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**MULTILEVEL REFUGEE PROTECTION IN GERMANY:
THE IMPACT OF CEAS ON EXCLUSION AND REVOCATION**

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List of Abbreviations

AfD	Alternative für Deutschland
CAT	Convention Against Torture
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CoE	Council of Europe
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EPC	European Political Cooperation
EU	European Union
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
IDPs	Internally displaced persons
QD	Qualification Directive
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
US	United States

Chapter 1

1 Introduction

An influx of refugees of apocalyptic proportions, terrorist plots and attacks - interlaced with rising levels of xenophobia, Islamophobia, racism and an overall feeling of instability and unease among the general public - magnified by hordes of fear-mongering politicians pursuing a security-laden agenda... Although it may sound like a blockbuster script, these events and sentiments were at the heart of European politics ever since the first Syrians fleeing the carnage of the civil war in their home country started arriving in Budapest in the summer of 2015 and tried to make their way North. What followed was a cascade of national escalatory responses aimed restricting the freedom of movement, particularly in the form of reinstitution of border controls; an international campaign orchestrated by the EU to minimize the inflow of foreign nationals which culminated in a much-criticized EU-Turkey deal and even more dubious agreements with Libyan militias; and a lukewarm response by the European institutions both in terms of the level of ambition and amount of offered assistance to the frontline member states bearing the brunt of the influx.

Yet, 2015 is also memorable for another reason, as a record number of terrorist attacks were planned, foiled or carried out in the EU¹. According to Europol, there were almost 700 arrests for jihadi terrorism and more than 200 attacks that took place that year². Many of these attacks went unnoticed, but two managed to capture the headlines because they sparked widespread moral outrage and indignation: the assault on Charlie Hebdo and the Paris attacks. The latter was particularly horrific as the onslaught on the French capital claimed lives of 130 innocent victims³. In terms of impact, it was the most devastating terrorist act carried out on European soil since London and Madrid bombings almost a decade earlier.

This event had a profound impact on the immigration debate in the EU because of its timing. The evidence uncovered by the French police pointed to possible links between refugees, who came mostly from Syria, and terrorists, as two of the perpetrators had Syrian passports⁴. For many people - regular civilians and government officials alike - this connection raised the prospect of terrorists coming to the EU in the guise of refugees⁵. As a result, the EU countries started to impose tougher measures at their borders attempting to control the influx and contain the possible threat. However, soon it became clear that the situation was spiraling out of control, as the numbers of refugees crossing into the EU

¹ BBC (2016). Record number of EU terror attacks recorded in 2015.

² Europol (2015). European Union Terrorism Situation and Trend Report.

³ Independent (2019). Watch: A timeline of terror attacks in Europe since 2015.

⁴ The New York Times (2015). Paris Attacks Shift Europe's Migrant Focus to Security.

⁵ The New York Times (2016). Terrorism Suspects Are Posing as Refugees, Germany Says

were steadily increasing with no end in sight. Furthermore, it was virtually impossible to implement mass-scale screening programs to register all the incoming migrants, much less identify potential terrorist suspects. And so, the governments reverted to national action, as described above, to appear capable of managing the influx that was gradually evolving into a “crisis”.

Fast-forward to the present day, few could have predicted that the Refugee Crisis and the ensuing cataclysmic events would shake the EU to its core and threaten the very fabric of solidarity and liberalism that hold the European nations together. The populist right-wing parties are on the rise across the EU, redefining the immigration debate. In the period 2015-2018, such parties achieved electoral successes in many European countries. While in most cases a significant proportion of the general vote did not propel these parties into positions of power, in some, they became members of the governing coalition. Ideologically, right-wing populists are averse to multiculturalism and immigration, which is seen as a threat to national identity. The Refugee Crisis and the looming terrorist threat provided them with an unprecedented opportunity to advance anti-immigrant agenda and score electoral victories. In turn, established political parties were obliged to adopt the right-wing rhetoric to maintain their grip on power; if they failed to do so, they were punished by domestic voters.

The influence of right-wing populist parties on the immigration debate is noticeable not only with respect to the ideological dimension, as more and more leaders across the EU appear to embrace the mantra of appearing tough on immigration, but often spills over into the realm of policy. There are several documented cases when Eastern European countries with right-wing populist governments resisted the EU-mandated relocation schemes because most of the refugees allocated to them came from the Muslim-majority countries and hence were perceived to undermine the cultural homogeneity of domestic societies⁶. There are also instances when populist governments imposed tough measures targeting illegal immigrants, but in practice also affected refugees with genuine protection needs⁷. Even in countries, where populism could be contained, immigration and asylum policies were significantly tightened. While the effects of such policy changes cannot be solely attributed to the emergence of right-wing populism, as countries like Germany were responding to a panoply of legitimate public concerns, the anti-immigrant posturing of domestic populists and the resulting political exigencies forcing the leadership to act undoubtedly played a role.

However, the effects of right-wing ideology on the EU asylum policy should not be overstated. Aside from an occasional deviation that manages to capture the headlines, the policy is characterized by a remarkable degree of continuity and consistency. For starters, one must keep in mind that asylum and

⁶ Politico (2017). Why Poland doesn't want refugees.

⁷ Amnesty International (2016). Hungary: Appalling treatment of asylum-seekers a deliberate populist ploy.

immigration are two separate legal frameworks. Whereas immigration is a national prerogative, which entails a broad margin of discretion as regards specific measures that countries put in place, asylum is regulated in international law. The 1951 Refugee Convention codifies key legal norms on asylum which form the basis of the international refugee protection regime. These norms have inspired the creation of several regional regimes of refugee protection, including the Common European Asylum System. In the EU legal order, CEAS is but a piece of a broader rights-protection framework spanning several legal sources. First, the primary law underpinning the EU legal order contains references to key international norms on asylum. Thus, compliance with international refugee law is a constitutional requirement in the EU, which pervades all the subsequent measures adopted in the field of asylum. Second, the EU is bound by ECHR to protect refugees. The jurisprudence of ECtHR has been helpful in bridging the gap between human rights and refugee law and illuminating some of the core obligations of European states to refugees under the former branch of law. Third, the obligation to protect refugees is codified in the secondary legislation in the form of legal instruments comprising CEAS. Finally, CJEU ensures that the member states comply with their obligations under the EU law and implement asylum provisions contained in the secondary legislation in a consistent manner. Thus, the EU legal framework on refugee protection can be seen as a hedge against the restrictive impulses of the member states, as it determines the scope of possible changes with respect to asylum that the EU countries can undertake.

Nevertheless, the EU governments exert considerable influence over asylum policy. At the EU level, the decision-making process endows representatives of the member states with a veto power over the final legislative text. In other words, any European law must secure the necessary majority in the Council before it is adopted. Hence, to a large degree it is the member states themselves that determine what laws will govern them. At the national level, the EU governments enjoy a wide margin of discretion when giving effect to the European provisions in domestic legislation, as they have several methods at their disposal. As already noted, European laws determine a broad scheme for the EU governments to follow, whereby the states are free to “fill in the blanks” according to their voter preferences.

In a nutshell, asylum cooperation in the EU can be seen as a “two-level game”, comprising European and national levels (Putnam, 1988). There are constraints and opportunities for the member states on each level, which they try to leverage when implementing EU laws to accommodate concerns of the domestic public. The purpose of the present thesis is to examine implementation of CEAS in Germany. It evaluates whether CEAS has contributed to the tightening of domestic asylum laws. The next section briefly reviews literature on the impact of the EU on national asylum legislation.

2 Literature Review

Literature on the effects of the EU asylum policy can be divided into two strands. The first strand focuses solely on the European level and examines the effects of the European institutions on the quality of legislative output. In this regard, the Commission received the most attention. As a supranational policy entrepreneur, it managed to push through a liberal asylum agenda despite the security-inspired discourse on immigration following the September 11th attacks on the US and the institutional rules of the Amsterdam Treaty favoring the Council of Ministers. Kaunert (2007) argues that the Commission managed to convincingly construct normative and functional linkages to the existing instruments and structures to pitch a liberal asylum framework to the member states. On one hand, the Commission embraced the Refugee Convention as the normative frame for CEAS, thus, fending off more restrictive international norms on counter-terrorism propagated by the UNSC. On the other hand, it consistently advocated for applying policy harmonization framework to the asylum policy domain. From a functional perspective, it made sense to the member states because the Commission had the necessary expertise acquired during several decades of integration of the Internal Market and hence was perceived as a credible actor by the EU governments (Hix and Hoyland, 2011). This strategy paid off and the Commission persuaded the member states to adopt the first package of the EU asylum instruments.

More recent research focuses on the impact of institutional changes brought about by the Lisbon Treaty on the quality of the legislative output. Under the new institutional framework, co-decision is the standard decision-making procedure in the area of asylum, with the EP and the Council as co-legislators. Furthermore, CJEU exercises full judicial control over the policy. It can review the legality of measures adopted by the EU governments and deliver preliminary rulings on contentious questions about the interpretation of the relevant provision of the EU law raised by national courts. As regards the impact of these changes, Ripoll Servent & Trauner (2014) note that “communitarization” of asylum policy competences under the Lisbon Treaty had some impact on the quality of adopted legislation- Comparing EU asylum legislation before and after these changes became effective, they argue that the recast instruments are less restrictive and more harmonized than their first-phase counterparts. However, they also note that only a handful of provisions comply with this trend, which is due to the fact that asylum “policy core” has been negotiated in the Council prior to the empowerment of the EP and CJEU (Trauner & Ripoll Servent, 2016).

The second strand of research focuses on the impact of the EU asylum cooperation on the asylum policies of the member states. Previous research emphasized the propensity of such cooperation to produce suboptimal outcomes for refugees in terms of regulatory race to the bottom and lowest

common denominator policies (Hatton, 2005). Noll (2000) describes the product of the integration dynamic that characterized early stages of cooperation as a “common market of deflection”, whereby European countries tend to adopt more restrictive asylum policies to shirk responsibility for examining asylum claims.

More recent research, however, disconfirms these findings. Toshkov and de Haan (2013) find no evidence of regulatory race to the bottom among the EU countries as regards protection standards. After examining asylum application and recognition rates in the 29 European countries during the period 1999-2010, they find a degree of convergence on these indicators. These findings give credence to the idea that CEAS aspires to introduce common asylum standards across the EU. Furthermore, Zaun (2016) argues that, instead of producing lowest common denominator policies, the opposite outcome is the likely result of the EU asylum cooperation. She shows that CEAS increased the protection standards in several European countries. In this light, she underscores the role of “strong regulators” like Germany who try to impose their own vision of asylum policy on other countries via the EU in order to avoid material and ideational costs of domestic adaptation.

A related strand of literature investigates the effects of institutional overlaps, i.e. the presence of multiple regulatory frameworks covering the same subject, on the quality of national asylum legislation. Prior to the inauguration of CEAS, Guiraudon (2000) formulated the seminal “venue-shopping” hypothesis, which postulates that the governments elevate their cooperation on asylum and immigration to the EU level to avoid domestic constraints. The purpose of such cooperation is to avoid scrutiny by the judiciary and the NGOs and, thus, to have a free hand in introducing new measures aimed at tightening domestic laws on asylum and immigration. Probably the best-known confirmation of this hypothesis is the reform of the constitutional right to asylum in Germany, which was presented as a condition *sine qua non* by the German politicians in order for their country to comply with the EU law. Other restrictive notions and concepts of questionable legality were introduced into national laws of many EU countries because of the secretive cooperation that was taking place between their law and order officials at the EU level before 1999 (Byrne *et al.*, 2004).

However, recent scholarship put the “liberating” effects of the EU policy venue in question. The entry into force of the Lisbon Treaty had a major impact on the ability of the government officials from the EU member states to escape domestic constraints. Kaunert & Leonard (2012) note that the Lisbon Treaty changed the underlying structural preconditions that enable “venue-shopping”. Particularly, “communitarization” of the asylum policy gave the supranational institutions a larger stake in the policy process, offsetting the disproportionate influence of the Council. In combination with the related dynamic of “judicialization” of the European policy venue, which is linked to the empowerment

of CJEU, it raised the standard of protection of refugees in the amended asylum legislation. Finally, the empowerment of the EP encouraged humanitarian NGOs to enter European venue as full-fledged actors vying for legitimacy and authority (Kaunert *et al.*, 2013). Bonjour *et al.* (2018) note that these reforms, particularly the empowerment of CJEU, imposed “liberal constraints” on asylum cooperation between European governments making it less prone to secretive intergovernmental bargaining and more open to outside influence thus making it more akin to a domestic decision-making arena.

The research on the effects of the EU asylum cooperation points to a broader trend: the empowerment of supranational institutions improves the standard of treatment of asylum-seekers in the EU. First, the EU asylum provisions become less restrictive as a result of the involvement of supranational actors in the decision-making process, which can potentially result in a better treatment of refugees within a state. Second, they also contribute to the harmonization of domestic asylum provisions, resulting in the overall better treatment of refugees across the EU.

While these findings paint a promising picture of the EU asylum integration, there are some issues left unexplored. The mentioned studies focus predominantly on the EU level. That is, the effects of change are explored with respect to the EU instruments; whether or not domestic asylum laws are affected as a result of this change is unclear. Insofar as domestic changes are addressed, they are presented either in an incidental fashion to illustrate a point or detached from the broader dynamic of the EU asylum integration. It is worth pointing out that none of the articles addresses the influence of CEAS instruments on domestic legislation directly. In most of the mentioned studies, the main drivers of change are the supranational actors; the laws they enact are the main dependent variables; and the institutional structure of the EU accounts for the variation in the outcomes. Furthermore, these articles focus on the policy aspects of the EU asylum regime, while neglecting the normative side of the debate. Even though most of them employ qualitative research designs, they do not engage in doctrinal analysis of the relevant provisions. In most cases, the provisions of the EU instruments are compared before and after Lisbon changes took effect, categorized according to the direction of the change as “rights-enhancing” or “rights-restricting”, and then added up to determine the overall direction of the policy.

The present study seeks to close this gap by engaging in doctrinal analysis of the laws at the core of CEAS and their implementation in Germany to see whether domestic asylum policy is moving in a more restrictive direction as a result. The next section presents the main theoretical framework guiding the inquiry.

3 Theoretical Framework

The underlying proposition explored in the present thesis is that the presence of multiple regulatory frameworks in the field of refugee law erodes the quality of refugee protection by making it more restrictive. There is some theoretical support for this proposition. Alter and Meunier (2009) suggest that states can leverage “international regime complexity” to their advantage. When countries are embedded in various international institutions with overlapping claims to authority in a given issue area, they can adopt different strategies that exploit ambiguity about the applicable legal norms, which increases the scope of their action. Betts (2010) explored the significance of institutional overlaps with respect to refugee protection. He argues that the presence of international institutions with competing mandates worsens the quality of refugee protection because states can use alternative venues to circumvent their obligations under the international refugee regime (Betts, 2009).

International regime complexity presupposes a lack of hierarchical relationship between competing institutions (Alter and Meunier, 2009). In contrast, the EU legal order has a clear hierarchical structure. The principle of supremacy ensures that provisions of the EU law prevail in case of a normative conflict with domestic provisions. Furthermore, the principle of direct effect requires the EU governments to transpose European provisions into national law. As already noted, EU legislative texts put forward a broad normative scheme, which the governments need to adapt to their national circumstances. They can pass new laws, adopt administrative measures or use a combination of both to give effect to the EU law. In some cases, no action is necessary, if national courts deem domestic provisions broad enough to account for the effects intended by the EU legislator.

It matters significantly, which method of implementation the government chooses, as they entail varying degrees of discretion. If a country gives effect to the EU provisions by means of passing legislation, these laws automatically fall within the purview of CJEU. Furthermore, such laws must comply with the requirements outlined in the constitutional texts of the EU. Thus, this method imports a high degree of accountability. In contrast, if a country decides to adopt administrative measures to give effect to the EU law, they generally fall outside the jurisdiction of CJEU, unless they impinge on some fundamental individual rights. Since CJEU cannot review the adopted measure, it might be devised in such a way as to interfere with lesser aspects of the right that do not give rise to a complaint. Furthermore, in cases when administrative measures do interfere with individual rights, it might be justified by references to the pursuit of a legitimate public policy objective.

In the context of implementation, the degree of specificity of legal provisions plays an important role. On one hand, very specified legal provisions may restrict the discretion of domestic authorities by providing authoritative guidance as to their application. On the other hand, they also restrict the

interpretative freedom of judges when they are requested to rule on the application of such provisions. Furthermore, the purpose of clarification of legal provisions is relevant. Once again, there are two opposing dynamics at play. It is conceivable that the purpose of the legislator in specifying a legal provision is to extend the scope of its application to a number of cases not previously covered by it. It is also possible, that a higher degree of specificity results in the exclusion of an array of cases. Next, the function of the relevant provision in the broader legislative scheme is important. If that purpose is to restrict access to certain rights, specifying it can potentially decrease the number of applicable scenarios, thus making the provision more liberal. Conversely, if a legal provision is conceived to enhance individual rights, making it more specific may have restrictive effects. Finally, it needs to be pointed out that clarification of legal provisions is always context specific. That is, it can be done by various means, including addition of new requirements or changing the wording. However, the purpose of such specification can only be ascertained by looking at the position of the legal provision in the broader legislative scheme and its relationship with other clauses. The courts have a particular strong influence as regards contextualizing the application of norms. A judge can interpret legal provisions in light of various legal sources and create normative linkages between separate legal frameworks intended to clarify the ambit of the law in question. In this context, the source of the relevant norms matter, as it can expand or restrict the scope of the application of domestic norms in a given area.

In sum, there are several indicators that are worth examining while answering the main research question. First, the chosen method of implementation plays a role. Second, the level of specificity of the relevant legal provisions is important. Third, the goal of legal clarification needs to be considered. Fourth, the purpose of specific legal provision in the broader legislative scheme needs to be evaluated. Finally, the scope of the undertaken changes needs to be assessed.

The next section formulates the main research question and the sub-questions.

4 Research Question

The main research question that the thesis addresses is the following:

To what extent has the development of CEAS had a restrictive effect on the asylum policy in Germany?

Two points bear mentioning. First, the substantive focus of the thesis is restricted to the rules providing for the identification of the beneficiaries of refugee protection, conditions under which refugee protection is granted, and its scope. Second, the temporary scope of the inquiry is limited to a period

2009-2017. This period coincides with the introduction of the amended instruments into the European framework for asylum, as well as with a number of domestic legislative changes in Germany.

In order to answer the main research question, four sub-questions have been formulated. First, the duty to protect refugees comes from the international level. The 1951 Refugee Convention spells out the various facets of the legal duty to protect refugees. Therefore, the first sub-question is the following:

What is the existing legal framework that provides for refugee protection at the international level?

Second, there is an explicit link between the international refugee protection regime and the European regulatory framework for asylum. The 1951 Convention serves as a normative reference point for the EU asylum legislation. It establishes the standard of protection, from which the EU legislator cannot derogate. However, the two refugee protection frameworks serve distinct purposes, hence, there are also some differences between the two. Thus, the second sub-question is the following:

How has the international qualification framework for asylum been incorporated in the EU legal order?

Third, international and regional conventions are purposefully vague, which in turn prompts states to adapt the rules contained therein to national circumstances. Furthermore, neither international nor regional rules are self-applying, meaning that states must give effect to these rules in national law. Thus, the third sub-question is the following:

How have the cessation and exclusion clauses introduced in the QD been implemented in Germany?

Finally, the Refugee Crisis and the events that took place in the aftermath have summoned the specter of a “terrorist-refugee”. European governments have adopted a number of restrictive measures, arguing that terrorists posing as refugees try to infiltrate their countries and inflict harm on domestic institutions, critical infrastructure and citizens. However, the governments are not completely free to invoke security in the name of restricting the rights and freedoms of refugees. It is the task of the courts to check the restrictive tendencies of the executive branch. Hence, the fourth sub-question is the following:

How have the European and German courts interpreted exclusion and cessation clauses with respect to terrorist suspects?

In the next section, the methods used to answer the main research question and the sub questions are introduced and explained.

5 Methodology

With respect to the main research question, the central task is to investigate how the German legislator interpreted its mandate to protect refugees, given the normative constraints emanating from different legal sources. In order to answer that question, a systemic analysis is conducted. It comprises two steps. The first objective is to disentangle the various obligations that Germany has assumed under the banner of refugee protection and trace them to their normative origins. The second step involves evaluation of the normative constraints on the German asylum policy *inter alia* by having recourse to the indicators outlined in Section 3. The purpose of the sub-questions is to illuminate the various aspects of the normative constraints that the German legislator faces when implementing domestic asylum policy.

The first sub-question focuses on the norms of international refugee law codified in the Geneva Convention. It analyses the qualification framework for refugee status. The analysis of the international legal doctrine of refugee protection relies on the text of the Refugee Convention and on the vast legal commentary available on the subject.

The second sub-question looks at the European system of refugee protection and analyzes the provisions of the QD implementing the qualification framework of the Convention. The analysis of the doctrinal status quo focuses on the legal texts of the EU, explanatory secondary materials and the case law of CJEU, insofar as it establishes relevant precedents. Compared to the Refugee Convention, the QD serves a different purpose. To highlight the differences between the two legal sources, comparative approach is used. Also, where appropriate, a comparison is drawn to the previous version of the Directive. Finally, the question also explores the role of international norms in the EU legal order. In this regard, the conflict resolution rules, such as the principle *lex superior*, as well the applicable case law of CJEU, are relevant.

The third sub-question interrogates the implementation of the qualification framework in Germany with a focus on exclusion and cessation clauses. To that end, the legislative scheme established by the QD and its implementation in domestic law in Germany are juxtaposes and analyzed in light of the principles of direct effect and supremacy. The analysis also touches on the methods of implementation. Doctrinal analysis is the dominant methodology, whereby the relevant legal texts and accompanying materials are examined. Where appropriate, the analysis is supplemented with the commentary from the secondary literature.

The answer to the fourth question consists of two parts. The first section traces the development of the international normative framework on terrorism. The implementation of counter-terrorism norms in the EU and in Germany are explored in light of the principles *lex superior* and *lex posterior*. The former applies because there is a number of international counter-terrorism treaties, and international norms on the topic come from a variety of legal sources. The latter is relevant because the section covers the period 2001-2017, during which several normative texts on counter-terrorism were adopted. The analysis examines the relevant treaty texts as well as the legal commentary on the subject.

The second part examines the case law of the German Courts and CJEU. The cases are selected from a larger pool of samples provided by EDAL in such a way as to reflect the development of the doctrine on exclusion and cessation. The selection covers the period 2009-2017. The principle of supremacy is relevant for the analysis because of the hierarchical structure of the EU legal order. Furthermore, *lex specialis* is applicable as well, since exclusion and cessation belong to the framework of refugee law, while terrorists and terrorist suspects are covered by a different legal framework. Analogical reasoning is used to examine conditions that give rise to the application of different exclusion and cessation norms in order to identify the applicable pattern. It is supplemented by argumentation by syllogism to trace the influence of counter-terrorism norms on the doctrine of exclusion and cessation in refugee law. Where appropriate, the analysis of the case law is supplemented by the available legal commentary on the selected cases.

Chapter 2

Refugees are rightfully considered one of the most vulnerable groups of people in the world. What sets them apart as a class is that they do not enjoy the protection of their home country. In addition to that, they are outside the territory of that country without the prospect of returning there because of the circumstances that have caused their flight. Consequently, they need to turn to the international community for protection, whereby the “burden” of protection still falls on states. The state can assume protective responsibilities towards refugees by granting them asylum. However, there is no international duty that would bind states to do so, which creates a broad margin of appreciation for the national immigration authorities (Boed, 1994). In addition to that, refugees cannot rely on the rights as citizens in the host country. This leaves them in a very precarious situation, whereby they cannot go back to their home country, do not have the right to receive asylum, and cannot access any rights as citizens of the host country. The purpose of refugee protection is to fill this lacuna and ensure that refugees can rely on the entitlements granted to them under international law.

Protection of refugees is not an easy task in the international system where sovereign authority reigns supreme, and states are reluctant towards accepting humanitarian obligations – the absence of the right to asylum being but one example. However, the presence of universally applicable international refugee treaties points to the fact that sovereignty is not the only norm that structures inter-state relations, and humanitarian considerations undoubtedly exert some influence on the way states behave. The majority of states have ratified the 1951 Convention Relating to the Status of Refugees, which serves as the normative backbone of refugee protection. Furthermore, the majority of states have also acceded to the 1967 Protocol to the Convention, which has lifted the temporal limitation on the scope of the Convention application, thereby making it a universal refugee treaty. The Convention establishes “refugee” as a legal status akin to citizenship and lays down the features that define refugees as a class. It also attaches certain rights to the possession of refugee status, which the persons entitled to it can rely on while being outside their home country. Finally, it requires states to implement laws that would enable refugees to exercise their rights and guarantee them a dignified living.

The Convention is but one source of the obligations that states assume under the humanitarian banner. Binding regional arrangements, such as the EU asylum system, as well as domestic asylum laws are equally relevant for the purposes of refugee protection. Therefore, refugee protection refers to the totality of rules designed to protect and empower refugees. As Goodwin-Gill (2014) notes, refugee protection boils down to the use of treaties and national laws to ensure that no refugee in search of asylum is penalized, expelled or refouled, that refugees can enjoy the broad spectrum of rights to which they are entitled as “refugees”, and that human rights of every refugee are guaranteed.

Refugee protection is a very broad notion, and the main purpose of the present chapter is to narrow it down to its principal elements. Even through the provision of material assistance as well as the implementation of resettlement schemes remain crucial for the functioning of the international refugee protection regime, they are beyond the scope of the inquiry. The present chapter focuses on the international dimension of refugee protection, particularly the legal regime created by the 1951 Convention. First, the chapter briefly discusses the two sources of law that inform international refugee protection. Next, it turns to the rules and norms underpinning refugee protection, whereby the focus is on the qualification framework for refugee status. The chapter finishes with the summary of the main findings.

1 International law of refugee protection: two sources

The law of refugee protection derives its rules from two sources: international human rights law and refugee law. The former is considered a form of “soft” law because it cannot compel states to act in accordance with its postulates. Human rights norms can be traced back to national constitutions, which

provide for the rights and freedoms of individuals. However, in contrast to national constitutional rights, international human rights are not backed by the coercive authority of the state. In the international system, human rights norms affect the behavior of states through “acculturation”, that is dissemination of ideas and beliefs about the acceptability of certain practices (Goodman & Jinks, 2004). Until recently, human rights norms have not even been articulated in a treaty. Rather, they derive their force from “non-conventional sources”, such as customary international law, general obligations *erga omnes* and peremptory norms *jus cogens* (Goodwin-Gill & McAdam, 2007; Henkin, 1995; Simma & Alston, 1988). Since 1966, a number of international human rights instruments have been adopted, including the ICCPR and the ICESCR in 1966, and the CAT in 1984. These treaties give expression to some of the most fundamental human rights norms, such as the prohibition of slavery, torture, discrimination and *non-refoulement* (Goodwin-Gill & McAdam, 2007).

In contrast, international refugee law is a form of “hard” law because it flows from a universal treaty underpinned by the consent of sovereign states. The Refugee Convention is a duty-based instrument, in a sense that upon ratifying the treaty, the signatories have agreed to take up certain responsibilities with respect to refugees. Thus, in contrast to human rights treaties, the obligations established by the Refugee Convention are tangible, in that they are not informed by some vague notions of “customary practice” or the “interest of the international community”, but rather by the positive law of the treaty. Furthermore, the obligations are specific because the Convention only covers refugees, which renders it more suitable to address the particular concerns of this group of persons.

A detailed comparison of the two strands of international protection is beyond the scope of the inquiry. The purpose of the present section is to highlight the areas of their convergence and divergence, and why it is significant for refugee protection. The next section focuses exclusively on the protection regime established by the Convention.

2 International Regime of Refugee Protection

The international regime of refugee protection comprises the 1951 Refugee Convention and the UNHCR tasked with overseeing the implementation of the treaty by states. The two elements are examined in turn.

2.1 The UNHCR

Founded in 1950, the UNHCR is mandated to lead and co-ordinate international action to protect refugees and resolve refugee problems worldwide. Its primary purpose is to safeguard the rights and well-being of refugees. It strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another state, with the option to return home voluntarily, integrate locally or to resettle in a third country. States are bound to cooperate with the UNHCR by virtue of Article 35 of the Refugee

Convention, while Article 36 tasks the UNHCR with overseeing the implementation of the Refugee Convention by states.

The next section examines the Refugee Convention.

2.2 The Refugee Convention

The 1951 Convention is the legal instrument that forms the basis of the international refugee protection regime. The legal regime established by the treaty has two major purposes: to identify persons deserving international protection, and to endow them with a legal status accompanied by some rights. The scope of the Convention application is restricted to refugees. While there are other groups of vulnerable people who deserve international protection, such as IDPs, only refugees can obtain such protection. The treaty establishes a host of stringent criteria that need to be fulfilled for a person to qualify as a “refugee”. The fulfillment of these requirements automatically renders the person in question eligible for refugee status (UN Handbook, 1992). The official refugee status determination procedure employed by the state thus only serves to affirm it. In other words, the state cannot deny a person refugee status if all the relevant criteria laid out in the Refugee Convention have been fulfilled. If this is the case, it must either assume responsibility for the person in question or transfer the claimant to a different state that can offer effective protection (Chetail, 2014).

The recognition of refugee status grants access to the various entitlements contained in the Convention. Some of the rights that flow from it have been intended to compensate for the “disabilities” associated with “enforced alienage” (Hathaway & Foster, 2014), that is, for the precarious situation of being outside the country of origin without enjoying its protection. Other rights become accessible as soon as refugees reach their destination countries and establish territorial and legal ties with the host state.

While rules providing for the identification of the beneficiaries of protection and their subsequent empowerment are crucial elements of the international refugee protection regime, the regime would remain incomplete without specifying the methods that facilitate the achievement of the two objectives. To fill this gap, the refugee definition and the rights of refugees should be articulated in the country’s legislation for refugees to be able to be recognized as such, as well as to have access to the benefits associated with their legal status.

Therefore, the international refugee protection regime rests on three major pillars that govern: (i) access to protection, (ii) the content of such protection and (iii) the implementation scheme (Chetail, 2014). In a similar vein, the UN Handbook (1992) distinguishes between three distinct types of provisions contained in the Convention: provisions giving the basic definition of who is (and who is not)

a refugee and who, having been a refugee, ceased to be one; provisions that define the legal status of refugees and their rights and duties in their country of refuge; and provisions dealing with the implementation of the instruments from the administrative and diplomatic standpoint, respectively. Below, provisions comprising the qualification framework are examined in detail.

3 Refugee definition

The definition of the term “refugee”, which is articulated in Article 1 of the Convention, sets out the qualification framework for refugee status. Article 1(A)(1) applies to any person considered a refugee under previous international arrangements. Article 1(A)(2) defines “refugee” as any person who

“owing to 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”.

Article 1(C) spells out conditions when the Convention ceases to apply, while Articles 1(D) through (F) lay out criteria that justify the exclusion of a person from the scope of the Convention application.

Chetail (2014) notes that the refugee definition is highly selective, which is reinforced by its very structure. Article 1 introduces three “levels of requirements” that need to be fulfilled for a person to qualify as a refugee. First, Article 1(A)(2) spells out the “inclusion criteria” on the basis of four cumulative conditions:

- (i) first, a refugee is outside his/her country of nationality;
- (ii) second, he/she is unable or unwilling to avail himself/herself of the protection of that country;
- (iii) third, such inability or unwillingness must be attributable to a well-founded fear of persecution;
- (iv) and fourth, persecution must be based on five grounds (race, religion, nationality, membership of a social group, and political opinion).

Second, even if a person duly satisfies all the criteria set out in Article 1(A)(2), he/she might be excluded from the scope of the Convention application. The “exclusion criteria” are documented in Article 1 sections D through F. First, a person is ineligible for the refugee status if he/she already benefits from other forms of protection, whether he/she receives UN protection (Article 1(D)) or has rights/obligations attached to the possession of the nationality in his/her country of residence (Article

1(E)). Second, a person cannot enjoy the benefits of the Convention protection if the person in question has committed one of the serious crimes mentioned in Article 1(F). Finally, the protection granted by the Convention is not permanent. The presence of “cessation clauses” stresses the temporary nature of protection offered, which is terminated as soon as the need for such protection is no longer justified (Chetail, 2014). In what follows, the inclusion, exclusion and cessation clauses are examined in detail.

3.1 Inclusion

According to the definition, a refugee must be outside the country of origin because he or she fears mistreatment there. While the requirement to have crossed an international frontier certainly has an instrumental value in narrowing down the pool of potential candidates for international protection, it is not the most important inclusion criterion. Rather, the fear of mistreatment in the country of origin is the central feature of the refugee definition. The Convention frames the latter requirement as the need to have a “well-founded fear of being persecuted”, which comprises two elements. First, the refugee definition stipulates that the fear must be “well-founded”. Second, the Convention provides protection only against particular forms of harm that reach the level of “persecution”. The two elements are examined in turn.

3.1.1 *Well-founded fear*

The Convention itself is silent as to what the constituent elements of the “well-founded fear of persecution” entail. The UN Handbook provides critical guidance as to the interpretation of this provision. With respect to “well-founded fear”, the document proposes a bipartite standard of assessment (UN Handbook, 1992). That is, the claimant’s testimony must point to the perception of subjective risk on one hand, and the risk perceived must be grounded in some sort of verifiable truth on the other hand. Hence, the “fear” experienced must be “well-founded”. However, scholars are divided as to the interpretation of this provision. Some legal commentators endorse the bipartite standard suggested by the UN Handbook (see Goodwin-Gill & McAdam, 2007, Ch.3). They argue that the evaluation of the subjective dimension of fear looks at the evidence of various aspects of an individual’s life, including beliefs and commitments. These facts help locate the individual in a social and political context, which in turn may attest to the “reasonableness” of fear when considered against the backdrop of objective evidence. Others reject this idea. For example, Hathaway & Foster (2014) argue that the bipartite standard imposes an additional burden on a refugee to prove to state authorities that he or she is, in fact, in a state of personal terror. They note that, the notion of fear employed in the Convention refers to a prospective risk, rather than an emotional state. In their view, the Convention does not warrant the inclusion of subjective factors into the overall assessment of fear.

Therefore, they propose an alternative approach which is solely concerned with the “apprehension” of risk, that is, anticipating the likely consequences of the return by drawing inferences about the likelihood of future risks to the claimant based on evaluation of the objective evidence available (Hathaway & Foster, 2014). In practice, a combination of credible testimony and relevant country of origin data satisfies the test (Noll, 2005).

3.1.2 Persecution

Besides “well-founded fear”, “persecution” is another distinguishing feature of refugees. It is linked to all the other elements of the refugee definition. The fear of persecution looks to the future, as it encompasses prospective risk (Goodwin-Gill & McAdam, 2007; Hathaway & Foster, 2014). Thus, a person does not need to have left the country of origin on account of fear of persecution or having experienced it. It can arise during an ordinary stay abroad or because of the actions of an individual while abroad.

The term “persecution” is not defined in the Convention. Scholars and practitioners agree that it comprises two essential elements: serious harm and the lack of state protection (Goodwin-Gill & McAdam, 2007; Hathaway & Foster, 2014). As regards the first element, Hathaway & Foster (2014) suggest that human rights standards allow to determine whether the risk feared meets the threshold of relevant harm. Since the adoption of the UDHR, various human rights have been incorporated into a total of nine international human rights instruments. Because of the widespread codification of human rights, persecution is often interpreted as a form of severe violation thereof. However, it is often unclear what exact rights are protected against persecution and how severe the violation must be.

The risk of serious harm is often attributable to the lack of effective remedies against potential mistreatment. As stated in the UN Handbook, “a refugee is always a person who does not enjoy [state] protection”. The lack of such protection can take two forms. Under the first scenario, a refugee is unable to avail him/herself of the protection of the state due to the circumstances beyond the will of the person concerned. Under the second scenario, a refugee is unwilling to accept the protection of the country of his/her nationality because the government of that country cannot effectively protect the person in question from persecution (UN Handbook, 1992). Goodwin-Gill & McAdam (2007) argue that the lack of state protection might create “a presumption as to the likelihood of persecution and to the well-foundedness of any fear”. Hathaway & Foster (2014) go one step further in arguing that the lack of state protection must result in a sustained or systematic discriminatory conduct towards an individual before it can rise to the level of persecution. The motivation on the part of the agents of

persecution might be a relevant factor in the overall analysis, however, it is not as decisive as the lack of state protection.

There are several approaches to establishing the lack of state protection. For example, Goodwin-Gill & McAdam (2007) argue that it can be inferred from the failure of a country to exercise *due diligence* with respect to upholding the basic human rights, that is, when a country is unable or unwilling to detect, punish and prosecute rights abuses. Indeed, disaggregation of state protection into “ability” and “willingness” under *due diligence* dovetails with the bifurcated approach endorsed by the UN Handbook. However, it is silent on whether or not restrictions on the individual rights can be justified by reference to the pursuit of some legitimate public policy objective by a refugee-producing country. Therefore, Hathaway & Foster (2014) suggest a purely international standard for the evaluation of the lack of state protection. In their view, only when a state fails to protect one of the core entitlements recognized by the international community, and such failure results in a systematic and sustained violation of the recognized individual rights, can mistreatment rise to the level of persecution.

In addition to the fear of harm and the lack of state protection, there must be a connection, or a “nexus”, between the anticipated harm and one of the Convention grounds for protection. As already mentioned, the agents of persecution might target an individual “on account of” or “for reasons of” possession of one of the attributes that are relevant for refugee protection (Hathaway & Foster, 2014). The Convention mentions five grounds that warrant protection in Article 1(A)(2): ethnicity, nationality, religion, membership of a social group and political opinion. The fear of persecution can be established by reference to one or more of these characteristics. While ethnicity, religion and nationality are easily discernible, membership of a social group and political opinion are more elusive. In order to establish belonging to a social group, courts may look at the grounds for association, including voluntary ties based on shared values, some immutable characteristics that bind individuals together as a group, and the perception of the group by outsiders (Goodwin-Gill & McAdam, 2007; Hathaway & Foster, 2014). As regards political opinion, the interpretation is called for that encompasses the expression of deeply held political beliefs, but also includes political acts (Goodwin-Gill & McAdam, 2007).

3.2 Exclusion

Well-founded fear of persecution is the central inclusion criterion. However, even if a refugee duly satisfies this requirement, refugee status is not always guaranteed. The Refugee Convention provides for a possibility of exclusion from refugee status, which can take two forms. First, exclusion is justified if protection is already provided elsewhere as prescribed by Articles 1(D) and 1(E). These articles give expression to the notion of “surrogacy” of international protection. That is, in allocating responsibility for protection, priority should be given to national protection (Chetail, 2014). As a result, there is no

need to accord refugee status if a person already receives protection elsewhere. There are two categories of refugees who fall under the ambit of this provision. Article 1(D) states that refugees receiving protection from the UN agencies other than UNHCR are excluded from refugee status. Furthermore, Article 12(E) states that persons who possess rights and obligations, which are normally attached to the possession of nationality in their country of residence, are also excluded from refugee status.

Second, exclusion is also justified if the applicant committed serious crimes prior to applying for asylum. The rationale behind the exclusion under Article 1(F) is twofold. On one hand, the provisions of this article recognize that certain acts are so grave that they render their perpetrators “undeserving” of international protection as refugees. On the other hand, the legal framework of refugee protection is not intended to shield fugitives from justice from facing prosecution for their crimes (Nyinah, 2000). Exclusion clauses in Article 1(F) are meant to protect the integrity and moral authority of the institution of refugee protection by excluding person responsible for the suffering of refugees from refugee status, were they to seek protection. Therefore, the purpose of the exclusion analysis is not to highlight how a particular individual threatens or undermines the security of the host state; Article 33(2) deals with the latter concern. Rather, the focus of the analysis is on the actions of an individual before seeking asylum.

Article 1(F) lists three types of crimes that can disqualify a person from refugee status. The first category comprises international crimes, such as crimes against peace, war crimes, and crimes against humanity. It also contains a link to the relevant instruments of international criminal law that provide normative guidance for interpreting Article 1(F)(a). In this context, The Rome Statute of the ICC plays a prominent role.

Article 1(F)(b) lists serious non-political crimes as a ground for exclusion. In order for a wrongdoing to fall under this category, it must be both “serious” and satisfy the requirement of “criminality”. Opinions of scholars and judges converge with respect to the usefulness of criminal law framework when assessing either of these criteria. However, there is no agreement as to the reference country, whose Penal Code should serve a benchmark for the assessment in any particular case (Hathaway & Foster, 2014). Furthermore, the crime must be “non-political”. Hathaway & Harvey (2001) argue that extradition law framework is best suited to evaluate whether crimes committed by a person trigger the application of this provision because of the “political offence” exception in extradition law. If a person fails the latter test, he should also be excluded from protection pursuant to Article 1(F)(b) because of the “ethical symmetry” requirement, which mandates treating similar phenomena in a similar fashion under both frameworks. In practice, judges use a variety of techniques to evaluate the

non-political character of the wrongdoing, including proportionality, causality and proximity (Saul, 2004). The purpose of such tests is to relate the wrongdoing to the outcome it seeks.

Finally, the last category of excludable offences in Article 1(F)(c) refers to acts contrary to the purposes and principles of the UN. Traditionally, this clause has been interpreted as applying to those who held a position of power in a UN member state (Hathaway & Foster, 2014). Furthermore, the UN Handbook (1992) suggests that only acts impinging on an international plane should be considered as falling within the scope of this provision. With hardly any normative guidance as to the interpretation, Sivakumaran (2014) suggests a framework for analysis that encompasses two dimensions: assessment of the unlawfulness of the act on one hand and its gravity on the other hand.

There are certain ground rules that apply to the analysis of exclusion based on the commission of serious crimes. First, the evidentiary threshold under Article 1(F) is the “serious reasons for thinking” standard. Under this standard, the evidence required to sustain criminal liability must be clear and convincing. That is, both elements of the offence, including *mens rea* and *actus reus* requirements, must be met, as well as no plausible defense can be mounted (Hathaway & Foster, 2014). Second, even though Article 1(F) can be used to justify exclusion of a person from refugee status, the obligation of *non-refoulement* still binds states not to send that person back to the country where he or she fears persecution. Finally, the Convention does not contain the requirement to examine the qualification requirements in any particular order. Hence, states are free to begin status determination procedure by considering the applicability of exclusion clauses. However, because of the profound consequences of excluding a person from refugee status, judges are advised to perform “anxious scrutiny” with respect to the applicant, that is, apply exclusion provision in a restrictive manner and only after a careful evaluation of all the established facts of the case (UN Handbook, 1992).

3.3 Cessation

Because the benefits of the refugee status are intended for the duration of the risk, Article 1(C) lists several categories of persons who no longer need international protection. Refugee status ceases if a refugee voluntarily seeks out protection of the country of nationality; has lost nationality but chooses to reacquire it; reestablishes him/herself in the country of origin; or can no longer invoke the fear of risk because of some fundamental changes in the country of origin. Furthermore, Article 1(D) excludes from the refugee status persons who receive protection from other UN Agencies. Finally, Article 1(E) states that refugee status ceases to apply if a refugee has acquired protection from a third country.

Having discussed the qualification framework for refugee status, the next section focuses on the principle of *non-refoulement*.

4 Non-refoulement

The principle of *non-refoulement* is the cornerstone of refugee protection. Article 33(1) stipulates that

“[n]o Contracting State should 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 social group, or political opinion”.

The Convention does not define *non-refoulement*, nor does it establish any specific guidelines for the implementation of the principle. As a result, the scope of state obligations under *non-refoulement* remains disputed.

Despite the centrality of the principle of *non-refoulement* in the field of refugee protection, it remains ambiguous. First, there is a debate among legal scholars as to the status of the principle in international law. A number of scholars argue that *non-refoulement* represents a *jus cogens* obligation or a norm of customary international law (Allain, 2001; Goodwin-Gill & McAdam, 2007; Lauterpacht & Bethlehem, 2003), while others disagree (see Hathaway, 2005; Hathaway & Foster, 2014). Furthermore, there is no agreement in the scholarly community as to what the principle entails. There are two interconnected lines of inquiry, along which the principle has been approached and its content fleshed out. First, *non-refoulement* entails an obligation - not to expel or return - which is triggered under certain circumstances. Thus, the first set of questions delves into the conditions that can trigger *non-refoulement*. Second, Article 33(1) further stipulates that the obligation of *non-refoulement* is conditional on the presence of threats to “life or freedom”. Thus, the second set of questions relates to the nature of prohibited treatment that warrants *non-refoulement*.

As regards the circumstances under which *non-refoulement* is triggered, there are two central questions. First, does the principle apply only to persons recognized as refugees? And second, does it apply only to refugees who have already entered the territory of the state of refuge? The answer to the first question depends largely on whether one views *non-refoulement* as a treaty obligation or attaches a more fundamental meaning to the principle. For example, Lauterpacht & Bethlehem (2003) argue that the obligation of *non-refoulement* is so profound that it applies to all refugees, irrespective of whether they have been recognized as such or not. In contrast, Hathaway & Foster (2014) posit that the wording of Article 33 establishes a clear causative link, whereby recognition as a refugee precedes and conditions the benefits of *non-refoulement*.

Similarly, the answer to the second question depends largely on whether one views the principle through the prism of state obligations or as an individual right. Proponents of the former view argue that the relevant obligations under Article 33(1) are triggered once the state has exercised jurisdiction

over a refugee (Hathaway & Foster, 2014). In other words, state duties associated with *non-refoulement* are engaged only after a refugee enters the territory of the host state. There are two relevant duties. The core obligation of any state under *non-refoulement* is not to send refugees back to territories where they might face persecution. The second obligation is engaged when a refugee enters state territory. While recognizing that the admission of refugees is the prerogative of the state, *non-refoulement* entails the duty to not reject refugees at the frontier because the failure to anticipate their protection needs by refusing them entry might contravene the first obligation (Hathaway, 2005). The combination of these duties implies that there is also a duty to grant at least temporary asylum to a refugee for the duration of his or her status determination procedure (Chetail, 2014; Goodwin-Gill & McAdam, 2007). Proponents of the obligation-based view of *non-refoulement* accept the legality of affirmative measures that states adopt to prevent the arrival of asylum-seekers at their borders, as there is no obligation in the Convention or any other international instrument to facilitate the travels of refugees (Hathaway & Foster, 2014). Defenders of the rights-based view of *non-refoulement* counter that the imposition of measures preventing refugees from arriving at state borders implies bad faith on the part of the signatories because such measures are against the spirit of the Convention (D'Angelo, 2009).

Generally, the obligation-based view of *non-refoulement* is narrower than the rights-based variant because the former does not preclude *de facto* reservations to this provision, such as the non-arrival and *non-entrée* policies (Hathaway, 2005). Apart from reservations that result from the implementation of the principle by states, the prohibition of *refoulement* in the Convention permits explicit derogations. Article 33(2) stipulates that, the benefit of *non-refoulement* does not apply to refugees, who pose a threat to national security of the country of refuge. In contrast, human rights instruments permit no derogations from this principle.

As regards the prohibited treatment that warrants *non-refoulement*, once again interpretations diverge. Scholars agree that *non-refoulement* applies to persons with a “well-founded fear of being persecuted”. Clearly, Articles 1(A)(2) and 33(1) operate in tandem. The logic of the Convention is to provide “surrogate” protection to persons who fear mistreatment as a result of the failure of their home countries to guarantee respect for their basic human rights (Chetail, 2014). However, for international protection to be of any use to refugees, the ability of the state to expel or send refugees back to persecution must be constrained. Therefore, the principle of *non-refoulement* has been incorporated into the document as the ultimate safeguard against the arbitrary exercise of sovereign powers towards refugees at state borders. Considering *non-refoulement* through the prism of persecution further enhances the coherence of the rules of refugee protection. The language of Article 1(A)(2) is that of persecution, whereby other criteria set out in the definition operate as parameters

concretizing it. While Article 33(1) does not mention persecution by name, it is not only logical but also morally desirable not to send persons back to territories where they might face it. Therefore, the formulation “life or freedom would be threatened” clearly references the predicament of “being persecuted” in Article 1(A)(2).

However, when it comes to mistreatment which cannot be characterized as persecution, opinions diverge. For example, Lauterpacht & Bethlehem (2003) argue that aside from “well-founded fear of persecution”, the provision “life or freedom would be threatened” also encompasses the real risk of torture, or cruel, inhuman or degrading treatment, but also threats to life, physical integrity and liberty. This interpretation extends the benefits of *non-refoulement* to a broad category of persons, whose protection needs are not covered by the Refugee Convention or human rights instruments. Such a liberal understanding of *non-refoulement* has been rejected by other scholars and is not reflected in the actual state practice (D’Angelo, 2009; Hathaway, 2005; Hathaway & Foster, 2014). Furthermore, there is some contention about the formulation of prospective harm as a threat to “life and liberty” in Article 33(1). This textual ambiguity has at times been interpreted so as to accord the benefits of *non-refoulement* only to a sub-group of refugees, who can show that their “life and freedom would be threatened” in addition to having met the “well-founded fear of persecution” requirement (D’Angelo, 2009). Such interpretation effectively excludes certain groups of refugees from the scope of *non-refoulement*.

5 Conclusion

The present Chapter set out to explore the legal regime of refugee protection. The 1951 Refugee Convention codifies the international norms of refugee protection, while the 1967 Protocol ensures the universal applicability of these norms. The 1951 Refugee Convention is an inter-state treaty, and as such, a duty-based instrument. Therefore, states are the primary addressees of this instrument, not refugees. Even though scholars often point out that the Refugee Convention is a human rights instrument, and that international refugee law is a subset of human rights law, there are marked differences between the two branches of law and the respective legal instruments that they have produced. For starters, human rights treaties codify rights that inhere in all human beings, irrespective of individual properties or conduct. In contrast, the Refugee Convention codifies rights that inhere in a carefully circumscribed group of persons, subject to possible derogations and further reservations based on individual conduct.

Upon signing the Refugee Convention, states have agreed to guarantee a number of rights on behalf of refugees. In practice, it means that the rights that refugees possess flow from the refugee status, which is akin to citizenship in that it denotes the belonging of a person to some territorial entity. Some

of these rights are inchoate, that is, contingent on the recognition of refugee status by states, while others are said to inhere in refugees simply because of their predicament of being outside their country of origin without the possibility of return. Nevertheless, the recognition of refugee status is equally important for the latter category of rights as well, because states are not bound to provide the panoply of entitlements codified in the Refugee Convention to persons who do not qualify as refugees.

The principle of *non-refoulement* enshrined in Article 33(1) of the Refugee Convention is the central pillar of the international refugee protection regime. It embodies the fundamental belief that refugees should not be sent back to territories where they fear persecution. Compliance with this duty is necessary to ensure that refugees can rely on other legal entitlements contained in the Refugee Convention. *Non-refoulement* encompasses both rights and duties. Importantly, it entails an obligation on the part of states to not reject refugees at the border. Furthermore, it also entails a duty to examine refugee claims because failure to do so might amount to a breach of the core obligation under *non-refoulement*, i.e. not sending refugees back to territories where they fear persecution. Thus, some authors speak of an implied right to asylum, albeit of a temporary nature.

As soon as a state exercises jurisdiction over a refugee, a status determination process commences. Here, the refugee definition articulated in Article 1 of the Refugee Convention plays a crucial role as it sets out the qualification framework, which consists of inclusion, exclusion and cessation clauses. Inclusion criteria listed in Article 1(A) posit four requirements for the recognition of refugee status, the most important of which is the well-founded fear of being persecuted in the country of origin. The “well-founded” element of the definition has been interpreted as a probability of persecution occurring, while “persecution” is said to comprise serious risk and the lack of state protection. Serious risk refers to a systematic and sustained violation of human rights. However, it is often unclear which rights are so fundamental as to constitute persecution when breached. The lack of state protection comprises both the inability and unwillingness of the state in question to offer protection to its citizens, for example, by making available and enforceable a system of remedies against human rights abuses. Persecution manifests itself when the lack of state protection results in systematic and sustained violation of individual human rights. Finally, persecution is always discriminatory, and the Convention lists five protected characteristics that the agents of persecution seek to overcome in their victims, including race, religion, nationality, political opinion and membership in a social group.

The fulfillment of the inclusion criteria does not automatically lead to the recognition of an individual refugee status. Rather, it is also contingent on the non-applicability of exclusion clauses with respect to the individual in question. There are two types of exclusion. The first type reflects the idea that international refugee protection is a measure of last resort, and recourse to national protection should

take priority. The second type of exclusion is intended to preserve the moral authority of the Convention by preventing criminals, who are oftentimes responsible for creating refugee flows, from gaining access to refugee protection. There must be serious reasons for believing that the individual in question committed one or more of the prohibited crimes prior to applying for asylum before exclusion is triggered.

Finally, the cessation clauses reflect the idea that the benefits of refugee status are intended for the duration of risk.

Having discussed the main features of the international refugee protection regime, the next Chapter turns to the European asylum regime.

Chapter 3

The present chapter moves the focus towards the European regime of refugee protection. It is divided into two broad sections. The first section discusses the primary sources of law, which comprise the founding Treaties and the Charter of the Fundamental Rights of the EU. Also, it briefly touches on the role of the Refugee Convention in the EU legal order. The second section presents the secondary asylum legislation of the EU. It analyses the recast Qualification Directive because the instrument implements the qualification criteria contained in the Refugee Convention. The final section summarizes the findings.

1 Primary law of the EU

European regime of refugee protection has a hierarchical structure. In the hierarchy of normative texts of the EU, the TEU and TFEU occupy the highest position. That is, the founding Treaties are the ultimate normative frame of reference for the secondary measures adopted by the EU. The Lisbon Treaty has also elevated the Charter of the Fundamental Rights to the status of the founding Treaty. Together, these three instruments codify the corpus of the primary law of the EU. Furthermore, international norms also play a role in the EU system of refugee protection. International instruments, such the Refugee Convention, are frequently referenced in the primary normative texts of the EU, and European asylum rules expressly build on the norms of international refugee law. Thus, the relevant rules derived from the TEU, TFEU, the Charter of the Fundamental Rights of the EU and the Refugee Convention represent the top layer of the system of refugee protection in Europe. That is, they are responsible for the validity of the secondary measures adopted by the EU in the field of asylum. The rules on asylum derived from the secondary legislation form the bottom layer of the system of refugee protection in

the EU. The focus of this section is on the primary law of the EU and its relationship with the Refugee Convention.

1.1 TEU and TFEU

Even though the EU is not a nation state, its founding documents outline the values, norms and principles that govern it. After the entry into force of the Lisbon Treaty, TEU and TFEU codify the corpus of primary law of the Union. Articles 4 and 5 TEU establish a number of fundamental principles that govern the vertical allocation of powers and the relationship between the different levels of authority responsible for the attainment of the Union's objectives. First and foremost, Articles 4(1), 5(1) and 5(2) TEU codify the principle of conferral. Article 5(2) TEU states that "the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties". Articles 2-6 TFEU further categorize the various competences that the EU has acquired, i.e. areas of cooperation where member states have decided to pool their sovereignty and authorize the EU to act on their behalf. The exclusive competences of the EU are outlined in Article 2 TFEU. The EU and the member states have a shared competence to legislate in the policy areas mentioned in Article 3 TFEU; asylum and immigration falls into this category. Finally, the EU can provide support and coordinate activities of the member states in the policy areas listed in Article 4 TFEU. In short, the principle of conferral grants the EU the capacity to legislate in areas of exclusive and shared competences.

The principle of conferral operates in tandem with two other principles that govern the use of Union's competences. Article 5(3) TEU defines the principle of subsidiarity, which applies to areas of shared competences. The principle states that the Union should act only insofar as it is better equipped to attain specific policy objectives than the member states acting separately. Article 5(4) TEU promulgates the principle of proportionality, which essentially serves as a guideline for the choice of legislative instrument to better attain the objectives in a given policy area. Another fundamental principle guiding the exercise of competences by the EU and its member states is that of sincere or loyal cooperation enshrined in Article 4(3) TEU. Even though the provisions of Article 4(3) TEU address the supranational institutions and member states alike, a heavier emphasis is put on the latter. Klamert (2014) argues that this principle imposes a duty on the EU member states to ensure full compliance with the founding Treaties, to facilitate the achievement of the Union's goals, and to abstain from any contravening measures. In other words, the principle of loyalty contributes to the attainment of consistency and coherence of Union's actions (Van Vooren & Wessel, 2014). Finally, the Union should act in accordance with the objectives and values listed in Article 3 TEU.

The establishment of AFSJ is one of the objectives outlined in Article 3 TEU. Article 3(2) TEU stipulates that "[t]he Union shall offer its citizens an area of freedom, security and justice without internal

frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime". Title V of the TFEU further elaborates on the content of AFSJ, which comprises five Chapters, including cooperation on police and judicial matters, and border controls, asylum and immigration. Article 78(1) TFEU establishes the legal basis for the enactment of EU-wide rules on refugee protection. It states that "[t]he Union shall develop a common policy on asylum, subsidiary protection and temporary protection", which "must be in accordance with the Geneva Convention".

Many European rules on refugee protection have their basis in international refugee law. However, compared to the 1951 Convention, the European system of protection has a broader scope, as it also encompasses non-Convention refugees. As Chapter 1 argues, refugees can also rely on international human rights norms to seek and obtain protection. Given the strong standing of human rights standards in the constitutional order of the EU and its member states, it is not surprising that Article 78(1) also obliges the EU to establish common rules of subsidiary protection, in addition to a set of common rules on asylum.

Thus, the EU brings different forms of international protection under one regional umbrella to ensure uniform treatment of refugees who qualify either for Convention status or subsidiary protection under the relevant international agreements in the member states. Article 78(2) TFEU further specifies the elements that are deemed necessary for an EU-wide system of protection to function and the decision-making procedure needed to adopt the laws. It calls on the EU bodies to adopt legislation under ordinary legislative procedure on the following seven matters: (i) a uniform refugee ("asylum") status; (ii) a uniform status of subsidiary protection; (iii) a system of temporary protection; (iv) common refugee status determination procedure; (v) internal responsibility- and burden-sharing mechanisms; (vi) minimum quality of reception conditions; and (vii) readmission agreements with third countries. In short, the various secondary measures adopted in the field of asylum in the EU explicitly build on Article 78(2).

1.2 Charter of the Fundamental Rights of the EU

The Charter of Rights is another source of primary law in the EU legal order. In contrast to the TEU and TFEU, it is directly relevant for refugees and asylum seekers. The Charter is a document that codifies fundamental rights applicable to all people in the territory of the EU, subject to qualification under Article 51. Following the entry into force of the Lisbon Treaty, Article 6(1) TEU recognizes the legally binding character of the Charter and states that it shall have the same legal standing as the founding Treaties. The Charter reaffirms the status of fundamental rights, derived from national constitutions of the EU member countries and other legal sources, such as customary norms or peremptory norms

jus cogens, as general principles of the EU law by bringing them together in a single document (Rossi, 2008). The instrument certainly plays an important role in the EU legal order because of the changes to the EU architecture introduced by the Lisbon Treaty. The Treaty not only elevates human rights norms to the level of primary law, but also makes CJEU the guardian of the Charter (De Burca, 2013). One of the tasks of CJEU under the Lisbon Treaty is to ensure compliance by the EU with fundamental rights stated in the Charter when performing its functions. As Weiler (2009) notes, after legalization of human rights in the EU legal order, the EU has formally acquired constitutional traits.

Even though the Charter is often likened to a European constitution because it codifies fundamental rights of people residing in Europe, which in turn can be enforced by CJEU, it has a limited scope of application. Article 51(1) states that the Charter provisions *“are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”*. Thus, the document does not seek to challenge the constitutional traditions of EU member states by elevating human rights protection to the level of EU competence. Article 6(1) TEU and Article 51(2) of the Charter explicitly prohibit the Charter from altering the institutional balance in the EU or allocating any new powers to the Union. Rather, its purpose is to ensure validity and legality of measures adopted by the Union and its member states while discharging their respective duties under EU law (Gil-Bazo, 2008). As regards EU bodies, the Charter applies to measures that the supranational institutions adopt pursuant to the realization of the Treaty objectives in areas of their competence. As regards EU member countries, the Charter applies whenever they fulfil their obligations under EU law (Lenaerts, 2012).

1.2.1 The Charter and Refugee Protection

The Charter is relevant for refugee protection because it ensures that fundamental rights are taken into account when EU member countries implement secondary legislation on asylum. Indeed, Article 67(1) TFEU explicitly ties the creation and operation of AFSJ to respect for fundamental rights. The scope of the Charter application is not restricted to reviewing national laws implementing European asylum rules, but also encompasses administrative or discretionary measures put in place to achieve the objectives outlined in the secondary legislation. For example, in *NS*⁸, CJEU has ruled that domestic measures adopted by the UK under Article 3(2) of the Dublin Regulation (the so-called “sovereign clause”) must comply with the Charter because they are part and parcel of the CEAS and as such can be described as giving effect to Union law (Lenaerts, 2012). In addition to that, there are linkages between the TEU and TFEU on one hand, and the Charter on the other hand, which can strengthen the system of refugee protection in the EU. Lenaerts (2012) argues that the principle of loyal cooperation

⁸ CJEU - C-411/10

(Article 4(3) TEU) has a potential to amplify the effects of the Charter in the EU legal order. To begin with, the principle obliges EU countries to respect fundamental rights enshrined in the Charter when they derogate from the provisions of the EU law on grounds of *ordre public*. Indeed, CJEU has established such a precedent in *ERT*⁹, when the Court argued that any derogation from the EU law must be compatible with the fundamental rights under ECHR. Furthermore, Article 4(3) TEU reinforces the principle of effective judicial protection enshrined in Article 47 of the Charter. In *DEB*¹⁰, CJEU has relied on the latter principle to set aside national procedural measures that inhibit access to justice and, thus, hinder the effectiveness of the EU law.

There are a number of Charter provisions that are particularly relevant for refugee protection. First and foremost, Article 18 of the Charter guarantees the right to asylum in the EU. There is a debate among scholars as to what this provision entails. Article 18 does not specify the holder of the right; therefore, it is addressed to refugees and states alike. Furthermore, it does not specify the exact guarantees attached to the right, i.e. whether a person can “seek”, “enjoy” or “be granted” asylum (Gil-Bazo, 2008). These uncertainties are exacerbated by including a reference to the Refugee Convention in Article 18. As discussed in Chapter 1, the approach to asylum put forward by the Geneva Convention is couched in terms of state obligations rather than individual rights. Furthermore, the benefits of refugee status are only applicable to persons who satisfy criteria listed in Article 1(A) of the Refugee Convention. In other words, persons falling outside the scope of the Convention application are not entitled to refugee status. Gil-Bazo (2008) rejects such a narrow reading of Article 18 of the Charter. She argues that in the EU legal order, the right to asylum is an enforceable individual right, codified as a general principle of EU law and further elaborated in the secondary legislation. She states that this right applies to refugees who qualify for Convention status and subsidiary protection alike because the scope of refugee protection is broader in the EU law than in the Refugee Convention. Indeed, a combined reading of Article 18 of the Charter and the relevant provisions of the Qualification Directive guarantee a status to all refugees, regardless of whether they qualify as such under Geneva Convention or international human rights instruments. That is, refugees in the EU have the right to “international protection”.

Further provisions of the Charter that are relevant for refugee protection include the prohibition of torture and inhuman or degrading treatment or punishment (Article 4); protection in the event of removal, expulsion or extradition (Article 19(2)); and the right to an effective remedy and to a fair trial (Article 47). Article 19(2) can serve as grounds for judicial review by CJEU of the treatment of refugees

⁹ CJEU - C-260/89

¹⁰ CJEU - C 279/09

by the EU countries to examine compliance of national measures with *non-refoulement* obligations, while Article 4 can be invoked to examine national detention measures. Finally, Article 47 limits the discretion of states with respect to designing national rules that impede access to legal help for refugees.

Having discussed the two sources of primary law in the EU legal order and their relevance for refugee protection, the following section briefly addresses the role of the Refugee Convention in the EU legal order.

1.3 Refugee Convention in the EU legal order

Primary law of the Union contains references to the Refugee Convention and the relevant norms of international law. For example, Article 78(1) TFEU states that *non-refoulement* underpins the European system of protection, which in turn must be “in accordance with Geneva Convention”. Furthermore, Article 18 of the Charter of Rights guarantees the right to asylum “with due respect for the rules of the Geneva Convention”. Such references raise the question as to the role of the Refugee Convention in the EU legal order.

International agreements concluded by the EU can be divided into three categories. The first type is binding on the EU; the second type is binding on the EU and the member-states (so-called “mixed agreements”); and finally, the third type of agreements binds only EU member countries (Eckes, 2010). The EU can be bound by the first two types of international agreements by virtue of Article 216(2) TFEU. As regards international agreements binding on EU member states only, Article 351 TFEU applies. It states that the rights and duties of European countries arising from international agreements concluded prior to joining the EU (or the EEC) are not affected by the EU Treaties.

The Refugee Convention falls within the scope of Article 351 TFEU, which operates as a gateway allowing the norms of international law, stemming from the agreements concluded by the EU member states prior to joining the Union, to have legal effects in the EU legal order. As such, it does not preclude a possibility of a conflict of norms. While such a conflict is unlikely to emerge with respect to the provisions of the Refugee Convention, which serves as the normative backbone of the EU regime of refugee protection, it is possible that other UN norms might conflict with the fundamental rights and freedoms guaranteed by the EU.

In *Kadi*, CJEU set aside national counter-terrorism measures implementing UNSC Resolutions on grounds of a possible violation of the core values of the Community legal order. Thus, the Court established that the fundamental values of the EU legal order is the ultimate reference point for the validity of national measures implementing international law under Article 351 TFEU. This is highly

salient for refugee protection because of two factors. First, the UN Charter is binding on the EU member states only. Hence, Article 351 TFEU is the provision that regulates its effects in the EU legal order. Furthermore, UNSC Resolutions are adopted on the basis of the powers granted to the UN by virtue of its Charter. Thus, their effects in the EU legal order are governed by Article 351 TFEU as well. Second, Resolution 1373 links international counter-terrorism and refugee law frameworks at the level of the UN. Without Article 351 TFEU and the Court to enforce it, the member states would be free to derogate from the fundamental values of the EU legal order because of the *jus cogens* nature of the UNSC norms. In the future, CJEU might prove adept at defending the fundamental rights of refugees from possible encroachments in the guise of “war on terror” and the resulting necessity to suspend civil liberties while implementing UNSC Resolutions.

Having reviewed the primary law of the EU, as well as the role of international rules on refugee protection in the EU legal order, the next section turns to the secondary legislation on asylum adopted by the EU pursuant to the realization of the objectives stated in the primary law.

2 Secondary law of the EU

As explained in the previous section, secondary law of the EU implements provisions contained in the founding Treaties. Article 78 TFEU is the legal basis for the enactment of CEAS, while Article 78(1) spells out its scope, which encompasses a common policy on asylum, subsidiary protection and temporary protection. The goal of the envisioned policy is to offer appropriate status to persons with protection needs and ensure compliance with *non-refoulement*. The article goes on to say that such policy must be in accordance with Geneva Convention and the 1967 Protocol, and other relevant treaties, including the Charter of the Fundamental Rights of the EU. Article 78(2) calls on the Council and the EP to adopt legislation following the ordinary legislative procedure on the following seven matters: (i) a uniform refugee (“asylum”) status; (ii) a uniform status of subsidiary protection; (iii) a system of temporary protection; (iv) common refugee status determination procedure; (v) internal responsibility- and burden-sharing mechanisms; (vi) minimum quality of reception conditions; and (vii) readmission agreements with third countries. Comprehensive review of the various instruments is beyond the scope of the present inquiry. Here, the focus is on the substantive aspects of qualification for refugee status as specified in the recast QD. First, the development of CEAS is presented. Following that, the relevant provisions of the recast QD are discussed. Where appropriate, a comparison is drawn between the Directive and the Refugee Convention.

2.1 CEAS

Creating CEAS has been on the EU political agenda since the inauguration of AFSJ in 1999. The European Council provided the political rationale and impetus for the adoption of various AFSJ-related

measures. Thus far, it has issued three multi-annual Programmes outlining political priorities, setting the general direction of the policy, and establishing a timeframe for the implementation of the relevant measures. In 1999, the European Council introduced the Tampere Programme for the period 1999-2004 (European Council, 1999). Following that, the Hague Programme has been adopted for the period 2004-2009 (European Council, 2004). Finally, the Stockholm Programme has been adopted for the period 2009-2014 (European Council, 2009). The objectives outlined in the respective Programme Conclusions provide the necessary context for the creation and development of CEAS.

In line with the Tampere Conclusions, the first stage of the creation of CEAS involved harmonizing national asylum laws of the EU countries on the basis of common minimum standards. The European Council noted that CEAS must be based on “full and inclusive application of the Geneva Convention” as well as on respect for *non-refoulement*. To accomplish these objectives, the Commission presented a number of legislative proposals laying down the ground rules for the European engagement with refugees. The first batch of Directives adopted between 1999 and 2006 sets minimum standards and criteria with respect to (i) qualification of asylum seekers for international protection and (ii) the applicable procedural rules and safeguards, (iii) reception conditions in the EU member countries, and (iv) temporary protection. In addition to Directives, the Dublin II and Eurodac Regulations have been adopted. The former lays down responsibility-sharing mechanisms among the EU member states as regards examining asylum claims, while the latter implements provisions of the Dublin II Regulation relating to the identification and registration of the incoming asylum-seekers.

Following Tampere, the Hague Programme has given the EU bodies time to reflect and evaluate the appropriateness and effectiveness of the measures in place with a view to making improvements. In 2008, the European Commission launched a public consultation with the relevant stakeholders in order to set the agenda for the upcoming Stockholm Programme. Following that, the Commission adopted the Policy Plan on Asylum on 17 June 2008, suggesting the completion of the second phase of CEAS through raising the standards of protection and ensuring their consistent application throughout the EU (Commission, 2008). In addition to that, the European Council adopted the European Pact on Immigration and Asylum on 17 October 2008, providing political endorsement and impetus to the Commission’s proposals (European Council, 2008). By the end of 2009, the Commission presented proposals for the amended versions of Directives and Regulations forming European asylum *acquis*, accompanied by their impact assessment. It noted that the first-phase instruments revealed a number of protection gaps that have laid bare the inadequacy of minimum standards for the creation of a common asylum system in the EU. Specifically, the Commission highlighted divergent implementation and restrictive application of asylum provision by the EU governments, and the amount of discretion accorded to the member states as reasons for adopting more stringent rules (Commission, 2009a).

In December 2009, the Stockholm Programme was adopted. One of the main objectives of the Programme is the completion of the second stage of CEAS. Between 2009 and 2013, the recast instruments have been adopted to address the shortcomings of the previous legislation. The European Council noted that CEAS should be based on “high protection standards”, which include “equivalent” level of treatment as regards reception conditions, and “same” treatment as regards refugee status and determination process (European Council, 2009). Consequently, the focus of the amended instruments has shifted from setting minimum standards of treatment of refugees to setting common standards with a view to ensuring a common asylum procedure and a uniform status for those granted international protection. While all the legislative instruments have been adopted by 2013, their implementation lasted well into 2015. Table 1 shows the first-phase and the second-phase instruments adopted by the EU as part and parcel of CEAS.

CEAS		
Name of the instrument	Date of entry into force	
	First phase	Recast
The Temporary Protection Directive	7 August 2001	7 August 2001
The Qualification Directive	20 October 2004	9 January 2012
The Asylum Procedures Directive	2 January 2006	19 July 2013
The Reception Conditions Directive	6 February 2003	19 July 2013
The Dublin II Regulation	17 March 2003	19 July 2013
The Eurodac Regulation	15 December 2000	19 July 2013

Table 1: CEAS instruments

Having discussed the context and development of CEAS, the next section focuses on the recast QD.

2.2 Recast Qualification Directive

Some scholars view QD as an instrument guiding the implementation of the Refugee Convention in the EU countries (Storey, 2008). Indeed, the recast QD elaborates on some of the central concepts of the refugee treaty, thereby strengthening compliance of the EU member states with their international obligations. However, there are also some differences between the two instruments as regards the wording and the degree of specificity of the relevant provisions, which are attributable to the purpose of each instrument. Whereas the goal of the Convention is to establish an international legal framework of refugee protection, the QD represents a regional “branch” of that framework with a distinct focus. As argued in Chapter 1, the Convention aims at establishing “refugee” as a legal category recognized by the international community of states to exclude persons belonging to this category from the ambit of laws of general application due to their specific predicament, which prohibits the

return to their country of origin. To this end, the central provisions of the Convention have been intentionally kept ambiguous enough to bring about the necessary acquiescence of states to the obligations contained therein. In comparison, the recast QD builds on the measures adopted by the EU states pursuant to the realization of the Convention objectives. The purpose of the recast QD is not so much to legalize the status of refugees and other persons deserving international protection in the EU; this task has been accomplished by the first-phase version of the Directive. Rather, the instrument aims at minimizing secondary movements of asylum-seekers between European countries by mandating a uniform refugee status throughout the EU. Therefore, it puts forward a framework for approximation that is rather specific about the content of the main qualification criteria, in order to limit the discretion of member states when implementing the relevant provisions and increases the validity of decisions on refugee status among the EU member states.

The recast QD was adopted in January 2012. It represents the most important piece of CEAS because it identifies beneficiaries of international protection. The Directive deals with substantive aspects of qualification, i.e. the definitions and rights of refugees. It establishes two regimes of protection: for refugees in the sense of Geneva Convention and for persons with protection needs not covered by the Convention, but rather by international human rights instruments, subsumed under the notion of “international protection”. The inclusion of human rights-based protection in the Directive reflects the growing engagement of European courts with the protection of fundamental rights, particularly the jurisprudence of the ECtHR and CJEU on that matter. Thus, the scope of the recast QD is broader than that of the Geneva Convention, as the former also encompasses protection against forms of mistreatment falling below the threshold of persecution, such as torture and inhuman or degrading treatment in general. In the recast QD, the standard of protection offered under either regime is almost identical and comprises similar entitlements, while some differences in treatment still persist (EASO, 2016a, 2016d). Importantly, the rules providing for the treatment of all refugees are established at the EU level, thus, limiting the discretion of member states during implementation. In contrast, the first-phase QD has been characterized by clear divergences in the standard of treatment, with issues of subsidiary protection relegated to the discretion of the EU member states (Peers, 2016). Thus, the recast QD represents an important step towards establishing a uniform status for all refugees in the EU. The recognition of refugee status under the recast QD is subject to the qualification criteria, discussed below.

2.2.1 Qualification criteria

The first six Chapters of the Directive are directly relevant to refugee status recognition. Chapter I contains general provisions, including the refugee definition in Article 2(d). Following that, Chapter II

deals with the assessment of claims for international protection. Article 4 sets the tone for the engagement with refugee claims; it deals with the assessment of facts and circumstances.

As already noted in Chapter 1, qualification for refugee status is subject to the application of inclusion, exclusion and cessation clauses. The central defining characteristic of a refugee is the “well-founded fear of being persecuted”. Defining its parameters is thus the central task of inclusion analysis. Article 9 defines persecution as “*acts which are sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights or an accumulation of various measures of severe consequences*” and provides a non-exhaustive list of measures that can constitute persecution. Further qualification criteria are mentioned in Articles 6 and 7, defining actors of persecution and agents of protection, respectively. The grounds for protection are listed in Article 10, while Article 9(3) represents the “nexus” clause, stating that there must be a connection between the reasons mentioned in Article 10 and the acts of persecution or the absence of protection against such acts.

Following inclusion clauses, the grounds for exclusion from refugee status are listed in Article 12. Finally, Articles 11 and 14 contain cessation clauses. Interestingly, Article 14 of the recast QD spells out conditions for the revocation of refugee status, which is an additional cessation ground, not codified in the Refugee Convention. Table 2 juxtaposes the inclusion, exclusion and cessation clauses in the recast QD and the Refugee Convention.

Qualification Criteria		QD (recast)	The Refugee Convention
Inclusion	Personal scope	Article 2(d)	Article 1(A)(2)
	Territorial scope	Article 2(d)	Article 1(A)(2)
	Well-founded fear	Article 2(d); 4(3), 4(4); 5	Article 1(A)(2)
	Persecution	Article 2(d); 6; 7(1), 7(2); 9(1), 9(2),	Article 1(A)(2)
	Protection grounds	Article 2 (d); 10(1), 10(2); 9(3)	Article 1(A)(2)
Exclusion	Protection elsewhere	Article 12(1)(a), (b)	Article 1(D), (E)
	Commission of crimes	Article 12(2)(a), (b), (c)	Article 1(F)(a), (b), (c)
Cessation	Individual actions	Article 11(1)(a), (b), (c), (d)	Article 1(C)(1), (2), (3), (4)
	Change of circumstances	Article 11(1)(e), (f), 11(2), 11(3)	Article 1(C)(5), (6)
	Revocation	Article 14(3), 14(4)	Not codified

Table 2: Qualification criteria in the recast QD and the Refugee Convention

From the above table it becomes clear that the qualification criteria included in the recast QD to a large degree incorporate similar provisions of the Convention. However, there are also some differences. First, persecution is more specific in the recast QD. In comparison to the Refugee Convention, where persecution is mentioned only in the definition and not further specified, the recast QD devotes a number of articles to flesh out its content. Second, the recast QD adds a new cessation ground in Article 14. Revocation of refugee status is not mentioned in the Refugee Convention.

Having described the central elements of the qualification for refugee status, the following sections analyze the inclusion, exclusion and cessation clauses of the Directive.

(i) Definition

Article 2(d) provides the refugee definition, which is strikingly similar to the one in the Refugee Convention. It defines “refugee” by reference to the same inclusion and exclusion requirement describe in Chapter 2. However, there are some differences as regards the personal and territorial scope of the definition. In contrast to Refugee Convention which addresses all refugees, the recast QD has a more restricted personal scope of application. It applies to third-country nationals or stateless persons, thus, excluding European nationals from refugee status. As regards the territorial scope of application, both the Convention and QD apply only to persons who are outside of their country of nationality or former habitual residence.

(ii) Persecution

As noted above, the recast QD addresses persecution in a number of articles. The concept is first introduced in Article 2(d), and given further expression in Articles 6, 7 and 9 of the Directive. It follows the conceptualization put forward by the Refugee Convention, which comprises two requirements: “serious harm” and “the lack of state protection” (Hathaway & Foster, 2014). Whereas Article 9 interprets the concept of “serious harm”, Articles 6 and 7 represent the two sides of “the lack of state protection”, namely, agents of persecution and actors of protection, respectively. The three articles are examined in turn.

Article 9 of the recast QD deals with acts that constitute persecution. It expands on Article 1(A)(2) of the Refugee Convention. First, it establishes two broad categories of mistreatment that qualify as persecution. Article 9(1)(a) defines persecution as an act which is “sufficiently serious” by the “nature or repetition” as to constitute “a severe violation of basic human rights”. Article 9(1)(b) defines persecution by reference to “an accumulation of various measures of severe consequences”. Second, Article 9(2) provides a non-exhaustive list of acts that can qualify as persecution.

Articles 9(1)(a) and 9(1)(b) offer two alternative views on persecution. Common to these two alternatives is the requirement for an act or measure to impinge on individual human rights in a manner that is sufficiently “serious” or “severe” to be considered as an act of persecution. The seriousness of a particular measure under Article 9(1)(a) is adjudged by reference to “basic” human rights. That is, an act is considered sufficiently serious by its nature if it entails a severe violation of this category of human rights. Alternatively, the repetition of acts, which, if considered in isolation, do not constitute “severe violation” of basic human rights, might qualify as persecution. The difference between Article 9(1)(a) covering the repetition of acts and Article 9(1)(b) on accumulation of various measures is that the latter has a wider scope of application. Measures falling under Article 9(1)(b) need not be “basic” human rights violations. Nevertheless, they must entail sufficiently severe violations of human rights to qualify as persecution (EASO, 2016d).

Article 9(1)(a) requires a violation of “basic” human rights. From this wording it is clear that only the violation of a specific category of human rights qualifies as persecution. Even though the Directive does not define the concept of “basic” human rights, its provisions shed some light on the matter. Article 9(1)(a) refers to non-derogable rights under Article 15(2) ECHR in particular. These rights include the right to life (Article 2 ECHR), freedom from torture, inhuman or degrading treatment or punishment (Article 3 ECHR), from slavery and servitude (Article 4(1) ECHR), and from retroactive criminal liability (Article 7 ECHR). Thus, the violation of a non-derogable right under Article 15(2) ECHR may be considered to constitute a severe violation of basic human rights. However, the reference to Article 15(2) ECHR is not exclusive as the provision is worded “in particular”. Therefore, rights other than non-derogable rights may constitute “basic human rights” in the sense of Article 9(1)(a). In addition, the list of potential acts of persecution mentioned in Article 9(2) includes acts such as legal, administrative, police and judicial measures, which do not normally impinge on non-derogable rights. Therefore, paragraph 1(a) is not restricted to the rights mentioned in Article 15(2) ECHR. Indeed, the EASO guidelines on the interpretation of the recast QD suggest that the reference to non-derogable rights appears to convey that violations of those rights are sufficiently severe and for that reason always constitute persecution, but does not restrict “basic human rights” to non-derogable rights (EASO, 2016d)

In addition to defining persecution in Article 9, the recast QD also defines agents of persecution. According to Article 6, actors of persecution or serious harm include: (a) the state; (b) parties or organizations controlling the state or a substantial part of it; and (c) non-state actors. The purpose of Article 6 is to codify the predominant practice of the EU states. To mention is, that the list of actors of persecution is non-exhaustive. That is, the three-fold categorization is not rigid, but rather intended to encompass any actor of persecution or serious harm (EASO, 2016d).

Following agents of persecution, actors of protection are listed in Article 7. According to paragraph (1), protection against persecution or serious harm can only be provided by: (a) the state; and (b) parties or organizations controlling the state or a substantial part of it. Paragraph (1) also states that actors in (a) and (b) must be “willing” and “able” to offer protection. Furthermore, paragraph (2) mandates that protection be effective, durable and accessible to the applicant. These conditions obtain if actors mentioned in 1(a) and (b) take “reasonable steps” to prevent persecution by operating “an effective legal system for the detection, prosecution and punishment of acts constituting persecution” and making sure that the applicant has “access to such protection”. Finally, paragraph (3) mandates that domestic authorities of an EU country dealing with a refugee claim have recourse to any guidance provided by the relevant “Union acts” when making an assessment, whether actors in the sense of 1(b) can offer effective protection in the sense of paragraph (2).

The purpose of Article 7 is to restrict the application of provisions on protection to a number of appropriate scenarios. To this end, the list of actors of protection in Article 7 has been made exhaustive (Commission, 2009b). Furthermore, Article 7(1) introduces the requirement that actors under 1(a) and (b) must be able and willing to offer protection in accordance with paragraph 2. Either of these points is absent from the first-phase version of the Directive. According to ECRE (2016), these amendments have significantly improved the quality of protection offered under the recast QD. For the first time, the Directive clarifies that only actors mentioned in paragraphs 1(a) and (b) can offer protection that is consistent with the requirements outlined in paragraph 2, given that they are willing and able to do so. This wording does not expressly exclude non-state actors from the ambit of Article 7(1). However, the superimposition of three levels of requirements conditioning the quality of protection in Article 7 makes it significantly more difficult to categorize non-state actors as valid actors of protection.

(iii) Reasons for persecution

As useful as Articles 6, 7 and 9 are for refining the concept of persecution, they do not capture its purpose-driven nature. As discussed in Chapter 1, the very nature of persecution is that it seeks to overcome a certain characteristic in those, who are targeted by it (Goodwin-Gill & McAdam, 2007). Therefore, it is logical that the legal instruments dealing with persecution include the reasons for persecution as one of its defining characteristics. The recast QD lists these grounds in Article 10. Similar to the Refugee Convention, the Directive offers protection only to those whose fear of persecution arises “for reasons of race, religion, nationality, political opinion or membership of a particular social group”, as mentioned in Article 2(d). In addition to that, Article 9(3) QD prescribes that

“In accordance with point (d) of Article 2, there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article or the absence of protection against such acts”.

The requirement in Article 9(3) QD that there be a causal link between the reasons and persecution builds on the nexus clause of the Refugee Convention. In comparison to the Refugee Convention, the nexus clause in the QD is not limited to the phrase “for reasons of”, but has an additional paragraph elaborating it. Furthermore, it provides for the possibility of two types of causal links between the motive and the deed. The reasons for persecution must be connected to either an act of persecution or the lack of state protection against it (EASO, 2016d). To note is, that the requirement to establish a causal link between the reasons for persecution and the lack of state protection is absent from the first-phase QD. According to EASO guidelines, the inclusion of this requirement in the final text of the recast QD has eliminated a protection gap characterized by inherent difficulty in imputing persecutory intent to non-state actors of persecution (EASO, 2016d).

As regards the reasons for persecution, the recast QD does not stop at simply enumerating the protected characteristics. Rather, Article 10(1) attempts to further define them. Articles 10(1)(a), (b) and (c) define “race”, “religion” and “nationality” for the purposes of the Directive. Article 10(1)(d) elaborates on the notion of “membership of a social group”. Finally, Article 10(1)(e) deals with “political opinion”. Furthermore, Article 10(2) provides some guidance as to how these criteria should be applied in practice. It states that the reasons for persecution must be assessed from the viewpoint of the agent of persecution. That is, it is irrelevant whether a person actually possesses one or more of the five protected characteristics. What counts is the perception of that person by the agent of persecution (EASO, 2016d).

(iv) Well-founded fear

As explained in Chapter 1, the phrase “well-founded fear” means that there must be a valid objective basis for the applicant’s fear of persecution. This element of the refugee definition deals with the risk or chance of persecution occurring (EASO, 2016c). Similar to Refugee Convention, the recast QD does not further define or specify what this concept entails. However, it offers some practical guidelines as to the interpretation of well-founded fear. The first step towards gauging the probability of risk presupposes a thorough examination of the available evidence. To this end, Article 4(3) prescribes the standards for evaluation of the evidence and credibility. It counts five sub-paragraphs that deal with (a) the relevant country of origin information, (b) personal testimony, (c) personal background factors, (d) post-departure conduct, and (e) whether an individual could avail himself of a nationality of another country. Article 4(4) then highlights that past persecution is a “serious indication” that the applicant’s

fear of persecution is well-founded. The wording of this provision indicates that claims based on evidence of past persecution are likely to be considered valid. It also suggests that such claims can be rebuttable. Also, Article 5 is indirectly relevant for the assessment of well-founded fear. It states that international protection needs may arise *sur place*, that is, in a course of events following the applicant's departure from the country of origin. In other words, the applicant does not need to have left his country on account of well-founded fear for it may arise during an ordinary stay abroad (Hathaway & Foster, 2014).

2.2.2 Exclusion

The QD implements exclusion clauses of the Refugee Convention in Article 12. There are some differences as regards exclusion for serious crimes. First, the wording of Article 12(2)(b) extends the temporal and material scope of Article 1(F)(b) of the Convention. As regards the temporal scope, Article 12(2)(b) recast QD provides that serious non-political crimes do not necessarily need to be committed while the applicant has been physically outside the country responsible for the examination of the asylum claim, as emerges from the interpretation of Article 1(F)(b). Rather, it also extends to acts that have been committed (i) after the arrival of the applicant in the territory of the member states, (ii) before applying for asylum, and (iii) for the whole duration of the status determination process (Guild & Garlick, 2010). With respect to the material scope, Article 12(2)(b) replicates the requirements put forth by Article 1(F)(b), namely, the physical and mental components of the criminal liability, the requirement for a crime to be "serious", and the "non-political" character of the crime. However, it also introduces the notion of "particularly cruel acts" which, according to Guild & Garlick (2010), has a potential to broaden the scope of the application of Article 12(2)(b), but also introduces an element of arbitrariness, as no comparable notion is established in international law.

Second, the wording of Article 12(2)(c) is somewhat different compared to Article 1(F)(c), as the former references the Preamble of the UN Charter and Articles 1 and 2. Furthermore, the scope of Article 12(2)(c) is broader than that of Article 1(F)(c), which is evident from the preparatory materials. Recital 31 of the recast QD endorses the position of the UNSC, which suggests that terrorism is an example of acts contrary to principles and purposes of the UN. In comparison, the conventional understanding of Article 1(F)(c) encompasses a very narrow category of acts that impinge on the international plane (UNHCR Handbook, 1992).

2.2.3 Cessation

In addition to cessation clauses in the sense of Article 1(C) of the Convention, the recast QD codifies further scenarios detailing how refugee status can end. Article 14(3) states that the EU member states "shall revoke, end or refuse to renew the refugee status" if either of the following situations apply.

First, Article 14(3)(a) stipulates that refugee status ends if it can be established that one of the exclusion grounds mentioned in Article 12 applies after qualification for refugee status.

Second, misrepresentation or omission of “decisive facts” bearing on the outcome of an asylum claim can lead to a revocation, ending or refusal to renew the refugee status in accordance with Article 14(3)(b). The Refugee Convention does not contain comparable revocation provisions. However, UNHCR Handbook (1992) advises states to incorporate measures that would allow for cessation of refugee status on grounds mentioned in Article 14(3)(b).

Third, refugee status also ends if the applicant represents a danger to national security of a country according to Article 14(4)(a). Compared to Article 33(2) of the Convention, which has the same material scope, the wording of Article 14(4)(a) suggests that, as soon as there are “reasonable grounds” for regarding a refugee a danger to national security, the applicant’s refugee status ends. The article does not mention the waiver of *non-refoulement* obligations of the host country towards the applicant. However, EASO Guidelines suggest that the application of Article 14(4)(a) lifts the prohibition of *refoulement* (EASO, 2016b).

Finally, Article 14(4)(b) states that refugee status ends if the applicant has been convicted by a final judgement of a particular serious crime, and as a result, poses a danger to the community. According to EASO (2016b), the application of this provision requires the establishment of a causal link between the crime for which the applicant has been convicted and the danger that he or she poses.

Cessation clauses generally apply after refugee status has already been granted. However, Article 14(5) contains a provision which allows States to use the grounds set out in Article 14(4)(a) and (b) as a reason to deny refugee status. Thus, it applies in a similar way to an exclusion clause. The provision is optional.

3 Conclusion

Since 1999, the EU attempts to create an asylum system built on a common standard of protection. The Refugee Convention serves as an important reference point for the EU asylum norms. Particularly, the qualification framework in the QD is imported from the Refugee Convention. That is, the inclusion, exclusion and cessation clauses are present in the QD, albeit with some clarifications.

While the EU regime of refugee protection is in line with international standards, it goes beyond what is mandated by the Refugee Convention. First, the QD establishes the notion of “international protection”, which is broader than the framework put forward by the Refugee Convention, as the former also covers persons whose protection needs are addressed by human rights instruments. These

include victims of human rights abuses, which do not rise to the level of persecution, but also victims of indiscriminate violence, who flee civil wars. While the first-phase QD created a separate legal regime for such persons, the amended version of the Directive eliminated most of differences in treatment accorded to Convention refugees on one hand and victims of other human rights abuses on the other hand.

Second, the EU regime of refugee protection is embedded in the larger EU legal order, in which primary law is responsible for the validity of secondary measures adopted by the EU legislator. As far as the system of refugee protection is concerned, TFEU mandates that secondary asylum measures conform with the principle of *non-refoulement* and the international norms on refugee protection codified in the Refugee Convention. Furthermore, the Charter of the Fundamental Rights ensures that the right to asylum is not restricted to non-rejection at the border and a temporary leave to remain pending the outcome of the status determination process. In combination with the right to an effective remedy and a fair trial in Article 47 of the Charter, the right to asylum becomes an enforceable individual right that refugees can invoke before the courts. In other words, a refugee is not a passive bystander but rather an active participant in the status determination process in the EU, who can attempt to sway the outcome of the case in his favor through the system of legal remedies at his disposal. Finally, CJEU also has a role to play as a guardian of the fundamental rights in the EU legal order.

Despite a rather liberal conception of the qualification criteria for refugee status in the QD, cessation and exclusion provisions tip the balance in the opposite direction because they provide decision-makers with legal tools to pre-empt asylum claims. First and foremost, neither the Refugee Convention nor the QD specify the exact order of the application of qualification requirements. Under the weight of the authority of the UNSC Resolutions, national courts are presented with an option to apply exclusion before inclusion provisions to rule out the possibility of offering safe haven to terrorists. In such instances, the manifold legal requirements, which often entail a high evidentiary threshold to sustain criminal liability, can to a certain degree forestall the outright application of exclusion measures by requiring judges to undertake anxious scrutiny with respect to the applicant against whom suspicion of having committed one or more of the serious crimes that warrant exclusion is mounted.

Several other factors exacerbate the dangers that “exclusion first” status determination process poses to refugees. First, exclusion provisions in the QD have a broader scope than their counterparts in the Refugee Convention and therefore cover a broader category of criminal offences. In addition to that, the QD puts forward the notion of “particularly cruel acts”, which does not have an established meaning in international or European law. Thus, reliance on Article 12(2) QD instead of Article 1(F) of the Refugee Convention by the courts in exclusion cases might potentially lead to incongruous results

and not only hamper the development of an asylum system based on common standards, but also lead to an arbitrary denial of protection.

The second problem relates to the implementation of exclusion provisions by states. The Refugee Convention (and the QD) permits two exclusion mechanisms: one based on Article 1(F) and another based on Article 33(2). These mechanisms have a distinct rationale and entail different consequences. In practice, however, states have the liberty of merging both mechanisms into a single exclusion procedure, which entails deportation, i.e. the loss of protection against *refoulement* permissible under Article 33(2), if the grounds for exclusion apply. A failure to make a distinction between the two exclusion mechanisms can potentially lead to devastating results, depriving refugees excluded from asylum under Article 1(F) of the right to remain. It is also problematic because the evidentiary threshold is lower under Article 1(F) than under 33(2), which means it is easier to justify deportation once it becomes clear that the relevant exclusion provisions apply.

Even when a refugee passes the extensive exclusion test, the application of revocation clauses may render the person in question removable. The QD conceives of revocation as a measure that ends refugee status after it has been granted, i.e. a cessation clause. Thus, revocation does not end the property of being a refugee, which is the task of exclusion clauses. Rather, it rescinds refugee's ties to the host state expressed through the issuance of appropriate documentation. The challenge arises with respect to the implementation of revocation provisions, because the QD does not specify the mechanism that ends refugee status or what happens after that; it only states when revocation applies. Consequently, states are free to devise administrative procedures as they see fit, as long as they incorporate the main tenets of revocation set forth in the QD.

To sum up, the QD strikes a balancing act. On one hand, it provides for a more liberal inclusion framework than the Refugee Convention which encompasses more people with protection needs. At the same time, it contains more specific inclusion requirements, which to a certain degree restrict the interpretative freedom of the courts but also provide immigration authorities with more guidance when applying the central refugee concepts, such as persecution. Certainly, this is the first step towards developing an EU asylum system based on common standards.

On the other hand, the QD provides for a more stringent exclusion framework than the Refugee Convention, potentially rendering applicants who have committed minor crimes deportable. At the same time, the instrument leaves a broad margin of appreciation to the governments implementing it, as many restrictive provisions are either voluntary or do not specify the exact mechanisms that affect the applicant's refugee status.

The next Chapter analyzes the implementation of the recast QD in Germany.

Chapter 4

The focus of the present Chapter is on the German system of refugee protection. The first part presents the development of refugee protection in Germany. The second part looks at the German asylum legislation in more detail. It examines the qualification criteria for refugee status enshrined in the Asylum Act and the Residence Act. Where appropriate, a comparison is drawn to the recast QD. The final section summarizes the main findings.

1 Refugee Protection in Germany

In national jurisdictions, refugee protection boils down to the issuance of an appropriate legal status to persons deserving protection, which is accompanied by individual rights, obligations and entitlements. Such status is “empty” without the norms that specify the eligibility criteria and regulate its content. In Germany, the norms of refugee protection derive from three legal sources. First, the German Constitution provides for an individual right to asylum, which is enshrined in Article 16a of the Basic Law. Adopted in the aftermath of the Second World War, the provision represents a powerful constraint on the exercise of sovereign powers by states because it implicitly supports resistance against oppressive regimes by guaranteeing a safe haven to political activists who try to affect change in their home countries (Bosswick, 2000).

The constitutional asylum guarantee is the cornerstone of refugee protection in Germany. It is broader than statutory asylum provisions incorporating the central tenets of the Refugee Convention (Meili, 2017). Whereas the central defining characteristic of a refugee in the sense of the Convention is his or her fear of persecution in the country of origin which justifies recognition of individual refugee status, constitutional asylum can be granted on the basis of a broad category of “infringements of personal rights that violate human dignity”, as the Federal Constitutional Court of Germany remarked.

The content of constitutional asylum in Germany derives from the interpretation of Article 16a of the Basic Law by the Federal Constitutional Court. As Lambert et al. (2008) note, this provision served as a catalyst for the development of a national system of refugee protection in Germany. In several decisions, the Court affirmed that constitutional asylum in Germany would always be more favorable towards refugees than the treatment provided under international refugee law. However, the restrictive interpretation of Article 16a by the German courts during the 1980s reversed the liberal “ethos” and contributed to a gradual erosion of constitutional asylum in Germany (Lambert et al., 2008). In 1993, Article 16a was further curtailed as a result of a political compromise and made subject

to reservations informally agreed by the EC governments (Guiraudon, 2000). Bosswick (2000) notes that the amendments introduced to this right, particularly paragraph (2), have transformed a constitutional guarantee into an administrative measure, subject to reservations and qualifications. Gradually, the Convention eclipsed Article 16a of the Basic Law as the dominant normative frame of reference for refugee protection because of its practical utility in adjudicating refugee claims.

International refugee norms codified in the 1951 Convention represent the second layer of protection for refugees in Germany. The codification of international refugee norms helped flesh out the content of constitutional asylum and enriched the understanding of the underlying obligations to refugees, as the two branches of protection developed in lock-step. Prior to the adoption of the Convention, very few obligations concerning asylum and refugee protection existed (Lambert et al., 2008). Therefore, its adoption provided an impetus for the development of an appropriate legal status for refugees entitled to constitutional asylum in Germany. In this regard, several historical milestones bear mentioning.

In 1953, Germany issued a provisional statutory order laying down the procedure for the recognition of refugee status in the sense of the 1951 Convention. One disadvantage of the Refugee Convention of that time was the temporal and spatial limitation on the refugee definition, restricting refugee cases to those who escaped their home countries as a result of events occurring before 1 January 1951. In 1959, the Federal Constitutional Court issued an opinion stating that this limitation does not apply to the constitutional right to asylum. This decision created a separate class of refugees, who could not be removed or expelled from German territory because of the principle of *non-refoulement*, yet at the same time did not qualify for refugee status and therefore did not possess any rights associated with it (Bosswick, 2000). The 1965 Aliens Act (since 2005: the Residence Act) eliminated this protection gap by introducing a recognition procedure for refugees in the sense of Article 1(A)(2) of the Convention but also for those, protected by Article 16a of the Basic Law, who fell outside the scope of the refugee definition. Following the ratification of the 1967 Protocol to the Convention by Germany, any remaining protection gaps between the constitutional asylum and refugee status were eliminated (Lambert et al., 2008).

During the late 1980s, however, the German courts adopted a restrictive approach towards asylum which created a rift between domestic and international standards of refugee protection. For example, the Federal Constitutional Court decided in 1989 that political persecution within the meaning of Article 16a of the Basic Law could only relate to acts of states. The case law of the Federal Administrative Court, responsible for the adjudication of refugee cases based on the Convention claims, followed the same restrictive path (Lambert et al., 2008).

The emerging divide between domestic practice of granting asylum and international standards of refugee protection was further reinforced by national asylum measures enacted during that period. Even though there was no difference in legal status granted to the beneficiaries of protection under German law regardless of the legal basis of their claims, divergences in the standard of treatment revealed a bias against Convention refugees (Lambert et al., 2008).

This bias persisted until the EU asylum measures were introduced. Harmonization of national asylum laws brought parts of German legislation, which were based on the norms of the Refugee Convention, in line with the international standards. Particularly, the restrictive interpretation of the qualification criteria for refugee status under the Convention was reversed. Also, any differences as regards entitlements flowing from the recognition of refugee status based on Article 16a of the Basic Law or the Refugee Convention were eliminated (Lambert et al., 2008). Thus, the developments in the EU law have further entrenched the divide between constitutional asylum and refugee status in Germany, and arguably made the former obsolete from a practical standpoint (Lambert et al., 2008).

Finally, refugees can rely on European asylum norms for protection in Germany. The scope of refugee protection under the EU law is broader than under the Refugee Convention. Besides persecution, the eligibility for refugee status under the EU law can be justified by reference to human rights abuses that do not meet the severity of persecution, including torture and inhuman or otherwise degrading treatment. Thus, the EU instruments merge protection under international refugee and human rights law, and thus create a unified normative framework of “international protection”. Furthermore, the EU legal framework for protection is more robust compared to the regime established by the Convention. The primary law of the EU contains explicit references to international instruments that are relevant for refugee protection, such as the Refugee Convention, but also the Charter of the Fundamental Rights of the EU. Thus, the rights of refugees are not simply reiterated in the EU legislation, but rather firmly anchored in the emerging European regime of fundamental rights protection. Put differently, the different aspects of refugee protection, such as the qualification framework established by the Convention, but also the fundamental rights protection framework of the Charter, are consolidated in the EU legal order under the umbrella of CEAS. In addition to that, CJEU plays an important role in supervising the application of the EU asylum rules by national courts, but also enforcing the obligations of the member countries under the EU law. In the light of these factors, European asylum norms have become the focal point for protection claims in Germany.

The norms of refugee protection are distilled into two German laws. First, the Asylum Act (AsylG) contains both the substantive conditions that qualify a refugee for protection and general procedural rules governing the asylum procedure. It applies to all people seeking asylum in Germany. At the same

time, the law provides the legal basis for the work of the Federal Office for Migration and Refugees (BAMF), the authority responsible for carrying out the asylum procedure in Germany. Second, the Residence Act (AufenthG), regulates the conditions of entry and residence of third-country nationals in Germany. AufenthG lays down rules on the entry formalities, the conditions that third-country nationals must meet for a short- or long-term stay in Germany, and the conditions under which third-country nationals are expected to leave or can be deported from Germany even against their will. In addition to the general requirements, the Residence Act also contains the legal consequences resulting from a completed asylum procedure (Eichler, 2016). In combination with the constitutional provision on asylum in Article 16a of the Basic Law, these two instruments comprise the German system of refugee protection and govern both the eligibility criteria and the content of refugee status.

The next section looks at the Asylum Act in more detail as the law contains the relevant substantive qualification criteria; the Residence Act is examined insofar as it is relevant for the qualification for refugee status.

2 The Asylum Act

The Asylum Act was initially conceived as a purely procedural measure. Adopted in 1982, it was called the Asylum Procedure Act (AsylVfG). The law was designed to govern the administrative procedure for obtaining refugee status under Article 16a of the Basic Law. The same procedure also provided for the recognition of refugee status within the meaning of the Refugee Convention (Lambert et al., 2008). However, the qualification criteria for refugee status under the Convention were listed in the Residence Act of 1990. Following the introduction of European asylum legislation, German laws on asylum were amended.

In 2013, Germany transposed the recast QD into national legislation. The implementation of the Directive streamlined and simplified domestic asylum law. As already mentioned, all matters concerning substantive and procedural aspects of qualification for protection were brought within the ambit of the Asylum Act; only issues related to deportation remained within the scope of the Residence Act. Furthermore, the law implementing the recast QD introduced the concept of “international protection” into German law (Eichler, 2016). As noted in Chapter 2, the recast QD abolishes this distinction between refugees deserving Convention status and subsidiary protection and provides for almost equal treatment for both groups. International protection thus encompasses refugees within the meaning of the Geneva Convention, but also other victims of serious human rights violations, eligible for subsidiary protection. As a result, the Asylum Act distinguishes between two categories of refugees: (1) those satisfying the requirements for constitutional asylum within the meaning of Article

16a of the Basic Law, and (2) persons qualifying for international protection under the recast QD. The transposition of the recast QD into the Asylum Act is considered in more detail below with a view to comparing the qualification framework established by these instruments.

2.1 The Qualification Framework

AsylG consists of eleven Chapters, of which only three are directly relevant to the qualification for refugee status. Chapter I defines the scope and object of the Asylum Act. Article 1 states that the instrument covers foreigners applying for (1) protection against political persecution within the meaning of Article 16(a)(1) of the Basic Law, and (2) international protection under the recast QD. The latter paragraph reaffirms that international protection granted pursuant to the recast QD must be in accordance with the rules established by the Refugee Convention. The qualification criteria are introduced in Chapter II. First, Article 3 outlines the definition of a refugee in paragraph (1). Then, Article 3(a) defines acts of persecution, while Article 3(a)(3) represents the “nexus” clause. Following that, grounds for persecution are elaborated in Article 3(b). Finally, Articles 3(c) and (d) define agents of persecution and protection, respectively. Second, exclusion clauses are mentioned in Articles 3(2) and (3). Lastly, Chapter VIII deals with the expiration of refugee status. Cessation of refugee status is codified in Article 72, while Article 73 provides for the possibility of the revocation of refugee status.

2.1.1 Inclusion

The Asylum Act implements most of the provisions of the recast QD in a straightforward fashion. The inclusion criteria are transposed verbatim. Due to the fact that German law implements the concept of “international protection”, the Asylum Act also incorporates the inclusion criteria for subsidiary protection under the recast QD. These criteria are also transposed word-for-word.

The next section examines the exclusion criteria codified in the Asylum Act.

2.1.2 Exclusion

There are some divergences between the recast QD and German asylum legislation as regards exclusion criteria. The Asylum Act retains the same structure of exclusion which triggers when the applicant could be expected to obtain protection elsewhere on one hand, and upon commission of certain crimes on the other hand. One of the differences between the Asylum Act and the recast QD concerns the incorporation of serious non-political crimes in German legislation. As mentioned in Chapter 2, the recast QD extends the temporal and geographical scope of this provision by allowing it to apply during the whole status determination process.

Furthermore, Article 12 QD introduced the concept of “particularly cruel acts”, which may serve as a reason for exclusion from refugee status, possibly extending the reach of this exclusion clause (Guild & Garlick, 2010). To note is, that the application of “particularly cruel acts” proviso within the context of exclusion under Article 12 is optional, as the phrase is worded “may”. Nevertheless, the novel formulation of non-political crimes in the recast QD appears to establish two categories of offenders who can be excluded from refugee status. The first category comprises criminals who have perpetrated a non-political offense in the sense of Article 1(F)(b) of the Convention. The second group consists of persons who have committed a “particularly cruel act” within the meaning of Article 12 of the recast QD. It appears that the latter instrument extends the ambit of exclusion under Article 1(F)(b) to acts that are not considered criminal under international or domestic laws, but rather regarded “cruel”. It is not clear, what legal standard should be used to assess cruelty of a measure.

In comparison, the Asylum Act has a rather different conception of non-political crimes that is more in line with the interpretation of Article 1(F)(b) of the Convention. First, the extension of temporal and geographical scope of exclusion in the recast QD is absent from the German text. Thus, only acts committed prior to applying for asylum in Germany fall within the ambit of Article 3(2)(2). Second, the German provision does not incorporate the notion of “particularly cruel acts”. Rather, it is worded “in particular”, suggesting that “cruel” or “brutal” acts that serve an alleged political purpose may exemplify a non-political offence in the sense of Article 3(2)(2). That is, this phrase does not extend the material scope of exclusion as does the recast QD; in contrast, the German provision simply provides an example of a non-political offense. In comparison, the word “particularly” in the recast QD is used to describe the severity of a prohibited measure. Furthermore, the German version of Article 3(2)(2) of the Asylum Act uses the word “*grausam*” to describe a non-political offence, which can be translated as both “cruel” and “brutal”. The recast QD uses the word “cruel”, whereas the official translation of the Asylum Act mentions “brutal” acts. A case can be made that there is a difference between measures that are cruel and brutal. Whereas the former adjective qualifies a measure that causes harm or damage, the latter describes an act that is excessive and/or unnecessary. As in the case of police brutality, for example, a measure that intimidates but does not cause harm can still be considered brutal. Thus, brutal acts in the context of exclusion analysis have a wider scope of application. There are ample reasons for choosing the formulation “brutal” over “cruel” in the German text. As already mentioned, the assessment of brutality imports a test of proportionality, as the measure in question relates to a certain outcome. The evaluation of a non-political offence in the context of exclusion under Article 1(F)(b) employs the same standard to adjudge whether the gravity of a measure outweighs its supposed political impact. Therefore, the wording of the German provision is more harmonious with

the legal understanding of a non-political offence under the Refugee Convention than the wording in the recast QD.

Another difference between the Asylum Act and the recast QD pertains to the manner, in which the crimes against the goals and principles of the UN are transposed in Germany. The German provision on such crimes does not specify their source, in contrast to the recast QD.

Having discussed the transposition of exclusion clauses in the Asylum Act, the next section turns to cessation clauses.

2.1.3 Cessation

The biggest differences by far between the Asylum Act and the recast QD pertain to rules that govern expiration of refugee status. As discussed in Chapter 2, the recast QD mentions two scenarios, when individual refugee status can be ended. The first scenario concerns cessation of refugee status and comprises voluntary actions of an applicant aimed (re-)establishing ties to a country different than the country of refuge, listed in sub-paragraphs (a) through (d) of Article 11(1) on one hand, and the change of circumstances in the country of origin, which is so profound that it cannot be said to sustain individual's fear of persecution any longer, on the other hand. The rules related to the change of circumstances are codified in sub-paragraphs (e) and (f) of Article 11(1), and in paragraphs (2) and (3). The second scenario concerns revocation of refugee status, which is justified if a refugee has engaged in fraudulent behavior as specified in Article 14(3), but also on grounds of maintaining public order and security mentioned in Article 14(4).

In German law, both cessation and revocation are conceptualized as procedural measures. In this context, cessation of refugee status is a "passive measure", meaning that refugee status simply ceases to have effect, whereas revocation of refugee status is an "active measure", which must be carried out without delay if the relevant conditions obtain. These differences are attributable to the mechanisms that end refugee status in each case. In German law, cessation (*Erlöschen*) only encompasses voluntary actions of an individual, which aim at establishing ties with a country different than the current state of refuge. In practice, an individual would have moved to that country and acquired its nationality or been offered protection for his refugee status to cease to apply. This process does not require administrative intervention from the host state to end refugee status. In comparison, both individual actions and circumstances beyond personal control may serve as grounds for revocation of refugee status. Specifically, revocation takes place when an applicant misrepresents or omits critical evidence to influence the outcome in his favor (*Widerruf*), but also if the conditions for the issuance of refugee

status no longer hold (*Rücknahme*). In both instances, administrative intervention is necessary to end refugee status. In what follows, the relevant provisions of the Asylum Act are examined in detail.

The Asylum Act codifies cessation in Article 72, and revocation of refugee status in Article 73. Both cessation and revocation clauses in the Asylum Act apply to persons granted constitutional asylum and international protection (refugee status). In comparison to the recast QD, cessation under the Asylum Act encompasses only voluntary actions of an individual who seeks to end his or her refugee status. It also adds a cessation ground in Article 72(1)(4) stating that refugee status ceases to apply if an applicant voluntarily renounces its recognition and withdraws the asylum application before the decision of BAMF becomes incontestable. Following that, Article 72(2) stipulates that “[t]he foreigner shall return the notification of recognition and the travel document to the [decision-making] authority without delay”. The second cessation scenario, which relates to a change of circumstances beyond personal control of an applicant, falls under the rubric of revocation under German law. It is regulated by Article 73 of the Asylum Act. Article 73(1) incorporates the contents of Article 11 of the recast QD, particularly the sub-paragraphs (1)(e) and (f), and paragraphs (2) and (3). That is, it applies if the conditions on which the recognition of status was based have ceased to exist and the refugee “*can no longer refuse to claim the protection of the country of which he is a citizen, or if he, as a stateless person, is able to return to the country where he had his usual residence*”. Accordingly, revocation of refugee status cannot be based only on a change of circumstances in the country of origin, but it also has to be ascertained whether the refugee can be reasonably expected to return to the country of origin. This is not the case if, for example, a refugee has “compelling reasons, based on earlier persecution” to refuse to return. Article 73(2) incorporates the content of Article 14(3)(b) only. It states that, the “[r]ecognition of asylum status shall be withdrawn if it was granted on the basis of incorrect information or withholding of essential facts and if such recognition could not be based on any other grounds”. Article 14(3)(a) of the recast QD is not fully implemented in the Asylum Act. The possibility to revoke refugee status on grounds of retroactive qualification for exclusion under Article 12 of the recast QD only applies to refugees with subsidiary protection status according to the Asylum Act.

In addition to codifying the grounds for revocation of refugee status, Article 73 also establishes two procedures to carry it out. First, Article 73(2a) provides for a routine revision of refugee status every three years by BAMF. If, during such a revision, information surfaces testifying that the circumstances which gave rise to refugee status have ceased to exist, or that the applicant has misrepresented or omitted essential facts during the interview, refugee status is ended. Second, Article 73(1) establishes a procedure for revocation without a set time period. Under the latter procedure, revocation of refugee status is carried out if the conditions on which status determination was based have ceased

to exist, and it must be established that an individual can be reasonably expected to return to his country of origin. In the course of the revocation procedure, a refugee must be informed in writing about the decisions taken by BAMF as regards his or her case and be given an opportunity to respond (Article 73(4)). If refugee status is revoked or withdrawn, this does not necessarily mean that a foreigner loses his or her right to stay in Germany. The decision on the residence permit is taken by the local authorities and it has to take into account personal reasons which might argue for a stay in Germany. Therefore, it is possible that even after loss of status another residence permit is issued. In this case, Article 73(3) provides that if refugee status is revoked or withdrawn, qualification for subsidiary protection must be considered (AIDA, 2017). German law does not implement provisions on revocation of refugee status on grounds of public safety. These effects are accounted for by the “ceased circumstances clause”.

Generally, refugees enjoy the benefits of protection until the deportation order is carried out. Deportation of foreigners from Germany is regulated by Article 53 of the Residence Act. Article 51(1) establishes the basic legal framework of deportation and lays down several conditions that must apply before a foreigner can be compelled to leave. First, the foreigner’s stay must endanger “public safety and order, the free democratic basic order or other significant interests of the Federal Republic of Germany”. Second, the public interest in expelling a person must be weighed against the individual interest of that person in staying. The concepts of public and private interest are conceptualized in Articles 54 and 55, respectively. In order to justify deportation, the public interest to expel a foreigner must outweigh the personal interest of a foreigner to stay. Article 51(3) directly addresses the possibility of expelling refugees. It states that only if a refugee poses a threat to public safety and security, which is both current and serious, can his expulsion be considered. The provision further suggests that some fundamental societal interests must be threatened, and that deportation must be considered as only one of the possible means to eliminate that threat. Thus, deportation of refugees under Article 51(3) is also governed by the principles of necessity and proportionality.

3 Conclusion

The system of refugee protection in Germany is based on the individual right to asylum enshrined in Article 16a of the Basic Law. This constitutional right to asylum has paved the way for the development of a system of refugee protection in Germany. The implementation of the Refugee Convention has anchored international standards of refugee protection in national legislation. International norms have shaped the qualification criteria for refugee status in Germany, and codified the entitlements, rights and obligations of refugees. However, restrictive interpretation of the right to asylum by the Federal Constitutional Court created a divide between constitutional asylum and protection granted

under statutory laws implementing the Refugee Convention. The implementation of the EU laws eliminated any differences as regards treatment of refugees entitled to constitutional asylum and other forms of protection. Furthermore, the recast QD introduced the concept of “international protection” into German law, which is based on the norms of international refugee and human rights law. Thus, German law provides protection to foreigners who satisfy the requirements for constitutional asylum within the meaning of Article 16a of the Basic Law and to those, who qualify for protection under the recast QD.

The norms of refugee protection derive from different legal sources, which have to a varying degree influenced the qualification framework for refugee status in Germany. First, the inclusion criteria have been mostly influenced by the developments in the EU law. Importantly, the concept of “international protection”, which comprises claims to protection based on the Geneva Convention as well as international human rights instruments, has been implemented in German law. Another indicator pointing to the impact of the EU law on asylum legislation in Germany is the fact that all inclusion clauses have been transposed verbatim.

Second, the exclusion criteria in Germany are more in accordance with the traditional interpretation established by the Refugee Convention. For example, exclusion from refugee status for the commission of non-political crimes in Germany has not been influenced by the extended exclusion provision of the recast QD. Rather, it retains the original formulation provided by the Convention, albeit with some minor clarifications. Also, exclusion for crimes against the goals and principles of the UN in the Asylum Act applies Article 1(F)(c) verbatim.

Finally, the cessation criteria have been adapted to national circumstances in Germany. In particular, the expiration of refugee status is governed by cessation and revocation provisions in the Asylum Act, which have been conceived as procedural measures in German law. Nevertheless, the substantive aspects of cessation, i.e. the requirements that need to be met for refugee status to end, derive from international normative sources. On one hand, the Asylum Act retains the traditional structure of cessation established by the Refugee Convention, which comprises voluntary individual acts and a change of circumstances, leading to the expiration of refugee status. On the other hand, the introduction of the revocation clauses in the recast QD has allowed German authorities to deal with asylum cases, in which the grounds for refugee status recognition no longer apply, under the rubric of revocation. To that end, two procedural mechanisms have been established, which provide for a review of individual refugee status in light of the revocation clauses every three years, as well as establish a general procedure for the cancellation of refugee status, if the grounds based on which it was granted no longer apply. Even though some of the cessation grounds in the QD have not been

implemented in German law, Eichler (2016) notes that the “ceased circumstances clause” has a broad scope of application in German jurisprudence; it can account for the effects intended by the EU legislator.

On balance, the implementation of the QD had positive effects on the quality of refugee protection, as it introduced the notion of “international protection” into German law, which significantly expanded the pool of potential beneficiaries of refugee protection. Still, some differences in treatment of refugees qualifying for Convention status and subsidiary protection persist, suggesting that “international protection” has not yet been fully implemented in Germany.

On the other hand, the German asylum law also has a restrictive side. Even though it does not explicitly discriminate between different groups of migrants, it is not “value-neutral”. Before the QD was introduced, the law already targeted “abusive” or criminal asylum seekers. This is most evident with respect to implementation of the exclusion framework in Germany. While the conceptual distinction between exclusion under Articles 1(F) and 33(2) of the Refugee Convention is intact, it is somewhat diluted in the Residence Act. Particularly, Article 60(8) implementing the suspension of *non-refoulement* obligations if a refugee represents a serious threat, also provides for such a possibility if exclusion clauses apply with respect to the individual. From the point of view of domestic law, it matters not if the applicant committed crimes before or after applying for asylum; what matters is his criminal conviction, which “transfers” the person from asylum law into immigration law framework of Article 53 of the Residence Act.

The German asylum law was further tightened following the introduction of the “Cologne Act”¹¹ in 2016. The legislative changes significantly lowered the bar for exclusion from *non-refoulement* in Article 60(8) of the Residence Act. The changes introduced a possibility to lift protection against deportation for criminal offences punishable by one year of prison or youth custody; the protection must be suspended if the applicant committed a crime punishable by a final sentence of at least three years. After that, the immigration authorities must determine with a prohibition on deportation applies with respect to the applicant; if not, the person is requested to leave Germany.

Chapter 5

Having discussed the norms of refugee protection embedded in international, regional and national asylum regimes, the present Chapter focuses specifically on exclusion of terrorists from asylum. It is divided into three sections. The first part presents the definition of terrorism. The second part looks at

¹¹ BGBl I S. 394 2016

the Refugee Convention provisions that can serve as a basis for exclusion from refugee protection for terrorist offences. Following that, the relevant case law of the European and German courts is examined. The final section summarizes the main findings.

1 Terrorism in International Law

In its broadest sense, terrorism denotes using political violence to communicate a message to the broader public (Murphy, 2012). In that respect, it is similar to other phenomena, such as anarchism, resistance against oppression and national liberation movements, whose central defining characteristic is the recourse to violent means to achieve political ends. Naturally, a question emerges as to what distinguishes terrorism from other similar phenomena, like the ones mentioned above? One possible way to articulate this difference is by looking at the proportionality of the means employed to the outcome sought. Terrorist attacks target civilians, even though the actual target is a government or an international organization, whose behavior a terrorist tries to affect. In doing so, the perpetrator reduces the value of civilians to mere “objects”, whose killing is supposed to underscore the resolve of the perpetrator, demoralize the enemy and strengthen the legitimacy of a terrorist cause if the target decides to respond. Yet, none of these and possibly many other suggested aims can justify killing ordinary civilians. It is important to note, that in order to ensure that the message resonates, terrorists use a variety of methods intended to inspire fear in their target. In other words, what sets terrorism apart from other violent methods of political communication is the despicable and always disproportionate tactics employed, which involves deliberate targeting and killing of civilians, to intimidate the target by means of spreading fear (Ganor, 2002).

As a legal concept, terrorism is elusive, and the international community has yet to agree on a common definition. Thus far, there is only the most basic consensus that terrorism is a form of criminal offence that requires a coordinated international response. Examining terrorism through the prism of criminal law has the advantage of allowing to disaggregate it into two main components: the terrorist act and the culpable actors. The former component can be further subdivided into objective and subjective elements, whose interplay determines whether a criminal offence rises to the level of a terrorist act. As Murphy (2012) notes, it is not the act that triggers the label “terrorist”, but rather the motivation behind it. Thus, recourse to criminal law standards is clearly useful for the purpose of prosecuting terrorists because it helps distinguish terrorist acts from regular crimes and establish criminal liability for the former category of offences. However, the utility of criminal law doctrines is rather doubtful when adjudging culpability of terrorist actors. In contrast to liability, which denotes individual responsibility for the wrongdoing, culpability refers to a degree of personal guilt. Essentially, it is a moral judgement. In terrorism cases, determining culpability comes down to weighing in on whether

violence employed by the actor can be justified or at least excused given the circumstances. The morality of the concept opens it up to political manipulation, which in turn blurs the boundary between strictly jurisprudential tasks, such as developing legal criteria for the purpose of identifying, prosecuting and punishing terrorists, and broader foreign-policy objectives of states, such as supporting allies and punishing enemies. Hence, the enduring relevance of the saying *“one man’s freedom fighter is another man’s terrorist”*.

The inherent difficulty in contrasting terrorism with legitimate forms of opposition has precluded international community from agreeing on a common definition (Weigend, 2006). Nevertheless, the topic of terrorism has been up for debate in various international fora since the early 1960s, and gradually a normative framework for addressing terrorism started to emerge at the international level. The next section reviews the attempts to define terrorism by various UN organs.

1.1 The UN Definition of Terrorism

In the international arena, terrorism has long been defined by reference to specific acts. This approach has allowed international community to circumvent difficulties associated with agreeing on a “general” definition of terrorism, and instead proceed with sectoral cooperation intended to induce countries to criminalize certain violent conduct in domestic legal systems (Golder & George, 2004; Young, 2006). Since 1963, a number of global and regional Conventions have been adopted under the auspices of the Sixth Legal Committee of the UN qualifying certain acts, such as hijacking, kidnapping and bombing, as prohibited and punishable offences under domestic criminal law of the signatory states. The purpose of “sectoral” treaties is to give expression to the idea that some crimes are so grave and disproportionate that, even if politically motivated, they cannot protect perpetrators from justice (Bruin & Wouters, 2008). These instruments establish a web of overlapping national jurisdictions over various criminal activities that are widely perceived as acts of terrorism, judging by the unequivocal condemnation of such practices by the international community (Young, 2006). Some prohibit specified violent criminal acts against protected targets, such as aircraft, platforms and diplomats; sometimes this approach is linked with prohibition on loathsome methods or means, such as hijacking and hostage-taking; other treaties prohibit the use of particular weapons and criminalize the financing of terrorism; finally, in addition to principal crimes, some instruments also specify ancillary offences (Saul, 2006).

Considered in isolation, sectoral treaties do not explicitly reference terrorism or refer to terrorist offences. As already noted, the aim of these instruments is to criminalize violent conduct that has traditionally caused international indignation, and to establish jurisdiction over these crimes in order to not let them go unpunished. Gradually, however, the focus has shifted from outlawing certain

conduct to linking the prohibited acts with other requirements, such as motivation, to establish criminal liability for a distinct category of crimes. The 1979 Hostages Convention for the first time introduces coercion as an element of motivation and prohibits hostage-taking for the purposes of coercing a third party to act or abstain from performing an act. Other elements of the definition have been fleshed out only after the end of the Cold War. The 1997 Bombing Convention adds that an attack must be directed against “a place of public use”. Furthermore, it also stipulates that the act must cause death or serious bodily injury or extensive destruction to public property resulting or likely to result in major economic loss. Finally, the treaty establishes a link to the terrorist purpose. It states that, as long as the prohibited acts *“are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, [they] are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature”*.

The 1999 Terrorist Financing Convention (TFC99) for the first time consolidates the hitherto dispersed elements of a terrorist offence in a single document. Saul (2006) remarks that it is the first instrument that comes closest to furnishing a definition of terrorism. Article 2(1)(b) stipulates that *“any [...] act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”* constitutes an offence for the purposes of the Convention. Thus, the TFC99 lists three requirements that qualify a criminal act as a terrorist offence. First, an act must be sufficiently grave in that it causes a “serious bodily injury”. Second, the objective part of the act, i.e. the violence, must be directed against civilians and other non-combatants. Finally, motivation of the perpetrator is relevant insofar as an act seeks to intimidate or compel; political, religious or other ideological predispositions of the actor are irrelevant. The 2005 Nuclear Terrorism Convention (NTC05) reiterates the three requirements mentioned above in the main body of the treaty, but also departs from the wording of the TFC99 in two important respects. First, it includes the requirement of “substantial damage to property or environment” as an additional example of sufficiently grave harm. Second, the intent to compel natural or legal persons is placed on “equal footing” with the motivation to coerce a state or an international organization. Given the object and purpose of the treaty to prevent acts of nuclear terrorism, it is understandable why the definition encompasses criminal offences that normally do not rise to the level of terrorism. However, in the light of its specific focus, the NTC05 is less suitable for defining terrorism in general terms than the TFC99.

In addition to sectoral treaties adopted under the auspices of the Sixth Legal Committee, the General Assembly addressed the issue of terrorism on several occasions. UNGA adopted two Resolutions

condemning terrorism and urging closer international cooperation to detect, prosecute and punish terrorist offences. Neither Resolution defines terrorism. Nevertheless, they are relevant in two respects. First, they condemn all acts of terrorism, “wherever and by whomever committed”. This wording suggests that no cause, however noble it might be, justifies terrorist means. Thus, freedom fighters or any other group of individuals who resort to terrorist violence to assert their claims are likely to be treated as terrorists. In addition to that, both instruments state that there can be no justification for terrorist acts. This position appears to render the political exception obsolete for terrorists in extradition cases. Second, the two instruments reflect international consensus as regards terrorist purpose. Both documents state that terrorist acts “are intended or calculated to provoke a state of terror”.

The UN Security Council has also addressed terrorism in a series of Resolutions enacted under Chapter VII of the Charter, of which two are relevant for defining terrorism. In the immediate aftermath of September 11 attacks against the US, Resolution 1373 was adopted. Rostow (2002) notes that the adoption of Resolution 1373 sets an important precedent as the instrument imposes legal obligations on states which normally arise from treaties concluded through inter-state negotiations. More specifically, Resolution 1373 attaches legal consequences to terrorism without defining it or further specifying the prohibited conduct (Saul, 2006). In doing so, it invites states to decide unilaterally which criminal offences to designate as terrorist acts (Saul, 2004). However, states are not entirely free to draft and implement domestic lists of terrorist offences, as the document calls upon them to become parties to international conventions and protocols related to terrorism. In other words, Resolution 1373 urges countries to seek normative guidance from the sectoral treaties and other UN measures on terrorism when giving effect to their international obligations related to fighting terrorism.

In 2004, Resolution 1566 was adopted. Even though the instrument does not create new obligations, it is the first Security Council measure that contains a definition of terrorism. Paragraph (3) of the main body of the document recalls that:

“criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature [...]”

To a large extent, this definition is informed by the normative framework already established by the sectoral treaties on terrorism. It states that only acts “within the scope” and “as defined” in these treaties qualify as terrorist offences. Thus, it covers only international terrorism and requires states to adjust their criminal justice systems to be able to detect such crimes and criminalize the proscribed conduct to prosecute and punish offenders. In addition to that, it brings together the various elements related to establishing the terrorist intent of the perpetrator codified in the sectoral instruments. The added value of this definition is that it summarizes the “core” elements of a terrorist offence (Young, 2006). As regards objective elements, the first criterion is that an act must be prohibited by international treaties to qualify as a terrorist offence. The second requirement pertains to the gravity of the crime, which must inflict serious harm expressed in terms of “causing death or serious bodily injury”; damage to property is not expressly prohibited. In addition to that, the range of possible victims is fairly circumscribed and covers only non-combatants. As regards subjective elements, the formulation first points to the terrorist purpose, which is to “provoke a state of terror” in the general public, and to intimidate a population or compel a state or an international organization. Thus, a prohibited offence must be directed against a state or its population before it can rise to the level of terrorism. In this context, a reference to “general public” appears to convey the idea that the effects of terrorism are felt internationally, even though the actual crime takes place in a national context. Second, the definition requires a nexus between serious harm resulting from the proscribed offence and specific intent of the perpetrator, expressed in terms of spreading fear and/or intimidation or coercion. Terrorist motivation rooted in personal beliefs is irrelevant. Finally, regardless of the political motive, terrorist acts are never justifiable and hence do not constitute a political offence exception.

The international legal framework for dealing with terrorism is not without problems, however. First, as useful as the various mentioned instruments are for elucidating the meaning of terrorism, they do not prohibit terrorism *per se*, but rather urge states to treat the various manifestations of this phenomenon as a separate criminal offence, subject to heightened penalties if other requirements, such as criminal intent, obtain. In this regard, Saul (2006) observes that none of the international instruments related to terrorism expressly outlaws the killing of civilians, which is prohibited only to the extent that it occurs as a direct consequence of one of the proscribed offences. Second, there is no agreement on the issue of culpable actors. Particularly, the status of freedom fighters still causes controversy in international circles. Even though the wording of various UN instruments suggests that there is no exception for groups fighting for their independence as long as they utilize terrorist methods, the negotiations of the Draft Comprehensive Convention on Terrorism indicate that there is no international consensus on this issue. As an example, the Organization of Islamic Cooperation (OIC) resisted any attempts to define terrorism without exempting freedom fighters from the scope of the

definition (Saul, 2006). Additionally, the question remains whether a state can perpetrate terrorist acts. Once again, the OIC advocated for the inclusion of such possibility in the definition of terrorism, while the Western countries took the opposite stance (Saul, 2006). Third, there is some ambiguity about the status of proscribed offences in situations not expressly covered by international law. For example, it is far from clear whether an internationally prohibited offence perpetrated during an armed conflict can constitute a terrorist crime. Saul (2006) contends that rules of international humanitarian law (IHL) alleviate some of the normative uncertainty. However, IHL norms do not cover internal armed conflicts or other situations characterized by lower levels of violence (Hodgson & Tadros, 2013). Also, it is doubtful whether a legal framework designed to regulate open hostilities between states is applicable to private persons and organizations who rely on clandestine tactics to advance their claims. Another uncertainty relates to the status of attacks against military targets during peaceful times. The fourth point of concern relates to the level of specificity of international provisions on terrorism and, by extension, their scope. Weigend (2006) notes that the provisions of international instruments related to terrorism suffer from “vagueness” and “overbreadth” compared to domestic standards of criminal law. Finally, the measures discussed address only international terrorism; domestic terrorists fall within the purview of domestic criminal law to the extent that it contains specific counter-terrorism provisions.

Having briefly discussed the evolution of the definition of terrorism in international law in addition to some of the long-standing challenges associated with defining it, the next section examines the EU approach to defining terrorism.

1.2 The EU Definition of Terrorism

A common definition of terrorism forms the basis of the EU counter-terrorism policy, which is an integral part of AFSJ. Although several European countries experienced terrorism in the past, a common definition was largely redundant because of the idiosyncratic nature of the terrorist threat. In addition to that, political sensitivity of the topic precluded European governments from agreeing on the most basic common traits of terrorism. Traditionally, counter-terrorism has been considered a domestic prerogative, and governments viewed any attempts to establish binding European rules in this domain as an affront against their sovereignty. Despite the staunch defense of national decision-making autonomy, several informal channels of cooperation were developed, such as the EPC and the TREVI Group, to address the rising levels of terrorist violence during the 1970s. These informal policy-sharing networks were incorporated into the intergovernmental JHA framework following the entry into force of the 1992 Maastricht Treaty. Yet, it was not until the 1999 Amsterdam Treaty that the EU acquired competences to act, albeit very limited, in the field of counter-terrorism. The Commission used its newfound powers to push forward an ambitious agenda focused on strengthening the internal

security of the Union (Bossong, 2008; Kaunert, 2007). However, its proposals were likely to fall on deaf ears if not for September 11 attacks against the US, which injected a sense of urgency into the development of counter-terrorism as a European policy domain and provided a much-needed impetus for the adoption of specific policy measures to address the terrorist threat, including a common definition of terrorism (Argomaniz, 2011).

In June 2002, the EU adopted the Framework Decision on combating terrorism (FDCT02), which establishes the legal framework for the approximation of criminal legislation on terrorist offences and offences related to terrorist groups in the EU member states. It represents the first step towards adopting a common definition of terrorism across the EU, as it seeks to approximate the divergent national definitions. At the same time, the choice of the legislative instrument reflects the desire of the European governments to maintain as much decision-making autonomy as possible and limit integration to the bare minimum. Framework decisions resemble directives in that they impose obligations of result and leave the methods of implementation within discretion of the member states. In contrast to directives, however, their direct effects are disputed. Furthermore, the Commission cannot initiate an infringement procedure against a European country for failure to comply with provisions of a framework decision. Finally, under the 1999 Amsterdam rules, a framework decision is exempt from review by the European courts. As a result, its effectiveness depends on the correct implementation by the member states. The Commission (2004; 2007) published two rounds of reports on the implementation of the FDCT02 by the EU countries, in which it lamented the divergent transposition of the relevant provisions into national law. Rather than creating a single terrorism definition, the measure produced a range of national definitions, which undermined the principle of legal certainty in the EU (Murphy, 2012).

The next section examines in more detail the definition of terrorism enshrined in the FDCT02.

1.2.1 The 2002 Framework Decision on Combating Terrorism

Since the EU lacks the enforcement powers in the field of counter-terrorism, it relies on the member states to criminalize conduct proscribed by the FDCT02 in domestic law. Such conduct falls into three categories: terrorist offences, group offences, and linked and ancillary offences. This section discusses only the first two groups of offences, as they form the core of the terrorism definition.

Article 1(1) of the FDCT02 sets out the definition of terrorism. It requires the EU member states to take “necessary measures” to ensure that certain acts, as defined by national law, and which “*given their nature or context, may seriously damage a country or an international organisation*”, are deemed “terrorist offences” if committed intentionally. Murphy (2012) observes that the EU terrorism definition has a three-part structure, consisting of the prohibited acts, motivation and culpable actors.

First, the definition lists eight categories of terrorist offenses: (a) attacks which may cause death; (b) attacks upon physical integrity; (c) kidnapping or hostage taking; (d) acts causing extensive destruction to specified public and private property which endangers lives of other people; (e) seizure of aircraft, ships, or other means of public or goods transport; (f) offences connected with nuclear, biological, or chemical weapons; (g) release of dangerous substances or causing fires, floods, or explosions endangering human life; or (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource with a consequence of endangering lives of others. Threatening to commit any of these acts is also considered a terrorist offense in (i). Murphy (2012) notes that Article 1(1) draws together various UN Conventions against terrorism and the acts listed in subparagraphs (a) to (h) correspond with and in most cases duplicate the language of the comparable international treaties.

Second, the definition also covers subjective elements as it requires a distinct terrorist purpose. An act qualifies as a terrorist offence if it was committed with the aim of (a) seriously intimidating a population; or (b) unduly compelling a government or an international organization to perform or abstain from performing any act; or (c) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization. Here, the EU departs from the established international standard in two ways. First, it imposes a more demanding test for the terrorist motivation, requiring intimidation to be “serious” and compulsion to be “unduly”. Second, the EU law introduces an entirely new requirement of serious damage to the fundamental structures of a country. In addition to that, the EU law makes no reference to the personal motivation of the perpetrator. Thus, it remains unclear whether political, religious or other ideological considerations may justify or at least excuse the offence, and result in lesser penalties.

Third, the definition also specifies the culpable actors. The primary target of the FDCT02 are the non-state terrorist actors, operating individually or as a group. Individual actors fall within the scope of Article 1, while Article 2 criminalizes participation in terrorist groups. First, Article 2(1) defines a terrorist group as a “*structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences*”. It also notes that a terrorist group needs to have some organizational structure that enables its members to commit terrorist offences. At the same time, it does not impose other conditions, such as hierarchy, division of labor or even a permanent membership in a group, as necessary organizational features. Such a formulation allows to account for loosely structured groups, such as Al-Qaeda, within the scope of the definition. Second, Article 2(2) requires member states to criminalize directing and participating in a terrorist group.

To some extent, the FDCT02 also clarifies the issues falling outside its scope. Recital 11 explicitly excludes actions by armed forces during an armed conflict as well as actions by armed forces of a state in the exercise of their official duties from the definition. It is less clear whether other groups can be excluded as well. For example, there is no official exemption for peaceful protesters or for groups who fight to overthrow oppressive governments overseas (Murphy, 2012). As regards peaceful demonstrations, the instrument contains several safeguards. First, Recital (10) states that *“[n]othing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to [...] demonstrate”*. Second, Article 1(2) states that the operation of the FDCT02 is based on respect for fundamental rights and principles enshrined in Article 6 TEU. The instrument contains no safeguards that apply to other forms of protest. Rather, the EU legislator seems to defer to national authorities on this matter. Finally, it is unclear whether acts of state terrorism fall within the scope of the FDCT02. This question emerges because Article 7 of the FDCT02 provides for liability of legal persons, which can be extended to any entity possessing legal personality, including international organizations and states. However, it is unrealistic to expect the EU to enact an international measure by means of a criminal law provision (Dumitriu, 2004).

The definition of terrorism is also enshrined in the Common Position on the application of specific measures combating terrorists. The difference between the FDCT02 and the Common Position is that the former is an internal measure, whereas the latter is a foreign-policy instrument. Accordingly, the definition of terrorism serves a different purpose in each instance. The FDCT02 codifies the EU criminal norms on terrorism. The definition thus outlines general properties of a terrorist offence and of culpable actors, which are transplanted into national legislation for the purpose of detecting, prosecuting and punishing terrorists. In other words, it creates a common conception of terrorism in domestic criminal justice systems of the member states which in turn facilitates intra-EU counter-terrorism cooperation between law enforcement agencies. In contrast, the definition in the Common Position provides a basis for international cooperation between the EU and third countries, particularly the US, to sanction terrorist groups and dismantle financial networks that fund such organizations. Therefore, the instrument also contains a “blacklist” of individuals and organizations suspected of terrorism in the Annex (Cameron, 2003). As discussed below, the utility of such a list extends beyond the foreign-policy domain, as it is frequently referenced in other areas of law of domestic application.

Having discussed the definition of terrorism in the EU law, the next section looks at the changes to the FDCT introduced in 2008.

1.2.2 The 2008 Framework Decision on Combating Terrorism

In 2008, the FDCT02 was amended to reflect the evolution of the terrorist threat, but also to incorporate the relevant developments in international law. As regards the former, Recital (3) states that the *modus operandi* of terrorist activists and supporters has undergone major changes, as terrorist organizations have become more decentralized. The document also notes in Recital (4) that Internet plays an important role in this context, as it provides for the means of communication between terrorist cells. As regards the changing legal landscape, Recital (8) mentions that UNSC Resolution 1624 provides a basis for criminalization of incitement to terrorist acts and recruitment, including through the Internet. Furthermore, Recital (9) recalls that the CoE Convention on the Prevention of Terrorism establishes legal norms against public provocation to commit a terrorist offence, and recruitment and training for terrorism. Against the backdrop of these developments, the focus of FDCT08 is on criminalizing the incitement to commit terrorist offences.

In line with the changing focus of the instrument, the following amendments were introduced. First, Article 3 of the Framework Decision received a major overhaul. Originally, it criminalized three types of activities linked with terrorism: “aggravated theft” and “extortion” with a view to committing a terrorist offence, and “drawing up false administrative documents” for the purpose of a terrorist offence or for participating in a terrorist group. The new paragraph (1) sets out the definitions of “public provocation to commit a terrorist offence”, “recruitment for terrorism” and “training for terrorism”; these preparatory activities are also included in Article 3(2), which provides an updated list of linked offences. In addition to that, the new paragraph (3) states that in order for an act in paragraph (2) to be punishable, “it shall not be necessary that a terrorist offence be actually committed”. Second, the inclusion of preparatory activities that contribute to the realization of terrorist acts within the scope of the Framework Decision has also altered the structure of Article 4. The first paragraph prohibits aiding and abetting a terrorist offence referred to in Articles 1, 2(2) and 3. The second paragraph criminalizes inciting terrorist acts, and relates to crimes mentioned in Articles 1, 2(2) and 3(d) through (f). The third paragraph prohibits attempting to commit a terrorist offence in the sense of Article 1, 2(2) and 3(d) through (f). Paragraph four contains an optional clause to extend the application of the prohibition on attempting to commit a terrorist offence to crimes mentioned in Articles 3(b) and (c).

In its evaluation report, the Commission (2014) stated that most member states complied with their obligations under the FDCT08, while noting the divergent application of the provisions on incitement. Despite the correct transposition, the instrument raised some concerns among legal scholars. For example, Murphy (2012) notes that none of the proscribed linked offences requires intention. Furthermore, the terms “incitement” and “provocation” largely overlap, as both legal categories are

intended to address one and the same phenomenon, namely, the radicalization of individuals. In this light, the inclusion of provocation as a separate crime is problematic because it has no established legal meaning in the EU law. More generally, the criminalization of incitement or provocation raises concerns about the prospect of curtailing the right of free speech in the EU under the guise of fighting terrorism.

Having discussed the amendments introduced in the FDCT008, the next section focuses on the definition of terrorism, as enshrined in the 2017 Directive on Combating Terrorism (DCT)

1.2.3 The 2017 Directive on Combating Terrorism

In 2015, the Commission put forward a proposal for a directive on combating terrorism. It noted that the instrument is intended to close the remaining criminal enforcement gaps in the EU legal framework, and implement international obligations, particularly the provisions of the UNSC Resolution 2178 and the 2015 Additional Protocol to the CoE Convention on the Prevention of Terrorism (Commission, 2015). The main focus of the proposed directive is the criminalization of foreign terrorist fighters, who travel to conflict zones for the purpose of receiving training or engaging in terrorist activities. Upon returning to their home countries, such individuals pose a heightened security threat (Europol, 2015).

In 2017, the DCT was adopted following lengthy negotiations. It updated the legal framework for the approximation of substantive criminal law provisions of the member states related to terrorism, initially put forward by the FDCT02. In contrast to the latter, however, the DCT seeks to harmonize rather than approximate national criminal laws. Article 1 DCT states that the instrument *“establishes minimum rules concerning the definition of criminal offences and sanctions in the area of terrorist offences, offences related to a terrorist group and offences related to terrorist activities [...]”*. Furthermore, the legal basis for the adoption of the DCT is Article 83(1) TFEU, which provides a role for the Commission in activating, where necessary, the infringement procedure and the full judicial control by CJEU (Caiola, 2017).

The DCT does not alter the structure of the terrorism definition, but significantly expands its scope. The following new elements were incorporated in the new directive. First, the list of terrorist offences was updated to include “illegal system interference” and “illegal data interference” in Article 3(1)(i). The inclusion of these crimes in the definition provides a venue for criminalizing activities associated with “cyberterrorism” (Conway, 2014; Hardy & Williams, 2014). Furthermore, subparagraph (f) was also amended to include radiological and nuclear weapons. Second, the various terrorism-related offences were brought together in Title III of the DCT, and new offences were added. Article 8 criminalizes receiving of terrorist training. The Commission (2015) noted that this provision grants law

enforcement and prosecutors additional tools to tackle the threats resulting from potential perpetrators, including from “lone wolves”, by offering the possibility to investigate and prosecute training activities, which have the potential to lead to the commission of terrorist offences. Furthermore, the purpose of receiving of training for terrorism must be to carry out or contribute to the commission of a terrorist offence, and the perpetrator must have the intention to do so. Article 9 targets foreign fighters, as it criminalizes travelling abroad for terrorism. The aim of the provision is to oblige the EU member states to criminalize the act of travelling to another country, if it can be demonstrated that the intended purpose of that travel is to commit, contribute to or participate in terrorist offences as defined in Article 3, or to provide or receive training for terrorism as defined in Articles 7 and 8. The provision covers both the travel to third countries, as well as to other EU countries. Ciaola (2017) notes that the notion of “preparatory acts” in Article 9(2)(b) is a cause for concern because it is not further defined in the directive. Article 10 prohibits organizing or otherwise facilitating travelling abroad for terrorism. The Commission (2015) clarified that “organization” and “facilitation” cover a wide array of activities which assist a traveler in reaching his or her destination. Finally, Article 11 on terrorism financing was amended. The new paragraph (2) suggests that, as long as an offence in Article 3, 4 or 9 is concerned, the funds need not have been used to commit or contribute to the commission of a crime, nor is the knowledge of the specific offence necessary to incur liability.

Having discussed the evolution of the terrorism definition in the EU law, the next section briefly reviews the implementation of the definition in Germany.

1.3 Terrorism in German Law

Germany did not escape the scourge of modern terrorism. During the 1970s, the leftist revolutionary group, *die Rote Armee Fraktion (RAF)*, wrought havoc across the country with bombings, assassinations, kidnappings, bank robberies and shootouts with the police. In 1977, the activities of that group sparked national crisis, known as the “German Autumn”. Even though the group was officially dissolved in the 1990s, it left a decidedly painful imprint in German national consciousness, as it terrorized society for more than two decades.

The experience of German law enforcement with the RAF did not produce a definition of terrorism. However, it influenced the conception of terrorism in domestic criminal law. Article 129a of the Criminal Code (StGB) lays out the substantive criteria of a terrorist offence. First, it stipulates that only domestic groups can be culpable for acts of terrorism. Accordingly, individual perpetrators and transnational terrorist groups fall outside the scope of this provision. Second, Article 129a StGB outlines essential qualities of a terrorist group. It states that a terrorist group must consist of at least three persons. Also, it requires that such association of individuals be of certain duration. Furthermore,

a group must have some organizational qualities, such as the ability to coordinate activities. Finally, the provision posits an element of voluntarism as regards participation in a terrorist group. Weißer (2008) argues that all participants must possess a “common will” to commit crimes, as opposed to having to carry out orders of the leadership. Third, Article 129a StGB also identifies a terrorist purpose, which obtains upon commission of two types of crimes. The first category encompasses the most serious of crimes under domestic criminal law and international crimes. The second category consists of serious crimes of lesser gravity. The commission of such crimes must be linked with a specific motive and be able to cause severe damage. Weißer (2008) notes that the prohibited act must inflict severe damage on the German state, its population, or the fundamental state structures. Finally, Article 129a StGB criminalizes other activities of a terrorist group, which are not directly linked to the perpetration of serious crimes. It prohibits the agreement to form such an organization, membership in a terrorist organization, support for terrorist causes, and the promotion and incitement of terrorism.

European counter-terrorism legislation significantly affected the German conception of terrorism. The implementation of the FDCT02 required Germany to update its substantive criminal law provisions on terrorism. First, Article 129b StGB was introduced, extending the application of Article 129a to international terrorist organizations. Second, the catalogue of offences in Article 129a was expanded to include new crimes mentioned in Article 1(1) of the FDCT02. Finally, the requirements of the terrorist motivation were introduced into German Criminal Code to implement the EU law (Petzsche, 2012). The implementation of the FDCT08 further expanded the scope of criminal laws dealing with terrorism. In 2009, Germany enacted a new law prohibiting “preparation of a serious violent offence endangering the state”¹² (GVVG). The purpose of the legislation is to align German criminal law with the new European norms on terrorism. Two articles were added to the Criminal Code. First, Article 89(a) StGB codifies “training for terrorism” in German law. Essentially, it replicates the structure of the terrorist offence codified in 129(a) StGB, which comprises objective and subjective elements, such as the criminal offences and the specific intent of the perpetrator. It also differentiates between two categories of criminal offences distinguished by their severity and attaches different levels of requirements to each group. As regards material scope of Article 89(a) StGB, the German legislator went beyond the European requirements, and in addition to criminalizing the act of giving training also proscribed receiving of training for terrorist purposes (Petzsche, 2012). Second, Article 91 StGB codifies the crime of “incitement to terrorism”. It criminalizes oral and written instructions that potentially can lead a person to commit a terrorist offence. Importantly, both articles establish criminal liability for individual perpetrators. Before that, only group activities in connection with terrorism were

¹² BGBl I S. 926 2015

prohibited, and personal liability derived from the degree and nature of participation in a terrorist group. The new law changed that position, allowing to prosecute individual offenders not connected to a terrorist group, thereby extending the reach of German anti-terrorism norms.

International instruments spurred the development of further anti-terrorism norms in German law. In 2015, GVVG was amended as a reaction to the obligations to fight the phenomenon of “foreign fighters” established by the UNSC Resolution 2178 and elaborated in the Additional Protocol to the CoE Convention on the Prevention of Terrorism. A paragraph (2a) was added to the Article 89(a) StGB, which criminalizes travelling for terrorism. The inclusion of new terrorist crimes into the Criminal Code brought German law in line with obligations stemming from the DCT before the latter instrument was adopted.

In sum, Germany largely follows the international approach to defining terrorism by reference to serious crimes that must possess certain additional qualities before they can rise to the level of terrorism. Furthermore, it also establishes specific intent for the commission of such crimes. In other words, Germany has adopted a “functional” definition of terrorism designed to detect, prosecute and punish offenders and facilitate counter-terrorism cooperation with its European partners. The “moral” qualities of terrorism were not addressed in the German legislation.

Having discussed the definition of terrorism, the next part reviews the case-law of European and German courts on exclusion of terrorists from refugee protection

2 Exclusion of Terrorists from Refugee Protection

The Refugee Convention provides for the possibility of exclusion of terrorists from refugee protection. As noted in Chapter 1, Article 1F represents a bulwark against claims to protection raised by fugitives from justice, who might pose as refugees to avoid the legitimate punishment, including terrorists. Two articles are particularly suitable for that purpose: Article 1(F)(b) and 1(F)(c) (Saul, 2004; Sivakumaran, 2014). Traditionally, terrorists were excluded from refugee protection pursuant to Article 1(F)(b), which requires the commission of a “serious non-political crime” prior to applying for asylum to qualify the perpetrator “undeserving” of asylum. Article 1(F)(c) can also be used to exclude terrorists from protection, especially in the light of the pronouncements by the UN Security Council in several Resolutions that terrorism is always contrary to the goals and principles of the UN. In the latter case, however, the decision on exclusion is rather problematic because of the lack of substantive rules clarifying the relevant aspects of prohibited acts falling under this provision (Sivakumaran, 2014). In addition to exclusion clauses in Article 1(F), the exception to the *non-refoulement* principle codified in Article 33(2) of the Refugee Convention provides a pathway for states to expel dangerous refugees,

including terrorists, if the latter present “a danger to the security of the country” or constitute “a danger to the community of that country”. While refugee scholars argue that exclusion and expulsion provisions have a distinct rationale and focus, in practice, many countries do not maintain such a distinction in national legislation (Hathaway & Harvey, 2001; Hathaway & Foster, 2014). In most cases, exclusion under either provision results in deportation.

As shown in Chapter 2, these rules were successfully incorporated into the QD, subject to some clarifications. At the same time, the EU legislator introduced two additional grounds for exclusion. First, individuals who “incite or otherwise participate” in the commission of serious crimes mentioned in Article 12(2) can be excluded from refugee status pursuant to Article 12(3). Second, Article 14(4) provides for a possibility to revoke refugee status in case information surfaces after an individual was granted protection, which would have otherwise justified the application of exclusion clauses in the first place. In other words, if a refugee manages to conceal the fact that he bears responsibility for one or more of the serious crimes listed in Article 12(2), and that information comes to light after a positive decision was made as regards his asylum application, his refugee status is revoked, and that person possibly faces deportation. The EU law also provides for exclusion that does not necessarily affect the right of the applicant to remain in Article 24 QD. As noted in Chapter 3, the EU member states are required to issue residence permits to refugees with recognized protection claims, which allow them to access their entitlements. Article 24(1) on the other hand provides for the loss of a residence permit if “compelling reasons of national security or public order” arise with respect to the claimant, thus, prohibiting the renewal of the document.

The following section explores the application of exclusion clauses in the cases of terrorist suspects by the German Courts.

2.1 The German Jurisprudence

Over the years, Germany has developed a large body of jurisprudence detailing the application of exclusion clauses. Between 2007 and 2012, eleven cases were up for review by the Appellate Bodies; two of those cases were referred to CJEU for a preliminary ruling. Nine cases concerned PKK members, which is included in the EU list of prohibited terrorist organizations, while the rest concerned Chechen rebels. Although these cases address different aspects of exclusion, a common thread can nevertheless be discerned. Higher standing German courts agree that in cases involving alleged terrorists, membership in a terrorist group is a necessary but not sufficient condition to justify exclusion, and other facts of the case need to be considered. Particularly, it must be established whether an individual has a share of responsibility for the violent acts committed by the organization. Furthermore, several exclusion grounds are usually considered simultaneously revealing a myriad of possibilities to deny

safe haven to terrorists who claim to be refugees. For example, exclusion for serious non-political crimes is often considered in conjunction with other exclusion clauses. More generally, Article 12(2) provisions are considered in combination with Article 12(3), which criminalizes incitement and any other forms of participation in the commission of terrorist crimes, particularly as a member of a group. The same pattern characterizes the application of revocation grounds.

The following sections review the interpretation of exclusion provisions by German Courts in the light of two questions. First, what provisions do Courts rely on to justify exclusion of terrorists? Second, what are the elements of the exclusion test? The influence of the substantive provisions of the EU criminal law and the impact of international counter-terrorism norms on the interpretation of exclusion are examined where appropriate. In total, three cases are presented covering the period 2007-2012.

2.1.1 High Administrative Court Nordrhein-Westfalen, 2007, 8 A 4728/05.A

The first case concerns the scope of exclusion provisions. The applicant is a Turkish national who supported a revolutionary left-wing organization (TKP/ML) in Turkey. For his support, he was taken into custody several times and subjected to torture and other forms of inhuman or degrading treatment, which had severe repercussions for his health. In 2002, he fled to Germany, where he applied for asylum. Initially, his application was rejected as manifestly unfounded because of his support for a terrorist organization. At the same time, however, the authorities determined that the applicant must not be deported to Turkey, since he would be at risk of inhuman treatment upon return. The applicant appealed and eventually was granted constitutional asylum in Germany.

As regards applicable exclusion grounds, the Appellate Court interpreted domestic exclusion provision enshrined in Article 60(8) AufenthG in the light of the corresponding provisions of the Refugee Convention and the QD. Thus, it stated that Article 1(F) paragraphs (b) and (c) of the Convention are suitable for excluding terrorists. In this context, the Court made a clear distinction between exclusion from refugee status, which needs to be in conformity with other international obligations, particularly the absolute prohibition on *refoulement* in Article 3 ECHR, and a possible deprivation of the right to remain pursuant to Article 33(2) of the Refugee Convention. Furthermore, the Court considered that domestic exclusion provision should also be construed in the light of Article 12(3) of the QD, which prohibits incitement and other forms of participation in a terrorist organization. However, it also made clear that a simple membership in such an organization does not disqualify a refugee from asylum. Rather, the role of the applicant in the commission of serious crimes by the prohibited organization must be examined, as well as the context of such acts.

As regards the elements of the exclusion test, the Appellate Court argued that the claimant must pose an ongoing threat to society to be excluded from asylum. This requirement derives from a forward-looking understanding of exclusion established in German jurisprudence, the purpose of which is to avert danger. This finding is based on a literal understanding of the relevant provisions in the QD and the UNSC Resolutions 1269 and 1373, which use present tense to frame the excludable activities (p.20). Accordingly, crimes committed in the past are considered irrelevant. In this case, the Court found that, due to the applicant's health condition, he did not present an ongoing threat to the German state or society. Similarly, the Court rejected the reasoning that the purpose of exclusion clauses is to target "unworthy" applicants. However, this point applies only to constitutional asylum. As noted in Chapter 3, the right to asylum under Article 16(a) of the German Basic Law is broader than the statutory right to asylum based on the Refugee Convention. As elaborated by the BVerfG, participation in terrorism represents the only restriction on this right ("*Terrorismusbereich*"). In this regard, the Appellate Court found that, since the applicant's arrival in Germany, he did not support or participate in TKP/ML, and therefore cannot be excluded from protection.

As regards the influence of other sources of law on the interpretation of domestic exclusion clauses, it is noteworthy that the German Court relied heavily on the UNHCR Handbook. It adopted the same understanding of acts contrary to purposes and principles of the UN in Article 12(2)(c) as suggested by the UNHCR. Accordingly, only individuals who held a position of power in a government of a UN member state can fall within the scope of this provision. Furthermore, the Court also endorsed the assessment of proportionality to determine the seriousness of the crime, but also the reasonableness of the exclusion measure. As to the seriousness of the crime, it remarked that such an assessment is only relevant for exclusion pursuant to Article 12(2)(b). As to the proportionality of the measure, the Court stressed that proportionality belongs to the general principles of the EU law and therefore pervades the interpretation of European asylum provisions. The Appellate Court also drew on the UNSC Resolutions, the Refugee Convention, and the EU asylum laws to interpret exclusion under Article 60(8) AufenthG.

2.1.2 Federal Administrative Court 2010, 10 C 7.09

The second case concerns exclusion from refugee status due to the alleged participation of a civilian in war crimes. The applicant is a Russian citizen from Chechnya. He applied for asylum in 2002. He got involved with the armed conflict in Chechnya after his brother was arrested by Russian security forces. In order to obtain his brother's release, he and a Chechen resistance fighter attacked three Russian soldiers in a marketplace, killing two of them and taking the third hostage. The hostage was later exchanged for his brother. Initially, his application was rejected on grounds that it was implausible. The applicant successfully challenges the decision, and the High Administrative Court accepted the

view that there are substantial reasons to believe that he would face persecution if returned to Russia, because he would be perceived as a member of Chechen rebels by Russian security forces. This decision was later reviewed by the Federal Administrative Court because of the significance of the case.

The Court did not object to the High Administrative Court's reasoning that the applicant was at risk of persecution. However, the conclusion by the lower Court that the reasons for exclusion do not apply was not upheld. BVG started with an observation that the provisions of international criminal law codified in the ICC Rome Statute define international crimes and their victims, but not the group of perpetrators. Consequently, individuals who do not belong to either side in an armed conflict can become perpetrators of war crimes, if a "sufficient nexus" between the act and the conflict can be established. The Court noted that the killing of two Russian soldiers during the hostage-taking falls within the scope of Art 8.2(e)(ix) of the ICC Statute ("killing or wounding treacherously a combatant adversary"). In other words, the crime committed by the applicant can potentially fall within the ambit of exclusion under Article 12(2)(a) QD. Furthermore, the Court suggested that the exclusion ground in Article 12(2)(b) might apply as well. As a benchmark for evaluation of the seriousness of the act, the Court suggested an international standard, whereby the crime must be accepted as "particularly grave" in most judicial systems. It also noted that the "political" character of the crime should be reevaluated. Rather than relying on the perception of the crime by the Russian security forces, the Court highlighted the necessity to consider the personal motivation of the perpetrator when assessing the character of the crime. Finally, when applying exclusion grounds in Article 12(2)(b), the Court noted that other requirements, such as the danger of repetition, i.e. the "present threat", and the proportionality test might have to be considered as well.

Even though the issue of terrorism did not figure prominently in the judgement, it illustrates that terrorist acts can also be perpetrated during an armed conflict. However, even in such cases, their perpetrators cannot evade responsibility under international law.

2.1.3 High Administrative Court Niedersachsen, 2010, 11 LB 405/08

The third case concerns revocation of refugee status. The applicant applied for asylum in Germany in 1999 after being arrested in Turkey in the summer of 1998 for publicly hanging up pictures of the leader of the PKK. He claimed to have suffered serious abuse in police custody. In April 2000 he was granted constitutional asylum in Germany. In August 2004, he was convicted to a juvenile sentence of three and a half years for causing grievous bodily harm. In June 2006, the German authorities revoked their decisions on asylum and refugee status, claiming that the human rights situation in Turkey had improved and therefore the applicant had no reason to fear persecution as his political activities had

been insignificant and had taken place a long time ago. Neither did he have to fear persecution because of his family ties to other activists. The applicant appealed, and the revocation procedure was eventually cancelled.

After considering the facts of the case, the Court decided that revocation grounds in Article 14(4) and (5) of the QD are optional provisions, which do not apply in case of juvenile offenders. Accordingly, revocation under domestic law does not have to take these provisions into account. Furthermore, the court noted that Article 12 QD does not apply either since shouting slogans and posting bills in favor of the PKK cannot be considered as instances of aiding and abetting terrorist activities. Such forms of actions neither facilitate criminal acts by the PKK nor do they represent an “essential part” of such crimes. Such an extensive interpretation of the exclusion clause within the meaning of Art 12(3) of the QD is not warranted. Therefore, as a legal basis for revocation only Article 73(1) AsylG (“ceased circumstances clause”) should be considered. However, in this case no “significant and sustainable” improvement of situation in Turkey could be assumed.

2.2 The Case Law of CJEU

CJEU ruled on exclusion of terrorist suspects from refugee protection in three important cases. Generally, it agreed with the German Courts that individual responsibility is the most important criterion for triggering exclusion. Thus, a mere inclusion of an organization in the EU “blacklist” is not sufficient to qualify a member of that organization as excludable. Nevertheless, it is certainly one of the many criteria which the courts need to take into account, alongside other elements, such as the degree of personal involvement in the organization and the “degree of seriousness of danger” posed by the individual. Furthermore, it also endorsed the view that exclusion of terrorists falls within the scope of Articles 12(2)(b) and (c) of the QD. However, CJEU disagreed with the German Courts on the necessary elements of the exclusion test under Article 12 QD, particularly, as regards the forward-looking interpretation of exclusion provisions, including the assessment of proportionality prior to exclusion and the existence of current threat posed by the individual in question. Rather, CJEU insisted that the latter two elements are particularly relevant in the context of revocation of refugee status, because a decision to deprive a refugee of the guarantee to *non-refoulement* might lead to his expulsion and therefore must be approached with utmost caution. By clarifying the relevant elements of the exclusion analysis, CJEU contributed to the harmonization of the European asylum norms on qualification for refugee status ahead of the adoption of the second-phase QD. Finally, CJEU also relied extensively on international anti-terrorism norms, particularly, the pronouncements of the Security Council, to interpret exclusion provisions. Coutts (2017) argues that this is the most problematic aspect of the CJEU judgements on exclusion, as such reasoning fuses global counter-terrorism and refugee norms. It is noteworthy, that CJEU relied on international law to construct the “terrorism-asylum

nexus”, rather than on the provisions in the EU criminal law. In the following sections, the three judgements are explored in more detail.

2.2.1 C-57/09 and C-101/09 Bundesrepublik Deutschland v B and D

In *B and D*, the Court for the first time addressed the elements of the exclusion test under the QD. As regards the background of the case, *B* claimed asylum in Germany for supporting armed guerrilla warfare in Turkey, where he was arrested, subjected to torture and sentenced twice to life imprisonment. During his conditional release from custody on health grounds, the applicant fled to Germany, where he applied for asylum. *D*’s asylum claims were based on his fear of reprisals from the Turkish state and the PKK, where he was a senior official and a fighter, but later relinquished his membership and fled to Germany. Both applicants were denied protection for their links with a blacklisted organization. Upon appeal, the German Courts found that even if the applicants were excluded from protection under the QD, they may still be entitled to the right of asylum under Article 16(a) of the German Basic Law. The Federal Administrative Court referred the matter to CJEU with a request for a preliminary ruling.

As regards the questions submitted by the German Court, first, CJEU stated that there must be “serious reasons for considering” that the asylum-seekers committed the acts in question. This standard implies that a membership in a group which committed terrorist acts is not sufficient to justify exclusion from refugee status. Similarly, even if a person intentionally participated in criminal acts prohibited under the EU law, it does not automatically trigger exclusion, since refugee law is a separate legal framework. Rather, the Court stated that it is mandatory to determine whether asylum-seeker had a “share of responsibility” for the acts committed by the terrorist group while evaluating both subjective and objective criteria. In particular, CJEU noted that it is necessary to investigate the “true role” played by the person concerned in the commission of the acts in question by looking at the position of the claimant within the organization, knowledge of the activities, any pressure to commit the offence and other relevant factors to determine individual responsibility. In this context, a prominent position within a terrorist organization is a strong presumption of individual responsibility, as in the case of *D*.

Second, CJEU remarked that it is not necessary to assess whether an asylum-seeker poses a present danger, since the exclusion clauses in Article 12 QD only concern acts committed in the past. Neither is it necessary to assess proportionality before applying the exclusion measure because such assessment is already included in the evaluation of the seriousness of the act. With respect to Article 12(2)(c) the Court noted that an individual suspected of terrorism need not hold a position of power in a government, nor is it necessary for an individual to have committed a terrorist act. Rather, given the pronouncements of the Security Council that terrorism is always contrary to the goals and

principles of the UN, all terrorist acts with an international dimension fall within the scope of this provision.

Finally, CJEU affirmed the position of the *Bundesverwaltungsgericht (BVG)* on the right of individuals to benefit from domestic asylum arrangements, such as constitutional asylum in Germany, if excluded from protection under the EU law.

2.2.2 C-373/13, *H. T. v Land Baden-Württemberg*

In *H.T.*, CJEU ruled on the revocation of refugee status established by the QD. The case concerned a Turkish national of Kurdish origin, who already possessed a residence permit in Germany. Mr. T. claimed refugee status because of his support for the PKK. While in Germany, the claimant supported the organization by various means, such as collecting funds and travelling to Turkey to attend meetings of the group, for which he was convicted under German law. As result, a revocation procedure was initiated against Mr. T. with a view to expelling him, which was challenged before the High Administrative Court in Baden-Württemberg. Initially, the Court upheld the view that expulsion is lawful, because the claimant's involvement with the PKK was characterized by a large degree of continuity. Even though the claimant belonged to a "group of sympathizers", his activities were nevertheless deemed serious enough in that they shaped and influenced the environment, in which the PKK operates. However, it also noted that the decision on expulsion does not affect the living arrangements of the applicant with his family members in Germany as he still enjoys the right to private and family life enshrined in Article 6 ECHR and Articles 2(1) and 6(1) of the Basic Law. Upon further appeal, the matter was referred to CJEU for a preliminary ruling.

First, CJEU noted that a residence permit may be revoked pursuant to Article 21 paragraphs (2) and (3) or according to Article 24(1). If the former is the case, there must be "*reasonable grounds for considering that the refugee is a danger to the security of the state or, having been convicted by a final judgment of a particularly serious crime, he constitutes a danger to the community*". Similar to Article 33(2) of the Geneva Convention, the scope of this provision is limited to situations of *refoulement*, as opposed to expulsion to a third country (paragraph 42-44). Revocation can also take place pursuant to Article 24(1), which requires "compelling reasons of public security or public order".

Second, CJEU contrasted the consequences of the revocation pursuant to each article. The Court pointed out that revocation under Article 21(3) may render an asylum-seeker removable to an unsafe third country and urged the EU countries to consider it only as a measure of the last resort. Consequently, the provision sets a high evidentiary threshold as explicated by phrases "reasonable grounds for considering" and "particularly serious crime". In contrast, revocation under Article 24(1) does not entail deportation, merely a cancellation or a refusal to renew the residence permit. Nor does

it require the individual in question to have committed a serious crime. Thus, the latter provision has a broader scope of application, as it allows the authorities to revoke the residence permit for less serious crimes. In this context, CJEU also noted that a refusal to renew the residence permit does not entail the loss of any rights enjoyed by a refugee. Peers (2015) argues that revocation of a residence permit can only affect the ability of the refugee to travel within the Schengen area.

Finally, CJEU continued the line of reasoning established in *B and D* concerning the membership in a terrorist group. The Court stated that collection of money for a prohibited organization does not automatically amount to exclusion, as such acts “do not constitute, in themselves, terrorist acts”. Furthermore, CJEU suggested that the national court should examine the “degree of seriousness of danger” that Mr. T posed, by looking at the criminal conviction, but also at the punishment that he received. Finally, the Court noted that the principle of proportionality was necessary to revoke the residence permit. In particular, it stated that the national court should examine whether Mr. T. poses a “present threat”.

2.2.3 C-573/15, Commissaire général aux réfugiés et aux apatrides v. Mostafa Lounani

Finally, in *Lounani*, CJEU ruled on the scope of exclusion, but also addressed the relationship between the EU counter-terrorism and refugee norms. The case concerned a Moroccan national who was found guilty of participating in a terrorist group, forgery of documents, use of forged documents and illegal residence. Essentially, the bulk of his activities focused on sending fighters to Iraq. After his criminal conviction, Mr. Lounani applied for refugee status arguing that his conviction of participation in a terrorist group rendered Morocco unsafe for him. Initially, his application was rejected because the crimes he was charged with are covered by the FDCT and, thus, constitute a terrorist offence under national (Belgian) law. Hence, participation and support for a terrorist organization rendered him excludable from refugee status. Mr. Lounani appealed, and the Appellate Court submitted the request for a preliminary ruling on the interpretation of Article 12 paragraphs (2) and (3) to CJEU. The first question was whether it is necessary for a person to have committed a terrorist offence covered by Article 1 FDCT in order for Article 12(2)(c) QD to apply. The second question was whether the acts for which Mr. Lounani was found guilty are contrary to the purposes and principles of the UN. Finally, the third question was whether it can be imputed to the applicant, based on the judgement convicting him of being the leader of a local terrorist cell, that he knowingly participated or otherwise instigated prohibited acts, or an individual assessment of circumstances needs to be carried out.

First, CJEU noted that acts contrary to purposes and principles of the UN, which are alluded to in Article 12(2)(c) QD, are broader than terrorism. The Court based its reasoning on the text of the UNSC Resolution 1624, which states that “*knowingly financing, planning and inciting terrorist acts are also*

contrary to the purposes and principles of the United Nations”. Hence, it concluded that the definition of excludable acts under Article 12(2)(c) is broader than the catalogue of offences included in the FDCT.

Second, the Court remarked that the interpretation of Article 12(2)(c) QD should encompass the relevant provisions of international law, particularly UNSC Resolution 2178 addressing the phenomenon of “foreign fighters”. In this light, not only individuals directly participating in terrorism, but also those, who engage in activities facilitating the commission of terrorist acts through recruitment, organization and transportation of equipment and individuals, can be excluded from protection. Nevertheless, the assessment of individual responsibility is necessary. In this regard, the opinion of AG Sharpston is instructive as it sheds light on the elements which are necessary for the finding of individual responsibility. She noted that after a determination that a particular organization is indeed a terrorist organization, it would be necessary to examine the precise nature of the individual’s membership in the organization, his leadership role and participation in the planning, organization and perpetration of various acts of the organization.

Finally, the Court noted that it would not be necessary to demonstrate that the individual in question, or indeed the organization, perpetrated particularly violent or vicious acts of terrorism; mere participation in a terrorist organization and various ancillary activities may be sufficient to disqualify an individual from refugee status. Thus, the Court asserted a broad scope of the exclusion clause, meaning that a degree of support for “foreign fighters” will result in exclusion from refugee status (Peers, 2017). Once again, the reasoning of AG Sharpston is useful. She argued that a joint reading of Article 12(2) and 12(3) of the QD implied that the exclusion clause was not limited to terrorist acts, i.e. the list of crimes mentioned in Article 1 FDCT, and that a conviction for offences listed in Article 2 FDCT could serve as the basis for exclusion from refugee status. However, in order for exclusion to apply, the acts in question must reach a certain level of seriousness to ensure consistency with the wording of the exclusion provisions (Coutts, 2017).

3 Conclusion

This Chapter examined the interplay between anti-terrorism norms and exclusion from refugee protection for participating in terrorism. The main finding is that the international legal framework for counter-terrorism is a useful reference point in exclusion cases, as its norms provide interpretative guidance to the Courts. First, the judicial approach to excluding terrorist suspects from asylum dovetails with the international consensus on identifying terrorism by reference to violent acts, which are prohibited in international and regional agreements. Accordingly, the focus of exclusion analysis is on the act, rather than on the “moral” qualities of the perpetrators. In this context, the Courts insist

that individual responsibility for the commission of terrorist acts, which comprises objective and subjective elements, rather than simply belonging to a “blacklisted” terrorist group, justifies exclusion.

Second, Courts routinely draw on international counter-terrorism treaties to interpret exclusion provisions. In this regard, UNSC Resolutions enacted under Chapter VII of the Charter are particularly relevant, as these instruments impose legal obligations on states, which also affect the jurisprudence of the Courts. First and foremost, Resolution 1373 provides the basis for exclusion of terrorists from refugee protection in international law. It states that terrorist acts are always contrary to the purposes and principles of the UN, which provides a link to the exclusion ground in the Refugee Convention mentioned in Article 1(F)(c). The case-law reveals that the German Courts and CJEU routinely consider similar exclusion provisions in European and domestic laws when dealing with alleged terrorists. Other instruments, such as Resolution 1624 and 2178 are relevant as well. They further consolidate the exclusion-related obligations that span criminal and refugee law. For example, in *Lounani*, CJEU relied on the former Resolution to argue that Article 12(2)(c) QD has a broader scope than Article 1 FDCT, which contains a definition of terrorism and a catalogue of criminal offences. Thus, a person need not have committed a terrorist act to fall within the scope of Article 12(2)(c) QD. Furthermore, it also noted that a combination of Articles 12(2) and (3) can be used as a basis for excluding a person from asylum if the individual committed offences related to a terrorist group covered by Article 2 FDCT. As regards Resolution 2178, the Court suggested that individual responsibility for terrorism in case of Mr. Lounani can be established on the basis of his participation in activities proscribed by the instrument, since no comparable EU rules were adopted at that time.

Third, the Courts rely on the counter-terrorism and criminal law norms as a benchmark to evaluate the character of acts that can justify exclusion. The first step usually involves the assessment of criminality of the act. In *10 C 7.09*, BVG noted that if the conduct of the applicant is considered criminal under the Rome Statute, it can be considered as a ground for exclusion under the QD. In *Lounani*, CJEU considered provisions of the FDCT to highlight the criminal character of the offences perpetrated by the applicant, which would justify exclusion under Articles 12(2) and 12(3) QD. The second step involves the evaluation of the seriousness of the act. In *10 C 7.09*, the German Court suggested that this requirement is fulfilled if an offence is considered a capital crime in most judicial systems. Finally, the Courts also evaluate whether there are serious reasons for considering that an asylum-seeker committed the acts in question. Some of the criteria to establish individual responsibility in such cases derive from international criminal law and investigate the relationship between an individual and an organization and the role of that individual in various organizational activities and structures. This line of reasoning was adopted by the German Courts and CJEU in numerous cases involving a “blacklisted” terrorist organization and an asylum-seekers with ties to this group. At the same time, CJEU also noted

that refugee law is a separate legal framework, which requires a different approach. Therefore, in *B and D*, the Court stated that a criminal conviction for terrorism and a high position in the organizational hierarchy do not automatically constitute exclusion, but represent important indicators testifying to the “true role” played by individual in the commission of terrorist acts.

Another important finding is that refugee law provides the Courts with an array of legal tools to exclude terrorists from asylum. First, the analysis of the case-law reveals that the Courts cast their nets wide and consider multiple exclusion provisions simultaneously. Quite often, they rely on Articles 12(2) and 12(3) to justify exclusion claims because in most of the presented cases the applicants have ties to a terrorist organization. While Article 12(2) sanctions individual conduct, Article 12(3) is better suited to account for the involvement of an individual in a terrorist organization. Also, the Courts endorse considering Article 12(2)(b) in combination with other provisions of Article 12(2) to exclude terrorists. Each of these provisions serves a distinct purpose as they capture different aspects of a terrorist act. Some terrorist acts fall within the scope of Article 12(2)(b) because they are by definition disproportionate to their objective, and thus, non-political. This was the reasoning of the German Court in *10 C 7.09*, which pointed out that in the absence of an explicitly political motive of the perpetrator, the crimes committed by a civilian during an internal armed conflict can justify exclusion from asylum even if directed against one of the conflicting factions. Furthermore, in *B and D*, CJEU stressed that acts falling under Article 12(2)(b) must be committed in the past. In contrast, the German Courts used to argue that exclusion under Article 12(2)(b) turns on whether or not there is a risk of repetition, i.e. whether the individual in question perpetrates these crimes again. The ruling of CJEU in *B and D* aligned German jurisprudence with the European standards on exclusion. In the analysed case-law, however, exclusion for terrorism is mostly based on Article 12(2)(c). In *Lounani*, CJEU gave a broad interpretation of this provision. The Court stated that a person need not hold a position of power in a UN country to trigger exclusion, nor do the acts falling within its scope need to be committed. It also noted that individual responsibility can be based on personal involvement with a terrorist organization. Finally, the Court implicitly acknowledged that acts committed in the territory of the host state can form the basis of exclusion. Even though CJEU did not consider exclusion based on Article 12(2)(b) QD in this case, such interpretation appears to be in line with the wording of this re-cast provision.

Second, the case-law reveals that aside from exclusion clauses, the Courts can also rely on revocation provisions to exclude terrorists from protection. In *H.T.*, CJEU noted that Article 14 QD allows for two types of revocation. First, individual refugee status can be withdrawn pursuant to Articles 21(2) and 21(3). In this case, the applicant must pose a danger to national security or a threat to the community of the host state. Revocation under Articles 21(2) and 21(3) entails the loss of the right to remain, and the individual with respect to whom these provisions apply likely faces deportation. The second type

of revocation concerns the withdrawal of the residence permit pursuant to Article 24(1). In this case, the individual's right to remain is unaffected. Rather, the residence document is simply not renewed, which precludes travelling to other countries in the Schengen area. CJEU also clarified that these provisions cover different situations. The former governs a situation, whereby an asylum-seeker commits a particularly grave crime that affects the security of the host country or the local community. In this context, deportation is a procedural device that is supposed to alleviate that threat. In the latter case, crimes of lesser gravity might justify revocation of the residence permit. This provision seems to mostly affect individuals with no family ties, who, upon refusal to renew the residence permit, might be asked to leave the host country. Finally, CJEU drew a clear distinction exclusion and revocation in terms of the necessary legal requirements. As regards the former, it noted that exclusion only concerns crimes committed in the past. Therefore, it only targets "unworthy" applicants, who disqualified themselves from asylum because of having committed one or more of the crimes mentioned in Article 12(2) QD. Consequently, it is not necessary to evaluate proportionality of the exclusion measure, since it is already implicit in the assessment of the seriousness of the suspected crime. In contrast, the purpose of revocation is to address present threats emanating from asylum-seekers. Therefore, the decision to revoke refugee status in such cases must take into account the principles of proportionality and necessity, given the potentially grave consequences to an individual resulting from his removal to an unsafe country.

As illustrated above, exclusion analysis is based on rather vague concepts, which are relied on by the Courts to make conjectures about some hypothetical scenarios. It is fraught with difficulties and open to errors. The multiple exclusion options only make matters worse for refugees. However, despite the myriad of exclusion possibilities, the analysis of the case-law shows that the interplay between international, regional and domestic asylum rules allows for some "buffer" in case a refugee is wrongfully assumed to be a terrorist. In *B and D*, CJEU argued that it is possible for an individual to benefit from domestic asylum arrangements of an EU member state. Thus, both claimants were granted constitutional asylum in Germany, even though they were excluded from the regime of protection established by the QD. Despite the claims made by some scholars that constitutional asylum in Germany lost any practical significance, the analysis suggests that it is still granted occasionally. The main argument against asylum based on Article 16(a) is that it has a restrictive scope (Lambert et al., 2008). However, it pertains only to the inclusion requirements, such as persecution. As regards exclusion criteria, the Court took a rather liberal approach, arguing that only terrorism can constitute a restriction on this right. In *8 A 4728/05.A*, the High Administrative Court relied on the case-law of BVerfG to grant constitutional asylum to a person suspected of terrorism. It argued that, the purpose of exclusion is not to target "unworthy" applicants, who have committed criminal acts in the past, but

rather to avert danger to the security of the state. Since the applicant posed no threat because of his poor health condition, he was eligible for protection in Germany.

Conclusion

In Chapter 1, it was argued that there is a scholarly consensus that CEAS is good news for refugees because the empowerment of supranational institutions, most notably CJEU, moved the asylum policy into a more liberal direction at the EU level and ensured a better standard of treatment of refugees at the national level. This thesis set out to explore, whether this proposition holds true for Germany.

At the first glance, this is not the case. The first major point of concern relates to the implementation of revocation clauses in Germany. For starters, revocation is not even mentioned in the Refugee Convention. To implement the QD, Germany set up three administrative procedures to be able to cut ties with unwanted refugees in a wide variety of situations. The amount of administrative discretion bestowed on German authorities by the EU revocation scheme was on display, when the Ministry of Interior ordered BAMF to launch a revocation “probe” into 80.000 to 100.000 positive asylum applications following the scandal of Franco A., a German soldier, who was granted asylum in Germany based on false claims¹³. Third, the “Cologne Act” made it significantly easier for domestic authorities to expel criminal refugees, *inter alia* by allowing for the possibility of revocation of refugee status in cases of relatively minor crimes.

The second point of concern relates to the ruling of CJEU in *B and D*, which significantly expanded the scope of German exclusion clauses. Prior to that judgement, the German courts had endorsed a forward-looking understanding of exclusion, focusing on the level of danger posed by a refugee to the state or its society. German judges had not considered whether crimes committed in the past could disqualify an individual from protection because of a rather liberal conception of exclusion criteria, which were initially developed by BVerfG while interpreting the right to asylum under the Basic Law and subsequently applied to statutory asylum. Particularly, the notion of “unworthy” applicants never took hold in the German jurisprudence. CJEU disagreed and countered that a threat assessment is not relevant in the context of exclusion analysis. Rather, serious reasons for considering that an individual committed serious crimes in the past is the relevant benchmark. The judgement of the court thus created an additional class of excludable refugees in Germany, who would have otherwise been granted protection.

¹³ Spiegel (2017). Bamf soll Zehntausende Asylbescheide prüfen.

However, upon closer inspection, the opposite trend is true. The first major liberalizing effect of CEAS on the German asylum system took place after the introduction of the first-phase QD. It relaxed the restrictive interpretation of persecution that the German courts borrowed from the Federal Constitutional Court. In particular, it recognized non-state actors as legitimate agents of persecution, thereby significantly expanding the class of potential beneficiaries of refugee protection. While no official statistics are available on the frequency of claims based on persecution by non-state actors, there are reasonable grounds to believe that such claims represent a significant proportion of the total number of asylum claims.

The recast QD continued down the liberal path. One of the biggest achievements of the amended version of the directive is the introduction of the concept of “international protection” into German legislation, which regularizes the status of persons entitled to human rights protection under previous arrangements in the EU law. While minor differences in treatment persist compared to applicants qualifying for Convention status, it represents a big improvement for persons who could only benefit from *ad hoc* national asylum arrangements under the first-phase QD.

Another positive aspect of CEAS resulting in an improved standard of treatment at the national level is the specification of the provision on the agents of protection in the QD. Compared to its predecessor, the amended version of the instrument explicitly excludes non-state actors from the list of potential candidates who are able and willing to offer refugees protection. The exclusion of non-state actors from the scope of Article 7 QD relaxed the qualification conditions for protection status. Under the new arrangement, the EU countries are obliged to seriously consider asylum claims of persons, who could have been advised to turn to their family members for protection prior to that. It is a positive development from a legal and moral point of view, as non-state actors are not accountable under international law. Excluding them from the ambit of the actors of protection strengthens not only moral, but also legal authority of the Refugee Convention as an instrument that seeks accountability from its signatories.

Even aspects of the QD that arguably move the German asylum policy in a restrictive direction are counterbalanced by the liberal “ethos” of the European courts. As regards revocation, the judgement of CJEU in *H.T.* is instructive. The court established two types of revocation: “revocation-lite” that does not affect the rights of recognized refugees, and revocation that does result in the loss of the right to remain. The commission of lesser offences can only engage the former, potentially negating some aspects of the changes introduced to AufenthaltG by the “Cologne Act”. Furthermore, BVG argued in a recent judgement that the second type of revocation should only be applied in a restrictive manner, that is, as a matter of last resort. As regards exclusion for terrorism, the decision by CJEU in *B and D* to

exclude both individuals from protection based on the EU standards did not deter the referring court to grant them constitutional asylum.

Generally, one must keep in mind the original purpose of exclusion and revocation provisions before making inferences about their influence on the overall direction of the asylum policy. Exclusion clauses, however restrictive and “dangerous” they might appear, are reserved for serious criminals, whose wrongdoing is so grave that international treaties have been concluded to document it. It is clear, that such clauses were not intended to apply often, at least not nearly as often as inclusion clauses. Thus, the argument that the policy is moving in a restrictive direction as a result of a more expansive construction of exclusion is valid mostly in the realm of legal doctrine. In the policy domain, such inferences are likely to be disregarded because the application of exclusion clauses is a rather insignificant factor for the aggregated recognition rate, which is one of the indicators of the direction of the asylum policy.

Same argument can be made with respect to revocation. While indeed, there is a possibility that it can result in the suspension of *non-refoulement*, such a scenario is quite rare and therefore does not support the proposition that it can have significant impact on the asylum policy. In case a person commits a crime in Germany and faces revocation, domestic norms counteract the more restrictive elements of the revocation scheme. For starters, refugees need to be kept informed about the possible decision to revoke their refugee status in writing and be able to respond. Furthermore, even if refugee status is revoked, a refugee does not automatically face deportation. First, the applicability of grounds for granting subsidiary protection are considered. Second, the applicability of *non-refoulement* with respect to the applicant is considered. If none of the above applies, the expulsion framework of Article 53 AufenthG is activated. In practice, this process can take several years, during which the applicant enjoys the full spectrum of rights as refugee.

In sum, the amended QD establishes a liberal legislative scheme, which is further strengthened by the constitutional framework of the Lisbon Treaty and domestic legal norms of the EU countries. These factors have contributed to a liberal conception of asylum policy in Germany.

Naturally, a legitimate question arises, as to why invest so much effort in tightening the exclusion and revocation frameworks if most of these restrictive laws and administrative procedures are rarely utilized in practice or counterbalanced by rights-enhancing provisions? In other words, what role do such restrictive measures play in a liberal legislative scheme for asylum put forward by the German lawmakers? One way of looking at it is, quite simply, that these provisions are applied when a necessity arises. Most of these measures do not target refugees with a genuine fear of persecution, who come to Germany to escape domestic evils. Rather, they target criminals and fraudulent individuals, who try

to exploit the system of refugee protection for their personal advantage. Such individuals represent the minority of the refugee population, despite claims to the contrary by the right-wing political parties and the media.

Another explanation derives from the need to balance humanitarianism and realism. Germany takes its humanitarian obligations seriously and understands that refugee law is remedial and has humanitarian ends. This position emerges from the German jurisprudence on exclusion of terrorists prior to the intervention by CJEU in *B and D*. Because of the forward-looking conception of exclusion, German courts were not interested in whether refugees committed crimes in the past; these crimes might have pursued legitimate objectives. In the majority of German cases involving terrorist suspects that were reviewed by higher standing courts, the applicants were former members or affiliates of the PKK, an organization fighting for an independent Kurdistan; for this reason, it is severely repressed by the Turkish state. Even if protection in Germany was not forthcoming on Convention grounds, several applicants with ties to PKK were granted constitutional asylum. Even in *B and D*, the applicants, who were denied protection according to the EU rules, were still entitled to constitutional asylum, which is intended to protect the politically oppressed – an entirely humanitarian objective.

On the other hand, Germany is well-respected internationally, and its leaders understand the value of carefully crafted diplomacy. Hence, there is a possibility that the state of bilateral relations between Germany and third countries might have an impact on decisions of the courts in exclusion cases because, politically, these are highly sensitive cases. The same liberally-minded German courts that granted constitutional asylum to PKK affiliates decided to exclude a Chechen from refugee protection, even though there were serious reasons to believe that he would face persecution, were he returned to Russia. Even though the present research does not allow to draw inferences about the influence of politics on the decisions of courts because only few non-randomly selected cases were considered, the point is to illustrate the utility of exclusion and revocation reforms in the context of foreign policy.

The third reason, that might potentially explain why there is such a robust exclusion and revocation framework in Germany, while the overall direction of the asylum policy is liberal, has its roots in domestic politics. Decisions to “punish” refugees mostly come from the political level, when politicians try to respond to voter concerns and/or protect their power base. From the point of view of centrist politicians who try to fend off the right-wing challenge, it makes sense to “appear” tough on refugees, which is, as the examples have illustrated, possible without actually adopting any measures in contravention of the Convention obligations.

In short, there are reasons other than restricting access to protection for tightening domestic exclusion and revocation clauses in Germany. In the overall context of liberal asylum policies, these clauses allow domestic actors to pursue a myriad of political objectives.

The present thesis has a number of limitations. It addresses only the qualification framework in the QD, which serves as an indicator for the overall liberalizing effects of CEAS on German asylum policy. Analysis of other instruments of CEAS can provide a more nuanced understanding of the impact of the EU asylum laws on German legislation. It would help shed light on the question whether the presence of established norms in the field, as in case of the QD, is a precondition for the liberalizing effects of CEAS. Furthermore, the thesis covers only a limited number of cases and only the ones that were referred to higher standing courts. A larger and more diverse pool of cases potentially involving lower standing German courts but also judgements of the ECtHR can help increase validity of the findings.

Given the rise of the far-right parties in the EU, future research could investigate whether courts in states with right-leaning governments particularly in the Eastern parts of Germany, where AfD is represented in state legislatures, are more likely to adopt restrictive criteria when interpreting domestic asylum statutes. In this context, do courts defer to the executive, try to constrain it, or do not get involved in the politics of the executive branch?

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