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EQUAL YET DIFFERENT: WHY SHOULD BENEFICIARIES OF SUBSIDIARY PROTECTION HAVE THE SAME RIGHTS AS REFUGEES?

A comparative study between Canada, Germany, Hungary, and the EU

par

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To all families that cannot reunite

Résumé

Les demandeurs d'asile qui obtiennent une protection internationale sont soit considérés comme des réfugiés, soit comme des bénéficiaires d'une protection (subsidiaire). Cette différence pourrait influencer les conditions de séjour des demandeurs d'asile reconnus et leurs avantages dans plusieurs pays. Au Canada, les deux termes existent mais ils n'affectent pas les conditions de séjour d'une personne. Dans l'UE, la protection accordée peut faire la différence en fonction du pays d'accueil.

Cette étude analyse si l'Allemagne, la Hongrie et l'UE doivent réformer leurs systèmes d'asile pour améliorer les droits des *bénéficiaires de la protection subsidiaire*.
L'objectif est de répondre à la question de savoir pourquoi il devrait y avoir une différence entre les deux groupes en déterminant la différence entre les *réfugiés* et les *bénéficiaires de la protection (subsidiaire)*. À cette fin, les différents cadres juridiques du Canada, de l'Allemagne, de la Hongrie et de l'UE seront comparés afin de discuter des différentes approches. Ensuite, une analyse basée sur les droits de la personne montrera que la distinction entre les deux groupes est une discrimination à l'encontre d'un groupe de demandeurs d'asile. En outre, une évaluation démontrera que la vulnérabilité devrait prévoir un traitement égal des réfugiés et des *bénéficiaires de la protection subsidiaire*. S'appuyant sur l'utilitarisme, l'étude fournira une perspective économique sur le statut de la protection. Enfin, des recommandations pour le traitement des *bénéficiaires de la protection subsidiaire* concernant l'UE, l'Allemagne et la Hongrie seront fournies.

Mots-clés: demandeur d’asile - réfugié - protection subsidiaire - UE - Canada - Allemagne - Hongrie - droits de la personne - discrimination - vulnérabilité

Abstract

Asylum seekers who obtain international protection are either considered as *refugees* or as *beneficiaries of (subsidiary) protection*. This difference might influence the terms of stay of recognized asylum seekers and their benefits in several countries. In Canada, both terms exist but they do not affect a person's terms of stay. In the EU, the protection that has been granted can make a difference, depending on the reception country. This study analyzes if Germany, Hungary and the EU should reform their asylum systems to improve the rights of *beneficiaries of subsidiary protection*.

The objective is to answer the question why there should be a difference between both groups by determining the difference between *refugees* and *beneficiaries of (subsidiary) protection*. For this purpose, the different legal framework of Canada, Germany, Hungary, and the EU will be compared to discuss the different approaches. An analysis based on human rights will show that the distinction is a discrimination against a group of asylum seekers. Furthermore, an evaluation will demonstrate that the factor vulnerability should provide for an equal treatment of *refugees* and *beneficiaries of subsidiary protection*. Arguing with utilitarianism, the study will provide an economic perspective about the status of protection. Last, recommendations for the treatment of *beneficiaries of subsidiary protection* regarding the EU, Germany, and Hungary will be given.

Key words: asylum seeker - refugee - subsidiary protection - EU - Canada - Germany - Hungary - human rights - discrimination - vulnerability

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ABBREVIATIONS

Art.	Article
A.G.	Attorney General
ECFR	European Charter of Fundamental Rights
CAT	Convention against torture
CCRF/Charter	Canadian Charter of Rights and Freedoms
DFN	Designated Foreign National
DCO	Designated Country of Origin
EC	European Community
EU	European Union
ECtHR	European Court of Human Rights
ECHR	European Charter of Human Rights
ECFR	Charter of the European Union on Fundamental Rights
FOMR	Federal Office of Migration and Refugees
GBL	Basic Law (Germany)
HBL	Basic Law (Hungary)
ICESCR	International Covenant on Economic Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
IJRC	International Justice Research Center

IOM	International Organization for Migration
IRB	Immigration and Refugee Board (Canada)
IRPA	Immigration and Refugee Protection Act (Canada)
IRPR	Immigration and Refugee Protection Regulation (Canada)
MCI	Minister of Citizenship and Immigration (Canada)
RICC	Refugee, Immigration and Citizenship Canada
RPD	Refugee Protection Division (Canada)
SCO	Safe Country of Origin
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the EU
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNHCR	United Nations High Commissioner of Refugees
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNRWA	United Nations Relief and Work Agency
VCT	Vienna Convention on the law of treaties

"*Our duty to the people we serve is to work together to move from fear of each other to trust in each other. Diversity in all its forms is an asset, not a threat.*",
Secretary-General António Guterres

INTRODUCTION

Asylum is a major topic in the world news. It is of public concern because it deals with granting persons who are in life-threatening situations protection. The sovereignty of States allows to regulate the entry of foreign citizens or stateless persons into their territory. States that acceded the *Convention relating to the Status of Refugees*[1] decided to admit persecuted persons and to give them shelter in times of need, according to international law.

Due to humanitarian crises,[2] countries like Canada, Germany or Hungary experience increased asylum influxes. The number of people who are displaced increases on a yearly basis.[3] While many persons are displaced internally, also the number of asylum seekers, who seek for protection in another country, increases.[4] People flee hoping to find a place where the conditions would allow them to live in security and without constantly fearing for their lives, without persecution and without torture. Yet, depending on the reason for displacement, different of asylum seekers are established who might be treated differently once they get international protection. While Canada treats all persons in need equally, there are countries like Germany and Hungary that differentiate between refugee protection and an additional (subsidiary) protection. Hence, States that receive large numbers of asylum seekers in Europe and North America have different approaches towards asylum seekers, based on their respective legal frameworks and moral ideas.

While there is an inherent need for people in dangerous situations to ask for asylum, Germany and Hungary decided to treat persons who get "subsidiary protection" differently than persons who are recognized as "refugees". Canada also has two different definitions of persons in need: "person in need of protection" and "refugee". The country grants the same rights and benefits to

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[1] UN, *Convention relating to the Status of Refugees*, 189 UNTS 137 (entered into force 22 April 1954, accession by Canada 4 June 1969, by Germany 1 December 1953, by Hungary 14 March 1989) [*Refugee Convention* and *Geneva Convention*].
[2] UNOCHA, "Global Humanitarian Overview 2018", online: <https://www.unocha.org/sites/unocha/files/GHO2018.PDF> (requested on 4 January 2018).
[3] Cf. UNHCR, *Global Trends 2017*, (Geneva: UNHCR, 2018) at 4, UNHCR, *Global Trends 2016*, (Geneva: UNHCR, 2017) at 6.
[4] UNHCR, *Global Trends 2016, ibid.*

both groups. Where Germany and Hungary limit the rights of beneficiaries of subsidiary protection compared to refugees, Canada has a more humanist approach when protecting persons in need. The equal treatment makes a difference. Family reunification or the right to work is granted automatically in Canada, whereas in Germany or Hungary beneficiaries of subsidiary protection face more obstacles or need to wait longer compared to refugees for receiving the same benefits. The research question for this study is: *Why should Germany, Hungary and the EU adopt an asylum legislation resembling the Canadian one that grants equal conditions for refugees and beneficiaries of subsidiary protection?*

The European Commission stated in June 2016 that "*Europe is currently experiencing unprecedented migratory flows, driven by geopolitical and economic factors that will continue and maybe intensify*" and speaks of "*a humanitarian crisis*".[5] The increase in inflows and the number of irregular migrants make the EU struggle. The Member States have discrepancies and disagree regarding reception conditions. Third country agreements, as for example the *Agreement between the EU and Turkey from March 2016*,[6] are adopted for securing European borders and limiting asylum seekers' immigration. However, European countries have the obligation to accept persons in need. The additional subsidiary protection that some European countries grant is less comprehensive than refugee protection. Thus, by increasingly granting subsidiary protection instead of refugee protection,[7] States also increasingly limit the rights of numerous protected persons.

I argue that the Canadian regime provides better options than the European ones, and that it would be an advantage for the European countries to adopt a legislation similar to the Canadian one – in terms of humanism and utilitarianism.

The European approach seems to apply a doctrine of "equal yet separate" which legitimizes a different treatment of protected persons, based on their protection status. Doing that, the EU

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[5] European Commission, *COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE EUROPEAN COUNCIL, THE COUNCIL AND THE EUROPEAN INVESTMENT BANK on establishing a new Partnership Framework with third countries under the European Agenda on Migration* (Strasbourg: COM, 2016), online:<ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/communication_external_aspects_eam_towards_new_migration_ompact_en.pdf> (requested 4 January 2018), at 2.
[6] Council of the EU, *EU-Turkey statement*, 18 March 2016, Press Release No. 144/16.
[7] See Chapter 5.

seems to inverse the doctrine of "separate yet equal"[8] that existed in the USA until 1954, when the US Supreme Court decided that every citizen is entitled to an equal treatment.[9] The EU grants different rights to people in equal circumstances.

Thierry Tuot, French Councilor of State[10], says that asylum policies center on three driving forces: **humanism**, **moralism** and **realism**. **Humanism** is what guides the acceptance and accommodation of asylum seekers. Humanism is the reason for not deporting people in need. It defines values and ideologically prescribes to comply with them. Essentially, humanism is the compassion that States and citizens show for asylum seekers who would suffer otherwise, or, in other words for those "*qui, au terme du parcours dont la plupart d'entre nous ne supporteraient la dureté, parviennent sur notre territoire qu'ils ont vu comme un des paradis terrestres.*"[11]

Morality is based on laws. In asylum law, this would be international law but also its national application. The moral aspect is closely related to humanism, but it resides in the legal expression of it. In particular, human rights and fundamental rights, which are essential in democracies, form part of the moral aspect that centers around asylum politics: "*Les leçons que nous donnons si volontiers au monde, seraient pathétiques ou ridicules si nous ne les appuyons du traitement rigoureux et humain des demandeurs [d'asile]*."[12]

Lastly, Tuot mentions **realism**. Realism indicates that the grand quest for asylum will continue and increase.[13] However, he sees a negative correlation between immense inflows of asylum seekers and the social equilibrium. Additionally, there is a correlation between moralism and realism. Moralism commands realism, yet realism is often misunderstood and provokes brutalist or cynic responses, that oppose humanist aspects by limiting conditions for asylum. Realism should promote efficacy and responsibility, in particular, it should enhance a human treatment of asylum seekers. Asylum seekers would often risk being left with a status of uncertainty, neither accepted nor refused and would lead a life full of insecurity.[14]

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[8] U.S. Supreme Court, *Plessy v. Ferguson* (No. 210), 163 U.S. 537, Decision 18 May 1896.
[9] U.S. Supreme Court, 347 U.S. 483, *Brown v. Board of Education of Topeka (No. 1.)*, Decision, 17 May 1954 (U.S.A.).
[10] "Conseiller d'État" (translated by the author).
[11] Thierry THUOT, "Préface", in Julian FERNANDEZ & Caroline LALY-CHEVALIER, eds, *Droit d'asile* (Paris: A. Pedone, 2015) 7.
[12] *Ibid.*, p. 8.
[13] *Cf.* UNHCR, *Global Trends 2016*, and *Global Trends 2017*, op. cit.
[14] *Ibid.*

His ideas apply to the situation of beneficiaries of subsidiary protection as well. While beneficiaries of subsidiary protection obtain protection and certain benefits in the EU, they are not in all countries treated like refugees.

ASSUMPTIONS

We establish two assumptions for proving the hypothesis that Germany and Hungary, and thus the EU, should provide equal treatment to refugees and persons in need of protection. The **first** assumption is that an unequal treatment would breach protected persons' fundamental rights. The **second** assumption is that it would provide more benefits to the society to treat beneficiaries of subsidiary protection like refugees.

OBJECTIVE, SOURCES AND SCOPE

This study will compare the concept of refugee protection and subsidiary protection in four different legislations and recommend legal modifications. It will show how Canada, the EU, Germany and Hungary translated the contents of international law into national law. International law will consider State practice to see whether a customary law has developed, as well as important human rights and Refugee treaties and resolutions. Resolutions and treaties considered are the *Refugee Convention*[15] and the *Protocol relating to the Status of Refugees* [16], the *Universal Declaration of Human Rights*[17], the *International Covenant on Civil and Political Rights*[18], and the *International Covenant on Economic, Social and Cultural Rights*.[19] Important national acts that will recur in the study include for Canada the *Canadian Charter of Rights and Freedoms*[20],

[15] *Refugee Convention.*
[16] *Protocol relating to the Status of Refugees*, 606 UNTS 267 (entered into force 4 October 1967, accession by Canada 4 June 1969, by Germany 5 November 1969, by Hungary 14 March 1989) [*Bellagio Protocol*].
[17] *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) [*UDHR*].
[18] *International Covenant on Civil and Political Rights*, (19 December 1966), 999 UNTS 171 (entered into force 23 May 1976, accession by Canada 19 May 1976, by Germany 17 December 1993, by Hungary 1974) [*ICCPR*].
[19] *International Covenant on Social, Economic and Cultural Rights*, New York, (16 December 1966), 993 UNTS 3 (entered into force 3 January 1976, accession by Canada 19 May 1976, by Germany 17 December 1973, by Hungary 17 January 1974) [*ICSECR*].
[20] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter* and *CCFR*].

the *Immigration and Refugee Protection Act*[21] and the *Immigration and Refugee Protection Regulations.*[22] The analysis of the German legislation will mostly focus on the *Asylum Law*[23] and the *Residence Law.*[24] For Hungary, important legislative documents are the *Asylum Act*[25] and the *Residence Act*[26]. Supranational EU legislation will consider the *Qualification Directive*[27], the *Reception Directive*[28] and the *Charter of Fundamental Rights of the European Union*[29]. Furthermore, the *European Convention for Human Rights*[30] will also be taken into account.

For answering the research question, the study is divided into three parts.

Part I will compare the legal asylum frameworks in Canada, Germany and Hungary and give an overview over the acceptance and refusal of protected persons, and the different rights of refugees and beneficiaries of subsidiary protection. Germany and Hungary, under the auspices of the European Union,[31] must apply EU law in order to comply with the moral obligations from their membership in a supranational organization. EU law consists, pursuant to art. 288 *TFEU*, mainly of regulations, directives, decisions. Regulations are binding for all Member States.[32] Directives address Member States but not necessarily all of them and "*leave to the national*

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[21] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*].
[22] *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].
[23] *Asylgesetz* (*Asylum Law*), 2 September 2008, BGBl. I S. 1798 [*Asylum Law*].
[24] *Aufenthaltsgesetz* (Residence Law), 25 February 2008, BGBl. I S. 162 [*Residence Law*].
[25] *Act LXXX of 2007 on Asylum*, 1 January 2008, (translated by Afford Fordító-és Tolmácsiroda Kft., proofreading: UNHCR Hungary Unit), online: < http://www.refworld.org/docid/4979cc072.html> (requested 4 January 2018) [*Asylum Act*].
[26] *Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals and the Government Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals*, 1 July 2007, (translated by the Ministry of Interior/Hungarian Network), online: <http://www.refworld.org/docid/4979cae12.html> (requested 4 January 2018) [*Residence Act*].
[27] *DIRECTIVE 2011/95/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, [2011] OJ L 337/9 [*Qualification Directive*].
[28] *DIRECTIVE 2013/33/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 laying down standards for the reception of applicants for international protection (recast)*, [2013] OJ, L180/96 [*Reception Directive*].
[29] *Charter of Fundamental Rights of the European Union*, [2012] OJ C 326/391 [*ECFR*].
[30] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*ECHR*].
[31] The European Union was established by the *Treaty on European Union* [*TEU*] and the *Treaty on the Functioning of the European Union* [*TFEU*], *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* - Consolidated version of the Treaty on European Union - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, [2012] OJ C 326/01.
[32] Art. 288(2) *Treaty on the Functioning of the European Union*, [2012] OJ C 326/47 [*TFEU*].

authorities the choice of form and methods"[33] for implementing the directives' content. The Court of Justice of the European Union (CJEU) interprets EU law, decides on the Member States' compliance with EU law, and creates European case law.[34] The Court's judgements are binding upon the Member States and cannot be revoked by unilateral measures, as long as the Union guarantees to protect individual rights.[35] The EU is, therefore, a supranational organization with a legal personality that has the competence to act and affect the Member States' internal legal functioning. Its competence to regulate the legislation on asylum derives from Art. 78 *TFEU*.

As we include four legal systems in our analysis (Canada, Germany, Hungary and the EU), it would be difficult for us to limit the analysis to a positivist study that conceives "*the legal institutions of every legal system (…) not subject to [– that is do not recognize –] the jurisdiction of legal institutions outside their system over them*".[36] Here, I argue that the EU and thus European law have become part of the States' legal systems, and prevail in a conflicting situation over national law by the hierarchy that it acquired through the transfer of competences from its Member States.[37] From this point of view, national laws are still in force but they are not applied in a conflicting situation[38], which could justify a positivist analysis. But considering that each Member State still has its national legal system, it is more convincing to analyze the question if Germany and Hungary should provide a like protection to subsidiary protected persons and refugees from a pluralist perspective.

A positivist study would deem the national systems as operatively closed.[39] In this meaning, the law, formed by the legislators like "modelling clay", is applicable per judicial decisions. Nevertheless, when studying asylum, it becomes clear that States create systems that are quasi-judicial. It is not the courts and tribunals that decide on admitting or refusing asylum seekers but boards and panels, consisting of officials who do not necessarily have a legal education, that have

[33] Art. 288(3) *TFEU*.
[34] Art. 288(4) *TFEU*.
[35] Bundesverfassungsgericht (Federal Constitutional Court), Koblenz, 22 October 1986, *Solange II*, BVerfGE 73, 339 (Germany), Flaminio Costa v E.N.E.L., C-6&64 [1964] ECR I-01141, Ulrich FASTENRATH & Thomas GROH, *Europarecht*, 3rd ed (München: Beck, 2012) at 42ff.
[36] Brian BIX, "John Austin and Constructing Theories of Law", (2011) 24 Can. J.L & Juris. 431 at para. 5.
[37] *Cf.* Michael POTACS, *Rechtstheorie* (Vienna: Facultas, 2015) at 105f.
[38] *Ibid.*, at 106
[39] Niklas LUHMANN, Das Recht der Gesellschaft, 1995, Frankfurt a.M.: Suhrkamp at 38.

been introduced.[40] Furthermore, law evolves and changes. The European countries we consider have constitutional law systems that develop binding norms by a deliberate political process. In Canada, we are studying a system that combines common law and constitutional law, which makes decisions from courts and tribunals binding sources. All countries concerned confirmed to respect the rule of law, which implies, in that context, the respect of the democracy and human rights. [41]

In a modern and globalized world, systems interact with each other. The analysis would be challenged if I interpreted the respective normative system as one closed autonomous "biotope" that is only nourished by its internal changes. Therefore, I consider external influences as well. The observation of distinct legal and political systems, the environment, allows to propose new ideas to one existing legal framework, to consider plural ideas and to take approaches that are based on external influences and the environment.[42] I think that intrinsic **and** acquired political, economic and social changes can inspire the law and interact with a specific system.[43] Hence, a positivist study would restrain the conclusions I could draw to explain why subsidiary protection and refugee protection should be alike. Therefore, when comparing the three countries, which also includes supranational aspects, I apply legal pluralism that extends its scope not purely to the existing legislations, wherefore I include public policies, measures taken by international organizations and opinions issued by non-State actors. The aim of this study is to conclude with an idea that is based on a normative order.[44]

In Part II, I will analyze if the different treatment of persons in need of protection and refugees is a discrimination against persons in need of protection under the concept of equity. Once I have obtained an answer, I will proceed to test if this treatment is justified under the concept of equality. I will approach this question once again from a pluralist perspective, by considering legal

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[40] In Canada, that would be the **Immigration and Refugee Board** of Canada, in Germany, the **Federal Office for Migration and Refugees**, and in Hungary, the **Immigration and Asylum Office**.
[41] Preamble, art. 2, art. 21 TEU; *Renvoi relatif à la sécession du Québec* [1998] 2 RCS 217 at 34, 44, 46, 48, 67.
[42] LUHMANN, *Das Recht der Gesellschaft* op. cit. at 26,
[43] Jean-Guy BELLEY, "Le pluralisme juridique comme orthodoxie dans la science du droit", (2011) 26(2) C.J.L.S. 257 at 259f.
[44] *Cf.* Emmanuelle BERNHEIM, "Le « pluralisme normatif » : un nouveau paradigme pour appréhender les mutations sociales et juridiques ?" (2011) R.I.E.J. 67; BELLEY, "Le pluralisme juridique comme orthodoxie dans la science du droit", op. cit. at 263f. ; Jeremy WEBBER, "Legal Pluralism and Human Agency", (2006) 44 Osgoode Hall L.J. 167 at paras. 5, 26.

decisions and its consequences under a mixed approach (positivist and constructivist). Important documents for the analysis will be multilateral human rights documents. When showing how responsible courts and tribunals interpret the legal dispositions, I will apply a positivist approach, without judging the outcome of the legal decisions.[45] The reason for applying a positivist theory in this section is that, although positivism is somehow limited to foresee how a situation will develop because of the moral aspect of the law, it is a theory that explains the current behavior of judiciary decision makers.[46] However, when discussing whether one is discriminated against as a subsidiary protected person in comparison to a refugee, we will apply a constructivist theory, i.e. suppose that the moral law stems from our own will[47], based on ethics and concepts of justice and human equality.[48] The humanitarian aspect in this part is supported by a constructivist perspective. States are not only driven by the – moral – interpretation of existing laws but also motivated to change their legislation because of their identity and culture.[49] Cultural differences between Canada, Germany and Hungary could explain the different approaches the States have towards the protection that cum-citizens will get. However, there are many similarities in the three legislations for internationally protected persons. In constructivism, global norms, even though not unilaterally recognized, can shape behavior and influence cultural identities.[50] Constructivism poses the question to which extent a State's reputation influences the decision-making process. It refers to legitimacy of State actions[51], and, vice versa, we also include omissions. In this sense, law will, at least in representative democracies, be created through a national assembly that senses the need to modify a current or develop a new legal framework that fits the supposed *status quo post*.

In Part II, I furthermore examine the origin of asylum seekers and the status that they obtain in the respective country by a statistical study.[52] This part is a rather utilitarian analysis which

[45] W. J. WALUCHOW, "The many faces of Legal Positivism", (1998) 48 Univ. of Toronto L.J. 387 at 408, 446f.
[46] *Ibid.*
[47] Frederick RAUSCHER, "Pure reason and the moral law: A source of Kant's critical philosophy", (1996) 13 History of Philosophy Quarterly 2 at 255.
[48] Juan IOSA, "The Structure of the Conflict between Authority and Autonomy", (2014) 27 Can. J.L. & Juris. 415 at para. 50.
[49] Asher ALKOBY, "Theory of Compliance with international law and the challenge of cultural difference", 4 J. Int'l L. & Int'l Rel. 151 at. 162, 166.
[50] *Ibid.* at 168.
[51] Antje WIENER & Uwe PUETTER, "The Quality of Norms Is What Actors Make of it", 2009, 5 J. Int'l. L. & Int'l Rel. 1 at 3.
[52] We obtained the data from **Immigration, Refugees and Citizenship Canada**, the **Federal Office for Migration and Refugees** and **Destatis** (Germany) and the **Immigration and Asylum Office** (Hungary)

embraces distinct aspects and perspectives.[53] It seeks to answer the question whether economic reasons could justify an equal treatment of refugees and persons in need of protection. For this purpose, I will apply a statistical legal analysis that allows to figure out if the outcome of the current asylum system could be improved[54] by granting refugees and beneficiaries of subsidiary protection a similar protection. We will compare the origin of asylum seekers as well as the acceptance and refusal rates. Although legal utilitarianism can be pursued as "*the moral worth of an action (...) by its effect in promoting happiness*"[55], I establish the hypothesis that an asylum framework that grants equal rights to refugees and persons in need of protection would be of advantage when the State could (and would) work more efficiently afterwards.[56] Thus, we use a cost-benefit analysis for getting to a Pareto optimality by according persons in need of protection the same rights as refugees.[57] I estimate that the utility of granting alike rights to both groups would be maximized according to rational choice[58], if, first, the cost per accepted asylum seeker would decrease over time, and, second, the social wealth would remain similar or even increase.[59]

I recognize that it may be difficult to evaluate how the social wealth might increase if States changed their legislations, as wealth can be defined by various, distinct parameters. If there were, for example, social and political conflicts between several interest groups that seek to maximize their own wealth by either maintaining current structures or changing them according to their values, an outcome would have a different value, depending on a group's objective.[60] I take two groups: the State (A) and protected persons (B), and seek to confirm the hypothesis that an equal

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[53] BELLEY, "La protection de la dignité humaine dans le pluralisme juridique contemporain", op. cit., at 119.
[54] Ejan MACKAAY & Alain PARENT, "L'analyse économique du droit comme outil du raisonnement juridique", 2e Journée d'étude sur la méthodologie et l'épistémologie juridiques, tenue le 4 mai 2012, à l'Université Laval, online: <https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/18309/Mackaay-Parent-AED-outil-raisonnement-juridique-2013.pdf?sequence=1&isAllowed=y>, (requested 4 January 2018) at 3.
[55] Richard A. POSNER, "Utilitarianism, Economics and Legal Theory", (1979) 8:1 The Journal of Legal Studies 103 at 104 (JSTOR).
[56] *Ibid.* at 109f.
[57] Bruce CHAPMAN, "Preference, Pluralism and Proportionality", (2010) 60:2 Univ. of Toronto L.J. 177 (JSTOR).
[58] Michael ILG, "Imposing Self-Interest: Behavioural Law and Economics, the Ultimatum Game, and Value Possibilities", (2005) 28 Dalhousie L.J. 141.
[59] Social wealth is, however, difficult to define (see POSNER, "Utilitarianism, Economics and Legal Theory", op. cit. at 119ff.). We are tending towards a definition, where social wealth will be maximized when the "*society attains the social patterns that are best adapted to its needs and this balance is expected to persist until external conditions change*" (*cf.* Moshe HIRSCH, "The Sociology of International Law: Invitation to Study International Rules in Their Social Context", (2005) 55 U. Toronto L.J. 891 at 902).
[60] HIRSCH, "The Sociology of International Law: Invitation to Study International Rules in Their Social Context", op. cit., at 906.

treatment of all protected persons requires less resources than a different treatment, and that it would add a social value. I do not seek to prove that wealth would increase on an individual or a small corporate level if Germany and Hungary would change its asylum legislation, but on a macro (societal) level. This part is conducted as a structural-functional analysis from a macro perspective.[61]

Finally, based on the results found in each part, I will provide recommendations and explain whether and why the European Union should introduce a harmonized and alike protection for both, refugees and subsidiary protection persons.

INTEREST OF SELECTION AND SHORTCOMINGS: CANADA, GERMANY AND HUNGARY

The selection of Canada, Germany and Hungary is based on several aspects. First, Germany and Hungary are two countries in the EU that have very different approaches towards asylum. Therefore, the inclusion of Germany and Hungary can provide different points of view when asking the question if beneficiaries of subsidiary protection should be treated alike. The inclusion of Canada is from interest because all protected persons are treated alike. Thus, the different legal systems could be inspired by each other's approaches.

Additionally, the three countries receive large asylum influx. Luft finds out that **push-factors** make people emigrate.[62] He defines **pull-factor**s as those reasons that make people want to immigrate in a country.[63] Notably the sharing of images of industrialized countries with a wealthy lifestyle through social and mass media makes people want to migrate. Furthermore, a State's willingness to accept immigrants play a role in migration. Thus, the comparison of three industrialized countries with different systems could provide fruitful insights in order to answer

[61] HIRSCH, Moshe, "The Sociology of International Law: Invitation to Study International Rules in Their Social Context", op. cit., at. 897.
[62] Stefan LUFT, *Die Flüchtlingskrise* (München: C.H. Beck, 2016) at 15f. Among the push factors we can find political and military conflicts, environmental catastrophes, the demographic development in the migrant's country of origin and the governments behavior.
[63] *Ibid.* He mentions find factors like international economic disparities and the perception of different lifestyles.

the question about why subsidiary protected persons should be granted the same rights as refugees.

However, I need to mention that Hungary is also a country that produces asylum seekers.[64] Guild and Zwaan published an article in 2014, where they analyzed refugee claims that come from Europe. They show how Europe creates refugee flows that are composed of minority groups like the Roma.[65] Also, they show that even though the European citizenship includes also the right of free movement and residence within the territory of the EU[66] this citizenship is subject to residual powers of each Member State. I.e. EU-citizens can be refused from other countries in specific cases.[67] Hence, no EU Member State has to accept a citizen of another Member States if a refusal can be justified by the above-mentioned reasons.

Last, I could not include decisions on subsidiary protection and refugee protection from Hungarian courts because of language deficiencies. Nevertheless, the analysis of Hungarian jurisprudence could be an interesting project for another study.

[64] Hungarians were the third-largest group that have been granted asylum by Canada in 2017 (*Cf.* IRB, "Refugee Protection Claims Statistics 2017).
[65] Elspeth GUILD & Karin ZWAAN, "Does Europe still create refugees? Examining the situation of the Roma", (2014) 40 Queen's L.J. 141 at 142f.
[66] Art. 1, EC, *Directive 2004/83/EC of the European Parliament and of the Council of 29 April 2004, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC*, [2004] OJ, L158/77 [*Citizens' Rights Directive*].
[67] *Cf. Citizens' Rights Directive*, at art. 1(c), 27; EC, art. 45(3), 52(1) *TFEU*.

PART I: ASYLUM IN INTERNATIONAL LAW AND STATE PRACTICE IN CANADA, GERMANY AND HUNGARY

"*A refugee does not become a refugee because of recognition, but is recognized because he is a refugee.*"[68]

This first part provides a definition of the terms migrant, asylum, asylum seeker, refugees, beneficiaries of subsidiary protection, beneficiaries of temporary protection and State practice related to those terms.[69]

Migrants in general are a vulnerable group.[70] The term migrant is not defined in international law, but the United Nations (UN) say that

> "an international migrant is someone who changes his or her country of usual residence, irrespective of the reason for migration or legal status. Generally, a distinction is made between short-term or temporary migration, covering movements with a duration between three and 12 months, and long-term or permanent migration, referring to a change of country of residence for a duration of one year or more."[71]

Migration and asylum are strongly connected with each other. Yet, not every migrant is an asylum seeker and needs international protection. Therefore, this part will provide an explanation of the status of refugees and persons in need of protection in Canada, Germany and Hungary. Doing that, I will give an overview about the legislation Canada applies, which rules in Germany and Hungary stem from the EU, what the European legislation on asylum currently prescribes, and how Germany and Hungary translate the legislation into their national frameworks.

Moreover, I look at the reasons for expelling a protected person and ending either refugee protection or subsidiary protection in theory and in State practice. Last, I introduce a term for recognized asylum seekers, i.e. refugees and persons in need of protection, that will in the further development be applied to protected persons independently from their status as refugees or beneficiaries of subsidiary protection, when appropriate. Also, in the further development, the

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[68] UNHCR, *HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES*, HCR/1P/5/ENG/REV.3, reissued, (Geneva: UNHCR, 2011) at para. 28.
[69] For definitions of each term, please refer to Annex I.
[70] *Cf.* ICRC, *Migrants – Vulnerabilities and Protection*, Report from the Conference jointly organized by the International Committee of the Red Cross and the European Union Institute for Security Studies in Brussels, on 22nd September 2016.
[71] UN, "Refugees and Migrants", online: <https://refugeesmigrants.un.org/definitions> (requested 26 August 2018).

term protected persons will refer to refugees and beneficiaries of subsidiary protection, but not to beneficiaries of temporary protection.

Within the meaning of the word international, only people who are crossing borders are included. Thus, the term international asylum seeker is applicable to people who are crossing borders to obtain asylum in a State different to their State of origin or residence. Asylum seekers who want to enter Canada, Germany or Hungary are taken into account. In some sections, however, I will include examples from different countries, providing a more comprehensive overview and analysis.

International doctrine presents two major theories of the integration of international law into domestic law. The first theory is the adoption theory or monist approach. According to the adoption theory, international law is directly integrated into the domestic system. Only when the State does not consent to a practice through estoppel or when there is a conflict with domestic law, there would be no direct adoption. The second theory is the transformation theory or dualist approach which says that international law becomes binding for a state upon its transformation into domestic law and that international and domestic legislation are operating separately.[72]

A treaty is binding for the signatory states that accessed it by the means of art. 16 *Vienna Convention on the Law of Treaties*[73] (*VCT*) when it enters into force under art. 24 *VCT*. The negotiating states can either agree on a date on which the document takes effect. Otherwise a state may specify the date from which on it will apply the treaty and its obligations.

Although the differences between both notions are subtle, EU Member States may treat beneficiaries of subsidiary protection very different from refugees. On the other side of the Atlantic is Canada. As a traditional immigration country, Canada does not make any difference between refugees and persons in need of protection. Therefore, we wondered about the reasons for distinguishing refugee protection from subsidiary protection in Europe.

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[72] Armand DE MESTRAL & Evan FOX-DECENT, "Rethinking the Relationship between International and Domestic Law", (2008) 53 McGill L.J. 573 at 583f.

[73] *Vienna Convention on the Law of* Treaties, Vienna, 23 May 1969, (entered into force 27 January 1980, accession by Canada 14 October 1970, by Germany 21 July 1987, by Hungary 19 June 1987); see also: art. 26 *VCT*: *Pacta sunt servanda.*

Additional protection in international law for non-refugees was discussed in 1989 under the auspices of UNHCR but did not bring the inclusion of an additional form of protection community any further within the international community.[74] Today, Canada offers international protection, similar to the EU.[75] With the introduction of the *Canadian Charter of Rights and Freedoms* in 1982[76], the country confirmed its obligation to respect international treaties.[77] That also meant that the fundamental rights granted in the *Charter* would protect not only Canadians but also persons in need, if certain rights like the prohibition of torture were violated. The *Charter's* application is limited to the Canadian territory.[78]

The adoption of international law, i.e. international treaties and international practice is different in Canada, the EU, Germany and Hungary, although the German and the Hungarian systems are quite similar. The EU shares the competence for the adoption of international law with its Member States.

Canada, Germany and Hungary are Member States of the *Vienna Convention on the Law of Treaties*. The three countries have mixed approaches towards international law.

The Canadian justices elaborated in *R. v. Hape*[79]:

> Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so expressly. Absent an express derogation, the courts may look to prohibitive rules of

[74] Jane MCADAM, *Complementary Protection in International Refugee Law*, (Oxford: University press, 2007) at 201.
[75] See Part I, Chapter 2.A.
[76] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*CCRF*, the *Charter*].
[77] Among others the *UDHR*, the *ICCPR*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987, accession by Canada 1987, by Germany 1990, by Hungary 1987) [*CAT*].
[78] Art. 32 *CCRF*.
[79] *R v Hape*, [2007] SCC 26.

> customary international law to aid in the interpretation of Canadian law and the development of the common law.[80]

Regarding customary law, Canada applies the adoption doctrine. The Court said in *R v. Hape* that international customary law can automatically be incorporated into the Canadian practice, if it does not interfere with the Canadian legislation. In this sense, also a violation of international law must happen "*expressly*"[81]. However, when international customary law enters in a conflict with domestic law an adoption is required. In what concerns treaties, in *Canada (AG) v. Ontario (AG)*[82], the Privy Council explained that treaties need to be adopted by provinces, if the content is within the provinces' competence. Thus, Canadian Parliament will express its opinion on a treaty before the government ratifies it.[83]

Germany recognizes the primacy of international public law in its *Basic Law (GBL)* and considers it to be federal law.[84] The adoption theory seems to apply. Similarly, the Hungarian *Basic Law* (*HBL*)[85] pronounces the general objective to ensure harmony between international and domestic law. The *HBL* recognizes "*general rules of international law*",[86] but demands a domestic legislation for all other sources of international law. Likewise, art. 59(2) *GBL* stipulates that in Germany, the legislative body must consent to treaties about the State's international political relations. The legislative organ (Bundestag) must, in this case, ratify a treaty before it can become binding.[87] Also in Hungary, the Parliament needs to approve treaties before their notification, pursuant to the transformation theory.

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[80] *Ibid.*, at para 39.
[81] *Ibid.*
[82] *Canada (AG) v. Ontario (AG),* [1937] AC 355 (JCPC).
[83] *Cf.* Laura BARNETT, "Canada's Approach to the Treaty-Making Process", 24 November 2008 (rev. 6 November 2012), Background Paper, No. 2008-45-E, Library of Parliament.
[84] Art. 25, *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law), BGBl., 23 May 1949, 1 [*GBL*].
[85] Art. Q(2), *The Fundamental Law of Hungary*, consolidated version as on 1 October 2013, translated by the Hungarian Ministry of Foreign Affairs and Trade, 25 April 2011, online: <http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf> (requested 4 January 2018) [*HBL*].
[86] Nóra CRONOWSK & Erzsébet CSATLÓS, "Judicial Dialogue or National Monologue?", (2013) 1 ELTE LJ 7 at 8.
[87] Christoph DEGENHART, *Staatsrecht I. Staatsorganisationsrecht*, 28th ed, (Heidelberg: C. F. Müller, 2012) at 225f.

According to Hobe[88], all German public official institutions must respect international law. *Ius cogens*, 'compelling law', has an even stronger effect than constitutional law and obligates Germany directly. Similarly, in Hungary, Chronowski and Csatlós confirm the direct obligation *ius cogens* imposes on Hungary.[89] Hence, *ius cogens* would not require a translation from international law into a domestic legislation. Furthermore, in Hungary, customary international law and the generally recognized rules of international law apply directly in Hungary and have a constitutional rank.[90] In Germany, however, all norms that are not compelling are either on the same level as constitutional laws or at an "*intermediate rank*"[91] between the constitutional norms and general laws. Hence, an obligation from customary international public law or state practice that is not *ius cogens* needs to be transformed by a deliberate process into a national norm to become binding, despite art. 25 *GBL* which makes it part of the adoption theory.

As we explained in the methodology, the EU Member States are bound to respect EU law. The EU itself can conclude treaties with other actors.[92] Among others, the EU has the competency for migration and visa politics within the EU[93] and the competency for asylum.[94] Theoretically, the EU could conclude treaties concerning asylum and migration with other subjects of international public law. Furthermore, it creates international law binding upon its Member States.

CHAPTER 1: APPLICATION OF INTERNATIONAL LAW AND THE CONCEPT OF ASYLUM IN CANADA, GERMANY, HUNGARY AND THE EU

Although the history of international asylum goes back several centuries[95], the first legal document that created a quasi-universal international obligation for States was the *United Nations*

[88] Stephan HOBE, *Einführung in das Völkerrecht*, 9th ed, (Stuttgart: UTB, 2008) at 237f.
[89] *Ibid.*
[90] *Ibid.*
[91] "Zwischenrang" (English translation by the author).
[92] Art. 216 *TFEU*: "The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."
[93] Art. 79 *TFEU*
[94] Art. 67(2), 78 *TFEU*, See also EU, *Charter of Fundamental Rights of the European Union*, [2012] OJ C 326/391 at art. 18 [*EECFR*].
[95] *Cf.* for example: Madeleine ALBRIGHT, *Fascism* (London: William Collins, 2018) at 185.

Convention relating to the Status of Refugees.[96] A following document, the *Protocol relating to the Status of Refugees*[97] further defined the *Refugee Convention's* application.[98] However, not all the countries acceded the *Refugee Convention* and the *Bellagio Protocol*. Still, the European Union Member States and Canada are parties to both treaties which is the reason for our inclusion of Canada, as a country that treats refugees and persons in need alike, in the comparative study.[99]

While the *Geneva Convention* and the *Bellagio Protocol* provided legal frameworks for the definition and treatment of refugees[100], further problems appeared. Persons who feared for their lives but could not get asylum because they did not qualify as refugees showed the need for a further discussion. Asylum seekers who were not necessarily persecuted in their country of origin but feared for their lives or security because of other reasons linked to a State's government would need a further protection. The European Union (EU) has established a subsidiary protection and temporary protection which both can be granted to persons in need to whom refugee protection cannot be conferred.[101] Several Member States already provided a system to protect persons in need before. Similarly, in Canada, the concept of "protected person" has been included into the *Immigration and Refugee Protection Act* since 1998.[102]

A ASYLUM IN INTERNATIONAL LAW AND IN STATE PRACTICE: DEFINITIONS OF ASYLUM, ASYLUM SEEKERS AND REFUGEES ARISING FROM HISTORY

The *Oxford English Dictionary* describes asylum as "*the protection that a government gives to people who have left their own country*".[103] The term's origin lies in the Greek word 'asulos', meaning 'inviolable'. The French *Larousse* explains that "'asile' is the "*[l]ieu où l'on peut*

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[96] *Convention relating to the Status of Refugees*, op. cit. [*Refugee Convention* or *Geneva Convention*].
[97] *Protocol relating to the Status of Refugees*, op. cit. [*Bellagio Protocol*].
[98] The explication of the refugee status follows in Chapter 1A.
[99] UNHCR, "State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol", online: <http://www.unhcr.org/protection/basic/3b73b0d63/States-parties-1951-convention-its-1967-protocol.html> (requested 4 January 2018).
[100] Art. 1A(2) *Refugee Convention*: "(…) *owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion* (…)".
[101] Council of the EU, *Presidency Conclusions*, 15 and 16 October 1999, Tampere, online available: <www.europarl.europa.eu/summits/tam_en.htm> (requested 4 January 2018), at para. 14.
[102] Natalie M. PERRYMAN, "The Innocent: The Exclusion of Innocent Victims of Civil War from the 1951 Convention and Canadian Refugee Policy", in: FYNN, Veronica P. (ed), Center for Refugee Studies 2009 Annual Conference Proceedings, Documenting the Undocumented: Redefining Refugee Status, 2010, Boca Raton: Universal-Publishers, 27, at 31.
[103] *Oxford English Dictionary*, 7th ed, *sub verbo* "asylum".

trouver un abri, une protection".[104] Also, the German *Duden* defines the term 'Asyl' as a shelter for the homeless, or as the action of accepting and granting protection to people in need.[105] To return to the definition of asylum, all three dictionaries link the term asylum to refugees.

The United Nations High Commissioner for Refugees (UNHCR) says that "*an asylum-seeker is someone whose request for sanctuary has yet to be processed*".[106] The International Justice Resource Center (IJRC) defines an asylum seeker as a "*person within a State party who has applied for recognition as a refugee. If the asylum seeker is determined to meet the definition of a refugee, they are granted asylum*".[107] However, I only partly agree with this definition, because also further persons who have applied for international protection can seek asylum – without being refugees. To redefine the term 'asylum seeker', we first consider the *Refugee Convention*.

In 1951, after two world wars and many conflicts in different regions worldwide, after numerous people had to flee from their homes because they feared persecution or the loss of their lives, the *Refugee Convention* was adopted. It was drafted in continuity of the 1948 *Universal Declaration of Human Rights* which recognizes "*the right [of everyone] to seek and to enjoy in other countries asylum from persecution*".[108] In 1967, the *Bellagio Protocol*, which extended the definition of the term 'refugee', entered into force.

The *Refugee Convention* defines the term refugee. The first part, art. 1A(1) refers to

> persons who have been considered as refugees under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization.

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[104] *Larousse*, ed 2017, *sub verbo* "asile".
[105] Duden, 26th ed., *sub verbo* "Asyl".
[106] UNHCR, "Asylum-seekers", online: <http://www.unhcr.org/asylum-seekers.html> (requested 4 January 2018).
[107] IJRC, "ASYLUM & THE RIGHTS OF REFUGEES", online: <http://www.ijrcenter.org/refugee-law/#Interpretation_of_Key_Terms> (requested 4 January 2018).
[108] Art. 14(1) *Refugee Convention*; UNHCR, "Introductory note by the Office of the United Nations High Commissioner for Refugees, Convention and Protocol relating to the status of refugees", online: <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf> (requested 4 January 2018); UNGA, *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [*UDHR*].

It relied on the **League of Nations'** *Convention Relating to the International Status of Refugees from October 1933*[109] which deemed certain circumstances as decisive. The 1933 *Convention* offered protection to "*Russian, Armenian and assimilated refugees*". Also, the 1938 *Convention concerning the Status of Refugees coming from Germany*[110] concerned a specific nationality and stateless persons. This *Convention* applied to

> (a) Persons possessing or having possessed German nationality and not possessing any other nationality who are proved not to enjoy, in law or in fact, the protection of the German Government.
> (b) stateless persons not covered by previous Conventions or Agreements who have left Germany territory after being established therein and who are proved not to enjoy, in law or in fact, the protection of the Germany Government.[111]

Moreover, the *Additional protocol of 14 September 1939* referred to refugees coming from Germany. After the de-facto annexation of Austria into Germany, it included also Austrians within the term "*refugees coming from Germany*".[112]

According to the *Refugee Convention*, a **refugee** is a person who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself from the protection of this country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it.[113]

However, the term first applied to people regardless of their nationality when the 1967 *Bellagio Protocol* explicitly excluded temporal and local restrictions. Since 1967, a 'refugee' is a person who is fearing racial, religious, or political persecution, persecution linked to the citizenship or to the membership in a social group.[114]

Despite the definition provided by the international treaties, the *UNHCR Handbook on Procedures and Criteria for determining Refugee Status* argues that also persons facing an

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[109] League of Nations, *Convention Relating to the International Status of Refugees*, 28 October 1933, CLIX LNTS 3663 at art. 1.
[110] League of Nations, *Convention concerning the Status of Refugees Coming From Germany*, 10 February 1938, CXCII LNTS 4461.
[111] *Ibid.*, at art. 1.
[112] League of Nations, *Additional Protocol to the Provisional Arrangement and to the Convention concerning the Status of Refugees Coming from Germany*, 14 September 1939, CXCVIII LNTS 4634 at art. 1.
[113] Art. 1 A(2), *Refugee Convention.*
[114] Art. 1(2), *Bellagio Protocol.*

excessive punishment in their country of origin are considered to be persecuted in specific cases. The *Handbook* considers persons who flee from injustice because of an official but arbitrary prosecution as refugees. [115] Still, an arbitrary judgement could lead to the recognition as a refugee, when linked to race, religion, nationality, race, membership of a particular social group, or political opinion.

Also, economic migration can, according to the *Handbook*, stem from persecution in some extraordinary cases. This notably happens when a State or a group within a State takes measures against a specific group's economic activities.[116]

In Canada, asylum is granted to "*Convention refugee[s]*" who are people being persecuted because of the grounds mentioned in the *Refugee Convention.*[117] Meanwhile, the EU recognizes asylum as a fundamental right for asylum seekers.[118] Asylum is an international obligation for States pursuant to (1) the *Refugee Convention* and (2) the *Additional Protocol.*[119]

A person who suffers persecution and flees from his country of origin or residence is an asylum seeker and, more specifically, a refugee. The European *Qualification Directive* that defines the overall asylum framework for the European Member States only applies the term 'asylum' to refugees recognized under the *Refugee Convention.*[120] Also the UNHCR equates the terms asylum seekers and refugees by considering persecution exclusively as the asylum seeker's reason of displacement.[121]

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[115] UNHCR, *HANDBOOK AND GUIDELINES ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES*, HCR/1P/5/ENG/REV.3, reissued, (Geneva: UNHCR, 2011) at para. 57.
[116] *Ibid.*, at paras. 63f.
[117] Art. 96 *IRPA* in combination with art. 2 *IRPA.*
[118] Recital 16, *Qualification Directive*.
[119] *Cf.* Art. 1, 3 *Qualification Directive.*
[120] *Cf.* Recitals 3, 5, 14, *Qualification Directive*; "[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 […] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country" qualifies for subsidiary protection; See also art. 2(f) *Qualification Directive.*
[121] "*At UNHCR, we believe that everyone has a right to seek asylum from persecution, and we do our best to protect those who need it.*", UNHCR, "Asylum-seekers", online: <http://www.unhcr.org/asylum-seekers.html> (requested 4 January 2018).

On the other side, the German *Asylum Law*[122] is applicable to all persons who apply for international protection.[123] In Hungary, the *Asylum Act*[124] defines asylum as the "*legal grounds for staying in the territory of Hungary and simultaneous protection against refoulement, expulsion and extradition*".[125] That indicates that the three countries do not exclude a non-refugee in need of protection from being granted asylum. Additional protection is offered when a person feels a threat for their life, might be tortured or exposed to a serious harm in their country of residence or origin. To explain a different use of the term asylum seeker, the definition of asylum as shelter and examples from legal doctrine can, together, lead to a broader definition than the *Refugee Convention*.

The Institute of international law codified asylum as "*the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it*".[126] Supporting this argument, María-Teresa Gil-Bazo defines asylum as "*the institution for protection*"[127] a State may grant to people in need. This definition seems more appropriate as it expands the term 'asylum seeker' and includes also people who need protection for reasons different to persecution. One example would be someone who has been condemned to the death penalty. A condemned person does not necessarily obtain asylum when the country of origin is characterized as respecting the rule of law and when there has been a fair and equitable trial.[128]

We conclude that the Canadian term 'Convention refugee' considers the *Convention's* criteria to recognize a person as a refugee and that it is similar to the European term 'refugee'. In the study, we will further apply the term refugee when referring to the definition provided by the *Geneva Convention* and the *Bellagio Protocol*, which is recognized by the EU and its Member States and by Canada.

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[122] *Asylgesetz* (*Asylum Law*), 2 September 2008, BGBl. I S. 1798 (Germany) [*Asylum Law*].
[123] *Cf.* Art. 1(1) *Asylum Law.*
[124] *Act LXXX of 2007 on Asylum*, 1 January 2008, (translated by Afford Fordító-és Tolmácsiroda Kft., proofreading: UNHCR Hungary Unit), online: < http://www.refworld.org/docid/4979cc072.html> (requested 4 January 2018).
[125] Art. 2c) *Asylum Act.*
[126] Institute of International Law, "Resolutions Adopted at its Bath Session, September", (1950) 45:2 The American Journal of International Law 15, Supplement: Official Documents (Apr., 1951) at art. 1 (JSTOR).
[127] María-Teresa GIL-BAZO, "Asylum as a General Principle of International Law", (2015) 27:1 Int'l J Refugee L 3 at 4.
[128] *Soering v. the UK*, no 14038/88, (7 July 1989) at paras. 101-104, 111 [*Soering*].

B SUBSIDIARY PROTECTION AND TEMPORARY PROTECTION IN STATE PRACTICE

The *Refugee Convention* and the *Bellagio Protocol* do not consider the fact that one faces a war in his country of origin, that one might be threatened by torture or by a cruel and unusual punishment as motivations for States to grant international protection. Yet, Canada, the EU, Germany and Hungary provide for international protection in specific additional situations.

For being considered a **person in need of protection** in Canada, it is necessary that the person who applies for protection would experience a threat, if they were to be sent back in the country of nationality or residence. Explicitly, torture, a risk to their life, or the risk of a cruel and unusual punishment constitute reasons complementary to persecution which lead to the granting of asylum.[129]

In the EU, the *Qualification Directive* provides a subsidiary, complementary protection on the same grounds as the *IRPA* when an asylum seeker cannot be granted refugee-protection.[130] Explicitly, the *Qualification Directive* considers "*the death penalty or execution, (...) or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict*"[131] for granting protection. As it is further defined, the "*'subsidiary protection status' means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection*".[132]

If a person cannot be granted a refugee status because of the absence of persecution in the meaning of the *Refugee Convention*, they might still enjoy subsidiary protection in the EU.

The protection which Canada grants to a person in need of protection is defined as "*refugee protection*", in the English version or as "*asile*", in the French one.[133] The wording indicates that 'refugee protection' equals 'asylum' in the Canadian legislation, contrarily to the European asylum law. I.e., in Canada, an asylum seeker who is not persecuted but nonetheless considered

[129] Art. 97 *IRPA.*
[130] Art. 15 *Qualification Directive*.
[131] Art. 15 *Qualification Directive.*
[132] Art. 2(g) *Qualification Directive.*
[133] Art. 95(2), 95(1)(a), 97 *IRPA.*

to be a person in need of protection, is either way granted refugee protection. If a person in need of protection goes to the EU, they would get subsidiary protection which in theory and practice differs from refugee protection. For the EU, a "*person in need of protection*" is a person who can receive international protection but not "refugee protection".

Currently, there is neither a treaty that defines the term "person in need of protection", nor a common definition in international public law. States can define their own meaning of "person in need of protection" and to define the reasons for which protection will be granted. However, an additional protection, subsidiary protection, is recognized in diverse areas and countries.

About twenty years after the Canadian *Charter* introduced legislation regarding fundamental rights in Canada, in 2001, the notion of a "person in need of protection" was included in the *IRPA.*[134] In the EU, the need to harmonize asylum frameworks emerged in the 1990s[135] and in 2004, the *Qualification Directive* which recognized subsidiary protection entered into force.

The idea to create a common asylum legislation for EU Member States was initiated by Denmark in 1997. When the EU Member States began to discuss subsidiary protection in 1998, it became evident that most States had a form of additional protection which they accorded to persons in need who could not be given refugee protection. However, there was no common European idea of asylum and no common legal basis that would ensure that sovereign States would accept persons in need. Moreover, the reasons for granting protection varied, depending on the country the request was made in.[136]

Now, there is a third protection in the EU. In 2001, after the immigration of persons who left the Balkan because of the ongoing war increased,[137] the EU introduced temporary protection.[138] This

[134] Art. 97, *IRPA*.
[135] Lieneke SLINGENBERG, *The Reception of Asylum Seekers under International Law: Between Sovereignty and Equality* (Oxford and Portland: Hart Publishing, 2014) at 371.
[136] Jane MCADAM, *Complementary Protection in International Refugee Law*, op. cit. at 55.
[137] 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, Official Journal L 212, 07/08/2001 P. 0012 – 0023 [*Temporary Protection Directive*], *cf.* recital (6).
[138] *Ibid.*

kind of protection intended to cover "*mass influx of displaced people*".[139] Also this form of protection is granted for one year, in case of a renewal, temporary protection would be granted for another period of six to twelve months.[140] The European Council may approve a proposition from the European Commission to grant specific persons temporary protection[141] with a qualified majority.[142] The Council may end protection upon a common decision.[143] States may decide, though, if they grant another, more comprehensive, form of protection.[144] Although there are other countries that also provide for temporary protection in times of major influx, Canada is not among them. In the further development, we will remain focused on refugee and subsidiary protection.

In Canada, both groups, refugees and persons in need of protection, have the right to reside in the country for the same time, they get the same access to housing and to support for integration in Canada. Refugees and persons in need of protection can ask for a family reunification after they arrive. In Europe, it depends on the host country if refugees and beneficiaries of subsidiary protection have the same rights. Furthermore, the rights granted to persons in need of protection and their concrete application differ from country to country. In Germany, for example, refugees and persons who are subsidiary protected have different terms of stay, they have to renew their demand for asylum after different periods, people who got subsidiary protection have to wait for two years until they can demand the family reunification whereas refugees can demand it immediately.[145] Also, in Hungary we can see differences between refugees and persons with subsidiary protection. For example, a refugee can ask for the Hungarian citizenship after having resided lawfully in the country for three years, while any other person, subsidiary protected persons included, have to wait for eight years before applying for naturalization.[146]

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[139] *Ibid.*, Preamble at (2)
[140] *Ibid.*, Art. 4(1).
[141] *Temporary Protection Directive,* at art. 5.
[142] A qualified majority means that 55% of Member States who represent 65% of the EU's population must confirm the Commission's proposition, see Art. 238(2) TFEU.
[143] *Ibid.*, at art. 6.
[144] *Ibid.*, at art. 3(5), Temporary protection has been adopted by Germany (Art. 24 *Residence Law*) and Hungary (Art. 19 *Asylum Act*).
[145] *Cf.* Chapter 2B2.
[146] *Ibid.*

We suggest considering everyone who is in need, because of being persecuted or facing a 'serious harm' as an asylum seeker because the person is seeking a shelter. The notions of 'refugee' and 'person eligible for subsidiary protection' should lead to a similar result, since in both cases the concerned person needs asylum. The categories refer to different status upon recognition but this does not interplay with the person's need. Consequently, asylum in the context of this study will be used as a synonym for international protection.

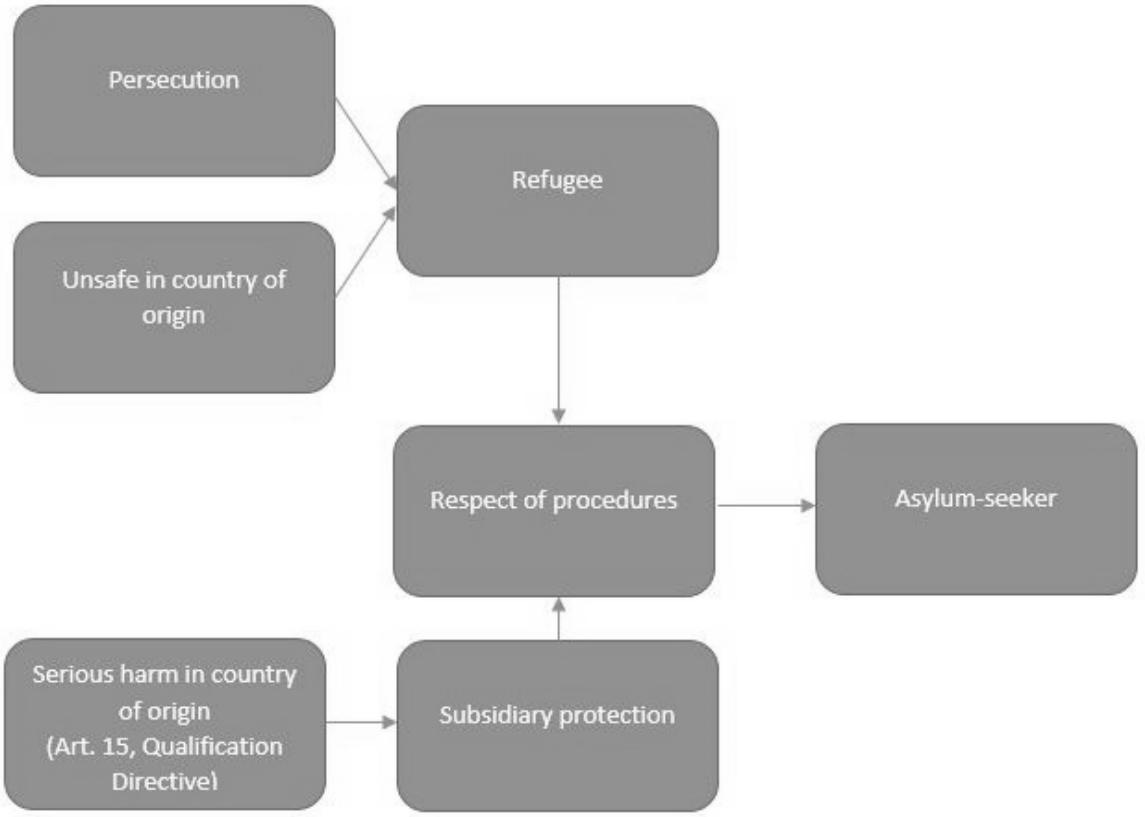

FIGURE 1: ASYLUM SEEKER

CHAPTER 2: STATE PRACTICE: THE GRANTING AND THE CESSATION OF ASYLUM IN CANADA, GERMANY, HUNGARY AND THE EU

Immigration within the EU relies on the Common European Asylum System (CEAS). The *Qualification Directive's* main objective is to "*ensure [that] Member States apply common*

criteria for the identification of persons genuinely in need of international protection".[147] The *Directive* "*is addressed to the Member States*".[148] Therefore, the minimum standards for receiving asylum seekers are similar in all Member States, and, although the national legislations might vary, the EU has common criteria for refusing asylum seekers. Within the supranational organization's Member States, persons who seek international protection cannot be refused because of reasons other than those listed in the *Qualification Directive*. In Canada, the *IRPA* mentions motivations that resemble those of the EU for refusing asylum seekers but applies them to refugees and protected persons alike. A Refugee Protection Division (RPD) which is part of the Immigration and Refugee Board (IRB) decides on the refugee claims.[149]

A THE ADMISSION OF ASYLUM SEEKERS AND THE INTRODUCTION OF THE TERM CUM-CITIZEN

1) DETERMINATION OF PROTECTION UPON ADMISSION

The procedure to determine the status of an asylum seeker relies on cooperation between the State's functionary who examines the asylum seeker's application and the asylum seekers who explain their cases and the facts that led to their claims. In practice, it remains mostly the asylum seeker's duty to establish the facts in a first phase, while the decision if an asylum seeker made a case remains within the State's competence. States also assess which type of protection needs to be conferred. There is an overlap of the both obligations in the first phase because the State needs to verify the asylum seeker's background. Then, the official decides, based on the findings, if the claim is plausible and which protection is needed.

In Canada, the *Ward* test is applied to find out if an asylum seeker needs protection. It consists from two questions that find its origin in the *Geneva Convention*. First, the claimant must have a **subjective** fear wherefore they left the country of origin, second, the fear must be **objectively** well-founded.[150] A well-founded claim is present when the State of origin would be unwilling or

[147] Recital 12, *Qualification Directive.*
[148] Art. 42, *Qualification Directive.*
[149] Art. 100 *IRPA.*
[150] *Ward v. A.G.*, [1993] 2 SCR 689.

unable to protect the claimant.[151] Also in the EU, the receiving State must evaluate the claim's validity, while the person must show that the request is well-motivated.

The CJEU said in 2014, that EU Member States are responsible for determining the protection, i.e. refugee protection or subsidiary protection.[152] Given that applicants often do not know about the differences, and that refugee protection provides a more comprehensive protection, the receiving State should, first of all, determine if the applicant could be granted the refugee status.[153] Furthermore, the Court suggested to apply an asylum procedure that would allow asylum seekers to lodge a general request for protection, and to make it the State's deciding organ's competence to determine which protection should be granted.[154]

Generally, the principle of effectiveness and the right to good administration need to be upheld individually by the EU Member State.[155]

The CJEU explained that there are two stages when assessing an asylum request, like in Canada. In the first stage, the facts that led to the request must be established by the asylum seeker (**subjectively**)[156] and in the second phase, the State must assess if it can appraise the claim for protection[157] in view of the *Qualification Directive's* content (**objectively**).

The establishment of proof can be difficult. Human and fundamental rights prevail when the establishment of facts infringes basic human rights such as the claimant's dignity or the right to the private life, like it happened in the case *A, B, and C.*[158]

A, B, and C was a preliminary ruling before the CJEU. When A, B, and C requested asylum in the Netherlands because of their sexual orientation (homosexuality) which was forbidden in their

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[151] *Ibid.*
[152] Art. 4 *Qualification Directive*. See also: *H.N. v. Minister for Justice, Equality and Law Reform, Ireland*, C-604/12, (8 May 2014), at paras. 34, 35.
[153] *Ibid.*, Rule.
[154] *A, B, C* v. *Staatssecretaris van Veiligheid en Justitie*, Joined Cases C148-13, C149-13, C150-13, 2 December 2014 [*A, B, and C*], at para. 56 45.
[155] *Ibid.*, Rule.
[156] *Ibid.*, at para. 56. The Court considers that asylum seekers are, first of all, responsible to prove their case, i.e. to "submit all elements needed to substantiate his application" and that "it is the duty of the Member State to cooperate with the applicant at the stage of assessing the relevant elements of that application".
[157] *Ibid.*, at para.55.
[158] *Ibid.*, at paras. 65, 69.

countries of origin, the Netherlands would not believe them. For the claimants, some of the questions[159] asked by the Netherlands violated their human dignity[160] and their right to private life.[161] One of the asylum seekers even suggested to "*take part in a 'test' that would prove his homosexuality or to perform a homosexual act to demonstrate the truth of his declared sexual orientation*".[162] In contrast, the Netherlands sustained that it was not the applicants' sexual orientation which made them skeptical of the asylum claim. They sustained that the asylum seekers had not shown a "*plausible case".*[163] In the advisory opinion, the CJEU said that the national authorities must not rely on stereotypes and must not demand proves regarding a person's sexual orientation because this would contravene fundamental rights. This case shows the difficulty to find a balanced approach between the subjective and the objective criteria to evaluate a request for asylum. This also leads to difficulties when determining if a person should be granted asylum. However, the principle of good administration (national authorities) and good faith (applicant) should be uphold when assessing a request for asylum, which is sometimes difficult to achieve. In August 2018, a case similar to *A., B., and C. v. The Netherlands* came up in Austria, when a decider did not grant protection to an asylum seeker from Afghanistan, because the latter one did not "seem" gay.[164] Stories like these pose the question about how to uphold the good administration, which is key to asylum, in situation where perception decides about the question if a person should be granted protection. They show that deciders need to be very conscious and objective, when deciding if a person is truly in need and that States need to provide further judicial means to correct decisions which have been taken on arbitrary individual judgements.[165]

In the EU, a person can apply for asylum because of facing the capital punishment in the State of origin or residence. In Canada, the question if persons who face the death penalty in their country

[159] *Ibid.*, at para. 35.
[160] Art. 1 *ECFR.*
[161] Art. 7 *ECFR*, Art. 8 *ECHR.*
[162] *Ibid.*, at para. 24.
[163] *A, B, and C* at para. 36.
[164] Frankfurter Allgemeine Zeitung, News release, "Österreich lehnt Antrag ab: Kleidung eines Asylbewerbers nicht schwul genug" (15 August 2018), online <http://www.faz.net/aktuell/politik/ausland/asyl-in-oesterreich-asylbewerber-nicht-schwul-genug-15738820.html> (requested 27 August 2018).
[165] Cf. *DIRECTIVE 2013/32/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, [2013] L 180/60 at art. 10(3), 11(2).

of origin or residence should get protection is not yet clarified. The *IRPA* does not explicitly include the death penalty as a ground for granting someone protection. However, executing the capital punishment means that someone risks dying. Therefore, it seems convincing to argue that a life is threatened which is a reason enounced in the *IRPA* to grant protection. On the other hand, when a court pronounces the capital punishment as a verdict, it might be stayed. The mere declaration or threat of the punishment does not per se entail its execution. Morever, not knowing when the execution will take place constitutes a "*cruel and unusual punishment*".[166] Yet, the capital punishment itself does not constitute a human rights violation, according to the **European Court for Human Rights** (ECtHR).[167]

The primacy of fundamental rights with regard to the capital punishment has been established in several cases. In *Kindler v. Canada*[168], the Supreme Court discussed if fundamental rights could constitute reasons against extradition in 1991 and compared art. 3 *ECHR* with art. 12 *CCRF*, the individual right "*not to be subjected to any cruel and unusual treatment or punishment*".[169] This argumentation was pushed further in the case *USA v. Burns*[170] where the question was if an extradition from a Canadian citizen to the USA was legal, when the person faces the capital punishment in the USA. *Burns* established that fundamental rights should be uphold when a foreign State would impose a punishment that contravenes the *CCRF*. The justices concluded that an action by the Canadian State that would potentially result in a violation of the fundamental rights would go against Canadian values.[171] However, a guarantee to not apply the capital punishment would be a compromise that allowed an extradition.[172] An analogous approach could be adopted regarding asylum seekers. Protection of individuals on the one hand and human or fundamental rights and values on the other hand are very closely linked.

Regarding extradition, Canada considers that fundamental rights prevail when wondering if sending a person into a country where the person could face the death penalty would constitute a violation of human rights. Although this argument does not underline that asylum would be

[166] *Soering*, op. cit., at para. 111.
[167] *Ibid.,* at para. 103.
[168] *Kindler v. Canada (Minister of Justice)*, [1991] 2 RCS 779.
[169] *Ibid.*
[170] *United States v. Burns*, 2001 SCC 7, [2001] 1 SCR 283 [*United States v. Burns*].
[171] *Ibid.*, at para. 92.
[172] *Ibid.,* at paras. 59, 78, 81, 94, 102, 137, 141.

granted to a person if the capital punishment was pronounced, it shows that Canada values human rights and safeguards them. When a person has been condemned to the capital punishment due to a State organ's arbitrary decision, because of an absence of the rule of law, that decision should constitute a cruel and unusual punishment. Therefore, it is likely that a person who has been condemned to death arbitrarily would get asylum in Canada.

A third interesting aspect is that an asylum seeker who might face the risk of being persecuted based on activities after leaving the country of origin does not necessarily qualify for refugee protection.[173] This disposition seems to be a warranty clause against the abuse of the asylum system.[174]

2) THE DIFFICULTY OF GRANTING THE 'RIGHT' STATUS

Another struggle is present in the EU, when it comes to the question of protection status. Should asylum be granted in form of refugee or subsidiary protection? Persecution does not necessarily need to have existed to get refugee protection. That means that refugee protection can be granted before persecution even exists. Underneath this concept lies the idea that an asylum application might be a reason for persecution, if the applicant went back to the country of origin/residence.

When a Syrian family applied for asylum in Germany, they were not recognized as refugees but as beneficiaries of subsidiary protection. According to the German Federal Office for Migration and Refugees (FOMR), the family did not suffer from persecution but from non-arbitrary violence due to the armed conflict in Syria in 2015.[175] The family, however, said that they have left Syria in an irregular way, that they have stayed abroad in a western country, and that they have asked for asylum, which would make the Syrian government see them as dissidents upon return. [176] Political dissidents might be persecuted and tortured in Syria. The court then decided that the probability of political persecution, not yet established but likely to happen upon return, would be a motivation for granting the family refugee protection. Hence, the subjective fear of

[173] Art. 5(3) *Qualification Directive*
[174] Cleopatra LAFRAI, *Die EU-Qualifikationsrichtlinie und ihre Auswirkungen auf das deutsche Flüchtlingsrecht* (Bremen: EH, 2013) at 164ff.
[175] Verwaltungsgericht (Administrative Court), Trier, 1. Kammer, 7 October 2016, 1 K 5093/16.TR (Germany) at paras. 3, 5.
[176] *Ibid.*, at para. 6.

persecution does not need to be based on past happenings but rather on the probability that the asylum claimant would be persecuted. In the end, the court decided that Germany must grant the Syrian family the refugee status.[177]

There are other situations that are surprising. For example, a German court decided that asylum seekers who have been granted asylum in another EU Member State, may still apply for protection in Germany.[178] In order to do so, protected person would need to demand a status that would provide them with more comprehensive rights in the other State.[179] I.e. a person who is recognized as a refugee in a country could not apply for the same status in another country. Yet, a person who has been granted subsidiary could apply for the refugee status.[180] It then becomes relevant if the protecting State treats the protected persons on the territory in a manner that is coherent with its asylum legislation. If the State denies protected persons benefits or if it does not effectively guarantee the access to basic needs, an asylum seeker who already receives protection can reapply in another country.[181]

These cases show that refugee and subsidiary protection are sometimes separated by a fine and blurry line. If an asylum applicant or a beneficiary of subsidiary protection fears persecution upon returning into their country of origin based on having lodged an asylum application, the mere fact that the person applied for asylum qualifies him for refugee protection.Sometimes, it is difficult to define if a person should get refugee protection or subsidiary protection. Therefore, European decision-makers should also take into account if awarding subsidiary protection might lead to a prospective persecution in the asylum seeker's country of origin, before deciding about the status based on the person's past. Furthermore, numbers demonstrate that in Germany, for example, there is a high uncertainty about status: about 1,400 out of 1,900 claims that decided if

[177] *Ibid.*, at tenor.
[178] Verwaltungsgericht Oldenburg (Administrative Court), Oldenburg, 04 November 2015, 12 A 498/15 (Germany).
[179] *Ibid.,* at para. 27.
[180] *Ibid.,* at para. 27.
[181] *Ibid.,* at paras. 38-50.

beneficiaries of subsidiary protection were to be granted refugee status were positive, according to the civil society organization Pro Asyl that advocates for asylum seekers' rights.[182]

The *Qualification Directive* contains two dispositions that seem somehow contradictory regarding the refugee status. On the one hand, the need for international protection may arise *sur place* and be based on the asylum seeker's activities after leaving the country of origin.[183] Decisions show that asylum seekers who claimed protection upon arrival to a European country and received subsidiary protection can still be granted refugee protection, when their original asylum claim might lead to persecution in their country of origin. On the other hand, the European countries do not need to grant asylum to a migrant who committed an act that might lead to persecution in their country of origin, according to art. 5(3) *Qualification Directive*. Could the demand for asylum then be an act which would lead to persecution in the State of origin? When a person is fleeing from a country because of a serious threat, there are valid reasons which indicate that there was no intention to abuse the system of international protection. Regarding other acts which might lead to asylum, for example publicly opposing the State of origin's politics, Laifra suggests approaching the question with the underlying principle of good faith, the continuity of the person's circumstances and the person's behavior. [184] If a person behaves coherently and seems to act according to their principles, the presumption should be that acts have not been committed in order to obtain asylum. Meanwhile, there are is no uniform interpretation and application of the principle of good faith according to art. 5(3) *Qualification Directive*. Furthermore, case law has shown that even though persons participated without good faith in acts that may lead to persecution upon return to their countries, they will probably not be expelled.[185]

Last, another difficulty of granting the 'right' status is connected to the decision-maker. Canadian studies about the acceptance rate of refugees by the individual IRB decision-makers[186] indicate

[182] Pro Asyl, "VG Trier: Eindrucksvolles Urteil zum Flüchtlingsschutz für Syrer*innen" (26 October 2016), online: <https://www.proasyl.de/news/vg-trier-eindrucksvolles-urteil-zum-fluechtlingsschutz-fuer-syrerinnen/> (requested 8 January 2018).
[183] Art. 5(2) *Qualification Directive.*
[184] LAFRAI, *Die EU-Qualifikationsrichtlinie und ihre Auswirkungen auf das deutsche Flüchtlingsrecht* op. cit., at 164ff.
[185] *Ibid.*
[186] Sean REHAAG, "Judicial Review of Refugee Determinations: The Luck of the Draw?" (2012) 38 Queen's L.J. 1.

that the quasi-judicial body does not have a uniform practice for granting asylum to applicants.[187] Rehaag has shown that there is a correlation between the decision-maker and the decision that is not linked to the factual circumstances of different cases. This conflict continues when a rejected asylum seeker files a demand for judicial review in court.[188] These findings indicate that even in a country where the rule of law is present, decision-making is not always impartial from personal preferences or motivations. Thus, there is a certain probability that also decision-making bodies within the EU Member States' err when granting individual protection to asylum seekers.

3) INTRODUCTION OF THE TERM CUM-CITIZEN

When a State recognizes an asylum seeker, they are "*refugees*", "*protected persons*"[189] or "*beneficiaries of international protection*"[190]. The translation into other official languages indicates that those terms are somehow complicated because of their length and complexity.[191] There is a need for a term which confirms the status of asylum finders. It should guarantee an inclusive approach by using positive language, instead of designating a vulnerable group of persons who flee from their countries.

We were inspired by the Dutch language, which uses the term "**Medelander**" to designate people who are no citizens of the country but who stay and live in it. A literal translation would be "with-citizen". In English, we could call them "**cum-citizens**" and the French language permits us to use the term "**cum-citoyen**", which would have the same meaning as "Medelander". Finally, in Germany people who have obtained the right to stay could be called "**Auchländer**". The German word for foreigners is "Ausländer" while the expression "auch" means "too, also" and the term "…länder" designates a nexus to a country or a place.

[187] *Ibid.*, at 3-6
[188] *Ibid.*, p. 15f.
[189] Art. 95(2) *IRPA*
[190] Art. 2(b) *Qualification Directive*
[191] Dutch: 'persoon die internationale bescherming geniet', French: 'bénéficiaire d'une protection internationale', German: 'Person, der internationaler Schutz zuerkannt wurde'.

We will, in the further development, apply the term '**cum-citizens**' when referring to "protected persons" or "beneficiaries of international protection" as we defined that cum-citizen means the same as beneficiary of international protection.

FIGURE 2: CUM CITIZEN

B THE CESSATION OF CUM-CITIZENS' RIGHT TO ASYLUM

There are several grounds to withdraw cum-citizens' protection. Some of them are linked to the circumstances which led to their asylum request, some of them are linked to acts the cum-citizen committed, some of them are interconnected. Again, in Canada the reasons are valid for all cum-citizens, while in Germany and Hungary we have to analyze separately the grounds for refugees and beneficiaries of subsidiary protection.

The first ground that leads to the cessation of protection is that the circumstances in the country of origin have improved and the need for asylum is not given anymore. The second reason is that the cum-citizen has successfully applied for naturalization (or, in Germany, for a permanent residence permit). The third reason is that the host State expulses the cum-citizen.

1) THE RETURN OF CUM-CITIZENS TO THEIR COUNTRY OF ORIGIN

All three States foresee that the protected person returns to his place of origin when the circumstances that led to his demand for protection cease to exist, under the condition that new threats do not appear.[192] However, after the reasons for protection have ceased, formerly protected persons could remain in Germany when possessing a residence permit, while in Canada and in Hungary they would need to acquire citizenship, which I explain in the further development.

2) NATURALIZATION OR THE RIGHT TO PERMANENT RESIDENCE

Naturalization (or in Germany the right to permanent residence) is another reason that leads to the cessation of asylum. Once a person obtains another citizenship, there is no need for the host State to grant protection anymore, since the cum-citizen would then be a citizen.

Territoriality is the "*principle that a country has the right of sovereignty within its borders*"[193] and is thus decisive for States. It comprises a **geographical dimension**, required for a **demarcation of power[194]** which is exercised by and for the citizens as (political) **society**[195]. Gärditz describes that nowadays, democratic States require citizens to have a genuine link to their territory instead of a personal loyalty towards one person (sovereign)[196], like it was the case in medieval Europe.[197] Consequently, a nationality or citizenship, which is conferred to a defined group of individuals legitimizes the constitution of governments in democratic States.[198] Borders define the geographical area in which State power is exercised by one political and legal system. Political or legal systems that are characterized by the arbitrary execution of power and decision-making are main reasons for asylum seekers to leave a country and go to a safe country.

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[192] *Cf.* art. 73(1) in combination with art. 73(2b), or art. 73b *Asylum Law*; art. 11(2)e) in combination with art. 11(4), or art. 18(2)e) in combination with art. 18(3) *Asylum Act*; art. 108(1)e) in combination with art. 108(4) *IRPA*.
[193] Black's Law Dictionary, 10th ed, *sub verbo* "territoriality".
[194] Power is in that meaning the "legal or official authority, capacity or right" to rule and regulate.
[195] Klaus Ferdinand GÄRDITZ, "Territoriality, Democracy, and Borders: A retrospective on the "refugee crises"", (2016) 17 German L.J. 907 at 908.
[196] *Ibid.*
[197] See: Karim BENYEKHLEF, *Une possible histoire de la norme*, 2nd ed, (Montréal: Les Éditions Thémis, 2015) at 389ff.
[198] *Ibid.*

Naturalizing a person entails the person's right of entering the State which granted citizenship,[199] and, thus, every State carefully evaluates who to grant this right to. The traditional ways to confer citizenship to a person are either by birth on a State's territory (*ius solis*) or by genetic descendance, based on the citizenship that the parents have at the moment of a child's birth (*ius sanguinis*). Liberal democracies exceed the *ius sanguinis* or *ius solis* principles by offering to naturalize aliens who then become part of the society, the "citizen-community". Hence, "*a particular national identity can also be based on political principles and institutions*".[200] The naturalization of immigrants reflects these ideas. Nowadays, sharing one language and adhering to one democratic system are the main criteria for integration in a pluralistic society. Therefore, granting protection to an asylum seeker might be the first step towards accepting a future citizen.

With regard to naturalization, the terms of lawful stay with a valid residence permit are important to know. Those are linked to the period for which protection has been conferred. In Germany for example, refugee protection is granted for three years, subsidiary protection for one year.[201] When the applicant's grounds for seeking protection have not ceased, any further approved demand for protection will extend the protection for two more years in both situations.[202] Hungary is a different case. Since 2016, the *Asylum Act* foresees that the status of cum-citizens shall be subject to revision every three years[203] which has been under discussion since 2015.[204]

CITIZENSHIP

Until October 2017, Canada and Germany both granted citizenship to protected persons after six years. Now, Canada grants citizenship to permanent residents who have stayed for three years on Canadian soil and filed their income taxes[205], while Germany links the naturalization to numerous further requirements. Germany allows a person who has lived in the country for eight years to

[199] *Cf. Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) at art. 13(2); *International Covenant on Civil and Political Rights*, (19 December 1966), 999 UNTS 171 (entered into force 23 May 1976) [*ICCPR*] at art. 12(4).
[200] GÄRDITZ, "Territoriality, Democracy, and Borders: A retrospective on the "refugee crises"", op.cit., at 911.
[201] Art. 26(1) *Residence Law.*
[202] Art. 26(1) *Residence Law*.
[203] Art. 7/A(1) and art. 14(1) *Asylum Act.*
[204] UNHCR, *Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016*, May 2016, available at: <http://www.refworld.org/docid/57319d514.html> [accessed 6 September 2016], para. 14.
[205] Art. 5 (1)(c)(i) *Canadian Citizenship Act*

apply for naturalization.[206] Persons who have made extraordinary efforts, for example, when they have participated in an integration course, are treated preferentially. For them, the time they must have lived in Germany might be reduced to seven or six years, independently from the residence permit that the claimant has been living on.[207] Also in Hungary, a person must have lawfully resided in the State for eight years and must not have contravened the Hungarian law. Despite this condition, asylum seekers who have been granted refugee protection have the right to apply for the Hungarian naturalization after having stayed lawfully for three years in the country.[208] Conversely, this rule does not apply to otherwise protected persons.[209] Theoretically, a refugee can apply for citizenship after being granted asylum for three years, when a person who benefits from subsidiary protection can either apply for the permanent residence permit after three years of protection have passed, or prolong their protection status twice before applying for the citizenship. [210]

PERMANENT RESIDENCE

When protected persons stay in the EU, they can apply for a national residence permit. The procedures and conditions for a national residence permit depend very much on the Member State, as they are competent for third-country-immigration, the terms of stay for third-country nationals and, most important in terms of sovereignty, for naturalizing aliens.

Directive 2003/109/EC[211] (*Permanent Residence Directive*) grants – under certain conditions – the right to lawfully stay, reside and work in countries that apply the *Permanent Residence Directive* while the national residence permit confers only the right to reside and live in the issuing State.[212] However, it is not applicable for protected persons.[213] The European Council and most of the Member States favored, at the moment of the *Directive's* introduction, a common

[206] Art. 10(1) *German Citizenship Law*
[207] *Staatsangehörigkeitsgesetz* (Citizenship Law Germany), 22 July 1913, BGBl. III, No. 102-1 at art. 10(3).
[208] *Act LV of 1993 on Hungarian Citizenship*, (translated by the Ministry of Foreign Affairs), online: <http://www.mfa.gov.hu/NR/rdonlyres/93F5CE78-6F49-4FBB-9360-D99B09BBB6D0/0/ActLVof1993onHungarianCitizenship.pdf> (requested 8 January 2018) at art. 4(2)(d).
[209] I.e. beneficiaries of subsidiary protection, *cf.* art. 17(1)(4) *Asylum Act.*
[210] Art. 14(2) *Asylum Act.*
[211] *Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, [2003] OJ L 16 [*Permanent Residence Directive*].
[212]
[213] *Cf.* Art. 3(2)(c)(d) *Permanent Residence Directive*.

European immigration system which would interact with the Member States' systems.[214] Acosta Arcarazo wrote in 2004, that the European residence permit had the potential to become a subsidiary form of European citizenship, despite the fact that its implementation is not uniform in all countries.[215]

In Canada, protected persons will be granted permanent residence immediately upon arrival when participating in a resettlement program or, when applying from within the country or at the border, after having lodged the application for their permanent residence.[216] Once the IRB decides to grant protection to a person, the cum-citizen can immediately apply for permanent residence. Permanent residence allows to enter and to remain in Canada[217], and it entitles the resident to social benefits and health care. At the same time, it is a work and study permit, and it grants the permanent residents Canadian protection.[218] For maintaining the permanent residence, one has to stay in Canada for 730 days in a five-year-period. The link to Canada still remains when a person accompanies a spouse or common-law partner or works for a Canadian enterprise abroad.[219]

The *Permanent Residence Directive* was introduced for long-term residents who were lawfully present during five years on the European territory.[220] Accordingly, a person who stayed in Germany or Hungary for five years can apply for a residence permit on national or European terms and acquire the right to move to other Member States.[221] Hungarian law specifies that half the time a person spent between lodging an asylum request and its confirmation accounts for the long-term residence permit under EU law, although the entire time will be considered if the transfer of protection took longer than 18 months. Yet, the *Permanent Residence Directive* does not seem to apply in the case of protected persons.[222] Thus, the stay as a cum-citizen accounts for

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[214] Diego ACOSTA ARCARAZO, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship – An Analysis of Directive 2003/109*, (Leiden, Boston: Brill, 2011) at 14.
[215] *Ibid.,* at 228.
[216] Art. 139 *IRPR*
[217] Art. 21(1), 27(1) *IRPA*
[218] *Cf.* Sasha BAGLAY, "Who is my Neighbor? The Duty of Care in the Immigration Context: A Perspective From Canadian Case Law", (2016) 33 Windsor Y.B. Access to Just. 117 at 123.
[219] *Cf.* Art. 28(1), (2) *IRPA*
[220] Art. 4(1) *Permanent Residence Directive.*
[221] Art. 9, 9a *Residence Law.*
[222] Cf. Art. 3(2)(c)(d)

getting through the five-year period of legal stay which is required for the national residence permit.[223] In Germany, the residence permit is unlimited, once obtained.[224]

In Hungary, persons who have been recognized as refugees but do not possess a long-term visa or residence permit can apply for a permanent residence permit.[225] The Hungarian *Asylum Act* does not mention that persons who get subsidiary protection can immediately upon arrival apply for the national residence permit. We interpret, therefore, that refugees can apply for an accelerated residence permit, i.e. apply immediately upon arrival, if they do not have a long-term visa. Normally, a person must live in Hungary for three years before demanding a national residence permit. That time has to pass without interruptions, with the exception of short stays abroad for a "*substantial reason*".[226] Thus, beneficiaries of subsidiary protection must wait three years before they can lodge a demand. Furthermore, for the national residence permit, the applicant must sustain himself[227] and have a healthcare insurance.[228] As most refugees have long-term visas,[229] there should be no need to ask for a permanent residence permit upon arrival.

In Germany, only exceptional situations, i.e. the applicant is principally self-sustaining, knows the German language and has refugee protection, justify a cum-citizen's request for a national permanent residence permit after three years.[230] Otherwise, a protected person may only lodge a demand after five years.[231] The time spent in the application procedure counts for the temporal requirements. Other criteria for a German national residence permit are that there is no contrary document that prohibits to issue a permit from the FOMR, that the applicant is mostly self-sustaining and that he has reasonable German language skills.[232] I interpret "*appropriate*" or

[223] Art.38(5), (5a) *Residence Act*
[224] *Cf.* Art. 9(1) *Residence Law.*
[225] Art 35(4) *Residence Act*, art. 103 *Government Decree 114/2007.*
[226] Art. 35 (1a) *Residence Act*.
[227] Art. 33 *Residence Act*, art. 95 *Government Decree 114/2007.*
[228] Art. 33 *Residence Act.*
[229] Hungary seems to consider any visa that exceeds 90 days as a long-term visa, *cf.* art. 13 *Residence Act*). Refugees will most likely get a three-years residence permit, according to the *Asylum Act*.
[230] Art. 26(3) *Residence Law* in combination with art. 9 *Residence Law.*
[231] Art. 9 *Residence Law.*
[232] *Ibid.*

"*reasonable*" language skills as B1-level skills.[233] The candidate cannot ask for the permit if he is in the process of demanding asylum or if he has a temporary protection status.[234]

After approval, Hungary grants the residence permit for five years,[235] where Germany grants it indefinitely. As soon as the reasons for international protection cease to exist, Hungary can revoke the permanent residence status.[236]

Reasons that exclude the foreigner from obtaining a permanent residence permit, either the EC residence permit or the national one, are similar to those which exclude a foreigner from being granted the refugee status or subsidiary protection.[237] Among those reasons, we can find criminality, unconstitutional activities, the use of violence, the incitation of hatred against part of the population, drug-dealing and drug-consumption (limited to heroin, cocaine and comparable drugs), forced marriage or implications in terrorism.[238]

This means that a person who has been recognized as a refugee can ask for permanent residency after having successfully prolonged the status once but a person who got subsidiary protection must prolong the right to lawfully stay twice. However, a person who has refugee protection might ask for the permanent residency permit after three years. The pre-conditions are that the applicant masters the German language and that he is principally self-sustaining.

3) THE EXPULSION OF CUM-CITIZENS

Protected persons can also lose their right to protection upon expulsion. In that case, the cessation of asylum is linked to acts that endanger the national security of a country or to criminal behavior before entering the host country. The *Refugee Convention* also mentions that a person who constitutes a danger for the community by having committed actions contrary to international

[233] In the *Citizenship Law*, art. 10(1) nNo.6 refers to "ausreichende Sprachkenntnisse" translated to "appropriate/reasonable language skills" by the author. Art. 10(4) *Citizenship Law* explains that the requirements of art.10(1) no. 6 are fulfilled, when the alien achieves the Certificate German B1 (Common European Framework of Reference for Languages). Therefore, we estimate that other legal documents intend a similar reference when they mention "aureichende Sprachkenntnisse".
[234] Art. 38(2)(d)(g) *Residence Act*.
[235] Art. 108(3) *Government Decree* 114/2007.
[236] Art. 39(1a) *Residence Act*.
[237] See Chapter 2B Section 3.
[238] Art. 11(1) in combination with art. 51, 53 and 54 *Residence Law.*

principles[239], or serious crimes can be expelled.[240] Although Canada, Germany and Hungary include these grounds, they also specify that other reasons closely linked to national security could result in an expulsion from their territories.

Again, in Canada the legislation considers all persons to protect alike. In the EU, the *Qualification Directive* sets the standards for revoking, ending or refusing to renew refugee or subsidiary protection, but different standards apply to the latter one. [241] Art. 12 and 14 *Qualification Directive* refer to refugee claimants and enumerates the content of the *Convention's* dispositions. Those motivations are translated in the German and Hungarian asylum legislations as well.[242] Art. 16, 17, and 19 *Qualification Directive* clarify the situation regarding beneficiaries of subsidiary protection.

REFUGEES

The expulsion of a person because of acts contrary to international principles that have not been committed in the country of temporary residence comprises an element of extraterritoriality and relies on international criminal law. The history of extraterritorial justice in criminal law remounts to the principle of universal justice. This principle was applied when bringing justice in cases that were not territorial, e.g. piracy. Milestones of international criminal justice were the Nuremberg and the Tokyo trials in which perpetrators who committed war crimes, genocides and

[239] By referring to "Actions contrary to international principles" we refer to war crimes, crimes against humanity, serious non-political crimes or acts against the United Nation's purposes and principles, according to Art. 1(F) *Refugee Convention* and Chapter 1 *Charter of the United Nations,* 26 June 1945, Can TS 1945 No. 7.
[240] Art. 1(E), (F) *Refugee Convention.*
[241] Art. 14 *Qualification Directive*, referring to notably the cessation of persecution in the country of origin or the voluntary return in his country of origin according to art. 11 *Qualification Directive*, the cessation of being a refugee, misinterpretation or omission of facts including forged documents or being a danger to the security of the Member State where the person is recognized as a refugee, participation in a serious crime as well as when art. 12 *Qualification Directive* applies. Art. 17 *Qualification Directives* mentions crimes against peace, war crimes, crimes against humanity, committing serious crimes, acts contrary to the purposes and principles of the UN.
[242] Art. 12(2) *Qualification Directive*: "A third-country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that: (a) he or she has committed a crime against peace, a war crime, or a crime against humanity (…); (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee, which means the time of issuing a residence permit based on the granting of the refugee status (…); (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations. 3. Paragraph 2 applies to persons who incite or otherwise participate in the commission of the crimes or acts mentioned therein."
National legislations: *Cf.* for Germany: art. 3(2), 72(3) *Asylum Law*, for Hungary art. 8(1) *Asylum Act.*

crimes against humanity during the Second World War were brought before military courts and were convicted because of the crimes committed.[243]

In the further development of international criminal justice, the *Genocide Convention*[244] was introduced, war crimes were defined, crimes against humanity found their inclusion in legislation, and measures to consolidate international justice in legislation and institutions have been taken. Following the conflicts in ex-Yugoslavia, in Rwanda, in Sierra Leone, and Cambodia, international tribunals were established in The Hague or in countries where war took place. The culmination of international criminal justice was the *Rome Statute of the International Criminal Court*[245] that established the International Criminal Court. Acts which violate international criminal law allow the International Criminal Court to trial alleged perpetrators of the above-mentioned (and further) crimes. These crimes also allow State authorities to trial cum-citizens.[246]

However, no person who sought international protection shall be *refouled* if there is a threat for his life or freedom because of his race, religion, nationality, membership of a specific social group or political opinion. The fact that protection has been revoked does not necessarily entail the person's deportation. A member of a terrorist organization, for example, could be refused the right to remain as a cum-citizen but granted a right to remain because of the principle of non-*refoulement*[247] that has been codified in art. 33 *Refugee Convention* and in national law. Art.

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[243] Phillipe SANDS, *East West Street: On the origins of genocide and crimes against humanity* (London: W&N, 2016); Antonio CASSESE. "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court", in Antonio CASSESE, Paola GAETA & John R. W. D. JONES, eds., *The Rome Statute of the International Criminal Court: A Commentary*, vol. I. Oxford: Oxford University Press, 2002.
[244] *Convention on the Prevention and Punishment of the Crime of Genocide*, Paris, (9 December 1948), 78 UNTS 277 (entered into force on 12 January 1951, accession by Canada 3 September 1952, by Germany 24 November 1954, by Hungary 7 January 1952).
[245] *Rome Statute of the International Criminal Court*, Rome, (17 July 1998), 2187 UNTS 3 (entered into force on 1 July 2002, accession by Canada 7 July 2000, by Germany 11 December 2000, by Hungary 25 May 2000).
[246] *Cf.* Aisling O'SULLIVAN, *Universal Jurisdiction in International Law*, (London: Routledge, 2017), at 82ff., Win-Chiat LEE, "SOVEREIGNTY AND UNIVERSAL JURISDICTION" in Larry MAY & Zachary HOSKINS, eds, *International Criminal Law and Philosophy*, ASIL Studies in International Legal Theory, (Cambridge: Cambridge University Press, 2009), 15 at 23ff.;
National Legislations: for Canada: art. 8(b) in combination with art. 6, 7 *Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24* [*War Crimes Act*]; for Germany: art 1 in combination with art. 6-13 *Völkerstrafgesetzbuch* (International Criminal Code), 26 June 2002, BGBl. I S. 2254, last amendment 22 December 2016 (BGBl. I S. 3150); for Hungary: art. 3(2) in combination with Chapter XIII and XIV *Act C of 2012 on the Criminal Code*.
[247] See for example: *Bundesrepublik Deutschland v B and D*, C-57/09 & C-101/09, [2010] ECR I-10979; EDAL Case summaries: Metropolitan Court of Budapest, *ÖH v BevándorlásiésÁllampolgárságiHivatal (Office of Immigration and Nationality, OIN)* 20.K.31.162/2012/10, online: <http://www.asylumlawdatabase.eu/en/case-law/hungary-metropolitan-court-budapest-%C3%B6h-v-

33(2) limits the principle's application to persons who do not constitute a danger for the national security of the accepting State. For instance, a conviction for a serious crime by a final verdict would justify the *refoulement* of an asylum seeker. The Latin American legal sphere considers the principle of non-*refoulement* as *ius cogens*[248] which some scholars confirm[249], yet, there is no consensus about the principles of non-*refoulement* as *ius cogens* in international law.[250]

In Canada, the *IRPA* codifies the principle of *non-refoulement* in the national legislation.[251] No person who might face a threat in his country of origin should be *refouled*, except if the person participates or participated in activities that are linked to serious crimes, or to human or international rights violations and endangers the national security.[252] As a fundamental principle of a liberal State, the right to life, liberty and security prevails in cases where asylum seekers constitute a danger to the national security but would face a serious risk for their lives upon returning to his country.[253] It requires a link between the Canadian action of expelling a person and the fear of torture in the country of origin. That is given when Canada sends a person to a country where the person is likely to suffer from one of the situations that constitute motivations to ask for protection.[254] Yet, the *IRPA* also contains that the principle of non-*refoulement* is inapplicable if a person is inadmissible because of security reasons or massive violations of human or international rights.[255]

In the EU, the principle of non-*refoulement* has been included into the legislation after the Council's special meeting in Tampere, where the CEAS was first discussed.[256] Member States

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[248] OAS, *Cartagena Declaration on Refugees,* adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held in Cartagena on 19-22 November 1984 [*Cartagena Declaration*] at III, 5th conclusion.

[249] Jean ALLAIN, "*The* jus cogens *Nature of* non-refoulement", (2002) 13(4) Int' J. of Refugee Law 533.

[250] *Cf.* Cathryn COSTELLO, & Michelle FOSTER, "Non-refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test", in M. HEIJER & H. VAN DER WILT (eds), *Netherlands Yearbook of International Law 2015*, 273; *Cf.* James HATHAWAY, "Leveraging Asylum", (2010) 45:3 Tex. Int'l L. J. 503.

[251] Art. 115 *IRPA.*

[252] Art. 115(2) *IRPA.*

[253] *Suresh v Canada*, 2002 SCC 1 at paras. 47, 54, 56, 75, 78, 128; 1 SCR 3 [*Suresh*].

[254] *Ibid.*

[255] Art. 115(2) *IRPA*.

[256] Council of the EU, *Presidency Conclusions*, 15 and 16 October 1999, Tampere, online available: <www.europarl.europa.eu/summits/tam_en.htm> (requested 4 January 2018) at 13.

must not *refoule* asylum-seekers "*in accordance with their international obligations*"[257]. The principle's scope is limited to asylum seekers who do not threaten the destination country's national security and who have not committed a "*particularly serious crime*"[258]. The *TFEU* lists several crimes that are considered to be "*particularly serious*" but leaves an open slot to the definition of further elements:

> 1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.
> These areas of crime are the following: **terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.**
> On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.[259]

However, the European *Dublin III Regulation*[260] notes in recital 3 that Member States shall not *refoule* an asylum seeker to a country where he would suffer from persecution.

In Canada, there are three dispositions which restrain the access to the territory that must not be overruled – not even by a contrary decision by the Minister of Citizenship and Immigration (MCI) – and which are much more precise than the *Refugee Convention.*[261] These rules concern **national security**, **human or international rights violations** and **organized criminality**.[262] The list of crimes resembles the one established by the EU to define a "particular serious crime".[263] According to the national security disposition, acts of espionage; subversion by force of any government or against a democratic government, institution or process; terrorism; or being a danger to the Canadian national security are reasons to refuse the access to the territory.[264]

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[257] Art. 21 *Qualification Directive.*
[258] Art. 21(2) *Qualification Directive.*
[259] Art 83(1), *TFEU* (emphasis added).
[260] *Regulation (EU) No 1316/2013 of the European Parliament and of the Council of 11 December 2013 establishing the Connecting Europe Facility, amending Regulation (EU) No 913/2010 and repealing Regulations (EC) No 680/2007 and (EC) No 67/2010*, [2013] OJ L 348/129 [*Dublin III Regulation*].
[261] Art. 25 *IRPA.*
[262] See also the exception to the principle of non-*refoulement* in art. 115(2) *IRPA*.
[263] Art. 83 *TFEU*.
[264] Art. 34 *IRPA.*

Further, acts of violence that would or might endanger the lives or safety of persons in Canada or being a member of an organization that has or will engage in those acts mentioned above also contravene the privilege to remain in Canada under the national security rule.[265] Also, gross human rights violations, being engaged in terrorism, in genocide, in a war crime[266], or in a crime against humanity are grounds for expulsion.[267] Additionally, convictions, resolutions or measures that concern one person, issued by an international organization or an association of States, restrict the concerned person's right to stay in the territory.[268] Last, the participation in organized criminality or in transnational crimes also constitute reasons for refusal.[269] Canada applies the expulsion to refugees and to persons in need of protection alike.

Mugesera v. Canada is one example that shows in which situation cum-citizens lose their right to asylum.[270] In 1996, the Rwandan citizen Mugesera, an ethnic Hutu, who had, at the given time, the permanent residence was expelled from Canada, considering that he took part in incitation to hatred and genocide in Rwanda in 1992. Mugesera appealed the decision, which was uphold by the Refugee Board's Appeals Division, and went to the FCA. The FCA reversed the deportation order, wherefore the Canadian MCI went to the Supreme court.

Mugesera was found to be well-educated and to have lived in Canada earlier to study at university. Following a speech he issued by radio in 1992 in Rwanda against the ethnic group Tutsi, the Rwandan authorities issued a warrant against him which led to his flight of the country. He then got asylum in Canada in 1993. However, when the Canadian MCI got notice about the speech, they sought to expel him despite his status as a protected person. Although the Canadian court did not find evidence that killings, murders or the genocide were directly connected to Mugesera's speech, the fact that his objective was to incite people to murder and hatred was enough to contravene his right to asylum. Set in the context of massacres that took place in Rwanda at that time, Mugesera used his voice to reach out to thousands of persons and to legitimize their act of killing Tutsi.[271] The Supreme court found that the decision of the RAD to

[265] Art. 34 *IRPA.*
[266] In the meaning of the *War Crimes Act*.
[267] Art. 35 *IRPA.*
[268] Art. 35 *IRPA.*
[269] Art. 37 *IRPA.*
[270] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40.
[271] *Cf.* at para. 71 ff., see also para. 76.

expel Mugesera was correct because of his actions in Rwanda before applying for asylum in Canada.[272]

It is interesting to note that Canada established a non-exhaustive list to determine criteria which need to be assessed when wondering if a person should be expelled because of complicity in crimes that go against international principles.[273] That list comprises (1) the size and nature of the organization where the perpetrator was implicated and (2) the part of organization where the person was directly implied.[274] The smaller the organization, the more probable it is that the person knew about the implication into crimes. Additionally, the department in which the person worked could be linked or not to crimes committed. (3) The person's duties and activities within the organization and (4) their rank within it. Personal duties as well as the rank give indications about the knowledge the person had about the acts which occurred at the time of crimes.[275] Last, (5) the temporal aspect of employment and (6) the method of recruitment as well as the option to leave the organization also play a role.[276] When assessing if a person has been implicated in an act going against international principles, it is more likely that the person has been directly involved when having been working for the organization for a more significant period of time. Additionally, the form of recruitment is decisive because it shows if the cum-citizen has been voluntarily contributed to maintain the criminal system, or if the person has been coerced into contributing thereto. In conclusion, there are many factors that determine the individual implication of a protected person in crimes punishable under international criminal law. The less implicated a person has been, the more likely it is that the person will remain protected.

The other major reason to cease protection is terrorism. It comprises a certain complexity because there is no universal definition.[277] Terrorism is, according to the UN Security Council, an act seeking to breach the international security.[278] Thus, it goes against the purposes and principles of the UN.[279] The notion of terrorism includes also the "*financing, planning and preparation of as*

[272] *Cf.* at para. 179f.
[273] *Ezokola v. Canada (Citizenship and Immigration)*, 2013 SCC 40, [2013] 2 S.C.R. 678.
[274] *Ibid.*, at paras. 94, 95.
[275] *Ibid.*, at paras. 96, 97.
[276] *Ibid.*, at paras. 98, 99.
[277] *Cf.* Ben SAUL, "Defining Terrorism in International Law" (Oxford Scholarship Online, 2010).
[278] See for example: UNSCOR, 4385th Mtg, UN Doc S/PV.4385 (2001) at recital 4.
[279] UNSCOR, 4413th Mtg, UN Doc S/PV.4413 (2001) at Annex.

well as any other form of support for acts of international terrorism".[280] In the *IRPA*, terrorism is one of the reasons that allow the State to refuse an asylum seeker or a cum-citizen. That said, the refusal of a cum-citizen does not mean that the person will be deported. Decisions about the question if they must leave the country when being a member of a terrorist organization have been taken in Europe and in Canada and prove to be closely linked to the principle of non-*refoulement*.

Hungary includes terrorism in its legislation as a justification for not granting refugee status.[281] Concerning subsidiary protection, Hungary only refers to crimes "*contrary to the purposes and principles of the United Nations*"[282], which would lead back to the recognition of terrorism as an act contrary to these purposes and principles by international documents.[283]

The German legislation, contrarily to the *IRPA*[284] and the *Asylum Act,* does not translate terrorism into grounds for the refusal of a protected person. Germany limits expulsion for protected persons when the cum-citizen's behavior constitutes a severe danger for the national security and public order which is linked to fundamental interests of society.[285] The notion of terrorism is present concerning the expulsion of aliens, wherefore it seems as if it was explicitly omitted regarding cum-citizens.[286]

However, the EU explains in the *Qualification Directive* that

> resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purpose and principles of the United Nations'.[287]

[280] *Ibid.*, yet, there is an uncertainty: where international terrorism is not defined, it might be difficult to condemn acts of terrorism and its financing, planning, preparation or supporting.
[281] Art. 8(3) *Asylum Act.*
[282] Art. 15(ac) *Asylum Act.*
[283] Recital 31 *Qualification Directive*, UNSCOR, 4385th Mtg. UN Doc S/PV.4385 (2001) at recital 4.
[284] Canada includes terrorism as a ground for refusal in art. 34 *IRPA.*
[285] *Cf.* Art. 53(3) *Asylum Law*.
[286] *Cf.* Art. 54(2)7 *Asylum Law*.
[287] Recital 31, *Qualification Directive*; aee also: United Kingdom Upper Tribunal (Immigration and Asylum Chambers), *AH (Algeria) v. Secretary of State for the Home Department*, [2013] UKUT 00382, at paras. 100-102.

Hence, I assume that the European legislation subsumes terrorism indirectly under art. 12 and 17 *Qualification Directive* which both refer to art. 1F *Refugee Convention* without mentioning it explicitly. In consequence, the EU Member States, including Germany, have the right to revoke a cum-citizen's residence permit because under the notion of national security which could be applicable to a cum-citizen who has been or is involved with a terrorist organization.[288]

The principle of non-*refoulement* is not limited to cases of international justice. It also intervenes when a person poses a threat to national security. In Canada, it was applied when Suresh, a Sri-Lankan national was to be expelled because of his activities that supported the financing of the group *Liberation Tigers of Tamil Eelam.*[289] Yet, the Canadian Supreme court justices decided that art. 7 of the Canadian *Charter*, the "*right to life, liberty and security of the person*"[290], might void the *refoulement* of an asylum seeker, who has committed fundraising for a terrorist organization on Canadian ground.[291] An utmost important argumentation of the Supreme Court debated the question, to which extent Canada must uphold and respect art. 7 of the *Charter*; could the fact that a protected person supported terrorist activities allow the country to expel that person? The *CCRF* presents the intrinsic limitation to its rights and freedoms when "*such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society*" intervene.[292]

In *Suresh*, the Court stated that the jurisprudence concerning the *Charter* had taken a balanced approach in the past, because

> "[o]n the one hand stands the State's genuine interest in combatting terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security. On the other hand stands Canada's constitutional commitment to liberty and fair process."[293]

[288] Art. 24(1)1, (2) *Qualification Directive.*
[289] *Suresh* at para 5.
[290] Art. 7 *CCRF*.
[291] *Suresh* at para. 5.
[292] Art. 1 *CCRF*, also see: *Oakes* test for the justification of measures that could violate the *Charter*, established in *R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC) at paras. 9f.
[293] *Suresh* at para. 58.

Canada must respect the right to life, liberty and security of a person when they will face torture upon arrival in the home country if they were to be expelled, apart from "*an exceptional case*", which the justices decided on without a further precision.[294]

In practice, Germany treats cum-citizens who supposedly participated in terrorist activities in a similar way. In 2017, the Federal Administrative Court decided that a protected person who is involved in terrorist organizations can be expelled.[295] The plaintiff was a Turkish citizen who belonged to the Kurd ethnic and who had been recognized as a refugee. In Germany he supported the Kurdistan Workers' Party (PKK), an organization recognized to have terrorist objectives. Therefore, the FOMR withdraw his residence permit in 2016 but not his international protection. In a first instance, the administrative court, remarked that the sovereign right to expel a cum-citizen was opposed by a personal need to remain. This case required, like *Suresh*, a balanced approach. When the court decided on the plaintiff's expulsion, it applied the principle of proportionality. The plaintiff could remain in Germany but was constrained to stay in a specific district. Furthermore, he had the obligation to report to the authorities twice per week.[296]

Thereafter, the plaintiff appealed to the Federal Administrative Court. The federal justices decided that the expulsion was justified, according to art. 53(1) in combination with art. 53(3) *Residence Law*, because he would constitute a danger to the German public order and the public security. Although the Court admitted that the definition of terrorism is not yet clarified in international public law, they acknowledged that attacking civilians to achieve political objectives is a terrorist activity.[297] The justices thus recognized every action that supports such measures as support of a terrorist organization, resulting in an expulsion. However, there is a limit to deportation, when a person is threatened by the death penalty, torture, or a cruel and unusual punishment upon arrival in the country of origin.[298] Where the *Refugee Convention* considers that only refugees can benefit from the principle of non-*refoulement*[299], the court

[294] *Ibid.* at para. 129.
[295] Bundesverwaltungsgericht (Federal Administrative Court), Leipzig, 22 February 2016, BVerwG 1 C 3.16 (Germany).
[296] Verwaltungsgerichtshof Baden-Württemberg (Administrative Court), Karlsruhe, 13 January 2016, VG 1 K 102/12 (Germany) at 148.
[297] *Ibid.*, at paras. 30f.
[298] *Ibid.*, at para. 48.
[299] *Cf.* art. 33(2) *Refugee Convention.*

emphasized that the prohibition of torture[300] is a compelling norm, that must not be violated by **any** other disposition. Hence, this *ius cogens* norm would have an unrestricted scope in view of the persons it applies to; it is, thus, broader than the scope of the *Geneva Convention's* art. 33.[301]

For Hungary, data was difficult to obtain. There were no international cases at the time given that could have shown how Hungary deals with persons that are supposedly terrorists. Newspaper articles and public policies give some ideas about Hungarian practices. The Hungarian discourse and measures remain in a large part in the securitization context.[302] For example, Hungarian Prime Minister Viktor Orbán communicated and still transmits in his speeches that he would not be the person embracing increasing migration inflows into Hungary and the EU.[303] He furthermore established a link between migration and terrorism after the Charlie Hebdo shootings.[304] Also, his willingness to take securitization measures resulted in building a fence between Hungary and Serbia, hence, restricting the access to the Hungarian and, thus, the European Union's territory.[305] Brief, the Hungarian State uses a public discourse in which migration, largely characterized by the asylum inflows in 2015/16, is demonized and portrayed as a reason for closing the border in a protectionist way. Not even persons in need get an easy access to Hungary based on and because of the securitization discourse and measures, which is contrary to the right to asylum in times of individual need.[306]

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[300] Art. 3 *ECHR.*
[301] Bundesverwaltungsgericht C 3.16 op. cit., at para. 48.
[302] Jan BLAZEK, "Resistance to the securitization of migration in Hungary: the MIGSZOL network as a case of radical cosmopolitics", Visegrad Fund, online: <http://www.visegradexperts.eu/data/_uploaded/Finals/Jan%20Blazek.pdf>, (requested 30 November 2017) at 2f.; Reuters, "Illegal migration clearly linked with terror threat: Hungary PM" (25 July 2015), #World News, online: <http://www.reuters.com/article/us-europe-migrants-hungary-idUSKCN0PZ08F20150725> (requested 4 January 2018).
[303] Interview of PRIME MINISTER VIKTOR ORBÁN by Éva KOCSIS (22 December 2017) on "180 Minutes", Kossuth Radio, Budapest [English transcription provided by the Hungarian government's website], online: <http://www.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-on-kossuth-radio-s-180-minutes-programme-20171227> (requested 8 January 2018).
[304] *Ibid.*
[305] András SZALAI & Gabriella GÖBL, "Securitizing Migration in Contemporary Hungary", CEU, November 2015, online: <https://cens.ceu.edu/sites/cens.ceu.edu/files/attachment/event/573/szalai-goblmigrationpaper.final.pdf>, (requested 30 November 2017).
[306] Nóra KÖVES, "Serious human rights violations in the Hungarian asylum system", (10 May 2017), online: <https://www.boell.de/en/2017/05/10/serious-human-rights-violations-hungarian-asylum-system> (requested 28 August 2018).

Additionally, reasons that can end refugee protection in Hungary include criminal infractions, like the use of false or forged documents when they were decisive for the cum citizen's recognition, or committing a crime that entails at least five years imprisonment under Hungarian law.[307]

SUBSIDIARY PROTECTION

In the EU, the **reasons to preclude a person from subsidiary protection** retake the national security reasons that apply also to refugees.[308] By initiating or committing a crime against peace, humanity or a war crime, as well as a serious crime[309], or when acting against the aims and purposes of the *Charter of the United Nations*, an asylum seeker is generally excluded from international protection.[310] However, contrary to a refugee claimant, States can also refuse an applicant for subsidiary because of being "*a danger to the community or to the security of the Member State in which [the applicant for subsidiary protection] is present*".[311] At last:

> Member States may exclude a third-country national or a stateless person from being eligible for subsidiary protection if he or she, prior to his or her admission to the Member State concerned, has committed one or more crimes outside the scope of paragraph 1 which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from those crimes.[312]

In Germany, an alien is subject to expulsion if they pose a threat to the public security, public order, the free democratic order of the republic or to other significant interests of the country, according to article 53(1) *Residence Law.*[313] These are reasons that resemble the Canadian legislation.

There are two important differences in the wording in article 53 *Residence Law* that need to be interpreted: art. 53(1) *Residence Law* uses the broad term '*foreign citizens*', while art. 53(3) explicitly considers '*persons entitled to asylum'.* Art. 53(4) furthermore considers '*foreigners*

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[307] Art. 11 *Asylum Act.*
[308] *Cf.* Art. 12 *Qualification Directive.*
[309] Here, the *Qualification Directive* does not mention a "*non-political serious crime*" like it does in art. 12, when considering reasons that would allow to refuse refugee-protection.
[310] *Cf.* Art. 17 *Qualification Directive.*
[311] Art. 17(1) para. (d) *Qualification Directive.*
[312] Art. 17(3) *Qualification Directive*, paragraph one refers to war crimes, crimes against humanity or other serious crimes.
[313] Art. 53 *Residence Law.*

who have filed an application' for asylum. Here, the wording first indicates that **protected persons** can only be expelled when their behavior is a violation of art. 53(3), which means that they pose a serious threat or danger to the public security or the public order. When the German legislation refers to "*persons entitled to asylum*", it most likely applies the term exclusively to persons entitled to refugee protection. Art. 53(3) mentions that persons entitled to asylum or who have been recognized as refugees cannot be refused on other grounds than that they currently represent "*a serious threat to public safety and law and order which affects a fundamental interest of society and the expulsion is essential to protect that interest*"[314]. **Asylum seekers who have lodged an application** are rather under the same regime as refugees until the officials decide on their right to stay, because there is no certainty on recognition and status yet.[315] Both groups, refugees and asylum seekers, can only be expelled if they in fact have constituted a specific serious threat by an action. However, **beneficiaries of subsidiary protection** are under the regime as other third-country nationals, which would allow their expulsion.[316]

Art. 54 *Residence Law* that mentions specific grounds which lead to the expulsion of '*an alien*'. The legal text of art. 54 only refers to 'foreign citizens' who have been mentioned in art. 53(1). It should thus apply to refugee-protected persons and asylum seekers when a "serious threat" demands their expulsion. Furthermore, it would apply to beneficiaries of subsidiary protection who endanger the public safety and law and order. That indicates that cum-citizens with refugee protection and asylum seekers can only be expelled, if they are a serious threat to the public order or security of Germany, while cum-citizens with subsidiary protection are in worse circumstances and can be refused because of minor reasons. Again, even in the latter case, the expulsion of an alien does not necessarily mean that the person will be *refouled*, as Germany respects the principle of *non-refoulement* to which it is bound according to art. 60 *Residence Law.*[317]

In Hungary, persons who could obtain subsidiary protection are under the same regime as refugees. Art. 8 (*Reasons for Exclusion from Recognition as a Refugee*) and art. 11 (*Cessation of Refugee Status*) *Asylum Act* State the grounds for refusing refugees. Art. 11 enlists the reasons for

[314] Art. 53(3) *Residence Law.*
[315] Art. 53(4) *Residence Law.*
[316] Deutscher Bundestag, "Auswirkungen begangener Straftaten auf den Aufenthalt von Ausländern in der Bundesrepublik", No WD 3-3000-255/15 (29 October 2015) at 8f.
[317] *Ibid.*, at 12.

ending the protection. A person who could be eligible for **subsidiary protection** might also be refused pursuant to international crimes, terrorism, or a crime that entails five or more years of imprisonment under Hungarian law or a violation of the country's national security.[318]

The refusal of a request or a protected person, based on criteria linked to war crimes, to genocide, incitation thereto, to hate, or to terrorism constitutes a valid restriction of the right to asylum and does not establish a difference between refugees and beneficiaries of subsidiary protection. It punishes an individual who has behaved in a manner that goes against international principles and the law of the nations.

CONCLUSIONS PART I

In general, Canada and the European countries accept and accommodate asylum seekers that have a well-founded demand for international protection. Yet, while Canada has one approach for all persons in need, there are very different approaches concerning the protection that is conferred in the European countries. In Germany, the length of protection varies, depending on the status, whereas in Hungary distinct motivations apply for refusing beneficiaries of subsidiary protection.

In Canada, protection will be granted as long as the reasons that led to the protected person's need for asylum do not end. Furthermore, protected persons can immediately apply for a permanent residence. In Germany, refugees as well as beneficiaries of subsidiary protection can apply for a national residence permit after three years. Also in Hungary, both groups can apply for the national residence permit three years after the individual has been admitted.

The EU Member States have the competence to regulate asylum seekers' entry and terms of stay in different ways. More specifically, in Germany for example, the Refugee status is granted for three years.[319] When the applicant's grounds for seeking protection have not ceased any further asylum-demand that is approved will extend the protection for two more years. Hungary was a different case before changing its asylum legislation in June 2016. Since then the *Asylum Act*,

[318] Art. 15 *Asylum Act.*
[319] Art. 26(1)2 *Residence Act.*

foresees that the status shall be subject to revision every three years[320] which has been under discussion since 2015.[321] Before making that change, asylum was granted for five years.

Among the EU Member States, the concrete procedures for getting subsidiary protection have not been harmonized. The application procedures for subsidiary protection can differ from those a refugee has to undertake. For example, in Germany, the subsidiary protection status is granted for one year, in case of a re-application for two more years ("1+2+2 formula") while the refugee protection is accorded for three years, and in case of a prolongment for two years ("3+2+2 formula").[322] Also, a refugee who reapplies after three years to not lose his protection will now, in September 2017, only get a further prolongation of two years[323]. Meanwhile, in Hungary, the subsidiary protection status is subject to revision "*at least every three years*", like the refugee status ("3+3+3 formula").[324] Hence, in Germany, the right to stay a person enjoys under subsidiary protection, is different to the right a recognized refugee has. Therefore, an asylum seeker who can only apply for subsidiary protection, might rationally prefer to lodge a demand in Hungary. There, the protection status will be accorded for three years when Germany grants protection for only one year. Nevertheless, there might be other pull factors, such as the accessibility of the territory and the opportunities that migrants have in the destination country when it comes to preferences regarding the destination country.

In the comparison of the different regimes, I found out that each country has a different approach towards refugees and persons to protect. While Canada does not make any difference between both groups at all, Germany applies different laws when **admitting** asylum seekers. Hungary treats asylum seekers and cum-citizens different from each other concerning the **expulsion**. The CEAS provides a framework which all Member States need to apply, though it is not completely harmonized. Member States must apply minimum standards when granting protection and when

[320] Art. 7/A(1) *Asylum Act.*
[321] UNHCR, "Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016", op. cit., at para. 14.
[322] Art. 26(1)3 *Residence Law.*
[323] Art. 26 *Residence Law.*
[324] Art. 14(1) *Asylum Act.*

expelling refugees but may apply firmer regulations when expelling beneficiaries of subsidiary protection.

In Canada, protection will be granted as long as the reasons that led to the protected person's need for asylum do not end. Furthermore, protected persons can immediately apply for a permanent residence. In Germany, refugees as well as beneficiaries of subsidiary protection can apply for a national residence permit after three years. Also in Hungary, both groups can apply for the national residence permit three years after the individual has been admitted.

For cum-citizens who will most likely not be in the conditions to return into their country in the following six years after having obtained international protection and who want to establish themselves in another country, it would be better to go to Canada, where they can get the citizenship after three years. Refugees, however, can apply for naturalization after only three years in Canada and in Hungary, while the German law foresees six to eight years of lawful stay in Germany. The Canadian system seems to be more coherent than the European system. While Canada offers one Permanent Residence Permit, there are 28+1 different types of residence permits in the EU.

Therefore, it would be an advantage to go to Canada for persons who would rather get subsidiary than refugee protection. In Canada, cum-citizens may apply for naturalization after three years of lawful stay. In Hungary, refugees can also apply for naturalization after three years of lawful stay in the country. Beneficiaries of subsidiary protection would need to wait for eight years to apply for citizenship in Hungary. In Germany, both groups can eventually apply for naturalization after six years, if they had made extraordinary efforts to integrate. A permanent residence permit would be granted after five years in Germany and after three years in Hungary.

Although the criteria for granting international protection to an asylum seeker who cannot be considered a refugee are similar in Canada and the EU, there are significant differences between the Canadian **person in need of protection** and the European **status of subsidiary protection**. The Canadian legislation, for example, does not specifically include the death penalty or execution as a reason for granting someone a protection. However, case law regarding extraditions, as well as international doctrine and the principle of non-*refoulement* indicate that

protected persons would not be sent back if they faced the death penalty. Additionally, Canada should protect a person due to the cruel or unusual punishment clause when a trial that did not respect the rule of law has taken place in the country of origin. On the other hand, when the death penalty has been pronounced according to the rule of law and there is a guarantee to hold it, Canada might send back an asylum seeker. The mere declaration or threat of the death penalty does not per se entail its execution.

Regarding expulsion, crimes against international principles and national security reasons can lead to an expulsion. Beneficiaries of subsidiary protection can be expelled when they constitute a threat to the national security and/or community of a Member State. Moreover, when having committed a crime punishable by imprisonment prior to their admission in one EU Member State cum-citizens can also be expelled. Likewise, the Canadian legislation defines a serious crime as a ground for expulsion of a cum-citizen.

Terrorism is an alone-standing reason for expelling cum-citizens in Canada and in Hungary. Germany does not explicitly consider terrorism as a single-standing ground for expelling a protected person or an asylum seeker. Still, the supranational *Qualification Directive* subsumes terrorism under the notion of a crime against the purpose and principles of the United Nations, wherefore Germany could justify the expulsion of a cum-citizen because of an implication in terrorist activities.

The grounds for refusing international protection are more specific in Canada than in the *Qualification Directive*. Cum-citizens can be denied access to the Canadian territory because of terrorist activities. Also Hungary considers terrorism as a ground for refusal. In Germany, national security reasons, without a specification of terrorism, justify the refusal of cum-citizens. Yet, the *Qualification Directive* provides for a ground on which terrorists can be expelled. Even though some of the reasons for refusing to give protection to an asylum seeker differ for refugees and beneficiaries of subsidiary protection in the different countries, there are similar grounds on which a person can be convicted after having breached national law. When someone might experience torture, a cruel and unusual punishment or a fear for their life upon return to the country of origin, the personal integrity outbalances the deportation of persons in need of protection who are or have been involved in terrorist acts.

In all cases, national security dispositions are sufficiently elaborated to expel protected persons. An expulsion could not be realized, at least in Canada and Germany, when the principle of non-*refoulement* that would interdict the person's deportation can be invoked. Similar approaches towards asylum exist. Despite similarities, the application of the concepts is different in all three countries. This is particularly interesting, as Germany and Hungary have distinct practices in their application of asylum, yet, they are both EU Member States. That shows a need for more coherence and harmonization in the EU.

PART II: DIFFERENT OR EQUAL? ANALYZING THE REASONS FOR AN EQUAL TREATMENT OF CUM-CITIZENS

In Part II, I analyze why cum-citizens should be treated equally. In continuity of Part I, a first question which I will answer is if cum-citizens are in like circumstances. These findings will contribute to a systematical and teleological analysis if the notions of threat are similar for cum-citizens. In Chapter 3, I further analyze and compare the notions of "persecution" and "serious threat" with regard to their analogy. Thereafter, in Chapter 4, I argue based on a teleological discussion that human rights should be accorded to beneficiaries of subsidiary protection like they are provided to refugees, which is based on the State principles of liberalism and democracy, and on the principle of equality and likeness of cum-citizens. In Chapter 5, a utilitarian perspective will analyze, if it makes sense to accord only one protection status instead of two from an economic point of view.

The underlying theories applied in this chapter are linked to liberalism, morality, and utilitarianism. Both Chapter 3 and 4 scrutinize the equality of refugees and beneficiaries of subsidiary protection, based on the underlying assumption, that Canada, Germany and Hungary are liberal democratic States and that they should respect liberal principles as well as the rule of law. Although Hungary has proven to take an anti-immigration stance under prime minister Viktor Orbán, arguments are based on the principles Hungary has adhered to by joining the *Refugee Convention* and the European Union. Furthermore, Hungary also is a Member State to both international covenants, the *ICCPR* and the *ICESCR*. Last, it is a Member State to the *ECHR*. However, under Orbán, the Hungarian government is drifting away from the liberal democratic principles which it is based on, and, consequently, the country was characterized as a flawed democracy by the Economist Intelligence Unit in 2017.[325] Orbán is seen as an "*illiberal democrat*" which also has serious impacts on the Hungarian politics and values.[326] This populist tendencies also show effects on the Hungarian asylum procedures, as Hungary established barriers and obstacles to close down the borders and hinder asylum seekers to enter.[327]

[325] *Democracy Index 2017*, "Free speech under attack" The Economist Intelligence Unit (EIU 2018) at 13.
[326] *Ibid.*, at 31.
[327] Hungarian Helsinki Committee, "Two years after: What's Left of Refugee Protection in Hungary?", Information Note by the Hungarian Helsinki Committee, (September 2017).

In this part, the overall focus lies on the EU Member States because Canada already treats cum-citizens alike. A question about the equal treatment cannot be approached with a mere analysis of the national legislation which provides for an unequal treatment, wherefore theories about equality and equity will be applied for the analysis.

CHAPTER 3: COULD REFUGEES AND BENEFICIARIES OF SUBSIDIARY PROTECTION BE IN ALIKE CIRCUMSTANCES?

Before a person will be granted protection, the person is an asylum seeker. There are no differences in the treatment of asylum seekers per se. The different treatment begins in Germany and Hungary after a status has been conferred. That means that the different treatment only comes into being after protection has been accorded to a person. Now, as laid out in Part I, there are distinct elements in the two situations that allow to ask for protection: (1) Refugee protection which has the underlying element of **persecution**. (2) Subsidiary protection which has the underlying element of a **serious harm** or a threat for life.

This chapter seeks to clarify the notion of threat for refugees and for beneficiaries of subsidiary protection systematically. It furthermore compares the circumstances to which both groups are exposed in different phases to analyze if they are in equal situations.

A EQUITY AND THE INTERPRETATION OF NOTIONS OF THREAT

According to the principle of equity, likes should be treated alike. [328] Therefore, the notions of threat which a person experiences before asking for asylum should be analyzed in terms of their likeness. The notions of threat are the subjective fear of a person to be subjected to a threat. In addition, the official who decides on asylum must provide an objective analysis of the situation present in the country of origin.[329] A person in need of protection can, irrespectively of the reasons

[328] Robert E. GOODWIN, "Treating likes alike, intergenerationally and internationally", (1999) 32 Policy Sciences 189 at 189.
[329] *Cf.* Chapter 2A1.

therefore, only claim to be in need individually. Neither refugees nor beneficiaries of subsidiary protection can file collective demands for asylum.

The element of persecution linked to the refugee status can be found in several international documents. The *UDHR* recognized the right of every persecuted person to ask for asylum.[330] It additionally considers that "*[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*"[331] The element of persecution and the element of a serious threat, like torture or a cruel, inhuman or degrading treatment or punishment are not necessarily connected to each other. Persecution is a fear that subjectively exists in an asylum seeker's mind, but it also needs to be objectively justified and present on a collective and systematic level.[332]

The notion of **persecution** is, according to Canadian case law, "*[t]he subjective component [that] relates to the existence of fear of persecution in the mind of the refugee. The objective component requires that the refugee's fear be evaluated objectively to determine if there is a valid basis for that fear.*"[333] The *Qualification Directive* defines persecution as an act that must

> (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2)[334] of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).[335]

Thus, persecution is a threat which is present on a collective level. Yet, it affects an individual. Hence, persecution is a collective threat which has implications on a personal scale.

At first glance, the notion of a **serious threat** connected to subsidiary protection seems to be linked to individual circumstances. It does not concern collective criteria like political opinion or religious belief as the foundation for granting asylum. The *Qualification Directive's* art. 15 provides three grounds that amount to a serious threat and entitle a person to ask for protection:

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[330] Art. 14(1) *UDHR.*
[331] Art. 5 *UDHR.*
[332] This collective notion is linked to the objective component. Persecution does not refer to acts against a single person but to acts against a group based on the group's characteristics.
[333] *Cf. Rajudeen v. Canada (Minister of Employment & Immigration)*, [1984] A.C.F. No. 601, 1984 CarswellNat 675 (Westlaw) at para 14.
[334] Art. 15 *ECHR* provides the option for States to derogate from an obligation in a case of emergency. The footnote has been included by the author and is not to be found in the norm itself.
[335] *Cf.* Art. 9(1)(a)(b) *Qualification Directive.*

death penalty and torture, which have, according to the CJEU, an individual scope[336], and a "*serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflicts.*"[337]

Regarding death penalty, torture, and an unusual and cruel punishment the asylum seeker is individually threatened by the danger of being executed or tortured. Concerning indiscriminate violence in conflict situation, a person could claim to suffer an individual threat, yet, indiscriminate violence would also threaten the collectivity affected by it. Therefore, art. 15(c) presents an intrinsic contradiction and should be looked further into.

When being affected by indiscriminate violence, the entire group of civilians that is present in the region affected by war would be eligible for subsidiary protection. In this case, the individual and the collective notions overlap. The main difference between a threat by indiscriminate violence in armed conflicts and persecution would be that the civilian collectivity attained by an armed conflict should not be targeted by the conflict's participants[338], whereas persecution is based on criteria attributed to a specific group. UNHCR sees art. 15(c) as mean to "*address a protection gap at the regional level*"[339], being a result from not including war and conflicts as grounds for protection within the *Refugee Convention*.[340] Although the ideas regarding the notion of serious threat from the *Qualification Directives* vary in the different EU Member States,[341] the CJEU has clarified that the notion of individualism which is present in art. 15(a) and (b) is less important for granting subsidiary protection according to art. 15(c):

> 35 In that context, the word 'individual' must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an

[336] *Elgafaji v. Staatssecretaris van Justitie*, C-465/07, [2009] ECR I-00921, at para. 32.
[337] Art. 15(c) *Qualification Directive.*
[338] *Cf.* ICRC, IHL Database Customary International Law, "Rule 1. The Principle of Distinction between Civilians and Combatants", online: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1> (requested 28 August 2018).
[339] UNHCR, *SAFE AT LAST? LAW AND PRACTICE IN SELECTED EU MEMBER STATES WITH RESPECT TO ASYLUM-SEEKERS FLEEING INDISCRIMINATE VIOLENCE*, (Brussels: UNHCR, 2011), at 23.
[340] See also: Eric MOONEY "Displacement and the Protection of Civilians under International Law" in: Haidi WILLMOT, Ralph MAMIYA, Marc WELLER (eds.), Protection of Civilians, (Oxford Scholarship Online, June 2016), DOI: 10.1093/acprof:oso/9780198729266.001.0001 at 193ff.
[341] Cf. Council of the EU, *Outcome of proceedings*, from: Asylum Working Party, Interinstitutional File 2001/0207 (CNS), Brussels, 17 June 2002, at 25.

> application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive. (…)
>
> 38 The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation. [342]

Hence, the European case law defines that the notion of subsidiary protection is always connected to individual circumstances.[343] With regard to art. 15(c), that argument is not convincing. When a group, and may it be civilians, is the target of an indiscriminate attack, the notion of collectivity is definitely present. The individual notion then disappears and merges with the collective one. Since persecution needs to be "*sufficiently serious by its nature or repetition*" and violate human rights, it becomes increasingly difficult to argue that indiscriminate violence against the civilian population would not be persecution.

With regard to the difficulty of granting the 'right status',[344] we saw that an asylum seeker who is in an art. 15 *Qualification Directive* situation, should when facing the threat of persecution upon returning in the country of origin be recognized as a refugee.[345] Consequently, an asylum seeker who asks for protection can also be in refugee-like circumstances after obtaining the international protection. That requires the country of origin to judge the act to ask for asylum as punishable, because of political reasons, or as a criminal offence being worth persecuting the entire group.[346] As a result, asylum seekers who, in their country of origin, face a serious threat could be refugees rather than persons in need of subsidiary protection. Here the differentiation between person in need of protection and refugee becomes incredibly difficult and imprecise.

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[342] *Elgafaji v. Staatssecretaris van Justitie*, C-465/07, [2009] ECR I-00921, at paras. 35, 38.
[343] *Cf. Aboubacar Diakité* v. *Commissaire général aux réfugiés et aux apatrides*, C-285/12, [2014] OJ C 93/6, at para. 19
[344] *Cf.* Chapter 2A2.
[345] *Ibid.*
[346] See: Verwaltungsgericht (Administrative Court), Trier, 1 K 5093/16.TR, op. cit.

In international law, several dispositions refer to situations where individuals find themselves in a situation that would allow them to ask for subsidiary protection in the EU. [347] For example, the *CAT* foresees that no one should be sent back to a country where the danger of torture is present for the person.[348] Similarly, EU Member States that have abolished the death penalty do not *refoule* persons to places where they could be condemned to the capital punishment in practice. These obligations arise from a commitment to human rights, for instance announced in the *Protocol No. 6*[349] or in *Protocol No. 13*[350] *to the ECHR*. Complementary to the legal obligation from the *Protocols* to not subject a person to the death penalty, decisions and dispositions specify the arising obligations.[351] Persecution, on the other hand, is, apart from the *Geneva Convention*, not considered to be a reason that would result in an international obligation to grant protection.

A serious threat that affects a person is a violation of basic human rights and a severe violation of human rights. The threats concerned in art. 15 *Qualification Directive* are, hence, rarely on an individual level. That said, a serious threat and persecution are similar in their scope.

1) INDIVIDUAL VS. COLLECTIVE NOTIONS OF THREAT: WHAT'S THE DIFFERENCE?

Having read the definitions of persecution and a serious threat, I wonder about the difference between both notions. The European differentiation is based on circumstances that should normatively not make a difference. When every asylum seeker is part of one and the same group in need of (international) protection, why should one part of the group get better conditions than the other one?

Refugee protection is granted because of a collective experience, while subsidiary protection is conferred because of an individual situation, which does not correspond to the reality. There are

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[347] MCADAM, *Complementary Protection in International Refugee Law*, op. cit., at 209.
[348] *Cf.* Art. 3 *CAT*.
[349] *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty*, as amended by Protocol No. 11, 28 April 1983, ETS 114 (entered into force 1 March 1985).
[350] *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the Death Penalty in all circumstances*, Vilnius, 3 May 2002, ETS 187 (entered into force 1 July 2003).
[351] E.g. art. 15(a) *Qualification Directive* that reaffirms Protocol No. 6 *ECHR*; see also: *Al-Saadoon and Mufdhi v. the United Kingdom*, No. 61498/08, [2010] II *ECtHR* 61 at paras. 115-118.

situations in which entire groups have to move because they are being persecuted, like it happened 2017 in Myanmar where the Muslim Rohingya are persecuted by State officials and Buddhists which can be subsumed under the definition of persecution.[352] Nevertheless, the disseminated non-discriminatory violence present in other circumstances, like in the Syrian civil war, leads to uncertain results. Cum-citizens could be refugees because they might be politically persecuted upon returning to Syria, or they could become beneficiaries of subsidiary protection because they could suffer a serious harm due to the war.[353] The question whether an individual threat should be seen as part of a collective situation has neither been clarified in supranational nor in national case law.[354]

The notions of persecution and serious harm are to be found in human rights declarations, conventions, protocols and in national legislations and seem to recall States' responsibility to protect human-beings. Yet, the obligations that follow are undoubtedly more succinct in national and the supranational EU legislations, which place refugee protection and the additional protection next to each other, and, systematically, set them in a concrete context. In international legal documents, like in the *CAT*, the prohibition of *refoulement* and the **implicit** granting of further protection are pronounced; yet, there are no consequences deriving from the *CAT* that would obligate States to protect persons who have been or will be tortured.[355]

Interestingly, it seems as if international law and norms would consider persons in need of protection and refugees to be in different situations, because beneficiaries of subsidiary protection are not explicitly mentioned in legal documents. Meanwhile, national legislations indicate that they rather consider both groups to form part of one group because the objective of asylum is to protect all persons in need. Again, in State practice, the different treatment would indicate that there is a difference between both groups. There seems to be no consensus, neither in international law nor in State practice, that would simply answer the question of equality.

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[352] *Cf.* "Looking the other way", *The Economist* (28 October 2017).
[353] Sasan ABDI-HERRLE, "Auf den Status kommt es an", *ZEIT*, (21 February 2017), online: <http://www.zeit.de/politik/deutschland/2017-02/fluechtlinge-syrien-oberverwaltungsgericht-nordrhein-westfalen-bamf-fluechtlingsstatus> (requested 8 January 2017).
[354] *Ibid.*
[355] *Cf.* art. 3(1) *CAT*.

2) EXAMPLE: THE INTERDICTION OF TORTURE

To underline the argument that a serious threat and persecution are similar in their scope, I provide a further analysis of the interdiction of torture as a ground for subsidiary protection.

The prohibition of torture, for example, is *ius cogens.* There are reasons to justify the inclusion of a serious threat, like torture or a cruel or inhuman punishment, in the definition of persecution. According to the *CAT's* first article:

> (…) the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[356]

This interdiction can even limit the national legislation insofar, as that States where the rule of law is a principle must not legislate to *refoule* persons who could face torture upon return.[357] One question that is not completely clarified, yet, is whether torture needs to be systematic in order to be *ius cogens* and in order to impose an obligation to protect persons affected thereby.[358]

Generally, torture in international law does not refer to acts committed by individuals, but to acts committed by State organs.[359] There are two dimensions of torture: the individual dimension, which allows States to bring individual persons who have tortured in their official function to trial, and the inter-State dimension, which allows States to take cases of torture that have happened in third States, according to the principle of universality, to court.[360]

EU law furthermore defines that "*parties or organisations controlling the State or a substantial part of the territory of the State*"[361] or even "*non-State actors, if it can be demonstrated that [the State, parties or organisations controlling the State or a substantial part of it] are unable or*

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[356] Art. 1(1), *CAT.*
[357] *Cf.* Erika DE WET, "The Prohibition of Torture as an international Norm of jus cogens and its implications for National and Customary Law", (2004) 15:1 EJIL 97, at 101-105.
[358] *Ibid.*, at 118.
[359] *Prosecutor v. Anto Furundzija*, IT-95-17/1-T, Judgement (10 December 1998) at para. 162 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).
[360] *Prosecutor v. Anto Furundzija, ibid.*, at paras. 154ff.; for the principle of universal law see Chapter 2B3).
[361] Art. 6(b) *Qualification Directive.*

unwilling to provide protection against persecution or serious harm"[362] can also be actors who inflict a serious harm. The notion of torture as an individual or a systematic activity ought to be relevant for accusing the perpetrator. It was less relevant for defining if a need for protection arises thereof.[363] Yet, when torture is applied systematically in a specific context, the concerned persons would probably be recognized as refugees.

In the *travaux préparatoires* of the *ECHR*, the prohibition of torture was almost instantly recognized by each State representative present in the negotiations. They included a public and a private notion.[364] Certainly, the private notion of torture, i.e. one person torturing another one without any link to an institution or a State organ, is not universally recognized. However, when an act of torture has been committed by officials or State-authorized persons upon an individual, there is a common understanding that this is a severe violation of human rights. Also, in Canada, there are two notions of torture. According to the *Criminal Code*[365], which also encompasses the private notion, torture is

> "any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person
>
> (a)for a purpose including
> (i) obtaining from the person or from a third person information or a statement,
> (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and
> (iii) intimidating or coercing the person or a third person, or
> (b)for any reason based on discrimination of any kind,
>
> but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions."[366]

In another meaning, torture can be defined as a crime against humanity. In that sense,

> [f]or torture to be a crime against humanity it must be committed against an identifiable group in a widespread and systematic manner and it must have been a crime against humanity at the time and in

[362] Art. 6(c) *Qualification Directive.*
[363] Cf. APT & CEJIL, *Torture in International Jurisprudence, a guide to jurisprudence*, (Geneva & Washington DC: APT & CEJIL, 2008) at 2.
[364] Council of Europe, *Travaux préparatoires de l'article 3 de la Convention européenne des Droits de l'Homme*, 8 April 1970, Document CDH (70) 9, at 17.
[365] *Criminal Code,* R.S.C., 1985, c. C-46.
[366] Art. 269.1(2) *Criminal Code.*

> the place of its commission according to customary international law or conventional international law.[367]

The difference between persecution and torture as an individual threat is, hence, not easy to make. If torture was applied systematically against a group because of the national origin, religion, political opinion, affiliation to a social group or the ethnicity, a member of this group would be considered a refugee. If the civilian population was tortured, subsidiary protection would probably be conferred to an individual who claims a need to asylum.

Consequently, when a serious violation of human rights constitutes persecution, according to the EU, should torture not be defined as to persecution?

B EQUITY IN DIFFERENT PHASES OF CUM-CITIZENS' TRAJECTORY

Given that persecution and serious threat are sometimes difficult to distinguish from each other, I wonder whether it is just and proportionate to grant a more comprehensive protection to refugees than to beneficiaries of subsidiary protection. Both are in circumstances that would not allow them to return to their respective country of origin. I argue that if both groups are in equal circumstances because of their vulnerability, they should be treated alike, according to the principle "treating likes alike".

For analyzing if refugees and beneficiaries of subsidiary protection are in like-circumstances, I will analyze the different phases which asylum seekers and cum-citizens go through before lodging an asylum demand and when being accommodated in a host country. An individual threat one person claims to be subjected to should be understood like a collective threat because of several reasons. First, it seems that a serious threat is often imposed on a group and not only on an individual. Second, refugees and persons in need of protection are both in need of asylum because of a present threat which qualifies them for the same protection: asylum. I will sustain this argumentation with a depiction of the phases a cum-citizen goes through.

[367] *Canada (Minister of Public Safety & Emergency Preparedness) v. X*, 2011 CarswellNat 4377, 2011 CarswellNat 4378 (Westlaw) at para. 24.

In Part I, the legislation for asylum in Canada, Germany, Hungary, and also the EU has been compared. Relying on that assessment, a cum-citizen goes through different situations and administrative phases, before getting protection, during the time the person is protected, and when protection end. There are notably four phases which cum-citizens go through:

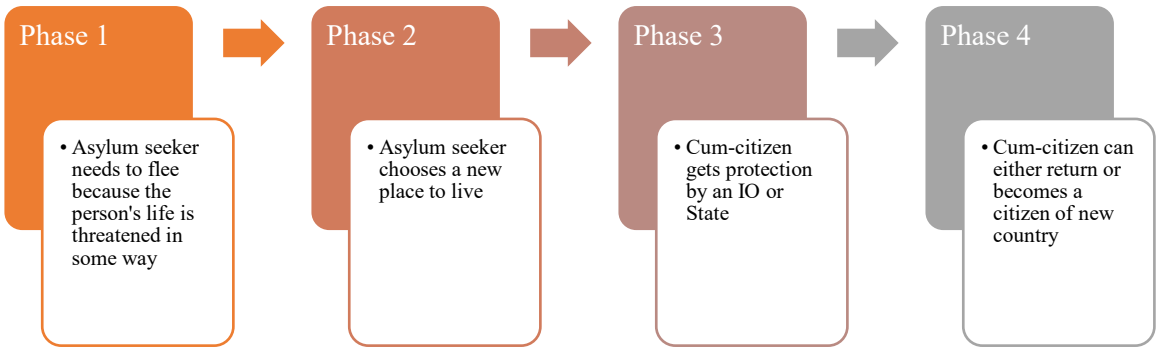

FIGURE 3: THE FOUR PHASES OF A CUM-CITIZEN'S PROTECTION

The differences between refugees and beneficiaries of subsidiary protection are only present in two phases: Phase 1 (latent) and Phase 3 (evident). Otherwise, there are no obstacles or rules that would prescribe a different treatment of asylum seekers, respectively protected persons. In Phase 1 a threat places a person in a dangerous situation which requires immediate action, e.g. moving to another place. However, the circumstances are different for each person who feels obligated to flee. One person might be part of a discriminated group, another person might be threatened individually. Yet, both situations lead to similar results. By only considering the original conditions, one could differentiate between groups and individuals that suffer a violation of their fundamental rights. On the other hand, the outcome is the same in both cases. Hence, the essential question is: May States differentiate between a collective threat or an individual threat when people need to flee because they might lose their life otherwise?

In Phase 3, the person gets protection by an international organization or another governmental or authority-exercising group. In that phase, it depends on the reception country if differences between asylum seekers based on the reasons of their flight are made. An example would be Canada which intakes persons that have been living in UNHCR camps, without creating a further

difference between refugees and persons in need of an additional protection[368]. But when persons get protection in a European country, like Hungary or Germany, not all of them are considered to be in the same situation and they will be treated differently because of the protection that has been granted individually to a person.

The Canadian legislation is very open towards the equal admission of asylum seekers. It seems as if the fear of persecution is not estimated to be worse than a serious harm would be. Therefore, another factor – vulnerability – might explain why refugees and persons to protect should be treated alike or differently.

1) VULNERABILITY IN PHASES 1 & 2

The concept of vulnerability is mentioned in international conventions and resolutions. The UN have included it in their *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*[369], the *Optional Protocol on the Sale of Children*, *Child Prostitution and Child Pornography*[370], the *Convention for the Protection of All Persons from Enforced Disappearance*[371], or the *New York Declaration for Refugees and Migrants*[372]. Nevertheless, the lack of a definition of "vulnerability" or of "vulnerable persons", a term that appears frequently in documents, makes it difficult to grasp the idea. Definitions, when given, often embrace specific groups of persons. For example, the International Law Commission (ILC) included in their *Draft Articles on the expulsion of aliens*[373] that "*Children, older persons, persons with disabilities, pregnant women and other vulnerable persons who are subject to expulsion shall be considered as such and treated and protected with due regard for their vulnerabilities.*"[374]

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[368] *Cf.* Part I.
[369] *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003) at preamble.
[370] *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, 25 May 2000, 2171 UNTS 227 (entered into force 18 January 2002, accession by Canada 14 September 2005, Germany 15 July 2009, by Hungary 24 February 2010) at preamble & art. 9(1).
[371] *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, 2716 UNTS 3 (entered into force 23 December 2010, accession by Germany 24 September 2009) at art. 7(2)(b).
[372] *New York Declaration for Refugees and Migrants*, A/RES/71/1, UNGAOR, 71st Sess (2016) [*New York Declaration*] at paras. 6, 29, 51, 58, 60.
[373] ILC, *Draft articles on the expulsion of aliens, with commentaries*, 66th Sess, 25 March 2014, Doc A/CN.4/670.
[374] *Ibid.*, art. 15(1).

The scholar Truscan explains that vulnerability can have different facets. Those are reflected by *a posteriori* consequences or by specific population groups that are *a priori* vulnerable.[375] A common aspect of vulnerable persons is that their physical or mental health is exposed to a potential injury.[376]

When assessing if refugees and beneficiaries of subsidiary protection should be treated alike, I ask if they are similarly vulnerable in Phase 1 and in Phase 3.

The ECtHR proclaimed several times its opinion on vulnerability by assessing the threats one person is exposed to. In 1981, the ECtHR referred to vulnerability in the context of the "*Wolfenden report*" on homosexuality.[377] In the report, it was defined that citizens who are "*specially vulnerable because they are young, weak in body or mind, inexperienced, or in a State of special physical, official, or economic dependence*" need protection.[378] Thus, asylum seekers who can identify with the characteristics pronounced in the case might be particularly vulnerable (independently from the factor homosexuality).

Case law provides that there are safeguards of fundamental rights which guarantee the right to dignity and protection to vulnerable persons. In 2016, the ECtHR justices considered in *Khlaifia and others v. Italy*[379] that art. 3 of the *ECHR* constitutes a limit to ill-treatment of vulnerable immigrants. In that case, an asylum seeker has experienced an inhuman treatment in a detention facility. Now, States are obligated to ensure that neither torture nor inhuman or degrading treatment or punishment will happen on their territory.[380] In *Khlaifia*, the Court stated that a "*specific vulnerability inherent in their status*"[381] would apply to asylum seekers, but not to

[375] See: Ivona TRUSCAN, "Considerations of vulnerability: from principles to action in the case law of the European Court of Human Rights", (2013) 36 Retfaerd Argang, 36 (2013) 64 at 69f.
[376] *Ibid.*, at 71.
[377] *Dudgeon v. the United Kingdom*, No 7525/76, [1981] *ECHR* 5, (1982) 4 EHRR 149 at 5.
[378] *Sexual Offences Act* (UK), 1967 [*Wolfenden Report*], cited in *Dudgeon v. the United Kingdom*, No 7525/76, [1981] *ECHR* 5, (1982) 4 EHRR 149 at 17.
[379] *Khlaifia and others v. Italy,* No. 16483/12, judgement, (15 December 2016), [ECHR] [*Khlaifia*].
[380] *Ibid.* at para. 161.
[381] *Ibid.* at para. 194.

immigrants per se even if they are in similar circumstances, which distinguishes *Khlaifia* from *M.S.S. v. Belgium and Greece*[382].[383]

In 2011, in *M.S.S.* the Court stated the need to "*take into account that the applicant, being an asylum-seeker, was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously.*"[384] That might extend to groups or not. While the court referred to one person, it indicated that asylum seekers as a group are particularly vulnerable. In a dissenting opinion, Justice Sajó criticized the global approach of vulnerability of asylum seekers. He said that asylum seekers "*cannot be unconditionally considered as a particularly vulnerable group in the sense in which the jurisprudence uses the term*".[385] In his point of view, the term vulnerability should be restricted and only applied to specific cases. Examples would be persons who might suffer from torture or unaccompanied children who migrate without parental company. Furthermore, he argued that no social classification of asylum seekers that would lead to the denomination of a group exist. Instead, any exclusion from privileged or rights asylum seekers might experience would only be temporary.[386]

In the article "The Protection of Vulnerable Groups and Individuals by the European Court of Human Rights",[387] Al Tamimi agrees with Sajó on this point, sustaining that vulnerability needs to be assessed on an individual level instead of a group level. Al Tamimi argues that asylum seekers cannot be considered to be vulnerable as a social group, because the vulnerability of asylum seekers is not necessarily addressed in a collective way.[388] Regarding the same question, Truscan, on the other hand, criticizes Sajó's concept of vulnerability. According to her argumentation, "*vulnerability stems from [the asylum seekers'] lack of knowledge of the system, culture or language of the host country*"[389] and appears when persons are separated "*from the rest of the*

[382] *M.S.S. v Belgium and Greece*, no 30696/09, [2011] I *ECHR* 255 [*M.S.S.*].
[383] *Ibid.*
[384] *Ibid.*, at, para. 232.
[385] *Ibid.*, PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE SAJÓ.
[386] *Ibid.*
[387] Yussef AL TAMIMI, "The Protection of Vulnerable Groups and Individuals by the European Court of Human Rights", (2016) 5 J.E.D.H. 561 at 567f.
[388] *Ibid.*
[389] TRUSCAN, "Considerations of vulnerability: from principles to action in the case law of the European Court of Human Rights", op. cit., at 75.

society".[390] However, similar to Al Tamimi, she estimates that the group criterion is lacking consistency because in her point of view, being part of a group is based on an individual and personal decision.[391]

It is certain that considering a group, instead of an individual, changes the perception of vulnerability. The main question is whether all asylum seekers are part of a vulnerable group. Absolute equality among asylum seekers does not exist. There certainly are persons who provide of more assets or who have already established contacts in the destination country, which could lead to the conclusion that asylum seekers are not a vulnerable group *per se*. Yet, all persons who are seeking asylum in a third-country are in circumstances that do not allow them to stay in their country anymore. As an international asylum seeker, a person does not necessarily know the country he is going to, nor does he know the language spoken in the country.[392] The person is not necessarily familiar with the culture or the society present in the country. Thus, we argue that all international asylum seekers should be regarded as being vulnerable. Vulnerability for international asylum seekers might either end when the person becomes a cum-citizen and is, hence, entitled to certain rights, or at the moment the person truly is an integrated member of the host society, or when the reasons for the need of protection have ceased to exist.

The term asylum seeker, as we argued in Part I applies to all persons in need of protection, irrespectively of the reasons for their flight, i.e. non-dependent on the elements persecution or serious harm. Following the concept of the applicability of the term 'in need of protection' in conjunction with the Court's argumentation in *Khlaifia*, I sustain that in Phase 1 and, subsequently in Phase 2, asylum seekers are in equally vulnerable circumstances.

2) IS THE STATUS OF REFUGEES AND BENEFICIARIES OF SUBSIDIARY PROTECTION COMPARABLE IN PHASE 3?

In Phase 3, the situation changes. Now, I consider only persons who have been granted asylum. Therefore, in Phase 3 all asylum seekers will receive protection. Given the situation, I analyze

[390] *Ibid.*
[391] *Ibid.*, at 76.
[392] That also corresponds to the perception of the UN which says that all migrants are part of a vulnerable group, see Part I.

again if all cum-citizens are in a like situation but this time the analysis will be based on the asylum status, i.e. refugee protection or subsidiary protection.

In Phase 3 the asylum seeker receives either refugee protection or subsidiary protection which depends mostly on the circumstances from Phase 1. In Europe, in Phase 3, beneficiaries of subsidiary protection are in different circumstances, because of the differing rights that come along with the respective protection status. Hence, persons seem to rather be in unlike circumstances in Phase 1.

In Phase 3, the asylum seekers are now cum-citizens and one step further in their way towards a safe and peaceful place where they can stay. However, now there are differences between refugees and beneficiaries of subsidiary protection who have once been part of one and the same group. When beneficiaries of subsidiary protection are living under legally worse conditions than refugees, is it justifiable and tenable to claim that the circumstances in Phase 1 may result in a different treatment?

European human right documents are a source of law when discussing if beneficiaries of subsidiary protection are discriminated against. The *ECHR* says that no one should be discriminated against because of reasons like "*sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*"[393]

Now, interestingly, status is a ground that is not explained further in the *Convention*. Status could refer to social status in a group, but it might also refer to the protection status a person has obtained. There is some case law from the ECtHR, that further defines the approach of status in view of protected persons. In *Hode and Abdi v. The United Kingdom*[394], the question was if a refugee was discriminated against because his demand for family reunification with his wife and child had been denied. After he has obtained asylum in the UK, the claimant had married a woman from Djibouti. He applied for reunification with her and the common child. The British authorities refused the right to reunification which the applicant considered to be unlawful, because his

[393] Art. 14 *ECHR*.
[394] *Hode and Abdi v. The United Kingdom*, No. 22341/09, (6 November 2012).

immigration status as a refugee led to the refusal of reunion.[395] The ECtHR said that in this specific case "*the applicants (…) enjoyed 'other status' for the purpose of Article 14 of the Convention.*"[396] It specified that the notion of status needs to be linked to an analogous situation which referred to immigration status in general. The criteria for the comparison were in the case of *Hode and Abdi* other persons with refugee status who had been married before filing an application for protection, but also students and workers with a temporary residence permit.[397] Hence, the court assessed the question with regard to other persons of the same group and with the same protection status but it furthermore considered persons in a similar situation due to the temporary right to stay on the territory. The limit that justifies an unequal treatment based on status must be "*objectively and reasonable justified*."[398] Specifically, States need a legitimate aim justifiable under the principle of proportionality to treat a person differently because of status. In the case of immigration status, the court indicated that there should not be a different treatment of refugees and persons who settled temporarily in a host-country.[399]

The next question is if the immigration status of persons with refugee protection and subsidiary protection should be equal, according to the interdiction to discriminate against a group. As we have learnt in Part I, different norms apply for asylum seekers when they have been accorded protection.

Art. 14 *ECHR*, the non-discriminatory clause, mentions status which could provide a reasoning for discrimination against beneficiaries of subsidiary protection, because the situation of asylum seekers is comparable. That indicates that the difference made between refugees and beneficiaries of subsidiary protection would be a violation of the non-discriminatory treatment. One decisive issue is that the line between persecution and a serious harm is oftentimes very fine, which the analysis of Phase 1 showed. In certain situations, it is close to impossible to distinguish between a serious harm and the danger of persecution, especially if a person is only persecuted *after* having asked for protection.

[395] *Ibid.*, at paras. 7, 10 11.
[396] *Ibid.*, at para. 48.
[397] *Ibid.*, at para. 50.
[398] *Ibid.*, at para. 51f.
[399] *Ibid.*, at para. 50.

Protection is in all cases conferred based on neutral criteria. Therefore, there might be no discrimination against beneficiaries of subsidiary protection with regard to the granting of a status in Phase 3, i.e. if a person gets refugee protection or subsidiary protection is not decisive at the moment when the person gets protection. Yet, providing different rights **after having granted protection** seems to be a discrimination against beneficiaries of subsidiary protection with regard to status. Is it proportional to assign people who are fleeing from a serious threat a status which is different from the status granted to persecuted people? Should the significant differences made between subsidiary protection and refugee protection be maintained from a liberal point of view? Although all international asylum seekers form part of a vulnerable group, this group dissolves in Phase 3 and becomes, at least in EU Member States, two major groups. In Canada, on the contrary, asylum seekers and cum-citizens will be treated alike.

When distinct countries in the Atlantic region treat all cum-citizens the same, would the reputation of countries that treat cum-citizens differently suffer if awareness grew? Hypothetically, the EU as well as its Member States are not bound to treat beneficiaries of subsidiary protection like refugees, which we analyzed before. There are no international documents that foresee an equal treatment of all asylum seekers. Yet, vulnerable persons shall be treated preferentially, and the ECtHR defined in *M.S.S.* that asylum seekers are per se vulnerable. In practice, many countries, in the EU and beyond, like Spain [400] or Canada, that are historically and culturally connected with Germany and Hungary, do not distinguish between subsidiary protection and refugee protection. The different treatment of refugees and beneficiaries of subsidiary protection in the EU starts in Phase 3, when the asylum seeker becomes a cum-citizens and ends in Phase 4, when the cum-citizen either leaves, obtains a permanent residence permit or gets naturalized.

CHAPTER 4: ARE HUMAN RIGHTS LAW FOR BENEFICIARIES OF SUBSIDIARY PROTECTION?

This Chapter seeks to answer the question if human rights should apply to beneficiaries of subsidiary protection and refugees alike. The law and morality stems from our will. In Canada,

[400] Tribunal Supremo, Madrid, 21 July 2015, (2015), STS: 3651/2015, ECLI: ES:TS:2015:3651 (Spain) at 4.

Germany and Hungary the political system is based on liberal and democratic principles. Consequently, human rights and humanism are underlying principles of these societies. They are expressly affirmed in the German and Hungarian constitutions because both States claim to be liberal democracies.[401] Liberalism parts from the idea that humans are equal. There are, of course, different definitions and concepts regarding equality.

In many political statements regarding asylum, humanitarian ideas are iterated. These humanitarian ideas would be based on the liberal order and principles. Yet, the humanitarian goal to provide a safety net does not argue for an equal treatment for persons in need. Therefore, liberalism and justice will be the main concepts applied in this chapter.

To assure an equal treatment, it is utmost important that discrimination against one group should not be based on race, nationality, the membership of a person to a specific social group, political opinion, or religion. Furthermore, the *ECHR* and thus its signatory States, to which Germany and Hungary also belong, enforces an equal treatment. Among the interdictions to discriminate against a group there are certain characteristics, such as color, language, association with a national minority, property, birth, or other status.[402]Canada, does not explicitly contain the liberal notion in its constitution but the *Charter* still considers liberties to be decisive for the political system.[403]

Human rights treaties provide safeguards for fundamental rights. All three surveyed countries, Canada, Germany, and Hungary, adhered to several human rights documents. Just to mention some of them, again, they adhered to the *ICCPR* and the *ICESCR*, they confirmed the existence and importance of the *UDHR*, they condemn human rights violations, and they incorporated key principles of human rights into their national legislations. Another important document for Germany and Hungary is the *ECHR* which stipulates that every person who is in the jurisdiction of the Contracting States shall enjoy the *ECHR's* rights and freedoms.[404]

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[401] *Cf.* Art. 10(2), 18, 21(2), and further, GBL; Preamble, HBL.
[402] Art. 14 *ECHR*, see also further human rights documents: art. 2(1) *ICCPR*, art. 2(2) *ICESCR*.
[403] *Cf.* Art. 7 *Charter*.
[404] *Cf.* Art. 1 *ECHR*. This means that persons who are on the territory of a Member State are entitled to the provisions of the *ECHR*. ECtHR case law also provides an extraterritorial application of the ECtHR, when a signatory of the *ECHR* has the effective control over a region (*cf. Al-Skeini v. the United Kingdom*, No 55721/07, [2011] IV *ECHR* 199, at paras. 130-150; *Al-Jedda v. the United Kingdom*, No 27021/08, [2011] IV *ECHR* 383, at paras. 75-86). In this study, we only consider the application on a Member State's territory.

The three surveyed countries do not only admit refugees onto the territory but also people who need an additional and complementary protection because of a serious harm or a threat thereto. In Canada, it does, in practice, not make any difference if a person has obtained asylum as a refugee or a person to protect, as the same legislation applies to both groups. In Chapter 2 we explained when the different legislations came into being. Now we could not find out why Canada decided to grant persons in need the same rights as refugees, and why the European countries decided to establish different frameworks for both groups, wherefore in this Chapter, I analyze the right to an equal treatment[405] and the rights that would derive thereof, e.g. respect for private and family life[406] in view of refugees and beneficiaries of subsidiary protection.

While most scholars would not necessarily say that refugees are a privileged group, Mole argued that they are.[407] In her opinion, people who were not recognized as refugees are often suffering from the uncertainty which their status implies.[408] As of today, subsidiary protection provides a protection status that enshrines certain rights (and obligations) for non-refugees. Beneficiaries of subsidiary protection might not have suffered from persecution. They needed to flee because of threats to their life or integrity. Unfortunately, these threats, even though they are comparable to persecution, may limit the right of beneficiaries of subsidiary protection in the host countries. Hence, in the EU, refugees are a privileged group compared to beneficiaries of subsidiary protection. Here, there might be a nexus between human rights, legally granted benefits and international protection, which could prescribe an equal treatment for all cum-citizens.

I extend the research in this part to other European countries that are subject to the CJEU and the ECtHR, as the European supranational case law is binding for the States that accessed the relative Conventions. Germany and Hungary are both Member States to the European Union and to the Council of Europe. In 2011, the presidents of the CJEU and the ECtHR published a joint communication, where they underline the inter-contextual validity of both, the *ECFR* and the *ECHR*, which assure the States' compliance with fundamental human rights.[409] Thus, cases or

[405] Art. 14 *ECHR*.
[406] Art. 8 *ECHR*.
[407] Nuala, MOLE, *Le droit d'asile et la Convention européenne des droits de l'homme*, 3rd ed., (Strasbourg: Éditions du Conseil de l'Europe, 2008) at 10.
[408] *Ibid.*
[409] CJEU, "Joint communication from Presidents Costa and Skouris", Joint communication, 24 January 2011, online: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf> (requested 8 January

decisions that were taken by the Courts in view of cum-citizens' fundamental rights are relevant. Canada considers the European courts as a mean to interpret certain dispositions.[410] In the present chapter, Canada will be included in questions that concern the interpretation of norms of international protection.

A THE RIGHT TO EQUALITY FOR CUM-CITIZENS

Ethics and justice are closely interconnected one to another. The philosophical concept of ethics poses the question of right and wrong, of morality, of a perception of good and bad.[411] Justice is a concept which allows us to decide if an action is morally correct. Further questions of justice in the international order concern equality among States in international relations and the concept of global justice which is focused on the relations between human beings.[412] Here, I rely on the concept of morality and ethics inherent in liberal democracies. After the Second World War, the concept of human equality was introduced. The UNHR explicitly recognized "*the inherent dignity and […] the equal and inalienable rights of all members of the human family*" as the "*foundation of freedom, justice and peace in the world.*"[413] It says that "*[a]ll human beings are born free and equal in dignity and rights.*"[414]

Regarding States and morality, I apply the theories of moral partiality and moral impartiality. From an ethical impartial perspective, contrarily to the partial view, the concept of a universal human equality argues according to egalitarianism that humans should be equal.[415] From a partial perspective, States are moral actors.[416] Consequently, also their agents are legitimate and applying the State's ideals.

2017); by citing art. 52(3) *ECFR* the presidents of the CJEU and the ECtHR specify that the "*the meaning and scope of those rights* [defined in the *ECFR*] *shall be the same as those laid down by the said Convention* [*ECHR*]."
[410] *Cf.*, *United States v. Burns* at paras. 53, 82; *Kindler v. Canada (Minister of Justice)*, [1991] 2 SCR 779 at 820f.; *Febles v. Canada (Citizenship and Immigration)*, 2014, SCC 68, [2014] 3 SCR 431 at paras. 33, 40, 43.
[411] Christine SWANTON, "The definition of virtue ethics", in Daniel C. RUSSELL, ed., *The Cambridge Companion to Virtue Ethics*, (Cambridge University Press, 2013).
[412] Gillian BROCK, "Global Justice", in: Edward N. ZALTA, ed., *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition), online: <https://plato.stanford.edu/archives/spr2017/entries/justice-global/>, (requested 28 August 2018).
[413] Preamble, *UDHR*.
[414] Art. 1 *UDHR*.
[415] GIBNEY, *The Ethics and Politics of Asylum*, op. cit., at 59.
[416] GIBNEY, *The Ethics and Politics of Asylum*, op. cit., at 23.

1) DIVERSE CONCEPTS OF JUSTICE AND EQUALITY REGARDING ASYLUM

Different concepts of justice and equality give starting points for an analysis of beneficiaries of subsidiary protection and refugees should be treated equally. I chose some concepts of justice, which could be applicable to the situation of refugees and beneficiaries of subsidiary protection.[417]

Global justice and international justice are complementary. The former one mostly concerns the behavior of States and State organs regarding aliens. With a view to protected persons, State behavior defines the rights of non-nationals residing legally in their country. Yet, the population that lives in a country goes beyond citizenship. All persons who are on the territory are affected by the rules and laws which the legislative body issues. Therefore, States might also consider in their law-making the interests of protected persons who were accorded shelter.[418] Additionally, concepts of justice define further ideas, linked to equality and fairness. For example, egalitarianism is based on the idea that each person should have access to the same benefits, while the concept of subsidiarity regards which benefits should be allocated to a person based on specific needs.[419]

In asylum law, the question of ethics and morality is also widely discussed and remains, in the academic context, one crucial issue for the development of asylum and international protection for persons in need.[420] For analyzing if the idea of an equal treatment for both groups should be envisaged, I will look further into the concept of subsidiary justice, which provides for an allocation of goods for persons who would otherwise not have access to them. Other groups could provide goods to those in need, which the latter ones would not have access to otherwise.[421] Also compensatory justice provides an argument for treating both groups alike, because it considers social positions which hinder the application of rights to persons.[422]

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[417] For further concepts, please refer to Louis P. POHMAN, Justice, (New York: Routledge, 2016).
[418] *Ibid.*
[419] *Cf.* Christoph LUMER, "Gerechtigkeit", in H. J. SANDKÜHLER, ed., *Enzyklopädie Philosophie*, (Hamburg: Meiner, 1999).
[420] *Cf.* Matthew J. GIBNEY, *The Ethics and Politics of Asylum*, (Cambridge: Cambridge University Press, 2009) at 2.
[421] LUMER, "Gerechtigkeit", op.cit.
[422] *Ibid.*

One important aspect in the concepts of justice and equality is the society that would need to sacrifice goods in order to enable other persons to have access to them. Regarding protected persons, the society in the accepting democratic country is mostly responsible for deciding which rights should be provided. It provides the means and the regulations that grant or deny rights to foreign citizens. In democratic States, the elected government and the legislative body elaborate laws which serve as the foundation for rights that will be granted. Hence, I argue that constitutional State principles can provide an answer to the question if cum-citizens should be granted equal rights.

This question is deeply connected to human rights and the moral acceptance of States thereof. We think that human rights are universal, but even for skeptics, I provide an argumentation that shows that refugees and beneficiaries of subsidiary protection are members of one group and should be treated equally. We have already seen two important aspects of this argumentation: First, I iterate that the lines between refugee protection and subsidiary protection are blurry.[423] Second, I emphasize that it is States which make protected persons unequal.

2) THE MORAL OF STATE ACTS WITH REGARD TO ASYLUM

State acts are the execution of State power which has been conferred upon the State organs by the people. The legislative body sets a legal framework which regulates the relations among the State and the people but also between individuals. Rules need to be based on the constitution, and they need to be legitimized morally and ethically.

The partial perspective provides a simple explanation for State behavior regarding asylum: standards, which are defined in norms, make it possible to evaluate and compare the situation of asylum seekers. A legislative body has decided on the regulations. As the body is legitimized, the rules appearing thereof are morally correct. When legislation sets criteria for protecting persons, decision-makers decide based on their evaluation of an asylum seeker's narrative if a person needs protection. Furthermore, the decision-makers have the obligation to decide which status would be most appropriate for the asylum seeker. In other words, a perceptive analysis decides on the protection status. In Canada and in the EU, it makes a difference if a person gets protection or

[423] *Cf.* Chapter 2A2).

not. Additionally, in the EU, it makes a difference whether a person gets refugee protection or subsidiary protection.

Human beings are the foundation of the State. All citizens constitute the State which is in the meantime governed by those living inside the territory.[424] In a liberal State, I presume that liberalism is the highest doctrine and that the use of State power needs to respect the idea that all humans possess an inherent dignity and equality before the law. By combining the ethical impartial perspective with the concept of global justice, interests should be balanced and considered to be equally important.

A basic default of the concept of morality of State acts is human behavior. Undeniably, humans make mistakes. Autonomous decisions that rely on individual agents can lead to false conclusions. When the decision-making authority errs in deciding if there is an individual need of protection for the claimant, the impact which the decision has can be tremendous. The refusal of protection to an asylum seeker who should have been granted protection is a phenomenon that is present in receiving States. That implies that also the decision if a person is accorded refugee protection or subsidiary protection in the EU can be based on mistakes. This applies in both directions: an agent can also err in finding that a person should be considered to be a refugee, although the reasons for protection are rather related to subsidiary protection.

I now ask if the interest to not be persecuted is equally important as the interest to not face a serious threat with regard to the four-phases-model. I could approach this question based on the question if the results of the act of persecution or the act to inflict a serious harm to a person would be equal in a specific country. If, for example, both actions would result in the grave violation of a basic human right, I argue that both persons would have an equal interest to not be subjected to persecution or a serious harm. Considering that one might lead to a severe violations of individual human rights, while the other one would cause an unequal treatment between different groups within the country but where basic needs would still be supplied for, I would argue that one would be significantly worse than the other. However, in the four-phases-model, I have provided an argumentation that shows that the outcome of persecution or of a serious harm

[424] Ana Filipa VRDOLJAK, "Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law", (2009) 20:4 EJIL 1163 at 1169.

would rather be equal than different. This indicates that the interest to not be persecuted is equally important as the interest to not face a serious harm.

However, when States commit to the idea of human equality, independently from status, how can they not provide equal rights to refugees and beneficiaries of subsidiary protection? The unequal treatment is not based on the origin or nationality, it is not based on the association with a national minority or birth, however, it is linked to status. Not only asylum law provides difficulties when defining the status of a person who needs protection, also other documents like the *CAT* do so.[425] They all deal with similar issues: the question of status and the question of applicability to individuals and to groups. To emphasize this argument, we quote McAdam who said that even though the *CAT* "*triggers eligibility for international protection, [it] does not elaborate the legal status that should be granted to persons recognized as having such a need.*"[426]

When authorities in Germany and Hungary decide to confer a protection status to a person, they deliberately agree to apply divergent rights and restrictions to beneficiaries of subsidiary protection. Thus, they decide to circumvent the concept of human equality. It seems as if they rather accept approaching the blurry lines which might even result in false decisions when conferring protection. False decisions require additional efforts: time, money, and administrative proceedings. Furthermore, what they do is to promote inequalities. While asylum is granted to all cum-citizens, there are no inherent rights linked to asylum. The conference of protection is equal for refugees and beneficiaries of subsidiary protection but not the privileges which apply afterwards.

What I see is a large gap between concepts and status. One gap is present between the concept of asylum and the status of protection. The concept of asylum only defines that persons in need require protection. The status it confers relies in the competence of the protection States. The second gap I see is the difference between international protection and equality. The concept of protection does not prescribe that all protected people should be granted the same rights. The third and last gap I see is the gap between asylum, equality and liberalism. Although liberal States part

[425] Art. 13 *CAT.*
[426] MCADAM, *Complementary Protection in International Refugee Law*, op. cit., at 209.

from the concept that human beings are equal, they treat protected people not alike. In consequence, there are three large gaps that need to be tackled.

Most of the differences between refugees and beneficiaries of subsidiary protection come into being because of national legislations. Before becoming cum-citizens, asylum seekers are one group. Only ex-cum-citizens cease to be part of the group of protected persons.[427]

B HUMAN RIGHTS DERIVING FROM THE PRINCIPLE OF EQUALITY

Human rights derive from the principle of equality. The same rights and obligations should be granted to all persons who are in like situations. Nobody who is part of one and the same group should be discriminated against. Human rights are applicable in like situations without discrimination against a group, except if limitations are indispensable according to the principles of necessity and proportionality.[428] The limits to international human rights can be found in international law as well. International criminal law, for example, constitutes valid reasons for limiting a person's right to freedom, for example, as it happened in the case of *Mugesera*.[429]

I want to emphasize that in my opinion, asylum, despite the idea that asylum seekers and cum-citizens should be seen as one group, can and should only be conferred protection because of individual circumstances. Each asylum seeker gets protection because of the circumstances which led to the individual threat. Abstractly. they form part of the same group when they need to flee and when they are cum-citizens, wherefore States should treat all cum-citizens equally.

1) EXAMPLE: THE RIGHT TO FAMILY REUNIFICATION

[427] *Cf.* Chapter 3B, the four-phases-model.
[428] Nihal JAYAWICKRAMA, *The Judicial Application of Human Rights Law – National, Regional and International Jurisprudence*, (Cambridge: Cambridge University Press, 2002) at 179.
[429] *Mugesera v. Canada,* op. cit.

In order to explain why an unequal treatment of beneficiaries of subsidiary protection and refugees contravene the principle of equality, I will give the example of the right to family reunification.

One essential right which refugees can claim but not beneficiaries of subsidiary protection, is the right to their family who is still abroad by family reunification. The *UDHR* and the *ICCPR* value the family and the protection thereof. The *UDHR* expresses that "*(1) Men and women of full age (...) have the right to marry and to found a family. (...) (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*"[430] Also the *ICCPR* defines the family as "*the natural and fundamental group unit of society (...) entitled to protection by society and the State.*"[431] Similarly, the *ICCPR* notes that it is "*the right of men and women (...) to marry and to found a family*".[432] Last, the *ECHR* says that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.[433]

The definition of family is not completely clarified. In Canada, for example, there is no legal definition of the term family. In the 2016 census,

> "'Census family' [was] defined as a married couple and the children, if any, of either and/or both spouses; a couple living common law and the children, if any, of either and/or both partners; or a lone parent of any marital status with at least one child living in the same dwelling and that child or those children."[434]

Germany gives "*[m]arriage and [...] family [...] the special protection of the State*".[435] A legal definition of family does not exist either and the interpretation changes as law and society evolve.

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[430] Art. 16(1),(3) *UDHR*.
[431] Art. 23 (1) *ICCPR*.
[432] Art. 23(2) *ICCPR*.
[433] Art. 8 *ECHR*.
[434] *Cf. Dictionary, Census of population*, "Census family", (2016) Canada, online: <https://www12.statcan.gc.ca/census-recensement/2016/ref/dict/fam004-eng.cfm> (requested 28 August 2018).
[435] Art. 6 *GBL*.

A common legal understanding is mostly focused on the (married) couple of either sex and their common or adopted children.

In Hungary, "*[f]amily ties shall be based on marriage and/or the relationship between parents and children*"[436], while marriage is "*the union of a man and a woman established by voluntary decision*".[437] The country also accords warrants the family's protection.

In the Hungarian interpretation, family concerns opposite-sex spouses and, if any, their children. In Germany also same-sex couples, independently from their marital status, can constitute a family but it seems as if parental-children relations are necessary in order to be seen as a family.[438] In Canada, families can be composed in various constellations. Couples, independently from their sex and marital status, are considered as a family, as well as their children. All three definitions include an emotional bound and relationship between the family and its members. Regarding the individual domestic legislations, (married) spouses and their children definitely constitute a family.

These provisions and definitions are the basis for the analysis of the question, if EU Member States, and particularly Germany and Hungary, should grant beneficiaries of subsidiary protection the same right to reunite with their family, as they do regarding refugees.

Family is a very important aspect of most peoples' lives. At the meantime, it is the foundation of our societies.[439] When asylum seekers leave their country, they oftentimes also leave part of their family. Asylum seekers who go to Germany, for example, are often young men who travel on their own. In many cases they want to prepare the circumstances for their families' subsequent arrival and to ensure that the living conditions for their family will be met upon arrival.[440]

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[436] Art. L *HBL.*
[437] *Id.*
[438] *Cf.* art. 1589 *Bürgerliches Gesetzbuch* (Civil Code), 2 February 2002, BGBl. I S. 42, last amendment 20 July 2017, BGBl. I S. 2787.
[439] Art. 16(3) *UDHR*, art. 23(1) *ICCPR*, art. 10 *ICESCR*; Germany: Bundesverfassungsgericht (Federal Constitutional Court), Karlsruhe, 17 January 1957, BVerfG 1 BvL 4/54, at para. 43; Hungary: *Act CCXI of 2011 on the Protection of Families*, December 2011, at preamble.
[440] See FOMR, "Aktuelle Zahlen zu Asyl", November 2017, online: <http://www.bamf.de/SharedDocs/Anlagen/DE/Downloads/Infothek/Statistik/Asyl/aktuelle-zahlen-zu-asyl-november-2017.pdf?__blob=publicationFile> (requested 5 January 2018) at 7; Eurostat, "Asylum Statistics: tables

In Canada, all cum-citizens have the right to reunite with their family through the family class.[441] There are two distinct programs. One is for resettled refugees, the other one for cum-citizens who were accepted in Canada after applying at the border or from inside the country. A cum-citizen must indicate the family members that might join in the application form, if they might go to Canada, too.[442] Canada grants permission to reunite during a **One-year window of opportunity** (OWO)[443] in the resettlement program. A protected person in Canada can ask for reunification with relatives and dependent persons who have been identified in the asylum-application-form.[444] When an applicant lodges a request from inside Canada or at the border, the applicant also must identify the family members that he is applying for.[445] Unlike in the OWO-procedure, the applicant can only file an immediate request for accompanying family members that are present in Canada.[446] Meanwhile, family members that do not accompany the applicant are admissible for a permanent resident visa.[447] In that case, cum-citizens could become sponsors for their relatives or include them in an application for the permanent residence.[448]

In the EU, the *European Directive on the right to family reunification*[449] and the *Qualification Directive* set the guidelines on family reunification. When it comes to the question if protected persons can apply for family reunification, the *Reunification Directive* does neither apply to asylum seekers whose status is not yet decided on[450] nor to subsidiary protected persons[451] but it applies to persons recognized as refugees.[452] That seems to diverge from the *Qualification Directive's* content which specifies in Chapter VII that family unity shall be ensured.[453] Here, the

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and figures", at Figures 5 & 6, (MS Excel), 2016, online: <http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics> (requested 5 January 2018).
[441] Part 7, *IRPR.*
[442] Art. 117(9)(d) *IRPR.*
[443] IRCC, Manual, IP-3, "In-Canada Processing of Convention Refugees Abroad and Members of the Humanitarian-Protected Persons Abroad Classes" (7 October 2011).
[444] IRCC, Guide 6000, "Convention Refugees Abroad and Humanitarian Protected Persons Abroad" (as of 8 January 2018).
[445] IRCC, Doc. IMM0008, „Generic Application Form for Canada" (as of 8 January 2018).
[446] *Cf.* IRCC, Guide 6000, "Convention Refugees Abroad and Humanitarian Protected Persons Abroad" (as of 8 January 2018).
[447] Art. 68(c) *IRPR.*
[448] Art. 141 *IRPR.*
[449] *COUNCIL DIRECTIVE 2003/86/EC of 22 September 2003 on the right to family reunification*, [2003] OJ, L 251/12 [*Reunification Directive*].
[450] Art. 3(2)(a)-(c) *Reunification Directive.*
[451] Art. 3(2)(c) *Reunification Directive.*
[452] Art. 9 *Reunification Directive.*
[453] Art. 23 *Qualification Directive.*

personal scope of Chapter VII, which includes the right to family reunification "*shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated*".[454] The wording in the article that concerns family unity does not indicate that a difference between refugees and beneficiaries of subsidiary protection could be justified. However, the *Qualification Directive* refers only to family member who are themselves eligible for international protection.[455] However, the limitation of the wording "unless otherwise indicated" provides a basis for national restrictions of the right to reunification.

Yet, the current legislation which concerns subsidiary protection is not as concrete as the regulations concerning refugee protection. Consequently, EU Member States must allow family reunification for refugees but can decide if they grant the right to reunite to subsidiary protected persons, although they shall maintain family unity. In practice, the Member States still have the right to limit the right to family unity for subsidiary protected persons. The European Commission suggested in a proposal for the revised *Qualification Directive*[456] to "*raise the level of rights of beneficiaries of subsidiary protection (...) and their family members*"[457] but the proposal has not (yet?) been accepted by the Member States.

Germany's legislation was similar to Canada's framework concerning reunification for refugees and beneficiaries of subsidiary protection until March 2016.[458] In general, international protection entailed the right to ask for family reunification for three months following the recognition.[459] The right to family reunification has been suspended for people who are granted subsidiary protection from March 2016 until March 2018 resulting from the large asylum seeker influx 2015.[460] The latest bill foresees that beneficiaries of subsidiary protection may ask for family

[454] Art. 20(2) *Qualification Directive.*
[455] Art. 23(3) *Qualification Directive.*
[456] Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, [2009] COM/2009/0551 final (no longer in force), at art. 23.
[457] *Ibid.*, Summary, Title "8. Family members".
[458] Art. 29(2.1.) *Residence Law*
[459] Art. 29(2.1) *Residence Law*
[460] Deutscher Bundestag, "Gesetzesentwurf zur Einführung beschleunigter Asylverfahren", No 18/7538 (16 February 2016). (Bill to introduce accelerated asylum procedures.) and *Gesetz zur Einführung beschleunigter Asylverfahren*, (16 March 2016) BGBl. I S. 390 at art. 2(4). Transitional disposition to temporarily modify art. 104(13) *Residence Law*.

reunification. [461] Yet, Parliament set a limit of 1,000 persons per months that may enter Germany as family members of beneficiaries of subsidiary protection. The question of who will be granted the right to reunite is not completely clarified. Parliament foresees to treat persons who have a particular humanitarian need to be reunited preferentially. That means that especially parents of minor beneficiaries of subsidiary protection, and children and spouses of persons who have been granted subsidiary protection be accorded family reunification.[462]

Also in Hungary, the law allows family members of persons with refugee status to apply for reunification.[463] Regarding beneficiaries of subsidiary protection, the Asylum Act allows accompanying family members to enter the country when the application has been submitted jointly or when an application for reunification has been submitted before the primary applicant has been granted protection.[464] Hence, Hungary and Canada have a similar approach but Germany applies more restrictive measures.

Germany argues that it must weigh the interest of the right to family reunification. The respective interests of the public and those of the protected persons are concerned.[465] Steering and regulating migration would be concerned as the public interest which Germany presents.[466] Territorial sovereignty and the admission of aliens seems to be the decisive reasons. The interdiction to reunite would be congruent with the limits to family life that are specified in the *ECHR* and which precisely say that "*there shall be no interference by the public authority with the exercise of [the right to respect for private and family life] except […] in accordance with the law and is necessary in a democratic society […]*".[467]

This argument is rather utilitarian, especially when we see that refugees who have also applied for protection have the right to reunite with their family.[468] Beneficiaries of subsidiary protection

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[461] *Cf.* Deutscher Bundestag, "Gesetzesentwurf zur Neuregelung des Familiennachzugs zu subsidiär Schutzberechtigen", No. 19/2438 (4 June 2018). (Bill to introduce a new regulation regarding family reunification).
[462] *Cf.* Deutscher Bundestag, "Gesetzesentwurf zur Neuregelung des Familiennachzugs zu subsidiär Schutzberechtigen", No. 19/2438 (4 June 2018). (Bill to introduce a new regulation regarding family reunification).
[463] *Cf.* Art. 19 (2) *Residence Act.*
[464] *Cf.* Art. 13 *Asylum Act*.
[465] *Cf.* Deutscher Bundestag, "Gesetzesentwurf zur Neuregelung des Familiennachzugs zu subsidiär Schutzberechtigen", op. cit., at 2.
[466] *Ibid.*, at 2f.
[467] Art. 8(2) *ECHR*.
[468] Art 29(2) *Residence Law*.

have the right to reunite with their family if there is a necessity, based on humanitarian reasons which could be the protection of children or when the family is still endangered because of the conflict present in the country of origin. However, once the family is outside the country, the right to reunite gradually diminishes. There are particular situations; if, for example, the family of a person who got subsidiary protection is unsafe in a third-country, the protected person could file a demand for reunification. Yet, if the family is in a safe third-country, there is, according to the State's view, no immediate need for reunification, except if one member of the family depends from the other one.[469] That means that the parents of a minor child who got subsidiary protection could be granted the right to reunite, if the child was alone in the host country. Vice versa parents could ask for the reunification with their child if the latter one was in another safe third-country. However, if a family of five persons with two parents and three children is separated and two children are with on parent while one is with the other one, the right to reunite is not instantly given.

This situation tears family apart. The State justifies the deny of family reunification with the argument that all children have someone who can provide for them. Furthermore, the State prioritizes those families where a clear dependency or an imminent danger is present. Based on the costs of asylum, the State opts out when it comes to the question if families who are torn apart should have the same right to reunite as refugees or families in precarious situations do. This is a utilitarian argumentation. It is based on reasons which we will further analyze in Chapter 5. A system which cannot carry a burden needs to find a way to cope with the situation. There might be the need for introducing restrictive measures which grant, accordingly to subsidiary justice, more rights to persons that have a more apparent need. Nonetheless, German judges, by introducing restrictive measures, that refugees have a more legitimate need to reunite with their family. Furthermore, it seems even less correct morally to justify that some beneficiaries of subsidiary protection have less rights than other ones, with regard to the principle of egalitarianism.

[469] *Cf.* Deutscher Bundestag, "Gesetzesentwurf zur Neuregelung des Familiennachzugs zu subsidiär Schutzberechtigen", op. cit., 22ff.

Is the different treatment a violation of art. 23 *Qualification Directive*? A recent judgement from the Administrative Court of Berlin decided that family reunification must be granted to beneficiaries of subsidiary protection in certain cases.[470] The claimant was a Syrian adolescent who came to Germany in July 2015. He suffered from mental health problems because of what he has lived in Syria and during the flight. The court decided that in this specific case, the *Convention on the Rights of the Child*[471] and the right to the protection of the family[472] must be ensured and that the well-being of the child was utmost important.[473] According to the court's arguments, there was no legal basis for treating beneficiaries of subsidiary protection like refugees, mostly because subsidiary protection would require, ideally, a shorter period of protection than refugee protection.[474] While the temporary suspension of the family reunification of beneficiaries of subsidiary protection could be justified, vulnerable persons have the right to demand family reunification because of humanitarian reasons.[475]

Yet, according to the *ICCPR* and the *ECHR*, the right to a family and to family life is enshrined in international law. Even though there are exceptions and limits to the right, the question is: How are these exceptions compatible with international law, and, furthermore, how are they congruent with a liberal democracy that makes human rights part of its own fundamental law?

The answer is not given in international law either, nor in the interpretation thereof. We can hardly apply an international covenant that grants certain rights but does not have binding legal consequences. Neither can we apply the *ECHR* if it provides an exception clause the State may have chosen to 'freeride' on. Rather, the answer lies again in the morality of States and their ethical responsibility for treating humans equally. Arguments that justify the exception to family reunification for beneficiaries of subsidiary protection refer oftentimes to realism and economics. Claim are that it is difficult to accept more persons than those cum-citizens who are already on the territory. Furthermore, an argument against family reunification is that it hinders the integration. Some persons indeed fear so-called "parallel societies" which work according to

[470] Verwaltungsgericht (Administrative Court), Berlin, 7 November 2017, VG K 92.17 V (Germany).
[471] *Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[472] Art. 6 *GBL.*
[473] Verwaltungsgericht Berlin, VG K 92.17 V, op. cit., at 11f.
[474] *Ibid.*, at 27.
[475] *Ibid.*, at 14ff.

different norms and cultural standards.[476] A shrinking social acceptance of new arrivals could be a reason for limiting the access to the country for asylum seekers. The opinion of the people is certainly important. Though, there is no unique public opinion about migration and asylum in societies.[477] The certainty that concurring opinions on asylum exist makes it more feasible and realistic to let the discussion remain in a discourse about constitutional values and norms.

Morally, refugees and beneficiaries of subsidiary protection are part of the same group and they should both be provided the right to protection of the family. As international declarations, conventions, and national laws define it, family is the basis of our societies and characterized by the emotional bond between the members. To not be granted the possibility to reunite with one's family can have traumatic impacts on cum-citizens. The doubt of not knowing what happens to the family abroad and the uncertainty that cum-citizens may face, demand a humanitarian solution. People who flee because of a threat to death, because of torture or a cruel or unusual punishment, or because of arbitrary violence have been in a situation where they suffered. Now, democratic liberal States which grant asylum should also permit cum-citizens to reunite with their families abroad because otherwise they would contravene human rights, fundamental rights, and, most important, their own humanitarian ideas and values. To treat cum-citizens differently in terms of the right to family is a cruel act and should not be supported. Instead, it should be the State's duty to provide equal human rights for all cum-citizens, that allow them to live a life free from fear.

2) EXAMPLE: THE RIGHT TO FREE MOVEMENT WITHIN A STATE

Another example was the exclusion of beneficiaries of subsidiary protection from the freedom of movement in Germany. Refugees always had the right to freedom of movement within the territory of the host State, while beneficiaries of subsidiary protection needed to stay at a

[476] *Cf.* Deutsche Welle, "Hungary's Orban tells Germany: 'You wanted the migrants, we didn't'", 8 January 2018, online: <https://www.dw.com/en/hungarys-orban-tells-germany-you-wanted-the-migrants-we-didnt/a-42065012> (requested 2 September 2018).
[477] Cf. for example: New York Times, "German Far Right and Counterprotesters Clash in Chemnitz", 28 August 2018, online: < https://www.nytimes.com/2018/08/28/world/europe/chemnitz-protest-germany.html > (requested 2 September 2018).

designated place when integration required it. That might have been rational choice. Yet, the argument cannot be explained by moral standards.

The German *Residence Law* demands, for example, that a protected person needs to stay in one specific place if the person receives social aid.[478] Yet, this rule applies exclusively to beneficiaries of subsidiary protection. Refugees are granted free movement, according to the *Geneva Convention*[479], except in cases where general conditions apply to aliens in like circumstances. This disposition was submitted to the CJEU for a preliminary ruling[480] when two beneficiaries of subsidiary protection complained over a residence obligation requiring them to reside in specific municipalities. The critical issue was that refugees were not subjected to this rule. Germany's argument was that the introduction served "*for the purpose of ensuring an appropriate distribution of the burden of public social assistance*".[481] The CJEU did not pronounce a distinct opinion in that case. It rather affirmed the disposition. Although it said that

> "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"[482],

the court also stated that the *Qualification Directive's* was not applicable "*since beneficiaries of subsidiary protection status and German nationals are not in a comparable situation so far as the objective of facilitating the integration of third-country nationals is concerned [Directive 2011/95 is not relevant]*",[483] which referred to the principle that refugees should be treated like nationals in view of public relief and assistance.[484]

The difficulty to integrate into Germany allowed for specific residence obligations for beneficiaries of subsidiary protection, which other third-country nationals, including refugees,

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[478] Art. 12a *Residence Law.*
[479] Art. 26 *Geneva Convention.*
[480] *Kreis Warendorf v. Alo* and *Amira Osso v. Region Hannover*, Joined Cases C-443/14 & C-444/14, (1 May 2016) [*Alo and Osso*].
[481] *Ibid.,* at para. 13.
[482] *Ibid.,* at para. 32.
[483] *Ibid.,* at para. 59.
[484] *Ibid.*, at para. 51.

were not subjected to.[485] The court indicated that States should treat beneficiaries of subsidiary protection as favorable as other third-country nationals with a temporary residence permit who obtain social assistance. States should not *per se* treat beneficiaries of subsidiary protection differently than third-country nationals who are in Germany because of reasons that are not linked to humanitarian or political situations or to international law dispositions in terms of residence obligations.[486]

Yet, the CJEU did not answer the question whether a residence obligation for subsidiary protected persons can be justified through integration measures to the German national court.[487] The German court decided that the limitation to free movement and choice of residence would constitute a violation of the *Qualification Directive's* dispositions which entitle cum-citizens to exactly these rights.[488]

This example demonstrates that States also introduce regulations that are not in line with international or supranational law. If beneficiaries of subsidiary protection and refugees would be treated alike, the possibility that official decision-makers err when granting a protection status would mitigate the harm which beneficiaries of subsidiary protection might suffer because of a lack of rights that go hand in hand with the status.

Instead of providing a legislation that would respect human rights and liberal principles, States may enact restrictive regulations because of economic reasons or because of social constraints. With regard to the choice of residence and free movement within the Member State, integration and the sharing of social services' costs is considered to restrain fundamental rights and consequently liberal values. That shows that the meaning of basic human equality is opposed to rational arguments which limit them. In terms of humanitarian values and liberal principles, a different treatment of refugees and beneficiaries of subsidiary protection cannot be justified. Based on a debate about values, only the public opinion, which does not exist in case of asylum, might provide reasons for restraining rights. These reasons would need to be developed in a public and political discussion. Based on rational choice, economic arguments could provide for

[485] *Ibid.,* at paras. 61-64.
[486] Ibid., at Tenor.
[487] *Ibid.,* at decision, para. 3.
[488] Art. 29, 33 *Qualification Directive.*

reasons to restrict asylum. Although I think that economic reasons should not be the *main* criteria to limit human rights, I will provide a statistical analysis of economic costs and benefits of asylum to verify if utilitarian arguments could provide grounds to treat beneficiaries of subsidiary protection differently than refugees.

CHAPTER 5: STATISTICAL ECONOMIC ANALYSIS OF ASYLUM

This chapter approaches the question of the benefits of a separate treatment of beneficiaries of subsidiary protection and refugees from a utilitarian perspective. It seeks to clarify with an economic analysis based on statistics whether the utility of asylum could be improved by providing similar rights to beneficiaries of subsidiary protection. It also seeks to answer the question if economic aspects could be the reason for artificially establishing two different forms of protection between Phase 2 and Phase 4.

By providing statistics about the number of cum-citizens in each country and the status granted, I will conclude Part II with a comprehensive rational and utilitarian argumentation about the administrative costs linked to cum-citizens. Abstractly, I also analyze if a change in legislation that implies an equal treatment of cum-citizens could be beneficial for the EU, Germany and Hungary and the European societies.

In the introduction, I underlined three characteristics of asylum policy: There are humanitarian aspects, moral aspects and realist aspects. From a humanitarian perspective, it is "the right thing" to accept people in need of protection and to provide them with rights and benefits. From a moral perspective, States have principles which define which rights they can offer to cum-citizens; but they also define limits to these rights. Last, I also have to consider the realist approach. Regarding the realist approach, I will analyze the costs of asylum, how protected persons can actually benefit States, and whether States and societies could experience increasing benefits if cum-citizens were treated alike.

I used data for the years 2013 until 2017, to evaluate how protection and asylum granting changed over the last years, in function of the program included or the protection granted.[489]

[489] See Annex II for the statistics from 2013-2016.

In the statistics for Canada, asylum seekers entered the country either through a resettlement program, or they crossed the border. Only in the latter case will an asylum hearing take place in the country and the protection status will be determined.

The German statistics do not include the very limited resettlement program. This is why only the numbers of asylum seekers who have entered the country and the number of accommodated persons, including the protection status they obtained (refugee protection and subsidiary protection) will be provided. The German system specifies in its *Basic Law* that protection will be given to politically persecuted persons[490] which is indicated separately in the asylum statistics. I include also this group under "refugee protection".

Hungary considers refugees, subsidiary protection and tolerated persons in its statistics, which I include in the data.[491]

The main objective of including a statistical part is to provide another, utilitarian, perspective on asylum. However, it is important to mention that statistics do not necessarily reflect the reality. One aspect is that Hungary, for example, hinders asylum seekers from entering the territory. Not only did the country establish a border fence, but they also consider Serbia, their neighbor country, to be a "safe country of origin" wherefore they send asylum seekers who try to cross the Hungarian border back to Serbia.[492] This practice has not been adopted by other EU Member States who consider the *refoulement* to Serbia as a breach of the principle of non-*refoulement*.[493] These securitization measures make it impossible to know about the number of persons who should have been granted protection in the country.

Another obstacle to comparing the number of protected persons is that Canada has specific programs that regulate the entry of asylum seekers and cum-citizens, which the other countries do not have in this extent. Together with the fact that it is quite remote geographically, the overall number of asylum seekers is lower than the one of the European States. Germany is a country that has no external EU borders (except the Nordic and the Baltic Sea) and experiences,

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[490] Art. 16a *GBL*.
[491] See Annex II.
[492] See also Chapter 2B. Hungary's decision is based on the *Council Decision 2007/819/EC of 8 November 2008 on the conclusion of the Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation*, [2007] OJ, L 334/45.
[493] Verwaltungsgericht (Administrative Court), Berlin, 4 March 2016, 23 K 26.16 A (openJUR 2016, 5799), at para. 26.

therefore, less asylum seekers who arrive directly at the border. However, Germany experienced also increased inflows at the border because it is a destination country of asylum seekers, not a transit country where people rather pass through. Thus, the statistics section provides a macro perspective which does not concern individual cases.

A HOW DO COUNTRIES' ACCEPTANCE STATISTICS COMPARE?

For analyzing if the asylum system could be improved from a utilitarian point of view, I will evaluate the number of persons who receive protection and the protection status conferred. Therefore, the recognition rate will be provided.

Grant and Rehaag studied the behavior of refugee adjudicators in Canada in view of the outcome.[494] They found out that the overall Canadian recognition rate under the current assessment system is at about 63%.[495] The **recognition rate** for claimants who arrive at the border[496] is complex to define. Not all claims lodged in one year will be decided on the merits in that same year. Therefore, at the end of each year there are still pending cases which will only be finalized in the year to come. Still, for the purpose of approximately defining acceptance rates, the total number of protected persons for the period from 2013 until 2016 divided by the total number of requests would be an indicator. According to this mean, Canada would have an recognition rate of 44.88%, Germany one of 40.95% and Hungary's rate would be 0.69%. Those numbers might indicate overall that Hungary refuses more asylum seekers than Canada and Germany do. An alternative explanation could be that claims are abandoned or withdrawn.

Another model to define the **recognition rate**, suggested by Grant and Rehaag, is to calculate how many asylum seekers have been accorded protection on the merits. There are no data available for Hungary. This option excludes abandoned and withdrawn claims as well as any other claims that did not proceed to the official decision and leaves out pending claims, too.[497] According to this approach, Canada's recognition rate was between 61 and 67.6% during the

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[494] Angus GRANT & Sean REHAAG: "Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System", (2016) 49 UBC L Rev 203 (LEXIS NEXIS).
[495] *Ibid.,* at Table 1 and Table 2.
[496] We do not include resettled persons in this rate, because their protection has been agreed on before they arrive in the country.
[497] GRANT & REHAAG: "Unappealing: An Assessment of the Limits on Appeal Rights in Canada's New Refugee Determination System", op. cit., at para. 36.

four years, with an average of 65.1%. Germany's rate constantly increased from 39.3% in 2013 to 71.4% in 2016 with an average of 55%. The numbers indicate that both countries assume the obligations to protect persons in need.

One third and last model to define the **recognition rate** would be to calculate the number of protected persons for each year, based on the number of incoming asylum seekers. Although this option does not reflect the actual acceptance rate, it indicates how the countries compare. The Canadian recognition rate was about 30% in 2013 and increased significantly to 52% in 2014.[498] Germany accepted 15.85% in 2013 and 20% in 2014. Hungary accepted 2.22% in 2013 but only 1.13% in 2014. In the following two years, we could see that the overall acceptance rate increased in Germany (29.56% in 2015, 58.2% in 2016), related to increasing inflows. Although Hungary faced equally increasing number of asylum seekers, the acceptance rate stayed very low at 1.13% in 2014, 0.29% in 2015 and 1.47% in 2016. Canada's rate was at 52% in 2015 and 42.7% in 2016. The numbers for Canada and Germany are significantly lower than under this approach. Also, the average acceptance rates based on this model are lower than in the second model; 44.9% for Canada and 43.9% for Germany. Hungary's average rate would be 0.96% under this model. The numbers suggest that Hungary's recognition rate would, overall, remain low compared to the other two countries, even if there were data available to calculate the recognition rate under the second model.

It is, furthermore, from interest to see how EU Member States compare with each other regarding the granting of different protection status. Numbers that indicate the qualitative relation of refugee protection and subsidiary protection will be shown. Canada is excluded in these calculations because it does not provide statistics for the different acceptance numbers; all incoming persons are subsumed under protected persons. Thus, the decision if an asylum seeker should rather be granted refugee protection or an additional protection remains within the competence of each functionary, yet, a positive decision on asylum will grant people the same rights.

I provide these numbers for the period from 2015 until 2017 under the third model:

[498] IRB, "Refugee Protection Claims Statistics", 2013, online: <www.irb-cisr.gc.ca/Eng/RefClaDem/stats/Pages/index.aspx> (requested 8 January 2018).

	2017	Recognition	2016	Recognition	2015	Recognition
Asylum seekers	2,297	-	29,432	-	177,135	-
RP[499]	106	4.6%	154	0.5%	146	0.08%
SP[500]	1,110	48.3%	271	0.9%	356	0.2%

TABLE 1: CUM-CITIZENS IN HUNGARY

	2017	Recognition	2016	Recognition	2015	Recognition
Asylum seekers	603,428	-	695,733	-	282,726	-
RP[498]	123,909	20.5%	256,136	36.8%	137,136	48.5%
SP[499]	98,074	16.3%	153,700	22.1%	2, 072	0,6%

TABLE II: CUM-CITIZENS IN GERMANY

	2017	Recognition	2016	Recognition	2015	Recognition
Asylum seekers	47,425	-	23,250	-	16,592	-
Cum-Citizens	13,553	28.6%	9,972	42.9%	8,596	51.8%

TABLE III: CUM-CITIZENS IN CANADA

[499] Refugee Protection.
[500] Subsidiary Protection.

The OECD showed in its *2016 International Migration Outlook* that recognition rates in 2015 were high in Europe with a general average of 52%[501] and particularly elevated for Syrians and Iraqis. In Germany, Syrians and Iraqis were recognized as refugees with a rate of "*close to 100%*".[502] According to FOMR documents, 85.5% of Iraqi and 94.7% of Syrian asylum seekers were accepted as refugees in Germany.[503] When granting protection, it was common practice to confer refugee protection in 2013 (54.23%[504]), 2014 (82.12%[398]) and 2015 (97.32%[398]), where most protected persons were recognized as refugees. Nevertheless, in 2016, there was a change: even though refugee protection was conferred more often than subsidiary protection, significantly more people were recognized to be in need of subsidiary protection (35.42%[398]) and the granting of refugee protection dropped (59.03%[398]). When we look at the 2016 statistics, we can see that especially Iraqis and Syrians were, in comparison to 2015, more likely to receive subsidiary protection (Syrians: 41.2%, Iraqis: 15.5%) instead of refugee protection (Syrians: 56.2%, Iraqis: 15.9%).[505]

In the same period, in Hungary, refugee protection overall decreased over the chosen timeframe until 2016 (2013: 47.26%, 2014: 49.69%, 2015: 28.75%, 2016: 35.65%). Subsidiary protection seemed to be the preferred choice by decision makers (2013: 1.13%, 2014: 48.86%, 2015: 70.08%, 2016: 62.73%). It is very interesting to see how especially Hungary changed its practice over time. In 2015, 65,085 Syrians submitted asylum applications, of which 19 got refugee protection while 140 got subsidiary protection. Of the 9,158 Iraqis who asked for protection, 6 got refugee protection and 40 got subsidiary protection.[506] Yet, that does not mean that the asylum seekers were sent back to their countries of origin. Instead, border countries like Hungary accompanied those asylum seekers to another border, where the claimants should enter another country which was supposed to avoid the application of the *Dublin III Regulation*.[507]

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[501] OECD (2016), International Migration Outlook 2016, (Paris: OECD Publishing) at 33.
[502] *Ibid.*, at 15
[503] FOMR, "Antrags-, Entscheidungs- und Bestandsstatistik 2015", obtained via e-mail upon request by DESTATIS (Federal Office for Statistics, Germany). Subsidiary protection was granted to 0.1% of Syrian applicants and to 1,7% of Iraqi applicants.
[504] Of protected people (also including tolerated persons).
[505] FOMR, "Antrags-, Entscheidungs- und Bestandsstatistik 2015", "Antrags-, Entscheidungs- und Bestandsstatistik 2014", "Antrags-, Entscheidungs- und Bestandsstatistik 2013", obtained via e-mail upon request by DESTATIS (Federal Office for Statistics, Germany).
[506] Statistics obtained via e-mail upon request by the Hungarian Immigration and Asylum Office.
[507] *Cf. A.S. v Sloveni,* C-490/16 & *Jafari*, C-646/16, Opinion of AG Sharpston, 8 June 2017, at paras. 41-58.

The causes for asylum are manifold. For Syrian asylum claimants, receiving subsidiary protection was a result of the ongoing crisis in Syria, where most persons were accorded asylum under article 15(c) *Qualification Directive*.[508] Similarly, Iraqis were rather considered to be victims of indiscriminate violence than being persecuted persons.[509] Furthermore, in Syria and in Iraq the activities of the Islamic State of Iraq and the Levant (ISIL), a non-State extremist and terrorist actor present in Iraq and Syria, include persecuting persons who are part of religious groups which do not have the same ideology as ISIL.[510] ISIL-members are Sunnite militants who also persecute other Muslims, who follow different interpretations of Islam.[511] Hence, States must also carefully evaluate on an individual level, if persons who have lived in areas where ISIL is present have been or are endangered to be persecuted.

There are overall tendencies that the paradigm of asylum is shifting in the direction of subsidiary protection in the EU.[512] It seems to be more likely that today's circumstances qualify asylum seekers for subsidiary protection and not for refugee protection, even though there are many signs which indicate that this system has its flaws. Among them, uncertain situations, e.g. when indiscriminate violence is linked to persecution or when an asylum claim would lead to persecution upon return, present a challenge. As long as international law and States' practice of granting asylum do not evolve further, this will lead to an increasing number of less comprehensively protected persons. However, a change of the German and the Hungarian asylum legislations or even of the supranational European asylum system might have impacts which could improve asylum.

B THE COST OF GRANTING SIMILAR PROTECTION TO SUBSIDIARY PROTECTED PERSONS AND REFUGEES

[508] *Cf.* Chapter 3A.
[509] Pro Asyl, "Gesprächseinsladung des Bundesamtes: Droht Widerruf des Flüchtlingsstatus?", (24 April 2018), online: <https://www.proasyl.de/hintergrund/gespraechseinladung-des-bundesamtes-droht-widerruf-des-fluechtlingsstatus/> (requested 28 August 2018).
[510] Counter Extremism Project, "ISIS's Persecution of Religions" online: <https://www.counterextremism.com/content/isiss-persecution-religions> (requested 28 August 2018).
[511] *Ibid.*
[512] Eurostat, "File: First instance decisions by outcome and recognition rates, 1st quarter 2018", online: <http://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:First_instance_decisions_by_outcome_and_recognition_rates,_1st_quarter_2018_.png> (requested 28 August 2018), EASO, *Annual Report on the Situation of Asylum in the European Union 2017*, online: <http://publications.europa.eu/webpub/easo/annual-report-2017/en/> (requested 28 August 2018) at 48.

The asylum system is expensive. States incur financial and social costs. Therefore, Germany and Hungary should change the current legislations towards an equal treatment of subsidiary protected persons and refugees (x) when either the entire society gains from the change (y) ($x^{max} = y^{max}$)[513], i.e. when the current level is not yet optimal or when there is a new optimum, because benefits (B) would be higher than costs (C) (B>C).[514]

For finding out if a similar protection would put the States in a better place than it was before, I will analyze the costs a State had to bear if a new asylum legislation would be introduced, by indicating administrative and bureaucratic efforts for the legislation, the current cost per asylum seeker as well as the effects that would impact costs in a new system. The parameters I apply to find out more about the benefits of such a regulation, that could either increase or decrease the benefits, are economic benefits, the social inclusion of protected persons, and the social acceptance by the people.

Costs can occur in several ways. There are efforts, material costs, resources, time, and utility or opportunity costs. In this section, we consider efforts as well as material costs and resources. The costs of integrating asylum seekers and cum-citizens must be borne by the State, and, partly, by the protected persons themselves. It is partly taxes that pay for the accommodation of cum-citizens, partly cum-citizens might bear costs themselves, if they have assets.

Each change of legislation entails administrative and bureaucratic costs. This subchapter also evaluates the costs that would incur from a change in the European, the German and the Hungarian asylum frameworks. Costs are evaluated by the sum of different aspects that we have to consider. On a financial level, there are administrative costs per asylum application, plus material benefits, housing and health care, integration and language classes that would fall under costs per asylum seeker. Administrative and bureaucratic costs incur because of officials who work on the dossiers, security agents and materials for working with asylum-related issues, as

[513] Pareto optimum, *cf.* Ejan MACKAAY & Alain PARENT, "L'analyse économique du droit comme outil du raisonnement juridique", op. cit., at 20.
[514] *Ibid.*

well as training of workers. Last but not least, in this case, a change of the legislative framework would entail costs.[515] The latter ones will not be estimated financially in this study.

1) COSTS OF ASYLUM IN CANADA AND THE EU

The costs of asylum in Canada and in the EU give different indications. In order to understand the economies, I will provide an overview of Canada's, Germany's and Hungary's economic assets. Then, I will show the costs of the asylum system for each State and set the wealth in relation to the costs.

Considering World Bank data, Canada's GDP amounted to 1.6 trillion USD in 2017, while Germany had a GDP of 3.6 trillion USD and the Hungarian one was 0.1 trillion USD. The overall EU GDP was 17.2 trillion USD. [516] Further, comparing the GDP per capita indicated how economic wealth is created by the population. In Canada, the GDP per capita was about 45,000 USD, in Germany it was 44,500 USD and in Hungary 14,225 USD in 2017. In the meantime, the European GDP per capita was 33,715 USD.[517] These numbers show that Hungary is a less wealthy State than Canada and Germany. Furthermore, Hungary is below the EU average while Germany is above. By these figures we can see that there are major income differences between the countries. That shows that Canada and Germany are in an almost similar situation, while Hungary is in another income category. Regarding the population, there are significant differences, too. Canada has about 36 million inhabitants, Germany has around 83 million and Hungary approximately 10 million habitants.[518]

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[515] UNHCR, 51st Mtg, EC/62/SC/CRP.18, "The role of host countries: the cost and impact of hosting refugees", (31 May 2011) at 2.
[516] World Bank, GDP (current US$) for Canada, Germany, Hungary, and the European Union. As of 20 August 2018. Online: <https://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (requested 20 August 2018). Search parameters: "GDP (current US$)" and "Canada", "Germany", "Hungary", "European Union".
[517] World Bank, GDP per capita (current US$) for Canada, Germany, Hungary, and the European Union. As of 20 August 2018. Online: < https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?> (requested 20 August 2018). Search parameters: "GDP per capita (current US$)" and "Canada", "Germany", "Hungary", "European Union".
[518] World Bank, Population for Canada, Germany, and Hungary. As of 4 September 2018. Online: <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=DE-HU-CA> (requested 4 September 2018). Search parameters: "Population" and "Canada", "Germany", "Hungary".

According to the German journal Zeit, asylum seekers cost Germany about 25.7 billion USD per year[519], which would roughly correspond to the 0.1% the IMF reports for Germany's spending. The Cologne Institute for Economic Research estimates that the general cost in 2016 was of 19.6 billion USD and calculates that in the following years the costs are likely to increase up to 31.8 billion USD until 2020.[520] This number mounted up to 15.23 billion Euros in 2018.[521] Just to mention some numbers, according to the law on the Federal budget[522], Germany foresaw to spend 822 million Euros for the asylum office and related costs.[523] The country calculated with 6 billion Euros for integration of cum-citizens in Germany and with 60 million Euros for social services related to asylum seekers and cum-citizens who wanted to return to their country of origin.[524] 2.8 million Euros were to be spend for integration measures provided by Muslim organizations[525], 3 million Euros were budgeted for digitalization in the asylum offices, 765 million Euros were to be spent for integration classes for asylum seekers who prospectively could remain, 33.5 million for cum-citizens who might stay for a long-term.[526]

To show how the countries compare economically, I provide an overview about the relation between the population of the countries, the income, the costs of cum-citizens in the first year and the costs a State incurs for asylum seeker per person.

	Canada	**Germany**	**Hungary**
Population (rounded, based on World Bank, 2016)	36 million	83 million	10 million

[519] Zeit, "Studie : Deutschland profitiert, wenn Zuwanderer hier arbeiten", (15 January 2017), online: <http://www.zeit.de/wirtschaft/2017-01/konjunktur-studie-fluechtlinge-deutschland-wirtschaftswachstum-bruttoinlandsprodukt> (requested 20 January 2017).
[520] Institut der deutschen Wirtschaft Köln, "The Effect of the Recent Influx of Refugees on Germany's Economy", online: <https://www.iwkoeln.de/en/studies/beitrag/tobias-hentze-galina-kolev-gesamtwirtschaftliche-effekte-der-fluechtlingsmigration-in-deutschland-318617> (requested 3 January 2018).
[521] *Cf.* Statista, "Höhe der Kosten des Bundes in Deutschland für Flüchtlinge und Asyl von 2017 bis 2022 (in Mililarden Euro)", online: <https://de.statista.com/statistik/daten/studie/665598/umfrage/kosten-des-bundes-in-deutschland-durch-die-fluechtlingskrise/> (requested 28 August 2018).
[522] *Gesetz über die Feststellung des Bundeshaushalts für das Haushaltsjahr 2018* (German Budget Law 2018), 12 July 2018, BGBl. I S. 1126.
[523] *Ibid.*, at 762.
[524] *Ibid.*, at 39, 1461.
[525] *Ibid.*, at 520.
[526] *Ibid.*, at 551.

GDP (rounded, in USD, based on World Bank, 2016)	1,530 billion	3,467 billion	124 billion
GNI per capita (USD, based on World Bank, 2016)	43,660	43,850	12,570
Number of accepted persons	32,115	140,915	508
Cost per cum-citizen (ratio C.p.a/GNI p.c.)	10,731 (24.6% of GNI p.c.)	8,908 (20.3% of GNI p.c.)	7,336 (58.4% of GNI p.c.)
Asylum cost ratio (No. of accepted persons * Costs per accepted person / Population)	9.57 USD	15.12 USD	0.37 USD
Ratio: Cost per citizen/GNI	0.02 %	0.03%	0.003%

TABLE IV: COSTS OF ASYLUM IN CANADA, GERMANY AND HUNGARY BASED ON OECD NUMBERS

The table shows that asylum is quite expensive. Hungary spends, with regard to the GNI per capita, relatively most per cum-citizen. For Canada and Germany, the total costs for the asylum system are higher because they have higher expenditures per cum-citizen and accommodate more persons. They spent about ten times more resources on cum-citizens than Hungary. That indicates that the Hungarian system seeks the cheapest way to accommodate cum-citizens. Yet, the resources Hungary can spend might be less than those of other States. Hence, in terms of equity, cooperation with other EU Member States where a common fund for asylum could serve as a mean to allocate money accordingly to States' needs could lead to a better optimum.

In 2015, according to the IMF, Germany spent 0.2% of its GDP, and Hungary 0.1% for the respective asylum systems.[527] In the same timeframe, Canada's budget foresaw to spend about 5.3% of its GDP for the internal asylum system[528], which is relatively the highest budget.[529] It

[527] IMF, "The Refugee Surge in Europe: Economic Challenges", Staff Discussion Note 16/02, January 2016, at 12.
[528] IRCC, Plan ministériel 2017 – 2018, online: <http://www.cic.gc.ca/francais/ressources/publications/pm/2017-2018/pm.asp#itm7-1> (requested 8 January 2018) at Sommaire de la planification budgetaire pour les programmes et les services internes (en dollars).
Exchange rate: 1 CAD = 0.78 USD.
[529] *Ibid.*, Canada foresees to spend over 21 million USD 2016/17 for its humanitarian programs and to spend over 17 million USD for the same objective in the following years.

was not possible to find data on Hungary's asylum budget for the next years but Amnesty International Hungary said that a budget of 23.5 million Euros that was allocated to asylum in 2015, while the border fence alone cost 98 million Euros.[530]

The Canadian budget is relatively higher than the German budget, which could be a result from the resettlement programs that invite protected persons into the country. Canada can estimate the expenditures it will incur. In the Canadian resettlement program, for example, the government will pay for a medical examination which is a pre-requirement for the resettlement and the travel costs. The protected person's travel costs and the costs for the medical examination are a loan from the government, which needs to be paid back (in instalments until up to six years) upon arrival.[531] In the private sponsorship accepted person will be sponsored by a group of private persons which implies that the accepted asylum seeker might burden more costs from his savings and that the government has less expenditures for a privately sponsored person. In that program, the government still provides health care for protected persons.[532] Persons in the Blended-Visa-Office-program can also get a governmental loan for their resettlement expenses. During the first six months after arrival, the person will obtain governmental financial support. When this period is over, private sponsorship takes effect and provides financial support, which reduces the governmental costs.[533] The Hungarian budget is in absolute and relative figures the lowest one. This could result from several factors. First, the Hungarian GDP and the GDP per capita are also absolutely and relatively the lowest ones compared to the other countries. Furthermore, Hungary took an anti-migration and anti-asylum stance. To plan with a low budget would be coherent with the statements issued by the government.

Income	**Canada**	**Germany**	**Hungary**
GDP in USD	1.6 trillion	3.6 trillion	0.1 trillion

[530] Amnesty International, "Fenced out : Hungary's violations of the rights of refugees and migrants", (London: Amnesty International Publications, 2015), online: <https://www.amnesty.hu/data/file/1792-hungary-briefing-final-embargo-081015.pdf?version=1415642342> (requested 20 August 2018) at 6.
[531] IRCC, Information Bulletin, "Government-Assisted Refugee Resettlement in Canada" (April 2014) at 2.
[532] IRCC, Information Bulletin, "Privately Sponsored Resettlement in Canada" (April 2014).
[533] Information Bulletin, "Blended Visa Office-Referred Program Refugee Resettlement in Canada" (April 2014).

GDP per capita in USD	45,000	44,500	14,225

TABLE V: GDP IN CANADA, GERMANY, HUNGARY (WORLD BANK 2018)

European community level – Countries have different provisions for accommodating asylum seekers and they have different capacities. Berger and Heinemann claimed that Germany and Hungary surpassed its asylum accommodation capacity in 2015. The authors analyzed that some States, in the European context notably the United Kingdom and France, relied on other countries and did not meet their obligations arising from international and European law.[534]

That indicates, that certain States might bear higher costs than they could, because they accommodate more asylum seekers than they can, which suggests that there is a need for a transformation on a supranational European level. This is not a merely European challenge. Some States could accommodate more asylum seekers, others exceed their capacities – the United States of America supposedly could accommodate more incoming asylum seekers[535] while Lebanon took in so many that the social service system struggles to provide means to ensure basic needs and an adequate standard of living.[536] That shows that although States might have a humanist approach and observe their obligations arising from international law, reality does not provide the requirements needed to cope with specific situations that arise from international migration flux and humanitarian crisis.

The European approach is thus not harmonized. However, according to Berger and Heinemann, if the European Union would introduce a common fund for administering asylum applications in the EU-28 countries, the expenditures for the EU would increase to about 30.3 billion Euros.[537]

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[534] Melissa BERGER & Friedrich HEINEMANN, *Why and how there should be more Europe in asylum policies*, (2016) ZEW policy brief No. 1 at 7.
[535] Katy LONG, *Why America Could and Should Admit more Syrian Refugees*, (2016) The Century Foundation issue brief.
[536] Government of Lebanon & UN, *Lebanon Crisis Response Plan 2017-2020*, January 2017, online: <www.3rpsyriacrisis.org/wp-content/uploads/2017/01/Lebanon-Crisis-Response-Plan-2017-2020.pdf> (requested 8 January 2018) at 8.
[537] BERGER & HEINEMANN, *Why and how there should be more Europe in asylum policies*, op. cit., at 13f.

That would be a share of about 3% of the annual European budget 2014-2020[538] and about ten times the current value of the asylum fund of the EU for the time 2014-2020.[539] It should be the Member States that contribute according to the principle of solidarity.[540]

Concretely, Berger and Heinemann suggest spending 0.21% of each country's GNI to a common European asylum fund, which could centrally allocate money, accordingly to the number of asylum applications, to the Member States. Such a fund could improve the asylum administration by going further than the *Dublin regulations*.[541] It would help to share the additional costs of asylum seekers and cum-citizens equally among Member States without overcharging the countries that experience inflows exceeding their monetary capacities.

2) INDIVIDUAL FINANCIAL COSTS

Financial cost for the asylum system and for refugees are composed by individual social support for protected persons, by financing the administrative offices that evaluate asylum claims, and by investing into organizations which assist cum-citizens with their integration in the host country.

Individual costs - Thielemann, Williams and Boswell published a policy paper for the European Parliament.[542] They analyzed the cost per asylum seeker among EU Member States. They divided costs by two categories: Particularly high costs and other costs.[543] Many of the high costs are

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[538] *Cf.* EU, *COUNCIL REGULATION (EU, EURATOM) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020*, [2013] OJ L 347/884, at Annex I.
[539] EU, *Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC*, [2014] OJ L 150/168 at Annex I.
[540] Art. 3(3) *Treaty on European Union,* [2012] OJ C 326/01 (*TEU*).
[541] BERGER & HEINEMANN, *Why and how there should be more Europe in asylum policies*, op. cit., at 17.
[542] European Parliament, Directorate General for Internal Policies, "What system of burden-sharing between Member States for the reception of asylum seekers?", (Brussels: European Parliament, 2010).
[543] *Ibid.*, at 39. They considered to be **particularly high costs**: Housing, Material reception conditions (food, clothing, communication), Health care (emergency care, treatment rehabilitation, medical screening) Translation, interpretation – Directive 2003/9/EC; Taking and storing fingerprints, Detention/custody, Costs of travel and escorts – Regulation EC 343/2003; Family reunion, Social security, Health care, Accommodation, Integration facilities, Travel costs, Escorted return, Custody Financial Incentives – Directive 2005/85/EC. **Other costs** were: Schooling of minors, Financial allowances, Special needs assistance for vulnerable groups, Legal assistance, Employment related/vocational training/practical employment experience, Staff training, Information material – Directive 20303/9/EC; Preparing proof and evidence for transfer requests, Processing transfer requests, Transit zones – Regulation EC 343/2003; Issuing of residence permits, issuing of travel documents, Vocational training, Education, social welfare, Support of unaccompanied minors, Special needs health care – Directive 2004/83/EC; Preparation of documentation/info, Reporting during application process, CoI information material, Negotiations with third

linked to detention, custody and escorted returns, cost that incur when asylum seekers arrive in a country or when the responsible asylum office declares that a person is inadmissible for international protection. As we only want to consider the cost for accepted persons, costs for cum-citizens would fall under the report's definition of "other costs".

In the EU in 2017, 226,800 persons returned and left their host-country, although the numbers do not refer to protected persons exclusively.[544] The costs of return amount to 5,800 Euros on average, depending on the destination country, the transport means, and unforeseen situations (e.g. medical emergencies).[545] In Germany the costs incurred because of inadmissibility were 1.3 million Euros in 2016.[546] The costs of repatriation, which often go hand in hand with financial incentives for asylum seekers or cum-citizens who decide to go back amounted to 23 million Euros in 2016.[547] According to the statistics, 5,975 persons returned or were enforced to return from Hungary.[548] Sometimes States decide to incur particularly high costs for refusing asylum seekers. When States want to send a rejected asylum-seeker back, they might pay over 70,000 Euros for only flying back one person who has not been granted protection.[549] That implies that for cum-citizens the costs that incur are lower than for persons who will be refused.

In Canada, a government assisted refugee will be accommodated in reception houses or hotels. They also receive clothing and food.[550] Soon after the arrival, refugees will receive monthly financial support for basic needs, plus a monthly allowance for housing until up to one year.[551] When a refugee is privately sponsored, the same reception benefits will be given. The only

countries, Staff training, Detention, Provision of ad-hoc humanitarian protection to refused applicants, Translation/interpretation, Medical support, Negotiations with third countries, Staff training, Accommodation, Schooling for minors, Life skills training – Directive 2005/85/EC.

[544] *Cf.* Uri DADUSH, "The Economic Effects of Refugee Return and Policy Implications", (October 2017), OCP Policy Center, PP-17/11 at 15.

[545] *Ibid.*, at 16.

[546] NDR, "Kosten, Ablauf, Ausnahmen: FAQ zu Abschiebung", (20 January 2018), online: <https://www.ndr.de/nachrichten/Kosten-Ablauf-Ausnahmen-FAQ-zu-Abschiebung,abschiebung642.html> (requested 21 August 2018).

[547] Bundesfinanzministerium, "Asylum and refugee policy: the role of the federal government", 27 January 2017, online: <https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Press_Room/Publications/Technical-Papers/2017-01-27-Asylum-and-refugee-policy.html> (requested 29 August 2018).

[548] Uri DADUSH, "The Economic Effects of Refugee Return and Policy Implications" at 15.

[549] Ulrike SCHEFFER, "Streit um Abschiebepraxis : Hohe Kosten für Rückführung einzelner Flüchtlinge", *Tagesspiegel*, (21 February 2017), online: <https://www.tagesspiegel.de/politik/streit-um-abschiebepraxis-hohe-kosten-fuer-rueckfuehrung-einzelner-fluechtlinge/19418420.html> (requested 21 August 2018).

[550] IRCC, Information Bulletin, "Government-Assisted Refugee Resettlement in Canada" (April 2014).

[551] *Ibid.*

difference is that they will come from a group of private sponsors and not from the State. Also in this second case, support will be provided for up to one year.[552] In the Blended Visa Office-Referred Program, the government will be responsible for providing support like initial housing, food and clothing for the first six months. After that, a private group might sponsor the refugee for up to six further months.[553] All three programs apply to resettled cum-citizens. When an asylum seeker asks for protection at the border or in the country, they can ask for support to fulfil their basic needs, too, which is similar in the EU. The EU could also include a reinforced resettlement program, as well as a private sponsorship program. Officials would still decide about the recognition of asylum seekers, but the burden sharing could be transferred to individuals and organizations who would take care of substituting State activities.

The EU tried to harmonize standards in the Union through the *Reception Directive* which applies to asylum seekers who entered at the border or on the territory of the EU.[554] Housing is to provide for asylum seekers for the time their process of being recognized takes.[555] Art. 2(g) defines material reception conditions as "*housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three*". Housing is mentioned in art. 18 but does not need to be provided in terms of shelter. Art. 18 stipulates that "*housing is provided in kind*", which means that it is not necessary to provide facilities but that financial allocations could be granted to ensure a first accommodation. HOME's proposal of a new *Reception Directive* includes the guarantee that States "*shall supply an adequate standard of living*" referring to the accommodation of asylum seekers. The proposal suggests either specific premises during the examination of the request, accommodation centers or private houses, flats or

[552] IRCC, Information Bulletin, "Privately Sponsored Resettlement in Canada" (April 2014).
[553] IRCC, Information Bulletin, "Blended Visa Office-Referred Program Refugee Resettlement in Canada" (April 2014).
[554] Art. 3 *Reception Directive.*
[555] Recital 8 *Reception Directive.*

hotels.[556] Germany and Hungary foresee to provide housing for asylum seekers[557] and cum-citizens[558], congruent with the *Directive*.

According to the OECD, an asylum seeker costs a European State on average, 11,100 USD[559] during the first year.[560] Although the costs usually decrease in years after acceptance, there are differences in the States' approaches towards accommodating asylum seekers and protected persons. In 2016, the OECD published a paper that compared the OECD countries' costs for protected persons in the first twelve months. However, the States have divergent approaches to sum up the costs. Where Canada and Germany start to count the costs from the moment that the asylum seeker has been accepted, Hungary counts the costs from the moment that the application has been lodged. The report shows that Canada spent 10,713 USD per protected person, Germany 8,908 USD per cum-citizen, and Hungary spent 7,336 USD per asylum seeker.[561]

The costs Berger and Heinemann found out for Germany and Hungary per application in 2015, do not correspond to the OECD listings.[562] According to Berger and Heinemann, Germany paid 23,460 USD per asylum application, and Hungary paid 7,357 USD.[563] Two factors could explain the differences: First, the costs considered by the researchers, second, the exchange rate.

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[556] European Commission, *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL laying down standards for the reception of applicants for international protection (recast)*, (Brussels, European Commission, 2016) at art. 17.
[557] For Hungary: Hungarian Helsinki Committee, "Housing", online: <http://www.asylumineurope.org/reports/country/hungary/content-international-protection/housing> (AIDA, requested 8 January 2018); for Germany: art. 44 *Asylum Law* in combination with Art. 3(1) *Asylum Seekers Act.*
[558] For Hungary: *Ibid.*, Hungarian Helsinki Committee, "Housing"; for Germany art.3(1) *Asylum Seekers Act* in combination with Art. 23-25 *Residence Law.*
[559] Costs in Euro converted by the average exchange rate 2016, 1 EUR ≡ 1,11 USD (European Central Bank, Calculation based on the daily concertation between national central banks, parameters EUR vs. USD from 01-01-2016 to 31-12-2016, online: <https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-usd.en.html>)
[560] OECD, *Migration Policy Debates N°13*, (2017) at 2.
[561] OECD, DAC Secretariat, ODA REPORTING OF IN DONOR CONTRY REFUGEE COSTS, (2016). Costs in USD based on prices at the time the report has been prepared, April 2016.
[562] *Ibid.*
[563] BERGER & HEINEMANN, *Why and how there should be more Europe in asylum policies*, op. cit., at 13. Costs in Euro converted by the average exchange rate 2016, 1 EUR ≡ 1,11 USD (European Central Bank, Calculation based on the daily concertation between national central banks, parameters EUR vs. USD from 01-01-2016 to 31-12-2016, online: <https://www.ecb.europa.eu/stats/policy_and_exchange_rates/euro_reference_exchange_rates/html/eurofxref-graph-usd.en.html>).

The OECD data[564] only include the costs for cum-citizens, while Berger and Heinemann also include the costs that incur for asylum seekers until the decision has been taken and after in case of escorted returns. Thus, it is likely that the difference would be the average sum of administrative costs, detention/custody, escorted returns and first-time accommodations, as well as material benefits asylum seekers get during the application procedure. Therefore, we estimate that also Canada has higher expenditures for asylum seekers who lodge a request at the border or at an office in the State. The second factor that helps to explain divergent numbers are the currencies the reports use. Based on the exchange rate at a given time, numbers might vary in the different reports as the European scholars listed the costs in Euros, while the OECD used dollars. We also converted the given numbers to dollars to facilitate the comparison between EU Member States and Canada, which could explain the different numbers for Hungary.

In all three Canadian programs, accepted asylum seekers get up until one year of support in Canada. However, material support ceases if the accepted asylum seeker becomes self-sufficient. After this initial period, asylum finders should be able to maintain themselves. Furthermore, financial aid is only provided for asylum seekers who apply for Canadian protection from a third country. When asking asylum from inside Canada, the preconditions for being granted the financial aid for resettlement are not met. Yet, social services and financial assistance will be provided upon request.[565]

Meanwhile, in Germany like in Canada, protected persons have the same access to social services as national citizens if they are not self-sustaining.[566] In this case, the costs could increase when beneficiaries of subsidiary protection are not self-sustaining during the time that they remain in Germany. If Germany reintroduced family reunification again for beneficiaries of subsidiary protection the costs could increase, if also the family members of an applicant are not self-sustaining. In Hungary, until 2016[567], protected persons had the option to enter in an integration

[564] OECD, DAC Secretariat, ODA REPORTING OF IN DONOR CONTRY REFUGEE COSTS, (2016).
[565] CIC, "Financial help – refugees", online: < https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/help-within-canada/financial.html> (requested 4 September 2018), Canadian Council for Refugees, "Refugees receive limited, if any, social assistance from government authorities", online: <http://ccrweb.ca/en/refugees-social-assistance> (requested 4 September 2018).
[566] Art. 7(1) *Sozialgesetzbuch* II (Social Code Book II), 24 December 2003, BGBl. I S. 2954, Art. 19(1)-(3), Art. 27 *Sozialgesetzbuch VIII* (Social Code Book VIII), 26 June 1990, BGBl. I S. 1163.
[567] European Parliament, Directorate General for Internal Policies, "Integration of Refugees in Greece, Hungary and Italy Comparative Analysis", (Brussels: European Parliament, 2017) at 22.

contract, if they are not financially autonomous and have never worked before.[568] The integration contract provided a means for cum-citizens to receive a financial aid but also integration support, which could even be a winning situation in the mid- to long-term perspective, as cum-citizens will integrate and could start to contribute to the economic welfare once they have acquired sufficient knowledge of the culture and society. However, like in Canada and Germany, cum-citizens can apply for social support, when they are not self-sustaining.[569]

3) THE ADMINISTRATIVE COSTS OF THE DIFFERENT PROTECTIONS

The different protections imply that there are administrative costs. If the States decide to grant subsidiary protection for only one year, that implies that each following year the authorities will have to deal with all the first applicants who have been granted this status in the year before, even if their circumstances did not change. That may lead to refusals of, now again, asylum seekers who are submitting second applications and, therefore, to higher administrative costs. Furthermore, when external or internal influences demand immediate measures, it is mostly the administration that has to cope with them, additionally to their usual workload. Errors in the system can lead to a revision of the status even before the protection period has elapsed. In Germany, for example, because of administrative errors, the FOMR had to reevaluate several thousand asylum applications in 2017.

Franco A., a German citizen who was an army officer applied for asylum because of probably right-wing terrorist motivations.[570] For this purpose, he faked his identity and passed the German border pretending to be a Syrian. While he was performing his military duties, he was also recognized as an asylum seeker and got subsidiary protection, a fatal error. With this being an ultimate misjudgment, the FOMR was obliged to revise about 2,000 applications that came from

[568] SCHARLE, Ágota, "Labour market integration of asylum seekers and refugees, Hungary", (Brussels: European Commission, 2016) at 6.
[569] European Parliament, Directorate General for Internal Policies, "Integration of Refugees in Greece, Hungary and Italy Comparative Analysis", (Brussels: European Parliament, 2017) at 23.
[570] Zeit, News release, "Zehntausende Asylentscheidungen werden überprüft" (31 May 2017), online: <http://www.zeit.de/politik/deutschland/2017-05/franco-a-fluechtlinge-asylentscheidungen-uberpruefung-bundesinnenminister-thomas-de-maiziere>; Frankfurter Allgemeine Zeitung, News release, "Früherer Bamf-Chef gibt „schwere Fehler" im Fall Franco A. zu" (19 May 2017), online: < http://www.faz.net/aktuell/politik/inland/ex-bamf-chef-weise-raeumt-mitverantwortung-im-fall-franco-a-ein-15023164.html>

Syrian and Afghan asylum seekers from January 2016 until May 2017.[571] It is true that stories like this one influence on the perception of the asylum system in a negative way. Such cases should, however, contribute to a more effective system.

With more than 700,000 first applications in 2016 and more than 400,000 protected persons, Germany was challenged. Additionally, there were over 23,000 second applications of which, at the end of 2016, more than 16,000 were pending.[572] These second applications come from 2015, when 1,707 persons got subsidiary protection and had, thus, to reapply in 2016. Also, the 29,762 second applications (refugees and subsidiary protected persons) in 2014 were subject to a renewal in 2016, if the concerned person was still in need of asylum. Second applications can be reduced by several situations. Either the person is not granted protection anymore because the reasons have ceased, or the person returns voluntarily, or the person has applied for a residence permit where no further asylum application will be required. Tables I and II show that there are trends in Europe that indicate that subsidiary protection is nowadays more likely to be granted than ever before. [573] In Hungary, it is granted even more often than refugee protection. In Germany, although refugee protection is still conferred frequently, subsidiary protection is constantly increasing.[574]

In consequence, Germany's system which revises every application for subsidiary protection three times within the first three years is quite expensive and leads to a situation, where new applications might not be decided on the merits for longer than needed. Contrarily, Hungary only revises the status of all groups after three years, if there have been no changes in a particular case. Thus, an option might be to reduce administrative costs by introducing a common revision standard system in the EU, that would revise all second applications after three years.

All the asylum applications require administrative costs. If asylum was to be granted for three years for all protected persons, the State would have the possibility to reevaluate and to adapt the number of functionaries required in the following year(s), based on an estimated number of first

[571] Tagesschau, Newsrelease, "Neue Details über Konsequenzen im Fall Franco A." (5 May 2017), online <https://www.tagesschau.de/inland/bamf-faelle-101.html>.
[572] FOMR, "Antrags-, Entscheidungs- und Bestandsstatistik" 2016.
[573] See also Annex II for numbers from 2013 until 2016.
[574] See Annex II.

inflows and on the number of persons that have been granted protection three years ago. Such a system would enhance administrative flexibility.

Another idea to lower administrative costs would be to maintain a system in which States only categorize cum-citizens according to the reasons for protection and the country of origin and invite protected persons to renew their status when they probably would no longer be in need of protection because the reasons for protection have ceased.

Benefits could, in the long-term, compensate the costs that States currently incur. Granting a similar protection would also require investments in measures to encourage integration. This would be a significant change for beneficiaries of subsidiary protection in Germany, who, knowing that they will remain in the host country for a longer period, might have a higher intrinsic motivation to work or to study, especially when they have a family to provide for.

Moreover, if protected persons contributed to the economic growth of one country, the entire country would benefit from their engagement. Thus, it rather seems to be expensive to provide courses and classes for cum-citizens who might not even have the right to stay long enough to provide benefits for the respective country.

In conclusion, States might incur higher costs when granting all asylum seekers an alike status, resulting from a longer support of persons in need who are not self-sustaining. Furthermore, also family reunification might increase the number of persons that are in need of social services provided by the State. Also, the costs of a revised CEAS and an asylum fund would increase the EU Member States spending on the European integration. However, costs could be decreased by introducing different periods of protection and status revision which could lead to an improved allocation of resources for the administrative offices and to other facilities which enhance integration.

C CREATING INCENTIVES: THE BENEFIT OF A FAST INTEGRATION AND A LONG-TERM STAY

Analyzing the costs of asylum does not provide an argument that would convincingly advocate for a legislative change towards one protection status. Costs play a major role and they seem to be at an all-time high. Still, the question is if there are positive effects on the States, the society and the economy, when it comes to the question if beneficiaries of subsidiary protection should be granted the same rights as refugees.

I will take into account the benefits of granting beneficiaries of subsidiary protection a residence permit for three years at first. Instead of granting asylum for only one year, granting protection for three years might be an advantage for the EU.

According to an OECD report, about 85% of refugees in Germany would like to remain in the country after the reasons for protection will have ceased[575] which indicates that there is a need for integration in view of a long-term stay if the person is not sent back. Whilst I could not obtain representative numbers for the other countries, the right to remain in a new country for a long-term stay could be decisive for taking the decision where to go. For the State, it could be important to start the integration of protected persons right at the beginning, especially when they want to remain in the country.

In July 2016, the Commission introduced the *Long-term resident proposal*[576] that concerns persons who are eligible for a long-term residence within the EU. This proposal seeks to harmonize the European residence legislation by introducing common standards for the Member States, including a residence for beneficiaries of subsidiary protection. Curiously, it suggests that subsidiary protection should be provided for one year and in case of prolongation for two more

[575] Eva DEGLER & Thomas LIEBIG, *Finding their Way: Labour market integration of refugees in Germany*, (OECD, 2017) at 22.
[576] European Commission, *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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*, Doc COM/2016/466/FINAL, (Brussels, COM, 2016) (*Qualification Directive Proposal*).

years, which resembles the German approach ("1+2+2 formula").[577] Refugee protection should be granted for three years and thereafter for three more years, which corresponds to the Hungarian approach ("3+3+3 formula").[578] This proposition to harmonize standards would reduce subsidiary protection in all EU Member States to one year for subsidiary protection and to three years for refugee protection.[579] The Hungarian approach to protect persons in need for three years might be more appropriate to increase overall benefits. I include Canada for comparing the assumed benefits for the EU Member States with a State that already grants similar protection for all accepted asylum seekers and include it in the analysis.

1) INDIVIDUAL BENEFITS

MAXIMIZING THE UTILITY IF A CONFLICT DOES NOT END

When people flee from a country where a conflict is ongoing, there is a temporal aspect that supports the argumentation to grant subsidiary protection for more than three years. When we look at conflicts in the world we can see that several conflicts are ongoing for years and that there is no certainty about the conflict's ending. António Guterres, now Secretary General of the United Nations, said in his position as High Commissary for Refugees in 2015 that "*[t]his war [in Syria] has to end, and quickly. (…) But more importantly, if this conflict does not end quickly, this might be the end of Syria as we know it – and the same is true for Iraq*".[580] The civil war in Syria broke out in 2011.[581] The latest conflicts in Iraq are still partly a result from the military intervention in 2003.[582] The reasons for leaving those countries did not end until 2018 and people from Syria, Iraq and other States that are in domestic or international armed conflicts still need international protection.

Therefore, the need to find approaches that would allow to precisely invest in the integration of persons who face wars or systematic or individual breaches of human rights, persecution or who

[577] *Ibid.*, art. 26.
[578] *Ibid.,* at art. 26(1).

[580] UNHCR, Remarks by UNHCR António GUTERRES, (delivered at the United Nations Security Council (7592nd Meeting). Briefing on the Humanitarian Situation in Syria. New York, 21 December 2015).
[581] UNHCR, "Syria Factsheet", (February 2018), online: <http://www.unhcr.org/sy/wp-content/uploads/sites/3/2018/02/Syria-Fact-Sheet-2017-2018.pdf> (requested 24 August 2018).
[582] UNSCOR, 8285th Mtg., UN Doc S/PV.2421 (2018).

fear for their lives and security in their countries of origin is urgent. An option for European States would be to adopt the Canadian approach. That means that persons protected internationally would get an indefinite protection, and that their status will be revised once the grounds for protection cease to exist in the place of origin.[583]

BENEFITS OF A 3-YEARS-PROTECTION

If States decide to not grant an indefinite protection to cum-citizens, a unique period of protection might contribute to a more efficient system. A 3-years-period of protection could provide certain benefits, which seems to be also recognized by the Commission's *Long-term resident directive proposal*, although the proposal still considers refugees and beneficiaries of subsidiary protection as two different groups who should have different rights.

When States have the competence to decide about a person's entry and stay[584], there are legitimate reasons for not granting an indefinite protection, even if the reasons for protections do not cease. For example, the reasons mentioned in Chapter 2B indicate the possibility that a person will be refused asylum when having committed a crime or when there are substantial reasons to believe that the cum-citizen is or has been implicated in activities that endanger the national security of a country. (The principle of non-*refoulement* is, in that case, a neutral argument because even though it might raise costs, it applies to asylum seekers and to cum-citizens alike wherefore costs could not be lowered, and benefits would not increase.)

Another and more interesting aspect would be an integration contract, which has been provided by Hungary but has now been abolished.[585] Such a contract could provide an effective basis for creating a cum-citizen-community which could integrate into society at more ease. Also Germany provides integration measures for cum-citizens who prospectively remain. However, there is no certainty that persons who passed an integration course are truly integrated into the society. With a periodical evaluation of protected persons' integration, offices could provide the protected person with helpful information regarding the continuance of the stay and introduce measures to

[583] *Cf.* Chapter 2B1.
[584] *Cf.* Chapter 2B.
[585] Cf. Migszol, "Draft amendments to asylum law in Hungary will drive refugees to Western Europe", 17 March 2016, online available: <http://www.migszol.com/blog/draft-amendments-to-asylum-law-in-hungary-will-drive-refugees-to-western-europe> (requested 4 September 2018).

help persons integrate. Granting protection for three years would in this sense be an option. For example, in individual situations where three years after entering the country difficulties with the everyday life are still present, the offices could, together with the philanthropic sector or civil society organizations adapt measures to improve the individual integration during a second term of stay if the reasons for granting asylum have not yet ceased to exist.

A path towards the creation of a society that relies on the contributions of cum-citizens could establish measures to help protected person integrate. In that sense, it might be beneficial for a State and its society to reevaluate the protection status every three years and to apply measures that meet the needs of each individual person.

BENEFITS OF INTEGRATION

The long-term integration of protected persons is also an aspect which we consider, when discussing whether subsidiary protection should be like refugee protection or not. Legal and social scientists question whether a precarious status, either a status of non-citizenship or a status that provides only a short-term security, has a negative impact on the person who is granted such a status.[586] They found out that a precarious status often leads to insecurities, like an uncertainty about the future status, and might have negative impacts on the mental and physical health of protected persons, when being denied the access to social security benefits or when feeling excluded from the society.[587]

Dembour and Martin described how asylum applicants in Calais, France, go as far as to burn their fingertips when there is an uncertainty if they will be recognized as refugees.[588] These actions may lead to higher medical expenses, once a person gets protection. Having fled from a country where one fears for his life and living the complicated process of acceptation afterwards affect

[586] *Cf.* Samia SAAD, "The Psychological Impact of Falling Out of Status" in Luin GOLDRING & Patricia LANDOLT, eds, *Producing and negotiating non-citizenship: precarious legal status in Canada* (Toronto: Univerity of Toronto Press, 2013) at 137; see also Marie Bénédicte DEMBOUR & Marie MARTIN, "The French Calais: transit zone or dead-end?" in DEMBOUR, Marie Bénédicte & Tobias KELLY, eds, *Are human rights for migrants? : critical reflections on the status of irregular migrants in Europe and the United States* (Oxon, New York: Routledge, 2011) at 123.
[587] DEMBOUR & MARTIN, "The French Calais: transit zone or dead-end?" op. cit., at 133; SAAD, "The Psychological Impact of Falling Out of Status" op. cit., at 143-152.
[588] DEMBOUR & MARTIN, "The French Calais: transit zone or dead-end?" op. cit., at 133.

asylum seekers' mental health. Hence, the provision of a certain mid-term perspective with an early integration could eventually help to close the gap between the length of protection and the individual worries connected thereto.

Not every asylum seeker needs to be recognized as refugee, yet, I recommend granting a similar status to subsidiary protected persons and refugees. This would enhance a more comprehensive protection, a more secure legal status and similar benefits to both groups. In return, the protected persons might integrate faster and could use further educational offers when the persons will probably not be in conditions to return to their countries of origin anytime soon.

2) ECONOMIC BENEFITS

A good integration of cum-citizens could benefit a State's economy and thus the entire society. Cum-citizens do, first of all, require resources. States have to invest in accommodation, basic requirements, like food or clothing, and administrative procedures. However, it is not the government alone that cares for protected persons' first needs, as civil society organizations or family members often provide material and non-material support to cum-citizens.

BENEFITS IN TERMS OF ECONOMIC GROWTH

Economic growth is the increase of economic activities over time. It can be measured through the change in a country's Gross Domestic Product (GDP) over time. Many studies conclude that asylum seekers and protected persons create an initial GDP growth because they increase private and public spending.[589] This initial growth is not long-lasting and, although present, not very significant. In the EU, for example, persons in need of protection contributed to an increase of the GDP for 0.05-0.13% between 2015-2017.[590] Once asylum seekers and protected persons have fulfilled their needs, there is no immediate positive impact anymore on a State's GDP from a purchasing perspective. In the long run, cum-citizens who stay in the country have a positive

[589] Marcel FRATZSCHER & Simon JUNKER, "Integration von Flüchtlingen – eine langfristig lohnende Investition", (2015) DIW Wochenbericht Nr. 45 at 1085f.
[590] IMF, "The Refugee Surge in Europe: Economic Challenges", Staff Discussion Note 16/02, January 2016 at 14.

impact on the GDP through their economic activities that increase economic demand and production.[591]

Policies that limit asylum seekers' and protected persons' right to work have negative effects on integration and increase at the same time governmental spending for asylum, because the protected persons cannot gain their own income. Thus, the openness of the labor market towards protected persons affects the influence of cum-citizens on the GDP. If protected persons have access to the labor market, they will most likely contribute to the GDP in a positive way. Restraining the access would decrease the positive effects on the overall economy. In the three countries all protected persons, i.e. refugees and subsidiary protected persons, have immediate access to the labor market. However, cum-citizens need to present some skills for having access to employment. Usually, language skills are a decisive factor in order to find work.[592] In Canada, English and French are the official languages, whereas in Germany and Hungary the languages are German, respectively Hungarian. Both languages are less widespread in the countries cum-citizens come from. In Hungary, it is the civil society that provides access to language classes for refugees and for beneficiaries of subsidiary protection in many cases.[593] In Germany, foreign citizens might even be obligated to participate in an integration course, that is, among other reasons, the case when the alien will immigrate to Germany because of humanitarian reasons, i.e. when he is a cum-citizen.[594] The German integration course has to be paid by the cum-citizen. However, if the cum-citizen depends on social welfare, he will be exempted from the fees.[595]

According to an IMF discussion paper, wages between protected persons and natives show large gaps, particularly in the first time after arrival.[596] However, this gap usually decreases over time, in correlation with the degree of integration and education of the protected persons.[597] The better

[591] *Ibid.*, at 12; FRATZSCHER & JUNKER, "Integration von Flüchtlingen – eine langfristig lohnende Investition", op. cit., at 1085f.
[592] DIW, *Abschätzung von Effekten der Integration von Flüchtlingen*, (2017) DIW Berlin: Politikberatung kompakt 117 at 34f.
[593] *Cf.* European Parliament, "Integration of Refugees in Greece, Hungary and Italy Comparative Analysis", op. cit., at 65.
[594] Art. 44a(1)(1.) in combination with art. 44(1)(1.c) and Art. 25(2) *Residence Law.*
[595] *Cf. Verordnung über die Durchführung von Integrationskursen für Ausländer und Spätaussiedler* (Regulation concerning the integration of aliens and late repatriates, translated by the author), 13 December 2014, BGBl. I S. 3370 at art. 9(2).
[596] IMF, "The Refugee Surge in Europe: Economic Challenges", op. cit., at 15f.
[597] *Ibid.*

a protected person is integrated in the society, the more likely it becomes that he will find an employment, or even create new jobs through entrepreneurship.[598] Protected persons can be seen as additional human capital States receive when granting asylum.

BENEFITS OF EDUCATING PROTECTED PERSONS

The Cologne Institute of Economic Research found out that in 2016, 58,000 out of 290,000 protected persons who were able to work also found a job in Germany. This rate is lower than the general employment rate in the country.[599] The Institute estimates that until 2020, 80,000 protected persons will access the labor market yearly.[600] That indicates the importance of integrating protected persons from the very beginning. Access to language schools, access to the labor market and benefits and equal rights (and obligations) for refugees and subsidiary protected persons could improve the integration of protected persons.

Employment is a decisive issue. Physicians, for example, often have to undertake tests or programs to be recognized in the country of destination. Those requirements cost money and time. Even though in specific cases the country has issues to find persons who work in specific positions, the recognition of a foreign certificate needs time or is oftentimes not possible if cum-citizens could not bring their credentials with them.[601] This is comprehensive because it takes time to obtain certain qualifications. However, time is a crucial issue. If the recognition of a qualification cannot be provided the subsidiary protected person would have to study again for the qualification to be recognized. Yet, the limited right to remain might make the person rather occupy a job where little or no qualification is required.[602] That choice could be based on economic needs. A low-paid job brings at least some money into the household and helps to be autonomous instead of depending on the social contribution the State grants the person otherwise.

If subsidiary protection was granted for three years, beneficiaries of the protection might have real motivations to invest resources into education. They would be more likely to find a paid

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[598] *Ibid.*
[599] The employment rate of cum-citizens would be 20%, while the employment rate overall in Germany was 57.8% (*Cf.* Destatis, *Statistisches Jahrbuch 2017*, (Wiesbaden: destatis, 2017) at 360).
[600] *Ibid.*
[601] Lori WILKINSON & Joseph GARCEA, *The Economic Integration of Refugees in Canada: A Mixed Record?*, (Washington D.C.: Migration Policy Institute, 2017) at 15.
[602] *Cf.* DIW, *Abschätzung von Effekten der Integration von Flüchtlingen*, op. cit., at 11.

work and to integrate into the labor market.[603] According to the German Institute for Economic Research, a good integration would in the end decrease the costs of the asylum system overall.[604] However, there needs to be an open and transparent communication about the opportunities provided for cum-citizens to enable them for working in the host country.[605]

There might be economic reasons to grant two different forms of protection in the short-term. Yet, there are also economic reasons that we could take into account regarding increased economic benefits in a mid- to long-term perspective. Therefore, the utilitarian analysis did not provide an ultimate result when discussing if the same rights should be granted because of economic benefits which would be higher than incurred costs.

CONCLUSIONS PART II

Analyzing the equalities and differences of cum-citizens has provided two important results. First, refugees and beneficiaries of subsidiary protection are equal, only separate by status, which cannot be justified morally or ethically. Both groups experience alike notions of threat and should be treated alike, which they are in Canada, but which they are ultimately not in Germany and Hungary. In consequence, the right to equality poses a crucial issue, because even though refugees and beneficiaries are like, they are not treated alike. This goes against liberal principles which the EU Member States should upheld. In practice, I must admit that his argumentation is more difficult to sustain for Hungary which took an anti-asylum and anti-EU stance in the last years. Therefore, there is no absolute conclusion for the Hungarian case. Germany, however, should stick to its values and treat refugees and beneficiaries of subsidiary protection alike. In conclusion, based on democratic values and principles, based on human rights and the respect thereof, persons in need should be treated alike, with the exception of persons, like Mugesera, who have committed serious crimes that go against international principles.

Second, a utilitarian analysis could not provide a definite answer if granting two different statuses would be more beneficial than granting only one. There are reasons that sustain the advantage of

[603] *Ibid.,* 9f.
[604] *Ibid.*, 39ff.
[605] WILKINSON & GARCEA, *The Economic Integration of Refugees in Canada: A Mixed Record?*, op. cit., at 20.

a different treatment of both groups based on increased costs, but there are also benefits that could result from an improved integration measures in the long-term. In that case, a change of the current asylum legislation towards an equal protection for both groups would be required to also gain the benefits.

Although granting an alike status to beneficiaries of subsidiary protection could initially lead to higher costs, it might also increase benefits in a long-term, especially for Germany. Costs are present in terms of efforts, finances and in administrative workforce. If beneficiaries of subsidiary persons would be granted the same rights as refugees, costs in terms of efforts would probably remain about the same. Nevertheless, financial costs are likely to increase initially because granting the same rights to both groups would imply that also family members of beneficiaries of subsidiary protection would have the right to join their relatives in the EU and would, thus, be eligible for the social benefits granted to the person in need. However, granting an alike status might decrease administration costs because of a better allocation of functionaries corresponding to the number of asylum seekers and the number of second applications from cum-citizens. A part of the resources foreseen for the administration of asylum could be reallocated into other branches. Furthermore, an alike status might increase the benefits protected persons bring into the country. After arrival, protected persons stimulate the GDP because of additional expenditures. Yet, the stimulation is rather negligible with only 0.05-0.1%. On the long-term, though, well-integrated protected persons become more and more valuable for the country. They can provide workforce and additional human capital, and, being entrepreneurial, contribute to the development of new employment. Furthermore, the children of protected persons, i.e. the second generation, might also contribute to the country's economy in the future. Hence, the utilitarian analysis did not provide a final conclusion.

PART III: RECOMMENDATION - THE NEED FOR AN INTERNATIONAL CONVENTION ON CUM-CITIZENS' RIGHTS

International protection is not a cause, it is a remedy. Asylum will be granted only in particular circumstances to those who are vulnerable and cannot stay in their place of habitual residence anymore.

CHAPTER 5: RECOMMENDATIONS FOR THE EU, GERMANY, AND HUNGARY

A first recommendation is that the EU should take further measures to harmonize asylum in its Member States. Common rules and common practices could improve the accommodation of asylum seekers. Mutual approaches are required to ensure that all countries respect EU law. Thus, the CEAS should be harmonized in what concerns the protection residence permit and reception conditions for asylum seeker and cum-citizens. Furthermore, the creation of a Common European Asylum Fund could improve the accommodation of asylum seekers and cum-citizens in the EU Member States and contribute to a better mechanism for the integration of asylum seekers.

We suggest that the EU and its Member States should at least establish common criteria for the acceptance of asylum seekers and harmonize the national legislations that regulate rights and obligations in the host country. Based on the utilitarian analysis, we propose that States work with systems which categorize cum-citizens by only two criteria: First, the country/specific region of origin, and second, the situation within the country of origin that led to international protection. This system would allow to review the status of already protected persons when, for an established fact, they have the option to return to their country. The establishment of a protection that lasts at minimum three years would, hence, be our recommendation for the European Commission's proposal on harmonizing the asylum system in Europe.

We suggest that Canada should maintain the current asylum legislation. Hungary should remain with a legislation that grants subsidiary protection and refugee protection for the same period, but it should grant similar material benefits to both, refugees and beneficiaries of subsidiary protection. Ideally, Hungary should grant similar provisions regarding naturalization and citizenship to both groups. The EU and Germany should modify their frameworks to provide refugees and beneficiaries of subsidiary protection with equal rights concerning the length of

their stay and the material rights provided. Concerning the naturalization, there seems to be no imminent need that would require same conditions for refugees and beneficiaries of subsidiary protection, as long as either has the right to legally remain in the country. Yet, in terms of equality and morality States should treat cum-citizens under one regime and enforce the same rights for protected people.

Another recommendation is to introduce a *Declaration of the rights of cum-citizens*. Canada could take the lead in international negotiations where those States that already agree on a similar treatment of cum-citizens could gather and codify them. The EU and its Member States should also enter into talks about ways to enhance a more comprehensive asylum system. Regarding the EU, there is still much to figure out internally. Yet, the idea of harmonization is a task that the supranational organization took upon since its constitution in 1993 and even earlier, when it was known as the European Community. The knowledge which the EU could provide in establishing common legal frameworks could be beneficial for such a Declaration, under the premises that it gets the Member States to find a consensus for asylum. To provide some initial ideas, I will elaborate more on the need for codification and on ideas for the content of a feasible international or multilateral *Declaration*.

CHAPTER 6: A DECLARATION ON THE RIGHTS OF PERSONS IN NEED OF PROTECTION

Based on our findings in Part II, we consider that refugees and beneficiaries of subsidiary protection are part of one group yet treated differently which is not in accordance with the idea of human equality and the idea of liberalism. However, there is no international documents that considers refugees and beneficiaries of subsidiary alike, even though multilateral agreements exist.

A THE NEED FOR CODIFICATION

Unequal treatment because of the belonging to a defined group became more and more outdated. The UN established conventions against racism[606], for the rights of persons with disabilities[607], on the rights for migrant workers[608], the Council of Europe introduced declarations on the rights of persons belonging to national or ethnic, religious and linguistic minorities[609], and the international community even developed a declaration for refugees and migrants (*New York Declaration*).

Filippo Grandi, the UN High Commissioner for Refugees said that "*[t]he New York Declaration marks a political commitment of unprecedented force and resonance. It fills where has been a perennial gap in the international protection system – that of truly sharing responsibility for refugees.*"[610] Still, there has not yet been a *Declaration on the Rights of Beneficiaries of an International Protection* to close the gap between refugee and subsidiary protection.

We found out that refugee protection is a well-established concept in international law which is recognized worldwide. The idea of subsidiary protection has not yet found its place in international treaties but can be interpreted as a form of customary law. Customary law consists from *opinio iuris*, the State's legal conviction, and State practice. The conviction of States is shown by the legal framework which States provide.[611] Subsidiary protection has been largely recognized.

There are tendencies in many legal environments all over the world that show that asylum goes beyond the *Refugee Convention*. In 2005, the UNHCR's Executive Committee presented its

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[606] *International Convention on the Elimination of All Forms of Racial Discrimination*, New York, 21 December 1965, 660 UNTS 195, (entered into force 1969, accession by Canada 14 October 1970, by Germany 16 May 1969, by Hungary 4 May 1967).
[607] *Convention on the Rights of Persons with Disabilities*, New York, 13 December 2006, 2515 UNTS 3, (entered into force 2010, accession by Canada 2010, by Germany 2009, by Hungary 2007).
[608] *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, op. cit.
[609] *Framework Convention for the Protection of National Minorities*, 1 February 1995, ETS 157, (entered into force 1 February 1998, accession by Germany 10 September 1997, by Hungary 25 September 1995).
[610] UNHCR, "UNHCR welcomes 'unprecedented force and resonance' of New York Declaration", online: <http://www.unhcr.org/news/press/2016/9/57dff34f4/unhcr-welcomes-unprecedented-force-resonance-new-york-declaration.html> (requested 28 August 2018).
[611] *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)*, Judgement, I.C.J. Reports 2012, 99, at para 55.

Conclusions on the Provision on International Protection Including Through Complementary Forms of Protection[612] in which they highlighted the international documents like the *Cartagena Declaration*[613] in Latin America or the African Union's (OAU) *Convention Governing the Specific Aspects of Refugee Problems in Africa*[614]. Those extend, like the European legislation, the definition of asylum for granting persons in need international protection. The African legal sphere has recognized that specific situations go beyond persecution. The *Addis Ababa Convention* stipulates that the term "refugee" can also apply when a person cannot stay in his "habitual" place of origin anymore. According to the OAU

> [t]he term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[615]

The *Cartagena Declaration* of 1984 explicitly mentions the *Addis Ababa Convention* and recognizes similar circumstances as grounds for asylum.[616] Also in practice, some Latin American States recognize that asylum sometimes goes beyond the act of persecution but they do not have a common practice.[617] However, that definition of the term "*refugee*" would be another country's definition for "*person in need of (additional) protection*". The EU has recognized the need and created the system of subsidiary protection in the CEAS. Furthermore, several European countries that are not Member States of the EU also provide additional protection to persons in need who would not qualify as refugees.[618] That is why additional protection is part of the

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[612] UNGA, *Conclusions on the Provision on International Protection Including Through Complementary Forms of Protection*, REPORT OF THE FIFTY-SIXTH SESSION OF THE EXECUTIVE COMMITTEE OF THE HIGH COMMISSIONER'S PROGRAMME, 56th Sess, UN Doc A/AC.96/1021, (2005) at 11ff.
[613] OAS, *Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama,* held in Cartagena on 19-22 November 1984 [*Cartagena Declaration*].
[614] OAU, *La Convention de L'OUA régissant les aspects propres aux problèmes des réfugiés en Afrique*, 10 September 1969, 1001 UNTS 14691 [*Addis Ababa Declaration*].
[615] Art. 1(2) *Addis Ababa Declaration.*
[616] Conclusions of the *Cartagena Declaration*, III.3: "Hence the definition or concept of a refugee to be recommended for use in the region is one which, in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."
[617] María-Teresa GIL-BAZO, "El asilo en la práctica de los Estados de América Latina y África, Nuevos temas en la investigación sobre refugiados" (2013) UNHCR Informe de investigación No. 249.
[618] For example Switzerland. See: art. 4 *Loi sur l'asile*, 26 June 1998, 142.31 (Switzerland).

European, not exclusively of the EU, legal system. Also, other countries, like Canada, have provisions that grant persons in need at least some temporary protection.[619]

We consider that countries that not *refoule* persons to places where they would be subjected to torture or to violations of their civil and political rights, like it is the situation in many Asian States have a similar approach towards the right of persons who are not refugees but need asylum.[620] When it comes to a short temporary protection, African States have shown a more "*discretionary and ad hoc*" approach[621] which resembles temporary protection granted in the EU.[622] Thus, additional protection seems to be a practice in African States but is not defined legally but is rather practiced by the African States. In the Central American *Cartagena Declaration* the definition of the term refugee goes also further than the definition laid down in the *Refugee Convention*. Refugee protection in the African and Latin American contexts exceed the *Refugee Convention's* dispositions, which shows that both regions adopted a practical approach, while the EU maintained differences in status.

State practice is the application of the *opinio iuris*. The interpretation of what is State practice is vast.[623] According to the ILC, State practice is defined by several observations.[624] For example, national laws[625] and decisions of national courts can be part of State practice, when they confirm observations of the *opinio iuris*.[626] When international law evolved, tribunals referred to decisions made by national courts in order to confirm if the practice of States could serve as the

[619] Art. 97 *IRPA.*
[620] Mary CROCK, "Shadow plays, shifting sands and international refugee law: convergences in the Asia-Pacific", (2014) 63(2) I.C.L.Q. 247 at 257ff., 267.
[621] Tamara WOOD, "Developing temporary Protection in Africa", (2015) 49 FMR 23.
[622] *Cf.* Annex I.
[623] *Cf.* Niels PETERSEN, "The International Court of Justice and the Judicial Politics of Identifying Customary International Law" (2017) 28:2 EJIL 357, at 368.
[624] ILC, *Identification of customary international law: The role of decisions of national courts in the case law of international courts and tribunals of a universal character for the purpose of the determination of customary international law*, Memorandum by the Secretariat, ILC 68th Sess, A/CN.4/691 (2016).
[625] *Ibid.*, at. 13.
[626] *Ibid.*, at 5.

foundation for international customary law.[627] Furthermore, also the ICJ refers to national practice when pronouncing an advisory opinion or when deciding a case.[628]

In 1995, Goodwin-Gill said that "*States do generally extend protection to persons fleeing situations of grave and urgent necessity*."[629] According to his opinion State practice confirmed the concept of (subsidiary) protection for people who were not considered to be refugees. The practice, *consuetudo*, together with the legal opinion, *opinio iuris*, would establish customary law. Consequently, States confirmed that they consider circumstances other than persecution as preconditions for granting international protection. When national laws which protect persons in need who are not refugees implement different rules and grant diverse forms of protection, subsidiary protection which is enshrined in many national or supranational legislations is a form of State practice and is already used and implemented in several regions.

Considering that additional protection for persons in need is practiced by many States, they should start discussions on a new international convention, which could be based on the *Refugee Convention* and include the challenges from today. Otherwise, the drafting of a new treaty to define how to handle additional protection could further improve the international community's approach towards additional protection. Canada could take the lead in such negotiations. It is not enough to consider persecution as an exclusive ground for protection anymore. Conflicts and crises are shaping asylum in State practice. A global compact for migrants has been worked on by the UN (as of August 2018) but subsidiary protection has not been, precisely, included, although humanitarian migration was an issue.[630] However, the global pact seems not to be a binding treaty according to the aims defined by the IOM.[631] Therefore, I think that the international community should additionally start a dialogue about the humanitarian protection of individuals with the

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[627] *Ibid.,* at 6.
[628] Cases being: *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgement, I.C.J. Reports 2002, p. 2 at 23-24 and *Jurisdictional Immunities of the State* at 55, 64, 71-77, 118.
[629] Guy S. GOODWIN-GILL, "Asylum: The Law and Politics of Change", (1995) 7 Int'l J. Refugee L. 1 at 7.
[630] *New York Declaration*, Annex 2, III Content, p. 22.
[631] IOM, "Vision on the Global Compact on Migration", 13 April 2017, online: <https://www.iom.int/sites/default/files/our_work/ODG/GCM/IOM-vision-on-the-global-compact-on-migration-13April2017.pdf> (requested 8 January 2018).

objective to establish a *Convention* or *Declaration on the rights of persons in need of international protection*.

Such a *Declaration* should be drafted to harmonize international law and to close significant gaps. It should rely on human rights and scrutinize the importance of equality in like circumstances. The *Declaration* should not focus explicitly on refugees and beneficiaries of subsidiary protection (in terms of asylum), but it should rather regard State practice in order to include further reasons that could create the need for persons to migrate and look for international protection in a third country. Moreover, it would be coherent to talk about protected persons or cum-citizens, instead of refugees and beneficiaries of subsidiary protection.

By these means, the *Declaration* should overcome critical issues and the lack of basic human rights in situations, where rights should be provided. Individual rights could ensure the well-being of persons, who have suffered situations in which they faced death or other unfavorable circumstances. The *Declaration* should apply to persecuted persons, as well as to tortured persons, to those who face a cruel and unusual punishment or to others who have become victim of an unjust treatment which could not have been prevented. The pre-requirement for granting protection according to the Declaration should be the absence of the State of origin when it comes to respecting human rights, to protecting them, and to preventing abuses thereof.

The international *Declaration* should remain open to new grounds, so as not to be redrafted, again, after the elapse of 50 more years. Although we do not want to take the discussion much further, this new *Convention* could provide safeguards in terms of international law and State responsibility, regarding climate change and environmental protection, for example. When the international community in its entirety is responsible for the global warming, it is very unlikely that there will not be a point at which a court will grant international protection to an inhabitant from an island that is about to drown.[632] Those grounds could be left open in the new Convention, which would prevent the need to redraft another international agreement.

[632] Jane MCADAM & Walter KÄLIN, "Rights for people forced out by climate change", (22 August 2018), online: <https://www.lowyinstitute.org/the-interpreter/rights-people-forced-out-climate-change> (requested 28 August 2018).

B RIGHTS AND OBLIGATIONS OF CUM-CITIZENS

There are inalienable human rights that should find their place in the *Declaration on the rights of persons in need of international protection*. For finding these rights, we provide an overview that is not exhaustive but that considers all the fundamental rights which should be granted to human beings. Human rights are also for people in need of international protection, which the *Declaration* should pronounce in its preamble.

Regarding the articles, a first part should retake the most essential content of the UDHR and other human rights documents. Here, the *Declaration* should recognize that human beings are created equal, and that dignity is imprinted in this recognition.[633]

Second, the *Declaration* should recognize an interdiction to discriminate against protected persons, without a distinction of ethnic origin, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[634]

Other articles that this part should include are the right to life, liberty and security of person. Furthermore, the *Declaration* should cover an interdiction of torture and the interdiction of a cruel and unusual punishment, as well as an interdiction of slavery.

The second part of the *Declaration* should recognize the reasons for being granted asylum. These reasons could include persecution because of the reasons mentioned in the *Refugee Convention*[635] but it should go beyond these criteria. It should rather be drafted in a way that remains open. A possibility would be to say:

"A person who owing to a well-founded fear of being persecuted by the State or by non-State actors for reasons of being part of a particular ethnic group, religion, nationality, membership of a particular social group or political opinion; or who, not having a nationality and being outside the country of habitual residence as a result of such events; or who, being subjected to a threat to life because of a serious harm, or to torture, or to a cruel and unusual punishment, or who is affected

[633] Art. 1 *UDHR*, preamble and art. 10 *ICCPR*, preamble and art. 13 *ICESCR,* preamble *ECHR.*
[634] *Cf.* Art. 2 *UDHR*, art. 2(1) *ICCPR*, art. 14 *ECHR.*
[635] Nationality, race, religion, membership of a particular social group, or political opinion.

by reason of indiscriminate violence in situation of armed conflict; or who, being affected by a threat to their existence that arose due to the international community's actions or omissions; **and** who is outside the country of their nationality or habitual residence as a result of such events, **and** who is unable or, owing to such fear, is unwilling to avail themselves to the protection of that State or to the State of habitual residence, should be granted international protection."

The grounds which make asylum seekers move to other countries are vast. They will not cease to exist but rather be expanded in situations that are not yet taken into account. Today, we only need to look at climate change, caused by the international community in its entity, to estimate into which direction international protection might go. Currently, it still seems as if climate change would not provide reasons for persons to be granted asylum in third countries. Yet, the effects of climate change only started. Climate change which substantially threatens certain people and their self-sufficiency, is likely to cause mass migrations and reasons for demanding international protection.[636] It is the States' responsibility to provide remedy for their internationally wrongful acts in view of other States[637], and it should also be the international community's responsibility to provide remedy to persons who have been affected by the lack of measures that have been taken in view of these global menaces.

There is a quite uniform opinion that instead of coping with a problem, the causes need to be remedied. Yet, as long as the cause still exist the need to cope with the results exists as well.

In this second part, the need to enshrine also limits to asylum needs to be written down. Those reasons should also refer to universal principles of human rights as well as to reasons that developed in our modern societies. The interdiction to commit crimes against humanity, the interdiction of genocide and human rights violations should be laid down. Also, terrorism, the incitation to hatred against persons and groups and the intention to undermine democratic institutions that safeguard human beings and individual liberties should be considered when drafting the *Declaration*.

[636] See also MCADAM & KÄLIN, "Rights for people forced out by climate change", op. cit.
[637] ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the ILC on the Work of its Fifty-third Session, UNGAOR, 56th Sess, Supp No 10, p. 43, UN Doc A/56/10 (2001).*

The third part should focus on material rights for the persons who received protection. In that part, cum-citizens would be granted the right to basic needs. They should have the right to a family and to private life. They should have the right to education and to work. Necessarily food, water and health care must be provided. Also the liberty of free movement within the Member State, the right to property and equality before the law and legal institutions could be codified.

Family reunification should be granted to all cum-citizens. Although family reunification would probably increase the public spending initially, the long-term benefits are likely to affect economic growth in a positive way. However, States need to act and take measures that support the integration of cum-citizens, especially in what concerns language classes and qualifications. Well-integrated cum-citizens are probably impacting the economy in a positive way. While economic activities would be stimulated, population growth could be increased. Furthermore, refugee protection and subsidiary protection should be granted for the same period.

In the fourth part, the obligations of cum-citizens could play a major role. Among these obligations the requirement to accept the host State's constitution and its legislation during the protection could find its place in the *Declaration*. Additionally, the obligation to return to the country of origin, if the reasons for protection have ceased, should also be incorporated.

In the fifth and last part, the States should show a commitment to human rights again. They should declare not to deport a person who faces, in the country of origin, a serious threat to their life and/or integrity. This clause would find its origin in the principle of non-*refoulement* which is an obligation that liberal democratic States should value. The dignity and integrity of a human being should not be at stake in our societies.

All in all, the *Declaration on the rights of protected people* could enshrine an international, common, minimum legal framework for answering the question on how to treat asylum seekers and cum-citizens, based on current legislative provisions that are present all over the world. It would close the gaps that currently exist between asylum and status. Furthermore, it would aim at finding a consensus for the international community. The *Declaration* should create incentives for States to behave morally and to provide an equal protection to everyone, who is in need thereof.

CONCLUSION

In the first two parts, the asylum legislation of three countries has been described and analyzed. From the comparison of the three national systems, always with regard to the EU and to international law, we asked if and how human rights can apply to cum-citizens. By comparing the grounds that hinder the admission of asylum seekers in both territories, we saw that the EU and Canada have similar though not identical legislations. In Canada and in the EU, the legal framework distinguishes between refugees and persons in need of (subsidiary) protection. As I explained in Part I, I consider that refugees and persons who are otherwise in need of protection seek asylum, i.e. international protection, and are, therefore, upon acceptance part of one group: cum-citizens.

In comparing refugees and beneficiaries of subsidiary protection, I found out that currently refugees and beneficiaries of subsidiary protection are treated differently which affects their rights and benefits in EU Member States but that they are treated alike in Canada. In Part II, I proceeded to analyze in the **four-phases-model** based on the concept of equality ("treating likes alike"), if refugees and beneficiaries of subsidiary protection are in like circumstances when they need to leave their place of origin. Analyzing the notions of threat and the inherent vulnerability asylum seekers are exposed to, they have experienced like situations. When they have to flee they are asylum seekers, once they arrive to another country they are cum-citizens, and when the protection ends they are no longer beneficiaries of asylum. Thus, refugees and beneficiaries of subsidiary protection are like in alike circumstances, except where States decide to not grant rights to beneficiaries of subsidiary protection that they grant to refugees.

More concrete the results from Part I and the analysis of cum-citizens in the four-phases-model has shown that in Germany, the differences are the length of protection and family reunification, where regulations provide a more comprehensive framework for refugees while beneficiaries of subsidiary protection are in worse conditions. In Hungary, different rules regulate the naturalization of a protected person and also the right to family reunification for beneficiaries of subsidiary protection. Thus, in Germany the different treatment is present during Phase III, while in Hungary different treatment takes place between Phase III and Phase IV.

These findings were tested in view of human rights provisions. Given that refugees and beneficiaries of subsidiary protection are like, they should be treated alike. Hence, we asked if they were part of an equal group, which we affirmed. Based on that result, I applied the principle of non-discrimination, which is to be found in the *ECHR*, the *UDHR*, the *ICCPR*, and the *ICECSR*. That test confirmed the equality of asylum seekers and cum-citizens who are different by status. As status is conferred upon asylum seekers by a State, it is an artificial criterion which makes refugees and beneficiaries of subsidiary protection equal. As they are in practice alike, they should be seen as members of one group and should, accordingly to the liberal principle of basic human equality benefit from the same rights.

In the last analytic section, I analyzed the economic impacts that two different status have from a utilitarian perspective. In that section, I wondered if countries would do better by providing equal rights to refugees and beneficiaries of subsidiary protection. That part did not lead to a clear and concise conclusion. There are reasons that indicate that granting two different forms of protection might be economically beneficial (less costs) while other reasons indicated that granting only one form of protection could lead to long-term benefits (an improved allocation of resources, better integration and acceleration of economic activities). Hence, it is difficult to confirm the hypothesis that granting only one form of protection would be economically beneficial.

In the last part, I made recommendations for the States. One important recommendation was that the EU should find a common approach for treating refugees and beneficiaries of subsidiary protection within the Member States. European asylum law is not well-enough harmonized. That provides difficulties in terms of treating asylum seekers and cum-citizens and might also influence the choice of the host-country for asylum seekers. Furthermore, one common legislative framework would iterate the liberal principles on which democratic States are (on in the case of Hungary should be) based.

Furthermore, I suggested to start negotiations on a new multilateral or international *Declaration* for the rights of people who receive international protection. After the two World Wars, the international community took measures to enshrine the rights of displaced and fled persons. Today, asylum provides dispositions for persons who are in need and who are not be considered as refugees. International protection is a humanitarian obligation of all signatories of the *Refugee*

Convention. Therefore, an international agreement on the rights of protected persons could help to overcome the present challenges. Further regions and organizations, notably the OAU and the Latin American States, recognized an additional protection, for example in the *Addis Ababa Convention* (OAU), or in the *Cartagena Declaration* (Latin America). Both documents define a broader meaning of the word refugee or establish otherwise the category of protection persons who need to be treated like refugees. There is a need for a new revised *Refugee Convention* or for a *Declaration on the rights of persons in need*, that should go further than the *Geneva Convention* and the *Bellagio Protocol*. This *Declaration* should deal with questions arising from motivations for international protection which exceed persecution and enshrine it in international law. Moreover, it should also remain open with regard to new grounds that are likely to apply in a few years or decades, like flight because of a changing climate. Such an agreement should, overall, codify individual State practice. I propose to include a definition of persons in need of protection that goes beyond the term refugee. Furthermore, the rights and obligations of cum-citizens should be laid down in the *Declaration*. Those rights and obligations should be congruent with international human rights documents but also with additional international principles which regulate the refusal of asylum seekers and the revocation of protection.

In conclusion, I would like to insist that international protection is a remedy for persons who are in need. In an ideal world, international protection would not be required. As we live in a world that still comprises situations in which persons suffer from war and violence, from torture and persecution, we should do our best to safeguard our humanitarian values and principles which guide us in difficult times. We should continue to uphold them and do our utmost to protect persons in need, who, in return, should make their best effort to integrate into the host society during the period in which protection is conferred.

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ANNEX I: DEFINITIONS

Migrant: "(…) [A]n international migrant is someone who changes his or her country of usual residence, irrespective of the reason for migration or legal status. Generally, a distinction is made between short-term or temporary migration, covering movements with a duration between three and 12 months, and long-term or permanent migration, referring to a change of country of residence for a duration of one year or more."

Source: https://refugeesmigrants.un.org/definitions

Asylum: "the protection that a government gives to people who have left their own country"

Source: *Oxford English Dictionary*, 7th ed, *sub verbo* "asylum".

Asylum seeker: "an asylum-seeker is someone whose request for sanctuary has yet to be processed".

Source: UNHCR, "Asylum-seekers", online: <http://www.unhcr.org/asylum-seekers.html>.

Refugee: [A person who] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself from the protection of this country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, unwilling to return to it.

Source: Art. 1 A(2), *Refugee Convention.*

Beneficiary of subsidiary protection (EU): A person who receives international protection because the person faced "the death penalty or execution, (…) or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict".

Source: Art. 15 *Qualification Directive.*

Person in need of protection (Canada): (A person who will get asylum because of) torture, a risk to their life, or a risk of cruel and unusual punishment.

Source: Art. 97 *IRPA.*

Cum-citizen: A beneficiary of international protection.

Source: Part I, Chapter 1 of this thesis.

ANNEX II: STATISTICS

Year	2016	2015	2014	2013
Permanent residents[638]				
Protected Persons[639]	N/A	12,070	11,179	11,930
Governmental sponsorship	17,935	9,448	7,626	5,726
Hybrid sponsorship	3,670	811	177	153
Private sponsorship	14,845	9,746	5,070	6,330
Total protected persons (RPs)	N/A	32,115	24,070	24,139
Temporary residents[640]				
Asylum claimants upon or after arrival	23,350	16,529	13,800	10,465
Accepted	9,972	8,596	7,156	3,064
Rejected	4,821	4,119	3,961	1,957
Abandoned/withdrawn	968	744	696	578
Pending (at the end of each year)	17,537	9,999	6,961	4,987
Total protected persons[641]	46,422	28,601	20,029	15,273

TABLE VI: ASYLUM IN CANADA

[638] Government of Canada, "Canada – Permanent Residents by Category", 2015.
[639] Protected persons refer in this context to cum-citizens who were not resettled.
[640] IRB, "Refugee Protection Claims Statistics", 2013-2016.
[641] Exclusion of "protected persons" who have been granted the permanent residence.

Year	2016	2015	2014	2013
First claims	722,370	441,899	173,072	109,580
Pending cases (end of year)	417,076	N/A	150,257	86,694
Second claims	23,175	34,750	29,762	17,443
Pending cases (end of year)	16,643	N/A	18,909	9,049
Asylum (political persecution)	2,120	2,029	2,285	919
Refugees	254,016	135,107	31,025	9,996
Subsidiary Protection	153,700	1,707	5,174	X[642]
Non-refoulement (tolerated)	24,084	2,072	2,079	9,231
Rejected	173,846	91,514	43,018	31,145
Abandoned/withdrawn	1,435	50,297	45,330	29,705
Total protected persons	433,920	140,915	40,563	20,128

TABLE VII: ASYLUM IN GERMANY[643]

[642] Germany adopted the *Qualification Directive* in 2013, thus, until 2014, subsidiary protected persons were considered to be "tolerated persons" and are numbered under the non-*refoulement* principle.
[643] Statistics obtained by FOMR and request for information.

Year	2016	2015	2014	2013
Asylum claimants upon or after arrival	29,432	177,135	42,777	18,900
Refugees	154	146	240	198
Subsidiary Protection	271	356	236	217
Non-refoulement (tolerated)	7	6	7	4
Total protected persons	432	508	483	419
Pending cases at the end of the year	N/A	36,694	15,685	1,886

TABLE VIII: ASYLUM IN HUNGARY[644]

[644] Statistics obtained by Hungarian Central Statistical Office and by request for information (Immigration and Asylum Office, Hungary).