The Emerging Constitutional Law of the European Union – German and Polish Perspectives
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Trying to Meet the Challenge: the Refugee Definition and the Emerging EU Asylum System

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I. Introduction

The aim of this article is to present some remarks on the EU asylum system which is currently under construction. This will be done by studying the personal scope of the emerging system – in other words by referring to the EU approach to the refugee definition.

The basis for the international refugee law is the 1951 Geneva Convention relating to the Status of Refugees (hereinafter the Geneva Convention)\(^1\) and the 1967 New York Protocol relating to the Status of Refugees (hereinafter the New York Protocol).\(^2\) Article 1 A of the Geneva Convention provides the basic definition of refugee. According to this classic definition, a refugee is a person who, firstly, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country or to return to it; secondly, this is owing to well-founded fear of being persecuted; thirdly, the fear of being persecuted results from at least one of the following reasons: race, religion, nationality, membership of a particular social group or political opinion.\(^3\) Originally, the application of this definition was restricted to

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\(^1\) 189 UNTS 150.

\(^2\) 606 UNTS 267.

events that occurred before 1 January 1951 and the state-parties were allowed to limit the scope of the adopted definition geographically by restricting it, exclusively to events that occurred in Europe. These restrictions were deleted by the New York Protocol.

The approach to the scope of the granting of protection was indeed evolving throughout the years. The fundamental question of this evolution was whether the convention definition was a sufficient means of ensuring protection to all persons in need of international protection. Some doubts about this matter arose even at the time of the adoption of the Geneva Convention. Recommendation E of the Final Act of the conference that adopted the Geneva Convention expressed hope that the state-parties would also grant protection provided by the convention’s provisions to persons outside the scope of the convention definition. The evolution of the approach to the scope of the granting of protection was further realised through shaping the scope of the UNHCR’s competencies, elaborating the Convention on territorial asylum, ultimately not adopted, the development of regional regulations complementing the universal refugee protection, and the states’ practice.\(^5\)

In this way, a second category of refugees evolved, which is broad and the scope of which is differentiated: non-conventional refugees or *de facto* refugees who, being outside the scope of the convention definition, are in need of international protection. Essential to the creation of this category was the development of the *non-refoulement* principle, as well as other means of the protection of human rights, guaranteeing protection against torture and other inhuman and degrading treatment.

In the regional systems of refugee protection in Africa and Latin America definitions were created which are subsidiary to the provisions of the Geneva Convention.\(^5\) This is not the case in Europe where the practice of granting subsidiary protection remains substantially differentiated. Also the convention definition is not interpreted uniformly by the European state-parties.

Thus, the first attempt in Europe of international development of a common and uniform interpretation of the convention definition

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4 Hathaway, *supra* note 3, at 11.


6 OJ 1996 L 63/2.
for elaborating – as it was announced in Tampere by the European Council – a common European asylum system.

Moreover, essential for the scope of the term "refugee" are the exclusion clauses. The Geneva Convention formulated them in Articles 1 D-F. The clauses constitute an established standard being applied in the practice of the European states, which was also reflected in the proposed Directive where the formulations of Articles 1 D-F of the Geneva Convention are literally repeated.9

II. Being outside the Country of one’s Nationality and Inability or Unwillingness to Avail oneself of the Protection of that Country or to Return to it

A. Internal Flight Alternative

The means of protection known as internal flight alternative remains to be one of the essential matters. Such a situation occurs when some parts of the country are free from the circumstances which led to leaving that country and seeking international protection.

A question remains whether in such a situation the possibility of finding protection in a part of the country’s territory becomes a prerequisite to exclude granting refugee status. No direct answer to this question can be found in the formulations of the convention definition, nor in the travaux préparatoires of the Geneva Convention.

The issue of refusing refugee status and returning persons to the countries of origin, in a part of which the persons seeking protection may find refuge is a very current matter in the context of persons seeking protection in Europe, as in the case of the Kurds in Turkey, the Tamils in Sri Lanka or the Sikhs in India. This problem also refers to the practice of returning persons seeking refugee status to what is known as safe havens or safety zones, i.e. internationally protected areas established in the country of origin where the conflict prevails.10

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10 Such practice occurred for example during the war in the former Yugoslavia. The absolute condition of such procedure must be securing lasting security in such internationally protected areas. As the experience form Bosnia shows,
According to the UNHCR's interpretation included in paragraph 1 of the Handbook, there is no requirement in the formulation of the convention definition that the fear of being persecuted extends to the whole territory of the country of origin. Such interpretation prevails in the doctrine.\footnote{See, e.g., Goodwin-Gill, supra note 3, at 74: “There is also no reason in principle why the fear of persecution should relate to the whole of the asylum seeker's country of origin”, however, cf. Storrie, ‘The Internal Flight Alternative Test: The Jurisprudence Re-examined’, 10 International Journal of Refugee Law (1998) 501-503.}

In the UNHCR's interpretation, however, there is a possibility to condition granting refugee status on examining whether the person seeking protection might not find refuge from persecution in a part of the country of origin's territory and whether it was not reasonable in the light of all circumstances. The practice of numerous states developed in this direction, which means that granting refugee status has come to be dependent on determining whether the internal flight alternative is not applicable. Nevertheless, the practice of particular states, including the European ones, is significantly differentiated as regards this issue.\footnote{ELEN, Research Paper on the Application of the Concept of Internal Flight Alternative (1998) 5; see also country reports in J.-Y. Carlier et al. (eds.), Who is a Refugee?: A Comparative Case Law Study (1997), as well as Storrie, supra note 11, at 505.}

The differences consider matters such as, for example, the essential question of the time in which the alternative of finding refuge in one's country of origin could exist: should the moment of leaving the country of origin be decisive or the situation in that country at the time the asylum request is being examined or should both be taken into account? Another example of divergent practice is the matter of assessing the reasonability of the possibility of finding refuge, both in the context of the existence of safe areas or in the context of their accessibility.\footnote{Generally on the notion of “reasonable” in international law see, e.g., O. Corten, ‘The Notion «Reasonable» in International Law: Legal Discourse, Reason and Contradictions’, 48 The International and Comparative Law Quarterly (1999) 613.}

Paragraph 8 of the Joint Position referring to the issue of the internal flight alternative provides that in the situation when the persecution is definitely confined to a specific part of a country’s territory, it may be necessary to make sure that the person seeking refugee status: “...cannot find effective protection in another part of his own country, to which he may reasonably be expected to move.” Thus, the persons who, according to relevant authorities of the Member States, might find effective protection in a part of their country of origin’s territory where they might be returned, would find themselves outside the convention definition if interpreted in this way. It is inconceivable that such a formulation could be sufficient to reach a harmonised approach to the issue by the Member States. Although it seems that the use of the present tense in the above quoted sentence of paragraph 8 indicates the moment of examining the asylum request as decisive, further issues are not developed there. Moreover, the quoted paragraph of the Joint Position states that the possibility of finding protection in another part of a country of origin should be considered: “in order to check that the condition laid down in Art. 1 A of the Geneva Convention has been fulfilled, namely that the person concerned is unable or, owing to such fear (of persecution), is unwilling to avail himself of the protection of that country ...”. As Jean-Yves Carlier rightly pointed out, such formulation clearly emphasises the discrepancy between the possibility of the internal flight alternative provided for in the Joint Position and the formulation of the convention definition which refers literally to a situation in which a person seeking refugee status does not want to avail himself of the protection of his country or to return to it.\footnote{Carlier, ‘General Report’, in Carlier et al., supra note 12, at 722.} Thus paragraph 8 of the Joint Position allows here a considerably narrowing interpretation of the convention definition applied by some Member States, which is contradictory to UNHCR’s interpretation and creates doubts as for the formulation of the definition itself.

The issue of the internal flight alternative was similarly approached in the proposed Directive. According to the proposed Article 10 (1), the Member States may examine whether the fear of being persecuted is not confined only to a part of the country of origin’s territory and whether the person seeking international protection (this term is understood in the proposed Directive both as refugee status and as subsidiary protection): “...could reasonably be returned to another part of the country where there would be no well-founded fear of being persecuted or of otherwise suffering serious and unjustified harm.” Taking into account
the postulates of independent experts, the proposed Directive provides that the situation, in which the agent responsible for persecution is the state’s authority or other agent related to it, should constitute “a strong presumption” against allowing the possibility of finding protection by a applicant in the country of origin. It should be emphasised, however, that such possibility was not eliminated.

According to Article 10 (2) of the proposed Directive, in examining whether an applicant can be reasonably returned to the country of origin within the internal flight alternative, Member States should have regard both to the general situation in the part of the country of origin the person is to be returned to, and the applicant’s personal circumstances, including age, sex, health, family situation and ethnic, cultural and social links.

While analysing the internal flight alternative principle, it should be indicated that it may be very difficult to assess the circumstances in particular parts of the country and hence the effectiveness of the protection granted to a person coming from one part of the country who is to be returned to another part, especially because the situation may deteriorate. Thus returning a person to his country of origin as a result of refusing refugee status due to the internal flight alternative may cause serious danger of violation of the non-refoulement principle. Obligations of the state-parties of the 1950 European Convention of Human Rights (hereinafter: the ECHR) which result from Article 3 ECHR forbidding tortures and inhuman or degrading treatment should also be taken into account in this context.

Strasbourg organs, while examining cases on violation of Article 3 ECHR towards persons who are to be expelled to countries such as Sri Lanka, Turkey or India, refer clearly to differentiated danger of being exposed to the forbidden treatment in different parts of those countries, thus considering this aspect to be important for deciding whether the expulsion of particular personamounts to a violation of Article 3.\(^{15}\) In the case of Chahal versus the United Kingdom of 1996, the applicant was a Sikh residing legally in the UK whose request for granting refugee status was refused. The decision about his deportation to India was taken because of his activities on the territory of the UK for the sake of the independence of Punjab, which were assessed by the authorities as bearing signs of terrorist activities and as such endangered the security of the UK. Recognising the fact that the situation in Punjab was more dangerous than in other parts of India, the British authorities were ready to transport the applicant to any airport in India. Examining the danger of exposing the applicant to the forbidden treatment should be deported, the Court, as well as the Commission in its report, decided that, among others, it is necessary to assess the risk of exposing the applicant to such treatment not only in Punjab, where he came from, but also in the whole territory of India.\(^{16}\) It was only the conclusion that, although the danger of exposing the applicant to the forbidden treatment was the greatest in Punjab, such risk existed in the whole territory of India, which lead the Court to deciding that in case of deportation Article 3 ECHR would be violated.\(^ {17}\)

In the above quoted case the Court recognised that, in deciding whether the deportation would violate Article 3 ECHR, the moment of possible expulsion was decisive and only to a limited extent considered the past situation when the applicant, residing temporarily in Punjab in 1984, was subjected to tortures. It is also remarkable that the British authorities, while examining his application for refugee status lodged in 1990, did not take those circumstances mentioned by the applicant into account, as they regarded the moment of examining the application as decisive. Such approach is consistent with the previous case-law referring to Article 3 ECHR.

B. Refugees sur place

The next issue to be analysed is the situation of the *sur place* refugees. The term refers to persons who left their countries of origin for reasons other than the fear of being persecuted, but during their stay abroad circumstances arose that resulted in the fear of being persecuted in case they should return to the country of origin. In other words, bearing in mind the declarative character of granting refugee status, such persons were not refugees at the time of leaving their countries and became refugees during their stay abroad. It is generally agreed that, in the light of the convention definition, such persons may seek refugee status.

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\(^{16}\) **Chahal v. the United Kingdom**, supra note 15, 98.

\(^{17}\) *Ibid*, 104-107.
There are two types of situation that may cause persons being outside the country of their origin to become sur place refugees. First, objective reasons, when the circumstances in that country change. Second, subjective reasons, as a result of a particular person's activities during his stay abroad. Subjective reasons are undoubtedly more difficult to assess. In some circumstances, the states' dislike towards political activities of dissenters from other countries may play an important role here.\(^{18}\) In paragraph 96 of the UNHCR Handbook it is stated that activities of that kind must be carefully examined in the light of all relevant circumstances in order to establish whether it is sufficient to justify a well-founded fear of persecution. It must also be taken into account whether the authorities of the country of origin know about the person's activities and how they may perceive it.

Guiding principles regarding this issue provided for in paragraph 9 of the Joint Position are in compliance with the above formulations. Paragraph 9 (1), referring to the situation of changes occurring in the country of origin, states that the changes may justify the fear of being persecuted only if the asylum seeker is able to demonstrate that as a result of the changes he would personally have grounds to fear persecution. In the situation of the person acting outside the country of his origin, to which paragraph 9 (2) refers, there are no grounds to grant refugee status to an asylum seeker who expressed his convictions mainly for the purpose of being granted the status. This does not, however, prejudice his right to remain in the receiving state if the return to the country of origin could endanger his physical integrity or freedom.

Paragraph 9 (2) conditions granting the refugee status also on whether the activities performed outside the country of origin constitute the expression and continuation of convictions which the person concerned had held in his country of origin or: "... can objectively be regarded as the consequence of the asylum-related characteristics of the individual." The condition of continuity is not taken into account if the asylum-seeker was not yet able to establish convictions because of age. Such conditions may cause doubts as regards their consistency with the convention definition. For as Vigdis Vevstad rightly pointed out, according to the provisions of the Geneva Convention, it is inadmissible to condition the granting of refugee status on the place and time of expressing convictions that are grounds for the fear of persecution.\(^{19}\)

The above reservations are even more relevant in the context of the regulations laid down in the proposed Directive. According to the proposed Article 8, prerequisites for granting refugee status can come into being sur place, but as regards the activities performed outside the country of origin, it must be established whether or not they were performed for the sole purpose of creating the necessary conditions for making an application for international protection. The proposed Directive states only that such situation does not exist if "the activities relied upon constitute the expression and continuation of convictions held in the country of origin, and they are related to the grounds for recognition of the need for international protection".

III. Well-founded Fear of Persecution

According to convention definition, a refugee is a person who has a well-founded fear of persecution. It is thus necessary to analyse here two terms that constitute this key element of the analysed definition: fear, which must be well-founded, and persecution. Both elements were considered while formulating the harmonising practice of the Member States of the EU included in the Joint Position and the proposed Directive.

A. Well-founded Fear

The fear of persecution is of subjective and/or objective character. The subjectivity of the fear means that a person is convinced that he is in danger of being persecuted, while the objectivity of the fear refers to an exterior element which is at least to some extent verifiable and which confirms the danger of persecution. Both factors must be considered, but it is the objective character which is decisive in establishing whether

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\(^{18}\) Vevstad, supra note 10, at 53; Such situation is illustrated, for example, by the above mentioned Chahal case. The applicant came to the UK at the beginning of the seventies for economic reasons and legalised his stay. During his stay he got involved in activities of Sikh separatists acting for the sake of independence of Punjab being part of the territory of India. Because of his activities he was, during his stay in Punjab in 1984 detained and tortured by security forces; he managed however to return to the UK. Threatened by deportation to India in 1990 he lodged an application for refugee status which was refused.

\(^{19}\) Vevstad, supra note 10, at 53.
the fear of persecution is justifiable, which is indispensable for being granted the convention protection. Thus the recognition of a well-founded fear of persecution depends on answering two essential questions: first, whether the fear of persecution is well-founded, which boils down to the question about the extent of the risk that a person is endangered by persecution; and second, what is the evidence standard, i.e. what constitutes the sufficient evidence that the fear of persecution is well-founded.\textsuperscript{20}

Analysing this issue in the context of guiding principles laid down in the Joint Position, the answer to the above questions is as follows. As regards the context of the risk of persecution, it is necessary to establish its credibility and thus exclude irrational reactions and fear. As regards evidence, the asylum-seeker is responsible for proving the risk in the context of his personal situation, but the authorities must confront his claims with the general circumstances in the country of origin, which is not sufficient in itself. The presented evidence does not need to confirm the presented facts in detail, but they must justify the danger of persecution. Such interpretation of the formulation “well-founded fear” laid down in the Joint Position is consistent with the interpretation presented in the UNHCR Handbook,\textsuperscript{21} as well as with the postulates of independent experts.\textsuperscript{22} Such interpretation was also reflected in the regulations of the proposed Directive (the proposed Article 7).

B. Persecution

The term “persecution” is not defined in the Geneva Convention, nor in the internal case-law of the state-parties of the Geneva Convention where the dominating approach is characterised by analysing the semantic range of this term in the context of each particular case.\textsuperscript{23} The Joint Position does not formulate such a definition either, which is expressed \textit{expressis verbis} in paragraph 4. But the term “persecution” is carefully interpreted in the Joint Position, while formulating guiding principles harmonising the application of convention definition.

\begin{itemize}
\item \textsuperscript{20} Vanheule, \textit{supra} note 3, at 95.
\item \textsuperscript{21} Para. 37 - 50.
\item \textsuperscript{22} Vanheule, \textit{supra} note 3, at 93; Carlier, \textit{supra} note 14, at 695.
\item \textsuperscript{23} Carlier \textit{et al.}, \textit{supra} note 12, \textit{passim}.
\end{itemize}

In spite of there being no definition of the term, it is generally agreed that persecution may be of different character (e.g. physical, psychological, in some circumstances economic) and that for a particular treatment to be regarded as persecution must reach a particular level of painfulness. It is also necessary to refer persecution to the guaranteed human rights in the context of their violation.\textsuperscript{24} The Joint Position shares this approach stating in paragraph 4, among others, that persecution within the meaning of Article 1 A of the Geneva Convention constitute acts that must be "... sufficiently serious, by their nature or their repetition: they must either constitute a basic attack on human rights, for example, life, freedom or physical integrity, or, in the light of all facts of the case, manifestly preclude the person who has suffered them from continuing to live in his country of origin.”

Further in paragraph 4 of the Joint Position it is stated that acts which constitute persecution within the meaning of the Geneva Convention must be also based on one of the reasons mentioned in the further part of the convention definition (thus race, religion, nationality, membership of a particular social group, political opinion). An individual may fear persecution for one or more of these reasons. Such an approach is common. The Joint Position adds here two reservations that are very important for the range of the term “persecution”. First, it is immaterial whether the reasons of persecution are in a particular case authentic, or whether they are attributed by the persecutor. Second, persecution may also be constituted by particular acts considered jointly, which would not amount to persecution if considered apart.

A similar approach to persecution is presented in the proposed Directive. According to the proposed Article 11, while evaluating the well-founded fear of persecution in the procedure for granting refugee status the term persecution should be understood as comprising at least four mentioned situations. First, infliction of serious and unjustified harm or discrimination on the grounds mentioned in the convention definition, which is sufficiently serious by its nature or repetition as to constitute a significant risk to a person's life, freedom or security or to preclude the person from living in his country of origin; second, legal, administrative, police and/or judicial measures when they are designed or implemented in a discriminatory manner on the grounds mentioned in the convention definition and if they constitute a significant risk to the per-

\begin{itemize}
\item \textsuperscript{24} Further see UNHCR, \textit{Handbook on Procedures and Criteria for Determining Refugee Status (1992)} para. 51 - 65; Hathaway, \textit{supra} note 3, at 99; Vanheule, \textit{supra} note 3, at 98.
\end{itemize}
son's life, freedom or security or preclude him form living in the country of origin; third, prosecution or punishment for a criminal offence if, on the grounds mentioned in the convention definition, the person is either denied means of judicial redress or suffers a disproportionate or discriminatory punishment, or the criminal offence for which the person is at risk of being prosecuted or punished, purports to criminalise the exercise of fundamental rights; fourth, in particular circumstances, prosecution or punishment for refusal to meet a general obligation to perform military service on the grounds mentioned in the convention definition.

Very important for the semantic scope of the term “persecution” and, consequently, for the scope of the convention definition is the question of the sources of persecution, i.e. agents of persecution. Three situations may be mentioned in this context:

- first, when persecution results form direct actions of any kind of state authority;
- second, when persecution results from actions taken by agents other than state authorities, but the actions are at least tolerated by the authorities;
- third, when persecution results form actions taken by agents other than state authorities and the authorities are unable to prevent them;

The Geneva Convention does not refer to the problem of the source of persecution. The aim of the Geneva Convention is ensuring protection to persons endangered by persecution and not being protected in this respect by their country of origin. It is decisive here that the endangered person is unable or unwilling to avail himself of the protection of his country of origin. Thus according to the interpretation included in paragraph 65 of the UNHCR Handbook, all three situations mentioned above constitute persecution within the meaning of the convention definition and constitute a prerequisite to granting refugee status. 25 Such interpretation is shared by non-governmental organisations dealing with refugee protection, 26 as well as being reflected in the practice of numerous state-parties of the Geneva Convention. In the practice of some of the state-parties, however, persecution within the meaning of the convention definition is understood as comprising only the first two situations and thus persons endangered by persecution by agents other than state authorities when the authorities are unable to ensure protection are refused conventional protection. Direct participation (acting) or indirect participation (encouraging, tolerating) of state authorities is decisive. Such practice developed in Europe in the case-law of countries such as Austria, France, Germany, Switzerland. 27 Thus this matter constitutes an essential discrepancy in interpreting the convention definition by European states, including the EU Member States.

The Member States of the EU had to consider this issue while attempting to harmonise the interpretation of the convention definition in the Joint Position. It deals with the forms of persecution by state authorities in paragraph 5 (1), and in sub-paragraph 2 of paragraph 5, which deals with persecution by third parties. It states that persecution by agents other than state authorities enters within the scope of the Geneva Convention if it is based on one of the grounds mentioned in Article 1 A, is of individual character and is encouraged or tolerated by state authorities; and further it states that when the authorities "fail to act, such persecution should give rise to individual examination of each application for refugee status, in accordance with national judicial practice, in the light, in particular, of whether or not the failure to act was deliberate." According to the last sentence of 5 (2), the persons concerned may be eligible in any event for appropriate forms of protection under national law.

Thus, according to the Joint Position, persecution by agents other than state authorities is, in principle, taken into account only when the authorities encourage or tolerate the actions amounting to persecution. The decisive element determining the character of the state authorities' passiveness is the issue whether the inaction was deliberate. This formulation is rightly criticised for being very ambiguous. The wording "in accordance with national judicial practice" allows a far-reaching freedom of interpretation. 28

This argument was taken into account by the Commission while formulating the provisions of the proposed Directive. The proposed Article 9, which deals with the question of the sources of persecution, in-

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25 UNHCR, Information Note on Article 1 of the 1951 Geneva Convention (1995); J. van der Klauw, 'Refugee protection in Western Europe: A UNHCR perspective', in J.-Y. Carlier and D. Vanheule (eds), supra note 3, at 239.
27 Carlier et al. (eds), supra note 12, at 44, 398, 269 and 149 accordingly.
cludes the situation when the persecution results from actions taken by agents other than state authorities and they are unable or unwilling to prevent such actions. Decisive for evaluating whether the fear of persecution is well-founded is the question whether there is an effective system of protection against persecution ensured by state authorities available in the state of origin. The term protection by state authorities within the meaning of the proposed Directive comprises also the protection guaranteed by intergovernmental organisations, as well as – under certain conditions – by quasi-state authorities.

In this context it is necessary to mention the Strasbourg case-law referring to Article 3 ECHR, which also refers to the problem of being endangered with a forbidden treatment by agents other than state authorities. In 1997 the Court examined a case against France, in which the applicant who was of Colombian nationality and charged with drug trade, claimed that his expulsion to Columbia would violate Article 3 ECHR because of the risk of being endangered by drug cartels. The Court clearly stated that it did not exclude the possibility of applying Article 3 in a situation when the danger of being treated in a forbidden way did not come from state authorities. It is nevertheless necessary to demonstrate that the risk is real and that state authorities are unable to prevent the danger by ensuring a relevant protection.29

Also, in another case of the same year the Court confirmed the necessity to examine the problem of protecting against treatment forbidden in Article 3 in the situation when the risk that a particular person would be treated in a forbidden way, had its source in intentional actions of public authorities in the country of origin or came from non-state agents and the authorities were unable to ensure a relevant protection.30

Such an approach remains consistent with the theory of negative and positive obligations of states resulting form the duty to respect human rights. States are not only obliged negatively not to violate particular rights of individuals under their jurisdiction, but also have the positive obligation to protect those rights. Thus even an unintentional lack of ensuring by the state authorities protection against violations of those rights by other agents, may constitute a violation of a state’s obligations and thus constitute a violation of human rights.31

29 HLR v. France, ECHR (1997) RJD, 40; see also Ahmed v. Austria, ECHR (1996) RJD, 44.
30 D v. the United Kingdom, ECHR (1997) RJD, 49.

IV. Grounds of Persecution

According to the convention definition, the fear of persecution must result form at least one of the five mentioned grounds: race, religion, nationality, political opinion or membership of a particular social group. Persecution may often be connected with more than one of these grounds. Also, it should be immaterial whether the grounds are real or attributed to a person by the persecutor. Such approach is confirmed in the Joint Position.

The Joint Position deals with grounds of persecution in paragraph 7. The interpretation of the first three grounds (race, religion and nationality) does not give rise to any controversies and is consistent with the interpretation of the UNHCR Handbook,32 as well as the common way of defining these terms in international law. However, the interpretation of the last two grounds (political opinions and membership of a particular social group) may cause reservations. According to paragraph 7 (4) holding political opinions different form those of the state authorities is not in itself a sufficient ground for seeking refugee status. It is necessary to demonstrate that, firstly, the authorities know about an applicant’s political opinions or attribute them to him; secondly, that those opinions are not tolerated by the authorities; and thirdly, that in this situation the applicant is likely to be persecuted for holding such opinions.

This interpretation is shared by the UNHCR Handbook, but is widened in paragraph 82 by a reference to a situation when a person seeks refugee status because of his political opinions that have not yet been expressed by the applicant and hence the authorities know nothing about them. When it is justifiable to assume that the opinions will be given expression later and that this would lead to persecution, the applicant should be considered to have fear of persecution on the ground of political opinion.

From the omission of this element in the Joint Position it follows that persons about whose political opinions state authorities are not informed are excluded form the scope of the convention definition, even if those opinions would undoubtedly result in persecution when state authorities learned about them.33

32 Para. 68-76.
33 Guild, supra note 7, at 332.
The proposed Directive’s interpretation of this issue is consistent with the interpretation in the Handbook. According to the proposed Article 12 (e), the term “political opinion” comprises holding or being attributed to hold opinion about the state, the state authorities or the state’s policy, notwithstanding whether this opinion has been expressed.

As regards persecution on grounds of membership of a social group, this term is defined by indicating persons of the same origin, customs or social position. It is pointed out that very often persecution on the grounds of membership of a particular social group may, but need not be, connected with another reason mentioned in the convention definition. Such is the approach of the UNHCR Handbook, also, the analysis of the case-law of the state-parties of the Geneva Convention shows that a social group is consistently defined by isolating common characteristic features that are constant or due to their essential character, it cannot be expected that they will change.

Concise reference to the term “social group” in paragraph 7 (5) of the Joint Position confirms the above interpretation as it indicates the same characteristics. Such an approach causes reservations because of the omission of significant differences in the case-law of the EU Member States, which — although their abstract definition of social group is uniform — demonstrate significant differences in determining particular cases. A fundamental problem is the issue of gender related persecutions and regarding women as a social group within the meaning of the convention definition. For example, in German case-law, women are considered to be a social group, while this is not the case in Danish and Swedish case-laws (although they are granted subsidiary protection); in some countries, such as the Netherlands, for example, case-law is not homogenous.

The convention definition does not differentiate between persecution experienced by men and women and remains neutral in this matter. This may result in not taking into account specific dangers that women are subjected to, a situation prevented by an interpretation according to which women are members of a separate social group. As James C. Hathaway points out, sex allows to unambiguously isolate a category of persons on the basis of necessary features that are socially signifi-

V. De facto Refugees

An analysis of the convention definition confirms that numerous persons in need of international protection are outside the scope of this definition and thus outside the scope of conventional protection. This results, first, from a narrowing interpretation of the definition applied by some European states which refuse to grant conventional protection, for example, those who are persecuted by agents other than public

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34 Para. 77-79.
35 See country reports in Carlier et al., supra note 12.
36 Ibid.
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Despite the CE repeatedly indicating the need for adopting harmonised standards for protection of the de facto refugees in Europe, no such attempt has been made. This issue was also left undeveloped for a long time within intensive harmonisation policy undertaken in the EU. It is evident that such regulations are necessary if the common asylum system developing at present within EU is to be complete and coherent.

Art. 63 (2) (a) EC imposes on the Council the obligation to adopt, within five years from the entering into force of the TA, means regulating "minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection." This provision refers to two issues: temporary protection and subsidiary protection.

As mentioned before, the Commission presented the proposed Directive which regulates jointly in one community legal measure both the standards regarding the conditions of being granted the refugee status, and subsidiary protection.

In the context of the European asylum system developing within the EU, there is at present a real chance of creating for the first time a regional subsidiary definition in Europe and ensuring the necessary protection to persons not covered by the protection guaranteed by the Geneva Convention who need international protection.

Such a definition was proposed in 1999 by the European Parliament in the Resolution on the harmonisation of forms of protection complementing refugee status in the European Union. Referring to the provision of the TA, the European Parliament emphasised in this resolution the need for developing a harmonised interpretation of the convention definition, as well as uniform standards of subsidiary protection. It expressed its conviction that developing a harmonised interpretation of the convention definition should be consistent with the guiding principles included in the UNHCR Handbook, and, what is more important, that the scope of the convention definition should comprise persons endangered by persecution by agents other than state authorities, as well as persons, especially women, who are at risk of gender-related persecution.

As mentioned above, the proposed Directive uses the term international protection under which it understands refugee status within the meaning of the Geneva Convention and subsidiary protection. According to

39 It must be pointed out here that the issue of granting temporary protection in the situation of a mass influx of persons seeking international protection, although it remains closely related to the question of forms of protection complementing the Geneva Convention, remains as a means of extraordinary character, a separate issue.


42 Adopted on 10 February 1999.
the proposed Article 5 (2) in connection with the proposed Article 15, subsidiary protection should be granted to a person seeking international protection who does not qualify as a refugee and who, due to a well-founded fear of suffering serious and unjustified harm consisting in:

- being subjected to torture or inhuman and degrading treatment or punishment,
- violation of a particular human right which is serious enough to engage international obligations of the Member State,
- threat to one's life, security or freedom as a result of spreading violence arising in situations of armed conflict or as a result of systematic or generalised violations of human rights,

was forced to leave or to remain outside the country of origin and is not able or is unwilling to avail oneself of the protection of this country.

In applying the above definition in evaluating the reasonableness of fear, the need of protection arising sur place, the agents responsible for the harm and internal flight alternative, the states are obliged to take into account the interpretation of these issues included in the proposed Directive, which was already mentioned above in the context of interpreting the convention definition. In Article 17 (1) the proposed Directive also provides a clause excluding subsidiary protection in a formulation identical with Article 1 F of the Geneva Convention. Article 17 states that the grounds for exclusion must be based solely on the personal and knowing conduct of a person (paragraph 2); guarantees judicial review of the decision to exclude a person from international protection (paragraph 3), and states that the application of the exclusion shall not affect the Member States' obligations under international law (paragraph 4). The last issue is of essential significance in the context of subsidiary protection granted in situations when a person is at risk of being subjected to torture or other inhuman or degrading treatment. According to the established case-law of the Court protection, against treatment forbidden in Art. 3 ECHR is also of absolute character in cases related to expulsion and cannot be excluded in any circumstances.\(^{43}\)

The proposed Directive is thus concerned with how to regulate the protection of persons outside the convention definition and in need of international protection, which is complex and coherent with granting refugee status.

\(^{43}\) Chahal v. the United Kingdom, supra note 15, 79-80.

VI. Conclusions

The unambiguous determining the emerging EU asylum system's personal scope is essential for the system's final comprehensiveness and coherence.

The analysis of other legal measures, provided in Title IV EC-Treaty and so far adopted, demonstrates the necessity to consider guaranteeing protection to refugees not covered by the convention definition and at the same time shows a certain inconsistency in this respect. According to the Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons,\(^{44}\) this form of protection was established as an extraordinary means applying only in the situation of a mass influx of displaced persons. This last notion comprises, apart from the refugees covered by the convention definition, also those outside its scope. On the other hand, the Decision establishing the European Refugee Fund,\(^{45}\) which – being based on the principle of solidarity – regulates financing the common asylum policy, while determining the categories of persons covered by the actions financed by the Fund, indicates convention refugees and persons covered by temporary protection, omitting persons covered by subsidiary protection. The European Parliament, in the consultation procedure, in effect indicated inconsistency of such formulation and postulated completing the relevant provision of the proposed decision with persons covered by subsidiary protection.\(^{46}\) Similar inconsistencies also apply to the proposed measures which are being currently discussed.

Yet, it seems that determining the personal scope of the system should have been a logical starting point for its elaboration. As this was not the case, some of the proposed measures refer to persons under subsidiary protection whereas others, such as for instance the proposed Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national,\(^{47}\) do not.

The analysed proposed Directive reflects some significant aspects typical for the whole process of the system's elaboration. The proposed


\(^{46}\) EP legislative resolution on the proposal for a Council Decision establishing a European Refugee Fund; Amendment 14.

measures have been generally based on the previous third pillar mechanisms. However, the activities undertaken have not been limited only to pure communitarisation of the existing mechanisms. They are generally of a much more liberal approach and, to a significant extent, take into account non-binding standards developed under the auspices of the CE and the UNHCR.

However, not all inconsistencies with international law – which were characteristic for many of the pre-Amsterdam asylum regulations – have been eliminated. It is especially important while taking into account the non-binding character of the latter in contrast to that of traditional community law measures. Yet, it should also be remembered in this context that the adopted measures will be under the jurisdiction of the Court of Justice.

Undoubtedly, the elimination of the deficiencies is necessary for a comprehensive and coherent EU asylum system.