

**The Application of “the Geneva Convention Relating the  
status of Refugees” to third-country nationals from post-war  
areas.**

**An analysis of the application of the concept of “Refugee” as laid down by the  
Geneva Convention and the Qualification Directive on Third-Country Nationals  
from post-war areas.**

**Bachelor Thesis**

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**Word count: 12. 316**

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## ***Abstract***

The Geneva Convention, a legally international binding instrument for refugee law, was signed in the year 1951 to define the standards for the treatment of refugees. The Convention is used as a tool to apply legislation on when and who can be qualified as a “refugee”, and it has been used as an international instrument to give protection to people in need. Even though the Geneva Convention has been implemented in International and National asylum legislations there still exist irregularities between the different legal levels.

To clarify whether a third country national has to be originated from a country which is currently in war or not, this paper will examine the following question: *Under which conditions can third country nationals coming from post conflict countries obtain and maintain their refugee status in Europe?* An third country national can apply for asylum in the European Union on grounds of three legislations; The Geneva Convention, The Qualification Directive, and the national legislation. Case law from post conflict countries, Iraq and Afghanistan in this research, will provide information of how the legislations are applied. After having examined the applicability of the Geneva Convention, three EU Court of Justice cases will be reviewed. Showing when and how third country nationals can be assigned as refugees or provided subsidiary protection according the Qualification Directive. The same will be done for the Dutch cases based on the guidelines of *Article 29 of the VreemdelingenWet 2000*. By analysing the obtained data, a comparison will be conducted to illustrate whether there exist irregularities between the three legal levels.

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## 1. Introduction

Due to the high amount of inhumane behaviour in some of the Middle-Eastern and Central-Asian countries, such as the suicide attacks by the Taliban, the invasion of The Islamic State in Iraq and Syria (ISIS), the topic of migration has been hard to avoid. The number of immigrants in the recent years has increased significantly, as people try to flee war, violence and prosecution in their country of origin. However the migration flow is not only from countries which are confronted with high level of conflicts but also other countries with lower conflict level (UNCHR, 2016). Vague ideas of what will happen to them, uncertainty of tomorrow, fussy life position in the long-term do not let individuals feel safe, which will undoubtedly affect environment interaction (Dontsov & Zotova, 2013). Unrest in the native country will affect people's lives and their living conditions to such an extent that they decide to flee from their country of origin. The wars that have taken place since the ninth of September 2001, have resulted into a high number of refugees fleeing to western countries (Telegraph, 2015). However when the wars were ceased, the threat that citizens have to face in their daily lives was not diminished. For example, the war Iraq and Afghanistan are officially ended with the complete withdrawal of the United States troops from Iraq in the year 2011, and 2014 from Afghanistan (Britannica, 2015). However the violence in these countries has remained, in the form of rebels, terrorism, conflicts between societies in a country etc. As a result of this, the immigration flow from these countries to Western countries will remain, due do the unsafe conditions in the country of origin. In order to manage this migration flow, The United Nations, Israel and Iraq gathered in 1951 in order to establish a refugee convention (UNCHR, 2001). Resulting into "The Geneva Convention Relating the status of Refugees" which has set the qualifications that have to be met before one can grant an asylum-seeker the status of a refugee (UNCHR, 2010). The agreement on the application of the Convention by states harmonized the refugee law among these countries (Weis, 1990). Protection of refugees has to be secured by the states party to the Convention, providing the refugees rights that can rely on in the host country. The Convention has conceptualized the "refugee" but in practice the application of the term refugee to migrants can differ within countries of nations (Peers, 2010). A main reason for this is the unclear definitions of the terms in the concept which can lead to different

interpretations. The application of the concept “refugee” to migrants fleeing from a post-war country might still be vague as set in the Geneva Convention ( Goodwin-Gill, 2014). This paper will provide clarifications on when the concept of “refugee” according to the “Geneva Convention” and the “Qualification Directive” can be applied to migrants who fled from their country of origin due to treats they are facing due to unrest that country is dealing with.

## 2. Research question and Scientific Approach

In order to investigate the applicability of the concept “refugee” according the Geneva convention to third country nationals from post conflict situations one has formulate a clear research question. The research aim is to answer the following main research question and three sub-questions:

*RQ: Under which conditions can third country nationals coming from post conflict countries obtain and maintain their refugee status in Europe?*

*Sub-question 1: To what extent is the status of refugee as codified by the Geneva Convention of 1951 applicable in post-war situations?*

This sub-question will elaborate on how the Geneva Convention is applicable to third country nationals from post conflict countries. The question will help in answering the main research question by applying the international legislation and the set conditions for qualifying as an refugee.

*Sub-question 2: To what extent is the Qualification Directive of the EU applicable in post conflict situation?*

The second sub-question regarding the applicability of the Qualification Directive in post conflict situations, will clarify when and who can qualify for a refugee status. This question will contribute in answering the main research question by elaborating how third country nationals can obtain and maintain subsidiary protection.

*Sub-question 3: How have Dutch Courts applied the rules stemming from the Geneva convention and the EU legal system in relation to the status of refugees for individuals coming from Iraq and Afghanistan?*

The Member States have implemented the guidelines of the Convention and the Qualification Directive, however there still can exist irregularities between the legislations. This third sub-question will elaborate on how third country nationals from post conflict

situation can obtain and maintain a residency permit according the national *Vreemdelingenwet 2000*.

## 2.1 Scientific approach

To answer the above mentioned research questions this thesis is structured as follows. Firstly, the theoretical framework will provide a description of the concerning laws, in this case the International Law, and the European Law. Explaining the origin and the scope of the existing legislation, this will clarify why there are multiple immigrations laws and what they have in common. Secondly, the conceptualization part will go further in depth on the conventions, directives, regulations and articles. This is needed to understand the cases that will be examined in this paper. After having clarified key notions and norms, chapter six will elaborate on the application of the Geneva Convention in the International Law in post-conflict situations. In chapter seven the applicability of the Qualification Directive to post-conflict situations will be discussed. Next, the application of the EU and the international norms by the Dutch Courts will be examined. With the obtained information due to the examined cases, a data analysis will discuss the findings. Lastly, the research question of this paper will be answered in the conclusion.

As mentioned in the research question, this thesis will analyse the relevant are judicial cases of migrants from recent post-war countries. In order to identify the relevant case law, one must take into account the multilevel regulatory framework existing in relation to asylum law. Therefore this thesis will analyse different cases<sup>1</sup> in which the post-conflict situations third country nationals apply for asylum. The set of cases used for this research are based on three legal levels; The Geneva Convention (international law), Qualification Directive (EU law), *Vreemdelingenwet 2000* (National law). Respectively each institution has its own web page where the cases can be traced from. When choosing the cases one has to set up several criteria; 1). Year (2005-2015), 2). Post-war country (Iraq and Afghanistan), 3). Type of legislations (refugee law) 4). Court (EU, Netherlands). The year 2005-2015 is important because in both countries (Iraq and Afghanistan) the war was declared to be over, but peace-

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<sup>1</sup> Bibliography – Case Law

keeping missions remained in the years after. The countries Afghanistan and Iraq are selected due to the wars. The type of legislation concerning is clearly based on a humanitarian one. The concerning court depends on what level the cases are investigated in this case a multi-level; European and National (Dutch). The European Database of Asylum Law (EDAL) contains a large number of asylum case from different kind of legal levels. The International Law cases have been extracted from this data base, where the Geneva Convention is used as the main tool for the judgment. The above mentioned criteria have been used to select the appropriate cases for this study. On the European Union legal level, the same data base is used where the Qualification Directive is used as the main tool for the judgment. For the National legal level the official website of the judicial organization in the Netherlands is used, *De Rechtspraak* provides an overview of cases on any legal level in the Netherlands. The cases chosen have been selected on the criteria mentioned before, where the *Vreemdelingenwet 2000* is used as the main tool for the judgment.

By setting up these criteria one can derive better and more reliable conclusions from the data, if the cases differ too much the reliability and the validity of the research will be affected. The most important aspect is the claim of an asylum seeker that his or her human rights are violated in the country of origin. The number of cases related to our research is limited, while not all cases are published, having found two cases relating to the International law, three relevant cases for the other legal levels (EU and Dutch courts), these will provide sufficient information on the application of the regulations.



Figure 1: Overview case selection criteria

The research is conducted through an analysis of cases, decisions, conventions, treaties as the

main legal framework. While the research is conducted on the basis of existing literature, the research can be described mainly as a content analysis. Content analysis may be seen as a method where the content of the message forms the basis for drawing inferences and conclusions about the content (Prasad, 2008, p.2). In the research the concept of refugee that is set by the Geneva Convention, is the one that is used as the main indicator for immigrants from post-war countries. Case law is incorporated in the research to ensure clarifications on this concept. If states apply the Geneva Convention as stated then the immigrants of post-war countries are assured of being assigned as refugees depending on their personal circumstances and the level of threat they faced in their country of origin. When states do not comply with the guidelines of the Convention then immigrants of post-war countries can be more easily be deprived from their human rights according to the Geneva Convention. The following information of the countries situation is needed to understand the general situation the third country nationals come from:

#### *Iraq country information*

Iraq currently consists of a population that is 56% Shiite and 36% Sunni, which are two branches of the Islam. The remaining population is Christian, Yazidi, and other minorities (Looklex, 2016). The country was until the year 1958 a monarchy that made place for a military regime. In the year 1979 Saddam Hussein became president of the country, which then was in a period of welfare due to the oil earnings. Saddam went to war with Iran in the year 1980 which lasted till 1988. In addition a second war, Gulf-War, in the year 1991 has affected the country's economy and society in a devastating way. The Shiite population in Iraq were thrilled by the defeat of Saddam by the American troops in 2003 which was led by the Bush Administration. However the optimism was extinguished when embittered Sunnis stroke back, a reason for this bitterness was e.g. being dismissed from their status in the army, leading to bloody campaign bomb attacks, kidnapping and killings. These sectarian conflicts were settled down by 2008, due to US troops and an improving Iraqi army. The US troops withdrew from cities in 2009 and completely in the year 2011, in orders of the Obama Administration. The then led Shiite government failed to unite the nation, this became a more difficult task with the rapid rise of the extreme Sunni rebellions in 2013. The extreme Sunni rebellions form a jihadist group now known as the Islamic State (IS). The Shiite government



was replaced after the election in 2014 by a more diverse government. Still the country is being confronted with daily sectarian conflicts and jihadist attacks (BBC-News, 2015).

#### *Afghanistan country information*

Afghanistan's inhabitants are mainly Sunni Muslims (84%), the other large group are the Shiites (15%), the remaining consist of e.g. Jews, Hindus (factover, 2016). Afghanistan was occupied by a Communist government since 1978, this however was ended with the help of resistance forces and i.a. US as a Cold-War strategy, leading to its collapse and the declaration of the Islamic State of Afghanistan. The country has been controlled by the Taliban since 1996, an Islamic political movement, till the year 2001 when the US troops managed to extrude them. A new government was formed in 2004, in along with a new constitution. However this new formed government has struggled to exercise its authority in the country and to unite the country. The security in the country was kept due to NATO-led troops after the invasion 2001, the troops officially left Afghanistan in December 2014 (BBC-News, 2016). The Taliban's activities have expanded since 2001 and reach a peak in the elections times, suggested that the largest number of the casualties are a result of the Taliban attacks. Afghanistan has been struggling with conflicts for more than three decades now, where several generations have only known war for whole their lives. The need for a more tolerable situation is noticeable by its people (Insightconflict, 2011).

## 2.2 Theoretical Framework and key legal concepts

### *2.2.1 Theoretical framework*

In order to clarify whether one should use the term asylum seeker or refugee for a person, one has to define the terms. An "asylum seeker" is a person who has applied for asylum under the provisions stated in the Geneva Convention of 1951, facing threats when the applicant returns to his or her native country. During the application procedure the applicant will retain the status of an asylum seeker as long as the application is pending. When the application is determined to be successful by the caseworker, then the asylum seeker can be assigned the status of a refugee. However when the application of the asylum seeker is unsuccessful and all rights of the applicant are exhausted then he or she has no rights to remain in the host-

country (Mitchell, 2006).

Goodwin-Gill (2014) states that from the existing law, as well as the internationally acknowledged principles of human rights, “protection” policies must be derived. International legal obligation and their implementation at the national level face fluctuations, Due to the sovereignty of states. However by academic inquiry and jurisprudence the interpretation and application of international law and its principles can be clarified and lead to clearer meaning. This clarity will lead to a better understanding among the nations relating international law. However the thought of having absolute, exclusionary competence of the nations is troublesome for the international cooperation. The achievements of international law have to let states realize the benefits of cooperation. Such as the agreement on the “Universal Declaration of Human Rights” 1948, adopted by the United Nations General Assembly, has set countries to modify their treaties concerning asylum. Another aspect relating international law is the lack of a treaty monitoring body. The circumstances before the establishment of the “Convention relating the Status of Refugees” in 1951 has been a stepping stone for the enactment of the agreement. The UNHCR has been assigned with the task of supervision of the application of international conventions, however states are familiar with the fact that the UNHCR does not have a binding authority and acts only as guidance. In international law there are three ground principles regarding the asylum and refugees. The first principle mentions the non-discrimination of people on basis of their race. Secondly, the international law has consolidated the principle of “*non-refoulement*” in its treaties. Following the principle that refugee rights have to be protected in cases of where people have been exposed to “*actions which results in victims and survivors whose rights require protection*” (Goodwin-Gill, 2014, p.653). The third rule international law regarding asylum is that one is dealing with an inescapable force, migration is a phenomenon that cannot be stopped due to the on-going events in the world. Through the guidance of the UNHCR the international law is secured of having the highest standard concerning the protection of refugees. Looking only at the refugee status given by the convention, can lead to different decision making across jurisdictions even when the cases are somehow similar to one another. It can be self-explanatory that not every asylum seeker can be granted the status of refugee. One has to assess the risk in the individual’s claim, which then decide whether there is a

need for protection( Goodwin-Gill, 2014).

According to Moreno-Lax (2014) the lack of political will in the European Union has led to underachievement in the aim of creating a common policy in the field of migration. The Common European Asylum System (CEAS) has conceptualized third country nationals, including refugees, as a threat to the integration of the European market, leading to exception and control measures on migration. The CEAS was enforced, in 1999, as a tool that would provide the same application of standards to any person that is seeking asylum in the European Union (Wijnkoop, 2014). The urge to develop the CEAS has developed from the Yugoslavian refugee crisis, there was a need for a policy that is in full and inclusive application of the Geneva Convention. The first step toward this aim was set during the Amsterdam treaty, providing “the legal bases for the adoption of the instruments of the first phase”

(Moreno-Lax, 2014, p. 147). Further adjustments in the EU treaties and the division of powers among the European Union institutions, e.g. increased power of the European Parliament and the European Court of Justice (ECJ,) made it easier for reforms and standard setting of the policies.

The CEAS is designed to “benefit only those who forced by the circumstances, legitimately seek protection” (Moreno-Lax, 2014, p. 149). This means that only persons that are in need of protection are entitled to benefit from this, however no channels have yet been established to achieve this measure. The CEAS is a policy meant to pave the way for harmonization of EU asylum rules, however it is not designed to replace all existing policies. In order for an asylum system to be effective it has to be capable of identifying refugees in an efficient and accurate manner by balancing refugee protection and immigration control. “The recast Qualification Directive of the European Union, 2011, the only instrument that has been formally adopted, has, indeed, better aligned recognition provisions with the Refugee Convention”

(Moreno-Lax, 2014, p. 148). The Qualification Directive has revised the rules on the definition and content of refugee and subsidiary protection status. The directive allows Member States of the European Union to set higher standard asylum policies, however these may not violate the provisions as set in the Geneva Convention (Peers, 2012).

### 2.2.2 Key concepts and legal framework

This section will elaborate of the concepts that will be used for this research, this is important in order to make unclear and imprecise notions more specific for a better understanding of the research (Babbie, 2010). As the research concerns a legal study mostly concepts from legal frameworks are used, these are the following:

#### The “Convention Refugee”

On 25<sup>th</sup> of July 1951 representatives of twenty-six states, United Nations and Iraq, met in Geneva in order to confront the refugee problem. This has led to the ratification of the most legally binding international instruments for refugee law, on 28<sup>th</sup> July 1951, defining the standards for the treatment of refugees. The first effort for the harmonization of the concepts happened after the First World War, the notion was strengthened after the Second World War. Mainly by the United Nations who has continuously addressed the problems of the numerous refugee situations in all the regions of the world (Weis, 1990).

In order to apply legislation concerning migration one has to know when and who can be qualified as a “refugee”, by defining the concept. In *Chapter I, Article I, Section A, paragraph two* of the 1967 Protocol the status of a refugee or the “Convention Refugee” is explained. Stating that a refugee is any person who:

*“As a result of events and owing to the well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national”* (UNHCR, 2010).

The important aspects in the provided definition is the occurrence of fear due to discrimination in the applicant's country of nationality, or not having the nationality of the country fled from leading to events resulting into fear for the applicant. Then one has to look whether the person in question has a double nationality, where one of the two might provide protection of the asylum-seeker.

The reason for choosing the "Geneva Convention" definition of refugee as the standard in this research is that the Convention is developed to function as an international instrument to give protection to people in need. It has set the universal standards which are defined in several other international instruments (e.g. conventions, resolutions, recommendations) , and these have been adopted by universal bodies as the United Nations or by regional organizations such as the Council of Europe, the Organization of African Unity and the Organization of the American States. Currently a growing number of countries are including the Convention in their national law (Weis, 1990), and states that have ratified the Convention are obliged to apply it already.

#### Non-refoulement

In addition to the definition of "Convention Refugee" there is one important principle in the "Geneva Convention" that guarantees the safety of fugitives, namely the "*non-refoulement*", Article 33 of the Refugee Conventions, which is "a ban on expelling or returning a refugee to a territory in which his or her life or freedom would be threatened for Convention reasons" (Peers, 2000, p. 109). However the as the convention allows the contracted states to interpret the concepts themselves, as no common definitions exist, which will to different interpretations on term such as „persecution“ or „degrading“ treatment that will lead to differences in the application of the principle (Pirjola, 2008).

#### Qualification Directive of the European Union

The CEAS goal of harmonizing the asylum system among the Member States of the EU, has led to the introduction of five main legal instruments which together make up the EU acquis on asylum. One of them is the "Qualification Directive" which sets the standards of who can qualify and thus be granted the refugee status. The first Qualification Directive, Directive 2004/83/EC, came into force in October 2006, which applied to all Member States of the

European union except for Denmark. The differences in the amount of successful applications of asylum seekers was a main reason for these harmonizing directives, e.g. in the year 2012, 59.1% of Afghans who fled their country and applied in Belgium have been recognized as refugees while only 6,8% of the Afghans applicants were granted the refugee status in that same year (ECRE, 2014). The Qualification Directive has been revised in 2011, the “Recast Qualification Directive” has included e.g. acknowledgements, and changes to the existing definitions. The recast Directive is applicable to all Member States except the United Kingdom, Ireland and Denmark.

Article 15(b) of Directive 2004/83 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, which corresponds in essence, to Article 3 of the ECHR.

Article 15(c) of Directive 2004/83, is in contrast to Article 3 of the ECHR and thus has to be interpreted independently from this Article.

If there exist a serious and individual threat to the life or person, then subsidiary protection that has to granted is not dependent on the provided evidence of the applicant of being specifically targeted by reason of factors causing the threat particular to his circumstances.

However the existence of such a threat can only be established when the level of indiscriminate violence that characterizes the armed conflict taking place (this has to be assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred), reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or region, would only by his presence in the territory be facing real risk of being subject to that threat.

Recitals 24 to 26 in the preamble to the Directive state:

(24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the

refugee protection enshrined in the [Convention relating to the Status of Refugees, signed at Geneva on 28 July 1951].

(25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

(26) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.'

These Recitals of the Qualification Directive state that the Directive expands the scope of the of who and when a third country national can be assigned as a refugee. Recital 26 emphasizes that although there is no question of an existing individual threat, the concept of 'serious harm' may still apply if the risk is aimed at the population or section of it.

Article 4(1), (3) and (4) in Chapter II of the Qualification Directive, entitled 'Assessment of applications for international protection':

Member States may consider it the duty of the applicant to submit all elements needed to substantiate the application for international protection. The assessment of an application for international protection is to be carried out on an individual basis taking into account a number of factors as they relate to the country of origin at the time of taking a decision on the application and the personal circumstances of the applicant. The fact that an applicant has already been subject to serious harm or to direct threats of such harm, is a serious indication of a real risk of suffering serious harm, unless there are good reasons to consider that such serious harm will not be repeated.

Article 29(1)(b) and (d) of the Law on Aliens 2000 (Vreemdelingenwet 2000, 'the Vw 2000')

In the Dutch law, "Article 29 *Vreemdelingenwet 2000*" provides the guidelines to deciding whether one should be granted asylum or not, and thus obtaining a residence permit for The Netherlands. The foreigner can receive the residence permit if the he/she is 1). a convention refugee, 2). Has provided sufficient proof that when returning to the country of origin there

will be a real risk of serious harm, this might be a death penalty or execution, or secondly inhumane or degrading treatment, or thirdly confronted with severe individual threat of one's life as a consequence of violence as conceptualized as an international or national armed conflict. Furthermore in the article it is noted when family members of the asylum-seeker can obtain a residence permit.

'Article 29(1)(b) of the [Vw 2000] allows the grant of a residence permit where the alien has proved satisfactorily that he has good grounds for believing that if he is expelled he will run a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.

That provision is derived from Article 3 of [the ECHR]. The removal of a person to a country in which he runs a real risk of being subjected to such treatment constitutes an infringement of that article. If that real risk has been or is established, a temporary (asylum) residence permit is in principle issued.

#### ***"person eligible for subsidiary protection"***

Means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15 ... and [who] is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;

#### ***'Serious harm'***

Article 15 in Chapter V of the Directive, entitled 'Qualification for subsidiary protection', shows when 'Serious harm' exists. Namely, a). death, penalty b). torture or inhuman or degrading treatment or punishment of an applicant in the country of origin or c). serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

#### ***'Refugee status and Subsidiary protection'***

One should put focus and examine the differences between granting a third country national the refugee status or subsidiary protection. As the Directive, Article 13, states that besides



Member States have to grant the refugee status for third country nationals or stateless persons who qualify. The Directive also lays down, in Article 18, that Member States have to grant subsidiary protection to third country nationals or stateless persons who qualify for this type of protection. Subsidiary protection however can be granted by a Member State that recognizes a third country national as in need for subsidiary protection. The Directive gives individuals protection as who otherwise would not be recognized as refugees according the Geneva Convention, but are ‘refugees in a broader sense’. The individuals that are included under these provisions are not only those that have a well-founded fear of persecution, if returning to their country or region of origin. But also include those that might have a substantial risk to be subjected to torture or to serious harm for reasons e.g. war, violence, conflict and massive violations of the human rights (Gil-Bazo,2006).

### 3. The application of the Geneva Convention in the International Law in post conflict situations.

The applicability of the provisions as stated in the Convention can be best interpreted when being used in cases. This chapter will elaborate on how the Geneva Convention is applied in terms of International Law in post conflict situations, and will help us in answering sub-question one. The cases chosen (UM 21121-10<sup>2</sup>, and B1 431721-1/2013<sup>3</sup>) are according the guidelines previously mentioned in the case selection and sampling paragraph. The two cases will illustrate how an Iraqi and Afghani applicant who applied for the refugee status in an EU state have been evaluated on the basis of the situation in the country of origin and their personal circumstances. This will provide an answer to the main research question, under which conditions the Geneva Convention grants the refugee status to third-country nationals coming from post-war countries.

#### 3.1 Sweden – Migration Court, 14 June 2011, UM 21121-10

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<sup>2</sup> UM 21121-10, (2011), 1951 Refugee Convention Article 1F

<sup>3</sup> B1 431721-1/2013 (2013), 1951 Refugee Convention Article 1

An Iraqi applicant appealed the Migration Court's decision of rejecting his request for asylum in Sweden. The applicant sought for asylum in the year 2009. He claimed to be arrested in the year 2005, while he was being subject to torture and later on was targeted with gunfire and explosions. He says to be a target due to his former position in the military. As a consultant to the Defence Minister and Secretary of Saddam Hussein's Council for the Development of Military Forces, which led to prosecution after the fall of Saddam's regime. He fears that if he will be deported to Iraq, he might be killed by the prosecutors because of his former position. The reason for the Migration Court refusal of the applicant's claim, is that they suspect that the reason that he is being prosecuted is due to the violent acts that Saddam's regime has committed, the applicant could not have been unaware of these actions. Which led to the decision to deport the applicant. The applicant appealed the decision and stated that he did not make any of the decisions but was purely there to provide information. The Court then examined on what grounds one could still be assigned as refugee, regardless of being guilty of crimes. The Migration Board then referred to two judgments earlier made by the Court of Justice (case 57/09 and case 101/09)<sup>4</sup>, these state that one could not assume that the person in question can be found guilty by only belonging to an organization on the so-called list of terrorist organizations. The individual case must be examined before reaching such a conclusion of that the person in question can be held responsible for the actions of that particular organization. While the Court only referred that the applicant was responsible for the violent actions against human rights as being consultant to the Minister of Defence in Saddam's regime and had no proof, the applicant was still granted a permanent residence and the refugee status. The applicant has met the conditions for exclusion but cannot be held individually responsible.

### 3.2 Austria – Asylum Court, B1 431721-1/2013/ Afghani applicant V The Asylum Court

An Afghan applicant claimed for international protection in the year 2012 on the grounds of well-founded fear in the country of origin. The applicant was positioned as the senior official

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<sup>4</sup> CJEU –C-57/09 and C-101/09 Germany V. B and D (2010), Directive 2004/83/EC, Article 12(2)(b) and (c)

in the Afghan ministry for agriculture, which led to threats of the Taliban. If he returns to his country origin there would be a real risk of him being killed by the members of the Taliban in Afghanistan. The Court rejected the applicant's request to the lack of well-founded fear of prosecution. One can assume that a risk can exist if the prosecution has a considerable probability, and that the protection offered by the country of origin is found to be unreasonable. The Court found it suspicious that the applicant was not confronted with these threats on an earlier stage during his office. Additionally, the Court questioned why he has not sought for protection by the superior officials of the state. The Court then stated that the refugee status can only be granted to those who face a real risk as that in Article 2 and Article 3 of the Convention. Additionally there must exist concrete facts for the real risk the applicant is facing. The Court declared the appeal unfounded, due to the lack of information and evidence provided to support the appeal.

### 3.3 The application of the Geneva Convention in post-conflict situations by Courts of European countries

The case of the Iraqi applicant (UM21121-10)<sup>5</sup>, demonstrated that the Convention provides protection to individuals who comply with the criteria set. The Iraqi citizen was granted asylum regardless the suspicion of him being an active member a member of a terrorist organization, while there was too little evidence to ground this speculation. The good amount of evidence of well-founded fear in the country of origin is also needed when granting an applicant the refugee status. The Afghani applicant (B1 431721-1/2013)<sup>6</sup> was denied asylum due to the lack of evidence that he was personally suffering from a well-founded fear of persecution. Regarding sub-question one: *to what extent is the status of refugee as codified by the Geneva Convention of 1951 applicable in post-war situations*. One can say that if the applicant provides a sufficient amount of concrete facts that there is a real risk that she or she has to face if going back to the country of origin. applicable to a larger group of asylum seekers.

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<sup>5</sup> UM 21121-10, (2011), 1951 Refugee Convention Article 1F

<sup>6</sup> B1 431721-1/2013 (2013), 1951 Refugee Convention Article 1

It has been argued that the nature of the Geneva Convention is interpreted in such a way where it encompasses victims of collective prosecutions rather focusing on the individual situation (Gil-Bazo,2006). Thus the conditions which are laid in the Convention have to be explicitly met in order to receive a refugee status by a third-country national.

The next chapter will discuss how the Qualification Directive is applied in the Member States, this will make us able to conduct a comparison between the two legislations.

#### 4. The applicability of the Qualification Directive to post-conflict situations: The Case law of the Court of Justice of the European Union and national courts.

This chapter will provide three EU cases which incorporated the Qualification Directive on third country nationals coming from Iraq and Afghanistan. A better view will be given on how and when these persons can be designated as refugees. The cases chosen (C-465/07<sup>7</sup>, 6.K.31.728/2011/14<sup>8</sup>, and UKUT 331(IAC))<sup>9</sup> will be used to answer sub-question two regarding the application of the Qualification Directive. The will clarify under which conditions the Qualification Directive assign third-country nationals as refugees, which we can compare the outcomes of chapter two of this paper concerning the Convention.

##### 4.1 C-465/07 Meki Elgafaji, Noor Elgafaji: Running a real risk of serious threat in the home-country. 2009.

The Elgafaji case (C-465/07) <sup>10</sup> notes that the convention is applicable to any citizen regardless their nationality as it refers to “individuals”. The appeal was requested due to difficulties in the interpretations of the Directive, leading to questioning the decision of the Minister of immigration. Does the 15(c) of the Council Directive 2004/83/EC<sup>11</sup>, offers other

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<sup>7</sup> C-465/07 (2009), Qualification Directive 2004/83 Article 15

<sup>8</sup> 6.K.31.728/2011/14 (2012), Qualification Directive Art. 4, Art. 8, Art. 9, Art. 15, Art. 21

<sup>9</sup> (2010)UKUT 331 (2010), Qualification Directive Art. 15(c)

<sup>10</sup> C-465/07 (2009), Qualification Directive 2004/83 Article 15

<sup>11</sup> Qualification Directive 2004/83/EC (2004), Article 15(c)

protection and has other qualifications regarding the status of refugees stating who and when a third –country national can be assigned the status.

Mr. Elgafaji was employed at an British firm, where he provided security for personnel transport between the airport and the ‘green’ zone. They decided to flee the country when they received a threat letter, which declared death to anyone who collaborates with Western countries. His uncle, also employed at the same firm, was killed by militia a short period before. On the 13<sup>th</sup> of December they applied for temporary residence in the Netherlands, what for they needed to provide evidence that they would be exposed to a real risk when returning to the country of origin. The Minister of Foreign Affairs and Integration announced on the 20<sup>th</sup> of December 2006 that their application was refused. The reason for this outcome is that they provided an insufficient amount of proof of the threat that they claim to be exposed to when returning to the country of origin. A satisfactorily amount of evidence is needed in order to grant one a residence permit according to Article 15(b) and (c) of the Directive<sup>12</sup> and Article 29(1)(b) of the *Vreemdelingenwet 2000*<sup>13</sup>. Mr. and Mrs. Elgafaji appealed the decision with success.

The Council of State (*Raad van State*) found that there were difficulties in interpreting the provisions of the Directive. Therefore it has proceeded with the case and has raised questions before the Court of Justice of the European Union (ECJ) in a preliminary ruling regarding Article 15(c) of Council Directive 2004/83/EC<sup>14</sup>. The purpose of this Directive is to lay down the minimum standards for the qualification and status of third country nationals or the stateless persons as refugees, or as persons are situated in a position as one that can be interpreted in Article 3<sup>15</sup> of the Convention. The interpretation in the case-law of the European Court of Human Rights, or Article 15(c) <sup>16</sup> may provide additional or other protections in comparison to Article 3. But if the Article 15(c) can indeed offer supplementary or other protection, how can one claim that the he/she can qualify for

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<sup>12</sup> Qualification Directive 2004/83/EC (2004), Article 15(b) and (c)

<sup>13</sup> *Vreemdelingenwet 2000* (2013), Article 29

<sup>14</sup> Qualification Directive 2004/83/EC (2004), Article 15(c)

<sup>15</sup> Convention Relating to the Status of Refugees – UNHCR (1951), Article 3

<sup>16</sup> Qualification Directive 2004/83/EC (2004), Article 15(c)

subsidiary protection?

The interpretation of Article 15(c) must be carried out independently from Article 3 of the ECHR, while harm defined in Article 15(c) is described as a more general risk of harm. Paragraph 34 referenced harm more as an general threat to a civilians or persons life, and not much as a consequence of specific acts of violence. Furthermore, the threat mentioned in Article 15(c) also refers to threat that is inherent in a general situation of international or internal armed conflict. Then the violence in question which is the causing the threat is described as a general one, which may apply to people regardless their personal situation. The Article does not discriminate between harm to civilians on the basis of their identity. The level of violence, due to the armed conflict, reaches such a high level that if the civilian will return to the region of the country origin or the country of origin there would be a real risk of being subject to violence as mentioned in Article 15(c).

The Court found that that the interpretation of the concepts as in Article 15(c) are not invalidated by Recital 26<sup>17</sup> in the preamble of the Directive, allowing exceptional situations which are characterized by such a high degree of risk that there are legitimate grounds would be shown for believing that the person may be exposed individually to the risk in question. According to paragraph 39<sup>18</sup>, the level of indiscriminate violence in the country or region can be weighed with the personal risk that the civilian may face and vice-versa. This means that the more applicant is able to show that he is affected by personal circumstances, the lower the need of indiscriminate violence for him to be eligible for subsidiary protection and vice-versa. In addition the region, geographical scope, where actual indiscriminate violence is taking place and the original living region of the applicant. The higher the indication of a real risk for the civilians, as referred to in Article 4(4)<sup>19</sup> of the Qualification Directive, the lower the need for the level of indiscriminate violence required for the applicant to be eligible for subsidiary protection .

As an outcome the Court ruled that according Article 15(c) of Council Directive 2004/83/EC on minimum standards for the qualification and status of defining one as a refugee, is in line

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<sup>17</sup> Qualification Directive 2004/83/EC (2004), Recital 26

<sup>18</sup> C-465/07 (2009), paragraph regarding the assessment of credibility.

<sup>19</sup> Qualification Directive 2004/83/EC (2004), Article 4(4)

with Article 2(e)<sup>20</sup>. First the Court stated that if there exists of a serious threat to the life of the applicant, then there is no need to provide evidence that he is specifically targeted by factors causing the threat particular to his personal circumstances. However the provisions as laid down in Article 15(c) are difficult to interpret in Article 29 of the *Vreemdelingenwet*, as the provisions were not transposed to the Dutch law by the date of 20 December 2006. The Court in 's Gravenhage annulled the decision of 20<sup>th</sup> December 2006.

#### 4.2 6.K.31.728/2011/14 - Hungary - Metropolitan Court of Budapest, KF v Bevándorlási és Állampolgársági Hivatal

An Afghan applicant (6.K.31.728/2011/14)<sup>21</sup> requested the refugee status in 2010, however this was rejected due to the claim that the applicant would not face any serious harm when returning to his country of origin. The applicant appealed the decision and noted that the concept of “serious harm” in the Hungarian Act of Asylum section 61 (c)<sup>22</sup> is broader than in Article 3<sup>23</sup>, on which the decisions was based. The claimant additionally appealed the decision on the grounds of current unsafe circumstances in the country. Stating that the current deteriorating circumstances country are too risky to be able to return the country of origin without facing any serious threat.

The Court did not recognize the claimant as a refugee due to incredibility of his motives to flee the country were neither consistent or convincing. However the situation in Afghanistan was unstable, which might result in risks for the claimant when send home, caused by the armed conflict in his province of origin. In addition countries which are struggling with armed conflicts, often do not provide save internal flights within the country. As this may lead to extension of the risks to areas that had been considered save before. This resulted into granting the applicant subsidiary protection on the grounds of well-founded fear of risk that he may be exposed to when returning to the country of origin.

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<sup>20</sup> Convention Relating to the Status of Refugees – UNCHR (1951), Article 2(e)

<sup>21</sup> 6.K.31.728/2011/14 (2012), Qualification Directive Art. 4, Art. 8, Art. 9, Art. 15, Art. 21

<sup>22</sup> Hungary –Act of Asylum section 61(c)

<sup>23</sup> European Convention on Human Rights (1951), Article 3

4.3. HM and Others (Article 15(c) Iraq CG, (2010) UKUT 331 (IAC) (Upper Tribunal (Immigration and Asylum Chamber) 06 08, 2010).

An Iraqi applicant claimed for subsidiary protection due to the circumstances in Baghdad at the time. The Finnish Immigration Service's rejected the claim, as according the UNCHR guidelines the threat in Baghdad is not sufficient to grant someone subsidiary protection. The applicant then appealed this decision, claiming that the security situation in central Iraq, especially in Baghdad, is causing a sufficient threat to grant subsidiary protection in this specific case.

The Court stated that in order to properly asses this case for international protection one has to look at both the law and fact. Meaning that one has to look at the current information concerning the security situation in Central Iraq, as well the previous experiences of the applicant in the country of origin. The decision to refuse the request of the applicant is due to the lack of provided information on experienced well-founded fear or persecution in Baghdad. The Supreme Administrative Court noted that both collective and individual factors must be reviewed, referencing to the *Elgafaji v Staatssecretaris van Justitie* (C-465/07)<sup>24</sup>, because the more the applicant can provide evidence that he has been exposed to a serious threat, the less the need of indiscriminate violence required. Furthermore referring to the Government Bill on the Aliens Act<sup>25</sup>, which states that the Geneva Convention does not cover the whole concept of internal and international armed conflict. There are other forms of armed violence and disturbances that can be included in the term armed conflict. Stating that the risk of harm can also include the general situation in the country, any person may be exposed to risk, e.g. individual targeting. The Supreme Administrative Court found out that family members of the applicant have been victims of arbitrary violence and that the applicant also has experienced some personal threat himself. Although the threat was not sufficient to lead to the conclusion that the applicant himself is being at risk, however on grounds of the Government Bill the occurring violence in Baghdad

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<sup>24</sup> C-465/07 (2009), Qualification Directive 2004/83 Article 15

<sup>25</sup> Government Bill on the Aliens Act, 2016



may be targeted at anyone indiscriminately. The improvements in the security situation in the region are not sufficient to designate the region as safe. Thus by weighing the personal and the current information of the region of origin, the applicant claim for the refugee status has been refused but still was granted subsidiary protection.

#### 4.4 Conclusion: the application of EU asylum legislation to post-conflict situations

The application of Elghafaji for obtaining a residence permit in the Netherlands was in the first instance rejected by the Dutch Minister on grounds laid down in the *Article 29(1)(b) of the Vreemdelingenwet 2000*, stating that sufficient evidence must be provided of the threat the applicant may face when returning to the country of origin. However according to Article 15(c) of the Directive, an applicant whose life is confronted with a serious threat in the country of origin does not need to provide evidence of him specifically being targeted by the factors that are causing the threat. But in order for this provision to be applicable to a third country national, the nature of the threat has to be examined. Only if the level of indiscriminate violence that characterizes the armed conflict causing the threat, reaches such a high level believing that if a civilian is sent back to the country of origin he may face a serious threat only by his presence in the territory. This case also refers to weighing the personal factors with the level of indiscriminate violence in the country or region. Additionally this section of the Directive has to be interpreted independently from all the other articles. These provisions are more difficult to interpret in *Article 29 of the Vreemdelingenwet 2000*, while they are not put down as clear as in the Directive. The Afghani applicant's case (6.K.31.728/2011/14<sup>26</sup>) demonstrated that due to the unsafe situation of a region in the country of origin, the applicant may face a real risk if sent back. The applicant was granted subsidiary protection according to Article 15(C) of the Directive. The Iraqi citizen (case: 2010] UKUT 331<sup>27</sup>) was referenced to the Elghafaji<sup>28</sup> case, noting that the more the applicant's risk to threat is caused due to personal factors the less indiscriminate violence there has to be in the country of origin to be eligible for subsidiary protection. The applicant later elaborated that he himself as his

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<sup>26</sup> 6.K.31.728/2011/14 (2012), Qualification Directive Art. 4, Art. 8, Art. 9, Art. 15, Art. 21

<sup>27</sup> (2010)UKUT 331 (2010), Qualification Directive Art. 15(c)

<sup>28</sup> C-465/07 (2009), Qualification Directive 2004/83 Article 15

family members have been threatened as would be facing a real risk if sent back to the country of origin. The initial claim for asylum on grounds of the current unstable situation in the country were considered to be insufficient. Nonetheless, with having elaborated on the personal factors the Court was able to weigh both factors and decided to refuse the claim for the refugee status but granted subsidiary protection instead.

To answer sub-question two, to what extent is the Qualification Directive of the EU applicable in post conflict situation, the cases show that evidence is not necessary if the applicant is being personally targeted. The claimant can weigh the personal circumstances with the current situation of the country, illustrating that the Qualification Directive is more flexible in the situation of the applicants on whether one should grant them subsidiary protection. This means that third country nationals from post-war countries have grounds to obtain asylum on grounds set by the Qualification Directive, rather than the Convention.

Having examined the applicability of the Qualification Directive concerning immigrant from post-war countries, chapter four will elaborate of the applicability of the Qualification Directive and the Geneva Convention in the Dutch Courts.

## 5. The application of the EU and international norms by Dutch Courts

This section will provide three Dutch case laws which incorporated the *Article 29 of the Vreemdelingenwet 2000*<sup>29</sup> on third country nationals coming from Iraq and Afghanistan. Again as the previous chapter a better view will be given on how and when these persons can be designated as refugees. This chapter will help in answering sub-question three, by examining the Dutch cases (ECLI:NL:RVS:2011:BR 2021<sup>30</sup>, ECLI:NL:RVS:2015:2017<sup>31</sup> and AWB 09 / 30503<sup>32</sup>). This chapter will illustrate well The Geneva Convention and the Qualification Directive are implemented on a national level, clarifying whether the same conditions have to be met by third-country nationals coming from post-war region.

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<sup>29</sup> *Vreemdelingenwet 2000* (2013), Article 29

<sup>30</sup> ECLI:NL:RVS:2011:BR 2021 (2010), *Vreemdelingenwet 2000 Article 29*

<sup>31</sup> AWB 09/09/30503 (2010), *Vreemdelingenwet 2000 Article 29 and Article 31(f)*

<sup>32</sup> ECLI:NL:RVS:2015:2017 (2015), *Vreemdelingenwet 2000 Article 29(1b) and (3b)*

## 5.1 ECLI:NL:RVS:2011:BR 2021 – Minister of Immigration and Asylum V. the applicant and the Justice Minister

On the second of February 2010 the Afghani applicant has notified about the refusal of his request his request for a residence permit. The applicant has appealed this decision on grounds of the general deteriorating safety conditions in Afghanistan. The Minister of Immigration and Integration has complained that the Court made its judgment without questioning the accuracy of the general official reports of the Minister of Foreign Affairs in the year 2009 till 2010<sup>33</sup>. Noting that one cannot exclude the occurring events in Afghanistan, specifically Kandahar, as they fulfil the same standards as those mentioned in Article 15(c) from the Qualification Directive. The Minister furthermore argues that with the available information on Wikileaks and the by him received message from the Human Rights Watch of the available internal documents on the American army about the war in Afghanistan in the period of 2004 till 2009, has not led to the objective that there is question of such an exceptional circumstance.

From the former claims a ruling has been made on the ninth of march 2011, declaring the appeal against the initial decision unfounded. The applicant has not provided evidence of being exposed to a real serious threat when returning to Kandahar, Afghanistan. Referring to the official reports of the Minister of Foreign Affairs from the period of 2009 – 2010, the ‘UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-seekers from Afghanistan’, the report of ‘the Afghan War: A Campaign Overview’, and several other reports. There is no sufficient evidence provided by the applicant to grant him subsidiary protection on the grounds of Article 15(c). Although official reports have mentioned the deteriorating circumstances in the province of Kandahar, one cannot determine that one by its presence in the area is exposed to a real risk or threat as mentioned in Article 15(c).

The applicant argued that the ruling was incorrect on him not being qualified for a residence

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<sup>33</sup> United Nations High Commissioner for Refugees (2011)

permit according to *Article 29 of the Vreemdelingenwet 2000*<sup>34</sup>, claiming for a categorical protection. The State Secretary then ruled that the current safety condition in Afghanistan is not sufficient to carry on a categorical protection.

#### 5.2 Iraqi applicant V. The Minister for Immigration and Asylum, AWB 09/09/30503 (*Rechtbank 's Gravenhage* 11 05, 2010).

The Iraqi applicant claimed to be a member of an influential family, from whom the members are active in the army. On the 27<sup>th</sup> of September 2008, the brother of the applicant was kidnapped. The applicant claims that he does not know what happened further to his brother. The family left their house the next day, and the applicant and his brother left country that day. The applicant claims that they received a threat letter at their house, also that other family members are being threatened and that he does not know about the current well-being of his family. Furthermore, the family is facing a larger threat due to dealing cars with the Americans in the previous years.

The Court has stated the facts as credible, as are the claims that the family is being threatened due to the position of the grandfather, father and uncle of the applicant had. However the Court has stated that the applicant has not provided sufficient evidence that the received threats are specifically towards him. The Court then stated that family of the claimant can be qualified as being active in a risk group and that the family is being exposed to a higher threat due to the occupancy of several family members.

A residence permit can be granted to the applicant according *Article 29 Vreemdelingenwet 2000*, however Article 31 of the same directive states that the application will be denied if the applicant does not provide sufficient evidence of himself being exposed to the threat mentioned. This has led to the refusal of the applicants claims for a residence permit according to *Article 29*. The applicant has appealed this decision on grounds of *Article 31(f) Vreemdelingenwet 2000*<sup>35</sup>. The claimant belongs to a risk group due to his co-operation with

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<sup>34</sup> *Vreemdelingenwet 2000* (2013), Article 29

<sup>35</sup> *Vreemdelingenwet 2000* (2000), Article 31(f)

the Americans. From the amending Vreemdelingencirculaire 2000 (WBV) 2008/28<sup>36</sup> it shows that Iraqi citizens who collaborated with international organizations, diplomatic representatives, or foreign companies are exposed to a threat. The threat exposure has no limitations to particular family members, meaning that there is no need to provide evidence that the applicant is being personally threatened. The Court ruled that on the grounds of *Article 31(f) Vreemdelingenwet 2000*, the applicants appeal has been justified.

### 5.3 ECLI:NL:RVS:2015:2017 – Iraqi applicant V. The Secretary of Security and Justice

On the 12<sup>th</sup> of September 2014 the Secretary of State has declined the applicant's claim for granting him a residence permit. The Shiite Iraqi applicant appealed this decision on grounds of the security situation in the province Najaf, Southern Iraq. Claiming that according *Article 29(1b) Vreemdelingenwet 2000* that one is eligible for a residence permit if there exists an exceptional situation in the region of origin. He provided additional documents on the current situation in the region. The applicant claims that due to the fast changing circumstances in the region, the general safety situation in Iraq is not safe to return to Southern-Iraq. He referred to report of the UNHCR regarding the 'Position on returns to Iraq' published on October 2014<sup>37</sup>, and an Article from the non-profit organization 'Vluchtelingenwerk Nederland'<sup>38</sup> which elaborates on the safety situation in Iraq.

The Secretary of State claims, as mentioned in the judgment made on the 12<sup>th</sup> of September 2014, that there is no question of an exceptional situation in the Southern of Iraq. Stating that Southern-Iraq, unlike to particular regions in Iraq for whom exists a departure moratorium, is not occupied by the Islamic State and that the level of violence is very low. Additionally, the situation in April 2015 has not changed in term to the previous year. This shows that there exists a stable situation in this particular region, this is also visible in the

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<sup>36</sup> *Vreemdelingencirculaire 2000 (WBV) 2008/28*, The vreemdelingencirculaire is an guide for of the policies and the application of them.

<sup>37</sup> UNHCR, 2014

<sup>38</sup> Vluchtelingenwerk, 2011

low migration flow from this area in the recent years. The Secretary of State points out that the initial ruling of the Court is correct.

According to *Article 29(3b) Vreemdelingenwet 2000*, protection must be provided to any person in a situation where the general violence in the on-going armed conflict reaches such a high level that one can assume that there will be a real risk for the civilian if sent back. This situation is considered to be exceptional known as the “most extreme case of general violence”. Official reports state that the level of violence has not increased since September 2014, also claiming that it is not usual for IS to head this far in the south of Iraq. However the reports mention that the sectarian tensions have increased since IS became active in Iraq. The majority of the inhabitants of Southern-Iraq are Shiite, this led to sectarian e.g. threats, murders, kidnapping of the Sunni minority in that region as a response towards the Sunni rebels who in particular aim at Shiite civilians. One can say from the provided official reports that the situation in Southern-Iraq is worrisome and needs to be monitored. Nonetheless, the current stability in the region and the non-random violence led to the judgment that there is no exceptional situation in Southern-Iraq.

The applicant did not provide additional documents which show that he may face a real risk if he returns to the Southern of Iraq, meaning that the appeal is unfounded.

#### 5.4 Conclusion: the application of international, European and national legislation to post-conflict situations in the Netherlands

The Afghani applicant (case: ECLI:NL:RVS:2011:BR 2021)<sup>39</sup> claimed that he is eligible for subsidiary protection due to the unrest in the country of origin, referring to the official reports on Afghanistan. However, Article 15(c) of the Qualification Directive as well the *Article 29* of the *Vreemdelingenwet* cannot provide any protection with the information that the applicant provided. In the case of the Iraqi applicant (AWB 09 / 30503)<sup>40</sup>, subsidiary protection was granted according to *Article 31(f)* of the *Vreemdelingenwet*. The article acknowledges the threat Iraqi citizens face who have worked with foreigners from the West.

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<sup>39</sup> ECLI:NL:RVS:2011:BR 2021 (2010), *Vreemdelingenwet 2000 Article 29*

<sup>40</sup> AWB 09/09/30503 (2010), *Vreemdelingenwet 2000 Article 29 and Article 31(f)*

According to *Article 29*, more evidence was needed in order to grant the applicant subsidiary protection. In the case of the applicant from Southern-Iraq (ECLI:NL:RVS:2015)<sup>41</sup>, the Court denied subsidiary protection due to the lack of violence or threat of facing a serious risk. While the claimant has not based his application on any personal circumstances, the current situation in the region was not sufficient to grant the applicant a residence permit. Regarding sub-question three: How have Dutch Courts applied the rules stemming from the Geneva convention and the EU legal system in relation to the status of refugees for individuals coming from Iraq and Afghanistan, the Dutch Asylum law is more similar to the Convention than the Qualification Directive. Despite the some differences between *Article 29*<sup>42</sup> and the Directive, the applicant can refer to the any of the legislations when applying for a residence permit.

In the next chapter an analysis will be made based on the findings in this research. A comparison will be made between the different legal levels on their applicability concerning immigrants from post-war countries.

## 6. General conclusion and answer to the main research question

The increased flow of immigrants towards the European Union mainly due to the armed conflicts or serious risk of being exposed to harm in the country of origin, has been continuing for a couple of years now.

The application of the Geneva Convention in cases in post war countries, showed that one has to fulfil the requirements as laid down by the Convention explicitly. The rigidity of the Convention leaves hardly any room for further interpretation of the provisions to be applicable to a larger group of asylum seekers.

By applying the Geneva Convention in the International Law in post conflict situations, the cases show that Article 2 and Article 3 of the Convention are considered to be strict guidelines for granting an applicant the status of a refugee. Additionally the applicant has to provide concrete facts of the real risk that he has to face if returning to the country of origin.

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<sup>41</sup> ECLI:NL:RVS:2011:BR 2021 (2010), *Vreemdelingenwet 2000 Article 29*

<sup>42</sup> *Vreemdelingenwet 2000 (2000), Article 29*

If this not sufficient amount of material is provided, then the request of the applicant for asylum will be declined.

As Moreno-Lax (2014) stated, that in order for the asylum system in the EU to be effective it has to be capable of identifying refugees in an efficient and accurate manner by balancing refugee protection and migration control. With the introduction of the Qualification Directive, the EU has indeed better aligned provisions with the Refugee Convention. Case law of the European Court of Human Rights and Article 15(c) offer supplementary or other protection in comparison to Article 3 of the Convention. The Directive provides protection to third country nationals who otherwise would not qualify for as Refugee according to the Convention, namely 'refugees in a broader sense'. The harm mentioned by the Directive references a more general threat than that mentioned in the Convention. Secondly, the indiscriminate violence in the country of origin of the third country national may be weighed with the personal risk that the applicant may face and vice-versa. This means that the higher one of the factor is, the less the need for the other factors is. Thirdly, if there exists a serious threat to the life of the applicant, then there is no need to provide evidence that he is specifically targeted by factors causing the threat particular to his personal circumstances. These interpretations of the directive provide third country nationals more easily protection and obtain a residence permit in one of the countries in the EU, than by getting assigned as a refugee according the Geneva Convention.

On a national level, the Dutch cases showed the criteria that a third country national has to meet in order to be granted a residence permit according to *Article 29 of the Vreemdelingenwet 2000*, are higher than the ones laid down in Qualification Directive. One case showed that regardless the claim of the applicant on facing a serious threat, the Dutch Law still has not granted any subsidiary protection whilst the Qualification Directive would have acknowledged this an sufficient threat to grant him protection.

The case law examined shows that the Geneva Convention is quite rigid to be applicable to larger group than in the criteria mentioned in Article 2 and Article 3 of the Convention.

Thus, third country nationals coming from post conflict countries can obtain the refugee status if the personal circumstances of the applicant meet the criteria as laid down by the Convention. However third country nationals coming from post conflict countries can obtain a residence permit more easily through the Qualification Directive. While the Directive



allows a greater amount of interpretations and is applicable to third country nationals who otherwise would have not met the criteria set by the Geneva Convention.

To give an answer to the research question, third-country nationals can obtain and maintain their refugee status if they comply with the criteria of one of the legal levels. The interpretation of the articles in the Geneva Convention and the Dutch Asylum Law seems to be more difficult than in the Qualification Directive, making Article 15(c) the most easiest to comply with. The Geneva Convention seems to be quite rigid, making it applicable to third-country nationals whose situation is explicitly according to the Convention. As stated before the Qualification Directive acknowledges refugees in the broad sense, which would apply to more third-country nationals from post-war countries than the Convention or the *Vreemdelingenwet 2000*.

This means that third country nationals should base their application on both the national and EU law to optimize their opportunities on receiving a residence permit. Despite the limited applicability of the Convention on third country nationals, the Directive is beneficial for skilful lawyers to try to interpret the Convention standards according to the Directive itself.

The aim of this paper is to answer the following research question: *Under which conditions can third country nationals coming from post conflict countries obtain and maintain their refugee status in Europe?* To give an answer to this question, third-country nationals can obtain and maintain their refugee status if they comply with the criteria of one of the legal levels. The interpretation of the articles in the Geneva Convention and the Dutch Asylum Law seems to be more difficult than in the Qualification Directive, making Article 15(c) the most easiest to comply with. The Geneva Convention seems to be quite rigid, making it applicable to third-country nationals whose situation is explicitly according to the Convention. As stated before the Qualification Directive acknowledges refugees in the broad sense, which would apply to more third-country nationals from post-war countries than the Convention or the *Vreemdelingenwet 2000*.

The Directive is still being updated once every few years, there is the need to examine the case law and find out how the Directives can be interpreted through the cases, to grasp a full understanding and use of the Directive.

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