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Constructing Equality in EU Asylum Law

Stefan Salomon*

ABSTRACT

The view that subsidiary protection status is a lesser form of protection than refugee status is widespread among European Union (EU) Member States' asylum authorities and courts. This view is based on the assumption that the protection needs of beneficiaries of subsidiary protection are of shorter duration than those of refugees. Based on this assumption, several EU Member States have curtailed the rights of beneficiaries of subsidiary protection and national courts have upheld these restrictions. This article argues that the assumption of a shorter duration of subsidiary protection, and therefore lesser protection needs, is empirically unfounded and normatively untenable. The assumption is based on the premise that the principal circumstances justifying subsidiary protection – poor security situations or armed conflicts – are temporary in nature. Contrary to tendencies in EU Member States, it is argued that the development of EU asylum law points towards the creation of a uniform status of protection that entails the same rights for refugees and beneficiaries of subsidiary protection. Why, then, does the assumption of the temporary nature of subsidiary protection persist? This article posits that the persistence of the assumption of the temporary nature of subsidiary protection derives from a more profound perception in international legal thought of wartime as exceptional and of short duration.

1. INTRODUCTION

The concept of subsidiary protection was established in European Union (EU) law in 2004 as a complementary form of protection to refugee status under the 1951

* Assistant Professor, European Studies Department, University of Amsterdam, Netherlands. Email: s.salomon@uva.nl. The arguments in this article build on the book chapter by Florian Hasel and Stefan Salomon, 'Differenzierungen zwischen Flüchtlingen und subsidiär Schutzberechtigten: Zu einem einheitlichen Schutzstatus' [Differentiations between Refugees and Beneficiaries of International Protection: Towards a Uniform Status of Protection] in Stefan Salomon (ed), *Der Status im europäischen Asylrecht* [Legal Status in European Asylum Law] (Nomos 2020). I would like to thank the two anonymous reviewers for their valuable comments on an earlier version of this article. Any errors remain my own.

[1] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

Convention relating to the Status of Refugees (Refugee Convention).[1] Ever since subsidiary protection found its way into EU law, the view has persisted that it constitutes a lesser form of protection than refugee status. This view is partly based on the assumption that the shorter duration of subsidiary protection means its beneficiaries' protection needs are less extensive than those of refugees, resulting in a 'subsidiary' legal status. When subsidiary protection was introduced, the European Commission stated that 'it was assumed that this status [subsidiary protection] was of a temporary nature. As a result, the Directive allows Member States the discretion to grant them [beneficiaries of subsidiary protection] a lower level of rights in certain respects'.[2] Since 2015, several EU Member States have curtailed in their domestic asylum laws the rights of beneficiaries of subsidiary protection – social welfare rights, the right to family reunification, duration of residence permits, for example – often justifiying these restrictions by reference to the allegedly shorter duration of subsidiary protection.[3] In several Member States, domestic courts have upheld legislative restrictions of rights of beneficiaries of

[2] Commission, 'Proposal for a Directive on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted' (Communication) COM(2009) 551 final, 8. During the negotiations relating to the EU Qualification Directive, some members of the European Parliament argued that a clear distinction between refugee status and subsidiary protection 'must be preserved. Refugees are granted their status on the basis of the forms of discrimination laid down in the Geneva Convention; this protection is designed for the longer term. Subsidiary protection, on the other hand … is a temporary protection which does not narrow down the possibility of a swift return'. European Parliament, 'Amendments 52-176' PE 310.971/52-176 (14 June 2002), cited in Jane McAdam, *Complementary Protection in International Law* (Oxford University Press 2007) 59. The alleged shorter duration of subsidiary protection was not the sole reason for according lesser rights to beneficiaries of subsidiary protection. As McAdam points out (at 91), it was also the outcome of political compromises during the negotiations of the Qualification Directive 2004.

[3] In March 2016, the German government suspended family reunification for beneficiaries of subsidiary protection for two and a half years. See § 104 XIII, Residence Act BGB1 I S 2460, 2461. Since 1 August 2018, family reunification of beneficiaries of subsidiary protection has been made possible again (see § 36a Residence Act BGBl I S 1147). However, family reunification visas are limited to 1,000 per month and, in practice, the extensive procedural requirements result in a low number of visas being issued. From 1 August 2018 to 31 December 2018, only 1,500 visas for family reunification were issued, although 5,000 places were available. See Thomas Matthies, 'Verfahrensrechtliche Hürden im Familiennachzug für subsidiär Schutzberechtigte' (*JuWiss Blog*, 10 January 2019) <https://www.juwiss.de/2-2019/> accessed 18 January 2022. In June 2016, the Swedish (Bernd Parusel, 'Sweden's U-turn on Asylum' (2016) 52 Forced Migration Review 89) and Austrian (Amendment of the Austrian Asylum Act 2005, BGBl I 24/2016) governments followed suit and restricted family reunification for beneficiaries of subsidiary protection; beneficiaries now have to wait for three years from the date they are granted protection before they can apply to be reunited with family members. Denmark, which has a special position in the Common European Asylum System (CEAS), also introduced amendments to its Aliens Act in January 2016, requiring beneficiaries of subsidiary protection who have fled from situations of generalized violence to have resided in Denmark for a minimum of three years, before they can apply for reunification with family members. See UNHCR, 'Observations on the Proposed Amendments to the Danish Aliens Legislation' (January 2016). The Danish Minister for Immigration justified

subsidiary protection. The Austrian Constitutional Court, for example, held that the 'circumstances, which typically justify subsidiary protection, such as a poor security situation or civil-war like conditions, rather are of a temporary nature and might be terminated sooner than acts of persecutions enumerated in Art 1 A (2) of the Convention Relating to the Status of Refugees'.[4] The assumption of the temporary nature of subsidiary protection is not limited to governments and courts; it is also reflected in some literature on asylum and refugee law.[5]

Contrary to the restrictive trend in several Member States, this article advances the argument that EU law entails an obligation of equal treatment of refugees and beneficiaries of subsidiary protection. This obligation represents the key legal principle that structures legal interpretation of the content of international protection, that is, the specific rights attached to refugee status and the status of beneficiary of subsidiary protection. The argument unfolds along two lines. First, the article identifies a shift in EU asylum law from an emphasis on the differences between refugee status and subsidiary protection status towards equal treatment, which is also reflected in many of the changes to the recast EU Qualification Directive adopted in 2011 (Qualification

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the legislative amendments that significantly curtailed the rights of beneficiaries of subsidiary protection by noting the 'expected temporary nature of the need of protection' (Danish Minister for Immigration, Integration and Housing, Letter to the Commissioner for Human Rights of the Council of Europe, 11 March 2016, 5). For a concise overview of the restrictive measures that have been adopted on family reunification in other EU Member States, see Council of Europe Commissioner for Human Rights, 'Realising the Right to Family Reunification of Refugees in Europe' (Strasbourg 2017) 34–35. Restrictions to family reunification are part of broader legislative amendments that curtail the rights of beneficiaries of subsidiary protection and reduce the duration of their residence permits. EU Member States also excluded beneficiaries of subsidiary protection from minimum social welfare (for Austria, see § 4 (1) Sozialhilfe-Grundsatzgesetz (Social Assistance Basic Law) BGBl I 108/2019). For a concise critique on the *de facto* exclusion of beneficiaries of subsidiary protection from minimum social welfare benefits, see UNHCR, 'Analyse des Entwurfs für ein Sozialhilfe-Grundsatzgesetz' [Analysis of the Draft Basic Social Security Law] (8 January 2019).

4 VfGH 10.10.2018, E 4248-4251/2017 (Austrian Constitutional Court) para 47. See also VfGH 28.06.2017, E3297/2016 (Austrian Constitutional Court) paras 21–22: 'contrary to persons being granted the status of asylum, the residence status of beneficiaries of subsidiary protection is of rather provisional nature'. Also, in the Austrian Asylum Act, refugee status is defined as an 'initially limited and eventually permanent right of residence and entry' (§ 2(1)(15) Asylum Act 2005 BGBl I Nr 100/2005), while the status of subsidiary protection is described as a 'temporary, extendable right of residence and entry' (§ 2(1)(16) Asylum Act 2005 BGBl I Nr 100/2005). The counsel for the Danish government argued in hearings before the ECtHR that the rule relating to the three-year waiting period for beneficiaries of subsidiary protection 'is due to the generally more uncertain and temporary nature of this group's need for protection'. See *MA v Denmark* [GC Hearing] App No 6697/18 (ECtHR, 10 June 2020).

5 See, *inter alia*, Matthew Price, *Rethinking Asylum* (Cambridge University Press 2009) 167 (describing subsidiary protection in the EU as a temporary protection status that grants persons the necessary protection before they can return to their countries of origin); Judith Putzer, *Asylrecht* [Asylum Law] (2nd edn, Manz 2011) 86.

Directive 2011) and, indeed, in its title.[6] Although this shift has not yet materialized in establishing full legal equality between refugees and beneficiaries of subsidiary protection in EU law, the Court of Justice of the European Union (CJEU) narrows Member States' room for differentiation. Secondly, the article argues that the assumption that subsidiary protection is temporary in nature is both normatively and empirically untenable. This assumption is not limited to EU Member States but exists also in the complementary protection regimes of non-European States.[7] The assumption of the temporary nature of complementary protection, as this article argues, reflects a more general perception of war and time in international legal thought: wartime is conceived of as an exceptional interruption of the 'normal' state of peacetime.[8] This perception of wartime arguably shapes the perception of the protection needs of those fleeing wars.

Although subsidiary protection in EU asylum law has received significant scholarly attention in past years, legal scholarship largely focuses on inclusion and exclusion criteria and barely engages with the content of subsidiary protection.[9] In a similar vein, the overwhelming majority of the judgments of the CJEU on subsidiary protection concern questions on the interpretation of inclusion or exclusion criteria.[10] Although, at the time of writing, the CJEU has decided on the content of subsidiary protection in only one decision,[11] the absence of a significant body of CJEU case law on the content of subsidiary protection does not mean that no principles can be carved out from EU law.[12] A small

6 Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 (Qualification Directive 2011).

7 On temporary protection status in United States (US) law, see Bill Frelick, 'What's Wrong with Temporary Protected Status and How to Fix It: Exploring a Complementary Protection Regime' (2020) 8 Journal on Migration and Human Security 42; Claire Bergeron, 'Temporary Protected Status after 25 Years: Addressing the Challenge of Long-Term "Temporary" Residents and Strengthening a Centerpiece of US Humanitarian Protection' (2014) 2 Journal on Migration and Human Security 22.

8 Mary Dudziak, *Wartime* (Oxford University Press 2012) 4.

9 See, *inter alia*, Ryszard Piotrowicz and Carina van Eck, 'Subsidiary Protection and Primary Rights' (2004) 53 International & Comparative Law Quarterly 107; Hélène Lambert, 'The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence' (2013) 25 International Journal of Refugee Law 207; Evangelia (Lilian) Tsourdi, 'What Protection for Persons Fleeing Indiscriminate Violence?' in David Cantor and Jean-François Durieux (eds), *Refuge from Inhumanity? War Refugees and International Humanitarian Law* (Brill Nijhoff 2014); Steve Peers, 'Qualification: Refugee Status and Subsidiary Protection' in Steve Peers and others (eds), *EU Immigration and Asylum Law* (2nd rev edn, Brill Nijhoff 2015).

10 Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECLI:EU:C:2009:94; Case C-285/12 *Aboubacar Diakité v Commissaire général aux réfugiés et aux apatrides* [2014] ECLI:EU:C:2014:39; Case C-542/13 *Mohamed M'Bodj v État belge* [2014] ECLI:EU:C:2014:2452.

11 Joined Cases C-443/14 and C-444/14 *Kreis Warendorf v Alo and Osso v Hannover* [2016] ECLI:EU:C:2016:127.

12 See Armin von Bogdandy, 'Founding Principles' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart Publishing/CH Beck 2011) 42–47.

number of authors have enquired into the principles that structure the content of subsidiary protection. In particular, the work of Jane McAdam and Jason Pobjoy has been groundbreaking in this regard.[13] While this article builds on and complements, in particular, the work of McAdam, it differs from it in several respects. McAdam argues (and has critiqued the fact) that the first version of the EU Qualification Directive, adopted in 2004 (Qualification Directive 2004),[14] entrenched an 'hierarchical protection structure' in EU asylum law and relegated subsidiary protection to a secondary role.[15] By contrast, the Qualification Directive 2011[16] adopts a less hierarchical approach. This article examines how it has reshaped the content of protection in the EU, especially when considered in light of EU fundamental rights law. Moreover, Pobjoy and McAdam rely on international human rights law to advance an argument on equal treatment of refugees and beneficiaries of subsidiary protection.[17] While international human rights law certainly has a *normative* bearing on EU law, its *practical* significance is limited, even in the pluralist legal order of the EU.[18] Hence, although the assumption of the temporary nature of complementary protection is limited to EU asylum law, this article provides a contextual

[13] See Jason Pobjoy, 'Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection' (2010) 34 Melbourne University Law Review 181; Jane McAdam, 'Status Anxiety: The New Zealand Immigration Bill and the Rights of Non-Convention Refugees' (2009) 2 New Zealand Law Review 239; Jane McAdam,'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 17 International Journal of Refugee Law 461, 497–514; McAdam (n 2). For a recent contribution, see Jürgen Bast, 'Vom subsidiären Schutz zum europäischen Flüchtlingsbegriff' [From Subsidiary Protection to a European Refugee Concept] (2018) 38 Zeitschrift für Ausländerrecht 41.

[14] Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12 (Qualification Directive 2004).

[15] McAdam (n 2) 49, 216.

[16] Qualification Directive 2011 (n 6).

[17] McAdam (n 2) in particular, chs 1, 6.

[18] The two principal international human rights treaties – the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) – as well as the observation and views of United Nations (UN) treaty bodies are, to a large extent, absent in the human rights jurisprudence of the CJEU and most domestic courts in EU Member States. See, *inter alia*, Aida Torres Peréz, *Conflicts of Rights in the European Union* (Oxford University Press 2009) ch 2; Mark Dawson, *EU Fundamental Rights Governance* (Cambridge University Press 2017). On the significance of the opinions of treaty bodies in the case law of domestic courts in general, see Machiko Kanetake, 'UN Human Rights Treaty Bodies Monitoring before Domestic Courts' (2018) 67 International & Comparative Law Quarterly 201, 203–04 (noting the 'selective and partial accommodation of international findings by domestic courts'). In the context of EU asylum law, the CJEU and Member States' domestic courts rely primarily on the provisions of the Charter of Fundamental Rights of the European Union [2000] OJ C364/01 and the European Convention for the Protection of Human Rights and Fundamental Freedoms

critique of this assumption and its consequences. Scholarship that is critical of a legal status quo cannot detach itself too much from existing political and legal realities.

The article proceeds as follows. The next part provides an overview of the different stages of the development of subsidiary protection in EU asylum law and argues that the development of EU asylum law shows a clear tendency towards affording refugees and beneficiaries of subsidiary protection the same rights and benefits (part 2). This tendency towards equal treatment is reflected in the case law of the CJEU (part 3) and close scrutiny of the empirical and normative bases of differentiation demonstrates that a differentiation of rights lacks any convincing justification (part 4). EU secondary law still permits Member States to differentiate the rights of refugees and beneficiaries of subsidiary protection in a few areas. Increasingly, however, the obligation to justify such differentiation leaves Member States little room for legal manoeuvres to adopt different sets of rights for refugees and beneficiaries of subsidiary protection (part 5). The article concludes with some reflections on the persistence of the assumption of the temporary nature of subsidiary protection.

2. THE DEVELOPMENT OF SUBSIDIARY PROTECTION: FROM DIFFERENT TOWARDS EQUAL PROTECTION

The establishment of subsidiary protection in EU asylum law is closely intertwined with international refugee law and the legal framework of the Refugee Convention. The objective of harmonizing subsidiary protection between EU Member States was intended to cater for the protection needs of persons who are in refugee-like situations but fall outside the scope of the refugee definition of the Refugee Convention. Like so many other initiatives in EU law, the impetus for the development of subsidiary protection came from preceding legal developments outside the EU legal framework, which occurred in particular in the Council of Europe and the European Court of Human Rights (ECtHR). As all Member States were (and are) members of the Council of Europe and bound by the European Convention on Human Rights (ECHR)[19] – the Council's principal human rights instrument – legal developments within the Council have a particular salience for the development of EU law. Thus, this part begins with an overview of the developments in the Council of Europe on complementary protection and subsequently describes the spillovers into EU law. These spillovers resulted in the adoption of the Qualification Directive 2004, which established subsidiary protection in EU law.

In 1976, the Parliamentary Assembly of the Council of Europe adopted Recommendation 773, which for the first time at the European level mentioned the notion of '*de facto* refugees'. Recommendation 773 envisaged harmonization of the diverging State practices that left many *de facto* refugees in legally precarious positions and provided a definition of '*de facto* refugees' as persons who do not qualify as refugees under the Refugee Convention and who cannot 'for political, racial, religious or other

(adopted 4 November 1950, entered into force 3 September 1953) (European Convention on Human Rights, as amended) ETS No 5 (ECHR). See eg Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law* (Routledge 2015).

[19] ECHR (n 18).

valid reasons return to their countries of origin'.[20] By drawing explicitly on the Refugee Convention, Recommendation 773, as McAdam points out, sought to complement the limited scope of protection of the Refugee Convention.[21] Although the Parliamentary Assembly recommended the adoption of an international agreement that harmonized the granting of residence and work permits to *de facto* refugees,[22] and in several subsequent recommendations called for improvement of the legal situation of *de facto* refugees in Europe,[23] a legally binding agreement was never adopted within the Council of Europe and State practices thus remained highly divergent. While the political appetite for harmonization of the legal situation of *de facto* refugees was lacking, the ECtHR developed, starting with its decision in *Soering v UK* in 1989,[24] a significant body of *non-refoulement* case law, which eventually shaped the development of subsidiary protection in EU law. On the one hand, the principle of *non-refoulement*, as developed by the ECtHR, prohibited the deportation or expulsion of a person to a country where he or she would be at risk of a violation of his or her rights under article 2 (right to life) or article 3 of the ECHR (prohibition of torture). At the same time, however, the ECtHR made clear that the prohibition of *non-refoulment* did not imply an obligation to grant a specific residence status.[25] Hence, while the ECtHR established common legal criteria under which a person's expulsion or deportation was prohibited, no common criteria on the treatment of such persons derived from its case law.

With the outbreak of the armed conflicts in the former Yugoslavia in 1991 and the largest mass displacements to Member States since the Second World War, the importance of article 3 of the ECHR increased considerably. The overwhelming majority of persons escaping from armed conflicts in the Balkans fell outside the scope of the refugee definition in the Refugee Convention and relied on article 3 of the ECHR to contest their expulsion.[26] In order to regulate the situation of these *de facto* refugees, various Member States started to establish complementary protection regimes in their domestic legal orders – which they labelled 'subsidiary protection' – as emergency measures to effectively deal with the high numbers of displaced persons.[27] Soon, the

[20] Parliamentary Assembly of the Council of Europe, Recommendation 773 'Situation of de facto Refugees' (1976).

[21] McAdam (n 2) 44.

[22] Council of Europe, Recommendation 773 (n 20).

[23] See, *inter alia*, Committee of Ministers of the Council of Europe, Recommendation No R (81) 16 on the Harmonisation of National Procedures relating to Asylum, 5 November 1981, para 4; Parliamentary Assembly of the Council of Europe, 'Recommendation 1016 (1985) on Living and Working Conditions of Refugees and Asylum Seekers', 26 September 1985, paras 4(ii), 6(ii); Parliamentary Assembly of the Council of Europe, Recommendation 1236 (1994) 'Right to Asylum', 12 April 1994, para 8.2.

[24] *Soering v UK* App No 14038/88 (ECtHR, 7 July1989).

[25] *Bonger v Netherlands* App No 10154/04 (ECtHR, 5 September 2005).

[26] See Khalid Koser and Richard Black, 'Limits to Harmonization: The Temporary Protection of Refugees in the European Union' (1999) 37 International Migration 521, 522.

[27] Paul Tiedemann, 'Die Geschichte des subsidiären Flüchtlingsschutzes' in Paul Tiedemann and Janina Gieseking (eds), *Flüchtlingsrecht in Theorie und Praxis* (Nomos 2014) 95, 111. Also, European Commission, 'Study on the Temporary Protection Directive' (January 2016).

practical importance of these domestic subsidiary protection regimes grew considerably. In 1998, a note by the Austrian presidency of the European Council highlighted that in all but four Member States subsidiary protection was granted more often than refugee status.[28] However, the scope of subsidiary protection in Member States still varied significantly: while some Member States' legal orders included a legal definition of subsidiary protection, others did not; while some included an individual right to be granted subsidiary protection if the conditions were fulfilled, most Member States established the granting of subsidiary protection as executive discretion. Further, the rights and benefits attached to the subsidiary protection status varied considerably among Member States.[29] These varying levels of protection resulted in undesired secondary migration by persons seeking international protection from Member States with a lower level of protection to Member States that afforded a higher level of protection.[30]

The impetus for harmonized rules on complementary protection in the institutional framework of the EU came in 1997 from a Danish proposal, which focused, in particular, on article 3 of the ECHR as a legal basis for the protection of *de facto* refugees.[31] The concept of subsidiary protection at the EU level was defined as a third-country national who did not qualify as a refugee under the Refugee Convention but was nevertheless in need of some form of international protection.[32] In 2004, the EU legislature adopted the Qualification Directive, which established for the first time in EU law an instrument that harmonized both the criteria for granting subsidiary protection status and the content of this status.

Subsidiary protection was clearly distinguished from temporary protection in respect of the applicable legal instruments, procedures, and objectives. In 2001, Member States had adopted the Temporary Protection Directive in order to respond effectively to future emergency situations of mass displacement.[33] The Temporary Protection Directive established a harmonized temporary protection status for persons who had to leave their countries of origin because of armed conflicts or generalized violence,[34] and a common procedure on triggering the temporary protection mechanism in situations of mass influx of displaced persons to EU Member States.[35] Because it was envisaged as an emergency measure, protection under the Temporary

[28] McAdam (n 2) 54–55.

[29] See Morten Kjaertum, 'Temporary Protection in Europe in the 1990s' (1994) 6 International Journal of Refugee Law 443, 451; also, McAdam (n 2) 54–55.

[30] Kjaertum (n 29) 451.

[31] Note from the Danish Delegation to Migration and Asylum Working Parties, 'Subsidiary Protection' 6764/97 ASIM 52 (17 March 1997), cited in McAdam (n 2) 54.

[32] ibid.

[33] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12 (Temporary Protection Directive).

[34] See Nuria Arenas, 'The Concept of "Mass Influx of Displaced Persons" in the European Directive Establishing the Temporary Protection System' (2005) 7 European Journal of Migration and Law 435.

[35] Temporary Protection Directive (n 33) art 5.

Protection Directive is only granted for a limited period of time.[36] The difference between subsidiary protection and temporary protection was also reflected in different procedures. Although the Temporary Protection Directive theoretically sets out that persons enjoying temporary protection can apply for asylum at any time,[37] in practice, it 'freezes' normal asylum procedures for a limited period – until standard asylum procedures can be resumed again – for the specific group to whom temporary protection is granted.[38] The objective of the Temporary Protection Directive is thus to provide *temporary protection* in emergency situations, which would overwhelm standard asylum procedures.[39] Moreover, while the application of temporary protection is triggered by a political decision of the Council on the existence of a situation of mass influx and protection is afforded to an entire group in a situation of mass displacement, the grant of subsidiary protection is based on the application of legal criteria and occurs after an individual asylum procedure. This differentiation between subsidiary protection and temporary protection is also reflected in the development of the Common European Asylum System (CEAS).

The development of the CEAS occurred in two phases. The Tampere European Council Conclusions in 1999 initiated the first phase (1999–2004),[40] at the end of which a set of legislative instruments on EU asylum law was adopted, including the Qualification Directive 2004, which established the concept of subsidiary protection in EU law. The Hague Programme in 2005 initiated the second phase (2005–09)[41] during which the first phase legislative instruments, including the Qualification Directive 2004, were evaluated and, at the end of the second phase, were replaced by the Qualification Directive 2011, which is currently in force. A third legislative phase was initiated in 2016 with several legislative proposals tabled by the Commission,[42] including a proposal on a Qualification Regulation 2016 to replace the Qualification Directive 2011.[43]

[36] ibid. The Directive was triggered for the first time in March 2022, in response to the situation in Ukraine (Council Implementing Decision (EU) 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ L71/1). Protection is granted for one year, extendable by a maximum of two six-month periods (art 4(1)), unless the Council adopts a decision to end the temporary protection earlier if the situation in Ukraine changes to permit a safe and durable return (art 6(1)(b), (2)).

[37] ibid art 17(1).

[38] ibid art 19(1) states that 'Member States may provide that temporary protection may not be enjoyed concurrently with the status of asylum seeker'.

[39] Council Implementing Decision (EU) 2022/382 (n 36) recital 6–7. See also John Koo, 'Mass Influxes and Protection in Europe: A Reflection on a Temporary Episode of an Enduring Problem' (2018) 20 European Journal of Migration and Law 157, 166.

[40] European Council, 'Conclusions of the Presidency, Tampere 15–16 October 1999'.

[41] European Council, 'The Hague Programme: Strengthening Freedom, Security and Justice in the European Union', 2005/C 53/01, OJ C53.

[42] For an overview of the legislative proposals, see Commission, 'A European Agenda on Migration' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0240> accessed 31 March 2022.

[43] As at January 2022, no legislative proposals have been adopted and, given the divergent interests among the different legislative actors, in particular the European Parliament, as well as more

During the first phase, the European Commission argued that the varying levels of protection in Member States resulted in undesirable secondary migration and that minimum standards for *de facto* refugees had to be established to close existing gaps in protection.[44] The Commission highlighted that persons who left their country of origin because of situations similar to those defined in the Temporary Protection Directive should not be disadvantaged if they sought protection individually in a Member State.[45] As subsidiary protection was not envisaged as an emergency measure that only temporarily suspends expulsion, the upshot was that the bundle of rights linked to the status of subsidiary protection was, conceptually, considerably thicker than the bundle of rights attached to temporary protection.

Although subsidiary protection was clearly distinguished from temporary forms of protection,[46] the Qualification Directive 2004 nevertheless provided different levels of rights for refugees and for beneficiaries of subsidiary protection. Temporal differentiations were crucial for justifying different standards in the content of protection. In its proposal on the Qualification Directive 2004, the Commission pointed out that:

> some differentiation has been made, in recognition of the primacy of the Geneva Convention and the fact that the regime of subsidiary protection starts from the premise that the need for such protection is temporary in nature, notwithstanding the fact that in reality the need for subsidiary protection often turns out to be more lasting. In order to reflect this underlying premise and reality entitlement to some important rights and benefits has been made incremental, requiring that a brief qualification period be served before a beneficiary of subsidiary protection status becomes eligible to claim them.[47]

If an aspiration of the law is to correspond to a minimal degree to social facts, the Commission's proposal was astonishing. Although it acknowledged that the premise of a merely temporary protection need lacked any empirical basis, the Commission nevertheless advanced this premise to justify different protection standards. Two factors might explain this. First, the Treaty of Amsterdam broadly described international protection, apart from protection under the Refugee Convention, as temporary protection and the Commission might have been caught in some kind of path-dependency.[48] Secondly, perhaps more importantly, the Commission had to accommodate the divergent positions of

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human rights progressive and more restrictive Member States, it is unlikely that the proposal for a Qualification Regulation 2016 will replace the Qualification Directive 2011. See Kris Pollet, 'All in Vain? The Fate of EP Positions on Asylum Reform after the European Elections' (*EU Migration Law Blog*, 23 May 2019) <http://eumigrationlawblog.eu/all-in-vain-the-faith-of-ep-positions-on-asylum-reform-after-the-european-elections/> accessed 18 January 2022.

44 Commission, 'Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection' COM(2001) 510 final, 4–5.

45 ibid 30.

46 McAdam 2005 (n 13) 463.

47 Commission, Proposal for Qualification Directive 2004 (n 44) 4.

48 EC-Treaty amending the Treaty on European Union [1997] OJ C340/1 (Treaty of Amsterdam) art 63. See also Bast (n 13) 42.

Member States during the negotiations of the Qualification Directive 2004. Germany was firmly opposed to the inclusion of persecution by non-State actors and the price for its agreement was the watering-down of the rights of beneficiaries of subsidiary protection.[49]

During the second phase of the CEAS, the (false) assumption of the temporary nature of subsidiary protection withered. The adoption of the Treaty of Lisbon in 2007 and its entry into force in 2009[50] marked a shift away from the assumption of the temporary nature of subsidiary protection. Subsidiary protection was included in the EU Treaty framework and was distinguished from temporary protection.[51] The five-year strategic framework programmes of the European Council in the areas of freedom, security, and justice illustrate this shift in the understanding of subsidiary protection by Member States. While the Tampere European Council Conclusions (1999) still mentioned that refugee protection 'should also be completed with measures on subsidiary forms of protection',[52] the Hague Programme (2005) aimed at the establishment of 'a uniform status for those who are granted asylum or subsidiary protection',[53] and the Stockholm Programme (2010) set out the 'objective of establishing a common area of protection and solidarity based on a common asylum procedure and a uniform status for those granted international protection'.[54] These different descriptions were not merely semantic changes, but reflected the Council's recognition of the same protection needs of refugees and beneficiaries of subsidiary protection,[55] and the approximation of the content of subsidiary protection with the content of refugee status.[56]

[49] McAdam (n 2) 91.

[50] Treaty on European Union (consolidated version as amended by the Lisbon Treaty) [2012] OJ C326/13.

[51] Treaty on the Functioning of the European Union [2012] OJ C 326/47 (TFEU) arts 78(1), (2)(b).

[52] European Council, 'Conclusions of the Presidency, Tampere 15–16 October 1999', para 14.

[53] The Hague Programme (n 41) 3.

[54] European Council, 'The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens', 2010/C 115/01, OJ C115, 32.

[55] This shift may also have been based on the objective of reducing secondary migration between EU Member States that resulted from the varying practices of Member States granting different protection statuses for persons from the same countries of origin. This is also relevant in the current context. For instance, in Germany, Austria, Greece, Bulgaria, and Norway, Syrian nationals were mostly granted refugee status in 2015, while in Sweden, Spain, Cyprus, and Malta, Syrian nationals mainly obtained the status of subsidiary protection. In a similar vein, while most Member States primarily granted refugee status to Afghan nationals in 2019, the overall numbers show that most Afghan nationals were granted subsidiary protection status rather than refugee status. This is explained by the fact that Member States that received a significant number of Afghan asylum seekers (Germany, France, and Greece) primarily granted subsidiary protection rather than refugee status. Significant differences in the rights attached to refugee status and the status of subsidiary protection then resulted in increased secondary migration to Member States that were more likely to grant refugee status. See European Council on Refugees and Exiles (ECRE), 'Asylum Statistics in Europe' (19 June 2020) <https://www.ecre.org/ecre-analysis-of-asylum-statistics-in-europe/> accessed 18 January 2022; ECRE, 'Asylum on the Clock? Duration and Review of International Protection Status in Europe' (June 2016) 4 <https://asylumineurope.org/legal-briefings/> accessed 18 January 2022.

[56] On the case law of the CJEU on the approximation of rights, see part 3.

In its proposal for the Qualification Directive 2011, the Commission explicitly recognized that the unequal legal treatment of refugees and beneficiaries of subsidiary protection was based on erroneous assumptions and retracted its initial premise on the temporary nature of subsidiary protection. While in its proposal for the Qualification Directive 2004 the Commission was satisfied to contrast the assumption of the temporary nature of subsidiary protection with non-matching empirical facts, it made a volte-face in its 2009 proposal for the Qualification Directive 2011, and clearly stated that this assumption was no longer tenable:

> When subsidiary protection was introduced, it was assumed that this status was of a temporary nature. As a result, the Directive allows Member States the discretion to grant them a lower level of rights in certain respects. However, practical experience acquired so far has shown that this initial assumption was not accurate. It is thus necessary to remove any limitations of the rights of beneficiaries of subsidiary protection which can no longer be considered as necessary and objectively justified.[57]

As the principal justification for maintaining different standards of protection could no longer be maintained, the Commission concluded that the rights 'granted to the two categories of beneficiaries [of international protection]' should be approximated.[58] Maintaining different sets of rights for the two categories of beneficiaries of protection would also, it argued, raise fundamental rights issues:

> Such an approximation of rights is necessary to ensure full respect of the principle of non-discrimination, as interpreted in recent case law of the ECtHR, and of the UN Convention on the Rights of the Child. It responds moreover to the call of the Hague Programme for the creation of a uniform status of protection.[59]

The Commission's emphasis on the objective of creating a uniform status of protection illustrated three points. First, the notion of a 'uniform status of protection' concerns the content rather than the form of protection as EU law still entails two different forms of protection. Secondly, as uniformity refers to the content of protection, uniformity of protection means equality of the content of protection between the two different forms of protection. Thirdly, the reference to the principle of non-discrimination indicates that the Commission considered equality of protection not simply as a desirable policy objective, but as a legal obligation mandated by human rights law.

The Commission was not alone in this view. The United Kingdom (UK) House of Lords Select Committee to the EU also criticized the unequal rules for persons in need of international protection and argued that these amounted to discrimination:

> We urge the Government to push for the extension of the same rights to everybody entitled to international protection. Not only would this remove an

[57] Commission, Proposal for Qualification Directive 2011 (n 2) 8.

[58] ibid.

[59] ibid.

> apparently unjustified discrimination between Geneva Convention refugees and beneficiaries of subsidiary protection, it would also, as the Government itself recognises, have practical advantages. It would help limit the number of appeals by those refused refugee status but granted subsidiary protection.[60]

In addition to fundamental rights compliance, equal treatment would also have pragmatic advantages by reducing the number of appeals and thus the length of asylum procedures, eventually resulting in more efficient asylum procedures.

After a significant increase in the number of asylum applications in EU Member States in 2015 plunged the CEAS into a deep policy crisis, the Commission initiated a third phase of legislative proposals with the aim of overhauling the entire existing EU secondary legislation on asylum and migration.[61] In 2016, it published a set of legislative proposals that included, among others, a proposal for a Qualification Regulation to replace the Qualification Directive 2011. The first set of legislative proposals in June 2016 was followed by a second set in September 2020, which the Commission labelled a 'New Pact on Migration and Asylum'.[62] For the purposes of the present analysis, three key points of the third legislative phase are highlighted.

First, the Commission's 'New Pact' of September 2020 does not address the content of protection and thus leaves the 2016 proposal for a Qualification Regulation unaffected. On the one hand, the 2016 proposal left intact the existing differences in the content of protection between beneficiaries of subsidiary protection and refugees. This is not surprising.[63] Like the preceding Commission proposals for a Qualification Directive, the proposal for a Qualification Regulation reflected the interests and

[60] Select Committee on the EU, *Defining Refugee Status and Those in Need of International Protection* (HL 2001–02, 16 July 2002) para 111.

[61] See Commission, 'A European Agenda on Migration' COM(2015) 240 final.

[62] The Commission's New Pact on Migration and Asylum includes a proposal for an amended Dublin Regulation (Commission, 'Proposal for a Regulation on asylum and migration management and amending Council Directive (EC) 2003/109' COM(2020) 610 final; a proposal on resettlement (Commission, 'Recommendation on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways' C(2020) 6467 final); a regulation that addresses protection in situations of crisis and *force majeure* to replace the Temporary Protection Directive (Commission, 'Recommendation on an EU mechanism for Preparedness and Management of Crises related to Migration' C(2020) 6469 final); and an asylum procedure regulation to replace the Asylum Procedure Directive (Commission, 'Proposal for a Regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU' COM(2020) 611 final). For a concise overview and discussion of the legislative proposals of the New Pact on Migration and Asylum, see the individual contributions in 'Special Collection on the "New" Migration and Asylum Pact', Immigration and Asylum Law and Policy (*EU Migration Law Blog*, 2020) <http://eumigrationlawblog.eu/series-on-the-migration-pact-published-under-the-supervision-of-daniel-thym/> accessed 18 January 2022.

[63] Since 2015, a more general trend of restricting the rights of beneficiaries of subsidiary protection and refugees has been observable in Member States. See the contributions in (2016) 17 German Law Journal Special Issue: Constitutional Dimension of the Refugee Crisis.

sensibilities of different actors in the negotiation process.[64] On the other hand, the 2016 proposal did not lower existing standards.[65] While some Member States arguably were inclined to lower existing protection standards, most Member States were not in favour of doing so.[66] In addition, the European Parliament, as co-legislator, cautioned against any lowering of the existing standards.[67]

Secondly, although existing different levels of protection in the Qualification Directive 2011 are maintained in the proposal for a Qualification Regulation, the principal justification for doing so – the temporary nature of subsidiary protection – has not been revived.[68] On the contrary, the Commission's legislative proposals in the 'New Pact' of September 2020 further cement the distinction between temporary protection in crisis situations, on the one hand, and subsidiary protection as a status granted after 'normal' asylum procedure, on the other.[69]

Thirdly, the Commission notes that recognition of protection still varies considerably among EU Member States. While in some Member States Syrian nationals were primarily given refugee status in 2015, in others they were granted predominantly subsidiary protection status.[70] This protection lottery resulted in secondary movements of persons seeking international protection towards Member States that would provide them with refugee status rather than subsidiary protection. One of the principal objectives of further harmonization in the 2016 proposal for a Qualification Regulation was the reduction of 'incentives to move within the European Union and [to] ensure

64 Also, the Commission's New Pact on Asylum and Migration of September 2020 reflects such a *Realpolitik*. See Daniel Thym, 'European Realpolitik: Legislative Uncertainties and Operational Pitfalls of the "New" Pact on Asylum and Migration' (*EU Migration Law Blog*, 28 September 2020) <http://eumigrationlawblog.eu/european-realpolitik-legislative-uncertainties-und-operational-pitfalls-of-the-new-pact-on-migration-and-asylum/> accessed 18 January 2022.

65 Commission, 'Proposal for a Regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents' COM(2016) 466 final, 10.

66 ibid. The Commission pointed out that '[o]n the level of rights granted to beneficiaries, Member States did not generally support the idea of further differentiating between the two international protection statuses'.

67 ibid.

68 As the principal justification for differentiating the content of rights withered, other justifications have been required in order to maintain differentiations at the level of EU secondary law that are compatible with higher-ranking EU fundamental rights law. See part 3.

69 The Commission's 'Proposal for a Regulation addressing situations of crisis and *force majeure* in the field of migration and asylum' COM(2020) 613 final, 2 envisages the triggering of temporary protection in exceptional situations of a mass influx of persons in need of protection, of such a scale as to render Member States' normal asylum procedures non-functional.

70 The Commission, in its Proposal for a Qualification Regulation (n 65) 4, noted that 'EASO data for the 2nd quarter of 2015 showed that Germany (99%), Greece (98%) and Bulgaria (85%) were giving refugee status to almost all Syrian nationals, whereas Malta (100%), Sweden (89%) Hungary (83%) and Czech Republic (80%) gave them subsidiary protection status'.

an equality of treatment of beneficiaries of international protection'.[71] The objective of avoiding secondary movements thus entailed establishing equality in the content of protection. Moreover, in several EU Member States – Germany, Sweden, and Denmark, among others – differentiation of rights coincided with a shift in the case law on protection status. Prior to the adoption of legislative amendments that curtailed family reunification rights for beneficiaries of subsidiary protection, Syrian nationals were mainly granted refugee status.[72] After the adoption of the amendments, Syrian nationals largely received subsidiary protection status without a 'substantive change in the protection needs of Syrians generally, that would explain such a shift'.[73]

3. FROM DIFFERENCE TO EQUALITY: STATUS RIGHTS IN THE CASE LAW OF THE CJEU

The rights attached to subsidiary protection status are defined by reference to the rights of other categories of persons, in particular to refugees, other third-country nationals, and citizens.[74] This part argues that the CJEU sets forth the principle of equality as a principal norm for the interpretation of the status rights of beneficiaries of subsidiary protection. While the CJEU pointed out the differences between refugee status and subsidiary protection status in its case law on the Qualification Directive 2004, in its decisions on the Qualification Directive 2011, it has emphasized the objective to establish a 'uniform status' of protection in accordance with article 78 of the TFEU (section 3.1). The CJEU employs the notion of a uniform status to advance an equality argument (section 3.2), which is grounded in EU fundamental rights law (section 3.3).

3.1 Towards a uniform status of international protection

In its decisions on the Qualification Directive 2004, the CJEU considered subsidiary protection and refugee protection as two distinct systems of protection. In *Aydin Salahadin Abdullah v Bundesrepublik Deutschland*, the court stated that the Qualification Directive 2004 'governs two distinct systems of protection, that is to say, firstly, refugee status and, secondly, subsidiary protection status'.[75] In its judgment in *HN v Minister for Justice, Equality and Law Reform, Ireland, Attorney General* also, the CJEU argued

[71] ibid 18.

[72] Council of Europe Commissioner for Human Rights, Third Party Intervention in the case *MA v Denmark* App No 6697/18, ComDH(2019) 4, paras 24–25.

[73] ibid.

[74] The Refugee Convention sets out the following standards of treatment for refugees: (i) the same treatment as third-country nationals (right to movable and immovable property, right of association, right to employment, right to housing, right to public education, freedom of movement); (ii) the same treatment as nationals (freedom of religion, artistic rights and intellectual property, access to courts, right to public elementary education, rights to social welfare assistance, labour legislation and social security, fiscal charges, rationing); and (iii) autonomous rights (transfers of assets, prohibition of sanctions for illegal entry, administrative assistance, prohibition of expulsion).

[75] Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 *Aydin Salahadin Abdullah v Bundesrepublik Deutschland* [2010] ECLI:EU:C:2010:105, para 78.

that 'in its definition of "international protection", Directive 2004/83 refers to two separate systems of protection, namely the system governing refugee status and that relating to subsidiary protection status'.[76] Although the legal question in dispute in *HN* did not concern the content of international protection, but rather the compatibility of a provision in domestic asylum law that made the assessment of subsidiary protection conditional upon the prior refusal of refugee status, the court nevertheless mentioned 'that refugee status offers greater protection than that conferred by subsidiary protection'.[77] As the legal questions in both judgments concerned the criteria for granting and withdrawing protection status, the statements of the CJEU on distinct protection systems concern primarily the form, rather than the content of protection. The CJEU's *obiter dictum* on the 'greater protection' of refugee status thus represents a declarative statement, which refers to existing differences in the content of protection, rather than a normative statement on how differences of status rights *ought* to be interpreted in the future.

The CJEU addressed how the content of subsidiary protection ought to be interpreted in its decisions relating to the Qualification Directive 2011. In *Alo and Osso*, the first decision before the CJEU on the rights of beneficiaries of subsidiary protection,[78] the court had to decide on the application of a German law that required beneficiaries of subsidiary protection who received social welfare benefits to take up residence in a specific town or district in Germany. The key questions before the CJEU were whether the right of free movement, which is guaranteed in the Refugee Convention for refugees, extends to beneficiaries of subsidiary protection, and whether a limitation of that right permits unequal treatment between beneficiaries of subsidiary protection and other third-country nationals who reside lawfully in a Member State. In its assessment of the scope of the right of free movement, the CJEU stated that the Qualification Directive 2011 must be interpreted in compliance with the Refugee Convention and the Charter of Fundamental Rights.[79] This, however, raised the question whether the provisions of the Refugee Convention were only relevant for the interpretation of the content of refugee status, or also relevant for the interpretation of the content of subsidiary protection.[80] The CJEU argued that although the provisions of the Refugee Convention are in principle only relevant for the determination of the content of protection for refugees, 'the EU legislature intended, in responding to the call of the Stockholm Programme, to establish a uniform status for all beneficiaries of international protection'.[81] Instead of emphasizing the difference between the two forms of protection, as it did in its decisions on the Qualification Directive 2004 in *Alo and Osso*, the court rejected a differentiation in the content of protection. Instead, it held that restricting the scope of the right of freedom of movement for refugees would create, contrary to the objective of

[76] Case C-604/12 *HN v Minister for Justice, Equality and Law Reform, Ireland, Attorney General* [2014] ECLI:EU:C:2014:302, para 26.

[77] ibid para 34.

[78] *Alo and Osso* (n 11).

[79] ibid para 29.

[80] ibid para 30.

[81] ibid para 32.

creating a uniform status of protection, a distinction between refugees and beneficiaries of subsidiary protection.[82]

Although *Alo and Osso* is (to date) the only decision in which the CJEU has decided on the content of protection, the court referred in two other decisions to the uniform status of protection. In *EG v Republik Slovenija*, it referred to its decision in *Alo and Osso* and repeated that the Qualification Directive 2011 reflects the intention of the EU legislature to establish a uniform status of international protection.[83] The CJEU argued that the Qualification Directive 2011 'has put in place a scheme of rights and benefits which, as a general rule, is the same for all beneficiaries of international protection'.[84] In *Mohammed Bilali v Bundesamt für Fremdenwesen und Asyl*,[85] it assessed whether a Member State must revoke subsidiary protection in the absence of an actual need for protection, if conferral of the status is based on an error made by a Member State's asylum authority. It extended the revocation provisions of the Refugee Convention to beneficiaries of subsidiary protection, thereby expanding the scope *ratione personae* of revocation of subsidiary protection in the Qualification Directive 2011. The argument of the court? The objective of the EU legislature to establish 'a uniform status for all beneficiaries of international protection'.[86] The CJEU argued that the legislature consequently 'chose to afford beneficiaries of subsidiary protection the same rights and benefits as those enjoyed by beneficiaries of refugee status'.[87]

The court seems to pursue a two-pronged approach in its judgments on the Qualification Directive 2011. In regard to inclusion criteria, subsidiary protection retains a 'certain autonomy',[88] which encompasses, in particular, its autonomous meaning under EU law as a complementary form of protection.[89] In regard to exclusion criteria and the content of protection, the CJEU sets out a uniform status of international protection, which means that the grounds for exclusion from protection status and the content of protection, in principle, are the same. Essentially, the court levels differentiations in the content of protection by using the notion of a 'uniform status of protection' in EU law.[90] This, however, raises the question: how does the CJEU conceptualize the 'uniform status of protection'?

[82] ibid para 36.

[83] Case C-662/17 *EG v Republik Slovenija* [2018] ECLI:EU:C:2018:847, para 40.

[84] ibid para 42.

[85] Case C-720/17 *Mohammed Bilali v Bundesamt für Fremdenwesen und Asyl* [2019] ECLI:EU:C:2019:448.

[86] ibid para 55.

[87] ibid.

[88] Joined Cases C-443/14 and C-444/14 *Alo and Osso* [2015] ECLI:EU:C:2015:665, Opinion of Attorney General Cruz Villalón, para 90.

[89] *Salahadin Abdullah* (n 75) para 80.

[90] In the wider context of the second phase of the CEAS, the CJEU's judgments on approximating the content of protection can be seen as part of a broader pattern of judicial extension of the subjective rights of asylum seekers, in particular, in the Dublin system. See, *inter alia*, Case C-63/15 *Ghezelbash* [2016] ECLI:EU:C:2016:409, para 35; Case C-490/16 *AS* [2017] ECLI:EU:C:2017:585, paras 24–25; Case C-201/16 *Shiri* [2017] ECLI:EU:C:2017:805, para 35. See also Maarten den Heijer, 'Remedies in the Dublin Regulation: *Ghezelbash* and *Karim*' (2017) 54 Common Market Law Review 859.

3.2 The uniform status of protection as an equality argument

In its judgment in *Alo and Osso*, the CJEU repeated that the CEAS is based on the full application of the Refugee Convention and stated that the Convention system applies only to refugees and not to beneficiaries of international protection. However, it then argued that:

> 32. Nevertheless, recitals 8, 9 and 39 of Directive 2011/95 state that the EU legislature intended, in responding to the call of the Stockholm Programme, to establish a uniform status for all beneficiaries of international protection and that it accordingly chose to *afford beneficiaries of subsidiary protection the same rights and benefits as those enjoyed by refugees, with the exception of derogations which are necessary and objectively justified*.
> 33. Thus, Chapter VII of Directive 2011/95, which relates to the content of international protection, is to apply, in accordance with Article 20(2) of the directive, both to refugees and to beneficiaries of subsidiary protection status, unless otherwise indicated.[91]

Two points may be drawn from this key passage of the judgment. First, the court does not construe the uniform status of protection as a formal legal status to which specific accessory rights are attached. This makes sense, as neither the treaties nor the Qualification Directive 2011 includes the 'uniform status of protection' as a formal legal status. Rather, the CJEU employs the notion of the uniform status of protection as a rhetorical figure that cloaks an equality argument: rights and benefits of refugees are identical ('the same'). The court thereby follows the EU legislature objective of the Stockholm Programme to establish a uniform status of protection, which means essentially an approximation of rights. Importantly, this approximation is not only reflected as a mere policy goal in the European Council's multi-annual strategic framework programmes,[92] but is also undergirded by the Commission's opinion that this is legally mandated by the principle of non-discrimination.[93] Of course, equal treatment was not the only outcome possible in *Alo and Osso*. The CJEU could also have referred to recital 39 of the Qualification Directive 2011, which permits 'necessary and objectively justified derogations' from equal treatment, to 'allow for greater room of differentiation between the refugee status and the subsidiary protection [status]'.[94] It could then have used this recital to assess whether restrictions of social welfare rights and freedom of movement of beneficiaries of subsidiary protection are justified. However, the court decided not to do so, and instead stated that beneficiaries of subsidiary protection have the 'same rights and benefits' as refugees.

Secondly, the specific notion of equality employed by the court seems to be based on a formal conception of equality. Formal equality requires that 'like should be treated

[91] *Alo and Osso* (n 11) paras 31–33 (emphasis added).

[92] See part 2.

[93] Commission, Proposal for Qualification Directive 2011 (n 2) 8.

[94] Jean-Yves Carlier and Luc Leboeuf, 'Choice of Residence for Refugees and Subsidiary Protection Beneficiaries; Variations on the Equality Principle: Alo and Osso' (2017) 54 Common Market Law Review 631, 638.

alike', unless there are objective reasons not to do so. Sandra Fredman describes formal equality as 'a matter of consistency' as it requires only that similar situations are treated in the same way.[95] However, establishing which persons are in an analogous situation requires reliance on a comparator; unequal treatment only occurs if a similarly situated person who does not share a particular characteristic (such as sex or race) has been treated less favourably.[96] The court does not make explicit exactly why it considers that refugees and beneficiaries of subsidiary protection are in an analogous situation. Formally, refugee status and subsidiary protection are two different statuses. Refugee status in EU law is the recognition of a person as a refugee[97] on the basis of the refugee definition in the Refugee Convention.[98] Subsidiary protection status is granted to a person 'who does not qualify as a refugee'.[99] However, the relevant comparator, as Advocate General Cruz Villalón pointed out, is not the difference *of* legal status, but the difference *in* status: '[t]he difference in treatment with regard to refugees who are in receipt of social benefits and are therefore in a comparable situation, *may only be based on the difference in legal status*'.[100] Substance rather than form determines comparability. However, Advocate General Cruz Villalón did not explicitly state what he considered the relevant comparator.

Refugee law scholarship is instructive in fleshing out why refugees and persons in need of subsidiary protection are in an analogous situation. Two specific criteria can be distilled from this literature. First, refugee status and subsidiary protection share the same precondition of cross-border movement to avoid a risk of serious harm in the country of origin or habitual residence.[101] Both groups are protected by the principle of *non-refoulement* under refugee law and human rights law respectively, although the legal basis of *non-refoulement* protection differs – *non-refoulement* in the Refugee Convention is linked to refugee status, while the prohibition of *non-refoulment* in international human rights law does not entail an obligation to accord a specific type of status.[102] The Qualification Directive was an attempt by the EU

95 Sandra Fredman, *Discrimination Law* (2nd edn, Oxford University Press 2011) 9.

96 ibid 11.

97 Qualification Directive 2011 (n 6) art 2(e).

98 Refugee Convention (n 1) art 1A(2).

99 Qualification Directive 2011 (n 6) art 2(f) states that a '"person eligible for subsidiary protection" means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15'.

100 *Alo and Osso* AG (n 88) para 73 (emphasis added).

101 McAdam (n 2) 198–99; Pobjoy (n 13) 214. Acts of persecution in the Refugee Convention require a certain gravity; subsidiary protection requires serious harm. The type of harm comparator is more convincing than the 'lack of the element of personal choice', which seems to function as the comparator in Advocate General Cruz Villalón's Opinion in *Alo and Osso* AG (n 88) para 76. To argue that someone who is illiterate, underfed, and cannot afford access to basic medical care leaves his or her country out of free choice, is to mock their condition.

102 See *Bonger v Netherlands* App No 10154/04 (ECtHR, 5 September 2005).

legislature to create a legal status for certain beneficiaries of human rights-based *non-refoulement* to close a protection gap.[103]

The extension of rights linked to legal status is related to the second criterion: substitute protection. Both refugee status and that accorded to beneficiaries of subsidiary protection are motivated by the need of a third State to provide protection that would normally be provided by the home State,[104] which is unable or unwilling to provide it. With respect to the host country, both refugee protection and subsidiary protection provide the status holder with specific rights that enable the person to rebuild his or her life. The absence of any legal reasoning related to the difference between refugees and beneficiaries of subsidiary protection in the drafting of the Qualification Directive 2004 illustrates that there is no principled basis for different treatment.[105]

3.3 The fundamental rights basis of equal treatment

Although the CJEU advanced an equality argument in *Alo and Osso*, the court remained vague as to what constitutes the concrete legal basis for this argument. Two different legal bases for equal treatment emerge; each entails a narrow and a wide conceptualization of equality. The two legal bases may be illustrated by the conceptual differences between 'rule' and 'principle' in legal theory. Rules are generally defined as entailing a low level of generality and narrowly circumscribe specific elements.[106] A rule is either complied with or not.[107] In order to avoid norm conflict, a rule countering another rule is often stated as an exception to the first rule,[108] and exceptions are specifically enumerated. Principles, by contrast, are characterized by a high level of generality and can be fulfilled to different degrees. In the case of norm conflict between two principles, the colliding principle is neither declared invalid nor described as an exception, but simply recedes in the application.[109] Exceptions to a principle are generally open rather than enumerated.

Applying this distinction between rules and principles to the decision in *Alo and Osso*, it is apparent that, on the one hand, the CJEU referred to article 20(2) of the Qualification Directive 2011 as a rule for its equality argument. Article 20(2) states that '[t]his Chapter [on the content of protection] shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated'. In *EG*, the CJEU stated that the Qualification Directive 2011 'has put in place a scheme of rights and benefits which, as a general rule, is the same for all beneficiaries of international protection'.[110] In

[103] As legal residence status is a threshold right that often functions as a precondition for effectively enjoying different kinds of other rights – the right to work, to social benefits, access to medical care – the bare minimum of *non-refoulement* leaves a person in socio-economic destitution.

[104] McAdam (n 2) 199.

[105] ibid 221.

[106] Robert Alexy, *Theorie der Grundrechte* [A Theory of Constitutional Rights] (7th edn, Suhrkamp 2015) 73 (see also the references therein).

[107] ibid 77. Ronald Dworkin describes this as 'an all or nothing way' of application that characterizes a rule. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1975) 24.

[108] Alexy (n 106) 77.

[109] ibid 79.

[110] *EG* (n 83) para 42.

both decisions, the court construed equality in a rule exception logic: unless a specific rule derogates from the rule of equal treatment in article 20(2) of the Qualification Directive 2011, refugees and beneficiaries of subsidiary protection must be granted the same rights.[111]

On the other hand, however, the CJEU seemed to rely on a principle, not merely on a rule of equality. First, it held that the EU legislature chose to 'afford beneficiaries of subsidiary protection the same rights and benefits' and then, in the subsequent paragraph, argued that: 'Thus, Chapter VII of Directive 2011/95, which relates to the content of international protection, is to apply, in accordance with Article 20(2) of the directive, both to refugees and to beneficiaries of subsidiary protection status'.[112] The reference to the rule in article 20(2) thus appears as a corollary to the statement of the 'same rights and benefits' in the previous paragraph. Although the court only alluded to a principle of equality, Advocate General Cruz Villalón[113] stated more clearly that the Qualification Directive 2011 defined the content of protection 'on the basis of the *principle of equal treatment*, with various formulations. That principle is, moreover, a general principle of EU law and now contained in Article 20 of the Charter [of Fundamental Rights]'.[114]

The difference between principle and rule can also be seen in the structure of exceptions that the court employs. When the CJEU referred to article 20(2) of the Qualification Directive 2011, it referred to strictly enumerated exceptions, characteristic of a rule.[115] By contrast, when the court alluded to the principle of equality, the character of exceptions was deliberately left open: derogations are permitted as long as they are necessary and objectively justified.[116] An express reference to the Charter of Fundamental Rights is suspiciously absent in the court's decision. This absence, however, should not be overestimated. In other decisions in immigration and asylum law also, the CJEU has not expressly referred to the principle of non-discrimination in the Charter, but in effect has applied it. For instance, in *LM v Centre public d'action sociale de Seraing*, the CJEU rejected the distinction Belgian immigration authorities made between minor and adult children in expulsion, and held that the relevant criterion was the dependency of the child upon his or her parents, and not the child's age.[117]

111 This reflects the narrow concept of equality in the EU non-discrimination directives.

112 *Alo and Osso* (n 11) paras 32, 33.

113 Advocates General (AsG) are high-ranking CJEU functionaries who assist the court by issuing reasoned written legal opinions in cases that raise new points of law (TFEU, art 252). Although Advocate General opinions are not legally binding for the court, they are often indicative of the legal outcome in a case. Sadl and Sankari, analysing cases on EU citizenship law, note that the court reached the same outcome as the Advocate General in 64% of cases and a different outcome in only 9% of the cases analysed. Urska Sadl and Suvi Sankari, 'The Elusive Influence of the Advocate General on the Court of Justice: The Case of European Citizenship' (2017) 36 Yearbook of European Law 421, 429.

114 *Alo and Osso* AG (n 88) para 71 (emphasis added).

115 *Alo and Osso* (n 11) para 33.

116 ibid para 32.

117 Case C-402/19 *LM v Centre public d'action sociale de Seraing* [2020] ECLI:EU:C:2020:759, para 42.

However, the court did not mention in its reasoning which legal provision rendered such a distinction unlawful and only concluded that article 21(1) of the Charter was contrary to such a distinction.[118] Thus, while the court refrained from an explicit reference to the principle of non-discrimination, it essentially endorsed its logic. It would be strange to conclude that the court only relied on a rule of equality in article 20(2) of the Qualification Directive 2011 and not on the equality and non-discrimination provisions in the Charter, as the CJEU explicitly held in *Alo and Osso* that the rights of beneficiaries must be interpreted in light of the Charter.[119]

A clarifying remark on the relation between the principles of equality and non-discrimination in the Charter might be in good order here. Generally, equality and non-discrimination emanate from the same normative source: the protection from discrimination.[120] The principle of equality and the principle of non-discrimination are thus 'positive and negative statements of the same principle', 'two faces of the same coin'.[121] The principle of non-discrimination in article 21 of the Charter thus constitutes a negative and qualified statement of equality by defining specific prohibited grounds of different treatment.[122] Now, the reason beneficiaries of subsidiary protection are treated differently from refugees is their different formal legal status. Although article 21 of the Charter does not expressly include migration status as a ground of discrimination, the nature of article 21 as a principle means that its scope is not exhaustively defined and includes additional grounds that are not expressly enumerated in article 21.[123] Advocate General Cruz Villalón argued that 'the legal status of migrant as one of the prohibited grounds of discrimination is not in doubt'.[124] The Advocate General relied on two arguments. First, he maintained that the grounds of discrimination in article 21 are not exhaustively defined. Secondly, he argued that the fact that migration status constituted

[118] ibid para 55.

[119] *Alo and Osso* (n 11) para 29.

[120] Alexander Somek argues that the assessment of equality by Constitutional courts (Germany, Austria, and the US Supreme Court) and the CJEU is based on a universal grammar of equality. The *normativity* of equality does not derive from treating like alike, but rather lies in the assessment of the reasons for unequal treatment. The function of these reasons, and the normative source of equality, is thus to assess the validity or invalidity of reasons of unequal treatment. Somek thus describes these reasons as 'second order' reasons. See Alexander Somek, 'Gleichheit als Diskriminierungsschutz' [Equality as Protection from Discrimination] (2004) 43 Der Staat 425, 426; Alexander Somek, *Rationalität und Diskriminierung* [Rationality and Discrimination] (Springer 2003).

[121] See Samantha Besson, 'Gender Discrimination under EU and ECHR Law: Never Shall the Twain Meet?' (2008) 8 Human Rights Law Review 647, 652, 655.

[122] Mark Bell, 'Article 20' in Steve Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2015) 565.

[123] ibid. Given that the grounds of discrimination in art 21(1) of the Charter essentially refer to status-based discrimination, immigration status as a ground of discrimination is already conceptually inscribed in art 21(1) of the Charter. See, *inter alia*, Claire Kilpatrick, 'Article 21' in Peers and others (eds) (n 122) 581; Cornelia Köchle, 'Artikel 21' in Michael Holoubek and Georg Lienbacher (eds), *GRC-Kommentar* (2nd edn, Manz 2019) para 51.

[124] *Alo and Osso* AG (n 88) para 75.

a prohibited ground of discrimination was apparent when article 21 of the Charter was interpreted in conformity with article 14 of the ECHR. Three points support this reading. First, the CJEU held in previous cases that article 21 of the Charter is based on article 14 of the ECHR.[125] Secondly, the explanations to the Charter clarify that article 21(1) draws on article 14 of the ECHR and applies in compliance with it.[126] And thirdly, the principle of equivalent protection requires that the rights in the Charter are interpreted in such a way that they have the same scope of protection as the rights in the ECHR.[127]

Article 14 of the ECHR includes as grounds of discrimination, among others, the notion of 'other status' and the ECtHR employs a wide reading of this notion. As early as 1976, the ECtHR held that it is not required that status amounts to a personal characteristic and considered, for example, that a distinction based on military rank falls within the notion of 'other status'.[128] In subsequent decisions, the ECtHR applied the notion of 'other status' to chosen professions,[129] marital or civic partnerships,[130] trade union membership,[131] different group of prisoners,[132] and so forth. The ECtHR regularly subsumes immigration status under the notion of 'other status' in article 14 of the ECHR to find that differentiations between different groups of non-nationals are contrary to article 14. Arguably, the decisions of the ECtHR on article 14 of the ECHR often depend on the specific facts of the case and lack coherence and consistency.[133] Despite this criticism, two points can be drawn from the ECtHR's case law on immigration status.

First, the ECtHR considers that although immigration status is not inherent to a person, but is a status conferred by law, this 'does not preclude it from amounting to an "other status" for the purposes of Article 14'.[134] In this regard, the immigration status case law of the ECtHR differs from its other (and contradictory) case law in which the court considers that a personal characteristic that distinguishes one group from another must exist in order to fall within the scope of article 14 of the ECHR.[135] In *Hode and Abdi v UK*, the ECtHR noted that the comparator groups do not need to be identical, but that the applicants 'must demonstrate that, having regard to the particular nature of their complaints, they had been in a relevantly similar situation to others treated differently'.[136] This is particularly relevant when the specific immigration

[125] See Joined Cases C-199/12 to C-201/12 *X, Y and Z v Minister voor Immigratie en Asiel* [2013] ECLI:EU:C:2013:720, para 54: 'Article 14 ECHR, on which Article 21(1) of the Charter is based'.

[126] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17. See also ibid.

[127] Charter of Fundamental Rights (n 18) art 52(3).

[128] *Engel v Netherlands* App No 5100/71 (ECtHR, 8 June 1978) para 72.

[129] *BS v Spain* App No 47159/08 (ECtHR, 24 July 2012).

[130] *Petrov v Bulgaria* App No 63106/00 (ECtHR, 10 June 2010).

[131] *Danilenkov v Russia* App No 67336/01 (ECtHR, 30 June 2009).

[132] *Kafkario v Cyprus* App No 21906/04 (ECtHR, 12 February 2008).

[133] Janneke Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 Human Rights Law Review 99, 103.

[134] *Bah v UK* App No 56328/07 (ECtHR, 27 September 2011) para 46.

[135] Gerards (n 133) 104–05.

[136] *Hode and Abdi v UK* App No 22341/09 (ECtHR, 6 November 2012) para 50.

status conferred upon an individual derives from a risk of human rights violations. The ECtHR emphasized that 'the argument in favour of refugee status amounting to "other status" would be even stronger, as unlike immigration status refugee status did not entail an element of choice'.[137] Like refugees, beneficiaries of subsidiary protection also lack, as Advocate General Cruz Villalón argued in *Alo and Osso*, 'the element of free personal choice' when leaving their country of origin.[138] Although there are weighty reasons why subsidiary protection amounts to an 'other status' in the sense of article 14 of the ECHR, the ECtHR has, until now, not assessed differentiations between refugees and beneficiaries of subsidiary protection under article 14.

In *MA v Denmark*, a case that concerned the introduction of a three-year waiting period for family reunification which applied to beneficiaries of subsidiary protection but not to persons who had been granted refugee status, the ECtHR extended the procedural guarantees of its case law on family reunification of refugees to beneficiaries of subsidiary protection. At the same time, however, it found 'no reason to question the distinction made by the Danish legislature in respect of persons granted protection due to an individualised threat, namely refugee status under the UN Refugee Convention …, on the one hand, and persons granted protection due to a generalised threat …, on the other hand'.[139] The ECtHR does not seem to consider different treatment of refugees and beneficiaries as a matter of discrimination and seems to accept different treatment based on different status. However, it also appears to consider different treatment between refugees and beneficiaries of subsidiary protection as justified, based on a distinction between generalized and individualized threat. The court has not engaged in any substantive reasoning on this distinction. Moreover, the ECtHR found that it was not necessary to engage in an assessment of a possible violation of article 14 of the ECHR, because it had already found in favour of the applicant on the basis of a different provision (article 8 of the ECHR, the right to family life). Therefore, the distinction made by the ECtHR between individualized and generalized threat should not be considered as a distinction on principled grounds, but rather as a strategy of avoiding a more principled assessment under article 14 of the ECHR and a concession to States' immigration control powers.

Secondly, the ECtHR's immigration case law is highly fact-contingent. This fact contingency means that the assessment of discrimination is bound up with a substantive reasoning at the various stages of the judicial test and not limited to a mere formalistic comparison of different groups.[140] For instance, in *Bah v UK*, the ECtHR highlighted the 'wide range of legal and other effects [that] flow from a person's immigration status'.[141] In *MA v Denmark*, the ECtHR assessed the three-year waiting period for family reunification, which applied to beneficiaries of subsidiary protection. In its

[137] ibid para 47.

[138] *Alo and Osso* AG (n 88) para 76.

[139] *MA v Denmark* [GC] App No 6697/18 (ECtHR, 9 July 2021) para 177.

[140] Oddný Mjöll Arnardóttir, 'Cross-Fertilisation, Clarity and Consistency at an Overburdened European Court of Human Rights: The Case of the Discrimination Grounds under Article 14 ECHR' (2015) 33 Nordic Journal of Human Rights 220, 234.

[141] *Bah v UK* (n 134) para 46.

assessment, the court emphasized, in particular, the applicant's status as a beneficiary of subsidiary protection, which distinguished him from other categories of non-nationals, and the situation of general violence in his home country, Syria, which made it impossible for him to establish family life there.[142] In this regard, the ECtHR seemed to suggest that the pertinent reason for extending procedural guarantees of its case law on family reunification of refugees to beneficiaries of subsidiary protection is the 'permanent or long-lasting character' of the risks that beneficiaries of subsidiary protection face in their home countries.[143] This reasoning sits well with the objective behind establishing a subsidiary protection regime in EU law. As argued in part 2, one of the principal objectives of establishing subsidiary protection status in EU law was to avoid the existence of an underclass of individuals who could not be expelled yet would be deprived of socio-economic rights and would therefore find themselves in legally precarious situations. The normative content of asylum in EU law is not merely protection from *refoulement*, but primarily to enable those who are granted protection to rebuild their lives in the State providing protection.[144] This is of particular relevance for persons who are, like beneficiaries of international protection, not merely temporarily in the Member State providing protection.[145]

[142] *MA v Denmark* (n 139) paras 145–46, 179.

[143] ibid para 146.

[144] This is normatively anchored in art 18 of the Charter of Fundamental Rights. The notion of 'asylum' in art 18 is not equivalent to the refugee protection of the Refugee Convention. Den Heijer points out that in the second phase legislative acts of the CEAS the notion of asylum is replaced by the notion of 'international protection'. Maarten den Heijer, 'Article 18' in Peers and others (eds) (n 122) 532–33. In the non-legislative instruments, the notion of asylum is used synonymously with 'international protection'. Moreover, the CJEU clearly differentiates in *B and D* between 'asylum', on the one hand, and refugee protection, on the other (see C-57/09 *Bundesrepublik Deutschland v B and D* [2010] ECLI:EU:C:2010:661, para 120; see also UNHCR, 'Guidelines on International Protection No 12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions', HCR/GIP/16/12 (2 December 2016)). Art 18 of the Charter represents a vehicle for the realization of other (fundamental) rights, such as the right to equivalent working conditions, the right to freedom of movement, or access to housing. See den Heijer at 522. See also Emmanuel Matti, 'Artikel 18' in Holoubek and Lienbacher (eds) (n 123) paras 42–43. Since these rights are often enshrined in EU secondary law, it is EU secondary law that specifies the legal connection expressed in art 18 between beneficiaries of subsidiary protection, on the one hand, and the State providing protection, on the other. See Joined Cases C-297/17, C-318/17, C-319/17 and C-438/17 *Bashar Ibrahim v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:219, para 97.

[145] *Alo and Osso* AG (n 88) para 79: beneficiaries of subsidiary protection are not in a 'provisional situation'. Also, the Commission notes that 'the granting of international protection status in EU Member States has in practice almost invariably led to permanent settlement in the EU, while its original and primary purpose was to grant protection only for so long as the risk of persecution or serious harm persists'. Commission, 'Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe' COM(2016) 197 final, 5.

4. JUSTIFYING DIFFERENT TREATMENT

Virtually all States' immigration laws reflect a relationship between time and rights: the longer a person's stay in a country, the more rights accrue to that person.[146] Conversely, the shorter a person's stay in a country, the fewer rights granted to that person: tourists on a short-term visa do not have access to social welfare benefits, in contrast to long-term residents. This relationship between time and rights signifies social time, that is, the social ties built with the passage of time.[147]

In the situations where the Qualification Directive 2011 does not formally require equal treatment, the principle of equal treatment does not prevent Member States from establishing different sets of rights for refugees and beneficiaries of subsidiary protection. However, if Member States do so, they have to justify different treatment. The CJEU does not, in general, accept arguments that seek to justify different treatment with clock time; 'only objective differences' are capable of justifying different treatment. In *Ahmad Shah Ayubi v Bezirkshauptmanschaft Linz-Land*, for instance, the CJEU did not accept the argument that 'refugees who have resided for a number of years in a Member State are in an objectively different situation from that of refugees who have recently arrived in that Member State' as justification for reducing social assistance to the latter.[148] In a similar vein, the ECtHR considers clock time differentiations in themselves as insufficient to justify different treatment.[149] Applied to the argument that subsidiary protection is of shorter duration than refugee status – the principal justification of Member States in differentiating rights[150] – this means that, as beneficiaries of subsidiary protection supposedly remain for a shorter time in the Member State providing protection (relative to refugees), the amount of rights granted to them can also be justifiably less than the rights accorded to refugees. This normative claim, however, rests on an empirical assumption: that the duration of residence of beneficiaries is *in fact* shorter than that of refugees. Thus, section 4.1 below engages with the empirical

[146] See James C Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) ch 3.

[147] Time in this sense proxies for membership in a political community. On a philosophical analysis of time in EU migration law, see Martijn Stronks, 'Grasping Legal Time: A Legal and Philosophical Analysis of the Role of Time in European Migration Law' (PhD thesis, Vrije Universiteit Amsterdam 2017).

[148] Case C-713/17 *Ahmad Shah Ayubi v Bezirkshauptmanschaft Linz-Land* [2018] ECLI:EU:C:2018:929, paras 30–31.

[149] In *Hode and Abdi v UK* (n 136) para 55, the ECtHR saw 'no justification for treating refugees who married post-flight differently from those who married pre-flight' and thus rejected a temporal distinction of family unity as an argument for restricting rights. In *Biao v Denmark*, the Danish government argued that legislation which differentiated among Danish nationals for the purpose of family reunification, depending on the length of Danish citizenship, was justified because a longer possession of Danish citizenship reflects a stronger degree of integration. The Grand Chamber rejected this argument, stating that '[t]he answer to this question cannot, in the Court's view, depend solely on the length of nationality, whether for 28 years or less'. *Biao v Denmark* App No 38590/10 (ECtHR, 24 May 2016) para 125.

[150] See references in nn 2, 3.

aspects of the claim that an allegedly shorter duration of subsidiary protection justifies a legally inferior status. Section 4.2 critically engages with normative arguments that seek to justify differentiation.

4.1 Is subsidiary protection of shorter duration?

No data on the length of subsidiary protection exist at an EU-wide level. Therefore, the duration of subsidiary protection may either be inferred directly from residence statistics in Member States, or indirectly from the cessation of protection status. The latter occurs either involuntarily, due to a change in the circumstances in the country of origin, or voluntarily, because the person returned to his or her country of origin.[151] Thus, if a large number of beneficiaries of subsidiary protection have their protection status ended earlier than refugees, it can be inferred that the protection needs of beneficiaries of subsidiary protection are for a shorter time than those of refugees. In this regard, the CJEU made clear that the cessation of protection status requires that any change of the situation in the country of origin must be 'significant and not just temporary'.[152]

The main problem in assessing the duration of residence of beneficiaries of subsidiary protection in the EU is the lack of publicly available data relating to the cessation of subsidiary protection or to the average duration of residence at the EU level. In addition, in most Member States, data on the cessation of international protection are not publicly available.[153] In the 11 Member States where information on the cessation of international protection is available,[154] the data indicate that the cessation of protection status is very low. Although the available data for these Member States do not differentiate between refugee status and subsidiary protection status – and thus do not allow

[151] 'Voluntariness' is a more ambiguous term here: if a decision to return is based principally on restrictive asylum policies (eg, the lack of family reunification), it is anything but a decision taken voluntarily (ie, not subject to significant external constraints).

[152] *Salahadin Abdullah* (n 75) para 69. See also UNHCR, 'Guidelines on International Protection No 3: Cessation of Refugee Status under Article 1C(5) and (6) of the1951 Convention relating to the Status of Refugees (the "Ceased Circumstances" Clauses)' HCR/GIP/03/03 (10 February 2003).

[153] In 16 of the 27 Member States, such data are not available. The main reason for the lack of such data in most Member States might be the absence of systematic revocation of protection status in most Member States due to ceased circumstances in the country of origin. See Asylum on the Clock (n 55) 8. The numbers are based on the country reports of the Asylum Information Database that encompasses country reports of 19 EU Member States. See Asylum Information Database <https://www.asylumineurope.org/reports> accessed 18 January 2022. Data on the eight Member States not included in the reports on the database were collected by consulting the publicly available asylum and immigration statistics (Finland, Denmark, Lithuania, Luxemburg) or the annual reports on migration and asylum for the year 2018 that the national contact points submitted to the European Migration Network of the DG Home Affairs of the European Commission (Estonia, Latvia, Slovak Republic, Czech Republic) <https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network_en> accessed 18 January 2022.

[154] These 11 Member States are: Austria, Germany, Hungary, Bulgaria, Romania, France, Belgium, Spain, Portugal, Slovenia, and Poland.

direct conclusions to be drawn concerning the relative duration of subsidiary protection – data in these States nevertheless indicate that cessation is rare. For instance, in Austria, only three nationals from Somalia had their protection status terminated in 2015–17.[155] In Spain, protection status was ended in four cases that all concerned Syrian nationals (2018).[156] And in Romania, protection status was ended in only three cases.[157] Data sets in other Member States that differentiate between subsidiary protection status and refugee status show that the cessation of the former is significantly lower than cessation of the latter. For instance, in Germany, the Member State with the highest number of cessation procedures (2017–19), subsidiary protection status was withdrawn in only 1.3 per cent of all the cases in which cessation procedures were started. By comparison, refugee status was ended in 9.8 per cent of cases (2017).[158] In the following years, the relative numbers on cessation and withdrawal of subsidiary protection status were even lower. In 2018, only 0.2 per cent of the procedures resulted in the cessation of subsidiary protection status, compared to 0.84 per cent of cessations of refugee status;[159] and in 2019, subsidiary protection was revoked in 0.66 per cent of procedures initiated, compared to 2.5 per cent of refugee status.[160] In France, refugee status was terminated in 371 cases and subsidiary protection status in 44 cases (2018).[161] A tangible difference in the cessation of refugee status and subsidiary protection occurred in only two Member States. In Poland, subsidiary protection was ended in 100 instances, whereas refugee status was ended in six cases (2019).[162] The cessation of subsidiary protection, however, primarily concerned Russian nationals and occurred predominantly as a result of travel to their country of origin.[163] In Hungary, refugee status was ended in 12 cases and subsidiary protection was ended in 45 instances (2019).[164] The majority of

[155] From the data available, it is not apparent in how many cases cessation of protection status resulted in an expulsion order. As the data concerned relate to first-instance decisions taken by the Federal Asylum Agency, it is also not apparent in how many cases these decisions were overturned by the Federal Administrative Court. See Bundesministerium für Inneres (Austrian Federal Ministry of Interior), 'Anfragebeantwortung Aberkennungsverfahren nach dem Asylgesetz' [Response to Parliamentary Request] 2497/J, 26.GP (20 February 2019) 4.

[156] Asylum Information Database, *Country Report: Spain* (April 2020) 108.

[157] Asylum Information Database, *Country Report: Romania* (April 2020) 123.

[158] Before 2015, revocation procedures were initiated in only 5% of all cases in which international protection was granted. From 2017 onwards, a stark increase in cessation procedures occurred due to alleged shortcomings and several cases of corruption in the asylum procedures. The German Ministry of Interior instructed the Federal Migration and Asylum Authority to re-examine asylum decisions, which were carried out as revocation procedures.

[159] Federal Office for Migration and Refugees, 'Aktuelle Zahlen' [Recent Data] (January 2020) 14 <https://www.bamf.de/SharedDocs/Anlagen/DE/Statistik/AsylinZahlen/aktuelle-zahlen-januar-2020.pdf?__blob=publicationFile&v=3> accessed 18 January 2022.

[160] ibid.

[161] Asylum Information Database, *Country Report: France* (April 2020) 129–31. Data for the year 2019 were not available as at February 2021.

[162] Asylum Information Database, *Country Report: Poland* (April 2020) 94.

[163] ibid 100.

[164] Asylum Information Database, *Country Report: Hungary* (April 2020) 114.

these cases concerned Afghan beneficiaries of subsidiary protection whose status was not renewed after three years because the Hungarian asylum authority considered return to Afghanistan safe,[165] which is legally highly questionable.[166]

The discussion of these data indicates that no empirical basis exists for the claim that subsidiary protection is shorter in duration than protection under the Refugee Convention. It is remarkable that although UNHCR and legal scholars have pointed out, since the early 2000s, that there is 'no empirical basis' for the assumption of a short duration of subsidiary protection, this assumption has persisted throughout the years.[167]

4.2 Differences between subsidiary protection and refugee status in the source of harm

Differences between the content of protection of refugee status and subsidiary protection status cannot be justified *empirically*, that is, on the basis that subsidiary protection is shorter in duration than refugee protection. However, such differences might still be justified *normatively*, that is, on the basis that beneficiaries of subsidiary protection and refugees face different types of human rights violations in their home countries. Some refugee law scholars argue that differences in the type of harm in the country of origin justify different treatment of the two forms of protection.[168] Two strands of argumentation can be identified in this regard.

[165] ibid.

[166] UNHCR stated that 'given the current security, human rights and humanitarian situation in Kabul, an [internal flight alternative] is generally not available in the city'. See UNHCR, 'Submission by the Office of the UNHCR in the case of *MJ v The Netherlands* (application no 49259/18) before the European Court of Human Rights' (6 December 2019) para 4.16 <https://www.refworld.org/country,UNHCR,AFG,5dea96304,0.html>. See also UNHCR, 'Afghanistan: Compilation of Country of Origin Information (COI) relevant for Assessing the Availability of an Internal Flight, Relocation or Protection Alternative (IFA/IRA/IPA) to Kabul' (December 2019).

[167] UNHCR emphasized that 'in reality … the need for subsidiary protection is often just as long-lasting as that for protection under the 1951 Convention'. UNHCR, 'Observations on the European Commission's proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection' (2001) 11 <https://www.refworld.org/pdfid/3c6a69254.pdf>. See also UNHCR, 'Response to the Green Paper on the Common European Asylum System (2007)' <https://www.refworld.org/pdfid/46e159f82.pdf>. Guy Goodwin-Gill and Agnes Hurwitz pointed out that there is 'no empirical basis' for the assumption of a short duration of subsidiary protection. Guy S Goodwin-Gill and Agnes Hurwitz, 'Memorandum' (Minutes of Evidence taken before the European Union Committee (Sub-Committee) 10 April 2002) <https://publications.parliament.uk/pa/ld200102/ldselect/ldeucom/156/156.pdf>, cited in McAdam 2005 (n 13) 475. In regard to the Qualification Directive 2011, ECRE pointed out that '[t]here has indeed been little justification to date for the presumption that subsidiary protection is a more temporary status to that of Convention refugees so as to legitimately distinguish the duration of residence permits'. See Asylum on the Clock (n 55) 4.

[168] See eg James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 362; James C Hathaway, 'Forced Migration Studies: Could We Agree Just to Date?' (2007) 20 Journal of Refugee Studies 349, 352–53; Price (n 5) 167–82.

The first strand identifies a significant difference between refugees and beneficiaries of subsidiary protection in the essentially political character of persecution that refugees experience. Matthew Price, for instance, argues that refugees are not only forced to leave their home country, but are effectively expelled from the political community of citizens.[169] In this regard, refugee law reflects the severance of the political bond between refugee and home country and the provisions of the Refugee Convention offer not only substitute protection, but also substitute membership.[170] In other words, refugees are on a path to citizenship. By contrast, the risk of harm that a beneficiary of subsidiary protection is subjected to in his or her home country would generally not be of a political nature, especially in situations of indiscriminate violence. Thus, Price argues, the political and legal bond between home State and beneficiary of subsidiary protection would continue to exist.[171] As the Refugee Convention provides substitute membership, refugees should also enjoy a broader range of rights than persons entitled to subsidiary protection. Price thus concludes that '[p]roviding a lesser package of rights and benefits to those with temporary protection does not offend principles of liberal equality, because their civic standing is not at stake – they remain members elsewhere'.[172] This is unconvincing for several reasons. First, it is not apparent why severance of the political bond might not also be the result of estrangement from a community in which neighbours have violently turned against one other. Secondly, from a 'pure' legal perspective, substitute membership of refugees is conditional upon the continued existence of a need for protection. This applies to both refugees and beneficiaries of subsidiary protection; if circumstances in the home country change, and the need for protection ceases to exist, both statuses may be revoked. Thirdly, Price himself admits that the distinction in the protection needs of refugees and beneficiaries of subsidiary protection is subject to an exception: if the latter cannot return to their home country due to ongoing civil wars, 'their need for protection is anything but temporary' and they should enjoy the same rights as refugees.[173] The problem with this view is that it is based on an *ex post facto* assessment (only after it turns out that a specific conflict is not of short duration); the legal position of beneficiaries of subsidiary protection should be aligned to that of refugees.

Proponents of the second strand argue that the special protection afforded to refugees is based on the criterion of individual discrimination. For instance, Hathaway maintains that refugees are worthy of double protection: they flee their home countries not only because of impending serious human rights violations, but also because they are exposed to a fundamental deprivation of rights in their societies due to the nature of persecution. In contrast to others seeking protection, the persecution of refugees is based on characteristics that are either immutable (for example, race, gender, or nationality), or are so fundamental that a person cannot be expected to change them (for example, religion or political opinion).[174] In a similar vein, the ECtHR seems to

169 Price (n 5) 167.

170 ibid 174.

171 ibid 168.

172 ibid 181.

173 ibid 176.

174 Hathaway (n 168) 352–53; Hathaway and Foster (n 168) 362.

make a distinction between 'individualized threat' under the Refugee Convention and a (supposed) 'generalized threat' to which beneficiaries of subsidiary protection are exposed.[175] The criterion of individual discrimination is reflected in the requirement of a causal nexus between flight and persecution: in order to be considered a refugee, a person must be individually affected by one of the grounds of persecution in the Refugee Convention.[176] Thus, refugee status constitutes, according to Hathaway's argument, the legal conception of this particular moral and categorical claim and enables an individual to raise specific legal claims against the international community.[177] The aspect of individual discrimination permits identification of potential victims of human rights violations who have experienced fundamental social disenfranchisement and thus represents the basis for distinguishing refugees from other categories of forced migrants.[178] If scrutinized more carefully, however, this normative distinction crumbles.

Individual discrimination requires individual concern. It is certainly reasonable to assume that persons who escape internal armed conflicts are fleeing from situations of arbitrary violence that affects all people equally. They are therefore not individually concerned. However, even when assessing the risk of serious harm in article 15 of the Qualification Directive 2011, the risk a person faces needs to be individualized, even though the degree of individualization decreases relative to the degree of arbitrary violence.[179] Thus, in the structure of EU asylum law, the criterion of individual concern is gradual rather than categorical. This renders a principled distinction between refugees and other categories of forced migrants based on *individual* discrimination difficult to maintain.

Individual *discrimination* thus remains as a distinguishing criterion. Both Hathaway[180] and Price[181] admit that at least some of those entitled to subsidiary protection are subject to individual discrimination in their home countries. For Hathaway, however, the difference is that all refugees are individually discriminated against on the basis of who they are or what they think,[182] and thereby experience fundamental social disenfranchisement upon return to their home countries, whereas not all, but only some, beneficiaries of subsidiary protection would experience individual discrimination if they returned to their home countries. In particular, individuals who flee an

175 *MA v Denmark* (n 139) para 177: 'The Court finds no reason to question the distinction made by the Danish legislature in respect of persons granted protection *due to an individualised threat*, namely refugee status under the UN Refugee Convention covered by section 7(1) of the Aliens Act or "protection status" covered by section 7(2) of the Act, on the one hand, and persons granted protection *due to a generalised threat*, the so-called "temporary protection status" covered by section 7(3) of the Act, on the other hand' (emphasis added).

176 Refugee Convention (n 1) art 1A(2).

177 Hathaway (n 168) 352.

178 ibid 353.

179 *Elgafaji* (n 8) paras 37–39. See also Hugo Storey, 'Article 15' in Kay Hailbronner and Daniel Thym (eds), *EU Immigration and Asylum Law* (2nd edn, Hart/Beck/Nomos 2016) 26; Pieter Boeles and others, *European Migration Law* (2nd edn, Intersentia 2014) 348.

180 Hathaway (n 168) 352.

181 Price (n 5) ch 2.

182 Hathaway and Foster (n 168) 362.

armed conflict with a high degree of arbitrary violence will often not have experienced individual discrimination. Pobjoy points out that the relevant question in this context is not whether a particular form of persecution constitutes refugees as a special legal (or moral) category, but rather whether such differences in the form of persecution make beneficiaries of subsidiary protection less vulnerable in the host country and thus justify a stratification of their rights.[183] Is a person who would risk losing his or her life due to arbitrary violence less vulnerable than someone who is individually targeted? Is the fact that one group would experience social exclusion when returning to their home country and another would be exposed to violations of basic human rights a sufficient justification for reducing social benefits or restricting the right to family reunification? If the argumentation is reformulated along these lines, it is difficult to see which concrete reasons could justify affording beneficiaries of subsidiary protection lower levels of protection than refugees.[184]

5. EXISTING DIFFERENCES IN THE CONTENT OF PROTECTION

As argued in part 3 above, EU fundamental rights law mandates equal treatment of refugees and beneficiaries of subsidiary protection and the Qualification Directive 2011 provides equal treatment in most areas.[185] Yet, in some areas, EU secondary legislation either explicitly permits Member States to adopt different rights for beneficiaries of subsidiary protection and refugees in their domestic laws, or excludes beneficiaries of subsidiary protection from the scope of rights granted to refugees. It is important to highlight that EU law does not mandate different treatment, but merely permits Member States to differentiate rights of beneficiaries of subsidiary protection in specifically enumerated situations. The CJEU has clearly stated that Member States can bring the rights of beneficiaries of subsidiary protection 'in line with those related to refugee status'.[186] This part analyses the four specific situations in which EU secondary

[183] Pobjoy (n 13) 222–23.

[184] This position is also shared by most scholars in asylum and refugee law. See, among others, Daniel Fröhlich, *Das Asylrecht im Rahmen des Unionsrechts* [Asylum Law in the Framework of EU Law] (Mohr Siebeck 2011) 355 (arguing that a distinction of the 'integrative needs' of refugees and beneficiaries of subsidiary protection cannot be justified); Pobjoy (n 13) 222–23 (arguing that a preferential treatment of refugees compared to beneficiaries of subsidiary protection cannot be justified objectively with the different forms of persecution that these two groups face); McAdam 2005 (n 13) 498 (arguing that different forms of protection do not require different levels of protection); Ruma Mandal, 'Protection Mechanisms Outside of the 1951 Convention' UNHCR Legal and Protection Policy Research Series, PPLA/2005/02, 56.

[185] The Qualification Directive 2011 (n 6) states that both groups have the right to be informed about their rights and obligations in connection with their status (art 22); Member States must ensure that family unity is maintained without differentiating between the legal status of protection (art 23); both groups must be given equal access to the labour market (art 26), education system (art 27), medical care (art 30), housing (art 32), integration measures (art 34), and procedures for the recognition of professional or educational qualifications (art 28). Treatment of unaccompanied minors (art 31), freedom of movement within the EU (art 33), and support for voluntary return(art 35) also follow the principle of equal treatment.

[186] *EG* (n 83) para 42.

legislation permits Member States to adopt different levels of rights. It argues, first, that the legal effects of some differentiations are, upon closer scrutiny, negligible and, secondly, that the CJEU applies equality reasoning to level down existing differentiations.

The first ground of differentiation concerns the type of travel documents issued to refugees and beneficiaries of subsidiary protection. While the Refugee Convention obliges States to issue a travel document to refugees,[187] no international treaty exists that obliges States to issue travel documents to beneficiaries of subsidiary (or complementary) protection. Article 25(2) of the Qualification Directive 2011 obliges Member States to issue travel documents, which are valid for journeys outside the territory of the EU, to beneficiaries of international protection. Since the purpose and function of both travel documents are identical, beneficiaries of subsidiary protection and refugees are in a similar legal position.[188]

The second differentiation concerns a different standard regarding entitlements to social welfare benefits. Article 29(1) of the Qualification Directive 2011 states that Member States must grant both beneficiaries of subsidiary protection and refugees the same social assistance as provided to their nationals. However, article 29(2) of the Directive permits Member States to restrict social welfare assistance for beneficiaries of subsidiary protection to 'core benefits' provided to nationals. If Member States decide to limit social welfare to core benefits, the latter must be provided under the same conditions as applicable to its nationals.[189] Member States' room to manoeuvre is further limited by the objectives of the Qualification Directive 2011 to 'avoid social hardship' and to 'provide beneficiaries of international protection with adequate social welfare and means of subsistence'.[190] Moreover, the general differentiation requirement of article 20(3) of the Qualification Directive 2011 requires Member States to take into account individual circumstances in providing social welfare benefits: severely sick persons might require particular medical support; victims of torture might need to obtain extensive psychological support; and pregnant women might require particular assistance. Hence, any decision to limit social welfare assistance has to take into account the specific protection needs of particular categories of persons and a blanket reduction of social welfare assistance would not be reconcilable with this requirement and the objective of avoiding social hardship.

The third differentiation concerns the minimum duration of the residence permit that Member States must issue to refugees and beneficiaries of subsidiary protection. While the latter are granted a residence permit that is valid for one year and, in the case of extension, for two more years,[191] refugees are issued a residence permit that is valid for at least three years.[192] Member States' practices differ in this regard. While Austria's

[187] Qualification Directive 2011 (n 6) art 25(1).

[188] For example, in Austria, refugees obtain a Convention pass (§ 94 Aliens Police Act 2005) and beneficiaries of subsidiary protection are issued with an alien's passport (§ 88 Aliens Police Act 2005). Both documents serve as international travel documents.

[189] *Alo and Osso* (n 11) para 49.

[190] Qualification Directive 2011 (n 6) recital 45.

[191] ibid art 24(2).

[192] ibid art 24(1).

policy is based on the lower limit and initially grants residence permits for one year,[193] France issues residence permits that are valid for four years.[194] These differences in the duration of residence title are largely irrelevant: the actual duration of residence does not depend on the length of the residence title issued but results from the factual circumstances in the country of origin. As the circumstances triggering subsidiary protection generally persist for more than three years, as discussed in section 4.1, the duration of residence of beneficiaries of subsidiary protection generally exceeds three years. Moreover, if the need for protection ceases to exist, the protection status – and thus the corresponding residence permit – of both refugees and beneficiaries of subsidiary protection may be revoked.[195] Thus, from a formal legal perspective, both refugee status and the status of subsidiary protection are 'temporary'. The different duration of residence permits in the Qualification Directive 2011 is a relic of the past assumption of the temporary nature of subsidiary protection and no convincing reasons exist that would justify issuing shorter residence permits to beneficiaries of subsidiary protection.[196] On the contrary, the initial short duration of residence titles might have negative consequences for beneficiaries of subsidiary protection. Short duration of residence titles results, for example, in greater difficulties for beneficiaries of subsidiary protection in accessing the housing market and bank loans.[197]

The fourth ground of differentiation in EU secondary legislation concerns the exclusion of beneficiaries of subsidiary protection from the scope of the more favourable provisions of the Family Reunification Directive that apply to refugees.[198] While applications by refugees for family reunification are to be examined 'immediately' by Member States' authorities, this provision does not apply to beneficiaries of subsidiary protection.[199] The initial exclusion of beneficiaries of subsidiary protection from the scope of the Family Reunification Directive can be explained by the fact that the Directive was adopted in 2003 and thus predates the concept of subsidiary protection in EU law. The introduction of specific provisions on family reunification at a later stage sought to remedy the exclusion of beneficiaries of subsidiary protection. Although the European Commission deliberated in 2011 with Member States to extend the personal scope of the Family Reunification Directive in order to include beneficiaries of subsidiary protection, it never provided a legislative proposal to amend the Directive, due to a lack of support from Member States.[200] While beneficiaries of subsidiary protection are

193 Asylum Act (n 4) § 8(4).

194 cf Asylum Information Database, 'Residence Permit France' <https://www.asylumineurope.org/reports/country/france/content-international-protection/status-and-residence/residence-permit> accessed 18 January 2022.

195 *Bilali* (n 85) paras 55–57.

196 See Bast (n 13) 44.

197 UNHCR, 'Subsidiär Schutzberechtigte in Österreich' [Beneficiaries of Subsidiary Protection in Austria] (February 2015) 23–29.

198 Council Directive 2003/86/EC on the right to family reunification OJ L251/12 (Family Reunification Directive) art 3(2)(c), 3(1).

199 ibid art 5(4).

200 Commission, 'Green Paper on the right to family reunification of third-country nationals living in the European Union' COM(2011) 735 final, 6.

outside the scope of the Family Reunification Directive, the Commission repeatedly highlights that Member States have to respect the right to family life and the prohibition of discrimination under the ECHR[201] and that the 'protection needs of refugees and beneficiaries of subsidiary protection are the same'.[202] Even though the CJEU confirmed in its judgment in *K, B v Staatssecretaris van Veiligheid en Justitie* that beneficiaries of subsidiary protection are excluded from the scope of the Family Reunification Directive,[203] it held that, if a Member State applies the provisions of the Family Reunification Directive in its domestic law to beneficiaries of subsidiary protection, it has jurisdiction to interpret the Directive. The court found that, as the Netherlands applied the provisions of the Family Reunification Directive to beneficiaries of subsidiary protection, it had jurisdiction and interpreted the provisions of the Directive through a fundamental rights lens, emphasizing the protection needs of beneficiaries of international protection.[204] Although the CJEU's decision in *K, B* does not provide beneficiaries of subsidiary protection with an autonomous right to family reunification, the significance of the decision should not be underestimated: 15 of the 27 Member States grant the same rights to beneficiaries of subsidiary protection as to refugees.[205] Thus, even though the Commission's proposal for an EU Qualification Regulation does not provide for full equality of the content of protection of refugees and beneficiaries of subsidiary protection, there is a clear trend towards equal treatment.

6. CONCLUSION

The preceding parts demonstrated that neither the historical development of subsidiary protection in EU asylum law, the empirical data, nor the normative arguments support the assumption that beneficiaries of subsidiary protection should enjoy lesser rights than refugees on the basis that they face more temporary forms of harm in their country of origin. Contrary to current legislative amendments in several EU Member States, the CJEU held that beneficiaries of subsidiary protection and refugees must be afforded equal treatment. Why, then, does the presumption of the temporary nature

[201] ibid 25. It seems that the Commission considers equal treatment in family reunification not merely as a policy choice but as a legal obligation of Member States that derives from their obligations under the ECHR.

[202] ibid 6. In the guidance documents for application of the Family Reunification Directive, the Commission repeated that the 'protection needs of persons benefiting from subsidiary protection do not differ from those of refugees'. See Commission, 'Communication on guidance for application of Directive 2003/86/EC on the right to family reunification' COM(2014) 210 final, 24.

[203] Case C-380/17 *K, B v Staatssecretaris van Veiligheid en Justitie* [2018] ECLI:EU:C:2018:877, para 33.

[204] The CJEU held that Member States must consider: the need for an individual examination of the application, the best interests of the child, the fact that refugees cannot lead a normal family life in their home State, and the length of the separation period of the family. See ibid paras 52–53.

[205] See the arguments provided to the German Parliament by UNHCR on the extension of suspension of family reunification: Deutscher Bundestag (German Parliament), 'Stenographisches Protokoll 19/5' (29 January 2018) 27.

of subsidiary protection persist? One explanation – perhaps too simple – might be the argument that the shorter duration of subsidiary protection serves as a smokescreen to conceal the underlying political motivations, in particular to reduce undesired net immigration. While it is certainly correct that the ECtHR, the CJEU, and national courts in several Member States are generally lenient towards Member States' immigration concerns, it does not explain why parts of refugee law scholarship consider subsidiary protection to be an inferior protection status to refugee status. In addition to courts' leniency towards the immigration powers of States, an additional factor that explains the persistence of the assumption of a shorter duration of subsidiary protection might also be the temporal perception of armed conflicts in liberal international legal thought.

In her book, *Wartime*, legal historian Mary Dudziak describes how the perception of war is determined by a specific conception of time.[206] She argues that, based on a linear conception of time, war and peace are perceived as successive temporal sequences: wartime is always followed by peacetime, and war is perceived as the exception to the 'normal' state of peace. As war is thus perceived as an exception to the normal state of peacetime, it implies the presumption that an essential aspect of wartime is its temporary nature.[207] In other words, the perception of wars as exceptional and temporary shapes the legal description of protection granted to people fleeing from these conflicts. Protection, then, is also presumed to be temporary in nature.

The structure of the liberal post-1945 international legal order reflects this perception of wartime as an exception to the normal state of peace. The UN Charter[208] includes war as a 'never again' reference to past experiences only twice and its aspiration is to banish war from the realm of international relations.[209] In its first working session, the International Law Commission considered whether war should be included as a topic of enquiry in its programme of work. It decided that 'war having been outlawed, the regulation of its conduct had ceased to be relevant'.[210] It was both a project of belief and ambition: belief in the rationality of international law that ought to overcome the transient social anomaly of war, and ambition that international legal rules have the power to harness States' acts on aggression.[211] The 1990s, in particular, reflected this belief that the end of USSR obstruction in the UN Security Council, which ushered in new possibilities of collective action in the Council, would bring a swift end to armed

206 Dudziak (n 8) 4.

207 ibid.

208 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16.

209 This is argued in more detail in Stefan Salomon, 'The Missing Link between Law on Force and Refugee Law: Some Preliminary Remarks in Context' in Stefan Salomon and others (eds), *Blurring Boundaries: Human Security and Forced Migration* (Brill 2017) 76–79.

210 Vol I, Yearbook of the International Law Commission 1949: Summary Records and Documents of the First Session including the Report of the Commission to the General Assembly, 281.

211 In a similar vein, German social theorist Hans Joas observed that social theory itself largely abstains from war as an object of inquiry. The repression of 'war' as an object of inquiry, he argued, might be induced by the characterization of 'war' as a social anomaly, a transient aberrance to be overcome. See Hans Joas and Wolfgang Knöbl, *Kriegsverdrängung: Ein Problem in der Geschichte der Sozialtheorie* [War in Social Thought] (Suhrkamp 2008) 10–11.

conflicts and that protection of persons fleeing these conflicts would only be needed for a short duration.[212] This assumption was not limited to the 1990s. In 2018, the Austrian Constitutional Court argued that 'poor security situation[s] or civil war-like conditions tend to be temporary and can be ended more quickly'; hence, the court also considers the protection of subsidiary protection as temporary.[213] This assumption is not supported by the reality of long-lasting conflicts in Afghanistan, Somalia, and Syria and the duration of subsidiary protection granted to people escaping from these conflicts, which is anything but short in duration.

The continuing nature of these conflicts, as well as the absence of convincing normative and empirical reasons to justify different treatment of beneficiaries of subsidiary protection and refugees, means that the principle of equal treatment increasingly levels Member States' scope for differentiating the content of protection in EU asylum law. The general requirement of equal treatment in EU fundamental rights law could be used by the CJEU to strike down as discriminatory provisions in EU secondary law that explicitly permit Member States to afford beneficiaries of subsidiary protection a lower level of protection than refugees. This is, however, unlikely to happen.[214] Rather, it is more likely that the principle of equal treatment will function as a brake on future differentiations of Union legislature in EU secondary law and, at the same time, as a strict standard of interpretation of the provisions that permit Member States to exclude beneficiaries of subsidiary protection from certain rights. In this regard, the case law of the CJEU has cleared the path towards a common status of international protection in EU asylum law.

[212] See Koo (n 39) 168–69.

[213] VfGH 10.10.2018 (n 4) para 47.

[214] *K, B* (n 203) para 33.