose of the Convention is to protect the human rights of refugees in the widest possible way, and at the same time to prevent unduly heavy burdens on and tension between countries by promoting international cooperation and burden sharing.

⁵² For example, the right to public relief and assistance (Article 23) and the right to social security (Article 24).

⁵³ For example, the right to engage in wage-earning employment (Article 17).

⁵⁴ For example, the right to self-employment (Article 18) and the right to housing (Article 21).

⁵⁵ For example, the right to have free access to the courts of law (Article 16) and the right to administrative assistance (Article 25).

Further, the beneficiaries of these rights are qualified in four categories: refugees “*tout court*”, “lawfully present” refugees, “residence” refugees and “lawfully staying” refugees. Hathaway named these qualifications as “incremental system”, whose characteristic is that the refugee has stronger claims for protection when his ties with the host state are tighter.⁵⁶

Refugees “*tout court*” means refugees that are not lawfully present on the territory. The rights guaranteed to refugees “*tout court*” are protection against *refoulement* and discrimination (Articles 33 and 3), access to a state's courts (Article 16(1)), religious freedom (Article 4), and the right to benefit from educational systems (Article 22). Identity papers are to be issued to refugees without documentation (Article 27) and penalties on account of illegal entry or presence are prohibited (Article 31).⁵⁷

Lawful presence means that refugee's presence is in conformity with relevant domestic law, if his presence is authorized or regularized. Any title to remain on a temporary basis makes the presence lawful. Rights that demand lawful presence of a refugee on the territory are Articles 18, 26 and 32 of Refugee Convention (self-employment, freedom of movement and *non-refoulement*).⁵⁸ On a practical example this means that if the States deny those Refugee Convention benefits to a refugee who requested recognition of his refugee status (applicant), because under its domestic law this applicant was not lawfully present, they do not act in breach of their Convention obligations. Finally it is important

⁵⁶ J.C. Hathaway, “*What's in a label?*” EJML (5)2003, p. 1-21.

⁵⁷ As well as Articles 13 (movable and immovable property), 29 (fiscal charges) and 30 (transfer of assets).

⁵⁸ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.451.

to mention that States have a duty to render the refugee's presence lawful if admission to a third country cannot be secured.⁵⁹

The Convention makes a distinction between refugees in the territory of contracting states and refugees residing in the territory of contracting states, therefore it can be assumed that "residence" implies a sojourn of a certain period of time. Paragraph 14 of the Schedule attached to the Refugee Convention employs the term "residence" in contrast to "transit through" and "establishment" in a state. This implies that "residence" sets in after an only brief period of time and that permanent settlement is not required. Battjes refers to Grahl-Madsen's observation that three months seems to be almost universally accepted as the period for which an alien may remain in the country without needing a residence permit⁶⁰ and argues that this may imply that presence continued after the expiration of a period of three months would be "residence" in the sense of Refugee Convention. Rights guaranteed to "resident" refugee are Articles 12 (personal status), 14 (intellectual property rights) and 25 (administrative assistance) of Refugee Convention.⁶¹

The opinion of authors varies regarding the meaning of "lawfully staying" refugee. According to Hathaway refugees undergoing status determination procedures are not "lawfully staying" in the country.⁶² According to Battjes, status determination procedure is not necessary in order to become "lawfully staying" refugee. Refugees who are lawfully present in the country for more than 3 months are automatically "lawfully

⁵⁹ This obligation is implied from the Article 31(2) of Refugee Convention (Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.451).

⁶⁰ A. Grahl-Madsen, *The status of refugees in international law*, Volume II, Leyden: A. W. Sijthoff, 1972.

⁶¹ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.452.

⁶² J.C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press 2005.

staying” after the mere laps of time.⁶³ Refugees “lawfully staying” benefit from freedom of association (Article 15), the right to engage in wage-earning employment and to practice a profession (Articles 17 and 19), access to housing and welfare (Articles 21 and 23), protection of labor and social security legislation (Article 24) and right to travel documentation (Article 28).⁶⁴

2. Nature of refugee status determination procedure

Application of Refugee Convention’s rights contained in Articles 2 to 34 also depends on whether a refugee is recognized or not. The theory developed two views on the nature of refugee status determination procedure; declaratory and constitutivist. In the latter view a person becomes a refugee only after his recognition as a refugee by the host State and only then becomes entitled to Convention benefits. In the declaratory view the recognition may eventually take place, but it is not mandatory for the entitlement to Convention benefits. A person is a refugee as soon as he fulfills the criteria contained in the Article 1(A) of Refugee Convention. He does not become a refugee because of recognition, but is recognized because he is a refugee.⁶⁵

Under European Asylum law, a person who requests international protection under Refugee Convention is an applicant and becomes a refugee only after his recognition as a

⁶³ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.453.

⁶⁴ James C. Hathaway, *Refugee rights are not negotiable*, Georgetown Immigration Law Journal, 2000.

⁶⁵ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, 1992.

refugee by a Member State,⁶⁶ despite the Recital 14 of Qualification Directive preamble that states that the recognition of a refugee status is a declaratory act.

Refugee Convention itself does not explicitly require status determination for entitlement of its benefits, but on the other hand it does refer to the status determination on several places. According to Battjes, the object and purpose of individual provisions lead to the conclusion that some provisions presuppose that status determination has taken place, whereas other provisions necessary apply to unrecognized refugees to.⁶⁷ It does not result from the Convention provisions that only recognized refugees are entitled to the Convention benefits. After examining relevant provisions, Battjes concludes that Articles 1C, 5, 28, 32 and 34 apply only to recognized refugees.⁶⁸

3. Interpretation of the exclusion clauses of Refugee Convention

Exclusion clauses are contained in the Article 1F of Refugee Convention and are the following:

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;

⁶⁶ Articles 13 and 2(d) of Qualification Directive and Article 2(c) and (b) of Procedural Directive.

⁶⁷ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.457.

⁶⁸ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.469.

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

The rationale of the Article 1F is that refugees who are responsible for the most serious crimes do not deserve international protection under the Refugee Convention and that the refugee protection regime should not shelter serious criminals from justice. By excluding them from refugee status, the integrity of the international system of refugee protection shall be preserved.⁶⁹

A. Article 1F(a)

As the provision states itself, we have to refer to international instruments, in order to find a definition of the mentioned crimes. The best-known instruments are the 1945 London Agreement and Charter of the International Military Tribunal (Nuremberg), the 1948 Genocide Convention and the 1949 Geneva Conventions,⁷⁰ the International Criminal Tribunal for Yugoslavia, International Criminal Tribunal for Rwanda and International Criminal Court Statutes⁷¹.

For example in Germany, an applicant from Rwanda was excluded from refugee status on the basis of the equivalent provisions to the Article 12(2)a, because he was mentioned on the list of the United Nations General Assembly of 1 November 2005 (under Resolution 1596/2005) and was placed there on the grounds that he is the “President of X

⁶⁹ ECRE position on exclusion from refugee status, March 2004.

⁷⁰ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Convention Relative to the Treatment of Prisoners of War and Convention relative to the Protection of Civilian Persons in Time of War. Relevant are also Additional Protocols to the Geneva Conventions, first relating to the Protection of Victims of International Armed Conflicts and second relating to the Protection of Victims of Non-International Armed Conflict.

⁷¹ Although those Statutes were adopted after the Refugee Convention, UNHCR pointed out that the Convention has to be interpreted in the light of the evolutionary approach.

organization, exercising influence over policies, and maintaining command and control over the activities of this organization.” The acts committed by the group under his control were qualified as ‘war crimes’ under Article 8(2)c and e and as “crimes against humanity” under Article 7 of the Statute of the International Criminal Court (ICC). The personal responsibility of the applicant was also derived from Article 28(b) of the Statute of the ICC.⁷²

B. Article 1F(b)

To understand the 1F(b) provision, notions such as “serious”, “non-political” and “prior to admission” have to be defined.

a) Serious

Although the notion of “serious” (non-political) crimes would require a uniform interpretation, State practice shows little consistency in interpreting the meaning of a “serious” crime. The preferred approach for purposes of interpreting the exclusion clauses should be to focus on the substance: to take into account the nature and circumstances of the crime. Serious crimes usually involve crimes against physical integrity, life and liberty such as murder or robbery.⁷³

⁷² UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, 6 November 2007.

⁷³ G. Goodwin-Gill, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, UNHCR, *The Refugee in International Law*, April 2001.

b) Non-political

There is no universally accepted definition of non-political crime. To help us with the interpretation, we should look at the definition of political crimes and then apply the argument *a contrario*.

State practice has developed two different categories of offences regarded as political: absolute or purely political offences and relative or related political offences. The first type of crime relates to acts that directly interfere with the integrity or security of the State but not with other individuals' rights. These cases, such as for example treason or electoral fraud, should not be the grounds for exclusion.⁷⁴

Relative political offences pose more difficulties of interpretation. Here crimes are committed with a more or less political motivation. UNHCR position is that for an offence to be deemed "political", its political nature must predominate over its common criminal character. A serious crime should be considered non-political when motives such as personal gain are the predominant feature, or when there is no clear link between the crime and its alleged political objective or when the act is disproportionate to the alleged political objective. Furthermore, for a crime to be regarded as political in nature, the political objectives should be consistent with human rights principles.⁷⁵ We need to apply balancing between the seriousness of the crime and the motives of the individual

⁷⁴ UNHCR *Guidelines on UNHCR Background Note on the Application of the Exclusion clauses: Article 1F of the Refugee Convention*, 4 September 2003.

⁷⁵ UNHCR *Guidelines on UNHCR Background Note on the Application of the Exclusion clauses: Article 1F of the Refugee Convention*, 4 September 2003.

who committed it.⁷⁶ Article 1F(b) is of particular relevance for the acts of terrorism, as they are likely to be disproportionate to any political objective.⁷⁷

c) Prior to admission

UNHCR wrote in its comments that it would not be correct to interpret the phrase “prior to admission ... as a refugee” as referring to the time preceding the issuing of a residence permit, as recognition of refugee status is declaratory rather than constitutive.⁷⁸ In UNHCR’s view it should be interpreted as referring to the time preceding the person’s physical presence in the country of refuge.⁷⁹ If the person commits serious non-political crime in the country, he is subject to the criminal law and in the case of particularly grave crime to the Articles 32 and 33(2) of the Convention. By contrast, Articles 1F(a) and (c) are concerned with crimes whenever and wherever they are committed.

An example of exclusion under Article 1F(b) or equivalent provision under Qualification Directive contained in Article 12(2)b, would be the case in Slovakia, where a Chechen applicant was excluded from refugee status, because he was a suspected member of an

⁷⁶ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.263.

⁷⁷ UK in the case *T v. Secretary of State for the Home Department* (1996, AC 742; 2 WLR 766) developed two conditions that need to be fulfilled in order to consider the crime as political: (1) the crime must be committed for a political purpose and (2) there is a sufficient close and direct link between the crime and the alleged political purpose. The Court will examine the means used to achieve the political end and will have particular regard to whether the crime was aimed at a military or governmental target or a civilian target and whether it was likely to involve the indiscriminate killing or injuring of members of the public.

⁷⁸ Qualification Directive interprets the phrase “prior to admission” as prior to the time of issuing a residence permit based on the granting of refugee status.

⁷⁹ UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*, January 2005.

armed group which had committed indiscriminate killings and he was accused of murder in the Russian Federation.⁸⁰

C. Article 1F(c)

The reference to the purposes and principles of the United Nations makes Article 1F(c) difficult to define, because the purposes and principles are vague and unusual for the characterization of individual acts of a criminal nature. By their very nature, they relate to the Member States and questions of international concern, such as, for instance, international peace and security, the territorial integrity or political independence of any State, the peaceful resolution of international disputes, or equal rights and self-determination of peoples.⁸¹

For example in France, the Commission des Recours des Réfugiés (CRR) has mainly applied this provision to the representatives of the public authorities of the countries where acts, contrary to the purposes and principles of the United Nations, occurred. The CRR, for example, considered that serious violations of human rights and fundamental freedoms in Haiti under the presidency of Jean-Claude Duvalier could be considered as acts contrary to the purposes and principles of the United Nations. The CRR held that, given his authority and function as Head of State, Jean-Claude Duvalier was responsible for acts contrary to the purposes and principles of the United Nations and was excluded.⁸²

⁸⁰ UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, November 2007.

⁸¹ The purposes and principles of the UN are set out in the Preamble, Article 1 and 2 of the UN Charter.

⁸² *Duvalier*, 18 July 1986, 50.265, confirmed by the Conseil d'Etat on 31 July 1992, 81963.

State practice shows that this exclusion clause is mainly applied to terrorist acts.⁸³ However, it is one thing to state as a matter of policy that terrorism is contrary to the purposes and principles of UN, but quite another to translate that policy into a rule of law. Too often counter-terrorism practices can be used to justify the elimination of political opponents or suppression of resistance to military occupation, since labeling opponents as terrorists offers a time tested technique to de-legitimize and demonize them.⁸⁴

While terrorism can indeed be against principles of UN and therefore a basis for exclusion under Article 1F(c) of Refugee Convention, conformity with international obligations requires that decisions be taken in accordance with appropriate procedural guarantees. Article 1F(c) can only be applied when there are serious reasons to consider that the individual has committed an offence specifically identified by the international community as one which must be addressed in the fight against terrorism, and only by the way of due process.⁸⁵

Terrorism as such cannot be used as a separate ground for exclusion, given the lack of consensus within the international community as to its exact definition and constituent

⁸³ Some States have used it as a residual category in relation to certain terrorist acts or trafficking in narcotics. German jurisprudence found that terrorist and sabotage activities from Lebanon against Israel were a basis for exclusion under Article 1F(c). Also, in 1972, a German court held that bomb and terrorist attacks resulting in deaths were contrary to the purpose and principles of UN. The UK Home Office has reportedly applied Article 1F(c) to offences considered to be terrorism although there is no generally accepted definition of terrorism or of the elements necessary to constitute the crime of terrorism. The Netherlands declared that Article 1F(c) is an inherently vague basis for peremptory exclusion of any kind and has therefore decided not to rely on this provision at all (Guy S. Goodwin-Gil and Jane McAdam, *The Refugee in International Law*, 3rd edition, Oxford University Press, 2007).

⁸⁴ Report of the Policy Working Group on the UN and Terrorism, in UN Doc. A/57/273, 10 September 2002.

⁸⁵ Guy S. Goodwin-Gil and Jane McAdam, *The Refugee in International Law*, 3rd edition, Oxford University Press 2007.

elements.⁸⁶ In this respect, ECRE believes that most so-called terrorist offences are appropriately dealt with under paragraph (a) and particularly (b) of Article 1F. Whenever possible, recourse should be made to these provisions and any unduly expansive interpretation of the “purposes and principles of the United Nations” referred to in Article 1F(c) should be avoided to prevent abuse of the exclusion clauses.⁸⁷

D. Serious Reasons – the Standard of Proof

The Refugee Convention does not provide any guidance as to what is meant by “serious reasons for considering” that an applicant has committed a crime falling within the scope of Article 1 F. It is clear that because of the severe consequences of a decision to exclude, the exceptional nature of exclusion and the general protection purpose of the Refugee Convention, the threshold of proof applied should be high.⁸⁸

Since the exclusion clauses deal with the commission of crimes, it seems reasonable to search for existing standards of proof in the area of criminal law, ideally international criminal law. In this respect, reference can be made to the standard of proof required for criminal indictment.⁸⁹ In terms of the ICC Statute, this corresponds with what is required by the Prosecutor of the ICC to convince the Pre-Trial Chamber to open a trial against a person on charges.⁹⁰

⁸⁶ Geoff Gilbert, *Article 1F of the Geneva Convention – Introduction to rationale, scope and interpretation*, presentation at the ELENA course Cessation and Exclusion Clauses, National Security and *Non-Refoulement*, Athens, 22-24 February 2008.

⁸⁷ ECRE position on exclusion from refugee status, March 2004.

⁸⁸ *Refugees, Rebels and the quest for justice*, The Lawyers Committee for Human Rights, Human Rights First, 2002.

⁸⁹ ECRE position on exclusion from refugee status, March 2004.

⁹⁰ According to Article 61(5) of the ICC Statute, at the hearing, the Prosecutor shall support each charge with sufficient evidence to establish *substantial grounds to believe* that the person committed the crime he

E. Individual responsibility - membership

While Article 1 F does not expressly mention individual criminal responsibility as a condition for its application, it can be clearly inferred from the text “any person ... has committed” or “... has been guilty”. Thus, when establishing whether a person is excludable under Article 1 F, the determining authority needs to show that there are serious reasons to believe that the applicant is in fact individually responsible for the committed crime.⁹¹

The concept of individual responsibility for criminal offences is well established in national and international criminal law. It involves an objective and a subjective element. In this respect, Article 25 of the ICC Statute, which provides a detailed compilation of the various forms of how criminal responsibility may be established (objective element), and Article 30, which describes the mental element required (subjective element), may be considered to reflect an international consensus in respect of crimes covered by Article 1F.⁹² As in the criminal context, the question of applicable defences must also be

was charged of. Based on its determination, the Pre-Trial Chamber shall confirm these charges and commit the person to a Trial Chamber for trial on those charges as confirmed. There is a certain textual similarity (‘serious reasons for considering’, ‘substantial grounds to believe’) as well as a comparability of the respective objectives.

⁹¹ ECRE position on exclusion from refugee status, March 2004.

⁹² Article 25(3) of the ICC Statute provides that a person shall be criminally responsible and liable for punishment for a crime [...] if that person (a) Commits a crime, whether as an individual, *jointly with another or through another person* regardless of whether that other person is criminally responsible; (b) *Orders, solicits or induces* the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of *facilitating* the commission of such a crime, *aids, abets or otherwise assists* in its commission or its attempted commission, including providing the means for its commission; (d) In any other way *contributes* to the commission or attempted commission of such a crime *by a group of persons* acting with a *common purpose*. Such contribution shall be intentional and shall either (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; (ii) be made in the knowledge of the intention of the group to commit the crime. (e) In respect of the crime of genocide, directly and publicly *incites* others to commit genocide. (f) *Attempts* to commit such a crime by taking action that commences its execution by means of a substantial step [...].

considered as an element of individual responsibility (e.g., duress, necessity, self-defence, insanity, error of law and fact, etc.).

A number of States consider the mere membership of a terrorist organization as sufficient to amount to complicity with or participation in the acts of the organization. For example in Canada the low standard of proof needed, does not even require actual membership, but only the possibility that the person was a member. The consequences of that kind of restrictive policy are that most members or supporters of organizations representing dispossessed peoples that are occupied, repressed and subjected to severe human rights violations, are not viewed as victims but as terrorists, even if they were never engaged in violence.⁹³

Association with or membership of a group practicing violence or committing serious human rights abuse is, *per se*, not sufficient to provide the basis for a decision to exclude. The reasons for this are that Article 1F(b) represents a limitation on an individual right and without evidence of involvement in a specific serious non-political crime, it would be contrary to the Convention to exclude someone for mere membership. However, since the ad hoc tribunals have found civilians to be liable for war crimes based on their position in the command hierarchy, senior members of a government or an organization which carries out Article 1F(b) crimes could be found to have knowledge sufficient for

Article 30(1) of the ICC Statute stipulates that a person shall be criminally responsible and liable for punishment for a crime [...] if the material elements are committed with intent and knowledge. (2) For the purposes of this article, a person has intent where: (a) In relation to conduct, that person means to engage in the conduct; (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events. (3) For the purpose of this article, “knowledge” means awareness that a circumstance exists or a consequence will occur in the ordinary course of events.

⁹³ Barbara Jackman; *Terrorism and the Charter*, National Journal of Constitutional Law, 2007.

exclusion.⁹⁴ As an example it can be mentioned that French CNDA (Commission de recours de réfugiée) considered that even though the applicant was not on any list of people accused of genocide in Rwanda, the fact that he remained in the government during the time the government tolerated or encouraged the genocide shows clearly his political opinions. The applicant did not dissociate himself from the system and thus contributed to the genocide.⁹⁵ Therefore in France someone with a high position can be excluded for acts committed by someone who is under his/her order.

UNHCR guidelines also state that the fact that an individual is designated on a national or international list of terrorist suspects (or associated with a designated terrorist organization) should trigger consideration of the exclusion clauses, but will not in itself generally constitute sufficient evidence to justify exclusion. In such cases, it is necessary to examine the individual's role and position in the organization, his or her own activities, as well as related issues ...⁹⁶

F. Proportionality

Certain crimes, particularly those within Article 1F(a), should always lead to exclusion, no matter how well founded the fear of persecution is. On the other hand, Article 1F(b) already contains one proportionality test - is the non-political crime sufficiently serious so as to justify exclusion? The question is whether there is a second proportionality test - balancing the fear of persecution in the country of origin against exclusion. The view of

⁹⁴ Geoff Gilbert, *Exclusion (Article 1F)*, Refugee Protection in International law, UNHCR's Global Consultations on International Protection, Cambridge University Press, 2003.

⁹⁵ *M. S.*, CRR, 13 April 2005, 375214.

⁹⁶ UNHCR *Guidelines on UNHCR Background Note on the Application of the Exclusion clauses: Article 1F of the Refugee Convention*, 4 September 2003.

several states is that whether the applicant would be persecuted if denied refugee status and forced to return is of no consequence when applying Article 1F.⁹⁷ However, in states where the double balancing test is denied, other protection under human rights treaties is available. It could be therefore argued that the circumstances changed since 1951, in the terms of human rights guarantees, and exclusion under Article 1F(b) should no longer be absolute.⁹⁸ This argument will be further developed under the Chapter IV of the present work.

G. Expiation and Lapse of Time

A person who has been convicted for an excludable offence and served a sentence is generally considered to have expiated this offence. According to the nationally and internationally recognized principle of *ne bis in idem*, such a person shall not be tried again for this offence in the same jurisdiction.⁹⁹

The fact that an asylum applicant was convicted of a serious non-political crime and served a sentence or benefited from an amnesty should therefore be taken into account. The presumption will usually be that the exclusion clause is no longer applicable. However, an exception may be justified if the proceedings in the other court were designed to shield the accused from criminal responsibility or otherwise were not concluded independently or impartially in accordance with the norms of due process recognized by international law, but were conducted in a manner which, was inconsistent

⁹⁷ For example case *Pushpanathan v. Canada*, (1998) 1 SCR 982; *Immigration and Naturalization Service v. Aguirre-Aguirre*, 536 US 415, 119 S.Ct 1439, 143 L.Ed (2d) 590 (1999).

⁹⁸ Geoff Gilbert, *Exclusion (Article 1F)*, Refugee Protection in International law, UNHCR's Global Consultations on International Protection, Cambridge University Press, 2003.

⁹⁹ See Article 20 of the ICC Statute; Article 10 of the ICTY Statute; Article 9 of the ICTR Statute; Article 3 of the European Council Framework Decision on the European arrest warrant and the surrender procedures between Member States.

with an intent to bring the person concerned to justice. Similarly, an exception may be justified in cases of truly horrible crimes, where it may be considered that the person is still undeserving of international refugee protection.¹⁰⁰

Is the lapse of time relevant for the application of exclusion clauses? If someone who has committed Article 1F crimes in the past renounces such methods, will he qualify for refugee status? According to UNHCR, a person may claim a refugee status if the Article 1F crimes are sufficiently distant in the past and applicant's conditions of life have changed. The central question should be whether the applicant's criminal character still predominates.¹⁰¹ However, the lapse of time is only going to be relevant with regard to Article 1F(b), since no statutory limitations shall apply to war crimes and crimes against humanity as well as crimes against the purposes and principles of the UN, irrespective of the date of the commission.¹⁰²

H. Procedural issues

Although the present work will not focus on the procedural aspects of exclusion clauses, they are so important that they need to be mentioned in order to get a complete picture of exclusion clauses. Therefore I will briefly expose the most important procedural issues that need to be respected when exclusion clauses are examined and applied.

¹⁰⁰ UNHCR *Guidelines on UNHCR Background Note on the Application of the Exclusion clauses: Article 1F of the Refugee Convention*, 4 September 2003.

¹⁰¹ UNHCR, *Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practice Violence*, 1 April 1988.

¹⁰² Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity of 26 November 1968; Article 29 of the ICC Statute.

- Since the consequences of exclusion are very serious, the exclusion clauses should be examined under the regular refugee status determination procedure and not under admissibility or accelerated procedures.
- Confidentiality of the procedure shall be respected at all time, although in exceptional circumstances, when national security is seriously endangered, the officials can contact the asylum seeker's country of origin, but even then the existence of asylum application cannot be disclosed.
- A burden of proof lies on the State and the applicant should be given the benefits of the doubt. When however the individual has been indicted by the international criminal tribunal, or where individual responsibility is presumed, the burden of proof is reversed.
- Exclusion should not be based on sensitive evidence that cannot be challenged by the individual concerned. Anonymous evidence may be relied upon only in exceptional circumstances, when is necessary to protect the safety of witnesses and the applicant's ability to challenge the substance of the evidence is not substantially prejudiced.¹⁰³

4. Inclusion before exclusion?

We cannot avoid mentioning the very controversial question, whether inclusion should come before exclusion in refugee status determination process. Shall a Member State consider if the applicant has a well founded fear of persecution (inclusion), before

¹⁰³ UNHCR *Guidelines on UNHCR Background Note on the Application of the Exclusion clauses: Article 1F of the Refugee Convention*, 4 September 2003.

examination if conditions for exclusion are present? Opinions of experts are different. A growing number of States seem to consider the application of the exclusion clauses before or even without looking at inclusion.¹⁰⁴ In the view of ECRE and UNCHR, this is mistaken, as using exclusion as a test of admissibility to a full examination of the need for protection is inconsistent with the exceptional nature of the exclusion clauses and can prejudice the decision-maker's capacity to come to a sound conclusion. To apply Article 1F before Article 1A indicates a presumption that all applicants for refugee status are potentially excludable. They suggest that inclusion and exclusion form integral parts of the asylum procedure and that the decision-making process should entail an inherent balancing between the nature of the alleged crime and the likely persecution feared by the applicant, which requires an understanding of all the circumstances of the case.¹⁰⁵

The UK for example agrees that its decision-makers should not adopt an "exclusion culture" meaning that instead of asking a refugee "what do you fear?", they would ask him "have you committed a serious crime?". But they still do not agree that after the serious criminality becomes an issue, they should apply inclusion before exclusion. They are convinced that when the exclusion subject matter has been identified, the exclusion should come before inclusion. There is nothing that would demand that in order to apply an exception, one first has to decide whether a person falls within the rule. Of course where there is no clear evidence of serious criminality, there is too great danger of being examined under exclusion clauses first.¹⁰⁶

¹⁰⁴ For example, *Ramirez v. Canada* (1992) 2 FC 306 (CA).

¹⁰⁵ ECRE position on exclusion from refugee status, March 2004.

¹⁰⁶ *Shyam Bahadur Gurung v. Secretary of State for the Home Department*. [2003] EWCA Civ 654, 1 May 2003.

There are however two exceptions where exclusion could be considered without detailed examination of inclusion clauses also in UNHCR's view. First is the case where there is an indictment by an international tribunal and second where there is a strong evidence that the person committed serious non-political crime. But also in the cases of exceptions, the individual responsibility needs to be established and proportionality test applied.¹⁰⁷

5. Relation between exclusion clauses and exceptions to the principle of *non-refoulement* under Article 33(2) of Refugee Convention

International refugee law provides for the protection of refugees against removal to a country where they would be at risk of persecution. This is known as the principle of *non-refoulement*. In the Refugee Convention it is included in Article 33(1).¹⁰⁸ It applies to all persons who meet the inclusion criteria of Article 1A of the Convention and it applies not only in respect of return to the country of origin, but also with regard to removal to any other country where a person has a reason to fear persecution, or from where he risks being sent to his country of origin. Since the Article 33 encompasses the declaratory nature of refugee status determination, it applies also to unrecognized refugees.

¹⁰⁷ Maria Bances del Ray (UNHCR), *Application of Article 1F of the Refugee Convention*, presentation at the ELENA course Cessation and Exclusion Clauses, National Security and *Non-Refoulement*, Athens, 22-24 February 2008.

¹⁰⁸ Article 33 - Prohibition of expulsion or return ("*refoulement*")

1. No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. 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.

Is Article 33 of Refuge Convention a peremptory norm? To be *jus cogens* norm, two conditions need to be fulfilled: (1) a vast and representative majority of states must consider the rule binding and (2) they must hold that the rule does not allow for derogation.¹⁰⁹ Even if we assume that the whole international community accepted the principle of *non-refoulement*, it is still not a peremptory norm, because the second condition is not fulfilled. The Article 33 itself contains an exception to the principle and there are no sufficient indications of *opinion juris* that the provision is *jus cogens* norm.

Even though the principle of *non-refoulement* is not a peremptory norm, the international community recognizes it as a rule of customary law. Therefore the customary prohibition of *refoulement* must be respected also by the states that are not party to the Refugee Convention.¹¹⁰

Under second paragraph Article 33 contains exceptions to the principle of *non-refoulement*. A person can be returned, if he presents a danger to the security or the community of the host country. For the “danger to the security” exception to apply, there must be an individualized finding that the refugee poses a current or future danger to the host country. The danger must be very serious and it must be a threat to the national security. For the “danger to the community” exception to apply, the refugee must have been convicted of a crime of a very grave nature and it must also be established that he constitutes a very serious present or future danger to the community of the host

¹⁰⁹ Article 53 of Vienna Treaty Convention.

¹¹⁰ UNHCR, *The principle of non-refoulement as a Norm of Customary International Law*, 1993.

country.¹¹¹ Whether or not this is the case will depend on the nature and circumstances of the particular crime and other relevant factors.¹¹²

The removal of the refugee is lawful only if it is necessary and proportionate. This means that there needs to be a rational connection between the removal and the elimination of the danger for the security or community of the host country. The founding of dangerousness must be based on reasonable grounds and therefore supported by credible and reliable evidence. *Refoulement* must be the last possible solution for elimination of the danger, and the danger for the host country must outweigh the risk of harm for the person as a result of *refoulement*. Determination of whether one of the exceptions applies must be made in procedure which offers adequate safeguards.¹¹³

Examining the relationship between Article 33(2) and 1F, we come to the findings that Article 33(2) triggers higher threshold than Article 1F, since in order to apply exceptions to *non-refoulement*, it must be established that the refugee constitutes a danger to the security or to the community of the country of refuge. The focus is on the future threat and not on the commission of some act in the past, thus the provisions serve different functions: exclusion is motivated by the seriousness of crimes that an individual has committed, whereas Article 33(2) is directed at protecting the safety of the host state.¹¹⁴

¹¹¹ The danger cannot be meant as a danger to the international community or to foreigner country, but only as a danger to the host country. For example, a refugee that supports a political cause in a foreigner State cannot be considered as presenting a danger to the country of refuge (Geoff Gilbert, *Exclusion (Article 1F)*, Refugee Protection in International law, UNHCR's Global Consultations on International Protection, Cambridge University Press, 2003).

¹¹² UNHCR *Note on Diplomatic Assurances and International Refugee Protection*, 2006.

¹¹³ UNHCR *Note on Diplomatic Assurances and International Refugee Protection*, 2006.

¹¹⁴ Jane McAdam, *The Qualification Directive: An Overview*, in *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, edited by Karin Zwaan, Wolf Legal Publishers, 2007.

Thus, if a conduct of an applicant is insufficiently grave to exclude him from refugee status, it is unlikely to satisfy the higher threshold in Article 33(2).¹¹⁵

Another difference between the provisions is that Article 1F(b) applies to the crimes committed outside the country of refuge, prior to admission, on the contrary, Article 33(2) must be read as applying to a conviction for a particularly serious crime committed in the country of refuge, or elsewhere, subsequent to admission as a refugee.

Further, the principal difference between exclusion and exceptions to the principle of *non-refoulement* is that the latest applies to the persons, who have been found to be refugees under the Refugee Convention, but who can nonetheless be removed.¹¹⁶ On the contrary, when exclusion clauses are present, the persons do not even fall under the protection of Refugee Convention; they are excluded from refugee status.¹¹⁷ Article 33(2) was never conceived as a ground for terminating refugee status. To put it simple, a person to whom Article 33(2) is applied is still a refugee in the sense of Refugee Convention, whilst a person who is excluded is not a refugee and never was. If the applicant is excluded from refugee status, but for some reason cannot be expelled, he only retains a right to be protected from expulsion and no other right resulting from Refugee Convention,¹¹⁸ whether a refugee who fulfills the conditions under Article 33(2), but cannot be expelled for some other reasons, still possesses the rights belonging to a refugee under Refugee Convention.

¹¹⁵ Geoff Gilbert, *Exclusion (Article 1F)*, Refugee Protection in International law, UNHCR's Global Consultations on International Protection, Cambridge University Press, 2003.

¹¹⁶ Removed under the scope of the Convention, but perhaps not under the international human rights law. More about this in the next chapter.

¹¹⁷ ECRE position on exclusion from refugee status, March 2004.

¹¹⁸ Member States do grant some rights to the applicants in this position, but this is within their discretionary competence.

Finally, we cannot continue without mentioning the trend, evident in other international instruments, against the exceptions to the principle of *non-refoulement*. For example, *non-refoulement* is not subject to the exceptions in OAU Refugee Convention, American Convention on Human Rights, neither in Cartagena Declaration.¹¹⁹ As we will see in the next chapter, *non-refoulement* in a human rights context also allows of no limitation or derogation.

¹¹⁹ Geoff Gilbert, *Exclusion (Article 1F)*, Refugee Protection in International law, UNHCR's Global Consultations on International Protection, Cambridge University Press, 2003

IV. *Non-refoulement* under international human rights treaties

International human rights treaties bound states not to transfer any individual to another country, if this would result in exposing him to serious human rights violations, notably arbitrary deprivation of life, torture, or other cruel, inhuman or degrading treatment or punishment. The principle of *non-refoulement* is sometimes explicitly mentioned in human rights treaties, but most of the time, it is derived from the provisions that prohibit torture and inhuman or degrading treatment. Of course, the prohibition of torture is not the only human right with which we can connect the principle of *non-refoulement*. *Refoulement* of a person can trigger several other rights that might be engaged extraterritorially, such as for example, the right to life, the right to liberty or the right to private and family life.¹²⁰ However, for the present work, I will only focus on the principle of *non-refoulement* as derived from the prohibition of torture and inhuman or degrading treatment or punishment.

Torture is defined in Article 1 of Convention against Torture (CAT), as including the unlawful use of psychological or physical techniques to intentionally inflict severe pain and suffering on another, when such pain or suffering is inflicted by or with the consent of public officials. The prohibition of torture is considered a peremptory norm of international customary law, which cannot be easily derogated from.¹²¹ No State has ever

¹²⁰ Nuala Mole, *Asylum and the European Convention on Human Rights*, Council of Europe publishing, 2007.

¹²¹ Peremptory norm can be changed only with other peremptory norm. Articles 53 and 64 of the Vienna Convention on the Law of Treaties provide that existing or new peremptory norms prevail over Treaties.

legalized torture or admitted to its deliberate practice and the governments accused of practicing torture generally deny their involvement.¹²²

The prohibition of torture is included in several multilateral instruments.¹²³ Article 3 of CAT expressly prohibits deportation to torture.¹²⁴ The International Covenant on Civil and Political Rights (ICCPR) and the ECHR expressly consider prohibition of torture as an absolute right, from which it cannot be derogated, not even in the cases of emergency.¹²⁵ Although neither of those two instruments contains the express prohibition of deportation to torture, the application of the provision to deportation cases was clearly established through the jurisprudence of ECtHR¹²⁶ and in the General Comments of the Human Rights Committee.¹²⁷

Despite this, States, whilst trying to deport a refugee, sometimes argue that the Refugee Convention does not preclude deportation to torture, since Article 1F actually excludes the applicant from refugee protection status and Articles 32(2) and 33(2) allow deportation of a refugee, for reasons of national security, and if his/her expulsion is in accordance with due process of law.

¹²² Intervention of Amnesty International in case *Suresh v. Canada* (Minister of Citizenship and Immigration), 2002 SCC 1.

¹²³ ICCPR, Geneva Conventions, UDHR, ECHR, AMCH, ACHPR, Universal Islamic Declaration of Peoples' Rights, CAT, ...

¹²⁴ Article 3.1 of CAT provides that "no state party shall expel, return (*"refouler"*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

¹²⁵ Article 7 of ICCPR states that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

Article 3 of ECHR - Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

¹²⁶ See Subchapter 2 of the present Chapter.

¹²⁷ General Comment No.20, 1992.

Concerning the relation between Refugee Convention and CAT, it is interesting to look at the jurisprudence of the UN Committee, charged with monitoring compliance with CAT. The Committee also deals with individual complaints and “deportation to torture” cases are the most frequent type of complaints. In the case *Tapia Paez v. Sweden*,¹²⁸ Sweden wanted to exclude Mr. Tapia from refugee status and returned him to Peru, applying Article 1F of Refugee Convention. Tapia was allegedly a member of the terrorist organization *Sendero Luminoso*. He had handed-out leaflets and distributed homemade bombs that were used against the police in Peru in 1989. The Committee responded that it considers the test of Article 3 of the Convention as absolute. Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State Party is under an obligation not to return the person concerned to that State. The nature of the activities in which the person engaged cannot be a material consideration when making a determination under Article 3 of the Convention. The Committee therefore found that Article 1F of the Refugee Convention did not impede the operation of Article 3 of CAT.

As for the Articles 32(2) and 33(2), there are as well several strong reasons for supposing that torture cases escape the reach of these Articles.¹²⁹ First, Article 32(1) requires that the decision to expel must be reached in conformity with due process of law. If the state is a party to the conventions that contain absolute prohibition of *refoulement* that would expose the person concerned to a serious risk of torture, this prohibition forms a part of the law of the state and the due process clause requires a decision-maker to obey the law.

¹²⁸ *Tapia Paez v. Sweden*, Communication No. 39/1996, 28/04/97; CAT/C/18/D/39/1996.

¹²⁹ Evan Fox-Decent, *Suresh and Canada's obligations regarding torture*, National Journal of Constitutional Law, 2000-2001.

The absolute prohibition of *refoulement* to torture contained in international treaties therefore forecloses through due process of law any deportation in cases where there is a substantial risk of torture.

Second, Article 33(1) does not mention torture; it speaks only about threats to life and freedom. While life and freedom are of course important, these are however not absolute rights and some derogations in exceptional circumstances are contained already in international instruments and can therefore be justified in terms of national security.

Third, the Refugee Convention itself contains a provision in Article 5 which stipulates that nothing in the Convention shall impair rights of refugees granted by the State apart from this Convention.

Fourth, according to the Article 30 of Vienna Convention, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty relating to the same subject matter. Refugee Convention is thus precluded by the *lex posterior rule* from blocking the operation of the rights that flow from CAT and ICCPR, which were adopted after the Refugee Convention.

Fifth, according to the doctrine *lex specialis derogate leges generalis*, Articles 32 and 33 of Refugee Convention give only a general indication of the State's right to expel refugees. There is no mention of torture in the entire Convention. CAT, ICCPR and ECHR are therefore more specific and take precedence with respect to torture cases.

Finally, according to the principle of progressivity, a right-holder can ground his claim on the basis of the instrument that most favorably protects the right at stake. Therefore, in

the case of *refoulement* to torture, the principle of progressivity would allow the endangered person to appeal to the provisions of international human rights treaties as these treaties protect subjects in most favorable terms.

Despite this argument in favor of the absolute nature of the prohibition of torture, it seems that several countries do not longer agree with it, as exemplified is the following examples drawn from domestic case law. It should also be mentioned that *non-refoulement* is only absolute regarding the deportation to torture or inhuman and degrading treatment or punishment and not while other human rights are at risk. A person can still be returned and face a life long imprisonment without fair trial procedure.

1. Suresh v. Canada

A clear example of considering the prohibition of torture as no longer an absolute right is the reasoning of the Supreme Court of Canada in the case *Suresh v. Canada*,¹³⁰ where the Court did not rule out the possibility to deport a refugee to the country of origin, where there are substantial grounds to believe that he would face a serious risks of torture.

Suresh was a Convention refugee from Sri Lanka, who was ordered to be deported back to Sri Lanka, because he was a member and a fundraiser of an alleged terrorist organization called the Liberation Tigers of Tamil Eelam (LTTE). Despite the recognized fact that the members of LTTE are tortured in Sri Lanka, the Minister still issued a

¹³⁰ *Suresh v. Canada* (Minister of Citizenship and Immigration), 2002 SCC 1.

deportation order, arguing that, in balancing between the risk of being tortured upon return and protection of national security, the later prevailed.

The Supreme Court recognized to Suresh an entitlement to a new deportation hearing, because during the first one the procedural safeguards were not respected. In its reasoning, the Court particularly mentioned the CAT and ICCPR, which Canada had ratified. It acknowledged that international instruments in general prohibit deportation to torture, even when national security interests are at stake. The Court also admitted that the prohibitions of torture in CAT were not intended to be derogatory and that it did not follow from the convention that Article 3 would permit deportation to torture in exceptional circumstances. Despite all those findings, the Court still approved that Canada's interest in combating terrorism must be balanced against the refugee's interest in not being deported to torture.

It seems that Canada can still allow deportation to torture and therefore derogates from Article 3 of CAT and Article 7 of ICCPR. The Court reasoning is not consistent. First, the Court discussed whether the prohibition of torture is a peremptory norm and concluded that it is certainly a norm that cannot be easily derogated from. However, the Court accepted the balancing as being a determining test. What is then the difference between prohibition of torture and other non absolute rights, if all of them can be put on the balance?

Suresh was followed by cases, where the Court affirmed deportation decisions, despite the recognized fact of the risk of torture in the country of deportation, without any analysis of the exceptional circumstances in which a person can be deported. The Court

just stated that the exceptional circumstances, namely the protection of Canada's security exists and that deportation is therefore permitted. The reasoning of the Court discloses no actual facts to support a finding that exceptional circumstances justified a return to torture.¹³¹

2. Case law under the European Convention of Human Rights

The ECHR does not deal explicitly with refugees. Nevertheless, several provisions can be applied in this field. One of the most relevant is definitely Article 3 which prohibits torture and inhuman or degrading treatment or punishment. The principle of *non-refoulement* is derived from this provision. The Member States must ensure that a person will not be tortured or submitted to inhuman or degrading treatment after *refoulement*. In this regard, it is vital to bear in mind that the *non-refoulement* protection in Article 3 of the ECHR is wider than the one offered by Article 33 of the Refugee Convention. As we will see in the following analysis of the ECtHR case law, the protection against torture is absolute whenever the Article 3 is engaged. On the contrary, the Refugee Convention provides protection for only a privileged group of people at risk of persecution as defined in Convention and that protection cannot be offered if the exclusion clauses apply.¹³²

The attempts to reevaluate the absolute nature of prohibition of torture appeared in Europe even before the events of 11th of September 2001. The first important case,

¹³¹ For example, *Nlandu-Nsok v. Canada (Ministre de la Citoyenneté & de l'Immigration)*, (2005) F.C.J. No. 55.

¹³² Nuala Mole, *Asylum and the European Convention on Human Rights*, Council of Europe publishing, 2007.

making foundations for all future extradition cases, was *Soering v. United Kingdom*.¹³³

Although the case was not about a refugee seeking protection, but about a criminal who was to be extradited to face charges of a brutal murder he committed before coming to United Kingdom, the judgment still carries an important decision that can be applied also to refugee cases. The Court stated that the person should not be extradited, if there are substantial grounds for believing that he would be in danger of being subjected to torture, regardless of how serious the crime he allegedly committed was.

Shortly after the judgment in *Soering*, the first refugee case *Cruz Varas v. Sweden*¹³⁴ was decided. The Court held that the principle developed in *Soering* applies also in the cases of expulsion. This was reaffirmed in the case *Vilvarajah v. the United Kingdom*.¹³⁵

The ECtHR had an opportunity to affirm that the prohibition of torture is absolute in the case *Chahal v. UK*.¹³⁶ Mr. Chahal, a member of Sikh separatists, came illegally to England, but was granted an indefinite leave to remain. Sixteen years later, the Home Secretary decided that Mr. Chahal ought to be deported because his continued presence in the UK was a danger to the national security and against international fight against terrorism. Mr. Chahal applied for asylum and claimed that if returned to India, he would be facing a risk of being tortured. His allegations were confirmed by several international organizations, which published reports about the risk of torture the members of Sikhs are subjected to in the region Punjab in India. UK authorities refused to grant Mr. Chahal asylum, because they established that he was an active member of a terrorist organization

¹³³ *Soering v. United Kingdom*, 7 July 1989, Application No. 14038/88, ECtHR.

¹³⁴ *Cruz Varas v. Sweden*, 20 March 1991, Application No. 15576/89, ECtHR.

¹³⁵ *Vilvarajah and others v. United Kingdom*, Application Nos. 13163/87, 13164/87, 13165/87, 30 October 1991, ECtHR.

¹³⁶ *Chahal v. UK*, 15 November 1996, Application No. 22414/93, ECtHR.

the International Sikh Youth Federation (ISYF). Mr. Chahal was imprisoned for 6 years, pending deportation.

In its reasoning, the ECtHR first referred to *Soering v. UK* and recalled that Member States have an obligation under Article 3, not to expel the person to the country, where substantial grounds have been shown that the person in question will be subjected to the risk of torture. The UK accepted this principle, but claimed that it should be applied differently in cases of national security. In the *Soering case*, the UK claimed, the security reasons were not at stake. The UK suggested that even if a risk of ill treatment existed, the removal justified on the reasons of national security should be allowed. In the alternative, the UK suggested that the reasons of national security should at least be balanced against the person's risk of ill-treatment. The Government supported its arguments with Articles 32 and 33 of Refugee Convention, amongst other.

While examining Article 3 allegations, the Court made it clear that despite terrorism, the prohibition of torture is an absolute right and when there are substantial grounds for believing that there would be a real risk of torture or inhuman or degrading treatment or punishment in receiving country, the deportee's conduct cannot be part of the material consideration. Basically, the Court is saying that as soon as the substantial risk of torture is established, the fact that the deportee is a member of terrorist organization becomes irrelevant and there is no room for balancing. Only in cases where there were serious doubts as to the likelihood of a person being subjected to treatment contrary to Article 3, the benefit of that doubt could be given to the deporting State whose national security

was threatened. The protection afforded by Article 3 is thus wider than provided by Articles 32 and 33 of the Refugee Convention.

Another important case concerning refugees is *T.I. v. U.K.*¹³⁷ T.I., a Sri Lankan national, applied for asylum in Germany, but his application was rejected, because Germany at that time did not recognize protection to those persecuted by non-state actors. T.I. escaped to the UK, where he applied for asylum. The UK wanted to return him to Germany, without a substantive consideration of his asylum application, because under the Dublin Convention, Germany was responsible for his asylum application. T.I. complained that with his removal to Germany, the UK would violate Article 3 of Convention, because Germany would return him to Sri Lanka and he would have no opportunity to challenge his expulsion. His claim was declared inadmissible, because it was proved, that in Germany, he would have an opportunity to have his case reconsidered before expulsion. The case is important because the Court found that the indirect removal to an intermediary country, does not affect the responsibility of the UK to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of ECHR. The Court also emphasized that the UK cannot rely automatically on the arrangements made in Dublin Convention concerning the attribution of responsibility between European Countries for deciding asylum claims. It would be incompatible with the purpose and object of ECHR, if contracting States were absolved from their responsibility under the Convention by engaging in posteriori Community law agreements.

¹³⁷ *T.I. v. U.K.*, Application No. 43844/98, 7 March 2000, ECtHR.

Regarding terrorism, the Council of Europe issued guidelines on human rights and the fight against terrorism.¹³⁸ In the guideline XII, the issue of asylum, return and expulsion is asserted. The guideline makes it clear that “it is the duty of a State that has received a request for asylum to ensure that the possible return (“*refoulement*”) of the applicant to his/her country of origin or to another country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment.” The same applies to expulsion. In 2005, the Court took position on the terrorism and held, in the case *Khashiyev and Akayeva v. Russia*,¹³⁹ that terrorism will not justify a cessation of prohibition of torture and inhuman and degrading treatment, even in the most difficult circumstances.

This year, Europe awaited eagerly the decision in the case *Ramzy v. the Netherlands*.¹⁴⁰ The decision was of extreme importance, because the absolute nature of Article 3 of the Convention was again put into question. Lithuania, Portugal, Slovakia and United Kingdom intervened in the case parting support of the government of the Netherlands, with the common argument, that the Court shall revisit its decision in *Chahal* and decide that the prohibition of torture shall no longer be absolute in the cases where terrorism threatens national security. Mr. Ramzy was facing a deportation to Algeria, because he was suspected to be involved in an Islamic extremist group in the Netherlands. The governments argued that even if Mr. Ramzy would be exposed to a real risk of prohibited ill treatment upon return, this should be assessed in the light of the threat to security he posed.

¹³⁸ *Guidelines on human rights and the fight against terrorism*, adopted by the Committee of Ministers on 11 July 2002.

¹³⁹ *Khashiyev and Akayeva v. Russia*, 24 February 2005, Application Nos. 57942/00, 57945/00, ECtHR.

¹⁴⁰ *Ramzy v. the Netherlands*, Application No. 25424/05, ECtHR, pending.

Such a serious attempt to abandon the absolute nature of the prohibition of torture and other ill treatment did not stay unnoticed. Ten international non-governmental organizations intervened and challenged the position of the governments. The Court decided that it will first solve the case *Saadi v. Italy*,¹⁴¹ where the question was the same: can we expel an asylum seeker to torture, because he is a danger to the national security? When the *Saadi case* was relinquished to the Grand Chamber, the only information published by the Court was that a case called *NS v. Italy* had been relinquished, but no details were provided as to the issues which it raised. Details of the subject matter of the *Saadi case* were not made public on the Court's website until the week before the Grand Chamber hearing, by which time the 12 week deadline for third party interventions had expired. The UK Government was able to request that its intervention in *Ramzy case* be placed on the *Saadi case* file, prior to the 12 week deadline, because it had been notified about the case by the Italian government. The Court granted that request and the UK was even permitted to make oral submissions at the hearing, which is rarely allowed to an intervening party.¹⁴² In contrast, the NGO interveners in *Ramzy case* only became aware of the issues raised in the *Saadi case* by chance about 10 days later. The NGO interveners then requested the Court to place their interventions in *Ramzy* on the *Saadi case* file in the same way that the UK's interventions had been transferred. Those requests were refused on the grounds that they were out of time.¹⁴³

¹⁴¹ *Saadi v. Italy*, Application No. 37201/06, 28 February 2008, ECtHR.

¹⁴² Rules of Court, Rule 44(2)a (Third-party intervention): The President of the Chamber may, in the interests of the proper administration of justice, invite or grant leave to any Contracting State which is not party to the proceedings, or any person concerned who is not the applicant, to submit written comments, and, in exceptional circumstances, to make representations at the hearing.

¹⁴³ Human Rights Watch letter to the Judge Jean-Paul Costa, the president of the ECtHR, urging for the enhancement of public notification of cases, 26 November 2007. Available at: http://www.londonmet.ac.uk/londonmet/library/u32024_3.pdf.

Mr. Saadi, a Tunisian national, living in Italy, was suspected of international terrorism and was issued a deportation order to Tunisia, where he have been sentenced in 2005, in his absence, to 20 years' imprisonment for membership of a terrorist organization. Mr. Saadi claimed that deportation to Tunisia will be in breach of Article 3 of ECHR, since it would expose him to the risk of being subjected to torture or inhuman and degrading treatment.

The intervening governments and Italy did not challenge the absolute nature of Article 3 as a negative obligation – meaning that the States should refrain from torture or ill-treatment. States instead argued that the right not to be removed is not expressly set out in Article 3, but it is inherent or implied and therefore analogous to a positive obligation. This is important difference, since according to the well established case law, the States have a large margin of appreciation in the field of positive obligations and therefore they are permitted to balance the rights of the individual against the general interest of the community. Second, the States claimed that the absolute approach to the prohibition to return to torture excludes the fundamental rights of citizens, threatened by terrorism, as irrelevant. Third, the States claimed that the absolute approach is not supported by the international law, namely Refugee Convention, where exceptions to *non-refoulement* are permitted and even though the CAT has been interpreted as imposing an absolute approach, the interpretations of the Committee Against Torture are not legally binding and after all this approach applies only in cases of torture. Fourth, the absolute approach does not reflect a universally recognized moral imperative. While considering removal to inhuman or degrading treatment it should not be irrelevant that the person poses a real risk to the lives of the citizens in the State. Here the governments referred to the *Suresh*

case and higher standard of proof of tortured required in the United States. Finally the States claim that an absolute approach is inconsistent with intentions of the original signatories to the Convention and that right to asylum cannot be implied into Article 3, since this right was intentionally left out of the Convention, as well as it was not agreed that security considerations shall be ignored.

The Court observed that it could not underestimate the danger of terrorism and noted that States were facing considerable difficulties in protecting their communities from terrorist violence. However, that should not call into question the absolute nature of Article 3. The Court did not accept the arguments of the governments that the obligation not to remove is similar to the positive obligations and therefore the protection against deportation to ill-treatment should be weighed against the interests of the community as a whole. As the Court has repeatedly held, it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. The balancing between the danger to the community and the risk of being tortured or ill treated upon return is never permitted under the Convention. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the Refugee Convention. The Court also considered that it would be incorrect to require a higher standard of proof, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test. The Court referred to reports of NGOs that mentioned numerous and regular cases of torture inflicted on persons accused of

terrorism. It was reported that allegations of torture and ill-treatment were not investigated by the competent Tunisian authorities, that they refused to follow up complaints and that they regularly used confessions obtained under duress to secure convictions. The Court did not doubt the reliability of those reports and noted that the Italian Government had not adduced any evidence capable of rebutting such assertions. The deportation of Mr. Saadi to Tunisia would be therefore in breach of Article 3 of the Convention.

Using a balancing test in order to determine if the deportation to torture is lawful, would at least for the present, never be approved by the ECtHR. Under the jurisprudence of ECtHR, the absolute right not to be tortured cannot be balanced towards another interest. Prohibition is absolute.

V. Exclusion clauses under the Qualification Directive and their compliance with Refugee Convention

The purpose of the Qualification Directive is to establish minimum standards for the qualification of third country nationals and stateless persons as refugees or beneficiaries of subsidiary protection within EU Member States, as well as the minimum level of rights and benefits attached to the protection granted.

The Qualification Directive does not systematically analyze all the possible forms of protection under international law, but is based on a restrictive interpretation of pre-existing Member States practice and aims to harmonize existing concepts. It is an instrument of compromise. For the purpose of the present work, I will focus only on the exclusion and revocation clauses, namely Articles 12(2), 12(3), 14(4), 14(5) and 14(6) and explore their compatibility, as well as that of domestic application measures, with the Refugee Convention.

1. Article 12(2) exclusion clause: room for abuse?

Article 12(2) of the Qualification Directive provides:

A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

(a) he or she 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 or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of

issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

Although the exclusion clauses as contained in Article 12(2) of Qualification Directive seem to mirror Article 1F of Refugee Convention, there is one important distinction. Paragraph b has two parts that are not contained in the Refugee Convention.

First, particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes. I do not consider that Qualification Directive, with this provision, narrows the protection offered to refugees to render it incompatible with the Refugee Convention. Even though the Refugee Convention only excludes persons who committed non-political crimes, it is well established practice, that the assessment of the political nature of crimes involves balancing of the seriousness of the crime and the motives of the individual who committed them.¹⁴⁴ Therefore particularly cruel actions, even if committed with a political objective, would constitute a reason for exclusion also under the Refugee Convention. UNHCR guidelines suggest that while determining the seriousness of the crime, the nature and circumstances of the crime should be taken into account and not just automatic classification regarding the prescribed sentences in national law.¹⁴⁵

¹⁴⁴ UNHCR *Guidelines on UNHCR Background Note on the Application of the Exclusion clauses: Article 1F of the Refugee Convention*, 4 September 2003.

¹⁴⁵ G. Goodwin-Gill, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, UNHCR, *The Refugee in International Law*, April 2001.

Second, Article 12(2)b defines “prior to his or her admission as a refugee” as the time of issuing a residence permit based on the granting of refugee status. This interpretation does not result from Article 1F(b) of the Refugee Convention, where the admission means mere physical presence in the country of refuge. In UNHCR’s view this should be interpreted as referring to the time preceding the person’s physical presence in the country of refuge.¹⁴⁶ The wording of Article 12(2)b, however allows Member States to exclude an applicant for a serious non-political crime committed outside the country of refuge, but in between applying for refugee status and the residence permit being granted - such crimes should be dealt with under Article 33(2) and not Article 1F of the Refugee Convention.¹⁴⁷

Member States’ abusive legislations

In Hungary, regarding the exclusion clause 1F(b), the evaluation of the crime committed by the asylum-seeker depends only on the measure of the imprisonment foreseen by Hungarian law and not on a complex evaluation of all related factors. In consequence, the asylum authority cannot assess such a case on an individual basis. As a result, the exclusion clause becomes automatically applied to every crime where the maximum imprisonment foreseen by the Hungarian Criminal Code exceeds 5 years.¹⁴⁸ We could say that this provision is in contradiction with UNHCR guidelines.

¹⁴⁶ UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004*, January 2005.

¹⁴⁷ Geoff Gilbert, *Is Europe living up to its obligations to refugees?* European Journal of International Law, November 2004.

¹⁴⁸ Section 8(2) of the Asylum Act.

In Germany, “serious” crime has been interpreted by reference to the German Criminal Code, which suggests that a criminal offence punishable by a prison sentence of a minimum of one year constitutes a “serious” crime.¹⁴⁹ The German Federal Office also applies a very expansive interpretation whereby any acts deemed “terrorist” and any support for such acts are always considered disproportionate to the alleged political aims and, therefore, are always designated as “non-political crimes”.¹⁵⁰ The extensive use of exclusion in Germany is not due to the transposition of the Qualification Directive, but relates to new anti-terrorism legislation. However, the Qualification Directive may have served as a pretext.¹⁵¹

2. Article 12(3) – the question of membership

Article 12(3) of Qualification Directive provides:

“Paragraph 2 of Article 12 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.”

It results from the Directive that persons who instigate or otherwise finance, plan or incite terrorist acts are excluded from international protection, since such acts are seen as contrary to the purposes and principles of the United Nations. According to UNHCR,

¹⁴⁹ This German restrictive approach is also in sharp contrast with French and Slovak legislation. In France the length of imprisonment applicable to a particular crime in national legislation is not the determining factor and according to the Slovak Penal Code, a “serious crime” is defined by a length of imprisonment of at least 10 years (UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, November 2007).

¹⁵⁰ UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, November 2007.

¹⁵¹ Internal Guidelines of Ministry of Interior are stating that Article 12(3) is “clarifying” the scope of application of Section 60(8)2 of Residence Act and has in that regard to be taken into consideration for the interpretation of Article 12(2) of Qualification Directive (UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, November 2007).

association with or membership of a group practicing violence or committing serious human rights abuse is, *per se*, not sufficient to provide the basis for a decision to exclude. The reasons for this are that Article 1F(b) represents a limitation on an individual right and without evidence of involvement in a specific serious non-political crime, it would be contrary to the Convention to exclude someone for mere membership.¹⁵² ECRE recalls that this Article must be consistent with international criminal law, where the concept of individual responsibility for criminal offences is well established,¹⁵³ rather than only referring to the national criminal codes.¹⁵⁴ Otherwise there is a risk that the lack of clarification of the terms “instigation” and “participation” could lead States to exclude persons who are not individually responsible as they have not been intentionally involved in the commission of crimes.¹⁵⁵

This Directive provision is not in itself incompatible with Refugee Convention, but it leaves room for incompatible application and interpretation by Member States .

Member State’s doubtful reliance on mere membership for exclusion

In Germany, membership of a terrorist organization alone is sufficient for the application of the exclusion clause. For example, a refugee lost her refugee status with reference to Article 12(2)c of the Qualification Directive. Although she was not a formal member of the terroristic organization People’s Mujaheddin of Iran (PMOI), she was collecting

¹⁵² Geoff Gilbert, *Exclusion (Article 1F)*, Refugee Protection in International law, UNHCR’s Global Consultations on International Protection, Cambridge University Press, 2003.

¹⁵³ In this respect, Article 25 of the ICC Statute, which provides a detailed compilation of the various forms of how criminal responsibility may be established (objective element), and Article 30, which describes the mental element required (subjective element), may be considered to reflect an international consensus in respect of crimes covered by Article 1F.¹⁵³

¹⁵⁴ Germany, Italy, Romania and Slovenia define “instigate or participate” with reference to their criminal laws (ECRE, *The Impact of the EU Qualification Directive on International Protection*, October 2008).

¹⁵⁵ ECRE *Information Note on the Qualification Directive*, October 2004.

money for an association supporting the PMOI. This continuing support and the fact that she was a sympathizer of the PMOI were found decisive in the decision to exclude her from refugee status. The Federal Office considered that in order to be effective in working against terrorism, activities which may not be relevant in criminal proceedings may qualify as support to terrorism as part of counter-terrorism measures.¹⁵⁶ This practice can be seen as incompatible with above mentioned standards.

3. Article 14(4): the revocation clause?

Article 14(4) of the Qualification Directive provides:

“Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

(a) 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;

(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.”

The Directive adds Article 14 on revocation, ending or refusal to renew refugee status. First, it is misleading to call Article 14 a revocation Article (as opposed to the exclusion Article 12), because there is no meaningful difference between revocation and exclusion. The Convention mentions neither “exclusion” nor “revocation”, but instead specifies that the Convention “shall not apply” to someone falling under the terms of article 1F. “Shall not apply” can refer to exclusion (forward looking) equally as well as to revocation (backward looking). Therefore the distinction the Qualification Directive attempts to

¹⁵⁶ UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, November 2007.

make between exclusion (article 12) and revocation (article 14) is meaningless.¹⁵⁷ Article 14 is, in all but name, an additional exclusion article that applies when the refugee after recognition engages in Article 1F(a) and (c) activities.¹⁵⁸

Second, Article 14(4) lists national security concerns and conviction for a particularly serious crime (exceptions to the principle of *non-refoulement* as contained in Article 33(2) of Refugee Convention) as grounds for revocation of refugee status. This is not in accordance with the Refugee Convention, where revocation applies when a refugee engages in Article 1F(a) and (c) activities and not if he fulfills the Article 33(2) conditions. While fulfilling Article 33(2) conditions, the Convention allows states to use those criteria not for exclusion, but rather to apply the much narrower sanction of revoking the right to *non-refoulement*. A refugee without Convention protection against *refoulement* nevertheless remains a refugee and retains the rights of a refugee “*tout court*” and, if being allowed to remain on the territory of the host state, also those Convention rights that belong to a refugee “lawfully present” in a host state.¹⁵⁹

Application of Article 14(4) seems to be incompatible with Refugee Convention, but since the provision is not mandatory, it does not oblige Member States to apply it. Therefore we cannot invoke the incompatibility of Directive provision with Refugee Convention. But as soon as Member States will apply this provision,¹⁶⁰ they will be in

¹⁵⁷ ECRE, *The impact of the EU Qualification Directive on International Protection*, October 2008.

¹⁵⁸ Article 1F(b) is not relevant because it can only be applied to the crimes committed before entering the country of refuge.

¹⁵⁹ UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, November 2007.

¹⁶⁰ According to the ECRE study on *The impact of the EU Qualification Directive on International Protection* (October 2008), revocation of refugee status based on the security reasons is possible in Austria, Bulgaria, the Czech Republic, Germany, Hungary, Ireland, Luxemburg, the Netherlands, Sweden and the UK.

breach of the Convention, unless they apply correctly Article 14(6) of the Qualification Directive, as it will be argued in section 5 below.

4. Article 14(4) read in conjunction with paragraph (5): a quasi-exclusion clause?

Article 14(5) of Qualification Directive provides:

“In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.”

Paragraph (4) read in conjunction with paragraph (5) is problematic, because it acts as quasi exclusion clause, in that it permits refugee status to be denied based on national security concerns or conviction for a particularly serious crime. Those reasons are beyond those provided by the Refugee Convention’s exclusion clauses.¹⁶¹

Exclusion is an extremely serious measure that limits human rights protection and therefore has to be interpreted restrictively. It can only be invoked when exhaustively listed grounds for exclusion are present.¹⁶² Article 42 of the Refugee Convention further provides that no reservations are possible to the entire Article 1 of the Convention. Therefore, adding new “quasi exclusion clauses”, as is the case in paragraphs (4) and (5) of Article 14 of Qualification Directive, might not be in line with the Refugee Convention.

¹⁶¹ Jane McAdam, *The Qualification Directive: An Overview*, p.22; in *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, edited by Karin Zwaan, Wolf Legal Publishers, 2007.

¹⁶² Whilst the exclusion clauses may be subject to interpretation, they cannot be expanded in the absence of an agreement by all States parties of the Refugee Convention.

The distinction between exclusion and *refoulement* has important consequences for the individuals concerned. The exceptions of *non-refoulement* apply to the persons, who have been found to be refugees under the Refugee Convention, but who can nonetheless be removed. On the contrary, when exclusion clauses are present, the persons do not even fall under the protection of Refugee Convention; they are excluded from refugee status.¹⁶³ This is of particular relevance when some other international human rights instruments preclude the deportation of the person, because he would face a risk of torture or ill treatment if returned.¹⁶⁴

Therefore the most relevant question is what kind of rights do the Member States grant to the persons excluded under the Article 14(4) in compliance with Article 14(5)?¹⁶⁵ In the next section we will examine whether Article 14(6) that confers a special “refugee” status in this situation ensures compliance with Refugee Convention despite applying extended exclusion clauses.

5. Article 14(6): the rights of excluded persons and a special “refugee” status

Article 14(6) of Qualification Directive provides:

“Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31 and 32 and 33 of the Refugee Convention in so far as they are present in the Member State.”

¹⁶³ ECRE position on exclusion from refugee status, March 2004.

¹⁶⁴ ECHR, Convention against torture (CAT), International Covenant on civil and political rights (ICCPR).

¹⁶⁵ According to the ECRE study on *The impact of the EU Qualification Directive on International Protection* (October 2008), Article 14(4) in conjunction with Article 14(5) is applied by Austria, Germany, Hungary, Italy, Luxemburg, Slovenia, Sweden and the UK.

Article 14(6) guarantees certain Refugee Convention rights to persons whom paragraphs (4) and (5) of Article 14 apply and therefore establishes a special “refugee” status. “Article 14(6) refugees” are persons whose refugee status was revoked based on Article 14(4) or persons who were excluded according to the Article 14(4) read in compliance with Article 14(5). As mentioned above, the most relevant question is what kind of rights does these persons possess if they for some reason, cannot be removed from a host state.

Rights that should be guaranteed under Refugee Convention

Since the reasons of national security and conviction for a particularly serious crime do not represent exclusion or revocation clauses under Refugee Convention, the person is still a refugee for the purpose of the Convention. He is entitled to all Convention provisions that apply to unrecognized refugees “*tout court*”¹⁶⁶ and, if he has been staying in a country for more than 3 months, also to all Convention rights that apply to “residence” refugees.¹⁶⁷

Further, where a refugee was denied recognition of refugee status under the Qualification Directive, but cannot be returned to the country of origin, he has obviously undergone a process of law, and having been allowed to remain in the host state, remains “lawfully present”.¹⁶⁸ In several countries, a person gets a tolerated stay permit, therefore his staying is authorized and it corresponds to the “lawfully present”,¹⁶⁹ or after 3 months

¹⁶⁶ Protection against *refoulement* and discrimination (Articles 33 and 3), access to a state's courts (Article 16(1)), religious freedom (Article 4), the right to benefit from educational systems (Article 22), right to identity papers (Article 27) and prohibition of penalties on account of illegal entry or presence (Article 31).

¹⁶⁷ Rights under Articles 12 (personal status), 14 (intellectual property rights) and 25 (administrative assistance) of Refugee Convention.

¹⁶⁸ ECRE, *The impact of the EU Qualification Directive on International Protection*, October 2008.

¹⁶⁹ Rights under Articles 18, 26 and 32 of Refugee Convention (self-employment, freedom of movement and *non-refoulement*).

according to Battjes's theory,¹⁷⁰ "lawfully staying" refugee. Even according to Hathaway theory, where a "lawfully staying" refugee is only that refugee who has undergone a refugee status determination procedure, the "Article 14(6) refugee" whose refugee status was revoked according to the Article 14(4) of the Qualification Directive, is a "lawfully staying" refugee, since he has undergone a refugee status determination procedure at first place. Consequently, he should also have all the corresponding rights, that under Refugee Convention belong to "lawfully staying" refugees.¹⁷¹

Other "Article 14(6) refugees" - excluded from refugee status according to the Article 14(4) in compliance with Article 14(5), would not be "lawfully staying" refugees according to Hathaway's theory. However, it is important to mention that States have a duty to render the refugee's presence lawful, if admission to a third country cannot be secured.¹⁷² Keeping a refugee for an indefinite period without status determination procedure is also against Refugee Convention, which implicitly obliges Member States to conduct the status determination procedure, although it does not explicitly settle in what time period.¹⁷³ Therefore, also refugees excluded from refugee status according to the Article 14(4) read in compliance with Article 14(5), will eventually have to undergo refugee status determination procedure and become "lawfully staying refugees", in order for States to avoid breaching the Refugee Convention.

¹⁷⁰ See Chapter III, Subchapter 1 – a refugee "lawfully present" becomes "lawfully staying" with the mere lapse of time.

¹⁷¹ Refugees "lawfully staying" benefit from freedom of association (Article 15), the right to engage in wage-earning employment and to practice a profession (Articles 17 and 19), access to housing and welfare (Articles 21 and 23), protection of labor and social security legislation (Article 24) and right to travel documentation (Article 28).

¹⁷² This obligation is implied from Article 31(2) of Refugee Convention (Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.451).

¹⁷³ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.467.

The later is also important for the States where excluded refugees who cannot be deported are not issued any temporary permission to stay, as for example in the Netherlands.¹⁷⁴ In my opinion those States are clearly in breach of Refugee Convention, since they should have legalized the refugee presence if the admission to a third country cannot be secured. Since the States are obliged to guarantee certain rights to “lawfully present” refugees, it would be contrary to the purpose of the Convention to refuse authorizing the refugee’s stay in order to avoid guaranteeing his rights.

Rights as guaranteed under Qualification Directive

Under the Qualification Directive, in that kind of situation, Article 14(6) only confers the rights from Articles 3, 4, 16, 22, 31, 32 and 33 of Refugee Convention. We can see that several important rights are missing and that persons who find themselves under “refugee status” as provided by Article 14(6) are indeed in a very difficult situation. Without possibility to work, without access to housing and welfare or security rights, they are pushed to the bottom of the society. What is even worse, those people have no hope that situation will change in the future. They have no place to go since being refugees the return to their country of origin is not an option.

Of course we should not forget that those people are considered as a danger to the society. But is this really always the case, or are they just unwanted? As we have seen in the examples of Member States’ questionable practice mentioned until now (e.g. exclusion because of mere psychological support of the terrorist organization, very low threshold for definition of a “serious crime”,...), a deprivation of refugee’s secondary

¹⁷⁴ ECRE, *The Impact of the EU Qualification Directive on International Protection*, October 2008).

rights seems frequently disproportional to the reasons for which he has been considered as a danger to the community. Besides, if there is some evidence of alleged criminal activity of a refugee, a criminal procedure should be conducted. But punishing a person with deprivation of rights he possesses under Refugee Convention without criminal procedure seems to be against the rule of law.

Despite the hopeless situation that Article 14(6) creates, the Qualification Directive itself is not incompatible with the Refugee Convention, since it only provides minimum standards and Member States need to assure all the rights missing, in order to comply with obligations resulting from the Refugee Convention. Unfortunately this is not the case.

Examples of Member States limitations of excluded person's rights

In accordance with Section 60(8) of German Residence Act, persons may be excluded from refugee status already in the initial procedure, if the prerequisites of Article 14(4) of Qualification Directive are met. Normally, this issue is dealt with in revocation procedures regarding persons having committed crimes related to terrorist activities during their stay in Germany.¹⁷⁵ For instance, in eight decisions reviewed, refugee status was denied to persons accused of low-level support to alleged “terrorist” organizations in Germany based on a conflation of Article 14(4) and an extremely broad interpretation of the grounds of Article 12(2)c, extending to conduct which could not be seen as reaching the level of actions “contrary to the principles and purposes of the United Nations”.¹⁷⁶

¹⁷⁵ ECRE, *The impact of the EU Qualification Directive on International Protection*, October 2008.

¹⁷⁶ UNHCR *Study of the implementation of the Qualification Directive*, November 2007.

There is no evidence in German legislation that the “Article 14(6) refugee” that cannot be returned, differs from any other cases, where a person that does not fulfill the conditions for being a refugee under Article 1A of Refugee Convention, for some reason cannot be deported. This means that persons who fulfill the requirements for refugee status under Article 1A of Refugee Convention are treated the same as those who do not. In practice, this means that the person would not be deported, but there is no formal status granted. A person will receive a tolerated stay permit, which is a temporary one and does not remove the obligation to be deported after the permit expires. Persons staying on the basis of this permit are excluded from social welfare system. Under German alien law the states can prohibit individuals with a tolerated stay permit from attaining both higher education and taking on paid jobs. Usually, the federal states tend to prohibit higher education but allow people with this status to work. Even when permitted to work, however, third state nationals have only secondary access to the labor market which allows them to work only if no one else (that is a German or a person with a residence permit) can.¹⁷⁷

In Slovenia there has so far been no exclusion cases, but according to the legislation, Slovenia literally implemented Article 14(6), without any additional rights granted.¹⁷⁸ In practice, a person that cannot be deported is granted a tolerated stay permit, which includes the right to emergency health care and a right to education.¹⁷⁹ This tolerated stay permit can be considered as an authorization for a lawful stay, therefore Slovenia should

¹⁷⁷ Nina Larsaeus, *The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection. The Unresolved Issue of Excluded Asylum Seekers*, Nordic Journal of International Law: 69–97, 2004.

¹⁷⁸ Article 6 of International Protection Act, Official Journal RS, No. 111/2007, 5 December 2007.

¹⁷⁹ Article 55 of Aliens Act, Official Journal RS, No. 71/2008, 14 July 2008.

guarantee that the person in question also benefits from the rights belonging to the “lawfully staying” refugees under Refugee Convention.

Another interesting fact is that, despite that Slovenia implemented Article 14(6) and is therefore supposed to guarantee the right to access to court (Article 16 of the Refugee Convention), which under second paragraph states that a refugee shall enjoy the same treatment as a national in matters pertaining to access to the Courts, including legal assistance, this is not the case in practice. Under the Free legal aid Act, foreigners with tolerated permit to stay are not entitled to free legal aid.¹⁸⁰ Therefore Slovenia does not correctly apply the Directive provision and is in breach of Community law.

¹⁸⁰ Article 10 of Free Legal Aid Act, Official Journal RS, No. 96/2004, 30 August 2004.

VI. Challenging national measures implementing the Qualification

Directive

The Qualification Directive seems incompatible with the Refugee Convention, but as we saw, it cannot be invalid, because it sets only minimum standards. Member States are free not to apply exclusion or revocation based on reasons of national security, or are free to assure additional rights than those contained in Article 14(6). The problem is that several Member States do not do that and are therefore in breach of Refugee Convention. What can an “Article 14(6) refugee”, whose rights have been violated, do?

In this chapter I will explore how to challenge the national measures implementing the Qualification Directive and the role of ECJ as a guardian of interpretation and application of European asylum law in compliance with international law. At the end I will also address the relationship between ECtHR and EU and examine if bringing a case before ECtHR can present a possible solution for “Article 14(6) refugees” whose secondary rights have been violated.

1. The role of the European Court of Justice in the asylum law issues

As we have seen so far, Member States while transposing a minimum standard Directive, must guarantee higher standards than provided by the Directive, in order to comply with its obligations under international law. Should Member States fail to do this the individual can challenge the implementation of the Directive before the domestic courts. Can the individual rely on Article 63 of EC Treaty? The provision is not unconditional,

because it requires adoption of standards, which includes discretion while implementing those standards. However, certain elements of the provision can have direct effect, if can be isolated of sufficient precision and clarity.¹⁸¹ The requirement of accordance and compatibility with international agreements is clear and unconditional and therefore this part of the provision has direct effect. Individuals can rely before the domestic courts on the requirement of accordance and compatibility of the national legislation that implemented the Directive, with international law.

Another possibility for the individual is to notify the Commission about Member States' failure to correctly transpose the Directive. Article 226 of EC Treaty grants the Commission the powers to investigate and bring before the ECJ any Member State that has failed to fulfill an obligation under the EC Treaty.

Since the individuals do not have a direct standing before the ECJ while invoking the mis-implementation of the Directive, the ECJ can be "brought into the game" through the preliminary reference procedure. If the domestic courts are uncertain about the interpretation of the conformity between international law and Community law, as transposed by national law, they can according to Article 68 read in conjunction with Article 234 of EC Treaty, refer preliminary questions to the ECJ.¹⁸² This includes questions on the requirement of accordance with the Refugee Convention and other relevant treaty law. However, there is one particularity concerning EU asylum law. Article 68(1) determines that in this field only courts against whose decision there is no

¹⁸¹ C-43/75, *Gabrielle Defrenne v. Societe anonyme belge de navigation aerienne Sabena*, (1976) ECR, 8 April 1976.

¹⁸² According to Article 234 of EC Treaty, the preliminary rulings can be made on three types of subject-matter: interpretation of the EC Treaty, the interpretation of acts of Community institutions and the validity of such acts.

further right of appeal are entitled to submit preliminary references.¹⁸³ The effect of this is to delay and limit the arrival of questions of interpretation before the ECJ, so that the Court would not be overloaded.¹⁸⁴ This also has an adverse affect on the unity of Community law in the field of asylum, because it will take more time before questions on interpretation are referred to the Court.

If a lower court deems a Member State act within the scope of Community law to be incompatible with international asylum law and can solve the case by interpretation of the Community law in accordance with international asylum law, there is no problem. But what can the first instance courts do, when they have doubts about the conformity of a provision of Community law with domestic or international law, since they cannot refer a preliminary question? In principle the courts have to apply the domestic law in conformity with Community law and cannot judge the conformity of the Community law with international law.¹⁸⁵ But there can be a solution, how to avoid application of the “doubtful” Community law, as suggested by Battjes.¹⁸⁶

For example, the court of first instance can issue the interim measure and suspend the application of the Community norm about which it has doubts of its validity. The ECJ ruled in the *Atlanta case*¹⁸⁷ that a domestic court can suspend implementation of Community law, if four conditions are meet: (1) that court entertains serious doubts as to the validity of the Community act and, if the validity of the contested act is not already in

¹⁸³ This limitation will be abolished once the Lisbon treaty will enter into force.

¹⁸⁴ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.572.

¹⁸⁵ Jean-Yves Carlier, *The role of the European Court of Justice*, p.33, in *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*, edited by Karin Zwaan, Wolf Legal Publishers, 2007.

¹⁸⁶ Battjes suggests three solutions, but I will only mention one of them, because the other two seem too radical.

¹⁸⁷ C-465/93, *Atlanta Fruchthandelsgesellschaft*, (1995) ECR, 9 November 1995.

issue before the Court of Justice, itself refers the question to the ECJ; (2) there is urgency, in that the interim relief is necessary to avoid serious and irreparable damage being caused to the party seeking the relief; (3) the court takes due account of the Community interest; and (4) in its assessment of all those conditions, it respects any decisions of the ECJ or the Court of First Instance ruling on the lawfulness of the regulation or on an application for interim measures seeking similar interim relief at the Community level.

Of course the first condition is problematic, since the courts of first instance cannot refer preliminary questions. But Battjes suggests that we should have in mind that the grant of interim measures is based on the principle that every individual is entitled to effective protection of the rights Community law entitles him to,¹⁸⁸ and if we assume that the prohibition under Article 68(1) was made in order to protect the ECJ from being overloaded and not in order to downgrade effective protection of an individual, we can conclude, that persons affected by the legislation under Title IV of EC Treaty, are entitled to interim relief in accordance with the EC principle of effective protection. After the interim measure is issued and Community provision suspended, the State authority in asylum issues has an obligation under Article 10 of EC Treaty to appeal,¹⁸⁹ until the case is brought to the Court that can refer a preliminary question.¹⁹⁰

Can ECJ review the national measures transposing Directive in the light of international law? We saw in the previous section, that according to Article 63(1) Community secondary legislation needs to be in accordance with Refugee Convention and other

¹⁸⁸ C-50/00, *Union de Pequenos Agricultores v. Council*, (2002) ECR, 25 July 2002.

¹⁸⁹ According to Article 10 of the EC Treaty, Member States shall take all appropriate measures to ensure fulfillment of the obligations arising out of the EC Treaty or any action taken by the Community institutions.

¹⁹⁰ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.575.

relevant treaties. What about Member States' acts that implement the asylum Directives? To answer this question a comparison with the scope of application of Community fundamental rights needs to be taken into account. The ECJ has held since *Wachauf*¹⁹¹ that Member State acts that implement or apply Community law fall within the scope of Community law and must therefore comply with general principles of Community law. According to Battjes, the same reasoning applies to the accordance of Member State implementing acts to Refugee Convention and other relevant treaties and they fall within the scope of the review under Article 63(1).¹⁹² Article 63(1) therefore renders the ECJ competent to review compliance of Member States legislation with Refugee Convention and other international agreements.

ECJ can therefore supervise the interpretation and application of instruments of international law, which is of particular interest as regards the Refugee Convention, since there is no treaty monitoring body that could address application of the Convention in individual cases.¹⁹³ If a Member State applies protection standards that are not in conformity with Refugee Convention, ECJ can rule in preliminary ruling that the domestic law is not in accordance with the interpretation of the Community legislation.¹⁹⁴

But the situation can also be different. The ECJ can prescribe treatment that falls short of the standards set by international law. As for permissible limitations on the rights, the

¹⁹¹ C-5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, (1989) ECR, 13 July 1989.

¹⁹² Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.98.

¹⁹³ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.605.

¹⁹⁴ However, Member States might have problems accepting these rulings that infringe upon their sovereignty, since Member States are the one that interpret the Refugee Convention, because there is no other monitoring body established.

ECJ has developed what might be called a “Community standard”.¹⁹⁵ So far the ECJ consistently ruled that the rights are not absolute and that therefore they can be restricted in the general interest as long as those restrictions do not constitute a disproportionate and unreasonable interference in relation to the aim pursued, undermining the very substance of that right.¹⁹⁶ It is therefore possible that ECJ will find that exclusion on national security ground restricts the right to be granted protection, but it is compatible with the Community standards. After all, why was this possibility even included into Qualification Directive?

If this happens, the domestic courts need to know that they are not bound by ECJ decision, because the Community provisions (as interpreted by the ECJ) only set minimum standards and do not affect the domestic’s court competence to give a more favorable ruling. Despite this non-binding effect, the ruling by the ECJ might have a detrimental effect on the protection of Refugee Convention rights. A domestic court might be tempted to rely on the interpretation by the ECJ and neglect the fact that obligations under international law rest on the Member State and remain unaffected by European asylum law.¹⁹⁷ This is particularly likable, since the European legislation suggests that its standards address issues on international law comprehensively, and in accordance with relevant treaties. In this case, the individual might turn to ECtHR and

¹⁹⁵ *EU Immigration and Asylum Law: Text and Commentary*, edited by Steve Peers and Nicola Rogers, Martinus Nijhoff Publishers, 2006.

¹⁹⁶ Joined cases C-20/00 and C-64/00 *Booker Aquaculture* (2003) ECR I 7411, 10 July 2003.

¹⁹⁷ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.582.

invoke the obligation of Member State to respect international law standards, autonomously from any obligations under European asylum law.¹⁹⁸

2. Example of currently pending preliminary reference concerning exclusion clauses

Since the Qualification Directive is a relatively recent legislation (deadline for the transposition was 10 October 2006) and because of the restriction that only the courts against whose decision no further appeal is possible can refer the preliminary references, it is understandable that until now only few preliminary references were referred to the ECJ. Regarding exclusion clauses there is currently only one pending preliminary reference, referred by the German Federal Administrative Court.¹⁹⁹ I believe that the ECJ ruling on this reference will bring very important clarifications and therefore it is worth mentioning this reference in whole.

The appellant is a Turkish citizen who actively supported the terrorist activities of the organization DHKP/C between 1993 and 1995. The organization is listed as a terrorist organization in the EU list. After being arrested in Turkey, the appellant was tortured and imprisoned pursuant to a double life sentence. After he was provisionally released for health reasons, as a consequence of a hunger-strike in 2002, he fled to Germany and asked for asylum. His application was rejected by the Federal Office for Migration and Refugees on the basis of the assumption that he had committed a serious non-political crime. However, the Administrative Court and Higher Administrative Court both obliged

¹⁹⁸ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.584.

¹⁹⁹ Bundesverwaltungsgericht Pressemitteilung, Nr. 65/2008, 14 October 2008, BVerwG 10 C 48.07 – Beschluss.

the Federal Office to grant refugee status, finding the application of exclusion to be incorrect. The applicant, it was found, had ended all contact to his previous organization and had distanced himself from its aims, so that exclusion would be disproportionate.

The Federal Administrative Court presented the following questions to the ECJ:

1. Does the membership in and the active support of the armed fight of an organization listed as a terrorist organization on the EU list constitute a serious non-political crime in the sense of Article 12(2)b of Qualification Directive or an act contrary to the purposes and principles of the UN in the sense of Article 12(2)c of Qualification Directive?
2. If yes, does the application of Article 12(2)b and c of Qualification Directive require that the person concerns continues to pose a danger?

Will ECJ ruling take into consideration the UNHCR's guidelines according to which association with or membership of a group practicing violence or committing serious human rights abuse is, *per se*, not sufficient to provide the basis for a decision to exclude and that without evidence of involvement in a specific serious non-political crime, it would be contrary to the Convention to exclude someone for mere membership?²⁰⁰ And will ECJ's answer to the second question be positive, since according to UNHCR, a person may claim a refugee status if the Article 1F crimes are sufficiently distant in the past and applicant's conditions of life have changed?²⁰¹

The Federal Administrative Court further asked:

3. If question 2 is answered negatively, do Article 12(2)b and c of Qualification Directive require an assessment of proportionality of exclusion in every individual case?
4. If question 3 is answered positively:

²⁰⁰ Geoff Gilbert, *Exclusion (Article 1F)*, Refugee Protection in International law, UNHCR's Global Consultations on International Protection, Cambridge University Press, 2003.

²⁰¹ UNHCR, *Determination of Refugee Status of Persons Connected with Organizations or Groups which Advocate and/or Practice Violence*, 1 April 1988.

a) Does the test of proportionality include considerations of protection under Article 3 of ECHR or national provisions against return?

b) Can exclusion only be disproportionate in particularly exceptional situations?

These are very important questions and the ECJ rulings on this matter will be of extreme relevance, since there is no consensus among States on this issue. Some States reject application of proportionality in exclusion clauses.²⁰² On the other hand, some States practice shows that balancing of the seriousness of the crime against the persecution feared is being used.²⁰³ The developments on the meaning of the principle of *non-refoulement* under international human rights law should also be taken into consideration,²⁰⁴ and it might be argued that the circumstances have changed since 1951, and therefore exclusion under Article 1F(b) should no longer be absolute.

Finally, the last part of the reference is:

5. Is it reconcilable with Article 3 of Qualification Directive if the asylum seeker has a claim for asylum under national constitutional law, even though exclusion grounds under Article 12(2) of Qualification Directive apply?

This is also an extremely relevant question, if not even the most important, since it addresses the issue of minimum standards that is relevant for all other Directive's provisions as well. Can Member states offer higher protection and do not exclude an applicant even if Article 12(2) of Qualification Directive applies? Will ECJ agree with

²⁰² For example, case *Pushpanathan v. Canada*, (1998) 1 SCR 982; *Immigration and Naturalization Service v. Aguirre-Aguirre*, 536 US 415, 119 S.Ct 1439, 143 L.Ed (2d) 590 (1999).

²⁰³ For example, the Belgian Commission permanente de recours des réfugiés has balanced the threat of persecution against the gravity of the crimes committed in the case of Ethiopian asylum-seekers (decisions W4403 of 9 March 1998 and W4589 of 23 April 1998). Proportionality considerations have also arisen in Swiss cases, for example in Decision 1993 No. 8, or in the case of E.K., judgment of 2 November 2001, EMARK 2002/9, concerning two former members of the Kurdish separatist PKK from Turkey, where the Swiss Asylum Appeals Commission took into account proportionality considerations, such as the length of time since the acts were committed, the young age at which they were committed, and the asylum-seekers' subsequent withdrawal from the organization.

²⁰⁴ See Chapter IV.

Battjes that the Community minimum standards cannot entail an obligation to take a negative decision, since if they did they would not be minimum standards?²⁰⁵ Or it will affirm the view of Legal Service to Asylum Working Party that any deviation in national law from the definitions laid down in Article 2 of the Qualification Directive and the related articles would be incompatible with the objective of harmonizing the contents of those notions?²⁰⁶

If the ECJ will answer that Member States cannot adopt higher standards regarding exclusion under Article 12(2), the next most important question will be how the Court interprets Article 12(2). If in accordance with Refugee Convention, then no issue concerning Member States' compliance with Refugee Convention will be raised, because the applicant would be excluded also under the Article 1F of Refugee Convention. On the contrary, if ECJ's interpretation of Article 12(2) will not be in accordance with Refugee Convention and Member States will be prohibited from applying higher standards, we might face a serious problem, bringing into the game the relationship between EU law and international law in general. I guess that for all further analysis we should wait for the judgment of the Court to be delivered.

²⁰⁵ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.164.

²⁰⁶ During the negotiations on Qualification Directive, the Council legal service was called to give an opinion on the legal meaning of the concept of minimum standards and how far Member States were allowed to develop or retain more favorite standards. The Council legal service noted that Member States remain free to legislate in the areas which are outside the scope of the Directive, but in order not to annihilate the objective of harmonization, the possibility to introduce more favorable standards could not be unlimited. Any deviation in national law from the definitions laid down in the Qualifications Directive and the related provisions that develop their content would be incompatible with the objective of harmonizing the content of those notions (14348/02 JUR 449 ASILE 67, 15 November 2002).

3. European Court of Human Rights – a final savior?

As already mentioned, Article 6(2) of EU treaty requires that the Community law respects fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States. The ECHR is therefore seen as a source of general principles of law, and respect for human rights is a condition of the lawfulness of Community acts. Thus, the ECJ is required to examine the legality of Community acts and Member States legislation implementing Community law with the provisions of the ECHR.

What about the role of ECtHR; can a Community act be challenged at ECtHR? As the EU is not a party to the ECHR, the ECtHR has no jurisdiction to receive complaints against it. But the ECtHR receives the complaints by individuals against the Member States that concern the application of the EU law.

The responsibility of Member States for acts that were conditioned by Community law was addressed in *Matthews case*.²⁰⁷ The applicant, a British citizen and a resident of Gibraltar, was refused a registry as a voter at the elections for European Parliament. UK claimed that this decision is based on the European Council decision, which left UK no discretion and therefore UK is not responsible for the alleged violation of ECHR. The Court did not agree and held that UK is still responsible to assure elections to the European Parliament in Gibraltar, notwithstanding the Community Act regulating the elections. The Court emphasized that the States stay responsible for the violations of the Convention even after the transfer of competences to the Community. Even if UK lost the

²⁰⁷ *Matthews v. UK*, Application no. 24833/94, 18 February 1999, ECtHR.

control over the Act regulating elections, its control over elections for the purpose of the Convention remained unchanged. As far as the responsibility under the Convention is concerned, there is no difference between domestic and Community legislation.

In *Bosphorus case*²⁰⁸ the Court at first reasoned similarly as in *Matthews case* that the Member States stay liable under the Convention, when they apply Community law that leaves them no discretion. But the Court went further by saying that since the Community provides equal protection of Human Rights to that of the Convention, Member States are absolved from their responsibility under the Convention, unless the applicant can show that in the particular circumstances of the case this protection was “manifestly deficient.” The Court therefore established a partial responsibility of the States under the Convention, in the cases where Community law leaves them no discretion. By equal protection, the Court means comparable, not identical, because the later would be contrary to the interest of international co-operation pursued. This is contrary to the rule *pacta tertiis* that the protection should remain identical after the transfer of power to the Community.

Bosphorus is almost of no relevance for the present work, where we are dealing with minimum standards Directives, which leave discretion to Member States and therefore the full and not partial responsibility of Member States applies. Besides it is not clear if *Bosphorus* rule would apply to the Article 3 of the Convention, since prohibition of torture and ill treatment is absolute and once it is established that the State interfered with this right, no justification is possible. It follows therefore, that when the Community law

²⁰⁸ *Bosphorus Airways v. Ireland*, 30 June 2005, Application No. 45036/98, ECtHR.

leaves some discretion to Member States, in no way affects the access of individuals to the ECtHR.²⁰⁹

As we have seen in the Chapter IV, Subchapter 2, ECtHR up to now successfully resolved the cases regarding the *refoulement* to the country where a person would face a serious risk of torture or ill treatment. Under the jurisprudence of ECtHR, the right not to be tortured remains absolute. But the »Article 14(6) refugee« is not concerned with the *refoulement* to his country of origin, he is concerned with deprivation of his secondary rights, necessary for a normal living, such as right to work, social security etc. Is that kind of case going to be successful before the ECtHR?

The jurisprudence shows more towards a negative answer. In the case *Bonger v. the Netherlands*,²¹⁰ the Court rejected the application of an Ethiopian asylum seeker who was excluded from refugee status under Article 1F as inadmissible. The applicant was not facing an expulsion order to Ethiopia, but he was also not granted any permission to stay. The applicant submitted that, although not being at risk of being expelled to Ethiopia for the time being, by denying him a residence permit the authorities violated his human rights and dignity since it remains impossible for him to become a full member of the Netherlands society. The Court held that his complaint must be rejected for being incompatible *ratione materie* as neither Article 3 nor any other provision of the Convention and its Protocols guarantees, as such, a right to a residence permit.

²⁰⁹ In the case *Cantoni v. France* (15 November 1996, Application No. 17862/91, ECtHR), the Court found that the provision in French law was imprecise and therefore in breach of Article 7 of ECHR, even though it was based on the provision of Community Directive.

²¹⁰ *Bonger v. the Netherlands*, Application No. 10154/04, 15 September 2005, ECtHR.

Another case from ECtHR jurisprudence should be mentioned, which also shows the negative approach towards recognition of refugee's secondary rights. In *Ahmed v. Austria*²¹¹ the applicant was deprived of his refugee status, because of criminal convictions. The Court judged that it would be the violation of the Convention to expel the applicant to Somalia, but had no jurisdiction to rule on whether or not he had been rightfully deprived of his refugee status under the Refugee Convention. Since his entitlement to social, medical and welfare benefits was dependant on his refugee status, he was, although prevented from being deported to Somalia, left in such isolation and destitution, that he committed suicide some months latter.²¹²

Whether the Court will decide differently in the case of "Article 14(6) refugee", where the difference with the *Bonger case* would be that the "Article 14(6) refugee" is a refugee under Refugee Convention and therefore entitled to secondary rights, while Mr. Bonger was excluded from Refugee Convention, remains to be seen. If the case would pass admissibility test, the situation will already be more positive, since the Court will have to see if limitations of applicant's rights are based on law and here the Refugee Convention should be considered, since the State is bind by it and it forms part of its national law. However the proclamation of the non-jurisdiction of the Court to rule on whether the Refugee Convention was applied correctly or not, again brings down our hopes for the case to be successful.

Of course it is not only residence permit whit which "Article 14(6) refugee" is concerned about. However, if we look at the jurisprudence concerning the right to work, we also

²¹¹ *Ahmed v. Austria*, 17 December 1996, Application No. 25964/94, ECtHR.

²¹² Nuala Mole, *Asylum and the European Convention on Human Rights*, Council of Europe publishing, 2007, p. 107.

cannot expect a positive decision, since ECHR does not include any right to work, so any complaint made on that basis would be inadmissible *ratione materie*.²¹³ A little bit positive aspect brings the jurisprudence regarding the entitlement of foreigners to social assistance under Article 1 of Protocol No.1. The Court found in the case *Koua Poirrez v. France* that the denial of access to welfare benefits, to which the applicants would otherwise have been entitled, simply because they were foreigners, violated that Article taken together with Article 14 which prohibits discrimination.²¹⁴

A small hope for “Article 14(6) refugee” can as well be derived from the case *Sisojeva v. Latvia*,²¹⁵ which concerned a family of ethnic Russians whose presence in Latvia remained unregularised although the authorities were not taking active steps to remove them. The Chamber of the Court held that it is not enough for the host State to refrain from deporting the persons concerned; it must also by means of positive measures if necessary, afford them the opportunity to exercise their rights in question without reference. In the Chamber’s opinion, the prolonged failure to regularize the applicants’ status constituted a violation of Article 8 of the Convention. The case was referred to the Grand Chamber, but by the time of the decision the Latvian authorities already regularized the family’s status and therefore the Court struck out the claim.²¹⁶ The decision of the Chamber was therefore never confirmed (but also not rejected).

As we can see, the jurisprudence regarding refugees’ secondary rights is not as coherent as the jurisprudence regarding *refoulement* to torture. Any clear conclusions on chances

²¹³ For example, *Neigel v. France*, Application No. 18725/91, 17 March 1997, ECtHR.

²¹⁴ *Koua Poirrez v. France*, Application No. 40892/98, 30 September 2003, ECtHR.

²¹⁵ *Sisojeva and others v. Latvia*, Application No. 60654/00, 15 January 2007, ECtHR.

²¹⁶ Nuala Mole, *Asylum and the European Convention on Human Rights*, Council of Europe publishing, 2007, p. 108.

of success for “Article 14(6) refugee” cannot be drawn without another extensive research.

VII. Conclusion

In sum, almost all deviations from international law in the Qualification Directive have in common that they set standards of protection at a lower level than under international refugee or human rights law. Thus, a person could be excluded from refugee status under the Directive by a Member State which would be applying the Directive correctly, and yet this person would be a refugee under international law.

Convention refugees, but not refugees according to the EU legislation, not being able to leave the country without a risk of being exposed to ill treatment – a small, but forgotten group of persons in need of protection that was created with Qualification Directive - “Article 14(6) refugees” as I call them. Their status in a refuge country being far away from adequate for living, Member States in general equate those persons with other illegal migrants, that for some reason cannot be deported to their country of origin, forgetting that there is a principal difference: “Article 14(6) refugees” are refugees, owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion unable or, owing to such fear, are unwilling to avail themselves of the protection of their country. Refugee Convention guarantees them rights that Member States should assure.

As we can see, Qualification Directive leaves a lot of questions open for the interpretation, starting with the basic one – the meaning of minimum standards and the level of discretion left to the States. National courts of last instance in Member States where implementation of the exclusion provisions is not in compliance with Refugee Convention should refer the preliminary references to the ECJ and seek the interpretation

in accordance with international law. Maybe under the influence of ECJ decision, the Member States will change the questionable legislation. With Lisbon treaty the situation might even improve since the restriction from Article 68(1) of EC Treaty will be abolished and all the courts will be able to refer the preliminary references to ECJ. High hopes are therefore concentrated into the future rulings of the ECJ. Of course, whether the ECJ will rule in compliance with Refugee Convention is another question. For a start let's wait how will ECJ answer the preliminary references regarding exclusion clauses, referred by the German Federal Administrative Court.

Another solution would be a bottom up approach, where the point is that national judges start acting more proactive and do not leave it all to ECJ. The NGOs active in the field of refugee protection should also not ignore the avenue of complaining to the Commission with a view to triggering an infringement action against Member State for alleged breaches of Community law.

What somehow cannot be explained in a satisfactory way is why the EU with Qualification directive even left the choice to Member States to apply exclusion or revocation based on reasons of national security, without assuring that Refugee Convention would be respected. At first sight it seems that EU draw a profit from the fact that since Refugee Convention has no control mechanism, Member States will be able to act in breach of it, without any sanctions. But if we think further, we can hardly believe that EU would sacrifice its reputation and its fundamental values and allow the breach of Refugee Convention to continue, particularly after being exposed to so many strong critiques. I guess more accurate answer would therefore be that EU at the point of

drafting the Qualification Directive just could not find a common understanding among Member States about exclusion clauses. But Commission is already working on proposals to Qualification Directive, including exclusion clauses and hopefully they will change the existing situation.

Despite the seriousness of the terrorist problem, combating terrorism cannot justify lowering standards of protection offered to refugees under international refugee and human rights instruments. We cannot fight against terrorism with the same weapon used by terrorist – violation of human rights. Although a lot of “terrorists” would deserve the cruelest punishment, this still cannot be allowed, also because of the risk of the abuse. As Geoff Gilbert wrote, labeling something terrorism is a political choice.²¹⁷ The clear example of politicized nature of the term terrorism is that Nelson Mandela’s African National Congress that fought against apartheid was labeled as a terrorist organization, by much of the international community.

We should not forget that many of those who seek international protection are themselves fleeing from terrorism. The expulsion of non-national terrorist suspects to face absolutely prohibited treatment is not a solution to this very serious problem. Given the weakness of the procedural guarantees in place to ensure that the individuals have been rightly identified as being terrorists, entirely innocent individuals may be subjected to torture.

Fortunately a recent attempt of several European States to persuade the ECtHR that prohibition of torture and inhuman and degrading treatment is no longer absolute as a

²¹⁷ Geoff Gilbert, *Article 1F of the Geneva Convention – Introduction to rationale, scope and interpretation*, presentation at the ELENA course Cessation and Exclusion Clauses, National Security and Non-Refoulement, Athens, 22-24 February 2008.

necessary response to terrorism, did not succeed. We can therefore conclude that at least for now the principle of *non-refoulement* has to be respected in Europe. However as we have seen, there are other problems. Even though not deported, “Article 14(6) refugees” have no adequate secondary rights guaranteed and their situation seems to be without prospects. Looking at the present jurisprudence, it is not so obvious whether ECtHR can solve these problems, but since ECHR is a living instrument that adapts to the changes in the society, bringing the case to ECtHR should not be neglected as a possible remedy.

Finally, it should be emphasized that the problems described in the present work are not affecting only Europe. Low standards in European asylum law may negatively affect international refugee law, since the interpretation of any treaty is informed by State practice.²¹⁸ The legislation on the reading of Refugee Convention in European asylum law may in this way influence the reading of that instrument, since there is no other monitoring mechanism. Therefore it is of extreme relevance that Member States accept the European asylum law as a set of basic rules from which they can and must depart in order to assure the compliance with obligations under international law.

²¹⁸ Hemme Battjes, *European Asylum law and International law*, Martinus Nijhoff publishers, 2006, p.613.

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