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Sebastian Frik,

Wien, im März 2017

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2. Glossary

AFSJ	– Area of Freedom, Security and Justice
CAT	– Convention Against Torture
CEAS	– Common European Asylum System
CEDAW	– Convention for the Elimination of all Discrimination Against Women
CIS	– Convention Implementing the Schengen Agreement
CRC	– Convention on the Rights of the Child
ECHR	– European Convention on Human Rights
ECtHR	– European Court of Human Rights
ECOSOC	– Economic and Social Council of the United Nations
EEA	– European Economic Area
EEC	– European Economic Community
EUMS	– Member States of the European Union
ICCRP	– International Covenant on Civil and Political Rights
ICESCR	– International Covenant on Economic, Social and Cultural Rights
IDP	– Internally Displaced Persons
ILO	– International Labour Organisation
INGO	– International Non-Governmental Organisation
JHA	– Justice and Home Affairs
MEP	– Member of the European Parliament
MS	– Member States
NGO	– Non-Governmental Organisation
OAU	– Organisation of African Unity
OPEC	– Organisation of the Petroleum Exporting Countries
QD	– Qualification Directive
SEA	– Single European Act
TCN	– Third Country National
UDHR	– Universal Declaration of Human Rights
UNDP	– United Nation Development Programme
UNGA	– United Nations General Assembly
UNHCR	– United Nations High Commissariat for Refugees
UNSC	– United Nations Security Council
WW1/2	- World War One / Two

3. Introduction

In 2014 the Austrian daily newspaper "Die Presse" published an article, which tried to present facts on the European Asylum System. As part of the article, the author used a chart, which illustrated all decisions regarding applications for asylum and international protection in Austria since 2004.[1] The graph distinguished between 'positive', 'negative' and 'other' decisions. While persons that absconded the procedure were subsumed under 'other', persons that had been granted subsidiary protection were counted under the category 'negative'. Subsidiary protection was introduced in 2004 to close the so-called protection gap of the Geneva Convention, which will be elaborated as part of this thesis with the clear statement that persons eligible for subsidiary protection were no less in need of protection than others. The public discourse, however, framed beneficiaries of subsidiary protection as persons who were not granted asylum. While this is legally correct, it tends to draw a rather negative image of those persons through connecting them to persons not eligible for asylum rather than stressing their protection needs. To counter argue this perception, the goal of this thesis is to examine the genesis of this complementary protection regime in the European Union until the implementation of the first Qualification Directive in 2004, highlighting especially its goals, strengths and weaknesses.

The contemporary refugee protection regime is based on the 1951 Geneva Convention relating to the status of refugees and the 1967 Protocol, which removed the temporal and geographical restrictions that were included in the original Convention. It defines the positivist term refugee and is legally binding in 146 states.[2] This definition is necessary since the foundation of the current world system is the sovereign nation-state, which constitutes itself *inter alia* through the control of their national borders. As Stephen Krasner points out, this kind of sovereignty, which he

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[1] Andreas Wetz, 'Faktencheck: So (ungleich) Werden Hilfesuchende Verteilt', *Die Presse*, 20 April 2014, http://diepresse.com/home/panorama/welt/4713076/Faktencheck_So-ungleich-werden-Hilfesuchende-verteilt.

[2] It has to be noted that not all states signed the Convention and Protocol without Declarations or Reservations. A detailed list can be found on the Homepage of the United Nations, http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html.

names interdependence sovereignty, remains to be the generally unchallenged principle in international relations albeit it has started to gradually erode due to globalisation.[3] Following this principle and certain liberal moral standards, such as the freedoms of speech, of worship, from want and from fear, the demand for a stringent international protection policy emerges, which regulates how and when persons fleeing their country of origin or their habitual place of residence are eligible for international protection.[4] Although the 1951 Convention is the primary source of refugee protection, it is based on the idea of universal Human Rights. Political asylum is far older than the idea of universal fundamental rights[5] that were implemented as 'Human Rights' and the global scale would not have been possible without the liberal idea that every person has basic rights, such as the right to life or the prohibition of torture. When analysing the development of international protection, international Human Rights treaties, especially the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment (CAT), consequently have to be taken as the legal and philosophical basis for international protection.

The policy makers of the post-World War 2 (WW2) era tried to use the Allied consensus that another event like the Holocaust had to be prevented at all costs to push forward the codification of Human Rights treaties. As such, the UDHR was signed in 1948 and only three years later, the Geneva Refugee Convention that has to be seen as a direct response to the mass refugee movements, which had been triggered by the Holocaust. This first codification of the term "refugee" hence follows a

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[3] Stephen Krasner, 'Abiding Sovereignty', *International Political Sciences Review* 22, no. 3 (2001): 231.

[4] While the need for granting international protection might not seem logical within the international state framework, M. Gibney has written an excellent piece on the ethical imperative to grant protection in the context of the liberal-democratic state. See: Matthew J Gibney, *The Ethics and Politics of Asylum Liberal Democracy and the Response to Refugees* (Cambridge; New York: Cambridge University Press, 2004), chaps 2–3.

[5] Fundamental here has to be read in a philosophical and not legal sense, thus indicating the understanding that those rights are essential for the liberal understanding of human relations.

definition which in many cases was interpreted in a very restrictive manner. While the 1967 Protocol removed some initial restrictions, the basic definition of a refugee, as regulated in Article 1A, remained. The main principle of international protection is that a person who fled their country of origin because their protection could not be guaranteed and would risk a threat to their life or liberty through expulsion to their respective state of origin, must not be expelled or returned (*refouler*). This principle is known as the principle of non-refoulement and regulated most prominently in Article 33 of the 1951 Convention: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[6] Since then, its scope has further been broadened through international Human Rights instruments, particularly Article 3 of the CAT and, within the European regional regime, Article 3 of the European Convention on Human Rights (ECHR). While the 1951 Convention restrains the non-refoulement clause to cases covered under Article 1A, the clauses in the CAT and ECHR are absolute, which means they must not – for any reason – be derogated.

Through the narrow interpretation of the refugee definition in the Geneva Convention, and the absoluteness of the prohibition of refoulement, certain gaps became obvious. The European Union responded to those gaps by introducing a second regional protection status that goes beyond the scope of the narrow understanding of refugee protection. This "subsidiary protection" status was first codified in the Qualification Directive[7], which can be seen as the heart of the Common European Asylum System (CEAS). The development of this new harmonized status is the general topic of this thesis. Its aim is to highlight the genesis and design through the process, which started with the Treaty of Amsterdam. The so-called "first wave" of harmonisation, which includes the Dublin Regulation, the Reception Conditions Directive, the Procedures Directive and the Qualification

[6] UNHCR, 'Convention and Protocol Relating to the Status of Refugees', 2010, chap. 33, http://www.unhcr.org/3b66c2aa10.

[7] European Communities, 'OJ 2004/L 304/12 COUNCIL DIRECTIVE 2004/83/EC', 30 September 2004.

Directive was completed in 2004. The Return Directive, which was adopted in 2008, sometimes also gets counted into this first wave. However, since its scope goes beyond international protection and focuses especially on the return of irregular migrants, this Directive will not be included in this study.
Before analysing the factual legal and political discourse during the construction process, I will start with some fundamental reflections on the necessity of complementary/subsidiary protection statuses, and consequently the scope of the refugee status. Why was the creation of a complementary protection regime necessary? Where do the differences between international protection, the obligation of non-refoulement and the judicial understanding of the term refugee come from?
This passage will then be followed by a general overview of the international protection discourse from the end of the Second World War until the post-Cold War era, with a focus on the Role of the United Nations High Commissioner for Refugees (UNHCR). This part is essential in order to understand the development of the regional protection regime in the European Union, since UNHCR holds the UN mandate on international Protection, and is therefore a direct partner and participant in the process. Only through understanding the changes of the 1990s will we be able to comprehend its position within the protection discourse. While the bipolar understanding in the field of international relations used to hold a very clear idea of security, this classical realist security discourse started to tremble once the referent object became more diffuse. Apprehending the scope of this break is essential when analysing the international protection discourse, which itself is based on the predominant idea of security. After a short explanation and justification of the methodology of research, I will then analyse particular discourse strands and planes. The goal is to understand the elaboration of the subsidiary protection regime, the roles of the important actors, and its meaning within the broader international protection discourse. Henceforth, the concluding part should be understood as a deeper reflection on the meaning of this inner-EU discourse in the broader field of refugee protection.

4. Preconditions to the Common European Asylum System

4.1. Scope of the 1951 Geneva Convention

To understand the meaning of complementary forms of protection, it is necessary to first examine the core of the international protection regime, namley the 1951 Convention Relating to the Status of Refugees because "subsidiary protection can only play any role when the concept of refugee is insufficiently inclusive to cover all those considered to be in need of protection"[8]. By highlighting the areas of international protection, which fall outside the scope of the 1951 Convention, a legal and political base for all further development is being built. A close historical analysis of the meaning and objective of the 1951 Convention is necessary in order to allow an implementation consistent with the Vienna Convention on the law of treaties. Following later Convention the original object and purpose have to be kept in mind when interpreting a treaty in good faith. In 2000, the European Commission explained that subsidiary protection commonly met highly specific means, but also that collective situations that were understood to be excluded from the 1951 Convention.[9] Thomas Spijkerboer shows that the collective nature of flight, which is regularly explained as a "new" phenomenon, already existed in the time of the drafting of the 1951 Convention.[10] The aim of this chapter is to explain the genesis of the protection gap through analysing the early development of refugee protection mechanisms.

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[8] SPIJKERBOER Thomas, Subsidiarity in Asylum Law. The personal scope of international Protection in Daphné Bouteillet-Paquet, Kay Hailbronner, and Academic Network for Legal Studies on Immigration and Asylum Law in Europe, eds., *Subsidiary protection of refugees in the European Union: complementing the Geneva Convention? =: La protection subsidiaire des réfugiés dans l'Union Européenne: un* complément *à la Convention de Genève?*, Collection de la Faculté de Droit de l'Université Libre de Bruxelles (Bruxelles: Bruylant, 2002), 19.

[9] European Council, '13119/00 ASILE 54', 2000, sec. 3.2.2., The main sources of this thesis will be internal documents of the European Council, which are published and open to the public. The citations will therefore be based on the Archive codification. This includes most relevant documents of the European Commission, which are part of the European Councils publications.

[10] op. cit. SPIJKERBOER (2002), 20f.

4.2. Groundwork of the 1951 Convention

Spijkerboer challenges the presumption that the refugee definition is an individual one on the basis of a historical analysis of this definition.[11] In his reading of the *travaux préperatoires* he shows how the drafting commissions intended to consolidate and extend the protection of earlier instruments, which defined refugees mostly under collective terms. The common characteristic of refugee definitions in the 1920s and 30s was that they lived outside the protection of their state of origin as a consequence of war or events directly connected to war.[12] This understanding of the refugee has to be read in a historic-analytical manner, with regard to the state-building processes that followed the First World War.

Although mass population displacements had existed throughout history, the nationalisation of citizenship also changed the meaning of political communities. Refugees have themselves been an important part of state-building processes through the homogenisation of populations. The state building projects comprised in the WW1 Peace Treaties also included minority treaties. Those treaties "said in plain language what until then only had been implied […], namely, that only nationals could be citizens, only people of the same national origin could enjoy the full protection of legal institutions."[13] The refugee qua refugee therefore symbolized the triumph of the modern homogenous nation-state since, not like the stateless person, they are still included in the rational of nationality.[14] The stateless - and therefore rightless – person, on the other hand, is now not only deprived of their home, but also deprived of finding a new one, and not only lost protection of their government, but of governments in general. They are the "scum of the world".[15] As a large-scale example, one can look at the forced exchange of persons between Greece and Turkey following the 1923 Lausanne Convention. While *in stricto sensu* no refugees were being "created" through this forced exchange, since the people that were moved immediately acquired the citizenship of the other state, the term refugee was used on

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[11] ibid., 21.
[12] ibid., 21-23.
[13] Hannah Arendt, *The Origins of Totalitarianism* (London: Ruskin House, 1958), 275.
[14] Gibney, *Ethics and Politics of Asylum*, 2.
[15] Arendt, *The Origins of Totalitarianism*, 281–295.

a regular basis when addressing those "new citizens".[16] While on a macro scale those mass migrations can be seen as religious homogenisation, the micro scale reveals unrooting for the refugees themselves, as well as racist resentments within the receiving societies.

Only with the "definition contained in the mandate of the International refugee Organisation (IRO)"[17] the categorical definition of the 1920s and 1930s changed for a general understanding of the word refugee. Refugees were hereby defined as

> *"(a) Victims of the nazi or fascist régimes or of régimes which took part on their side in the second world war, or of the quisling or similar régimes which assisted them against the United Nations, whether enjoying international status as refugees or not;*
>
> *(b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not;*
>
> *(c) Persons who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion."*[18]

The term refugee therefore covered victims of fascist regimes as well as persons who had been considered refugees before the Second World War for reasons similar to those in the 1951 Convention. While this definition can be seen as the direct predecessor of the Geneva Convention, a major difference has to be highlighted. Article 1(A)(2) of the 1951 Convention used the same reasons for flight as the IRO definition, but added the crucial phrase of a "well founded fear of being prosecuted." Although 'fear, based on reasonable grounds for persecution' had already been considered as an objection to repatriation in the IRO mandate, the new convention made it a prerequisite for being a refugee. While Spijkerboers historical analysis suggests that this phrase was not meant to be exclusive, the UNHCR noted several

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[16] Peter Gatrell, *The Making of the Modern Refugee*, 2nd ed. (Oxford: Oxford University Press, 2015), chap 2, esp. 64–72.

[17] ibid., 23.

[18] UNGA, 'CONSTITUTION OF THE INTERNATIONAL REFUGEE ORGANISATION, AND AGREEMENT ON INTERIM MEASURES TO BE TAKEN IN RESPECT OF REFUGEES AND DISPLACED PERSONS', 15 December 1946.

years later that this phrase had been, in some countries, "interpreted […] as requiring a threat of persecution by the government […] or deliberate denial of protection to the individual concerned."[19] This further leads to the assumption that "persons fleeing armed conflict cannot qualify as refugees unless they are singled out".[20] Whilst Spijkerboer shows in his analysis that especially the term "social group" was never intended to be an individual persecution ground[21], he also acknowledges that state practice has transformed these definitions -that are partly collective in themselves- into individual ones. The conclusion of his analysis is therefore that the need for complementary protection stems partly from the wrong application of the Geneva Convention. The actual need for subsidiary protection would be far more limited if the Geneva Convention was applied in a correct manner.[22]

Although the Geneva Convention could henceforth be interpreted in a very inclusive manner, some people, who are nowadays acknowledged to require international protection by the international community, still do not match the provided definition. Because the reasons for persecution that are set out in the 1951 Convention are directly linked to inherent specifics of certain groups, people fleeing generalized and indiscriminate violence, without matching the description in Article 1(A)(2), do not qualify as refugees since they do not have a specific element of individual persecution.[23] Still, they are in need of international protection because their deportation would be a violation of the prohibition of refoulement.

Following this rational, UNHCR distinguishes two groups of people who are essentially eligible for complementary protection. The first group are those people who should essentially be covered by the 1951 Convention, but fall outside the scope for various reasons. This can include persecution through non-state actors, which is not included in the 1951 Convention, gender related persecution, or persecution in on-going conflicts that is often rooted in ethnic political or religious differences, but not acknowledged as such.[24] The second group hereafter includes people who

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[19] UNGA, 'A/AC, 96/830', 9 July 1994, sec. 22.
[20] ibid.
[21] op. cit. SPIJKERBOER (2002), 27f.
[22] ibid.
[23] op. cit. UNGA (1994), sec. 30
[24] Standing Committee UNHCR, 'EC/50/SC/CRP.18', 6 September 2000.

genuinely fall outside the scope of the Geneva Convention, but are in need of international protection for other legitimate reasons.[25]

While representatives of international Organisations and NGOs as well as officials have stressed on multiple occasions that the 1951 Convention is the primary source of international refugee protection and all other protection statuses must therefore complement and not compromise it, critical scholars as well as UNHCR have expressed their concerns that by filling the gaps through complementary protection mechanisms states might only grant complementary statuses, for fugitives that would be eligible for refugee protection after the 1951 Convention.

As we have seen, the 1951 Refugee Convention can on the one hand be interpreted in a very inclusive manner, which is the basic understanding of UNHCR, or in an exclusive way, which corresponds more to modern state practice. In its Statement on International Protection 1994, UNHCR clarified that the basic refugee definition, which was adopted in 1951, was "intended and understood by the drafters to cover all those currently in need for international protection. […] it has always been understood that the basic definition of a refugee was meant to have an inclusive meaning […] in accordance with the fundamental objective of providing international protection to all who need it."[26] The restrictive application, on the other hand, has made it necessary to develop other protection statuses, to cover those people who fall outside the scope of the 1951 Convention and cannot be *refouled*, but are nevertheless in need of international protection.

4.3. The Scope and Development of Refugee Protection within the CEAS

To understand the later development of the Common European Asylum System, it is important to understand the roles that international protection and immigration played in Europe prior to the abolition of internal borders and harmonisation of policies. As has been argued, one of the main goals of the 1951 Convention was to

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[25] ibid.

[26] op. cit. UNGA (1994), sec 23-25

grant refugee status to persons fleeing persecution from an authoritarian state, which in the liberal-western post-WW2 discourse basically referred to the USSR. While the mass refugee movements before, during and after the Second World War are evidently the main-rational for this focus, the early phase of the Cold War also played a crucial role. With immigration and asylum as distinct concepts, protection also meant protection from communism.[27] In this early phase of refugee protection, the people were therefore not politicized qua refugees, but as persons within the broader scope of bipolar international relations. The western community of liberal "first-world" state had an intrinsic interest in granting protection to persons fleeing the communist world for several reasons. In the beginning of the cold war period, especially the political elites, as well as students or high-skilled workers who opposed the communist regime fled, and were of good use for the western powers. Furthermore, by granting protection to those refugees, the west could demonstrate its higher living standard and moral superiority over the communist block. The large-scale arrival of refugees after 1945, but also after the Hungarian uprising in 1957 and the Prague Spring in 1968, did not pose infeasible problems to the western states. The "post-war economic expansion across Western Europe and the growing labour and population requirements of national building states […] eased the dilemma of huge numbers of refugees by creating a range of resettlement opportunities."[28]

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[27] Randall Hansen and Matthew J Gibney, *Asylum Policy in the West: Past Trends, Future Possibilities*, ed. World Institute for Development Economics Research ([Helsinki]: UNU/WIDER, 2003), 1.
[28] Gibney, *Ethics and Politics of Asylum*, 3.

5. The Role of UNHCR

UNHCR is the primary international organisation for the global refugee protection regime. Its role includes promotion and solution of political and legal questions as well as on-the-ground protection. Being the most important refugee agency, its development frames and is framed by the international discourse. Understanding and analysing its development and position is therefore mandatory for a well-grounded examination of the European Unions protection regime. This chapter will be further subdivided in four parts. The first short part will look at the legal mandate and the creation process of UNHCR, while the other parts will look at the historical development in three steps: The first from the 1950 until the end of the cold war, the second roughly until the end of the millennium and the last part will look at more recent developments. Through this subdivision one may better understand the position that UNHCR held before the creation of the CEAS, but also its role during its development.

Given the topic of my thesis, my analysis will halt with the term of High Commissioner Ruud Lubbers (2000-2005) who was especially important for introducing the Convention Plus programme in the early 2000s. Obviously, the development of the CEAS and the UNHCR have influenced each other and continue to do so today, but especially this period of European policy harmonisation while having a European High Commissioner can be seen as the most important one to understand the development of complementary protection in Europe.

5.1. Creation and Mandate

As has already been mentioned, UNHCR was founded as the direct predecessor of the International Refugee Organisation in December 1950 as part of the United Nations. The funding of the organisation is entirely dependent on the donations of Member States. Its foreseen role was to provide international protection for refugees and to seek and promote durable solutions. The statute describes its role as entirely non-political, although this self-understanding has changed multiple times in its history, as will be shown in this chapter. In the statute of UNHCR, refugees are defined as persons residing outside of their country of origin, or country of habitual residence in the case of stateless persons, whose country is no longer able or willing to provide them with national protection. Although UNHCRs originally intended lifespan was only three years, its refugee definition does not include the same temporal and geographic restrictions as the 1951 Convention, which were only ruled out in the 1967 Protocol. Generally speaking, its interpretation of the refugee definition has been more inclusive than the understanding of most signatory states. Furthermore, UNHCR has extended its own scope and mandate on multiple occasions during the last 65 years.

International protection in the understanding of UNHCR aims to close to gap "created by the failure of the refugee's own state to fulfil its obligations towards its citizens."[29] How far this protection reaches has been subject to many discussions, since protection is always relative to the obligations a state holds towards its own citizens.

In 1994, the UNDP introduced the concept of human security, which includes basic social and economic rights into the concept of security. I will discuss this concept later in this chapter, but it is important to understand how politicized the scope of international protection, and therefore UNHCRs mandate, is. It always has to be analysed analogue to the obligation of the state towards its citizens and will therefore necessarily stay *in statu nascendi.*

Nowadays the national protection duties that arise from the exclusive interpretation of the Geneva Convention have to be seen as a narrow understanding of protection: Consisting, in principle, of the duty of *non-refoulement* and the guarantee of basic standards of treatment as described in the Convention. UNHCRs international protection duties, on the other hand, incorporate *inter alia* the improvement of the situation of refugees and reduction of the number of people requiring protection, the promotion of the assimilation of refugees, especially by facilitating their naturalisation, the promotion of international convention for the protection of refugees and supervision of their application, the assistance to voluntary repatriation and coordination of the efforts of private organisations concerned with the welfare of

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[29] Anne Hammerstad, *The Rise and Decline of a Global Security Actor* (Oxford: Oxford University Press, 2014), 72.

refugees.[30] International protection in the understanding of 1950s consequently has to be seen as a coordinating and advocating role, in contrast to practical on-the-ground protection. Refugee protection ergo includes two dimensions of protection: the physical dimension and the legal dimension. For a long time, the main concern of UNHCR was facilitating and promoting legal protection of refugees, while the task of physical protection was held by host countries. This has slightly changed over the years, with first granting material on-the-ground assistance, and then organizing large-scale protection camps.

In a similar manner as the IRO has been seen as a western agency by the communist block, the UNHCR was also framed as an illegitimate tool of western imperialism by the USSR, especially in the 1950s and 60s.[31] This becomes evident when recalling the perception of the refugee as primarily fleeing communism in the immediate post-war context. Especially the Hungarian uprising in 1956 and the following refugee exodus that was managed mainly by UNHCR on the one hand changed to perception of UNHCR in the west as a skilful and reliable actor, that fitted very well into the post-war refugee protection scheme, while on the other hand confirming Soviet fears, of an anti-communist agency. This perception changed little for little when UNHCR got more involved outside of Europe, especially in the anti-colonial war in Algeria. However, until the dissolution of the USSR, refugee protection had a clear political goal and the UNHCR stayed a "western" actor. As we will see, its role radically changed after the end of the cold war.

5.2. The Emergence as a Global Actor (1950-1990)

In the early years after the founding of the agency, UNHCR acted mostly on a classical international and therefore statist level. Its main concern was the refugee protection that was provided by states and the implementation of national protection measures. Therefore, the early texts adopted by the High Commissioner focus mainly on legal interpretation of the 1951 Convention and not necessarily on the situation of the individual refugee. The early interpretation of the own mandate stresses the fact

[30] UNGA, 'Resolution 428 (V)', 14 December 1950, sec. 8.
[31] Hammerstad, *The Rise and Decline of a Global Security Actor*, 82.

that UNHCR was never intended to be an operational agency, but to set standards and provide assistance in coordination of the practical refugee work.[32] This was mainly the influence of the United States who did not want to create a relief organisation, while the major European powers were much more in favour of a stronger mandate on the ground.[33] The idea was to function as a managing agent for implementing partners who were concerned with the practical work *sur place*. This obviously involves states, but also non-governmental agents, who were seen as linking partners between the international and the national protection. An important part of UNHCRs mandate is the commitment to being non-political. While I have already argued that this is not possible in a holistic way – given that the refugee definition qua definition is a highly politicized matter – UNHCR read this obligation in a way that excluded commenting on root causes of flight and human rights violations in the countries of origin.[34]

While especially the United States were interested in keeping the influence of the UNHCR little and mostly funded other (American) refugee organisations, the First High Commissioner Gerrit Jan van Heuven Goedhart sought to broaden the scope of influence and possible field of action. His first big coup was securing a grant from the Ford Foundation in 1952, which enabled UNHCR to take a leading position during the refugee crisis in West Berlin in 1953. The response to this crisis, and especially the role that UNHCR assumed, were important signs for its changing and more active position in the international refugee regime. This perception was further enforced once Austria formally asked for UNHCRs assistance after the Hungarian uprising in late 1956, when more than 200 000 refugees crossed the border in only a couple of days. UNHCR managed to demonstrate its capability, and after the very successful management of the crisis, even the US acknowledged that the agency was the only body capable of coordinating international responses to mass refugee

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[32] Ibid., 98.

[33] Gil Loescher, Alexander Betts, and James Milner, *The United Nations High Commissioner for Refugees (UNHCR): The Politics and Practice of Refugee Protection into the Twenty-First Century*, Reprinted, Routledge Global Institutions 23 (London: Routledge, 2009), 13.

[34] Ibid., 18.

movements.[35] After the crisis, the United States stepped in as the principal donor state of the agency and therefore allowed for the first time a fairly long term financial and operational planning. The involvement in Hungary played another very interesting and important role in the UNHCR's development. As the refugee definition of the 1951 Convention, and therefore the scope of responsibility of the UNHCR, was limited to cases that had happened before 1951, an argumentation had to be found on how UNHCR was still the appropriate body for the persons concerned. Auguste Lindt, the High Commissioner from 1956 on, argued that the root causes for the Hungarian Uprising and therefore the refugee movements could be traced back to events that happened before 1951, namely the declaration of the People's Republic of Hungary in 1949. Although the temporal and geographical restraints of the 1951 Convention were later removed, UNHCRs line of argumentation shows an early willingness to widen its own scope and play an active and crucial role in the international refugee protection regime.

The following years can be seen as a first glimpse of what was going to happen after the breakdown of the communist bloc. Decolonisation led to a sharp increase in United Nations members, and the new states sought for an involvement of UNHCR in dealing with post liberation-war refugees. This happened most prominently in Algeria[36], but also in Angola and other ex-colonies. The refugee context was entirely different, not only because political interests of the big western forces were directly concerned, but also because most of the new displacements happened outside the original mandate of UNHCR. With the new member states gaining more and more influence in the General Assembly, the mandate got ad-hoc expanded on multiple occasions.

The "good offices" approach helped UNHCR to become recognized as a global actor, operating in the Far East as well as in Africa, and therefore overcoming the post-War euro-centrism of the refugee discourse. The involvement in Algeria played an important role in the emergence as a global player not only because it was the first time that UNHCRs assistance was requested in the "Third World", but also because

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[35] Ibid., 21.

[36] Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford ; New York: Oxford University Press, 2001), 97–101.

major opposition, particularly of the French authorities who still regarded Algeria as an integral part of France, had to be overcome. By resisting the French opposition, the agency could strengthen its position as the moral authority on refugee matters.

In just 8 years after its establishment, UNHCR managed to not only broaden its own mandate but by doing so changing the perception of the "refugee". In the cold war context, refugees outside of the direct sphere of western influence were seen as a danger, because they could foster instability, which then could be used by the USSR. Only stable third states could be relied on as trustworthy partners. Refugee protection hence was an integral part of the western security regime, and the first world funded the agency willingly. Although the initial limitations of the Refugee Convention had already been weakened by the good offices approach, UNHCR sought to completely abolish them. This finally happened when the 1967 Protocol was adopted, which disestablished the temporal and geographical limitations of the 1951 Convention. While this new Protocol clearly broadened the scope of the refugee definition, not all states were satisfied. Especially African states, who were organized in the newly founded (1963) Organisation of African Unity (OAU), wanted to further extend the refugee protection regime, since they felt that the 1951 definition was not up to date anymore. This urge resulted in the adoption of the 1969 OAU Refugee Convention, which was written with the assistance of UNHCR.

While the refugee definition of the 1951 convention had been meant to be an inclusive one, a literal interpretation excluded many persons in need of protection. The OAU Convention now expressively broadened the definition to "every person who, owing to external aggression, occupation, foreign domination of event seriously disturbing public order […] is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country…"[37] While this definition had no legal value for UNHCR's mandate, it can be read as another sign of a will to extend the refugee definition, which will *inter alia* be of great importance for the European regional protection regime that regionally clarified the implementation of the 1951 Convention. The details will be explained in Chapter 7. The period of the growing involvement in countries of the global south is interesting, because UNHCR

[37] OAU, 'Convention Governing the Specific Aspects of Refugee Problems in Africa', 9 October 1969, sec. 1(2).

started to adopt a “development” approach of refugee protection, while working together with other UN bodies such as the UNDP or ILO. The logic behind this was that future refugee movements, as well as existing refugee assistance programs, could only be managed successfully if they were integrated in a broader spectrum of economic aid. This led to an internal disagreement over the goals of UNHCR, with the legal team arguing that the legal protection of refugees, which in their opinion was the main duty of UNHCR, lost momentum if and while the agency focused more and more on material assistance and development.[38]

The new refugee-creating *loci* could - with only a few exceptions - be found in countries of the global south. This fact helps to understand why the developments of refugee law and the protection discourse also responded to situations in “developing countries”.

In 1972, the Addis Abeba Agreement was adopted, which ended the First Sudanese Civil war that had raged since the mid-1950s. This new peace-agreement opened up repatriation for also those people that were forced to flee their homes during the war. To facilitate the repatriation measures the UNGA adopted a resolution, which for the first time named IDPs and refugees in the same text.[39] This was a further step in the development of the international understanding of the root causes for flight, which acknowledged a similar situation of displaced people, irrespective of the crossing of international borders.

The 1970s also played an important part in the creation of a global human rights advocacy regime. Amnesty International was already founded in the early 1960s, but the number of military coup d’états in the seventies, which went hand in hand with massive human rights violations gave a new importance to international advocation of NGOs. Situations of generalized violence and missing respect for Human Rights, which started to play an important role in the western foreign policy discourse, also shifted the preferred solution for refugee crisis in the south from repatriation towards durable resettlement and local integration. In this context UNHCR played a key role as managing organisation.

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[38] Loescher, Betts, and Milner, *The United Nations High Commissioner for Refugees (UNHCR)*, 27f.

[39] Gatrell, *The Making of the Modern Refugee*, 237–241.

While the huge increase of UNHCR staff and funding went along with the economic growth of the post-War period, the 1980s and the beginning recession went hand in hand with financial restrictions for the international community. Human Rights matters were no longer on the front page of concern and to uphold its own financial needs, UNHCR had to work together closely with the wishes of its main donor countries. This laid the cornerstone for protracted refugee situations some of which exist until today and initiated a change in UNHCRs discourse. As the cold war began to intensify and to grow more and more violent during the 1980s the number of global refugees rose distinctly. While in 1977 the global refugee population accounted for approximately three million persons, this number tripled in the following six years, to reach a post-WWII high of more than 10 million in 1982. While many internal conflicts continued to intensify in this phase of "globalisation of the cold war" the western states were less and less ready to accept refugees on a large scale.

The reasons for this policy changes are numerous and cannot be limited to the economic recession, although it played a large part. The facilitation of air-travel, both in range and price led to a rising number of refugees that tried to reach the western states and especially Europe. While limited means of transportation led most refugees to stay close to their area of origin, this now changed. Especially Germany and the United States were confronted with a large augmentation of asylum applications during the 1980s. The development of the situation in Germany will be analysed in a special chapter because it played an important role in the creation of what has become the CEAS.

For both the western donor states, but also for UNHCR this meant that the existing refugee resettlement and protection measures had to be adapted to the new situation of 'Jet Age refugees', which no longer travelled via the established channels but either independently or through the growing network of human traffickers. For the international refugee discourse this meant an important break. For the first time refugees from the 'third world' were not mainly regarded as persons that fled conflict and possessed a right to asylum, but as illegal immigrants and bogus refugees trying to circumvent the rules. UNHCR harshly protested the anti-refugee policies that were adopted in many of its donor states in the 1980s, but had to realize that its influence on the western states internal policy decisions was very limited. Most of UNHCR proposals were directly rejected in the name of internal security and sovereignty.

The growing influx of asylum seekers between 1983 and 1989 included many people who arguably did not meet the criteria of the 1951 Convention but were nevertheless in need of international protection. Furthermore for the first time, economic migrants, who wanted to bypass the strict immigration laws of the Western states, used the asylum channels.[40] The European legal system protects the rights or asylum seekers, even if their first application has been declined. Many persons stayed in the European Union, be it for working through the appeal procedures, or for reasons of non-deportability.[41] The answer of most European governments was thus to introduce deterrence measures, to prevent refugees from reaching European soil[42]. Most importantly Great Britain and Germany started to introduce carrier sanctions in in 1987, followed by most other European States. They later on toughened the visa requirements and first introduced the system of "safe third countries"[43] Similar to the situation in the United States, UNHCR also started to closer monitor policy developments in Europe and started to critique on them.

The protection goal of UNHCR and the policy goals of the European states hence started to diverge in the 1980s, which meant a loss of influence for UNHCR, since European states as donor states were not pleased about any interference with, what they regarded as, internal affairs. In this light of events it was impossible for UNHCR, as an agency which received almost all its funding from western powers, to uphold its non-political and solely humanitarian approach. The agency supported camps that were sometimes used as a recruitment spot for paramilitary or guerrilla forces, such as the Afghan Mujahedeen in Pakistani refugee camps, following the

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[40] Loescher, Betts, and Milner, *The United Nations High Commissioner for Refugees (UNHCR)*, 34.

[41] Charles Gosme has distinguished three major types of obstacles for the deportation of irregularly present migrants in Europe: Legal, Policy-based and Practical. See further: Charles Gosme, *Limbo Spaces between Illegal and Legal Stay: Resulting from EU Management of Non-Removable Third Country Nationals* (Paris: PhD Thesis - Sciences Po, 2014).

[42] see page 25

[43] Timothy J. Hatton and Williamson, 'Refugees, Asylum Seekers and Policy in Europe', *ISA Discussion Paper Series*, no. 1230 (2004): 16.

Soviet supported coup against the monarchy by the People's Democratic Party of Afghanistan in 1978 and the following Soviet invasion in 1979.[44] The western donor states had a geopolitical interest in those groups and therefore in such camps, which hosted refugee warriors. "UNHCR supplied assistance to 'refugee warrior' communities; [some of their] 'refugee villages' were even equipped with anti-aircraft weapons."[45] This led to the accusation from the Afghan representative to the UNHCR that the agency is "contravening the refugee Convention by providing assistance to 'fugitive insurgent elements in Pakistan.'"[46] Those interests explain the mushrooming of the UNHCRs budget from the mid 1970s until 1980.[47]

As the willingness of the global North to resettle refugees diminished in the 1980s, UNHCRs main function changed from managing international long term solutions, to being a humanitarian actor that mainly operated on the ground in mass refugee camps. This was especially the work of High Commissioner Jean-Pierre Hocké (1986-89), who thought that UNHCRs approach was too protection focused, and should be adjusted to the changing geopolitical situation. During the beginning of this development, the camps were still situated outside of the country of origin, this changed over time with the agency getting more and more involved in conflict countries themselves from the early 1990s on. Because refugees in general were regarded more as a group, than as individuals with individual needs, large-scale camps were convenient for almost all actors in the protection process. For host governments it meant, that the new arriving refugees did not have to be integrated into the existing social system and could be easily segregated from the 'native' community. For the international community – especially UNHCR and international NGOs in the protection cluster – it meant that the mass of refugees was easier manageable and distribution of goods was facilitated. While for many refugees this meant a life without personal freedom, leaders and armed militia groups, which were recruiting in those camps, also supported this solution, since it meant keeping refugee groups together. Due to this new situation, the primary long-term solution for refugee

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[44] Gatrell, *The Making of the Modern Refugee*, 255.
[45] Hammerstad, *The Rise and Decline of a Global Security Actor*, 95.
[46] Ibid.
[47] Loescher, Betts, and Milner, *The United Nations High Commissioner for Refugees (UNHCR)*, 36.

'management' also changed. Unlike in earlier years, resettlement was not an option any more on such a large scale and regional integration not wanted by the host governments. The neighbouring countries were very reluctant to offer integration opportunities to refugees already present on their soil. Although this approach has worked comparably well especially during the African refugee movements in the 1960s, where newly arrived refugees were provided with land and resources to become self-sufficient, it was no longer seen as viable when the numbers of persons concerned started to grow to formerly unknown quantities. The only liable solution that was seen was therefore repatriation.

This can be connected to a general change in the UNHCRs discourse, which changed from the protection paradigm to a more flexible and pragmatic approach. Unlike the early approach, where root causes of flight were not officially of concern for the High Commissioner, in this period the non-political credo got read in a new, holistic, manner. "Problems of refugee protection, assistance and solutions were increasingly understood to be intrinsically political and – from the early 1990s onwards – security problems."[48] Repatriation was more and more actively encouraged, despite unclear security situations for the returnees, such as in El Salvador or Sri Lanka.

A long-standing exception to this development was the Indo-Chinese "boat people" crisis. An international resettlement program, which included prima facie admission in south East Asian states followed by resettlement programs to western countries, functioned from the mid 1970s until the late 1980s. Only by the end of 1988 with further increasing numbers of persons fleeing Vietnam, the readiness of regional host governments, as well as western partners, harshly declined, resulting in more and more long stayers in the region. With both superpowers ready to end the conflict in the late 1980s a repatriation scheme was set in place with the cooperation of the Socialist Republic of Vietnam. The Indochinese Plan of Action foresaw a three way approach to the crisis: Temporary Asylum in the region during the refugee status determination process, repatriation for the people that were not found to be eligible for a refugee status, and resettlement for recognized refugees.[49]

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[48] Hammerstad, *The Rise and Decline of a Global Security Actor*, 123.

[49] Loescher, Betts, and Milner, *The United Nations High Commissioner for Refugees (UNHCR)*, 46.

While the responses in Asia and Africa veered away from the original refugee protection approach, the 1984 Cartagena Declaration on Refugees in Latin America did the exact opposite – it further expanded the refugee definition to be a more inclusive one, similar to the OAU definition of 1969 but going even further. Its goal was inter alia to adept the terminology of the 1951 Convention and the 1967 Protocol to further distinguish refugees from other migrants. Apart from including situations of generalized and indiscriminate violence, which were already included in the OAU convention, it also referred to situations of "massive human rights violations or other circumstances which have seriously disturbed public order."[50]

It is important to recognize that the Cartagena declaration is not legally binding, and should be seen as a guide to interpretation and policy advisement in refugee protection questions for the signatory states. Nevertheless, it has been incorporated into the national legislation of most signatory states and further broadened the international discourse, especially regarding the definition of refugee and the need for international protection schemes.

As we have seen, the 1980s have been a very important period in the development of the international refugee discourse. While ethical reasons and practical obstacles led to a protection focused approach in the immediate post-war period and the following decades, the growing number of refugees and the globalisation of refugee politics led to numerous changes from the mid-70s on. Refugees could be found increasingly in the global south, where they were housed and cared for by the international community, especially by UNHCR and NGOs of the protection cluster. At the same time, the global north tried to keep refugees, who increasingly tried to reach western states by themselves and not through the established routes, from arriving at their borders. This decline in willingness to host and protect refugees meant, that another solution for the concerned persons had to be found. Repatriation gained momentum during this period and would play an even more important role after the breakdown of the communist bloc.

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[50] 'Cartagena Declaration on Refugees', 22 November 1984.

5.3. The special case of Germany

With regard to the development of the protection regime in Europe, the German case is especially interesting for multiple reasons. In the direct aftermath of the Second World War the Federal Republic of Germany had a special standing in the international community for having provoked one of the largest refugee movements in contemporary history. On the one hand the legal foundations of the newly founded Republic therefore stemmed inter alia from the provision to prevent any comparable developments in the future. On the other hand however, the direct border with the communist block provided Germany with an important role as anti-communist wall, which is central when looking at the early post-war refugee regime. Furthermore, Germany has played a leading role in the creation of the European Union in general, but also with regard to the Common European Asylum System. Its perception of international protection hence significantly framed the discourse on asylum and complementary protection in Europe. The analysis of the development of immigration and protection policies in Germany prior to the creation of the CEAS helps us to understand the role and position that Germany took in the conception of the Qualification Directive.

In the immediate post-war western world, Germany can be seen as a role model of refugee and migrant integration with regard to rights granted as well as numbers received. In the final years of the war, more than eight million forced labourers were present on German soil, many of which did not want to leave and had to be integrated into the German society.[51] The first mass influx of refugees was received soon after the end of the Second World War – involving the "resettlement of more than 10 million refugees of German nationality expelled from eastern European countries and 3.5 million evacuees from Soviet-controlled East-Germany."[52]

A closer analysis on the development and changes of the German asylum system has identified four features of the Federal Republic that shaped the German protection

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[51] Hartmut Esser and Hermann Korte, 'Federal Republic of Germany', in *European Immigration Policy: A Comparative Study*, ed. Thomas Hammar (Cambridge: Cambridge University Press, 1985), 169.
[52] Gibney, *Ethics and Politics of Asylum*, 85f.

Regime: *Rechtsstaat* (a specific German form of the Rule of Law), Capitalist State, Nation State and European State.[53] The German constitution (*Grundgesetz*) was formed in 1949, under the auspices of the occupying western military powers. Given the German history, it included protection from centralisation of power and established a constitutional court to oversee governmental activities. It was therefore designed to "ensure against a repeat of the failures of the Weimar constitution".[54] For the development of the asylum regime this is especially important because the right to asylum was enshrined in the Section 16(2) of the *Grundgesetz* and read: "Persons persecuted on political grounds shall enjoy the right to asylum." It therefore went further than the 1951 Convention by not only granting protection from refoulement but also granting the right to an asylum status.

The fast economic development of West Germany demanded a large supply of cheap unskilled labour. Therefore numerous recruitment agreements have been signed between the mid 1950s and 1960s.[55] The term "guest worker (*Gastarbeiter*innen*) programs" was consciously chosen to stress the temporality of their presence.[56] This resulted in a massive grow in foreign labour force with more than 2 million foreign "temporary" workers, without provoking large scale tensions within the German society.[57] Another distinct factor in the German migration policies is founded on the particular understanding of the nation as "kind of a 'biological' entity."[58] While the guest worker program was conceived as being important for the economic development of Germany, it was never intended to actually integrate or naturalize the migrants.[59][60]

The German way of dealing with the 'migration question' was very successful as long as the growing economy allowed large-scale integration of newly arrived migrants into the labour market. This began to change for the first time, during the world recession

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[53] Ibid., 87.
[54] Ibid., 88.
[55] Esser and Korte, 'Federal Republic of Germany', 170.
[56] Ibid., 179.
[57] Gibney, *Ethics and politics of aslyum*, 90.
[58] Ibid., 90f.
[59] Ibid., 91.
[60] This can be seen as closely related to the conception of nationality in the inter-war period as described by Hannah Arendt (1958)

following the 1973 OPEC oil crisis. Declining growth rates and rising unemployment provoked the German government to "initiate a halt in the inflow of foreign workers."[61] While this measure was intended to incite a decrease in the number of foreign workers, family reunifications and the higher birth-rate resulted in a very slow decline until 1978 and a following rise of the foreign population notwithstanding the halt.[62] At the same time the number of asylum applicants, which was relatively steady on a low level in the 1950s and 1960s, rose significantly and peaked in 1980 with 92.000 applications. This can be partly be explained by a higher number of arrivals from outside of Europe (the 'Jet Age' asylum seekers) and the 1980 coup d'état in Turkey as well as the abolition of legal migration options for economic migrants.[63] Large numbers of asylum seekers that no longer were in line with the post war conception of refugee arrived at the Western European borders. Many people fleeing conflict in third-world non-communist countries had needs that derived not only from political persecution, but also economic underdevelopment and widespread poverty.[64] The German government reacted with the introduction of new restrictive policies, especially deterring the access to social and economic rights for asylum seekers. While the number of applicants dropped to a low of 16.000 applicants in 1983, it began to rise again later on, reaching 100.000 in 1986.[65] Increasingly the asylum discourse was framed in a very hostile way, linking asylum seekers to drug dealing, terrorist activities and fraudulent intentions.[66] The widespread hostility turned violent in the early 1990s. In the late summer of 1992 neo-Nazi and other far right groups attacked camps and housing for asylum seekers, which resulted in seventeen deaths and nearly 600 injured.[67]

The end of the Soviet Republic and the fall of the Berlin wall resulted into another mass influx of "ethnic Germans" that now could freely migrate to the Federal Republic. Given the German ethnical understanding of citizenship, as argued earlier

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[61] Gibney, *Ethics and politics of asylum*, 94.
[62] Esser and Korte, 'Federal Republic of Germany', 173.
[63] Wolfgang Bosswick, 'Development of Asylum Policy in Germany', *Journal of Refugee Studies* 13, no. 1 (2000): 45.
[64] Gibney, *Ethics and Politics of Asylum*, 96.
[65] Bosswick, 'Development of Asylum Policy in Germany', 46.
[66] Ibid.
[67] Gibney, *Ethics and Politics of Asylum*, 97f.

on, those *Aussiedler* were *de iure* entitled to the German citizenship. The new arrivals increased the already existing pressure on the government to restrict immigration since no other answer for the on-going racist attacks could be found by the policy makers.

Given the anchoring of the right to asylum in the *Grundgesetz*, the government needed a two-third majority in the *Bundestag* to change the provision. The Christian-democratic government of Helmut Kohl henceforth required the support of the social-democratic party. While the asylum provision was discussed during the 1987 election campaigns it was not until the crisis of the summer 1992 that the social-democratic party was ready to amend Article 16(2). Kohls conservative government stated on multiple occasions that it was not able to solve the problem without amending this article, and that the social democratic party was frustrating all efforts.[68] The public pressure – especially on the SPD – resulted in the cooperation of the two parties and the asylum compromise of December 1992, which amended the right to asylum but at the same time *inter alia* liberalized elements of Germanys restrictive citizenship requirements.[69]

5.4. The post-Cold War period

The changes that took place in the late 1980s and early 1990s can without doubt be described as the most important events in the post-War international relations. For almost 50 years, the realist perception of a bipolar world system was nearly uncontested when trying to explain the world system. Since the end of WW2 the sole referent object in the international relations and security discourse was the sovereign nation state. Only on the second level the state was also integrated into a system of states. As in a game of billiard, the analysis focused on the movement of the balls, and the influence that those movements would have on the positioning of all other balls on the table. How those balls were constructed and maintained intact was seen as a task for the elements of the ball itself, but not as main concern for the international community. This is especially important when looking at the changing composition

[68] Bosswick, 'Development of Asylum Policy in Germany', 49.
[69] Gibney, *Ethics and Politics of Asylum*, 102.

of active military groups. While many paramilitary groups during the Cold War could be more or less connected to one of the major powers, many smaller actors emerged from the 1990s on, that acted without this connection, or which, after having had a connection, now wanted to be seen as independent actor. As I have argued, the billiard understanding regarding international protection already commenced to change very slowly in the 1980s as a holistic approach to refugee questions started to focus more and more on the root causes of forced migration and hence on the situation within the billiard balls themselves. The breakdown of the Soviet Union and the end of the cold war allowed for this discourse to work in a much broader way. Many refugees that fled communist regimes were able to return home[70] and many resources that were designed to protect the west against the common enemy could be relocated, resulting in a new design of the international landscape. Still, while many conflicts could be resolved, some continued (Afghanistan, Angola) and many new conflicts arose, which now could not be as easily classified as in the bipolar period. The new wars in countries like Somalia, Sierra Leone or Iraq forcefully displaced thousands of people and forced UNHCR to again adapt its approach. The chosen answer was once again to interpret its own mandate in a very extensive manner, which can be seen as a continuation of the approaches of the late 1980s. Repatriation became – as I have argued before – the primary solution to refugee situations. Hence UNHCR adapted its concepts of 'safe situations' and started to act directly in the refugee producing countries. The new approach included *inter alia* post-return support for refugees, including rehabilitation, reintegration and development in the return-area.

An important event, which would shape the global international protection regime, was the international response to the War in Iraq in 1991. When the UNSC decided to permit an intervention on the basis of Article VII of the UN Charter, Secretary General Pérez de Cuéllar formally requested UNHCR to lead the humanitarian

[70] According to UNHCR between 1991 and 1996 more than nine million refugees were able to voluntarily return to their home. This is a significant increase to the returns in the second half of the 1980s when repatriation first appeared on the agenda of the refugee discourse.

response in northern Iraq.[71] The premise for such an intervention is, that the Security Council determines the existence of a "threat to peace, breach of the peace or act of aggression"[72] which allows measures in accordance with Article 43 - including the use of force - to be taken. This has to be seen in the light of a more liberal understanding of the phrase "threats to international peace and security" by the Security Council.[73] After, following the US-led Operation Desert Storm, the Iraqi troops lost most of their influence in central Iraq, the military response in the north against the revolting Kurdish minority led to approximately 2 million Kurdish refugees trying to leave Iraq. While Iran opened its borders for the refugees, Turkey, fearing that a massive increase in Kurdish population on Turkish soil could incite separatist uprisings in its own Kurdish regions and would therefore be a danger to internal security, closed its borders and argued that the only solution for the crisis would be the creation of a safe-area at the border. This resulted in almost half a million Kurdish refugees being stranded in the Iraqi-Turkish border zone and forced the international leaders to acts. After visiting the area, High Commissioner Sadako Ogata (1990-2000) decided not to regard the concerned people as refugees but as internally displaced people. This view reinforced the necessity of the international border crossing for the refugee definition. Doing so, Ogata decided not to stand up against Turkeys violations of international refugee law and to play along with the NATO forces, who already announced to prepare a safe-zone for protecting the 450 000 Kurds.

UNHCR was caught unprepared and not ready to take on the role as humanitarian leader in northern Iraq straight away. Only in early May, Ogata agreed to assume overall responsibility for protection, assistance and voluntary repatriation from the border Area.[74] This was possible due to the intensive cooperation with the still present coalition forces, which made up for the undeveloped capacity of UNHCR to act on such a large scale.

It marked thus an important change in the general perception of the agency, working together hand in hand with military forces to conduct a massive humanitarian relief

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[71] Hammerstad, *The Rise and Decline of a Global Security Actor*, 179.
[72] United Nations, 'Charter of the United Nations', 24 November 1945, sec. 39.
[73] Loescher, *The UNHCR and World Politics*, 288.
[74] Hammerstad, *The Rise and Decline of a Global Security Actor*, 181.

operation. While UNHCR was working 'against' the interest of the western powers when criticizing the deterrence measures that most states introduced in this period, the Iraqi crisis gave UNHCR an important role to play in the post-Cold War environment, which was not at all obvious in the direct aftermath. The intervention furthermore repositioned the agency as reliable cooperating partner for the UNSC. The decision to take on the lead humanitarian role was made for multiple reasons, including moral pressure from the coalition, and clearly positioned ad-hoc *sur place* protection of refugees in UNHCRs playbook. It was preceded by an internal debate within the agency between the 'protection focused' actors, gathered around the Division of International Protection, who wanted to focus UNHCRs action on pressuring Turkey into opening its borders and granting protection to the refugees and the 'security focused' actors including High Commissioner Ogata and the European Bureau, who finally decided to take on the responsibility in northern Iraq.[75] The Turkish decision to block the refugees from crossing the border could not be credibly criticized, after UNHCRs name got internationally connected with the protection operation in northern Iraq. The fulfilment of UNHCRs aspiration to become more relevant in the international field, and especially to stay relevant after the breakdown of the USSR went hand in hand with the loss of moral superiority on refugee law questions and especially international protection. By becoming the main implementing partner for humanitarian catastrophes, including forced displacement, the agency could no longer keep up the focus on refugee protection in third states, and especially the large donor states. The possibility of a destabilizing role that refugee movements could play in the international arena was not part of the agencies conception of protection in the first decades after its creation. But from 1992 on regular reports were sent to other UN and regional bodies on the possible consequences of mass refugee and displacement movements on the international security.

> *"During the Cold War, in-country assistance and protection of IDPs and victims of war were perceived to violate state sovereignty and therefore were taboo for UN agencies. In the post-Cold War period, by contrast, the UN*

[75] Loescher, *The UNHCR and World Politics*, 318.

> *developed a series of new measures, including a number of humanitarian interventions, for responding to instances of forced displacement within intra-state conflicts."*[76]

The new approaches also meant, that classical definitions in refugee law, such as the need for international border crossing, had to be rethought and readjusted to the necessities of the situations. Since many of the large-scale displacements did not include international border crossings, neither the already developed refugee protection schemes nor the prima facie admission of mass movements was of use.
According to this changes the United Nations developed other forms of protection, which were of a more temporary nature than the refugee status. The idea of temporary protection for mass refugee influxes, as well as the conception of refugees as being primarily temporarily present is reflected in the provisions of the Common European Asylum System that will be analysed later. The group of people of concern for UNHCR grew even further during the 1990s, not only including IDPs, but already people from war-affected zone, who are likely to become IDPs and are in need of humanitarian assistance. This also led to a massive increase of the persons that UNHCR was concerned with: from 15 million in 1990 up to 26 million in 1996.[77] While this new approach has worked, in the sense that many people could be assisted, in some cases, in which the international community was committed to act and guarantee security, the 1990s were also the decade of the biggest failures of UNHCR. With the UN not willing to act in the face of the Rwandan genocide as well as not being able to prevent the mass slaughters in Srebrenica, those events will stick to the collective memory of UNHCR as such, that casted serious doubt on this new security approach. A vast disappointment with the efforts of the international community let many high-ranking UNHCR officers to revisit their position as humanitarian actor in (civil-)war situations. Especially after the events of Rwanda and Bosnia the public question arose of "whether humanitarian action could sometimes worsen the security situation in a region."[78]

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[76] Loescher, Betts, and Milner, *The United Nations High Commissioner for Refugees (UNHCR)*, 54.
[77] Ibid., 55.
[78] Hammerstad, *The Rise and Decline of a Global Security Actor*, 146.

Around this time, when the referent objects of security were changing and now including not only states and refugees, but also UNHCR and its staff members, a new concept arose: Human Security. This concept was first introduced in the UNDPs Humans Development Report 1994. While in the classical realist understanding of security, the security of the individual and citizen was included in the state security, this new concept broke with that perception. The idea gets framed in the exact transition from "nuclear security" to a human centred security understanding.[79] "For most people, a feeling of insecurity arises more from worries about daily life, than from the dread of a cataclysmic world event."[80] The official idea was thus nothing less, than a reinvention of this perception and the meaning of the term security, leaving the state centred mantra and focusing on the individual wellbeing. The necessary prerequisite for this is the individual security. Another important part of this new approach was, that national borders were no longer of importance for the security of the individual, because security could only be guaranteed on a global scale. "When the security of people is endangered anywhere in the world, all nations are likely to get involved. […] Consequences travel the globe."[81]

Human security gets defined as the combination of freedom from fear and freedom from want. Its main categories are: economic security, food security, health security, environmental security, personal security, community security and political security.[82] This conception of security in consequence goes further than just guaranteeing survival. Security can be understood as "survival-plus", including a certain standard of living in dignity.[83] By including those basic human rights into the security discourse, Human security expands the classical understanding of security as mere survival.

But very soon critics reacted to the concept by showing two main problems of the approach: Even though the idea of human security seems to be morally incontestable within the liberal human rights discourse it lacks precise definitions. Those lacks are unresolvable, because the inventors of the idea, who were the leaders of western-

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[79] United Nations, ed., *Human Development Report 1994* (New York: Oxford Univ. Press, 1994), 22.
[80] Ibid.
[81] Ibid.
[82] Ibid., 23–33.
[83] Hammerstad, *The Rise and Decline of a Global Security Actor*, 25.

liberal democracies, had an inherent interest in keeping the terms vague.[84] As with the 1951 Convention, the western states did not want to codify a language, which could be interpreted as a blank cheque by countries of the global south. The concept and the discourse it carries, is strong precisely because of its inclusive language. But without narrowing it down on real situations, which would devalue the concept *per se*, it becomes practically unusable.

Due to the experiences made in the preceding years, UNHCR tried to use this concept when it was revising its own security discourse. The state-centric security discourse of the early 1990s should be substituted with a refugee friendly understanding of security as human security. Only by guaranteeing security for the people of a state real security of states could be acknowledged.[85]

5.5. 50 Years of the Convention: Global Consultations and New Initiatives

The mass refugee influxes in Europe following the Yugoslav war in the late 1990s led to further restraints in the willingness of the Western European states to grant protection to refugees. Most refugees who managed to cross the border to Austria and/or Germany were not granted refugee status but only temporary protection statuses. The general approach however, was to prevent persons seeking refuge from crossing over to the Western European states and thereby to keep them as IDPs. As a reaction to this deterrence strategy from most host states towards refugees, UNHCR launched the Global Consultations on International Protection in the year 2000. The intention was to bring together leaders from the north and the south, NGO experts, academics and other actors active in international protection to re-evaluate the scope of the 1951 Convention and enhance international support for refugee protection. As a major success on a symbolic level, more than 100 representatives of signatory states came together in Geneva in late 2001 to adopt a declaration reaffirming the

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[84] Roland Paris, 'Human Security: Paradigm Shift or Hot Air', *International Security* 26, no. 2 (2001): 88.
[85] Loescher, Betts, and Milner, *The United Nations High Commissioner for Refugees (UNHCR)*, 57.

importance of the 1951 Convention as the cornerstone of international protection and the fundamental importance of UNHCR.

An internal dispute in the agency slightly overshadowed this period of readjustment. After 10 years as the High Commissioner, Sadako Ogata stepped down in 2000 and her successor, Ruud Lubbers, wanted to focus the agencies efforts more on the interests of European Donor states, than on the classical protection agenda. Lubbers was widely perceived as the candidate of the European Union with a determined goal to "trim down the size and remit of UNHCR [and] nudge the refugee agency's priorities closer to those of European states."[86] As the Global Consultations led to the endorsement of the 'Agenda of Protection', it set out five main goals for the future of international refugee protection. This included security implications of refugee movements, both for the people concerned and for states, the enhancement of burden sharing mechanisms and most importantly the respect for the principles of the 1951 Convention, especially with regard to the particular needs of women and children.[87] In 2001 the new High Commissioner started an initiative, which was called 'Convention Plus' and focused on developing new international agreements to "supplement the 1951 Convention and to increase burden sharing by increasing the level of donor commitment to host countries in regions of origin."[88] Other than the Agenda for Protection, this new program hence focused more on financial burden sharing mechanisms, with the global south providing the loci for protection and the northern states providing the financial means. While upholding the right of every person in need to be protected, the Refugee Convention should be updated to fit the needs of the new millennium. Beginning with his first report to the UNGA, Lubbers stressed the importance to find long-term solutions for refugee situations, therefore continuing the focus on combating the roots causes of forced migration.[89]

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[86] Hammerstad, *The Rise and Decline of a Global Security Actor*, 153.

[87] UNHCR, 'A Refugee Agenda for Protection', n.d., http://www.unhcr.org/3c1a210d4.html.

[88] Loescher, Betts, and Milner, *The United Nations High Commissioner for Refugees (UNHCR)*, 63.

[89] UNHCR, 'Report of the United Nations High Commissioner for Refugees, 2000, UNGA Fifty-Sixth Session, Supplement No. 12 (A/56/12)', 2001, secs 9–10.

The big difference between the Agenda for Protection and the Convention Plus initiative could already be seen in the Title of the programs. While the former has an imminent focus on protection, and therefore the existing system of refugee law, the latter aims at complementing the existing regime. The 1951 Convention in itself is not perceived as strong enough to meet the needs of refugees and the international community anymore and therefore needs supplementing measures. Those measures included such that focus on refugee prevention. The three main components of the framework are:

- 'Development Assistance for Refugees',
- 'Development through Local Integration' and
- 'Repatriation, Reintegration, Rehabilitation and Reconstruction'.[90]

The use of the term security, which blossomed during the 1990s with a special emphasis on human security, changed its meaning with the term of the new High Commissioner. But especially the new securitisation of world politics after the 9/11 terror attacks led UNHCR to largely abandon the security narrative, out of fear to be associated with and to protest the "increasingly intolerant national security concerns driving asylum and refugee policies."[91] While the general three-way approach can be read as a continuum in UNHCRs policies, the change of language directed more towards a conservative understanding of refugee protection and to a certain degree of opposition towards the donor states of the global north.

5.6. Conclusion

UNHCR has gone a long way since its creation as a body intended for three-year long assistance in post-war Europe. While the first decades were marked by a slow enlargement of its mandate and the position as moral highness and expert on refugee law, this conception began to change in the 1980s. Refugee flows got more and more diverse and the economic recession led northern donor states to restrict their immigration policies. UNHCR increasingly became an international humanitarian

[90] Hammerstad, *The Rise and Decline of a Global Security Actor*, 156.
[91] Ibid., 165.

and relief agency, which slowly lost its non-operational character of the early post-war period. In this phase UNHCR started to reinvent itself, acting more on a global basis and starting to openly talk about root causes of refugee movements and long-term solutions.

The end of the Soviet Union and the cold war further intensified this discourse, with the realist concept of state sovereignty losing its absolute character. Enormous forced displacements led the agency to assume a lead role as international humanitarian actor and acting in refugee producing countries for the first time. Especially the Kurdish refugee crisis in northern Iraq can be seen as a very important turning point in UNHCRs history, since it marks the transformation from focusing on international protection to assistance *sur place*. The failures of the international community to appropriately respond to the crisis in Rwanda and Bosnia incited internal discussions about the positioning of the agency in the field. 50 years after its creation, the area of international protection only reflects the initial position up to a very limited point and UNHCR tried to find its place in this new setting. With its Convention Plus approach of 2001, the agency called for a holistic approach, including extensive work on the ground and in host regions of the global south together with financial support from the northern donor states and concentrated resettlement programs.

The history of UNHCRs role in international protection mirrors the international refugee protection debates, since the agency was on the one hand forced to react to national policy decisions and pressured by donor states to cooperate, while on the other hand holding the moral high ground to form the global protection discourse.

6. Methodology and Source Material

While this work is analysing the discourse of the first harmonisation phase of the CEAS (roughly 1997 – 2004), it cannot be seen as a classical discourse analysis in the Foucaultian sense of the term. A discourse is characterized by its internalisation of hidden power relations. Its main characteristic is therefore the exclusion of actors or transmittable language. This can either happen directly through an interdiction of action, or hidden in institutionalized settings, which do not allow or enable certain discursive strings to enter the discourse.[92]

The highly institutionalized form of the European Union policy making, is in itself exclusive, since it permits only contributions by certain predefined actors. While the changing composition of those actors is part of the analysis, only contributions by those players who are relevant at least at one point in the policy making process will be examined. The policy-image that was relocated from the national to the European level, was used to further exclude relevant actors from the discourse, as will be explained later on. While a classical discourse analysis would look at the how and when of the institutionalisations of those power relations, which can always be traced back to certain historic events, this thesis takes them as predetermined. By excluding questions about the originating power imbalances, I can focus on the actual policy making process.

My focus therefore lies in carving out the anchor points that were set during this procedure and in examining at the responsible actors. An anchor point can be seen as a contribution that is distinguishable from others through its novelty and extent. The question that therefore arises is: which were the contributions in the harmonisation process that managed to steer the discourse into a certain direction and to limit the possibility for other actors to react? It does not mean that after setting an anchor point the discourse is fixed and no more discussions or changes are possible, but that the possible changes are orbiting around this point within a certain deviation. The power to set anchor points obviously does not lie in the used language itself, but in the

[92] Michel Foucault, *L'ordre du discours: Leçon inaugurale au Collège de France prononcée le 2 decembre 1970*, Impr., nrf (Paris: Gallimard, 2009), 11–17.

combination of the content and the sender. Pinpointing the anchor points is therefore a method aimed at highlighting power imbalances. The aim of the work is consequently not solely to describe the evolution of a regional protection regime, but to reflect about the development of the relevant anchor points.[93]

From 1999 on the transparency in the decision making process was raised considerably. As long as the decision making power could be found solely in the hands of national executives, many documents were withheld from the public, especially in the Justice and Home Affairs (JHA) pillar, since interior affairs are historically regarded as highly sensitive. The access to the decision making process was not only restricted for the general public, but also for the MEPs, who, until the Treaty of Amsterdam, were not systematically informed about "all facets of such decision-making processes."[94] While said Treaty has, by transmitting migration and asylum matters to the supranational first pillar, introduced the exclusive right of legislative proposal for the European Commission and the right to comment on legislative processes for the European Parliament, the main policy making power could, during the five year transitional period, still be found in the hands of the European Council, and therefore national executives. The power of proposing directives is obviously very important in anchoring a discourse at a certain point. But the actual influence that the Commission had once it released its proposal to the European Council and the public is limited, because the decisive power still remained in the international and not supranational sphere.

The subsequent analysis is essentially based on the minutes and changes that the asylum working party within the European Council has made to the proposals of the Commission. While some external actors have been invited to participate in the process by commenting on proposals, or have proactively tried to contribute, the policy-image was foremost drawn by the institutional actors.

Focusing on internal actors has multiple effects on this analysis. First and foremost, it means further excluding those actors, who have not been able or powerful enough to

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[93] cf. Ruth Wodak and Meyer Meyer Michael, eds., *Methods of Critical Discourse Analysis*, Reprinted, Introducing Qualitative Methods (London: SAGE, 2007), 10–13.

[94] Elspeth Guild and Carol Harlow, eds., *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Oxford [England] ; Portland, Or: Hart Pub, 2001), 37.

enter the official discourse. This evidently includes the danger of teleological historiography, since the "relevant" actors and anchor points are identified through their influence on the final product. The goal of the prevenient chapters was to situate the harmonisation process in a broader picture of global international protection regimes, to counteract this risk. While a classical analysis of the evolution of the power imbalances within this existing regime would further explicate the genesis of the CEAS, the institution-focused approach helps to illuminate the internal decision processes after the main discourse has been framed.

When analysing sources such as the proposals and drafts of the European Council and certain EUMS, one always has to reflect on the intended addressees of those texts and include this reflection into the analysis. Not only is the intended addressee of those texts clearly stated, his foreseen interpretation can also be seen as part of the generative process[95] because they are, above all, internal status updates. While sender and addressee of the messages therefore consist of the same group of persons (Members of the Council of the European Union or the JHA Council), they are also intended to influence the broader civil society. To be relevant, every single work report has to show progress, while still suggesting a certain degree of openness and changeability. The model reader of those texts, which is the person expected to share the same ensemble of codes[96], is already assumed to be part of a restricted group of experts. This technocratic approach is an important mechanism of social exclusion because most people concerned are not able to participate on this level of legal and political expertise. The fact that UNHCR has included refugees in the global consultations does not undermine this statement, since their contribution can be read on a mere symbolic level, forced to adopt foreign procedures and playing their role more like actors in a play, than actual participants in the policy making.[97] To allow the analysis to be as extensive as possible it starts with the relevant texts and publications from the 1980s and comments on the developments in the primary law, especially the Treaty of Amsterdam. The main focus lies nevertheless in the 'hot'-phase of

[95] Umberto Eco, *The Role of the Reader: Explorations in the Semiotics of Texts*, Advances in Semiotics (Bloomington: Indiana University Press, 1979), 3.
[96] ibid., 7.
[97] Foucault, *L'ordre du discours*, 14.

discussions on the qualification directive from early 2002 till April 2004. The discursive strand that the analysis builds on is predominantly political and excludes legal and philosophical questions as far as they are not obligatory in the understanding of the political process. A valid point of critique could be, that the internal discussions and debates of the decision-making bodies are not open for public and academic consultation. The sources that are available for academic analysis consequently only represent a part of the discourse fragments that would be necessary to holistically reconstruct the internal processes. Responding to this critique I want to make a note of the fact, that for the research of discursive anchor points, the actual process of setting the anchor is only of secondary interest. The simple fact that a certain ideological input has been tied to the further discourse at a specific point in combination with the commentaries of the representatives of the MS suffices for the scope of this thesis.

The political and legal discourses have to be regarded as autonomous but closely related. The political discourse as main subject of this analysis has to have, create and uphold certain distinct semantics in order to distinguish itself from other systems that operate in similar discursive strings. That means that is has to, while availing itself of primarily legal linguistic codes, revalue those codes to serve its own opportunistic needs.[98] As I will show in the following chapter, those linguistic codes were used in a way, which help certain states to frame the discourse according to their respective interests.

[98] see Jürgen Habermas, *Faktizität Und Geltung: Beiträge Zur Diskurstheorie Des Rechts Und Des Demokratischen Rechtsstaats*, 1. Aufl (Frankfurt am Main: Suhrkamp, 1992), 399–415.

7. The Common European Asylum System

While the official evolution of the CEAS started with the Treaty of Amsterdam, its roots can be traced back to the early European integration of the 1980s and 1990s. Even though the post-war project that would eventually end up as European Union was founded primarily as an economic community, this perception slowly changed over the years. Although every institutional and legal transformation can be traced back to former actions, this analysis will take as a starting point the political integration process of what came to be the European Union that affected immigration and asylum policies. For the meaning of this paper this point can be allocated to the Single European Act and the first Dublin Convention in the mid-1980s.

7.1 The Early Phase of Institutional Changes

Even though prior to the Amsterdam treaty, all matters concerning immigration and asylum matters were organized on a mere intergovernmental level, certain events can be seen as very important for the subsequent progress. A holistic analysis that tries to systematically explain the developments around the turn of the millennium henceforth has to include long-term institutional evolvements. When resorting on the *autopoietic* theory by Niklas Luhmann, one can base the analysis on the assumption that institutional changes within the European Union aim at the simplification of its *autopoiesis*. Every process and change that happens has to produce or reproduce itself through the very elements it contains.[99] A process always has to reproduce itself or it ceases to exist and every reproduction of the process has to aim for simplification. The inclusion of matters of migration and asylum into the broader functional system of the EU has to be read as simplifying the underlying market mechanisms and must therefore be traced back and linked to developments in the wider scope of the Unions legal and political development.

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[99] Niklas Luhmann, 'Die Autopoiesis Des Bewußtseins', *Soziale Welt* 36, no. 4 (1985): 403.

In the mid-1980s the idea of an inner market "without internal frontiers in which persons, goods, services and capital can move freely in accordance with the Treaty establishing the European Community"[100] arose and got institutionalized in the Single European Act. While the idea of a single market might not look revolutionary on the first glimpse, it differed fundamentally from the mere economic cooperation of the European Economic Community (EEC). The abolishment of internal frontiers for persons signified the beginning of the end for border controls within the Member States. To function accordingly, the SEA demanded abolishing the border checks for all signatory states, a step which many signatory states were reluctant to take straight away. It would be problematic to directly link the development of the single market to a common approach on asylum questions, because some states – especially the UK – were on the forefront when pushing for market integration but did not want to be bound by the Unions migration agreements.[101] Henceforth other ways had to be found.

7.1.1. Schengen and Dublin I

The internal dispute between representatives of market and political integration led to the Schengen Agreement, which was signed by France, Germany, Belgium, Netherlands and Luxembourg in 1985. The international agreement that was initially not part of the EEC legal order aimed at the gradual abolition of border checks between the signatory states. It furthermore included direct provisions for an approximation of visa policies and the protection against irregular immigration through common rules on external border protection.

The common approach to border controls is the most important measure on asylum policies that had hitherto been taken. The fact that internal borders should be abolished meant that all persons, including asylum seekers and international

[100] European Communities, 'OJ 1987/L 169', 29 June 1987.

[101] Virginie Guiraudon, 'European Integration and Migration Policy: Vertical Policy-Making as Venue Shopping', *Journal of Common Market Studies* 38, no. 2 (2000): 255.

protectees[102], who are present in this internal market area, could move freely from one signatory state to another. A mutual answer to external border controls and asylum questions hence became mandatory. Over the years almost all EC Members States signed the Schengen Agreement: Italy (1990), Spain and Portugal (1991), Greece (1992), Austria (1995), Denmark, Finland and Sweden (1996). Most of the Member States that joined the European Union in 2004 and later, are also part of the agreement. Furthermore Norway, Island, Liechtenstein and the Switzerland joined the Schengen Area, albeit not participating in the European Union.

The Convention Implementing the Schengen Agreement (CIS) of 1990 finally realised the full abolition of internal border controls. Free movement of persons within the Schengen Zone was now guaranteed, and compensatory measures for border checks at the external borders were introduced. The new Convention now also expressly included measures regulating the responsibility for processing asylum applications. The procedure itself however, remained subject to national law of the signatory states. The new agreement entered into force in 1993 and finally formed the Schengen Zone in 1995. A very interesting detail when studying both the Schengen Agreement and the implementing Convention is the sharp rise of migration matters in the text: While the original 1985 agreement only included three short paragraphs that dealt with questions on immigration, the Implementing Convention was already dominated by (irregular) migration matters.

Approximately at the same time as the CIS was signed, another international treaty – that would become one of the cornerstones of the CEAS – came into force. On the 15th of June 1990 twelve countries signed an international treaty in Dublin. The 'Convention determining the State responsible for examining applications for asylum lodged in one of the Member States' was the first treaty in Europe that was exclusively concerned with matters of international protection. It came into force in 1997 with 12 initial signatory states[103]. The principle that guided the Convention was that only one Member State should be responsible for examining an application for asylum. On the one hand the system was designed to combat "asylum shopping": the

[102] I use the word term „international protectee" to include all kinds of international and national protection statuses that exist within the Member States.
[103] Austria, Finland and Sweden joined soon afterwards in 1997 resp. 1998

practice that asylum seekers that were not granted refugee status in one MS launched another application in another one. On the other hand however, it also intended to guarantee the examination of every asylum claim in the Schengen Area, thus protecting asylum seekers from a limbo in which no state would feel responsible for examining their application. The Convention sets out a list of criteria to identify the Member State responsible for examining the asylum application. To avoid confusion between the Schengen and the Dublin regime, the former ceased to apply to those matters, which were regulated in the Dublin Convention.

7.1.2. The Treaty of Maastricht

In 1992 the Maastricht treaty fundamentally changed the internal structure of the European Communities. It created the European Union, which was based on three pillars. The first pillar – the European Communities – was the only supranational pillar, while the second – the Common Foreign and Security Policy – and the third – Justice and Home Affairs – were governed on an intergovernmental basis. Migration and Asylum matters were based in the third pillar, which meant that they fully remained within the competence of the national governments. The K4 committee, which was set up as a political committee for the third pillar responsibilities, had a full working group dedicated to the matters of migration, asylum and visa policies, but their actual power was limited due to the necessity of an unanimous vote in the Council to pass legislation. Still the European Council expressed as early as 1993 that common action on asylum questions should be prepared as a matter of priority for further harmonisation.[104]

There are several theories on why the asylum and immigration measures were transferred to the European level and did not remain entirely national agendas. It has already become clear that the abolition of internal borders, which was an on-going process in the early 1990s, demanded a close cooperation in migration matters, since external border controls had to happen before a person entered the Schengen area. It could be argued that the question of responsibility has been already dealt with in the

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[104] European Council, '10655/93 JAI 11', 1993.

Schengen agreement and even more specifically in the Dublin Convention and that consequently a further intergovernmental cooperation was not an essential requirement. Nevertheless the national policy makers decided that closer collaboration was necessary.

Several political scientists have tried to answer the question on why this happened by using the arguments of the 'venue-shopping school'. Virginie Guiraudon first used this approach, that was based on the idea that depending on the "institutional locations where authoritative decisions are made concerning a given issue, different constituencies will be mobilized"[105] for explaining the European migratory polices in her seminal essay in the year 2000. "The rules guiding decision-making and the character of the participants at different levels of governance privilege a specific set of actors and mobilizing strategies. Political actors seek policy venues where the balance of forces is tipped in their favour."[106] This concept is very useful when analysing policy changes because it not only "emphasises actors' strategies, [but] also takes into account the rule bound context to which actors respond."[107]

This method can be applied to the creation of an intergovernmental decision body on migration matters. In this case a specific set of political actors, which are the officials of interior and justice ministries, saw themselves on a stronger position regarding the decision making rules on the European level, than on the national one. A change to a new venue henceforth meant, that the relevant actors have succeeded in framing the policy-image in a way that demanded this new level of decision-making. Policy-images in this interpretation are "public understandings of policy problems".[108] When a political problem is framed in a way, which allows political actors to switch to a new venue of decision-making, it usually includes a certain imbalance of power that is being saved or established. Following this line of argumentation, it can be reasoned that the responsible actors gained power by switching from the national to the international venue. This happened in three different ways:

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105 Guiraudon, 'European Integration and Migration Policy', 257.

106 Ibid., 252.

107 Ibid., 258.

108 Andreas Maurer and Roderick Parkes, 'The Prospects for Policy-Change in EU Asylum Policy: Venue and Image at the European Level', *European Journal of Migration and Law* 9, no. 2 (1 May 2007): 176, doi:10.1163/138836407X190424.

(1) because pro-migrant organisations were mainly organized on a national level prior to the Maastricht Treaty, finding common decisions on an international level devitalizes their criticisms;

(2) it is a way to bypass national parliaments and other governmental actors in the Member States. Since migration and asylum matters are not solely of concern for internal affairs, but also touch the scope of several other government bodies, such as social and labour ministries, a change to the European Community level prevents those actors from participating in the decision making process;[109]

(3) once other actors are formally or informally excluded from the discourse, the policy-image gets even closer connected to those who managed to be an integral part of it.

Additionally, to the working group in the JHA pillar, the European Commission set up a small taskforce, which was meant to support the work of the JHA and connect the Commission and the JHA working group. The goal of the taskforce was not to "push for a particular vision"[110] but rather to "evaluate proposals that could be an acceptable basis for compromise."[111] While in the European Communities the working groups were starting their harmonisation-work, UNHCR presented its yearly notes on international protection to the UNGA. As has already been argued in the chapter on UNHCRs development, the early 1990s were a very important period intellectual discursive work of international protection. Taking on its classical role as a promoter of refugee rights and law, UNHCR stressed the international community to read the 1951 Convention in an inclusive way[112] and to grant international protection also to those people, who fall outside the scope of the Convention but are otherwise in need of protection.[113]

7.1.3. The European Working Groups on International Protection

[109] Guiraudon, 'European Integration and Migration Policy', 252.
[110] Ibid., 263.
[111] Ibid.
[112] UNGA, 'A/AC, 96/830', sec. 23.
[113] Ibid., sec. 30.

Two years later the European working groups took on the question of the common definition of the refugee status in one of their first official publications. The first compromise that could be found on the European level was the 'Joint position on the harmonised application of the definition of the word refugee' in the year 1996.[114] While this document does not create any legally binding protection statuses, it harmonised the application of the 1951 Geneva Convention in the EUMS. The European task force in- and excluded certain specifics of the refugee definition and hereby further explained the protection gap that was to be filled after the Treaty of Amsterdam. The joint position clarifies inter alia that persecution in the sense of the 1951 Convention is *a priori* persecution through state organs. Third party persecution can only lead to the recognition as a refugee, if the responsible state authorities either permit or even encourage these acts of persecution. If the relevant authorities are not able or willing to protect their own citizens', national governments are to decide if this can be seen as sufficiently severe to grant the refugee status. This approach was in line with the German and French jurisprudence but differed radically from the Swedish understanding. Hence, Sweden "objected formally to this provisions […] noting that […| it [third party persecution] may also fall within the scope of the Convention in other cases, when the authorities prove unable to offer protection."[115] While most positions were non-controversial, the fact that a joint position of all European governments had to resort to national laws shows that the question could not be answered in a unanimous way. The joint position therefore has to be described as an "*accord sur un désaccord*"[116] regarding the sources of persecution.

The second important part of the Joint Position is Article 6, which deals with situations of generalized violence. It clarifies that a civil war or a situation of non-discriminate violence is not in itself sufficient for obtaining refugee status. Only once a group in a civil war has established authority over a particular area and then individually persecutes persons, the persecution-criteria could be met. All other protection for persons witnessing situations of generalized violence was again

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[114] European Communities, 'OJ 1996/L 63/2', 13 March 1996.
[115] Guild and Harlow, *Implementing Amsterdam*, 153.
[116] Bouteillet-Paquet, Hailbronner, and Academic Network for Legal Studies on Immigration and Asylum Law in Europe, *Subsidiary protection of refugees in the European Union*, 79.

transferred to national law and thereby excluded from a harmonized refugee definition. The 1996 joint position sends two main messages two years prior to the Amsterdam reform treaty. The Member States were committed to work together and harmonize their asylum policies even outside the Schengen acquis, which became fully operational in 1997, but this willingness was not strong enough to overcome the discrepancies in the perception of the scope of international protection.

7.1.4. Preparation Works on Complementary Protection

One of the last important amendments to the European Asylum policies prior to the Treaty of Amsterdam that has not been mentioned yet happened in 1995. The MS agreed on the implementation of minimum procedural guarantees for asylum applicants. The Council resolution, which was legally binding for all MS, included many standards of the asylum procedure that would later be used in the CEAS documents, but also a recall that explicitly mentions complementary protection. Without trying to regulate those complementary statuses, the Council acknowledges that Member States "may exceptionally allow aliens to stay for compelling reasons other than those covered by the 1951 Geneva Convention".[117] This recall again sends two important messages: In 1995, the Member States were not yet willing to talk about a European solution to the shortcomings of the 1951 Convention. Nevertheless, they already recognized these problems and the national efforts to solve them, while no attempt was made to harmonize these ambitions.

The working program of the Dutch presidency in the first half of 1997 included the preparation of a note regarding the different forms of subsidiary protection statuses in the EU. Although not participating in the Common European Asylum Policies, the first delegation to comment on this was the Danish administration, which presented their contribution on the 17th of March in 1997.[118] Although the "harmonisation of the [refugee] status, is an important step towards an equal distribution of asylum applicants" the Danish delegation criticizes that it does not "concern the forms of

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[117] European Communities, "OJ (1996) C274/13," June 20, 1995, Recall 3.
[118] European Council, '6764/97 ASIM 52', 1997.

protection falling outside the scope of the Geneva Convention, the so called subsidiary protection".

This note was crucial, being the first official high-level note on a common concept of harmonised protection in the European Union. It focused on reasons for the importance of such a protection status as well as possible implementations. The guiding rational for this proposition was that "where differences exist between the national schemes in Member States concerning alternative forms of protection, it may become of vital importance to the applicant […] to which Member State he or she is returned".[119] This was conceived as non-satisfactory in the light of a common asylum strategy. Only when the same level of protection could be guaranteed in all Member States asylum seekers would apply for asylum indiscriminately. While the need for harmonisation thus did not stem from the intention to broaden protection, it was still argued that "an approximation of national schemes […] if it is to have any meaning at all – must extend beyond repeating international obligations."[120] The note then added three important points to the discussion on complementary protection.

Firstly, the main reason for harmonising forms of subsidiary protection was not the need for a common protection standard as means to provide better protection, but the fear that different standards would lead to a concentration of asylum applicants in countries that granted more rights to persons with a complementary protection status. For the Dublin system to be effective, all protection standards would have to be harmonized, to prevent secondary migration movements. A solution, which only harmonises the definition of the refugee status but leaves out other forms of protection is not satisfactory. While the core element for a common status should be Article 3 of the ECHR, the proposal was not limited to Article 3 violations. The Danish delegation identified three groups, which could be eligible for such a subsidiary status:

- Aliens who fall outside of the 1951 Convention but have similar reasons (i.e. persons persecuted by non-state actors, who were later included in the common refugee definition);

[119] Ibid., 4.
[120] Ibid., 6.

- aliens who should not be returned for other substantial or humanitarian reasons (including i.e. long term stay in the country, medical reasons, private and family live); and
- aliens that are non-removable for practical reasons.

While no clear proposition for a status was made, it is still obvious that the authors regarded all groups as similarly in need for protection, although differences in reasoning were made.[121] The European Union should therefore not try to find the lowest common denominator, but develop an independent European protection scheme, with Article 3 ECHR as its basic principle.

Following the release of this note various working groups started to informally elaborate possible implications for a complementary protection regime. The presidency released an extensive survey on the implications of Article 3 ECHR for the expulsion of illegally resident TCNs in the EU. Although not only directed at asylum applicants, it already included many grounds for which protection was needed.[122] The survey contained relevant human rights sources as well as jurisprudence by the Commission and the ECtHR. The non-removability of TCNs due to human rights reasons (non-refoulement) was already mentioned in the 1951 Convention but also subject to the exclusion clauses. The ECtHR ruled in the *Chahal* & *Ahmed* Cases that "activities of the individual in question, however undesirable or dangerous cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by the 1951 Geneva Convention[123]." This absolute character of the prohibition of refoulement must therefore never be dissented from, even if the "person concerned may pose a threat to the public order.[124]"

Furthermore the presidency stated that following the *St. Kitts* judgement[125] the expulsion of persons who are not physically capable of travelling (*Tanko v. Finland;*

[121] Ibid., 8f.
[122] European Council, '7779/97 ASIM 89', 1997.
[123] Ibid., 2.
[124] Ibid.
[125] In D. vs. the United Kingdom (146/1996/767/964 ECtHR) the court ruled that it must reserve sufficient flexibility to address the application of Article 3. To limit the application of Article 3, by excluding sources of risks that stem from factors which cannot engage directly or indirectly the responsibility of the public authorities, would undermine the absolute character of the Article.

Bulus v. Sweden) or frequent repetitions of unsuccessful deportation attempts (*Giama v. Belgium*) could be seen as Article 3 violations[126]. Still it was clearly stated that violations of Article 3 can only happen when the person of concern is already under the (temporary) protection of the Member State, it can therefore never imply entry obligations but only answer questions of lawful expulsion. Nevertheless the presidency was confronted with the question – if factors involved are of a permanent nature – whether the ECHR implies an obligation to regularize the stay of persons concerned and thus to grant them a legal status.

7.2. The Treaty of Amsterdam

In 1997 the EUMS signed the Amsterdam Treaty, which reformed many of the institutional foundations that were laid down in Maastricht three years earlier. While the Maastricht treaty situated the area of migration and asylum in the third pillar, under the auspices of the JHA, the Treaty of Amsterdam, which became effective in May 1999, transferred this area into the first pillar and hereby into the legislative power of the supranational institutions. Furthermore, it integrated the whole Schengen *acquis* into the existing framework of the EU and hereby laid a first fundament for the European asylum system, by defining the material scope of international protection in the European Union law. This was a highly sensitive and problematic point because the *acquis* was only published in the Official Journal after the treaty has been signed[127], which means that commentators, the media but also researchers, were not able to obtain all relevant texts before they entered into force. The goal of transparency, which was one of the central promises of the Amsterdam treaty, could therefore not be met with regard to said agreement.

During a transitional period of five years, the decisive power stayed in the hands of the European Council, which had to decide unanimously in almost all cases, although

[126] European Council, '7779/97 ASIM 89', 3f.

[127] Guild and Harlow, *Implementing Amsterdam*, 41.

a mandatory consultancy of the European Parliament was introduced.[128] It was only after this transitional period, that the EP finally gained the competence of co-signing secondary law texts. One of the principal goals of the new treaty was the creation of the "Area of Freedom, Security and Justice", which aimed *inter alia* at ensuring free movement of people within the European Union while guaranteeing judicial protection.

Article 2 of the Amsterdam treaty explicitly mentions the areas of asylum and immigration as fundamental for ensuring this new AFSJ. For the first time European primary law mentioned the word asylum and the Union hereby openly entered the international protection discourse. The new TITLE IV EC introduced provisions[129], which dealt with the project of a common European asylum system that should be adopted within five years after the entering into force of the treaty. The new measures to be adopted had to include matters related to the Dublin System, to the reception conditions of asylum seekers and refugees in the MS, to a common definition of the word refugee (which would then be legally binding and must therefore not be confused with the 1996 joint position), minimum standards for temporary protection for so called "de-facto" refugees and the introduction of a burden sharing mechanism regarding refugee-flows.[130] However this last mechanism was excluded from the five-year deadline. While title IV can definitely be seen as a step forward, disappointment with the actual commitment of the MS took over soon afterwards. Three of the 15 MS opted out and did not want to fully participate in the new harmonized asylum system. While the United Kingdom and Ireland wanted to participate through an opt-in procedure, Denmark fully stayed outside the scope of the agreement.

The new treaty stated that measures that were to be taken had to be "in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties".[131] Through this mentioning of the 1951 Convention as cornerstone of the new asylum system - but also by explicitly mentioning other relevant treaties - the European authorities "clearly

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[128] European Communities, 'Treaty of Amsterdam (consolidated Version) OJ C 340 , 10/11/1997 P. 0173 - 0306', n.d., sec. 67.
[129] Ibid., secs 61 – 69.
[130] Ibid., sec. 63.
[131] Ibid.

recognised the applicability of human rights treaties in the field occupied by refugees, asylum seekers and migrants."[132] This did not only mean that human rights would be granted indiscriminately to all individuals on the European soil, but also, that the EU states recognized their political obligation for human rights protection. In this context the protection of the individual asylum seeker or refugee weighs heavier than the interest of the 'general public'. The CEAS was explicitly limited, even before its creation, not only by the 1951 Convention but also through other human rights treaties such as the ECHR, the CAT, the CEDAW, the CRC etc.

Although only released in early 1998, the European Commission started working on a summary of replies concerning national systems of subsidiary protection in 1997.[133] In the understanding of many delegations, all protection mechanisms that exceeded the 1951 Convention were seen as subsidiary protection, thus also systems of temporary protection. The main finding of the survey was, that all Member States provided at least some kind of complementary protection, which mostly took the form of temporary residence permits. As a result of the survey, the presidency identified four grounds for protection, which could be relevant for a future common subsidiary protection regime. The most important one – which was later included in the European refugee definition – was the field of 'Convention like grounds of persecution'. Most MS already provided some kind of protection for people who were persecuted for such reasons by non-state actors before the harmonisation. Furthermore, some Member States, especially France, provided special protection statuses for persons from Ex-Yugoslavia and Algeria. Persons fleeing for convention like reasons were relatively well integrated into the legal protection scheme and generally possessed a right to protection. However, this was not the case for people seeking protection for humanitarian reasons. While many states provided some kind of residence permit, the legal basis was vague and the permits only granted in exceptional cases. This meant a high degree of legal uncertainty for the persons concerned. Temporarily irremovable persons could be granted short time residence permits in Germany, Greece, France and the Netherlands while they were waiting for their travelling documents. If those documents were not tangible many MS granted

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[132] Guild and Harlow, *Implementing Amsterdam*, 145.
[133] European Council, '13667/97 ASIM 267', 1998.

some kind of legal toleration, which neither included the right to work, nor a residence permit.

7.2.1. The first steps after the Treaty of Amsterdam

Shortly before the Treaty of Amsterdam went into force in May 1999, Austria took over the presidency of the European Council and declared it one of their primary goals to advance the development of the CEAS. On the first of July of 1998, which was at the same time the first day of the new presidency, the Austrian authorities released an internal strategy paper on immigration and asylum policy, which was soon afterwards leaked to the press and widely criticised.[134] The basic assumption was, that a harmonised migration policy had to be connected to a strong foreign policy development in which the EU was called to show political muscle to prevent refugee flows, which were seen as inherent danger and security risk for the European Union. While arguing that refugee flows were to be seen as considerably influencing the internal security of the Member States, the Austrian presidency furthermore argued that the 1951 Geneva Convention had become less applicable after the fall of the Soviet Union and that it was not at all geared to answer displacements generated by inter-ethnic conflicts. The point that henceforth provoked the harshest criticisms was the call to restructure the protection system in the EU in order to take account of the new political developments, which also meant possibly amending, supplementing or replacing the Geneva Convention. The new understanding of protection was a combination of short-term protection for mass refugee movements in combination with speedy assistance on the ground, so that refugees would no longer need to prove personal persecution and would not be hosted indefinitely within the European Union. While the massive wave of criticism led to a revised draft that changed the wording of some of the most contentious arguments, the thoughts that were introduced into the general discourse remained crucial for the years to come.

[134] European Council, '9809/98 CK4 27 ASIM 170', 1998.

Roughly about the same time, a study on international instruments relevant to subsidiary protection was released.[135] The starting point for all refugee protection was seen in the 1951 Convention, which excludes fugitives fleeing solely situations of armed conflict. Still, as already argued in the chapter on UNHCRs development, the final act of the *travaux préperatoires* expressed the hope, that the protection granted due to the Convention would eventually exceed its contractual scope.

The humanitarian grounds that were most often used for granting protection in the EUMS, involved the medical condition of the person, a state of war in the respective country of origin and the risk of inhumane treatment upon return. Other than the survey on statuses in the Member States, the study identified three relevant groups, which might be eligible for protection: Persons in refugee like situations, humanitarian cases and general circumstances, which included natural disasters.

The existing non-refoulement obligations of the MS included all the reasons expressed in the 1997 survey, but also protected from arbitrary or excessive punishment for civil offences (very often in cases of death penalty). While the study on the implications of Article 3 ECHR violations implied that an obligation to grant a residence permit could be read into the ECHR, the new study negated this, stating that "these obligations are limited in that the relevant instruments and their subsequent jurisprudence cannot be taken as obligations on States to change their admission policy, nor, more specifically, do they directly imply an obligation to grant any specific status, residence permit or consequent rights to the person in question."[136]

While the political discourse focused on questions of migration management and included questions of (inter-)national protection into this schemes, high level working groups continued to elaborate clearer concepts of the European protection system. In early August 1998 the "Subsidiary Protection Note" was released, which for the first time explicitly defined the concept of subsidiary protection:

> *"The term "subsidiary protection" covers protection instruments for persons from third states who do not fall within the scope of the Geneva Convention but who still have need of some other form of international protection. It*

[135] European Council, '10175/98 ASIM 178 ASILE 6 MIGR 6', 1998.
[136] Ibid., 12.

> *covers, for example, the issue of a residence permit or the granting of "tolerated stay" status in cases where the conditions for the recognition of refugee status in accordance with the provisions of the Geneva Convention are not met, but where return to the country of origin or refoulement is not permissible, where Geneva Convention-like grounds exist or where in general return to the country of origin cannot be required on serious humanitarian grounds."*[137]

The Austrian presidency went on by clarifying that subsidiary protection is not expressly referred to in the Treaty of Amsterdam, but that disparities in the complementary protection regimes may "substantially affect an aliens decision to seek asylum or protection in a particular state"[138]. As in the Danish Note from 1997, the main rational for harmonising complementary forms of protection was the fear that existing disparities would undermine the goal of a functioning Dublin system. The Austrian Note then posed four main questions to be answered by all delegations:

- Are delegations in agreement with the findings on the study of relevant instruments?
- Is it necessary and possible to adopt a community approach?
- If so, which criteria and categories of cases should be taken into consideration and should the approach be sought with regard to other entitlements (i.e. social entitlements)?

After focusing their presidency on the implementation of the Amsterdam amendments and the migration policies, Austria invited the JHA council representatives to Vienna to work on an Action Plan regarding the details of the implementation. The so-called Vienna Action Plan was released on the 23rd of January 1999 and sets out detailed requirements for the implementations on the policy sphere.[139] Following the main line of argumentation of the Amsterdam treaty, the Action Plan focused on the realisation of "freedom" in the European Union. Freedom, which first and foremost meant material freedom and freedom of the market, could only be realized or enjoyed when a secure environment could be

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137 European Council, '10811/98 ASIM 193 ASILE 9 MIGR 13', 1998, 2.
138 Ibid., 3.
139 European Communities, 'OJ 1999/C 19/01', 23 January 1999.

guaranteed. The notion of freedom is therefore necessarily connected to the securitisation of the EU.[140] Given the fact that immigration and international protection measures are mentioned with, and therefore directly connected to, questions of security, shows how the EU administration tried to frame the discourse.

The main material contents of the Action Plan regarding asylum law reforms are the explicit mentioning of the necessity of legally binding measures, which would have to have adequate monitoring arrangements. One central goal of the Treaty of Amsterdam was to allow the Union to act as a unified body regarding questions of Justice and Home Affairs. The communitarisation of asylum questions was seen as a necessary step to be taken. To reach those goals, the delegations formulated five general principles:

- Rationalisation and Simplification;
- Specialisation and Responsibility;
- Continuity;
- Transparency;
- Flexibility.

These principles should be used as guidelines for the upcoming implementation of policies. Although the Action Plan recognized the fact that the areas of asylum and immigration are separate and require separate approaches, many policies, especially those tackling the entry into the European Union, were directed at both areas. As has been already mentioned, the creation of the CEAS was an integral part of the Amsterdam Treaty. The Vienna Action Plan therefore explicitly focused on the CEAS and identified necessary measures to be taken and a rough schedule. The measures were classified into different categories based on their urgency. The most pressing necessity was a unified minimum standard for temporary protection in case of a mass influx, which was to be implemented "as quickly as possible".[141] This urgency clearly stemmed from the experiences with refugee influxes after and during conflicts in Bosnia and Kosovo and the fear that similar mass movements could occur in the near future. Within two years after the Vienna Action Pan the EU should have

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[140] Jef Huysmans, 'The European Union and the Securitization of Migration', *Journal of Common Market Studies* 38, no. 5 (2000): 756f.
[141] European Communities, 'OJ 1999/C 19/01'.

fully integrated the Dublin Convention (Dublin I) into the community Acquis, ensured the functioning of the EURODAC [142] database, adopted minimum procedural guarantees for the granting of withdrawal of the refugee status, established minimum standards for the material reception conditions of asylum applicants and harmonised carrier sanctions. Especially the last point shows how asylum and immigration law questions were dealt with in the same manner.

The most important paragraph for this study is Art. 63 of the Action Plan, which sets out the goals to be reached within five years. Not only should the MS harmonise the minimum standards with the respect to the qualification for refugee status, but they should also define minimum standards for subsidiary protection for persons in need of international protection. The creation of a protection regime complementing the Geneva Convention, as it was laid out in the Austrian strategy paper, was from that moment on, on the frontline of the planned reforms. The German government took over the presidency in early 1999 and proposed that different points should be discussed in specialized working groups, including groups on expulsion and asylum.[143] The positions and findings adopted by the individual working parties should then be combined to a common approach at the Tampere Council.

7.2.2. The European Council of Tampere

The year 1999 was used primarily for the preparation of the Tampere European Council, which was held in October of the same year. The few documents that were released during the year confirm general commitments to Human Rights and especially the ECHR without further clarifying the preliminary developments.[144] In early February the presidency released a draft position for their strategy paper, outlining the central objectives. Arguing that many applications since the 1970s are

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[142] EURODAC is a European-wide fingerprint database used to identify the route of asylum seekers in the European Union. It is therefore an integral part of the Dublin system, since it allows the Member States to detect the first state of illegal entry into the European Union. The Dublin system codified the rule that if no other connective factor existed, the state of first illegal entry is responsible for examining an application for international protection.

[143] European Council, '14265/98 ASTIM 260 MIGR 31 ASILE 12', 1998.

[144] Statewatch, 'The Story of Tampere', September 2003, 2–5.

based on grounds that are not relevant for asylum,[145] the paper stated that "it will need to be considered whether complementary protection arrangements can be developed alongside the 1951 Convention".[146] The aim for a harmonized asylum policy would have been a consolidation of the Geneva Convention and the ECHR in the light of the changed circumstances, including the protection of Human Rights in the European Union as well as the tackling of root causes in the refugee producing countries. A coherent policy would have also included the cooperation with neighbouring countries, so that refugee protection could be dealt with in the same region. Here the post Iraq war discourse, which was described in in 5.4., is clearly copied and the mutual influence of the global refugee discourse and European asylum law is evident. The German comment, released only two weeks after the draft strategy includes all non-removable persons[147] into the understanding of subsidiary protection and once again stressed the importance of a fully harmonized protection system, because only harmonizing refugee protection would be problematic.[148] The survey on existing subsidiary protection mechanisms still mixed temporary mass protection and complementary individual protection. However, after a meeting of the asylum working party on the 1st and 2nd of March 1999, the presidency stressed that there had to be a clear distinction between subsidiary and temporary protection when complementary protection was to be discussed.[149] This however should not be understood as providing permanent protection for subsidiary protectees, but as underlining the idea that protection *per se* does not have to be permanent.

The biggest debate in the beginning of the harmonisation process was not the scope of complementary protection mechanisms, but the asylum procedure itself. While basic procedural harmonisation already started in 1995 many details were left to the Member States. The role that subsidiary protection – as concept - played at this stage was a substitute. In case an agreement could not be found without, subsidiary protection could be used as intermediary. Especially the French and the Portuguese delegations wanted to exclude any complementary form of protection and confine the

[145] see especially the short excursus on the development of the German asylum law
[146] European Council, '5864/99 ASILE 6', 1999.
[147] all persons that cannot be deported for practical or legal reasons
[148] European Council, '6246/99 ASILE 7', 1999.
[149] European Council, '6836/99 ASILE 10', 1999.

scope of the common approach to the 1951 Convention. Others, such as the German or Italian delegation sought to include subsidiary protection in all treaties of the CEAS. A working paper, released by the Commission in early March, read the Treaty of Amsterdam as including the need for a harmonisation of complementary protection statuses[150] but stated that, although there was a good case for a single asylum procedure including subsidiary protection, the workload was too big for the first phase of harmonisation. Hence subsidiary protection could be temporarily excluded.[151]

Furthermore, while pledging for harmonisation, all delegations and the Commission favoured an open approach including a certain minimal level of safeguards and guarantees and therefore a directive instead of a regulation. The fact that at the time the only regulation in the CEAS was the Dublin regulation, which contains barley any material subjective rights for the asylum applicants shows, that the Member States were reluctant to commit to a system that could be individually enforced against them. The main goal in this phase of discussions was to reduce secondary migration movements of asylum seekers once they entered the EU and not a high and harmonized level of protection. This becomes especially clear when looking at the British delegations' comment to the Commissions proposal, arguing for an inclusion of complementary protection in a common procedure: “Any successor to the Dublin Convention will also need to consider all persons in need of international protection rather than limit itself to those meeting the narrower requirements of the 1951 Convention. Otherwise, as is increasingly happening, applicants will avoid the [Dublin] Convention by claiming ECHR based protection”.[152] Still the UK argued for a flexible approach, meaning that Member States would have the opportunity to opt-out of this inclusion.

In the beginning of June 1999 the presidency released a paper that talked about the necessity to allow the adaption of the protection regime if the realities changed, while fully respecting the “European humanitarian traditions”.[153] This paper also clearly

[150] Article 63 (1) (d)
[151] European Council, ‘6702/99 ASILE 9’, 1999.
[152] European Council, ‘11615/99 ASILE 33’, 1999, 3.
[153] European Council, ‘8815/99 ASIM 23’, 1999.

expressed the need for temporary protection regimes that would complement the 1951 Convention, although a clear distinction between temporary protection for masses and subsidiary protection for individuals fleeing civil war or widespread and indiscriminate violence had to be kept. A presidency note from July 1999 further extended this approach stating that the European Union has to ensure full protection of displaced persons, beyond the existing provisions of the Geneva Convention.[154] While arguing for this apparent extension of the protection regime, the presidency also laid a strong focus on a holistic approach to Human Rights, which meant explicitly appeasement policies for refugee producing areas, and the tackling of the root causes of displacement and migration.

The special meeting at Tampere that focused on the creation of the Area of Freedom, Security and Justice was proposed by the Spanish delegation at an informal European Council in Pörtschach, Austria, and was criticized by NGO delegates for its in-transparency.[155] Boosting the transparency of the decision making processes in the EU was one of the figureheads while selling the treaty of Amsterdam to the general public, which makes it even more remarkable that no preparatory texts were released in the preparation phase. As the NGO Statewatch argued, five topics to be discussed at the Tampere meeting were on the table in the preceding informal meeting, including two concerned with the asylum and migration strategy. While the public was vaguely informed on what topics had been discussed at preliminary meetings, the European delegates did not agree on publishing a report. At the last informal meeting preceding Tampere, the JHA council in Luxembourg on the 4th of October 1999, the matters were "simply discussed over lunch".[156] Therefore at the morning of the 15th of October 1999, the day the Tampere meetings started, the public had no access to a detailed schedule. The only paper that was released prior to the presidency conclusions were draft conclusions that were made available at the morning press conference on the second day of the meeting.

The presidency conclusions, which were released at the end of the European Council meeting, repeated the remark that the roots of European integration lie in the

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[154] European Council, '10015/99 ASIM 31', 1999.
[155] Statewatch, 'The Story of Tampere', 2.
[156] Ibid., 5.

principles of Human Rights, democracy and the rule of law. The principle that "it would be in contradiction to European values to deny freedom to those who justifiably seek access to our territory"[157] made common policies on asylum and international protection necessary for the process of European integration. The EUs regional protection regime should not only be in full compliance with the 1951 Convention but also with other "relevant Human Rights treaties".[158] Without expressively using the term, the conclusions basically stated that the EU had an obligation to ensure human security in order to fight the root causes of forced displacement. While under certain circumstances this could be read as acknowledging economic reasons of forced displacement, the officials always clearly excluded "non-violent" reasons of flight. Still the conclusions include a clear approval of the principle of non-refoulement and state that the Common European Asylum System should be "completed with measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection."[159]

7.2.3. Single Status and Procedure

With subsidiary forms of protection now being an integral part of the CEAS, states were asked to give their opinions on the form and extent of their complementary protection statuses. The goal was to gather information about the status quo. For the facilitation of this process the Finish presidency released a "Discussion Paper on Subsidiary Protection"[160] dealing with the legal frameworks for the implementation of such a complementary protection regime, but most importantly gathering relevant questions to be answered by the delegations:

- Should the legal instrument include other situations then existing legal obligations?
- Should the subsidiary protection status be harmonized?
- If yes: should a single status for all protectees be created?

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[157] European Council, 'Tampere European Council - Presidency Conclusions', 16 October 1999.
[158] Ibid.
[159] Ibid.
[160] European Council, '13167/99 ASILE 41', 1999.

- Should the right to family reunification be harmonized?
- Should the right to employment and social security be harmonized?

A clear distinction between two categories of questions can be made that was sustained during the discussions: The material conditions for the qualification for international protection and the connected subjective rights, once a certain status has been granted. While the discussions on the scope of complementary protection went on, other working parties still ignored the developing subsidiary protection status. In a proposal for the creation of the European Refugee Fund, future subsidiary protectees have not been mentioned. The distribution of resources included only refugees and persons granted temporary protection.[161]

As the first delegation to respond and to set a strong sign, the Dutch administration stressed that “subsidiary forms of protection need to be included from the beginning on.”[162] In the Dutch perception, nothing would prevent the MS to implement the same procedural and social guarantees for refugee protection and other forms of protection.

This first debate on subsidiary protection that started in early 2000 did not discuss the scope of the status. The question to be examined was, if an application for subsidiary protection was to be dealt with under the same procedure as the asylum application and if the same minimum guarantees should be ensured. The actual content of the early scope of subsidiary protection can therefore only be found between the lines. While i.e. six member states wanted to broaden the target group of the European Refugee Fund to all protection statuses in the EU – especially the Finish presidency stressing that subsidiary protection should be of a more permanent nature than temporary protection – others argued, that granting complementary forms of protection too much space in the CEAS would undermine the primacy of the 1951 Convention. Especially France stressed this point stating that the 1951 Convention is the “main instrument for the international protection system, which must not be weakened.”[163]

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161 European Council, ‘5635/00 ASILE 2 FIN 17’, 2000.
162 European Council, ‘6186/00 ASILE 4’, 2000.
163 European Council, ‘8510/00 ASILE 24’, 2000.

In the final proposition for the European Refugee Fund the Commission stated that "persons granted complementary protection cannot be treated in the same way as refugees without running counter to the distinction made in Article 63 of the EC Treaty [refugees and "persons who otherwise need international protection"]".[164]

In the first debate on the Reception Conditions Directive, which started in the second half of 2000 only two delegations, the Dutch and the Swedish, wanted to widen the scope of the Directive to all forms of international protection. All other delegations wanted the reception conditions for complementary protection applicants to remain under national law.[165] Still the two delegations managed to slightly change the scope of the original draft, which included 1951 Convention refugees but "without ruling out the possibility of applying other forms of protection to those applicants.[166] The wording of this sentence clearly states, that subsidiary protectees could be included, but the application burden stays with the asylum seekers, who would have to specify for which kind of protection they are applying. The Commission specified this by stating that an "application for asylum shall be strictly understood in terms of the Geneva Convention, unless the person explicitly requests another form of protection".[167] But again no consensus on this topic could be found. As has already become clear in the analysis of the common refugee definition, the result of a disaccord within the Council was to leave the policies vague on the European level but "without ruling out the possibility to apply or adapt it to persons seeking other forms of protection"[168], as the presidency argued in this case.

Given the new developments in the Council, the Commission released an extensive communication in late November, revealing its ideas on the future asylum procedure and a uniform status. The view of the European Commission was without ambiguity: "The common procedure and uniform status must be applied to all international protection needs and not only to those covered by the Geneva Convention."[169]

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164 European Council, '11578/00 ASILE 42 FIN 358', 2000.
165 European Council, '10242/00 ASILE 30', 2000.
166 European Council, '11651/00 ASILE 48', 2000.
167 European Council, '11622/00 ASILE 46', 2000.
168 European Council, '13117/00 COR 2 ASILE 52', 2000.
169 European Council, '13119/00 ASILE 54', 7.

While acknowledging that the refugee definition of the 1951 Convention is not without ambiguities, the big difference lies in the time span for which protection is needed. The Commission argued that complementary forms of protection are generally available for shorter time spans but also recognized, that differing between two protection statuses might make the system unnecessarily complicated. The idea of a single protection status, albeit this would have meant expanding the scope of the Geneva Convention, was seen as a means of simplifying the asylum procedure, which could put a stop to asylum shopping practices. Confirming the importance of UNHCR in this regard, the report also stated that the 2001 Global Consultations would be of vital relevance for the European project. Hence, UNHCRs comments on the issue highlight the tension between the European leaders and international protection experts. UNHCR strongly invited the delegations to consider all forms of international protection irrespective of the form of risk under a single procedure and to apply a broad refugee definition, which – for HCR – could have also included persons fleeing indiscriminate violence. [170] This view was overruled when the Commissions proposal on the minimum standards for temporary protection, only defined a refugee in the terms of the 1951 Convention.[171] But UNHCR also argued, that the time span of subsidiary protection should only be as temporary as the refugee status was temporary. While technically the refugee status can be withdrawn if the reasons for which protection were granted cease to exist, in reality this barely happened as UNHCR stated. Arguing for the same temporality as the refugee status thus translates into a subsidiary protection status without a temporal limit.

While working on the Procedures directive, the Council included the possibility for states to apply the directive to other kinds of protection applications in March 2001. The fact that this proposal was a "may" and not a "must" provision, was harshly criticized by the delegations of the Netherlands and Sweden, who wanted to expressly include subsidiary protection into the single procedure. This is easily explainable due to the fact that both countries already examined an Article 3 violation in the same procedure as the classical asylum reasons as laid down in the Geneva Convention. Nevertheless, the commission wanted to make a clear distinction between asylum and

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[170] European Council, '5127/01 ASILE 1', 2001.
[171] European Council, '5191/01 ASILE 4', 2001.

subsidiary protection, even before clarifying the actual scope of this second protection status. The problems that evolved in not including subsidiary protection into a single procedure were not framed as political, but as practical ones. The wording of the Dublin Convention did “not cover other forms of protection if they are not dealt within a single procedure”[172] as the Commission realized. The biggest point of discussion in mid-2001 was the question if every application for protection should automatically be regarded as an application for asylum or if people apply for protection irrespective of the status granted.[173] On the 50th anniversary of the 1951 Geneva Convention the European Union released a statement in which the EU “reaffirms [its] commitment to assist and protect all those who are compelled against their will to leave their homes and their country in order to escape fear of persecution and severe human rights violations”[174]. Nevertheless the working groups wanted to include only well defined rights and duties into the CEAS. For that reason, the Spanish delegation stated that applications “for international protection” should be excluded from the reception conditions directive because the term was not yet clearly defined.[175]

Again this view collided with the UNHCRs, which emphasized that minimum standards of reception had to be ensured for every asylum seeker, irrespective of whether or not their protection claims are based on the 1951 Convention.[176]

Later in 2001 the Dutch and the Swedish delegations, which stressed the necessity for an inclusion of subsidiary protection in all spheres of the CEAS from the beginning on, managed to acquire a new partner: Finland. In a note that was published as a cooperation of the three delegations they argued, that subsidiary protection must be included in the proposals under Art 63 TEC. Since in both preceding years the numbers of granted complementary protection statuses exceeded the number of

[172] European Council, ‘9269/01 ASILE 31’, 2001, 12f.
[173] European Council, ‘9998/01 ASILE 34’, 2001.
[174] European Council, ‘10990/01 ASILE 38’, 2001.
[175] European Council, ‘11320/01 ASILE 39’, 2001.
[176] European Council, ‘11347/01 ASILE 40’, 2001.

officially recognized refugees[177], excluding subsidiary protection from the new instruments would drastically and unnecessarily limit the practical value of those instruments.[178] The actual scope of the new protection status was however discussed in the preliminary works to the Qualification Directive.

7.3. The Qualification Directive

The cornerstone of the European Asylum system is the directive that governs the groups of persons that qualify for international protection in the European Union. While the other agreements, the Procedures Directive, the Reception Conditions Directive and the Dublin Regulation could not ignore the fact that a new protection status was on the rise, the shaping happened in the preparations of the Qualification Directive (QD). On the 7 November 2011 the Commission forwarded a first working paper to the Council and the Asylum working group, which included a proposal of the QD.[179] The underlying premise for the new protection regime was, that the need for subsidiary protection is "temporary in nature, notwithstanding the fact that in reality it often turns out to be more long lasting".[180] Following the line of argumentation that was presented by the Dutch, Finish and Swedish delegation, the Commission urged the Member States to apply the optional Article 3 of the Procedures Directive – the extension of the procedural guarantees for applicants of other forms of international protection. The basis for a complementary protection status, as was already argued in the introduction, was to fill the protection gaps in the Geneva Convention. The Commission therefore considered all subsidiary protection measures as complementary to the Geneva Convention regime, which are to be implemented in a manner that complements existing regimes and not undermines them.[181] The new proposal defines the term "international protection" as combining

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[177] In 1999 32.386 persons got granted refugee status while 32.445 got some other kind of protection. The gap continued to widen in the year 2000 when 35.702 persons got asylum in contrast to 45.711 new subsidiary protectees.
[178] European Council, '12063/01 ASILE 47', 2001.
[179] European Council, '13620/01 ASILE 52', 2001.
[180] Ibid.
[181] Ibid.

asylum and subsidiary protection to a holistic protection regime. Given that, any application for international protection in the EU was to be seen as an application for both protection statuses and not as an application for asylum, as was envisioned by many delegations. While defining subsidiary protection the Commission stressed the point persons eligible for subsidiary protection are not "less deserving" of protection than refugees. But, given the principle of the full and inclusive application of the 1951 Convention, consideration whether an applicant is eligible for subsidiary protection should take place only after a person was denied the refugee status. Going beyond the initial scope of the 1951 Convention and expanding it to subsidiary protection, such a status must not only be granted when persecution happens through state actors, but also when non-state actors are included. The definition of the persons eligible for subsidiary protection is codified in Article 15 of the QD. While acknowledging that "no specific EU acquis directly related to subsidiary or complementary protection exists"[182], the Commission explicated that the definitions "do not create completely new classes of persons that Member States are obliged to protect, but represent a clarification and codification of existing practice".[183] The Commissions draft version should have been read as an encompassment of the best national practices that were already in place. Article 15 was divided in three subparagraphs. The first related to torture, inhumane or degrading treatment or punishment, reflecting Article 3 of the ECHR. The second subparagraph related to the "well founded fear of a violation of other human rights"[184]. While this wording would be open for a very inclusive application, requiring "serious unjustified harm on the basis of a violation of a human right" in case of a return to the country of origin mitigated it. The third subparagraph can be read as a compromise between the Temporary Protection Directive and the 1951 Convention. Subsidiary protection would also be granted to persons that were eligible for temporary protection but not refugee status, if they could establish that the fear was well founded on their individual basis.

Regarding basic rights granted to international protectees, the Commission proposed that standards should normally apply to both, refugees and persons eligible for

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[182] Ibid., 26.
[183] Ibid.
[184] Ibid.

subsidiary protection – including access to education and social welfare, unless factual differences demanded different sets of rights.[185] An important difference was still, that the need for subsidiary protection was considered as more temporary than asylum, and therefore the initial residence permit should only be issued for one year, albeit automatically renewable.[186] It did not take long for UNHCR to comment on this new proposal that was about to become the most important document in the alignment of the European protection regime. It criticized the fact, that the European Commission tried to find a new wording and definition for the term "international protection" since this was the area of interest and mandate of the High Commissioner. The Council reacted much later to this intervention by defining international protection as protection applied for by the applicant after all national protection opportunities have been exhausted.[187] On the first glimpse this looks like an implementation of UNHCRs critique. But in reality, national protection opportunities referred to the protection that every state had to provide for its own citizens. As soon as persons left their country of origin and sought protection in the EU, this was to be understood as international protection by the European authorities.

The biggest fear that UNHCR expressed was that the new protection status could undermine the scope of the Geneva Convention. Many people that fled conflict fled for reasons that were covered by the refugee definition. Adding a secondary protection status, which could be based on the non-discriminatory situation in the country, could be a slippery slope that would lead to persons eligible for refugee status only being granted subsidiary protection since their personal element of persecution might be hidden and no longer investigated enough. The Commissariat also took a clear stand on the rights connected to the protection statuses. It saw no rational for discriminating persons being granted protection, neither in duration of the residence permit granted, nor in the social rights or integration facilities.

The works on the qualification directive started in the end of 2001 but intensified from April 2002 on, when the asylum working party tried to elaborate a political agreement. The drafting phase can be divided in two main parts. Phase one went

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[185] European Council, '13620/01 ASILE 52', 28.
[186] Ibid., 29.
[187] European Council, '10596/02 ASILE 36', 2002.

from early 2002 until December and focused on the criteria of eligibility. The main problem of this period was finding a common definition of groups of persons that would be eligible for international protection. As will be shown later on, a general agreement could be found soon after the Seville European Council in November 2002. Following this agreement, the second phase then focused on what it meant to be granted protection in the EU. Which rights and duties for protectees would be connected and would there be different treatments for different?

The September 11 attacks radically changed the international discourse on refugee protection and migration in general. Migrants, especially the ones coming from Arab countries, were seen as security threat and danger for the receiving states. Only a week after the attacks the JHA Committee commented on the attacks and invited the "Commission to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and Instruments".[188] As a direct response the European Commission released the first annual communication on migration and protection matters on the 4th of December 2001.[189] While it still stated that a subsidiary protection regime would complement the Geneva Convention in all Member States, it focused extensively on the link between international protection and security implications; especially on the exclusion mechanisms that were codified in Article 1 F of the 1951 Refugee Convention. While earlier studies have certified that the prohibition of refoulement in the ECHR was absolute, no study forced the MS to grant a status to non-removable persons. Furthermore, the "serious reasons for considering" that an applicant has been guilty of acts contrary to the purposes and principles of the United Nations meant, that no evidence *strictu sensu* was needed to exclude applicants from protection. The issue of non-removable persons that were excluded from a protection status was therefore seen as one of the most urgent ones.

Following the attacks and the successional discourse change, the asylum working group focused more on deterring people from reaching European soil than on how to deal with persons that were already present. An action plan to combat root causes of flight was created in cooperation with UNHCR. International Human Rights

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[188] European Council, '12019/01 C/01/327 Press Release', 2001.
[189] European Council, '14860/01 ASILE 58', 2001.

organisations, like Amnesty International, stressed the importance of the prohibition of refoulement, but the focus was shifted to the refugee producing countries and no longer laid on Europe. Nevertheless, the Commission acknowledged that terrorists were, in practice, not very likely to make use of asylum channels, since other illegal channels were much more discrete and suitable.[190] UNHCR publicly stated that, while protection had to be granted to everyone eligible for it, exception clauses should be rigorously applied. Still all persons that launched an application for protection should be admitted to the procedure, since automatized exclusions carried the danger of refoulement. The biggest difficulty that the European authorities dealt with at that time was still impersonated by individuals that were non-removable but excluded from protection. It was necessary to grant them a certain minimal standard of treatment, which had to be comparable in all MS, since the question of secondary migration would have re-emerged otherwise. In the light of the changed circumstances and public pressure, high EU officials wanted to revise all relevant provisions regarding the exclusion of individuals from protection systems even though the high level working group acknowledged that the already existing legislation was sufficient to allow those exclusions.

While works on the reception conditions directive and the Dublin regulation continued, Sweden, the Netherlands and Finland started to lobby more candidly for an obligatory inclusion of subsidiary protection in those agreements. The single procedure proposal, that would harmonize the application process for international protection irrespective of the aspired protection status, gained momentum. In a commentary the three countries urged the Council and the Commission to reconsider whether the scope of the Reception Conditions Directive should be adapted, after the Qualification Directive would have added the harmonized subsidiary protection to the EU acquis.[191]

7.3.1. The Scope of International Protection

[190] European Council, '15520/01 ASILE 61 -> COM(2001) 743 Final', 2001.
[191] European Council, '7307/02 ASILE 16', 2002.

Given the fact that all Member States agreed to base subsidiary protection upon Article 3 of the ECHR, the first question that was broadly discussed in May 2002 was the burden of proof. Greece wanted to change the need to proof a well-founded fear of persecution, which has been based on the wording of the Refugee Convention for an "objectively established fear" which furthermore had to have a reasonable possibility. Germany, Ireland and Austria also wanted to sharpen the provision in demanding a reasonable likelihood of being subjected to the listed serious and unjustified harms.[192] France, Spain, Luxembourg and Portugal furthermore wanted to stress the idea, that subsidiary protection also had to be based on fear that is "well founded in his [the applicants] particular case"[193]. And Spain additionally wanted to link those individual grounds to the ones of the 1951 Convention albeit insufficient for obtaining refugee status. The Portuguese delegation wanted to further clarify the expression "serious and unjustified harm" since the wording of the phrase was too open and could therefore be misused or misread. The grounds that would lead to the eligibility for subsidiary protection at that time were still as proposed by the Commission: (a) torture or inhumane treatment or punishment (b) violation of a human right sufficiently severe to engage the Member State's international obligations and (c) a threat to his life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalized violations of their human rights. The delegations willingly took the opportunity to comment and elaborate on this first draft, either criticizing the not clearly established differences between subsidiary and refugee protection in (a) and (b) (Greece) or expanding the grounds to include the death penalty (Germany & Austria) or the concept of "real risk" and "cruel treatment" as defined by the ECtHR (Netherlands).[194]

Especially the grounds (b) and (c) were widely discussed. The concept of granting protection for the violation of a human right was seen as too broad for many MS and should therefore be limited to only certain human rights, which would have to be specifically elaborated. The Irish delegation further criticized that all cases that would

[192] European Council, '7802/02 ASILE 19', 2002.
[193] European Council, '9038/02 ASILE 25', 2002, 22.
[194] Ibid.

engage international obligations were already covered under (a) and (c) and that ground (b) was therefore unnecessary and blurry. Finland, while being a strong supporter of the concept of harmonized subsidiary protection, did not want to expand the scope to all people fleeing countries of war. While protection in cases of Article 3 ECHR violations was an international obligation, there was no such for "not returning a person to a country of war"[195].

As was already mentioned, the growing question of internal security and the framing of migrants as security threats had a huge influence on the protection policies. Especially Germany and Austria were reserved to the idea of creating the subsidiary protection status solely as an alternative to the Geneva Convention. Exclusion grounds should be broader and the social security access, including health and psychological care should be limited for persons eligible for subsidiary protection as compared to refugees. Already in this early phase two main groups of countries could be distinguished. Finland, the Netherlands and Sweden ("the northwestern countries") tried to harmonize subsidiary protection as far as possible and assimilate it to refugee protection. Germany, Austria and to some extent Greece ("the central-eastern countries") wanted subsidiary protection status to be as distinguishable from refugee protection as possible and connect far less rights to the new status. The German and Austrian positions can largely be explained on the developments and the tightening of their asylum policies in the 1980s and 90s.[196] The authorities feared to open up another window for irregular migration and therefore pledged for a very restrictive system.

The works on the Qualification Directive influenced all other CEAS working parties. The scope, which was mostly limited to refugees in the definition of the 1951 Convention respective the 1995 common position, had to be amended to cover all refugees as defined in the QD. Still an amended proposal for the Procedures Directive that was forwarded by the Commission did not obligate Member States to grant the same rights to applicants for asylum and applicants otherwise in need of international protection. While it clearly stated that the MS might decide to include those persons,

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[195] Ibid., 23.

[196] For Germany see 5.3., Austria had a similar development on migrations policies in the 1980s and 1990s.

no compulsion could be found in the paper.[197] Especially interesting were the works on the Dublin regulation. As expectable, Finland, Sweden and the Netherlands wanted to mandatorily include the new status. But here not only Germany protested but also the southern countries of Greece and Italy, which were primarily affected by the Dublin Regulation. Since one of the main criteria for assessing the Member State responsible for examining an asylum application was, and is, the irregular entry into the European Union, countries with an external border were unevenly affected by the Regulation. The Commission proposed a text, which would not stop the Dublin Procedure in case of the substitution of the asylum request on another basis than the 1951 Convention and was strongly supported by the northwestern countries of the Netherlands, Finland, Sweden and the United Kingdom.[198] On the other hand pretty much all countries that were directly negatively affected by the Regulation, including Austria, Greece, France, Italy and Portugal opposed this new text. The fear was that in including subsidiary protection the new Dublin Regulation would foster disproportions in asylum applications and therefore create an even more invidious system than the first Dublin Convention.

While the Presidency Conclusions of the Seville European Council in June 2002 contained no remarks on the progress of the works on the qualification directive, soon afterwards, in the road map after the Council, the presidency stated that a possible political agreement on the QD could have been found.[199] Given the fact that the working paper that was released only a week before the Council showed more disagreement than agreement[200] this was an astonishing publication, which could not hold up to its expectations. This could be also seen by the working parties' publication only some days later, which again was branded by extensive discussions on the scope of subsidiary protection.[201]

A big new area that emerged after the Seville Council of debate was the question of *sur place* arising. Following the constant judicature of the ECtHR and UNHCR

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[197] European Commission, '10279/02 ASILE 33 // COM(2002) 326 Final', 2002.
[198] European Council, '9305/1/02 ASILE 29 REV 1', 2002.
[199] European Council, '10525/02 JAI 152 ASILE 35 MIGR 63 FRONT 64 VISA 107', 2002.
[200] European Council, '9038/02 ASILE 25'.
[201] European Council, '10596/02 ASILE 36'.

policies, post-flight grounds are relevant when examining the eligibility criteria for refugee status. Persons that face a real risk of persecution for reasons that occurred after they have left the respective country of origin have the same right for protection. While the question of an Article 3 violation always has to be asked in the moment of the deportation and based on up-to-date country of origin information, Germany and Greece wanted to exclude persons that would have been eligible for subsidiary protection for post-flight reasons from the protection status. This should have helped to find a clearer distinction between refugee protection and subsidiary protection.[202]

While most criteria in the 1951 Convention are very restrictive, as already argued in the introduction, the social group criterion can be read in a very broad way. This is especially important for the discussion on complementary protection statuses, since they, although not less worthy, only come to application if refugee protection is not granted. The qualification directive was supposed to further explicate the grounds for protection and included persons that were persecuted on grounds of their sexual orientation, their common fundamental identity background and gender. For the 'restrictive delegations'[203] this went too far and exceeded the initial scope of the 1951 Refugee Convention. Especially Germany remarked that the grounds for persecution were well known concepts and that a definition should be avoided. The exclusion clauses, which were based on crimes that have been already committed, were again discussed. Austria, Spain, France, the Netherlands, Ireland and Portugal wanted to introduce a new exclusion clause based on a threat to "national security and public order".[204]

While works on the exact scope of subsidiary protection continued, the delegations started to elaborate the rights connected to international protection. As already mentioned, the Commission proposed that once a person was granted an international protection status, social and economic rights should be the same for all statuses. Spain, Portugal and Finland wanted to make clear, that not all rights that were foreseen in the 1951 Convention would also be granted to beneficiaries of

[202] Ibid.

[203] Austria, Germany and the Netherlands in this case

[204] European Council, '10596/02 ASILE 36', 22.

subsidiary protection. Therefore, delegations, inter alia the Greek, wanted to differentiate between the two protection statuses more precisely.

Another important point of discussion was the matter of accompanying family members. The initial proposal stated, that "the level of rights attached to a protection status […] shall be equally enjoyed by the accompanying family members of the qualified beneficiary".[205] Many Member States feared that this equal right for family members went too far, and proposed a very narrow definition of the word family member[206], different treatment for beneficiaries of subsidiary protection and refugees[207] and the requirement for the family members to meet the same conditions as applicants for international protection.[208] This expanded to the question of residence permits granted in combination with protection.[209] The Commission proposed an initial one-year residence permit that would be renewed automatically until it was no longer required. The permit would have been issued to the person that qualified for the protection status plus his family. The Spanish, Finish, Luxembourgish and Dutch delegations feared however, that an automatic renewal would hinder the yearly background checks on the security situation in the country of origin. The burden of renewal should be placed upon the beneficiary him/herself. For refugees however, the residence permit should be for an initial five years[210] and afterwards indefinite.

Similar reservations concerned the access to employment for beneficiaries of protection. While the initial proposal would have granted the same access as nationals, Germany wanted to distinguish beneficiaries of subsidiary protection and refugees. The proposal included a small discrimination for subsidiary protectees, allowing states to deter labour market access for up to six months after the status was granted. This proposal was criticized from both sides of the political spectrum, asking

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[205] European Council, '13620/01 ASILE 52', 49.
[206] Austria, Ireland
[207] Greece, Portugal
[208] Austria, Finland, Luxembourg
[209] Neither the refugee status nor the subsidiary protection include the specific material right to a residence permit.
[210] Only the Netherlands wanted to shorten this period to three years

if any deterrence was necessary[211], or wanted to delete the notion of automatic labour market access after a specified duration of stay.[212]

While the proposal equated most social rights, such as access to education, health and psychological care, social welfare and accommodation with those granted to nationals, many delegations were opposed to it. Whereas the 1951 Convention clearly expressed that no state should discriminate between its own citizens and protected refugees, no such privilege existed for beneficiaries of subsidiary protection. Again, especially the northwestern Member States wanted to discriminate subsidiary protectees on the basis, that subsidiary protection should be perceived as being more temporary in nature.

As already mentioned, not all Member States were of the opinion that the Treaty of Amsterdam foresaw such a detailed harmonisation of complementary protection mechanisms. They therefore asked the European Union's legal service for their opinion on the matter. As was hoped for, the legal experts clearly stated that Article 63(1) lit. c, which determined the mandate to adopt, within five years, minimum standards with respect to the qualification as a refugee, cannot be interpreted as to include subsidiary protection.[213] The different language versions of the treaty of Amsterdam had substantial discrepancies. Some versions clearly limited the scope of the Article's paragraph 2 lit. a to temporary protection, while others could be read as including subsidiary protection measures. The legal service put its foot down in stating that reading the paragraph as excluding subsidiary protection would compromise the objective of establishing an area of freedom, security and justice. Therefore, the power of the Council must be read as covering more than just temporary protection measures. While the qualification directive could therefore not have been based on the Article 63(1) lit. c, paragraph 2 lit a could be considered as providing a sufficient legal basis for the inclusion of subsidiary protection in the QD.

As the legal basis has been certified by the legal service, works on the wording of the directive could continue. By September 2002, the delegations agreed on limiting the scope of subsidiary protection by exchanging the words "safety or freedom" with

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211 Finland

212 Germany

213 European Council, '10560/02 ASILE 34 JUR 247'.

“physical integrity” in Art 15 (c) leg cit.[214] Given the important position that the word freedom had in the human rights discourse[215], this change can be read as more important than one would assume. While freedom and safety are concepts that can be applied to a vast variety of situations, physical integrity narrows this definition down to situations of physical violence. At the same time, the delegations introduced paragraph d, which would have granted subsidiary protection to all persons that left their countries for “acts outside the scope of paragraphs a – c, when severe enough to force an applicant out of his country when such acts entitle the applicant to protection from refoulement”.[216] This new wording managed to exclude refoulement risks that were covered by the *St. Kitts* decision, but expand the scope to all persons who could not be returned to their Country of Origin for reasons that arose *sur place*. Only a few years earlier the ECtHR ruled in the *St. Kitts* case, that the expulsion to a situation with an underdeveloped health system as well as the lack of a functioning social network that would be life threatening for the person, was a violation of Article 3 ECHR. The new development was nevertheless surprising given the history of limiting the scope in the previous sessions. The chair, by redrafting the whole paragraph, tried to implement the suggestions and criticisms that were brought forward by the delegations up to this point.

As the presidency continued to discuss the progress outside of the asylum working party, several delegations commented on this new paragraph. The “definition of subsidiary protection is inspired by the protection systems of the Member States and is clarifying and codifying existing international and community obligations and practices.”[217] The new lit. d clearly exceeded this definition, as no Member State had had hitherto a similar practice. Therefore “a number of delegations stressed, that the scope has to be clear [and] feared that Article 15(d) would be too open for interpretation”.[218] The Danish presidency wanted to reach a political agreement on both statuses (refugee and subsidiary protection) in its term. The Council Meeting on

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214 European Council, ‘11356/02 ASILE 40’, 2002.
215 The contemporary definition of Human Rights was „born“ in the „Four Freedom Speech“ by Franklin D. Roosevelt in 1941.
216 European Council, ‘11356/02 ASILE 40’.
217 European Council, ‘12148/02 ASILE 43’, 2002.
218 Ibid.

the 14th and 15th of October 2002 should have provided the necessary space to agree on those definitions. A big open question was still the case of the death penalty. While there was a consensus among the Member States that persons facing a real risk of being executed should be protected through the subsidiary protection regime, some delegations feared that the exclusion clauses were not broad enough to exclude ordinary criminals from protection. They therefore wanted to revise and broaden the exclusion clauses. The presidency further remarked, that the wording of the proposal would fully include ECtHR case law on Article 3 ECHR violations, such as the *St. Kitts* judgement. Furthermore also other human rights violations could provoke the prohibition of refoulement. In *Soering*, the ECtHR ruled that the deportation to a situation in which a fair trial could not be guaranteed was a violation of Article 6 ECHR.

The presidency did not want to broaden the scope of the European protection regime to such cases and therefore clearly limit the scope to man-made Article 3 violations in the country of origin. But even for those cases, the Member States could not yet find a consensus. Germany, Finland and the Commission still wanted to include a notion of freedom in the final text, which was refused by the Chair that feared to widen the scope of the regime. International protection regimes were from the beginning on designed to grant protection to civilian victims of armed conflicts or political persecution. The Dutch delegation wanted to clarify that this new protection regime also continued this tradition and therefore include the word “civilian” in the proposal. At the same time this would have meant, that ex-combatants who left their military life behind them, would have been excluded from protection, even if they could show that they would be facing a real risk of an Article 3 violation. The Commission therefore urged the Member States not to exclude those persons from the protection regime, since the goal was still to build a holistic system that would fill the protection gaps of the 1951 Convention.

As was shown at the beginning of the analysis, the majority of persons that were not protected due to this gap prior to the harmonisation of complementary protection were essentially persons fleeing war and indiscriminate violence. Still France, which due to his colonial history and vast military and political involvement in many of its ex-colonies was in a special position, feared that the notion of indiscriminate violence in the situation of an international or internal armed conflict would include the risk that entire populations would come to Europe and be eligible for subsidiary protection. The question that arose was therefore, if more focus should be put on the criteria of individual persecution in relation to an armed conflict. The difference between subsidiary and temporary protection was still not well elaborated. And as for Article 15 (d), that practically included all persons that were prohibited from refoulement, a vast majority of delegations filed reservations. The delegations were afraid of the consequences that a wide wording could have on future protection cases. Due to the structure of the European Union, every delegation knew that the ECJ had the interpretation monopoly on EU law. Given the history of the self-empowerment of the ECtHR, which at the beginning was a mere toothless court, controlled and monitored by the delegations of the European Commission of Human Rights, but over time evolved and became a powerful actor in Human Rights protection, the MS did not want to give too much freedom of interpretation to the court. A clear, precise and limited definition of subsidiary protection was needed that would not include all persons without residence permit who could not be expelled for legal reasons.

The definition of the "social group" as described by the 1951 refugee convention was one of the most delicate topics in the harmonisation process. I have already argued that the need for complementary protection stems from the protection gaps that were left by the Geneva Convention and that those gaps are created by the interpretation of the Convention and not its wording. The Asylum Working Party released a draft, which tried to specify the needs for being considered a social group. The most important feature that such a group had to have, was that they "share an initial characteristic […] that cannot be changed or […] that is so fundamental to identity or conscience that a person should not be forced to renounce it".[219] Characteristics such as sexual orientation, age or gender were used as examples albeit not shared by all delegations. Some, such as the Greek and French sought the deletion of all reference groups, but were opposed by the majority. While the elaboration of the qualification directive took place in the JHA council, other international players tried to lobby and play their part. The Economic and Social Council of the United Nations (ECOSOC)

219 European Council, '12199/02 ASILE 45', 2002.

delivered their opinion in September stressing that "gender related violence should be a strong reason for the refugee status".[220] Furthermore, it strongly regretted that the European Union planned on "granting" the refugee status, rather than straightforward recognizing it. A very important development that happened in the same period was the clarification that those characteristics did not have to be actually possessed by the persecuted person but that the mere attribution of the characteristics by the persecutors suffices. That means for example that, if a person is being persecuted for converting to a different faith, it does not make a difference if this conversion has actually happened. The mere fact that the person is persecuted because the persecutors think that he or she has converted is enough to reach the eligibility limit: "When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic, which attracts the persecutory action, provided that such a characteristic is attributed to him or her by the actor of persecution."[221]

With the limitation of the refugee definition, the protection gap that was sought to be closed, was widened again. Hence, the working party focused on finding a common definition of the term 'serious and unjustified harm' as well as common exclusion clauses for subsidiary protection. While in the older versions, the Article 3 violation had to be severe enough to otherwise force an applicant to leave or stay outside their country, the new version demanded that torture or inhumane treatment had to happen in their country of origin.[222] On the one hand it could be argued that this limitation was actually widening the scope, since it no longer included the severity consideration but on the other hand the deletion of this threshold did not de facto remove it. Because both torture and inhumane treatment are old legal concepts that rely on a long history of jurisdiction, the definition will necessarily evolve with the legal development of the concepts. By eradicating the words 'sufficiently severe to otherwise force an applicant to leave" it could no longer be argued that persons would have to endure a certain degree of inhumane treatment before it was severe enough to

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[220] European Communities, 'OJ 2002/C 221/43', 17 September 2002.
[221] European Council, '12199/02 ASILE 45', 15.
[222] Ibid., 20.

force them to leave the country. If a person faced torture or inhumane treatment in the country of origin he or she automatically fulfilled the eligibility criteria.

While the refugee status relied on individual persecution, the primary goal of the subsidiary protection regime was to grant protection to those fleeing situations in which their lives would be put in danger as the consequence of indiscriminate situations. Still the chair decided to rephrase the paragraph on indiscriminate violence and introduced the need for a serious and individual threat to life or physical integrity. It is interesting to see that only four delegations expressed reservations on this new wording. The definition of indiscrimination makes individualisation impossible. Either a situation is defined by an indiscriminate violence, that could affect every person with an equal probability, or some persons are specifically targeted, which then would carry the definition of indiscrimination ad absurdum. Only Germany openly proposed a different wording (significant real threat), which would have erased the need for individual persecution. By granting protection to all persons that fled a conflict due to indiscriminate violence, the Member States feared, that the scope would be too large and too many people would be eligible for protection in the EU. Therefore, only a few months after starting to target the protection gap, the delegations already tried to circumnavigate it. Finland and the Netherlands argued that, if individuality got included in the Directive, it "must not restrict the scope to being individually targeted."[223] Given this input Germany felt that the scope of the individual threat had to be clarified.[224] For the clarification two opportunities were presented to the Council: The Legal service suggested to add a reference to the 1949 Convention relative to the protection of Civilian populations in time of war. The Chair however proposed to introduce a new recital that would read "Persons fleeing due to a general sense of insecurity in situations of international or internal armed conflicts fall outside the scope of this Directive"[225]. This solution was chosen because "a vast majority of Member States supported the reference to 'individual' in order to avoid an undesired opening of the scope of this subparagraph".[226]

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[223] European Council, '12382/02 ASILE 47', 2002, 4.
[224] European Council, '12620/02 ASILE 54', 22.
[225] European Council, '13354/02 ASILE 55', 2002, 3.
[226] European Council, '12382/02 ASILE 47', 2.

While from the early stages on the delegates have argued that subsidiary protection has to be, by definition, of a more temporary nature, the cessation clauses got further tightened at this stage of the negotiations. The original conception was, that Member States had to ensure that a person is being protected as long as he or she is in need of this protection, and afterwards may revoke the residence permit of the person concerned. The late September draft radically changed this conception by stating that a person "ceases to be a person eligible for subsidiary protection when such protection is no longer required."[227] Furthermore while, in the original version, Member States had the freedom to withdraw subsidiary protection if the circumstances, which led to the granting of the status ceased to exist or changed profoundly and durable, the new version now urged the Member States to withdraw the status in such an event. While de facto Member States could still decide if they wanted to withdraw or maintain protection, replacing the word "may" with "shall" is a clear indicator that the European Council wanted subsidiary protection to be understood as temporary. The legal service later clarified this matter by stating that "'may' usually means that a provision is optional [and] 'shall' must be implemented but leaves room for more favourable treatments".[228] This became even clearer when the chair rephrased the exclusion clauses. Member States were already urged to exclude any applicant from protection if there were serious reasons for considering that they have committed a crime against peace, a war crime, a crime against humanity, a serious non-political crime prior to his admission or if he or she has acted against the principles of the United Nations. The September draft no longer urged the Member States to do so but instead simply stated that in case they have committed or instigated one of the crimes mentioned above they are excluded from being a person eligible for subsidiary protection.

The Member States could no longer ponder and grant subsidiary protection if they felt the need for it, since a higher level already excluded the person concerned. Again only a minority was opposed to this massive constriction of national sovereignty and wanted the possibility of delivering residence permits in some cases (i.e. for persons not deportable for non-refoulement reasons). At the same time a new Article 17B

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[227] Ibid., 21.

[228] European Council, '14348/02 ASILE 67 JUR 449', 2002, 3.

QD (as well as 14B for the refugee status) was introduced that regulated the revocation and renewal of a subsidiary protection status.[229] The new article slightly softened up the strict rhetoric of Article 17A leg. cit. and gave back some decisive freedom to Member States in cases where subsidiary protection has already been granted and further guaranteed the right to appeal such a decision in front of an independent court. Nevertheless, the freedom to grant subsidiary protection in cases where persons are excluded was no longer granted to Member States.

The leading idea of international protection, as already expressed in the 1951 Convention, is, that no one should be refouled to a country where they could face torture or inhumane treatment. The principle of non-refoulement has since then been repeated in all relevant human rights treaties and most prominently in the CAT and the ECHR. It describes an absolute prohibition, which cannot be limited for any reasons. The Qualification Directive also took up this obligation in Article 19, which simply stated that "states shall respect the principle of non-refoulement […] in accordance with their international obligations". [230] While this article did not materially add something to the non-refoulement discourse it repeated and therefore strengthened the acceptance of the principle. In September 2002 however, the delegations decided to rephrase and extend this article. From this moment on, states had the right to refoul a person (without prejudice to Art 19 Para 1 leg. cit., which more or less repeated the old phrasing) "where there are reasonable grounds for considering (1) him or her as a danger to the security of the country in which he or she is or (2) having been convicted by a final judgment of a particular serious crime, he or she constitutes a danger to the community of that country."[231]

Legally, the prohibition of refoulement still constitutes an absolute law, which must not be derogated by any state. Article 19 (2) leg. cit. therefore was a toothless paragraph from the beginning on, which could not change the conception of non-refoulement. Given that the European policy makers must have been well aware of this fact, the goal had to lie somewhere else – in the public perception. After 9/11 the public and especially right wing media demanded, that (potential) terrorists must not

[229] European Council, '14643/02 ASILE 68', 2002.
[230] European Council, '11356/02 ASILE 40', 23.
[231] European Council, '12199/02 ASILE 45', 27.

be granted residence permits or accepted as being physically present. While the prohibition of refoulement does not constitute a right to legal residence, it does constitute a right to physical presence. By introducing the new paragraph, the delegations framed the discourse in a way that made it seem like criminals would be deported if necessary albeit this was not legally possible in cases, where they would face the danger of an Article 3 ECHR violation. There was however no real consensus on this populist agenda. While some delegations felt like including provisions that were impossible to execute, others did not. This can very well be reconstructed when looking at multiple draft versions either including [232] or excluding[233] the relevant paragraphs. In the end however, the delegations found a common ground in the wording that an applicant for international protection may be refouled "where not prohibited by international obligations"[234].

The case of Article 19 QD is a good example of the non-political agenda that was made possible through the change of policy venue. Every debating delegation knew that their respective inputs could not change existing international law[235] but was still trying to impose their will on the European community. This would not have been possible in the same manner, if the venue would have been a national one with all relevant control mechanisms.

In a status report in late November 2002 the presidency affirmed that a political agreement on the scope of subsidiary protection will be reached in the following weeks and that "isolated Member States" are being pressured to "reconsider their position in the light of the necessity to reach progress and results".[236] The easiest way to reach such an agreement as fast as possible was to disguise disagreements. This tactic was used repeatedly in autumn of 2002 both by introducing 'may' provisions, which are primarily a confession that no harmonized 'must' agreement could be

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[232] European Council, '12199/02 ASILE 45'; '13648/02 ASILE 61'; '14083/02 ASILE 63', 2002.

[233] European Council, '12620/02 ASILE 54', 2002.

[234] European Council, '14643/02 ASILE 68', 26.

[235] This would not have been true if a delegation had sought to broaden the scope of the prohibition of refoulement. However all discussions centered on apparent limitations of the non-refoulement clause.

[236] European Council, '14707/02 JAI 272 ASILE 73 MIGR 126 FRONT 136 VISA 173', 2002, 7.

found, or by outsourcing disagreements into the recitals, as has happened i.e. with humanitarian grounds for protection or the definition of social groups.
A political agreement on the scope of subsidiary protection could finally be found in mid-December 2002. While some already closed questions were reopened and re-discussed in 2003, generally speaking the scope was clear. The eligibility criteria for serious harm in Article 15 QD were: "

(1) death penalty or execution
(2) torture or inhumane treatment or punishment of an applicant in his or her country of origin […]
(3) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict"[237]

7.3.2. The Content of Subsidiary Protection

Once a political agreement had been found on the scope of the two harmonized protection status, the delegations started to work on Chapter VII of the QD titled "the content of international protection". Three general rules were expressed in the initial proposal by the European Commission: all provisions should apply to refugees and persons eligible for subsidiary protection equally unless otherwise indicated, the transition from being an applicant for international protection to being granted protection should never result in a decrease in the level of protection and the level of rights granted to international protectees shall be enjoyed equally by their accompanying family members.[238] The main questions that were discussed in this phase of the harmonisation process were the following:

7.3.2.1. Residence Permits

[237] European Council, '15068/02 ASILE 77', 2002, 17.
[238] European Council, '13620/01 ASILE 52', 26.

The works on the material content officially started at the Asylum Working Group meeting on the 19th of December 2002. While in the general public understanding the granting of a protection status and the residence permit go hand in hand, legally they are not directly connected. The first matter to be discussed was the kind of residence permit that should be granted to persons enjoying international protection. The initial proposal foresaw a five-year (minimum) residence permit for refugees that would be automatically renewed and a one-year residence permit for subsidiary protectees. This proposal was altered in the first meeting. All delegations, except for Belgium and Sweden, wanted to merely grant a reduced three-year residence permit to refugees and introduced the possibility for MS not to renew a residence permit for subsidiary protectees if "compelling reasons of national security or public order require otherwise".[239] While especially Belgium continued to protest against this rule, and wanted to grant the same permit for both statuses, which would last for at least three years, no more alterations were made in the process and Belgium eventually gave up its reservations.

7.3.2.2. Travelling Documents

Travelling documents, usually passports, are generally issued by authorities of the respective home country. Persons that received international protection received this protection because their country of origin no longer guaranteed for their safety or actively persecuted them. Those people could therefore no longer rely on their country of origin to obtain an international travelling document. Already the 1951 Convention foresaw, that refugees should be granted travel documents unless compelling reasons required otherwise.[240] While no Member State questioned the right to obtain such a document for refugees, not all Member States wanted to do so for beneficiaries of subsidiary protection. Six member states put in scrutiny reservations and Germany and Greece expressed the will to limit the possibility of granting travelling documents to "certain cases", without further explaining this

239 European Council, '15627/02 ASILE 82', 2002, 3.
240 UNHCR, 'Convention and Protocol Relating to the Status of Refugees', chap. 28.

provision.[241] Given the discussions on this matter the presidency rephrased the article and restrained the issuing of travelling documents at least to cases where “serious humanitarian reasons arise that require their presence in another state”.[242] Nine Member States, both from the northwestern and central-eastern group expressed reservations on this new wording. Austria wanted to change the regulation from a ‘shall’ to a ‘may’ rule, but was overruled by the other delegations. In the end the article remained unchanged and got adopted in the original wording. Later proposals, such as the Dutch one, which intended to include serious personal[243] or professional[244] reasons could not find consensus.

7.3.2.3. Labour Market Access

Another big topic of discussion was the access to the labour market. The 1951 Convention equated the access to the labour market for refugees with nationals. The Commission therefore proposed that refugees would be granted this access under the same conditions as nationals and beneficiaries of subsidiary protection could be excluded for no longer than 6 months after their status has been granted. In the beginning of the negotiations it seemed like the delegations wanted to harmonize the labour market access for both statuses by granting immediate access under equivalent conditions. Using the word ‘equivalent’ instead of ‘same’ nevertheless showed, that the states wanted to keep the possibility to find different regulations for the labour market access as long as they could legally brand them as equivalent. For beneficiaries of subsidiary protection, the amended proposal furthermore included the word ‘normally’, which would have empowered Member States to exclude subsidiary protectees in exceptional cases. While Austria, Germany and Belgium had reservations on this point, Sweden, Finland and the Netherlands wanted direct work access for both statuses.[245] The Commissions proposal additionally included a subparagraph on working conditions for persons that have been granted labour

[241] European Council, ‘15627/02 ASILE 82’, 5.
[242] European Council, ‘5224/03 ASILE 2’, 2003, 5.
[243] European Council, ‘6566/03 ASILE 10 ADD 1’, 2003, 25.
[244] European Council, ‘6566/03 ASILE 10 ADD 1 COR 1’, 2003, 1.
[245] European Council, ‘15627/02 ASILE 82’, 6.

market access. This would have meant equal treatment in terms of remuneration and the access to social security systems. This subparagraph was deleted when the delegations started the negotiations and the northwestern countries were the only ones opposed to the deletion. While the access to the labour market did not mean a big change for those Member States, who already knew some concept of subsidiary protection, the MS in which such a "concept has not been developed prior to this legislative process […] do not yet know to what extent the new status would affect their labour market situation".[246] The presidency tried to mediate between the two views by allowing an exceptional limitation of the access to employment for reasons linked to labour market policies. Again a "consensus" could be found by including exception clauses. The presidency wanted to ensure access to employment-related education and vocational training, but left the conditions to be decided by the Member States. No harmonized agreement could be found. The proposal by the Greek presidency was discussed at the Asylum Working Party meeting in early February 2003. The delegations agreed on the possibility for MS to give priority in the labour market to EU citizens or citizens of states bound by the EEA agreement for no longer than one year. While a few states were still opposed to the idea of discriminating beneficiaries of subsidiary protection others only saw the need to establish an exhaustive list of exception reasons.[247] In the one corner, Sweden and Finland fought for similar access for both, refugees and beneficiaries of subsidiary protection, while in the other one Austria and Germany wanted to establish exclusion grounds that would lie in the hands of the Member States.[248] Therefore, Austria wanted to fully delete subparagraph 24(4) QD and leave the establishment of conditions for reasons of labour market policies entirely to the discretion of the Member States. As an alternative solution it proposed to extend the one-year period to five years.[249]

As a result of the JHA Council meeting on the 8th May 2003, an amended proposal of the Qualification Directive was published, including a new suggestion regarding

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[246] European Council, '5293/03 ASILE 3', 2003, 4.
[247] European Council, '5813/03 ASILE 7', 2003, 3.
[248] European Council, '6275/03 ASILE 9 ADD 1', 2003, 5.
[249] European Council, '6566/03 ASILE 10 ADD 1', 26.

labour market access.[250] The Greek Chair suggested that the Qualification Directive should include a solution similar to the one found in the Reception Conditions Directive, namely, that the Member States shall decide on the conditions for granting labour market access to beneficiaries of subsidiary protection one year after the status has been granted. This was a quite surprising proposition by the Chair, given that it was far more restrictive than the hitherto most restrictive propositions by delegations, namely the possibility to postpone the access for up to five years. The delegations however overruled the new proposal of the Chair and decided to keep the old wording, which was at this point only opposed by the Austrian and German delegations. The discussions on the labour market access lied idle until the Commission published a report on the implementation of the CEAS in late March 2003. In this report it harshly criticized the "political immaturity" of the Council and urged the delegations to focus on more ambitious visions of harmonisation. At the same time, it recognized that the process that had been already made showed, that the need for the establishment of comparable norms for refugees and subsidiary protectees has not been felt by the Member States. While the Commission did not want to give up on its goal of the creation of the uniform protection status, it recognized that this could not be implemented at the present stage.[251]

In the second half of 2003 the works on the European Asylum system laid idle. With the preparations of the 2004 enlargement and the prospect of 10 new Member States joining not only the EU, but consequently also the JHA Council and the Asylum Working party, the delegations decided to wait. The EU Parliament issued its long awaited opinion on the Qualification directive in December 2003, in which it demanded immediate access to the labour market for all persons granted international protection.[252] Given the ordinary legislative process of the EU at this time, the parliament still only possessed an advisory role and did not have the right to sign or veto a secondary law text. The proposal therefore did not influence the opinion of the JHA council, which finally decided to delete subparagraph 4 and include temporary exclusion clauses into subparagraph 3. A compromise could be found by allowing

[250] European Council, '8919/03 ASILE 29', 2003.
[251] European Council, '7964/03 ASILE 19', 2003.
[252] European Communities, 'OJ 2003/C 300 E/134', 11 December 2003.

Member States to take into account the situation of their labour market, including possible prioritisation of access to employment while at the same time adding a recital that emphasizes the principle of labour market access for beneficiaries of subsidiary protection as a general rule.[253] Sweden, the Netherlands and France still thought that unlimited restrictions are too much and wanted to limit possible labour market restrictions to a maximum of three years. Austria and Germany on the other hand wanted this to be to the discretion of the Member States. In the final version of the Directive both propositions were included in a way that ridiculed the demand of the northwestern countries. The duration of the labour market access restrictions was limited, as demanded, but the limitation was to be determined in accordance with national law.[254] Once again the goal of harmonized standards was undermined by simply agreeing on outsourcing controversial questions into the national policy making sphere.

7.3.2.4. Social Welfare and Health Care

While codified in two different paragraphs, the question of how the state should provide for people that have been granted protection was discussed in a similar manner. The Commission proposed that all international protectees should receive necessary assistance in terms of social welfare, means of subsistence as well as health and psychological care under the same conditions as nationals. Furthermore, special attention should be brought to the psychosocial hygiene of persons with special needs, such as victims of any form of abuse or minors. In the Commissions explanations however, the social welfare to be granted was not described as "under the same conditions as nationals" but solely as "necessary for a normal and dignified life for the duration of this protection".[255] This lack of clarity was immediately criticized by certain delegations. Comparable to the labour market access, Germany, Austria and France did not want to grant the same rights to refugees and beneficiaries of subsidiary protection. While the Commissions proposal included a clear commitment

[253] European Council, '7482/04 ASILE 16', 2004, 31.
[254] European Council, '7944/04 ASILE 21 OC 310', 2004, 31.
[255] European Council, '13620/01 ASILE 52', 31.

to both, physical and mental health, the delegations decided to rename Article 27 "Health Care", thus erasing the mention of psychological care. In lieu thereof, they decided to grant access to 'other assistance' to everybody and a right to appropriate mental care only to minors.[256] Irrespective of the fact that the term 'other assistance' does not necessarily denominate a lower standard than psychological care, the eradication of the word psychological could give the Member States the freedom to decide that mental health was not automatically covered. In the following discussions especially Austria and Germany proved to be hostile of a system that would harmonize social security for all beneficiaries of international protection at the same level as nationals. While Germany could agree on granting the same level of protection to refugees but only assistance in terms of means and subsistence for subsidiary protectees, Austria wanted to delete every link to the social security level of nationals.[257] In terms of health care access the two countries were willing to equate access for nationals and refugees and moreover include persons with special needs, such as pregnant women. But the access for beneficiaries of subsidiary protection should have been limited to fundamental health care in accordance with national law, therefore again excluded from the harmonisation efforts.

While in the beginning France and Germany put in reservations on the Austrian proposal regarding social welfare only to avoid social hardship, they later both withdrew their reservations[258] and consequently supported the Austrian postulation. With the northwestern states not supporting the demands, Germany proposed a new wording in late May 2003 that was even more restrictive and would only force the states to ensure that the "minimum level of assistance granted must not be lower than assistance granted to asylum seekers in line with Council Directive 2003/9/EC [Reception Conditions Directive|".[259] Being opposed to this new proposition the northwestern countries sought for a compromise, which would have included adding the Austrian proposal regarding social hardship to the recital, but keeping the original wording. Nevertheless, Germany pushed for a limitation of social security to core

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[256] European Council, '15627/02 ASILE 82', 8f.
[257] European Council, '6566/03 ASILE 10 ADD 1', 28.
[258] European Council, '6733/03 ASILE 11', 2003; European Council, '6566/03 ASILE 10 ADD 1 COR 1'.
[259] European Council, '9945/03 ASILE 32 ADD 1', 2003, 28.

benefits, fearing that a high level of social security would lead to a repetition of the situation in the 1980s.[260] With a German veto on the horizon, the delegations had to find a compromise that was acceptable for all Member States. Accordingly, the focus was set on defining core benefits, as demanded by Germany. In March 2004, the delegations presented a new proposal, which added an exceptional subparagraph including the possibility for Member States to limit social security for beneficiaries of subsidiary protection to core benefits, which were defined as minimum income support, assistance in the case of illness as well as pregnancy and parental assistance.[261] While neither Germany nor the northwestern countries were fully satisfied with this wording, they eventually decided to agree on it, since no better compromise could have been found.

7.3.2.5. Access to appropriate accommodation / housing

The Commissions proposal included the obligation for states to provide access to suitable accommodation for all persons enjoying international protection or, if necessary, the means to obtain housing. In the first reading in December 2002, the delegations decided to reduce this standard by linking it to the conditions of nationals. It is interesting to see that whenever the Commission tried to link a standard to the one of nationals the delegations tried to erase this link. However, when the Commission foresaw a higher standard for beneficiaries of international protection, tailored to their specific needs as vulnerable group, the delegations sought for the opposite. While most states were satisfied with the new wording, Austria demanded to limit the rights even more. The states should only have an obligation to grant "information about the housing market"[262] but not to actually guarantee access. While the Austrian demand went too far for the taste of most delegations, latter were willing to find a compromise, lowering the standard below the conditions of nationals. Whereas the northwestern countries tried to keep this standard, the delegations agreed on ensuring access to accommodation only "under equivalent

[260] see 5.3.
[261] European Council, '7482/04 ASILE 16', 33.
[262] European Council, '15627/02 ASILE 82', 10.

conditions as other third country nationals legally resident in their territories”.[263] Under EU law, states are not allowed to discriminate citizens from other EUMS. Lowering the standard to “other third country nationals” therefore meant, that it was excluded from harmonisation and could be determined under national law. Sweden, as the last country, held up its reservations until February 2003 but eventually gave in. In only two months, the proposed access to appropriate accommodation for all international protectees was limited to the lowest common denominator, which was equivalent access to the housing market with legally resident third country nationals.

7.3.2.6. Access to Integration Facilities

The last point of discussion was the question of the access to integration facilities. While this may seem like a less important point it carries a lot of ideological weight since integration is usually understood as a long-term goal of immigration. As I have already shown, a certain number of states stressed the fact that subsidiary protection was necessarily temporary. While refugee protection as such was also not understood as permanent, it still had a more durable character than subsidiary protection. The Commissions proposal, which once again foresaw that access to integration facilities had to be granted to all beneficiaries of international protection in the same manner only allowing a one-year protraction for subsidiary protectees, hence undermined this understanding. The leading idea was that both groups desired special attention and care rather than only equal access to “mainstream employment and education opportunities”.[264] Thus the Member States should be providing for language classes, training courses, measures aimed at promoting self-maintenance and events to promote mutual understanding with the host society and to understand their history and culture. The provision prevented states from only “protecting” persons for the duration of their non-deportability by obligating them to grant societal access. From the first reading on Germany and Austria put in scrutiny reservations on granting access for beneficiaries of subsidiary protection, while Sweden, the Netherlands and

[263] European Council, ‘5224/03 ASILE 2’, 10.
[264] European Council, ‘13620/01 ASILE 52’, 33.

Finland wanted to erase the possibility to deter access for subsidiary protectees.[265] But soon afterwards the delegations started to further erode this access by granting the states the freedom to support programmes which "they consider appropriate" and no longer which were tailored to the needs of refugees.[266] For beneficiaries of subsidiary protection granting this access was not even seen as obligatory for Member States. The new proposal foresaw that Member States should have granted only "similar" and no longer "identical" access. The goal of harmonisation was once again undermined by the will to grant as much freedom as possible to the individual Member State. Both sides were not pleased with this new wording and therefore the Chair decided to entirely rephrase subparagraph two. The new proposition untied the access for beneficiaries of subsidiary protection from the refugees and would have obligated the states to grant immediate access to integration programmes "which they consider appropriate".[267] Immediate access would have been granted, which was the central demand of the northwestern countries but the form and content of the integration programmes would have been entirely up to the national authorities. Sweden and Germany were both not satisfied with this compromise, and Germany, as well as Austria later on, exerted further pressure to replace the "shall" obligation with a "may" obligation, thereby fully excluding it from harmonisation.[268] While the obligatory access to integration programmes for beneficiaries of subsidiary protection seemed illusionary in late 2003, the European Parliament voted for the initial Commission proposal including the demands of the northwestern countries. Full access to integration facilities should be granted as soon as the status was granted. Nevertheless, as soon as the proceedings continued in March 2003 full access was out of question. Access for subsidiary protectees should only be granted "where it is considered appropriate"[269] by the Member States. The Dutch delegations continued to oppose this wording until the very end but nevertheless agreed to sign the Directive. The final text thus obligated the States to make provisions for integration programmes for refugees, but only grant access to those exact programmes to beneficiaries of

[265] European Council, '15627/02 ASILE 82', 11.
[266] European Council, '5224/03 ASILE 2', 11.
[267] European Council, '6275/03 ASILE 9 ADD 1', 11.
[268] European Council, '8858/03 ASILE 28 ADD 1', 2003, 32.
[269] European Council, '7482/04 ASILE 16', 37.

subsidiary protection when it was considered appropriate. The Council, and especially the Austrian and German delegations, successfully undermined the goal of the Commission to grant more or less equivalent access for all international protectees and managed to keep integration under national discretion.

8. Conclusion

This study has looked at the long-term development of the regional European protection mechanisms while putting a special emphasis on the harmonisation of the subsidiary protection regime in the early 2000s. The question that was to be answered was, if the goals of the Treaty of Amsterdam, namely a holistic protection regime that managed to fill the gaps of the 1951 Convention could be reached.

I have shown, how the international discourse changed in the decades following the Second World War. A high level of politisation marked the direct after-war period and the years until the fall of the Soviet Union. Refugees were perceived as persons fleeing the Socialist bloc and thereby supporting the liberal capitalist ideology of the west.

This perception started to change when refugees were framed as bogus migrants in the 1980s. Racist resentments led the western powers to gradually adjust their immigration and asylum policies. Especially Germany, which had a high level of refugee protection, widened the gap between refugee protection and non-deportability of irregular migrants in the early 1990s. When the European Union decided to progressively dismantle its internal borders, a common approach on migration matters became compulsory. The Treaty of Amsterdam, which came into force in 1999, foresaw the creation of the Common European Asylum System, including not only a common definition of refugee protection and common procedural guarantees, but also a harmonized definition of subsidiary protection. The status was intended to close the gap that resulted from the exclusive interpretation of the 1951 Convention. Last but not least, the CEAS also included a system for the determination of the state that was responsible for examining an application for international protection. The so-called Dublin-System resulted from the idea, that only one Member State was responsible for any application for international protection launched in the European Union.

From the early phase on, the Member States tried to keep as much discretion as possible. While all delegations recognized the need of a basic level of harmonisation, no state wanted to give up its national sovereignty. The CEAS is the result of four secondary law texts: three Directives and one Regulation. The only text that was directly binding for the MS was the Dublin Regulation, which essentially obligated the state of first illegal entry to examine an application for international protection.

Member States with no external border consequently had an advantage, since most irregular border crossings happened in the southeastern states. The regulation was mostly a renewal of the existing Dublin agreement and therefore did not introduce any new obligations for the Member States. All other texts, which guaranteed minimum standards for individual asylum seekers, were drafted as Directives, thus obliging the Member States to transfer them into national law.

The ambiguity between national sovereignty and the need for harmonisation was the central characteristic of the CEAS negotiations. While the European Commission and the European Parliament as supranational bodies fought for an extensive harmonisation, the Council, which was the sole decisive body until 2004, operated as representation of national motivations. The analysis has shown, that two groups of countries could clearly be distinguished. The northwestern countries, comprised mainly of Sweden, Finland and the Netherlands, already had a high standard of (complementary) protection and hence tried to elaborate a high level of harmonized European protection. The central, and to a certain part south-eastern, states, led by Germany and Austria, were the representatives of a very restrictive system. Their goal was to harmonize only minimum standards that could be used as reference model for the national policy makers, but not to impose higher standards through European legislature. The analysis of the sources clearly showed, that the initial proposal, which was drafted by the Commission in 2001 was progressively unlaced by the delegations. All proposed standards that could have been read as including subjective rights for the applicants for international protection were eventually rephrased as “may” provisions, granting the Member States the discretion to implement it into national law or to find other solutions. The goal, to harmonize protection statuses in the EU to prevent secondary migration movements could not entirely be met. While secondary migration movements were made irregular through the restrictive provisions of the Dublin Regulation, the goal that asylum seekers would apply for international protection indiscriminately in all Member States was not reached. When the first harmonisation phase was finished in 2005 a new subsidiary protection status has successfully been established. But while the title of the status was harmonized, its content remained to be diverging.

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10. Abstract

In this thesis I examined the harmonization process of the complementary protection regime in the European Union in light of the creation of the Common European Asylum System. At first I described the scope and background of the 1951 Refugee Convention to then analyse the protection gap that was created through an exclusive interpretation of the Convention in the post-war period. The development of UNHCR between 1951 and 2001 showed how the international protection discourse was transformed over the years. The centrepiece of the thesis is a detailed and critical analysis of the protection discourse during the crucial years from 1997 to 2004, when the European Council signed the first Qualification Directive. I have shown how an alliance of central and south-western European states managed to undermine the harmonization plans of the European Commission and keep many material rights of international protectees in the national policy sphere. Thereby the newly created subsidiary protection status harmonized complementary protection on the paper, but left the implementation to national discretion.

11. Deutsche Zusammenfassung:

Das Thema der vorliegenden Masterarbeit ist die Entstehungsgeschichte des Gemeinsamen Europäischen Asylsystems mit speziellem Fokus auf der Harmonisierung des komplementären Schutzes. Hervorgehend aus einer Analyse der Anfänge des Flüchtlingsschutzes in der Nachkriegszeit, beleuchtet die Arbeit die Entwicklung des internationalen Schutzdiskurses anhand der Rolle des Flüchtlingshochkommissariats der Vereinten Nationen. Die heute noch gültigen Hauptinstrumente des internationalen Flüchtlingsschutz, können als direkte Antworten auf die Gräuel des zweiten Weltkrieges bezeichnet werden und die verwendete Sprache, vor allem in der Genfer Flüchtlingskonvention von 1951, stellt primär auf Problemstellungen der Flüchtlingsbewegungen in den beiden Weltkriegen ab. Aus der Analyse der *travaux prepératoires* wird allerdings klar, dass die Autor*innen der GFK eine weite Interpretation des Textes im Sinne hatten.

Dennoch wurde der Text über die Jahre immer restriktiver ausgelegt, was zu einer weiten Divergenz zwischen Menschenrechtsschutz, allem voran dem absoluten Refoulementverbot, und dem Flüchtlingsschutz führte. Um diese Schutzlücke zu füllen, wurden über die Jahre verschiedenste komplementäre Schutzstatus eingeführt. Im Rahmen der Erschaffung des Gemeinsamen Europäischen Asylsystems welches erstmals im Vertrag von Amsterdam festgeschrieben wurde, entschlossen sich die Mitgliedsstaaten der Europäischen Union, diese komplementären Status zu harmonisieren.

Ziel dieser Arbeit war es, den Entstehungsprozess der Statusrichtlinie, welche den subsidiären Schutz harmonisierte, kritisch nachzuzeichnen. Als eine von vier Rechtsakten, die das GEAS bilden, normiert die Statusrichtlinie jene Personengruppen welche als Schutzbedürftig anerkannt werden, sowie die subjektiven Rechte, die mit einer Statuszuerkennung zusammenhängen. Anhand interner Statusberichte des Europäischen Rates, welcher bis 2004 die alleinige Rechtssetzungskompetenz in der EU innehatte, beschreibt diese Arbeit die Diskursentwicklung, mit einem besonderen Fokus auf die Jahre 2001 bis 2004.

Im November 2001 schickte die Europäische Kommission einen ersten Entwurf der Statusrichtlinie an den Rat. In der ersten Diskussionsphase, die bis Dezember 2002 anhielt, beschäftigten sich die Mitgliedsstaaten mit den Personengruppen welchen internationaler Schutz in der EU zukommen sollte. Während einige Mitgliedsstaaten im Sinne hatten, allen Menschen die aus menschenrechtlichen Gründen nicht in ihre Herkunftsstaaten abgeschoben werden konnten, subsidiären Schutz, der den Flüchtlingsschutz ergänzen sollte, zu gewähren, so setzten sich im Endeffekt die restriktiveren Mitgliedsstaaten durch, welche eine Verletzung des Folterverbots nach Artikel 3 der Europäischen Menschenrechtskonvention in das Zentrum stellte. Nur bei drohender Folter oder unmenschlicher Behandlung, drohender Todesstrafe, oder ernster Gefahr für Leib und Leben im Rahmen eines bewaffneten Konfliktes sollte einer Person subsidiärer Schutz gewährt werden.

Die Kommission sah Anfangs vor, allen Schutzberechtigten die selben sozialen Rechte zuzugestehen. Im Rahmen der Diskussionen schaffte es jedoch eine von Deutschland und Österreich angeführte Koalition an Staaten, die bereits in der ersten Diskussionsphase besonders für eine restriktive Schutzpolitik eintrat, den Diskurs so zu kippen, dass lediglich ein minimaler Standard für subsidiär Schutzberechtige harmonisiert wurde, während die Vergabe höherer sozialer Rechte der nationalstaatlichen Diskretion freigestellt wurden.

Der subsidiäre Schutz kann insofern als Fortschritt in der Harmonisierung des internationalen Schutzes gesehen werden, als es vor der Statusrichtlinie lediglich nationalstaatliche Regelungen gab, welche zwar menschenrechtlichen Pflichten unterlagen, jedoch nicht zentral geregelt waren. Das erklärte Ziel, die Schutzlücken der Genfer Flüchtlingskonvention zu schließen, wurde jedoch nur teilweise erreicht. Zu viele Personengruppen, welche aus verschiedensten Gründen nicht abschiebbar sind, fallen bis heute durch das Schutzraster und leben häufig in juristischen Limbos. Der subsidiäre Schutz konnte folglich in der ersten Statusrichtlinie nur nominal harmonisiert werden, während die subjektiven Rechte, die mit solch einer Schutzgewährung zuerkannt werden, auch nach Erlassung der Richtlinie maßgeblich zwischen den verschiedenen Mitgliedsstaaten divergieren.