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Measurements of Violence

The Application of Article 15(c) of the Qualification
Directive on Individuals Fleeing War & its Implications for
the Rule of Law

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Abstract

This thesis examines the application of Article 15(c) of the *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection* (the Qualification Directive). It uses a concept of ‘rule of law’ theory to examine and discuss what kind of difficulties that the application of Article 15(c) poses for the rule of law. Two different aspects of the rule of law are examined in relation to the aforementioned article of the Qualification Directive to determine what impact the article has on the rule of law in the European Union.

One is the principle of legal certainty in relation to that the text of the provision is worded poorly for application by the relevant national authorities in the European Union Member States where it can be seen through the analysis of previous writings on the topic that the wording of Article 15(c) in fact does impact the rule of law and possibility to guarantee legal certainty for the individual applying for international protection.

The second aspect of the rule of law that is examined in the principle of fairness or more specifically the principle of procedural fairness. It is shown through the research and analysis that the principle of procedural fairness is of utmost importance to uphold when dealing with decision-making in asylum matters and that Article 15(c) as it stands today is detrimental to the upholding of the principle in the European Union.

List of Abbreviations

CEAS – Common European Asylum System

CJEU – Court of Justice of the European Union

COI – Country of Origin Information

DELMi – Migration Studies Delegation

EASO – European Asylum Support Office

ECHR – European Convention on Human Rights

ECtHR – European Court of Human Rights

ECRE – European Council on Refugees and Exiles

ELENA – European Legal Network on Asylum

EU – European Union

MS – Member State

TFEU – Consolidated version of the Treaty on the Functioning of the European Union

TEU – Consolidated version of the Treaty on the European Union

UN – United Nations

UNHCR – United Nations High Commissioner for Refugees

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1 Introduction

1.1 Object & Purpose

When an individual submits an application for asylum in a European Union (EU) Member State (MS) what is firstly assessed by the relevant national authority is whether she is eligible for refugee status in accordance with the criteria that was first set out in the United Nations (the UN) *Convention Relating to the Status of Refugees* (the 1951 Refugee Convention).¹ However, if she does not fulfill the criteria for refugee status, she can still be granted international protection through a framework that serves as an addition to refugee status protection which is the subsidiary protection regime. For EU MS Subsidiary protection is regulated through EU law in *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection* (the Qualification Directive). Article 15 of the Qualification Directive is the provision that regulates subsidiary protection and does so by defining the term ‘serious harm’ used in Article 2(f).² Article 15 contains three separate provisions and the one that is relevant for this thesis is Article 15(c), which reads as follows,

Serious harm consists of: serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.³

This is a both vague and ambiguous provision that has since its entry into force required clarification. Such clarification has been provided through preliminary rulings by the Court of Justice of the European Union (the CJEU), and the scope of Article 15(c) has been defined. When defining the scope, the CJEU set out that the general security situation in a country can

¹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

² Article 2(f) of the Qualification Directive reads as follows “‘person eligible for subsidiary protection’ means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of stateless person, to his or her country of former habitual residence, would face a risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;”.

³ Provisions a and b of Article 15 reads as follows, “[s]erious harm consists of: (a) the death penalty; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin”.

be the sole reason for granting subsidiary protection in certain cases.⁴ However it also stated that the level of indiscriminate violence that characterizes the armed conflict has to be assessed by the relevant authorities and deemed to be of a high enough level for the security situation alone, without any individual threat, to be enough to be for an individual granted subsidiary protection. This assessment of the level of indiscriminate violence that the CJEU set as the scope for Article 15(c) to be a component in assessments under the EU Subsidiary Protection regime is obliged upon EU MS to make at national level through an assessment of Country of Origin Information (COI) made by their relevant national authorities.

This thesis aims to examine the application of Article 15(c) by EU MS at national level and how it is affecting the rule of law of the EU and as a consequence what effects it has on asylum seekers' human rights. One main aspect of this is the fact that EU MS can, and have, assess the security situation in the same country differently. This thesis aims to highlight this problem in consistency and harmonization and the adverse effects this has on promoting the rule of law in the EU and the legal certainty for the asylum seeker. The thesis will analyze the Qualification Directive and its Subsidiary Protection Regime as a framework and the different aspects of an assessment of an application for subsidiary protection that the EU requires of the national authorities of its MS.

In order to conduct this examination, the thesis will first begin with a historical background of the EU and how it has developed its asylum and immigration law which can be found in section 1.2 just below. Having knowledge of the historical background is key to understand the complexities with EU law and the sensitive topic of asylum and migration. It is further important for a comprehensive understanding of the subject matter of this thesis to have a basic understanding of what competence the EU has and how it affects the MS. Chapter 2 will examine the Qualification Directive as a whole in section 2.1 and Article 15(c) specifically in section 2.2. Chapter 3 will discuss the information examined in chapter 2 in relation to the 'rule of law' and certain challenges that arises. Section 3.1 will discuss harmonization and procedural fairness while section 2.3 discusses the linguistic challenges that comes with Article 15(c) and how they affect legal certainty. Lastly the thesis will conclude with section 3.3 with a brief summary of the findings and some concluding remarks by the author.

⁴ See judgement *Elgafaji v. Staatssecretaris van Justitie*, C-465/07, European Union: Court of Justice of the European Union, 17 February 2009 which is discussed in detail in section 2.2.1 of this thesis.

1.2 Historical Background

Legal competence in immigration and asylum matters was transferred from EU MS to the EU with the Amsterdam Treaty, which entered into force in 1999.⁵ The writing process of this thesis takes place during the spring term of 2019, almost exactly 20 years later in a world that is in many, if not most and certainly when it comes to migration, ways vastly different than the one in 1999. As previously mentioned above, to get a comprehensive understanding of the subject matter this thesis aims to discuss a presentation of the historical background and of the Common European Asylum System (CEAS) as a whole is key. What will serve as the starting point and main source of inspiration for the historical section of this thesis is a book titled ‘The First Decade of EU Migration and Asylum Law’ edited by Elspeth Guild and Paul Minderhoud.⁶ It is vital for the full understanding of the problem that this thesis aims to illustrate that the reader has an understanding of how the transfer of competence from the MS went and what kind of challenges that it posed for the EU in the beginning of the CEAS’s existence. (argue this better).

In the introductory chapter of the just previously mentioned book, ‘The First Decade of EU Migration and Asylum Law’, Kees Groenendijk writes that the first decade of EU Migration Law, 2000-2010, was one of many and surprisingly quick developments.⁷ This is something that might seem rather obvious with a recent transfer of competence from nation-states to a supranational body, however it is something that is important to make note of as the speed of which law is created, if fast, can often, although naturally not always, indicate a lack of certain amounts of preparation or quality control. Further Groenendijk writes that the new asylum and migration measures that the EU took contained provisions which were the result of negotiations and discussions in the Council bodies that stipulated directly applicable rights for migrants to invoke before the courts of the EU MS.⁸ Groenendijk goes on to state that there was an idea existing among the EU MS that the new directives governing asylum and migration matters were said to contain a large room for discretion, however this was quickly shut down by the CJEU in its first two judgments on the *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*⁹ (the Family Reunification Directive) where it clarified that, contrary to what the MS had thought, there was no discretion and that third-country nationals

⁵ European Union: Council of the European Union, *Treaty of Amsterdam Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts*, 10 November 1997, § 15.

⁶ Minderhoud, Paul & Guild, Elspeth, *The First Decade of EU Migration and Asylum Law (First Decade of European Union Migration and Asylum Law) [Electronic Resource]*, Brill Academic Publishers, 2012 [hereinafter ‘Guild & Minderhoud’].

⁷ Guild & Minderhoud, 1.

⁸ Guild & Minderhoud, 2-3.

⁹ European Union: Council of the European Union, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC.

have a right to family reunification as stipulated by the Family Reunification Directive.¹⁰ This potentially, although no conclusive answers can be made unless based on more comprehensive data, shows that the transfer of competence might have meant more change than what the MS were prepared for and might have agreed to had it been more of an informed decision.

Groenendijk points to that the ‘Europeanization’ of migration law meant extended supranational control in corners of migration law where traditionally the behavior of nation states and their authorities was excluded from external judicial review and scrutiny.¹¹ This is the major change with the shift in competence and it is a big one. It is a strongly solidified judicial norm that nation states have the right to control the entry, residence and expulsion of aliens on their territory¹² something that did change with this transfer of competence. It is still the task for each MS to control all of the things just previously accounted for, however it has to do so according to rules stipulated by the EU.

Another factor that is worth noting in regards to the historical background is that of the accession of 12 new MS in 2004¹³ and 2007¹⁴ during the first decade which meant a significant extension of its territorial scope.¹⁵ While the territorial reach of the EU has now been without significant expansion since it is still an interesting fact to take note of that the competence transfer was agreed upon and happened when the EU was a significantly smaller part of the world. This was one of the major changes during the decade combined with the entry into force of the Lisbon Treaty in 2009 which extended the competence to refer cases related to the new migration and asylum measures to the CJEU to all judges at national level and by granting the EU Charter of Fundamental Rights binding primary EU law status.¹⁶ The Charter of Fundamental Rights gaining binding status was a big step and something that will be of relevance throughout the thesis when discussing the human rights elements of the issue at hand.

Groenendijk also points out that a development that has strengthened the character of EU migration law as law, rather than a collection of policy measures, is that there has not been a

¹⁰ *Parliament v. Council*, C-540/03, European Union: Court of Justice of the European Union, ECR I-5769, CJEU 27 June 2006, §§ 105-206.

¹¹ Guild & Minderhoud, 3.

¹² For example the ECtHR reiterates this in cases concerning non-refoulement, see for example *F.G. v. Sweden* [GC], no. 43611/11, 23 March 2016 where § 111 reads, '[t]he Court reiterates that Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations, including the Convention, to control the entry, residence and expulsion of aliens' (emphasis added).

¹³ May 1st, 2004 Cyprus, Estonia, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia, Czech Republic and Hungary acceded to the EU.

¹⁴ January 1st, 2007 Romania and Bulgaria acceded to the EU.

¹⁵ Guild & Minderhoud, 3.

¹⁶ Guild & Minderhoud, 4.

specialized immigration court or tribunal developed within the CJEU.¹⁷ The need for such a court was discussed during negotiations on the Amsterdam Treaty by governments that feared that the CJEU would become a fourth instance asylum court or be unable to deal with urgent cases swiftly due to being flooded with immigration cases.¹⁸ When the aforementioned book was written in 2012 Groenendijk mentioned that ‘so far, none of those fears have materialized’.¹⁹ Not having a specialized court means that asylum and immigration cases are dealt with on the basis of general material and procedural standards and with the same care as other cases. Groenendijk also writes that at the time EU migration law had not developed as a separate domain where deviation from general principles and rules is accepted as normal or self-evident.²⁰ The lack of a specialized court for asylum matters is something that will be discussed at a later stage of this thesis as well.

Groenendijk also writes about the organization of NGO’s whose concern is protecting asylum seekers and immigrants on national level and also the cooperation between NGO’s at European level as something that has strengthened the character of EU migration law. He exemplifies that an important role for NGO’s in migration and asylum cases is as producers of reliable information on the actual and legal situation of immigrants in both Member States and countries outside the EU.²¹ (The judgment of the ECtHR in *M.S.S v Belgium and Greece* is a good example of the essential role of NGO’s and Council of Europe bodies as finders of facts on which the court can rely in deciding individual cases, add this somewhere, not here though).²²

When the Member States signed the Amsterdam Treaty in 1997, they agreed to extend the EU’s competence on asylum and migration and allow the EU to draft binding rules in almost all areas of asylum and migration law. The Schengen *acquis*²³ was also integrated in EU law with this shift in competence. In the first nine years after the entering into force for the Amsterdam Treaty in 1999 almost 50 regulations, decisions and directives were adopted by the Council of Ministers regarding immigration and asylum resulting in somewhat of a ‘legislative boom’.²⁴ This meant that now there were EU law governing the admission and status of all

¹⁷ Guild & Minderhoud, 5.

¹⁸ The issue of becoming a ‘fourth instance asylum court’ is something that has been a topic for the ECtHR and has been highlighted and problematized by judges of the ECtHR, see for example, *J.K. and Others v. Sweden* [GC], no. 59166/12, ECHR 2016, Concurring Opinion of Judge O’Leary, §10, 56.

¹⁹ Guild & Minderhoud, 5.

²⁰ Guild & Minderhoud, 5-6.

²¹ Guild & Minderhoud, 6.

²² Guild & Minderhoud, 6.

²³ The Schengen *acquis* is rules and legislation that is integrated into EU law, it regulates the border control of the Schengen Area.

²⁴ Guild & Minderhoud, 8.

major categories of migrants, family migration, students, long-term residents, asylum seekers and refugees.²⁵ Groenendijk lastly writes that the transfer of law making competence that took place was that of ‘one of the central functions of the nation state: admission and expulsion of non-citizens’ and further that most politicians, civil servants, judges and lawyers in the Member States probably have yet to realize the full extent of the loss of sovereignty and discretion in this area of the law.²⁶ Once again the

Groenendijk then poses the interesting and highly relevant question ‘why this transfer of sovereignty?’, as it is such a big change for each separate MS. Groenendijk writes that the main explanation that can be found when reading the documents of national policy debate is the establishment of the internal market and with that the abolition of internal border control in the EU.²⁷ Citing this as a reason for why MS may have been positive to take this big step makes a lot of sense given that the goal was one unified union with external borders. One can also imagine that MS not situated by the ‘new’ EU external border were enticed by the thought of not having to administer any kind of border control. There are also other grounds that can, according to Groenendijk, explain the rather rapid ‘Europeanization’ of migration law.²⁸ One of which is, he states, that at that point in time it had become clear for the MS of the EU that what kind of migration policy the other MS enforced had direct consequences for the rest of the EU.²⁹ This is then exemplified by that Germany’s more restrictive asylum law that entered into force in 1992 directly affected the number of asylum applications for the neighboring countries the following year.³⁰ This historical background is kept brief so as to not take up too much room and keep the focus of the thesis so there is indeed many aspects and happenings that has been kept out of this section. However, its purpose is only to serve as a starting point for analysis and to ensure the understanding of the relation between the EU and asylum and migration for the reader. It is important to bring with us two key things for the best understanding of the remainder of this thesis. Firstly, that the transfer of competence meant a big change for the EU MS and that perhaps it was something that was more extensive than what could be foreseen and secondly that because of this transfers magnitude and the speed of which the new directives and regulations was created they were perhaps not drafted in the most optimal way.

²⁵ Guild & Minderhoud, 8.

²⁶ Guild & Minderhoud, 9.

²⁷ Guild & Minderhoud, 10.

²⁸ Guild & Minderhoud, 10.

²⁹ Guild & Minderhoud, 10.

³⁰ Guild & Minderhoud, 10.

1.3 Methodology

Aleksander Peczenik's enlightening 'On Law and Reason' and how he describes the legal method as 'the systematic, analytically-evaluative exposition of the substance of ... law'³¹ will serve as the basis of the methodology section of this thesis. It will further be supplemented by the writings of Jan Kleineman in 'Juridisk Metodlära' (in English 'Legal Methodology') about an analytical version of 'legal dogmatics'³².

Such an exposition as Peczenik writes of in the quote above may contain elements of sociology or history, however at its core it consists of the interpretation and systematization of legal norms.³³ This type of method suits this thesis as it will naturally have elements in it that are not purely legal, however its aim is still to discuss a certain legal provision so a method with its focus on the interpretation of legal norms is the most fitting. Further Peczenik writes that such a method consists of a description of the literal sense of precedent, statutes, provisions etc. which is intertwined with 'moral and other substantive reasons'.³⁴ This thesis aims to problematize Article 15(c), its usage and interpretation and with this will come discussion about things that are not solely legal. Peczenik suggests that such a method may be called 'doctrinal study of law' or 'analytical study of law' and points to that in Continental Europe it is commonly referred to as 'legal dogmatics'.³⁵ The term stems from the German word Rechtsdogmatik.³⁶ Peczenik writes that compared to judicial method legal dogmatics is less bound to a given case and more abstract.³⁷ Peczenik's notions of the origin of 'legal dogmatics' is fascinating to someone who has a bachelor of science in law from a Swedish university where 'legal dogmatics' as methodology for thesis and essay writing was a given. It is therefore likely that the choice of methodology for the thesis also is somewhat rooted in the authors origin and previous writing experiences in the academic field of law. This might at first glance seem to be something negative and a choice of comfort rather than conscious however the author would argue that this is not the case. It is highly advantageous to choose a methodology one is already familiar with as it will make the application of greater quality.

This Continental European 'legal dogmatics' methodology that Peczenik writes of can be likened to, and further developed by, the one that is described by Jan Kleineman in the book

³¹ Aleksander Peczenik, Francisco J Laporta & Fredrik Schauer, *On Law and Reason [electronic resource]*, 2., Springer Science + Business Media B.V, Dordrecht, 2008, 13 [hereinafter 'Peczenik'].

³² In Swedish 'rättsdogmatisk metod', arguably the most commonly used method by Swedish legal scholars.

³³ Peczenik, 13.

³⁴ Peczenik, 13.

³⁵ Peczenik, 13.

³⁶ Peczenik, 13.

³⁷ Peczenik, 13.

‘Juridisk Metodlära’. Kleineman writes that describing legal dogmatics gives rise to some complex theoretic questions that make the actual description of legal dogmatics as a method seem rather vague and unclear and sometimes even contradictory and that it is therefore easier to describe the process of using the method.³⁸ The purpose of the legal dogmatics is often said to be to reconstruct a legal norm or solving a legal problem by applying a legal norm to it. The starting point when using legal dogmatics as a method is to look for the solution in the legal sources such as law, practice or legal doctrine.³⁹ Legal dogmatics almost always starts with a concrete problem formulation that has been analyzed extensively to find if it is correctly formed and relevant.⁴⁰ This is the first step for this thesis, to clarify the application of Article 15(c) of the Qualification Directive as it is applied by the relevant authorities today.

Regarding using the result of applying legal dogmatics to criticize what would generally be seen as more authoritative legal sources Kleineman writes that highlighting inconsistencies in the administration of justice is an important task for the scholarly legal dogma.⁴¹ This can be called ‘critically oriented legal dogma’ which is the step that follows after the reconstruction of the problem formulation has been finished.⁴² During this step the doctrine will review how the ‘solution’ works, its consequences and what other alternatives there could have been to solve the problem.⁴³ It is important through legal dogmatics to not only clarify the current legal position but also to criticize said position to continue the development of the law. Kleineman also highlights the important fact that without any formal authority legal doctrine can only be a legitimate heavyweight as a legal source through its own intrinsic legitimacy.⁴⁴ This is an important aspect of using legal dogmatics as a method for this thesis, that there is room for criticisms and discussion of the law and how it might be problematic or, even if deemed to be non-problematic, how it can be improved.

A last important aspect of legal dogmatics is the legal dogmatic analysis. Legal dogmatics as a method is often used to analyze which arguments for or against the solution to a certain problem that are ‘allowed’. Traditionally the types of argumentation have been split into two different parts, *de lege lata* which aims to describe the current legal position in a certain area of the law and *de lege ferenda* which aims to propose solutions to problems that as of the current

³⁸ Jan Kleineman in Maria Nääv & Mauro Zamboni (ed.), *Juridisk metodlära*, Second Edition, Studentlitteratur, Lund, 2018 (translation made by the author), 21 [hereinafter ‘Kleineman’]

³⁹ Kleineman, 21.

⁴⁰ Kleineman, 23.

⁴¹ Kleineman, 35.

⁴² Kleineman, 35.

⁴³ Kleineman, 35.

⁴⁴ Kleineman, 35.

legal situation remains unsolved.⁴⁵ This thesis will make both *de lege lata* and *de lege ferenda* arguments at different points in the process. It will mainly make use of the sub-section of legal dogmatics that Kleineman coins as ‘critically oriented legal dogma’ in its examination and discussion about Article 15(c) and on a broader scale also the CEAS.

1.4 Theoretical Framework

The theoretical framework that will be used in this thesis is what will be called ‘rule of law theory’. This section is divided into three different sub-sections that will explain the different aspects of the concept ‘rule of law’ and why a framework based on said concept makes up a fitting framework for this thesis. Firstly, in section 1.4.1 the concept of the ‘rule of law’ in international law will be accounted for and defined so as to provide for a basis for what the concept really is and its legal standing and value. The second section, 1.4.2, will examine the ‘rule of law’ in the specific area of EU law as this is the sphere of law in which this thesis is primarily located, and it is thus important to further establish the concept in this specific setting after having discussed the wider international one. The final section, 1.4.3, serves to connect the accounted for definitions of ‘rule of law’ and its connection to the principle of fairness and specifically procedural fairness in EU law.

1.4.1 The Rule of Law & Legal Certainty in International Law

James Maxeiner claims that the rule of law promises legal certainty at its core.⁴⁶ This is a bold statement to make as the ‘rule of law’ does not necessarily have a set definition and can be seen to contain a combination of various different elements. However, one would still have a hard time finding someone to refute Maxeiner’s claims in a convincing way. This is because the fundamental idea of the ‘rule of law’ is a democratic state with tools to ensure that the individual is spared from arbitrary intervention from state power. The general principle of European legal systems regarding legal certainty can be found in a quote from a case from the ECtHR in which it stated that the ECtHR must ‘ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein’ and that legal certainty being one of such general principles requires that domestic law ‘be clearly defined and that the law itself be foreseeable in its application’ this requirement stems from the

⁴⁵ Kleineman, 36.

⁴⁶ James R. Maxeiner, ‘Some Realism about Legal Certainty in the Globalization of the Rule of Law’, (2008) 31 Houston Journal of International Law 27, 30.

requirement of lawfulness from the Convention that requires that ‘all law be sufficiently precise to allow the person ... to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail’.⁴⁷ While this quote does indeed come from the ECtHR and not from the CJEU this general definition of legal certainty can be said to have general application and most certainly apply to EU law as well.

Antje Ellermann writes that the concept of the rule of law primarily seeks to emphasize a society that is rule-based for the interest of predictability and legal certainty.⁴⁸ Here once again an author claims that the principle of legal certainty is at the core of the ‘rule of law’, something that will be treated as a truism in this thesis. Further Ellermann writes that legal certainty is something that is fundamental to the rule of law.⁴⁹ While this might seem only to repeat what has been previously stated about the principle of legal certainty being a core principle calling it ‘fundamental’ is taking it a step further. This puts further weight to the argument that legal certainty is an aspect of the ‘rule of law’ and even a fundamental one, without legal certainty, no ‘rule of law’. Ellermann also argues for the principle of legal certainty’s high position as a legal norm by stating that it is among a few legal concepts that has been recognized both by the CJEU and the ECtHR and also is recognized in all European legal systems.⁵⁰ This is important to note as a claim that something is a general norm of international law is a bold statement that requires plenty of time and development, however this is something that is true for the principle of legal certainty. What will now follow is a more in depth look at how ‘rule of law’ and legal certainty is established in the EU context and what the CJEU has said on the matter.

1.4.2 The Rule of Law & Legal Certainty in the European Union

In the section above the concept of the ‘rule of law’ was discussed in the international sphere for the purpose of providing an understanding of the ‘rule of law’ as a concept in international law in general. For this thesis however, and in the usage of the ‘rule of law theory’ as a theoretical framework, it is vital to also establish the ‘rule of law’ in the EU context. One could argue that ‘rule of law’ is something that is central in most European legal cultures and a concept that is a cornerstone of the construction of the European Union and this section aims to reinforce such an argument. Article 2 of the *Consolidated version of the Treaty on European Union* (the TEU) states that ‘the Union is founded on values of respect for ... the rule of law. These values

⁴⁷ *Korchuganova v Russia*, no. 75039/01, § 47, 1 June 2006.

⁴⁸ Antje Ellermann, ‘The rule of Law and the Right to Stay: The Moral Claims of Undocumented Migrants’, (2014) 42 *Politics & Society* 293, 299 [hereinafter ‘Ellermann’]

⁴⁹ Ellermann, 299.

⁵⁰ Ellermann, 299.

are common to the Member States ...⁵¹ Further does Article 21 2(b) of the TEU state the EU shall work for a high degree of cooperation in all fields of international relations and define and pursue common policies and actions to consolidate and support the rule of law.⁵² Through these provisions in such an important legal document as the TEU one can see that ‘rule of law’ is something that is an important goal for the EU and even go as far as to say that it is a foundational principle for the EU. This does however not answer the questions of what the ‘rule of law’ that the TEU mentions actually entails

As can be seen from the above section on the ‘rule of law’ in international law the concept has several different parts and it can vary between legal systems. In the EU one aspect of the ‘rule of law’ is legal certainty and the doctrine of legitimate expectations or foreseeability of the law and this is why this theory is well suited for this thesis. It is well suited because this thesis aims to discuss the application of Article 15(c) and divergencies in interpretation between EU MS which in turn leads to less legal certainty and no foreseeability for the applicant.

At the EU level the principle of legal certainty and legitimate expectations provides that ‘those subject to the law must know what the law is so as to plan their action accordingly’.⁵³ Legal certainty is a central requirement for the rule of law and has been protected by the CJEU through its case law since 1961⁵⁴ and in preliminary ruling *Heinrich* it gave the following definition,

... the principle of legal certainty requires that Community rules enable those concerned to know precisely the extent of the obligations which are imposed on them. Individuals must be able to ascertain unequivocally what their rights and obligations are and take steps accordingly.⁵⁵

There are two dimensions to the principle of legal certainty, one which is the prohibition of retroactivity and the other which is clarity of the law and the latter one is the one that is relevant for the issues raised in this thesis. The obligation for clarity is also made up of two different

⁵¹ European Union, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01, Article 2 [hereinafter TEU].

⁵² TEU, Article 21 2(b).

⁵³ Hysni Ahmetaj, ‘Legal Certainty and Legitimate Expectation in the EU Law’, *Interdisciplinary Journal of Research and Development*, 1 (2014), 20.

⁵⁴ See, *Société nouvelle des usines de Pontlieue - Aciéries du Temple (S.N.U.P.A.T.) v High Authority of the European Coal and Steel Community*, C-42/59 and C-45/59, European Union: Court of Justice of the European Union, 22 March 1961, 87.

⁵⁵ *Gottfried Heinrich v Unabhängiger Verwaltungssenat im Land Niederösterreich*, C-345/06, European Union: Court of Justice of the European Union, 10 March 2009, § 44.

aspects, the first one is accessibility of the law and the second the clarity of the actual text and the foreseeability of its application.⁵⁶ This latter aspect is what will serve as the main focus for the thesis when examining the law as it works today, it will question the foreseeability for individuals when Article 15(c) of the Qualification Directive is applicable.

1.4.3 The Rule of Law & Procedural Fairness

After discussions on the ‘rule of law’, and more specifically legal certainty as a core element of the ‘rule of law’, in general international law and specifically in EU law what is lastly needed to tie up this theoretical framework is some notes on the connection between the ‘rule of law’ and human rights. More pointedly the connection between the ‘rule of law’ and procedural fairness to connect the need for harmonization between EU MS to the ‘rule of law’ and then further what effects this has on applicants’ human rights.

In an article titled ‘Understanding the International Rule of Law as a Commitment to Procedural Fairness’ Kevin Burke makes the connection between the ‘rule of law’ and procedural fairness clear in an informative way.⁵⁷ It is of importance to note that when applying the article in this context that said article is written in 2009 and from an American perspective, however the points that Burke makes are, according to the author, still relevant to shape this theoretical framework. Firstly, Burke argues that to direct the discussion on the ‘rule of law’ toward achievement and not ‘just slogans’ the discourse on the subject needs to change to become focused on guaranteeing procedural fairness as well as measuring it.⁵⁸ This way of thinking heavily highlights the place for procedural fairness in the concept of the ‘rule of law’ as it is in big part based on the populations perception of the justice system. Burke makes this point further by stating that ‘[i]rrational and inaccurate public discourse about courts undermines public trust and confidence’.⁵⁹ The undermining of public trust is of relevance in the discussion this thesis aims to lead, where divergencies in recognition rates for protection between EU MS causes the discourse to shift. Having the CEAS for the purposes of one united EU with the same set of rules for international protection yet having significant divergencies in actual protection granted is something that will cause such an undermining of public confidence and trust that Burke writes of.

⁵⁶ See e.g. *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*.C-325/85, European Union: Court of Justice of the European Union, 13 November 1990.

⁵⁷ Kevin Burke, ‘Understanding the International Rule of Law as a Commitment to Procedural Fairness’, (2009) 18 Minnesota Journal of International Law 357 [hereinafter ‘Burke’].

⁵⁸ Burke, 357-358.

⁵⁹ Burke, 358.

In his article Burke points to that when analyzing practices of courts, it is mostly done by overlooking whether outcomes in cases were ‘right’ or ‘fair’ rather than how procedural matters were handled for the enhancement of perception of fairness.⁶⁰ Perception of fairness is a key element when dealing with the law and especially complex law such as EU law. Having the law work the a way that applicant for international protection will need to understand how the law was applied in her case and why she was rejected while her friend fleeing the exact same situation was granted protection in another EU MS is detrimental to the ‘rule of law’ of the EU which this thesis aims to show. Burke further writes that ‘people value fair procedures because they are perceived to produce fair outcomes’⁶¹, which then in turn through logic would mean that when people perceive the rejection that they received through decision-making as procedurally unfair it will also perceive the outcome as unfair regardless of whether this is the case or not. On a note in the same vein Burke also mentions how procedural fairness is of importance because people are more inclined to accept a rejection if they feel like the decision-making process was procedurally fair.⁶² This point can be used to further establish the importance of procedural fairness, and the perception thereof, in all aspects and situations of decision-making. One last note that Burke makes that is important to note is that the difference between the decision-maker and the public may be problematic as perception of procedural fairness have a great impact on compliance for the public and that his is an inherent discrepancy between decision-makers and the recipients of decisions.⁶³ Such a discrepancy is relevant to make note of in the furthering of reading this thesis, that for a law to function well in symbiosis with the ‘rule of law’ more factors are important than that decisions made using said law are materially ‘fair’.

In September of 2017 the Migration Studies Delegation (DELMi), an independent committee under the Swedish Ministry of Justice, published a report on reforming the CEAS in which the position of the principle of fairness in EU law is discussed. The report, written by Bernd Parusel and Jan Schneider, argues that the importance for harmonization of asylum decision-making, an issue that is situated at the core of this thesis, stems from the principle of ‘fairness’ and that ‘asylum seekers should have the same – or at least very similar – chances of receiving protection irrespective of where in the EU they arrive and lodge their claims’.⁶⁴ The principle of fairness

⁶⁰ Burke, 359.

⁶¹ Burke, 368.

⁶² Burke, 368.

⁶³ Burke, 369.

⁶⁴ Parusel, Bernd & Schneider, Jan, *Reforming the common European asylum system: responsibility-sharing and the harmonisation of asylum outcomes*, Delmi, Stockholm, 2017, 33 [hereinafter ‘DELMi Report’].

exists in the broader sense in the first point of Article 79 of the *Consolidated Version of the Treaty of the Functioning of the European Union* (TFEU) which states that '[t]he Union shall develop a common immigration policy aimed at ensuring, at all stages, ... fair treatment of third-country nationals residing legally in Member States'.⁶⁵ The aim of the provision is therefore to establish a policy that is rights-based and that satisfies the essential requirements of justice when dealing with the treatment of foreigners.⁶⁶ It is important to note that a mention of fairness in this context exists in such an authoritative document as the TFEU, despite it being broad and without further definition of 'fair'. In the report Parusel and Schneider writes that while there has been no specification made as to the definition of 'legally residing' in Article 79(1) of the TFEU it should be interpreted as including asylum-seekers, at least when their request for protection has been deemed admissible.⁶⁷ It is also mentioned in the Tampere Conclusions from 1999 that with the creation of the CEAS a fair and efficient asylum procedure is envisaged.⁶⁸

Fairness is thus a term that has been used in relation to EU MS treatment of third-country nationals and asylum procedures and would seem to be enough to establish that there exists a principle of fairness in this context. Parusel and Schneider further points out that fairness indeed can have different meanings in different contexts and that in decision-making one can speak of procedural fairness and of substantive fairness.⁶⁹ In the context of asylum substantive fairness means that decisions in asylum matters have their basis in valid grounds and reasons that is in line with the purpose of the law.⁷⁰ Procedural fairness, on the other hand, is fairness in the sense that the applicant for asylum can expect or 'count on' a similar set of standards and equal outcomes no matter in which EU MS she applies for asylum.⁷¹ This is the same type of fairness as Burke wrote about and the one that is vital for this thesis. The discussion on substantive fairness is indeed also an interesting one, and even one that is highly relevant in the context of today's world, however the focus for this thesis is the variation of fairness that Parusel and Schneider, and Burke, calls 'procedural' fairness. The search for procedural fairness poses the question if an applicant's chance to receive protection is equal, or at the very least comparable,

⁶⁵ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/07, Article 79(1).

⁶⁶ DELMI Report, 37.

⁶⁷ DELMI Report, 37.

⁶⁸ European Union: Council of the European Union, *Presidency Conclusions, Tampere European Council*, 15-16 October 1999, 16 October 1999, § 14.

⁶⁹ DELMI Report, 37.

⁷⁰ DELMI Report, 37.

⁷¹ DELMI Report, 37.

in every EU MS.⁷² Parusel and Schneider argues that procedural fairness of that kind only is achievable when all EU MS use the same definitions and criteria when assessing an application for international protection and thus to reach such fairness requires harmonization, both of the relevant criterions and definitions but also their practical implementation.⁷³

Samantha Velluti writes that with the increased number of displaced people, migrants and asylum seekers in the EU there has been a ‘refocused public discourse on the Arendtian question of ‘who has the right to have rights’.⁷⁴ In particular she points to the questions of to what extent the asylum seeker has an effective standing to elicit the rights that is provided under the European Charter of Fundamental Rights and in the ECHR.⁷⁵ This clash between fundamental rights and the CEAS refugee policies that veer more and more toward restriction is something that will be a factor in the discussion part of this thesis. Velluti also writes that the European Charter of Fundamental Rights is having a significant impact on the development of the CEAS, especially since it became legally binding, and on asylum seekers’ human rights.⁷⁶ This is true to some extent, and not as true in others. The European Charter of Fundamental Rights and its standing in asylum measures will be a point of discussion as well. Steve Peers writes that ‘the issues of immigration and asylum are usually linked closely to human rights law, and the EU’s legal order is no exception’.⁷⁷

1.5 Delimitations

In the writing of this thesis three delimitations has been made to narrow the scope of the thesis and thus to ensure it maintains a level of nuance that can easily be lost when dealing with too broad of a topic or research question. Firstly, a choice has been made to not deal explicitly with different EU MS national law or look at specific decisions from national level but rather highlight the lack of harmonization, or cohesive decision-making, through previous writings and research on the area. Closely connected to this first delimitation is the one of not collecting any data or try to create statistics over decisions from national level but rather use already pre-existing reports and use the data in those for analysis. This choice has been made due to a

⁷² DELMI Report, 37.

⁷³ DELMI Report, 38.

⁷⁴ Morano-Foadi, Sonia & Vickers, Lucy (red.), *Fundamental rights in the EU: a matter for two courts*, Hart, Oxford, 2015, 139 [hereinafter ‘Morano-Foadi’].

⁷⁵ Morano-Foadi, 139.

⁷⁶ Morano-Foadi, 156.

⁷⁷ Steve Peers ‘Immigration, asylum and human rights in the European Union’, in Sionaidh Douglas-Scott & Nicholas Hatzis (eds.), *Research handbook on EU law and human rights [electronic resource]*, Northampton, MA: Edward Elgar Publishing Limited, 439.

combination of time constraints and lack of resources to conduct any kind of statistical research, both due to a language barrier in many cases and difficulties in availability.

The third and final delimitation that has been made is to focus on EU law on migration and asylum as it exists when writing this thesis, the spring of 2019, and not focus on the major changes to the CEAS that can be seen on the horizon.⁷⁸ A brief discussion will be had on the proposal for a change to make the Qualification Directive into a regulation as this is of specific importance to this thesis' topic but otherwise the CEAS reform will not feature in this thesis and the analysis and discussion, both in its *de lege lata* and *de lege ferenda* elements, will only discuss the law as it is today. This might give any analysis that is future-looking some sense of unrealism however the opposite, attempting to predict the result of the reform, would be equally, if not more, unrealistic.

1.6 Sources & Materials

The primary material will be EU law and practice such as the two preliminary rulings from the CJEU that set out the application of Article 15(c). Also, the Qualification Directive as a whole and other legal sources as well as practice guides and other materials from for example the European Asylum Support Office (EASO). The secondary literature will be mostly made up of articles that has been written on the topic of subsidiary protection and the definition of internal armed conflict and also other relevant doctrine on the topic of EU Migrations Law and Policy, for example publications by the United Nations High Commissioner for Refugees (UNHCR). Some materials used in the thesis will be in the author's native language Swedish and in these cases the translation to English will be made by the author, something that will always be clarified in the footnotes.

⁷⁸ For a general idea of what the CEAS reform might entail see, European Union: European Commission, *Communication from the Commission to the European Parliament and the Council Towards a Reform of the Common European Asylum System and Enhancing Legal Avenues to Europe*, 6 April 2016, COM/2016/0197 final.

2 The EU Subsidiary Protection Regime & Article 15(c)

2.1 The Qualification Directive

As was mentioned in at the beginning of this thesis it is the Qualification Directive that regulates subsidiary protection within the EU. While this thesis main focus will be Article 15(c) in particular it is important for a full understanding of the topic to introduce the Qualification Directive, its history and its legal scope before delving deeper into the details. What will follow is therefore a shorter chapter divided into two sections. Firstly, section 2.1.1 will discuss the drafting and entry into force of the Qualification Directive to provide context for why it was created and what legal gap it was at EU level that it was intended to fill and what it is as legal document. Then section 2.1.2 will be a brief notion about the proposal with the CEAS reform for a Qualification Regulation to replace the Qualification Directive.

2.1.1 The Drafting & Entry into Force

The Qualification Directive was the first supranational legal instrument to provide for a specific form of protection for individuals fleeing armed conflict when it was first adopted in 2004.⁷⁹ This means that it was an influential piece of legislation as it provided for an entirely new category of international protection at the supranational level other than the refugee status criteria from the 1951 Refugee Convention. However, before the Qualification Directive several EU Member States already had some form of protection of this kind in their national law but as this was not a result of a binding obligation on the regional level the national provisions and practice differed extensively.⁸⁰ This further reinforces the fact that the Qualification Directive was a greatly important piece of legislation even for harmonization's sake. Madeline Garlick writes that the Qualification Directive represents an innovative and important element to the CEAS in that it sets binding common legal standards for EU Member States in relation to, among others matters, the treatment of refugees and asylum-seekers, protection criteria and procedures for determining asylum claims.⁸¹ The Qualification Directive does indeed contain several different criteria for protection and the subsidiary protection regime

⁷⁹ Madeline Garlick 'Protection in the European Union for People Fleeing Indiscriminate Violence in Armed Conflict: Article 15(c)' in Türk, Volker, Edwards, Alice & Wouters, Cornelis (eds.), *In flight from conflict and violence: UNHCR's consultations on refugee status and other forms of international protection*, Cambridge University Press, Cambridge, 2017, 241 [hereinafter 'Garlick'].

⁸⁰ Garlick, 241–242.

⁸¹ Garlick, 242.

is but one of several new elements of EU law that was adopted with the Qualification Directive. The definition of ‘subsidiary protection’ can be found in Article 2(g) of the Qualification Directive which reads that ‘‘subsidiary protection status’ means the recognition by a Member State of a third-country national or a stateless person as a person eligible for subsidiary protection’ which is someone who is fleeing ‘serious harm’ as defined in Article 15. Article 15 then goes on to define three forms of ‘serious harm’ that warrants subsidiary protection, (a) the death penalty or execution, (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin and (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Jane McAdam writes in an article written not long after the entry into force of the Qualification Directive that this was the first supranational instrument that sought to harmonize ‘complementary protection’, which in EU terms instead became ‘subsidiary protection’.⁸² Just as written above it is important to note that while the Qualification Directive was innovative and offered a new level of international protection it was, and is, also a tool for harmonization between EU MS. McAdam writes that ‘complementary protection has a long history and that States have recognized that not everyone fits into premade definitions such as the one in the 1951 Refugee Convention.’⁸³ Context is important when dealing with international asylum and refugee law and the understanding that the international protection regime needs to be fluid and able to be broadened as new ‘types’ of refugees emerge due to the situation in the world today. Before ‘subsidiary protection’ there were different concepts used by the EU MS such as ‘de facto refugees’, ‘B status’ and ‘humanitarian asylum’, however what these different terms entailed on a more detailed level varied significantly.⁸⁴

The Qualification Directive was formulated in 2001 and formally adopted on April 29th, 2004, it was a long process as the first proposal came in 1997.⁸⁵ This means that the Qualification Directive was preceded by several years of discussions. In a summary made in February of 1999 it was concluded that all EU MS had some form of subsidiary protection regime that was applied together with the protection provided by Article 3 of the ECHR but that the protection’s reach varied between states to a great degree.⁸⁶ An interesting thing to note

⁸² Jane McAdam, ‘The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime’, (2005) 17 *International Journal of Refugee Law* 461, 461 [hereinafter ‘McAdam’].

⁸³ McAdam, 461.

⁸⁴ McAdam, 461-462.

⁸⁵ McAdam, 462-463.

⁸⁶ McAdam, 463.

indeed as it points even more toward that the Qualification Directive was made as a tool for harmonization rather than the need for a new form of international protection as such already existed in all EU MS. It was also noted, leading up to the creation of the Qualification Directive, that only four MS granted refugee status in accordance with the 1951 Refugee Convention in the majority of cases and in the rest there was more recognition for the different subsidiary protection regimes the different MS employed.⁸⁷ However, McAdam is quick to point out that this does not necessarily mean that there are more individuals in need of subsidiary protection but rather that some MS interpret the criteria for refugee status narrowly so as to provide international protection under the subsidiary protection regime rather than granting refugee status.⁸⁸ It is an interesting factor, the interpretation of what kind of protection should be granted in a specific case, because as McAdam points out there is also the opportunity to be narrow in the interpretation of granting refugee status, the problem of too much divergencies in decision-making is not a problem isolated to cases of subsidiary protection.

2.1.2 A Qualification Regulation?

A draft proposal for a Qualification Regulation was submitted in July of 2016.⁸⁹ The proposal lists in its objectives that while the current Qualification Directive has contributed to a certain level of approximation of the rules in the EU MS the recognition rates still vary.⁹⁰ This is something that has already been seen in the examination in this thesis and something that will be further highlighted below in chapter 3. The proposal further mentions the problem that with diverging recognition rates it creates incentives for applicants to apply for asylum in certain EU MS where the recognition rates are perceived to be higher.⁹¹ The proposal states that the reason for proposing the change from a Qualification Directive to a Qualification Regulation is one of a need for harmonization and that because regulations have direct applicability it in itself will contribute to further convergence.⁹² In the proposal Article 15(c) has turned into Article 16(c), however the wording of the article stays completely the same, something that is curious due to

⁸⁷ McAdam, 464.

⁸⁸ McAdam, 464.

⁸⁹ European Union: European Commission, *Proposal for a Regulation of the European Parliament and of the Council on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection and for the Content of the Protection Granted and amending Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals who are Long-Term Residents*, 13 July 2016, COM/2016/466 final [hereinafter 'Qualification Regulation Proposal']

⁹⁰ Qualification Regulation Proposal, 3-4.

⁹¹ Qualification Regulation Proposal, 4.

⁹² Qualification Regulation Proposal, 4.

the difficulties of interpreting the article.⁹³

2.2 Article 15(c)

The two other definitions of serious harm that is defined in Article 15 are derived from human rights instruments that bind EU MS, most prominently the ECHR.⁹⁴ Garlick writes that contrasting the two foregoing provisions of Article 15 is Article 15(c) that contains a new concept that is not linked to EU MS prior international or regional obligations and extended the categories of people that are eligible for protection under EU law.⁹⁵ She further points out that according to the drafting history of the Qualification Directive the European Commission proposed Article 15(c) as a means to broaden the range of people eligible for protection to go beyond what the 1951 Refugee Convention provides.⁹⁶ It is apparent, according to Garlick, that the original goal the European Commission had with Article 15(c) was to fill a gap in the EU protection framework which was protection for people fleeing indiscriminate violence in armed conflicts who might not fulfill the criteria for refugee status.⁹⁷ This need for a wider protection framework had already been recognized in other regional instruments⁹⁸ at the time and the adoption of a Subsidiary Protection Regime can thus, according to Garlick, be seen as the EU's move to bring the European Protection Framework in line with the international development of refugee law.⁹⁹ What will now follow is the recount and discussion of two important decision from the CJEU regarding Article 15(c) and its interpretation. Firstly section 2.2.1 will discuss the judgment in *Elgafaji* and how it set the scope for Article 15(c) in 2009 and then section 2.2.2 will discuss the newer *Diakité* judgment from 2014 which decided the definition of 'internal armed conflict' in the context of Article 15(c) and how this changed the application.

⁹³ Qualification Regulation Proposal, 40.

⁹⁴ Garlick, 243.

⁹⁵ Garlick, 243.

⁹⁶ Garlick, 243.

⁹⁷ Garlick, 244.

⁹⁸ See for example, for Latin America Article III (3) of the 1984 Cartagena Declaration on Refugees (adopted 22 November 1984), Organisation of American States which reads, '... in view of the experience gained from the massive flows of refugees in the Central American area, it is necessary to consider enlarging the concept of a refugee ... in addition to containing the elements of the 1951 Convention and the 1967 protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence ...' or for Africa in the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force 20 June 1974), 1001 UNTS 45 where Article 1(2) reads, '[t]he term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events serious disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'.

⁹⁹ Garlick, 244.

2.2.1 *Elgafaji* Setting the Scope

The scope of Article 15(c) of the Qualification Directive was clarified through case law for the first time through the preliminary ruling of *Elgafaji v. Staatssecretaris van Justitie (Elgafaji)* from 2009 in which the Dutch Migration Authorities requested a preliminary ruling by the CJEU in a case regarding the asylum application of two Iraqi nationals. The questions that was asked to the court were,

(1) Is Article 15(c) of [the Directive] to be interpreted as offering protection only in a situation in which Article 3 of the [ECHR], as interpreted in the case-law of the European Court of Human Rights, also has a bearing, or does Article 15(c), in comparison with Article 3 of the [ECHR], offer supplementary protection?

(2) If Article 15(c) of the Directive, in comparison with Article 3 of the [ECHR], offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15(c) of the Directive, read in conjunction with Article 2(f)¹⁰⁰ thereof?¹⁰¹

What can be gathered from these questions is that the scope of Article 15(c) was rather unclear until this point as it was not yet established if the protection from Article 15(c) was offering a different and perhaps more far-reaching kind of protection compared to the ECHR and Articles 15(a) and (b). This was however answered swiftly as the first thing that the CJEU noted was that while the Dutch Authorities sought guidance on the protection that is guaranteed under Article 15(c) compared to Article 3 of the ECHR, which can be seen from the questions quoted above, it is Article 15(b) of the Qualification Directive that is the corresponding article to Article 3 of the ECHR.¹⁰² Further the CJEU clarified that the content of Article 15(c) is different from Article 3 of the ECHR and an interpretation of it must be carried out independently.¹⁰³

¹⁰⁰ Since the judgment in *Elgafaji* the Qualification Directive has been recast and what was Article 2(e) at the time of writing the judgment text is not Article 2(f) and for clarity purposes this will be changed in the recount of the judgment.

¹⁰¹ *Elgafaji v. Staatssecretaris van Justitie*, C-465/07, European Union: Court of Justice of the European Union, 17 February 2009, § 26 [hereinafter *Elgafaji*].

¹⁰² *Elgafaji*, §§ 27-28.

¹⁰³ *Elgafaji*, § 28.

Therefore the CJEU concluded that the questions asked by the Dutch Migration Authorities actually concerned the interpretation of Article 15(c) in conjunction with Article 2(f) of the Qualification Directive.¹⁰⁴

The CJEU then stated, before moving on to actually answering the questions, that, in essence, the question before it was whether Article 15(c) in conjunction with Article 2(f) shall be interpreted as meaning that the existence of a serious and individual threat to the life or person of the applicant for subsidiary protection is conditional upon that the applicant adduces evidence that she is specifically targeted by reason of factors particular to her circumstances. Essentially it was for the CJEU to now establish whether the security situation in a country of origin of an asylum seeker alone could ever be enough to be granted protection under the EU International Protection Framework. Further the question would also be, if the answer to the first question was negative, what the criterion is for the basis of which the existence of such a threat could be considered to be established.¹⁰⁵ This is something that the CJEU did indeed answer in this ruling, as will be accounted for shortly, however the answer is seen as substandard by many scholars that have since critiqued Article 15(c) as a whole and also specifically the *Elgafaji* judgment, something that this thesis will discuss at a later stage.¹⁰⁶

The CJEU started its assessment with a comparison of the three types of ‘serious harm’ that is defined in Article 15 and thus constitutes the qualification for subsidiary protection in cases where substantial grounds have been shown for believing that the applicant faces a real risk of such harm upon return to the relevant country in accordance with Article 2(f).¹⁰⁷ The terms ‘execution’, ‘death penalty’ and ‘torture or inhuman or degrading treatment or punishment of an applicant in the country of origin’ that are used in Articles 15(a) and (b) cover the situations of applicant’s that are being specifically exposed to a particular type of harm whereas the harm that is defined in Article 15(c) covers a more general risk.¹⁰⁸ There are no references to a specific act of violence but rather a more general ‘threat ... to a civilian’s life or person’. Such a threat shall also be inherent in a situation of international or internal armed conflict and the violence that gives rise to such a threat is described as ‘indiscriminate’. The term ‘indiscriminate’ implies that it may extend to people irrespective of their personal circumstances.¹⁰⁹

¹⁰⁴ *Elgafaji*, § 29.

¹⁰⁵ *Elgafaji*, § 30.

¹⁰⁶ See section 3.3.

¹⁰⁷ *Elgafaji*, § 31.

¹⁰⁸ *Elgafaji*, §§ 32-33.

¹⁰⁹ *Elgafaji*, § 34.

In this context the word ‘individual’ in the provision has to be understood as covering harms to civilians regardless of their identity when the degree of indiscriminate violence that characterizes the armed conflict reaches a certain level. It shall be assessed by the competent authorities in the member states if the indiscriminate violence reaches such a high level that substantial grounds are shown for believing that a civilian, if returned to the relevant country or region, would, solely based on his or her presence on the territory face a risk of being subject to the serious threat that is referred to in Article 15(c).¹¹⁰ This is a paragraph of the ruling that is both revolutionary for how it expanded the EU Protection Framework and notorious for how poorly it set out guidelines for the MS to make an evaluation, or measurement, of the indiscriminate violence. The CJEU also noted that this interpretation would likely ensure an own field of interpretation for Article 15(c) and that such an interpretation would not be invalidated by the words in recital 26 of the preamble which states that ‘risks to which a population of a country or a section of the population is generally exposed to do normally not create in themselves an individual threat which would qualify as serious harm’.¹¹¹ The recital implies that an objective finding of a risk that is linked to the general situation in a country alone is not, as a rule, sufficient to establish that the conditions of Article 15(c) are met in respect of a specific individual. However, the word ‘normally’ still allows for the possibility of exceptional situations which would be characterized by such a high degree of risk that substantial grounds would be shown for believing that the individual would be subject individually to the risk in question.¹¹² What is notable throughout the judgment is that while the answer to the questions seem to be in favor of the asylum seeker it is also pointed to several ways in which this can only be the case in exceptional circumstances and that the level of indiscriminate violence needed is high.

The exceptional nature of the situation is also confirmed by the fact that the provision is subsidiary and that by the logic of Article 15 and that the harm in Article 15 (a) and (b) requires a clear degree of individualization. Collective factors does play a significant role in the application of Article 15(c) because of the fact that the individual concerned does belong, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, however the provision must still be subject to a coherent interpretation in relation to the other paragraphs and thus it is required to be interpreted with

¹¹⁰ *Elgafaji*, § 35.

¹¹¹ *Elgafaji*, § 36.

¹¹² *Elgafaji*, § 37.

close reference to individualization.¹¹³ Throughout the ruling it would seem, if one is allowed to be cynical, that the CJEU is somewhat unwilling to come to this conclusion and continuously puts up unreasonably difficult roadblocks to maneuver before it would ever be used. In the ruling the CJEU also stated that in regards to those facts, the more the applicant is able to show that he or she is specifically affected by reasons of factors particular to his or her personal circumstances, the lower the level of indiscriminate violence required for him or her to be eligible for subsidiary protection.¹¹⁴ This is something that has been coined the ‘sliding scale’ and is used in all risk assessments that are made by the MS of the EU.

The judgment in *Elgafaji* was the first judgment to set out the scope of Article 15(c). It was a landmark judgment and, in a system where being able to prove a concrete and individual threat is the norm the finding that in exceptional cases no individual threat is needed to be granted international protection was extraordinary. However, and as already mentioned, this judgment was not without critics, something that will be returned to at a later stage of this thesis.

2.2.2 A New Definition of ‘Internal Armed Conflict’ in *Diakité*

Another relevant judgment from the CJEU regarding Article 15(c) was made in the preliminary ruling *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides (Diakité)* from 2014. This set the definition for ‘internal armed conflict’ in the scope of Article 15(c) and changed it significantly from the definition in international humanitarian law, one which many MS had previously used in their assessments. The Belgian Migration Authorities asked the CJEU the following questions,

Must Article 15(c) of [Directive 2004/83] be interpreted as meaning that that provision offers protection only in a situation of ‘internal armed conflict’ as interpreted by international humanitarian law, and, in particular, by reference to Common Article 3 of the four Geneva Conventions?

If the concept of ‘internal armed conflict’ referred to in Article 15(c) of [Directive 2004/83] is to be given an interpretation independent of Common

¹¹³ *Elgafaji*, § 38.

¹¹⁴ *Elgafaji*, § 39.

Article 3 of the four Geneva Conventions ..., what, in that case, are the criteria for determining whether such an ‘internal armed conflict’ exists?¹¹⁵

The CJEU stated that the question asked was in essence whether the assessment of if an internal armed conflict exists shall be carried out on the basis on the criteria that is established by international humanitarian law and also, if the answer is negative, which criteria shall be used when assessing whether such a conflict exists for the purposes of determining whether a third country national or a stateless person is eligible for subsidiary protection.¹¹⁶ The CJEU firstly noted that the EU legislature used the phrase ‘international or internal armed conflict’ as opposed to the distinction between ‘international armed conflict’ and ‘armed conflict not of an international character’ which are the concepts used in international humanitarian law.¹¹⁷ International humanitarian law is designed to provide protection for civilian populations that are in a conflict zone and doing so by limiting the effects of war on property and persons, by contrast the Qualification Directive’s Article 2(f) read in conjunction with Article 15(c) provides for international protection for civilian’s that are outside both the conflict zone and the territory of the conflicting parties. Thus, the definitions of ‘armed conflict’ in international humanitarian law are not designed to identify the same situations that the Qualification Directive aims to cover.¹¹⁸ International humanitarian law and the subsidiary protection regime pursue different aims and establish distinct protection mechanisms.¹¹⁹ The CJEU then concluded that accordingly it is not possible to make eligibility for subsidiary protection conditional upon a finding that the condition for applying international humanitarian law have been met. If the law were to function this way it would have to disregard the two distinct areas of law.¹²⁰

Moving on to the next step the CJEU then stated that since the Qualification Directive does not contain a definition of ‘internal armed conflict’, the term’s meaning and scope must be determined by considering its usual meaning in everyday language while also taking into account the context in which it occurs and the purposes of the rules of which it is part.¹²¹ The CJEU stated that ‘the usual meaning in everyday language of ‘internal armed conflict’ is a

¹¹⁵ *Aboubacar Diakité v. Commissaire général aux réfugiés et aux apatrides*, C-285/12, European Union: Court of Justice of the European Union, 30 January 2014, § 16 [hereinafter *Diakité*].

¹¹⁶ *Diakité*, § 17.

¹¹⁷ *Diakité*, § 20.

¹¹⁸ *Diakité*, § 23.

¹¹⁹ *Diakité*, § 24.

¹²⁰ *Diakité*, § 26.

¹²¹ *Diakité*, § 27.

situation in which a State's armed forces confront on or more armed groups or in which two or more armed groups confront each other.'¹²² The CJEU also referenced its previous judgement in *Elgafaji* and that the condition that is needed to be met to be granted subsidiary protection under Article 15(c) is that the level of indiscriminate violence characterizing the internal armed conflict reaches a high enough level of violence.¹²³ Thus it is not necessary to carry out a specific assessment of the intensity of the confrontations in order to determine whether the conditions relating to armed conflict has been met when considering an application for subsidiary protection.¹²⁴ The CJEU also referred to recitals 5, 6 and 24 of the Qualification Directive that the minimum requirements for being granted subsidiary protection must be a complement and add to the protection of refugees that is enshrined in the 1951 Convention Relating to the Status of Refugees by identifying individuals that are in genuine need of international protection and those individuals being offered an appropriate status.¹²⁵ The finding that there is an armed conflict cannot be made conditional upon that the armed forces that are involved in the conflict have a certain level of organization or that the conflict lasts for a specific length of time. The finding of that the level of indiscriminate violence reaches a high enough level for it to be considered a serious and individual threat to a civilian's life or person will be enough to grant subsidiary protection.¹²⁶ The CJEU concluded that 'on a proper construction of Article 15(c) of Directive 2004/83, it must be acknowledged that an internal armed conflict exists, for the purposes of applying that provision, if a States' armed forces confront on or more armed groups or if two or more armed groups confront each other. It is not necessary for that conflict to be categorized as 'armed conflict not of an international character' under international humanitarian law; nor is it necessary to carry out, in addition to an appraisal of the level of violence present in the territory concerned, a separate assessment of the intensity of the armed confrontations, the level of organization of the armed forces involved or the duration of the conflict.'¹²⁷

Céline Bauloz, researcher at the Global Migration Centre, wrote in an article as a response to the *Diakité* judgment in the Journal of International Criminal Justice that 'there is no true definition of armed conflict, but only different ways of approaching it'.¹²⁸ Something that rings

¹²² *Diakité*, § 28.

¹²³ *Diakité*, §§ 30-31.

¹²⁴ *Diakité*, § 32.

¹²⁵ *Diakité*, § 33.

¹²⁶ *Diakité*, § 34.

¹²⁷ *Diakité*, § 35.

¹²⁸ Céline Bauloz, 'The Definition of Internal Armed Conflict in Asylum Law', (2014) 12 Journal of International Criminal Justice 835, 835 [hereinafter 'Bauloz'].

true to the *Diakité* judgment where the CJEU firmly stated that the subsidiary protection regime is one with separate aims than international humanitarian law and thus it would be inappropriate to use the same definition. Further Bauloz points out that the reason behind the questions being asked the CJEU in the first place was that of diverging practice among the EU MS, some applied the definition borrowed from international humanitarian law and some did not.¹²⁹ This had, as can be imagined, the unfortunate consequence of like cases not being treated alike in the MS which thus hindered a harmonized application of the subsidiary protection regime in the EU.¹³⁰ Bauloz points to that while the CJEU, as can be seen in the recount of the judgment above, explicitly severed the connection between international humanitarian law and the CJEU's definition of 'armed conflict', the definition the CJEU gave is similar to one from the International Criminal Tribunal for the former Yugoslavia (the ICTY) in its famous 1995 *Tadic* decision.¹³¹ The Appeals Chamber of the ICTY ruled that,

An armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.¹³²

This definition does seem rather familiar to the one in *Diakité* and this can, according to Bauloz, be explained by that the basis the CJEU used for its definition was its meaning in every language. Bauloz means that this shows that there still exists a 'core understanding' of what 'armed conflict' is.¹³³ The definition used in international humanitarian law contains two prerequisites, the conflict needs to be of a certain intensity and the armed groups has to display a minimum amount of organization.¹³⁴ The CJEU makes clear that these two criteria, intensity and organization, is not determinative of whether there exists an internal armed conflict for the purpose of subsidiary protection. Bauloz writes that the non-requirement of the conflict being protracted is because of the prerequisite of 'indiscriminate violence'.¹³⁵ Because of the context of Article 15(c) a requirement of the conflict being protracted would be superfluous in the definition of 'internal armed conflict'.¹³⁶ Bauloz further writes that the reason for the CJEU to

¹²⁹ Bauloz, 836-837.

¹³⁰ Bauloz, 837.

¹³¹ Bauloz, 838.

¹³² Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Dusko Tadic* (IT-94-1-T), Appeals Chamber, 2 October 1995, § 70.

¹³³ Bauloz, 838.

¹³⁴ Common Article 3 of the 1949 Geneva Conventions (fix this note).

¹³⁵ Bauloz, 839.

¹³⁶ Bauloz, 839.

not require the other criterion from international humanitarian law, a certain level of organization, also comes down to the purpose of Article 15(c).¹³⁷ Bauloz then writes that the reasoning for the CJEU to establish this new definition of ‘armed conflict’ stems from the CJEU’s understanding of ‘indiscriminate violence’ which has been ‘elevated as the central eligibility criterion of Article 15(c) ... to the extent that the armed conflict only sets the context in which such indiscriminate violence takes place’.¹³⁸ The elevation of ‘indiscriminate violence’ as the determinative criterion thus makes the characteristics of the armed conflict irrelevant as long as the degree of violence is high enough.¹³⁹ As regards the criterion of a certain duration Bauloz writes that it is ironic how a duration requirement actually would have more bearing under the subsidiary protection regime than it does in international humanitarian law.¹⁴⁰ This is because to be eligible for subsidiary protection an applicant has to show continuity in the serious harm risked upon return so as to warrant the continuing need for protection.¹⁴¹ Finally, as regarding the new definition, Bauloz writes that the definition established in *Diakité* is a more flexible understanding of ‘internal armed conflict’ that has a lower threshold than the one in international humanitarian law.¹⁴²

In the concluding remarks to her article Bauloz brings up two ‘major implications’ that the *Diakité* judgment might have. The first one of these is a positive one as the new definition increases the protective reach of subsidiary protection compared to if MS still had applied the criteria from international humanitarian law.¹⁴³ Bauloz concludes this positive remark by stating that ‘[t]he new definition thus bridges the protection gap that was created by using IHL for the purposes of interpreting Article 15(c)’.¹⁴⁴ Further she states that in addition to an increased level of protection a CJEU definition of ‘internal armed conflict’ will help to harmonize interpretations in MS and will mean more equal opportunities regarding eligibility for subsidiary protection between MS.¹⁴⁵

What this section about the judgment in *Diakité* and section above it dealing with the judgment in *Elgafaji* shows us explicitly is the problematic aspects of Article 15(c) as a provision. In both judgments there has been a requirement of extensive interpretational

¹³⁷ Bauloz, 839.

¹³⁸ Bauloz, 839.

¹³⁹ Bauloz, 839.

¹⁴⁰ Bauloz 840.

¹⁴¹ Bauloz, 840.

¹⁴² Bauloz, 840.

¹⁴³ Bauloz, 843.

¹⁴⁴ Bauloz, 843.

¹⁴⁵ Bauloz, 844.

guidance by the CJEU which makes it all the less surprising that there has been as extensive divergencies in application as it has been.

2.3 A Subsidiary Protection Assessment

This section aims to clarify two different components of an assessment for subsidiary protection that is of relevance for the discussion in this thesis. Firstly, in section 2.3.1 COI as a legal source will be discussed as it is of importance for an assessment of international protection under Article 15(c) as the determinant for whether an individual who applies for international protection solely because of the security situation in her country of origin will be granted protection. The second section will discuss the concept of internal flight alternative as this also majorly affects the assessment of a claim for international protection solely based on the security situation where the individual is situated. Both sections will be kept brief as there is no need to dwell on the specifics for the furthering of the discussion in this thesis however knowledge of these two concepts as components of a subsidiary protection assessment is key to illustrate the severity of the problems with this kind of assessment.

2.3.1 Country of Origin Information

If an individual applies for international protection solely based on the security situation in her country, or region, of origin she will not be eligible for refugee status. Instead what will constitute the main evidence in her case for protection will be Country of Origin Information. Country of Origin Information constitutes evidence in procedures concerning international protection which is reflected in legislation from the European Union. Some examples of this is in Article 4(3)(a) of the Qualification Directive which reads,

The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account,

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied.

Another important mention is the one in Article 10(3)(b) of the Asylum Procedures Directive which reads,

Member States shall ensure that decisions by the determining authority on applications for international protection are taken after an appropriate examination. To that end, Member States shall ensure that,

(b) precise and up-to-date information is obtained from various sources, such as EASO and UNHCR and relevant international human rights organisations, as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decision.¹⁴⁶

The Austrian Read Cross together with the Austrian Centre for Country of Origin and Asylum Research and Documentation published a training manual called ‘Researching Country of Origin Information’ in 2013 that has been widely cited, among others by EASO. The training guide uses defines Country of Origin Information as ‘information about the situation in refugee’s home countries which is used in procedures for determining international protection needs’.¹⁴⁷

The European Court of Human Rights has given guidance about dealing with anonymous sources when dealing with the case of *Sufi and Elmi v the United Kingdom*,

... where a report is wholly reliant on information provided by sources, the authority and reputation of those sources and the extent of their presence in the relevant area will be relevant factors for the court in assessing the weight to be attributed to their evidence.

The Court recognizes that where there are legitimate security concerns, sources may wish to remain anonymous. However, in the absence of any information about the nature of the sources’ operations in the relevant area, it will be virtually impossible for the Court to assess their reliability. Consequently, the approach taken by the Court will depend on the consistency of the sources’ conclusions with the remainder of the available information.

¹⁴⁶ European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU.

¹⁴⁷ Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), *Researching Country of Origin Information: Training Manual*, October 2013, 12.

Where the sources' conclusions are consistent with other country information, their evidence may be of corroborative weight. However, the Court will generally exercise caution when considering reports from anonymous sources which are inconsistent with the remainder of the information before it.¹⁴⁸

What is important to take with us from this brief account of the role of COI in applications for international protection is that it will be treated as a source of law while sometimes not being written as to be. Most of the COI used will be well-written and come from established sources however it is important to understand and reflect on the great role that COI plays in decision-making of subsidiary protection and that what is written in reports on the security situation might have a direct effect on whether an individual will be granted protection or not. It is therefore of utmost importance that the COI used in a case concerning subsidiary protection is one that takes into account the circumstances of the individual. For example, if the applicant is a woman or a child it is important to note that the COI reflects such a perspective of the security situation and not only is written from a male perspective.

2.3.2 Internal Flight Alternative

Another aspect of the law that is highly relevant when discussing individuals fleeing the security situation in their surroundings is internal flight and the assessment of internal flight alternatives for individuals that is made in the EU MS. The assessment of internal flight alternative is the reason why there is not more applications for subsidiary protection granted, because even if it is deemed that the security situation in the city or province of the applicant does indeed reach the level of violence that is required for Article 15(c) to be applied the individual might be able to flee to another area of the country of origin instead.

Jonah Eaton writes that the Qualification Directive rests at the center of EU refugee law, defining the standards of who qualifies for protection'.¹⁴⁹ Further he writes that the doctrine has many names, 'internal relocation', 'internal protection' or, and as it will be called throughout this thesis, 'internal flight alternative' and that it is a 'state-created doctrine'.¹⁵⁰ The doctrine makes it possible for states to deny refugee status, or other forms of protection, if it can be shown that the applicant of such protection has an alternative area within her country of origin

¹⁴⁸ *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, § 233, 28 June 2011.

¹⁴⁹ Jonah Eaton, 'The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive', (2012) 24 *International Journal of Refugee Law* 765, 766 [hereinafter 'Eaton'].

¹⁵⁰ Eaton, 766.

where adequate protection can be found.¹⁵¹ Eaton further writes that while all EU MS has at least partially transposed the Qualification Directive into national legislation there are still a significant divergence in practice.¹⁵² Eaton writes that the premise of the internal flight alternative doctrine is that if an asylum seeker can find protection in a different part of her country of origin there exists no failure of state protection.¹⁵³ The doctrine of internal flight alternative has been criticized because of its ‘dubious lineage’ and because it is not explicitly contained in the 1951 Refugee Convention.¹⁵⁴ Eaton writes that the doctrine first started to be used by Western states as a way to turn away applicants for asylum when the numbers started to increase during the 1980s and 90s.¹⁵⁵

The 1951 Refugee Convention can still be said to be compatible with such a doctrine as the Refugee Definition in Article 1A(2) mentions that the individual has to be ‘outside the country of his nationality and ... unable or ... unwilling to avail himself of the protection of that country’.¹⁵⁶ The definition speaks of the protection of the entire country of origin and not a region within it, thus it would seem inherent that to be a refugee within the definition one has to be unable to get adequate protection in the entirety of the country of origin. In a case from the United Kingdom Court of Appeal judge Sedley wrote about internal flight alternative and that rejecting an asylum claim based on the availability of an internal flight alternative is not possible if the applicant is unwilling to avail herself of the protection of the country of origin because of fear of persecution.¹⁵⁷ This means that an applicant being unwilling to avail herself of state protection is, in the language of the 1951 Refugee Convention, a ground for international protection.¹⁵⁸

Eaton writes that there has been extensive arguments over the internal flight alternative doctrine but that the main concerns are often the same and related to procedural and evidentiary issues.¹⁵⁹ The use of this doctrine in states have sometimes been used to raise the standard of who can qualify for protection and in certain cases been as restrictive as to be used as a threshold for protection, meaning that the applicant has to prove ‘country-wide persecution’.¹⁶⁰ An analysis of whether there exists an internal flight alternative for the applicant involves a

¹⁵¹ Eaton, 766.

¹⁵² Eaton, 766.

¹⁵³ Eaton, 768.

¹⁵⁴ Eaton, 768.

¹⁵⁵ Eaton, 768.

¹⁵⁶ 1951 Refugee Convention, Article 1A(2).

¹⁵⁷ *Karanakaran v Secretary of State for the Home Department*, English Court of Appeal, [2000] 3 All ER 449, §§ 473-474.

¹⁵⁸ Eaton, 769.

¹⁵⁹ Eaton, 769.

¹⁶⁰ Eaton, 770.

determination of what standard of protection that is required at the proposed new location.¹⁶¹ Eaton notes that there is a basic consensus inherent in the doctrine that ‘the original persecution that led the asylum applicant to flee cannot continue and that they should not face life threatening harm in the area of relocation, even if that threat is not related to one of the enumerated grounds in article 1(A)(2) of the Refugee Convention’.¹⁶² Further Eaton writes that it would violate the 1951 Refugee Convention to expect an applicant to flee to an area of her country origin and hide from her persecutors, he further exemplifies this firstly by remote areas such as a mountain side or desert where in individuals chances of survival would be a risk to a part of the country of origin where she does not have a family or social contact or does not speak the language.¹⁶³ In such cases there is a risk for something that has been characterized as ‘constructive’ or ‘indirect’ refoulement, where an applicant is returned to an internal flight alternative where there is a risk that she, out of desperation, would return to her region of origin.¹⁶⁴

The Qualification Directive contains a definition of refugee in article 2(d) that is the same as the one found in the 1951 Refugee Convention. Article 8 of the Qualification Directive sets out that EU MS can consider if there exists an internal flight alternative when assessing an application for international protection.¹⁶⁵ As mentioned at the top of this section, the relevance of internal flight alternative is stark when dealing with Article 15(c) and applications for protection solely based on the security situation in the country of origin as it is the main reason for why such an application is rejected. This is an aspect of the application of Article 15(c) that makes it the prospects of being granted asylum solely based on internal armed conflict in the country of origin very limited.

¹⁶¹ Eaton 770.

¹⁶² Eaton, 770.

¹⁶³ Eaton, 770.

¹⁶⁴ Eaton, 770.

¹⁶⁵ Article 8(1) reads as follows, ‘as part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection in a part of the country of origin, he or she: (a) has no well-founded fear of being persecuted or is not at real risk of suffering serious harm; or (b) has access to protection against persecution or serious harm as defined in Article 7; and he or she can safely and legally travel to and gain admittance to that part of the country and can reasonably be expected to settle there’.

3 Subsidiary Protection & the Rule of Law

After having examined and discussed the EU subsidiary protection regime and Article 15(c) in particular what will now follow is a discussion about the issues raised in combination with the rule of law. Firstly, in section 3.1 the discussion on harmonization and procedural fairness will be based on the previously mentioned DELMI report and also a poignant article by Hugo Storey on the importance of consistency in refugee decision-making. In this chapters second section, 3.2, will follow a discussion on the linguistical challenges of Article 15(c) and its implications for legal certainty, here as well a basis will be the words of Hugo Storey and a discussion from Satvinder S Juss on the language of Article 15(c) and how it affects the decision-making in the EU MS. Lastly as a final section of this chapter, and this thesis, will be section 3.3 with a summary of the findings and some concluding remarks from the author.

3.1 Harmonization, Consistency & Procedural Fairness

Hugo Storey writes in an article titled ‘Consistency in Refugee Decision-Making: A Judicial Perspective’ about the problems that a lack of consistency in refugee decision-making can cause. He writes that the article is written in a time where many recent studies have highlighted that decision-making in the area of refugee law is ‘still too much of a lottery’.¹⁶⁶ This seems to be a recurring theme, the use of words such as ‘lottery’, ‘roulette’ etc. It does indeed accurately depict the situation in a asylum law in a sad but accurate manner to this day, however it makes it all the more noteworthy that this problem has been prominent enough to have such words attached to it while still not more change has been seen. On that note, Storey points out that this issue has been a major problem for a long time and also that efforts to overcome this problem are bound to become even more important with the constant development of international refugee law.¹⁶⁷ This is something that has been seen since the article was written in 2013, however the need for such development is still glaring. What is also worth noting in connection to Storey’s article is that it was written before what has since been dubbed the ‘refugee crisis’ of 2015 which has seen a significant increase in numbers of asylum application everywhere in the EU, and which in turn has shown the divergencies between the MS even more clearly. Storey further argues that ‘[c]onsistency is *par excellence* an ambiguous – or at least morally neutral – norm’ and that despite the fact that the principle of that like cases should be treated

¹⁶⁶ Hugo Storey, ‘Consistency in Refugee Decision-Making: A Judicial Perspective’, (2013) 32 Refugee Survey Quarterly 112, 112 [hereinafter ‘Storey on Consistency’].

¹⁶⁷ Storey on Consistency, 112.

alike is seen as a key part of the idea of justice by many thinkers what its actual meaning is in practice is consistency in the service of just and fair decision-making.¹⁶⁸ Such ‘just and fair decision-making’ that Storey writes of is to be equated to the concept of procedural fairness as recounted for in part 1.4.3 in the section discussing the theoretical framework. The principle of that ‘like cases should be treated alike’ is difficult to enforce in asylum claims as they are rarely, if ever, exactly the same if it is an assessment of the individual circumstances. However, when the claim is solely based on the security situation in a country there are cases that are alike, exactly alike as a matter of fact. Storey goes on to claim that no one would welcome a scenario in which refugee decision-makers were ‘consistently draconian, saying “No” all the time’ but also adds that at the other end of the extreme a world where the same decision-makers instead always said yes could ‘destabilize the existing global system based on Nation States and make a mockery of the very notion of international protection as “surrogate” protection’.¹⁶⁹ This is true and the tricky balancing act that international refugee law will continue to deal with as long as we have a world order based on sovereign nation states. One could argue that in sense we do not have that with the EU as a union of several nation states, however, as long as it is not an all-encompassing union, containing the entire world, what has happened is that several smaller nation-states has formed into one bigger one and the issue of destabilizing the system remains. Storey also accurately points out that some of the most intense criticism from NGOs and academics has been directed towards mechanisms of accelerated procedure from governments as a response to a rise in asylum applications and such mechanisms could also be said to be consistency-enhancing measures.¹⁷⁰ This is an important notion and with the development of the EU as it stands hiding such measures as accelerated procedures behind the guise of a need for more consistency is something that could be a reality. There is also the question of whether consistency should only be strived towards when it is in favour of the individual, authorities could consistently deny everyone asylum, however this is of course not what is sought after in the discussion here. The principle of ‘like cases should be treated alike’ also *e contrario* means that different cases should not be treated alike, meaning that consistency of decision-making is only desirable in cases that are materially similar.¹⁷¹ Once again context is important and the fact that asylum claims are peculiar in nature and if you look hard enough there will always be something in the individuals situation setting it apart from cases that might be somewhat alike.

¹⁶⁸ Storey on Consistency, 114.

¹⁶⁹ Storey on Consistency, 114.

¹⁷⁰ Storey on Consistency, 114.

¹⁷¹ Storey on Consistency, 114.

Storey also importantly points out that in the context of judicial supervision of asylum decisions it is a fact that conscientious decision makers may at times come to different, yet all reasonable, conclusions having applied their minds to the same set of facts.¹⁷² One could argue that this makes the assessments of asylum claims a permanent lottery, one that will depend on the decision-maker that the individual gets assigned. This might hold true and if so there are no way to ever remedy it, however it only further highlights the need for as much regulation and guidance on procedural matters as possible to make the ‘lottery aspect’ as small as possible. Another aspect that Storey notes is that while he is writing from an English perspective where there is, like in the other Anglo-Saxon countries of the Global North, a proud and strong common law tradition that is operating on precedent there are also a lot of countries that does not use such a system and have other ways of achieving judicial consistency.¹⁷³ This is an important, and often overlooked, aspect of harmonization of EU law. There are great divergencies in legal systems across the EU with the strong common law tradition of the UK and the equally rooted civil law tradition of for example France while some hybrid systems can be found in MS like for example Sweden. MS still have the same obligations to transpose of directives and follow case law from the CJEU, however it is still important to note that how the law develops will differ and this might be a roadblock to harmonization. This is not to say that for complete harmonization all EU MS must have the same legal system, however it is still noteworthy that the way the law develops varies significantly between common law and civil law traditions.

Storey further writes that there is a considerable level of concern about divergencies and variations in recognition rates when it comes to refugee law and that this is the case because while the 1951 Refugee Convention is one of the most ratified international treaties there exists no effective international judicial supervision.¹⁷⁴ It is easy to be cynical here and claim that it is unsurprising that such a politicized area of the law as refugee law is one that is lacking international supervision, sadly this does not stop it from being at least potentially somewhat true. However, it is also something that can be explained by a heavily rooted tradition of sovereign nation states and to uproot legal norms that have reached such a level of custom is not something that is easily done. Storey argues that consistency is important for foreseeability and that while asylum-seekers who have successful claims might not care whether the system

¹⁷² Storey on Consistency, 114.

¹⁷³ Storey on Consistency, 114-115.

¹⁷⁴ Storey on Consistency, 115.

is 'just' this is of fundamental importance for the individuals that are unsuccessful.¹⁷⁵ It is one of the more glaring flaws in a CEAS where the goal is a uniform asylum procedure that divergencies between EU MS will undermine the system and create a mistrust in the law. If individuals with unsuccessful claims perceive their negative decision as arbitrary, according to Storey, this is not only a personal grievance but also more generally undermines the rule of law.¹⁷⁶ This is one of the main problems this thesis aims to bring discussion about, the fact that the EU is setting a unified front with the same rules while recognition rates still vary extensively. This is at its utmost prominent when dealing with asylum claims where the sole reason for seeking it is the security situation in the country of origin. To have one MS grant protection to individuals feeling a certain situation and another claiming that it is not enough to grant protection is completely contrary to all of the aims of the EU. However, what is most problematic is what kind of message this sends to the asylum seeker.

Regarding consistency in European decision-making specifically Storey writes that the situation for European decision-makers is a fast moving one and that in the late 1990s the EU started to develop soft law norms dealing with refugee issues and from the early 2000s onwards it started to introduce and implement legislation in the field of asylum and immigration law.¹⁷⁷ According to Storey the Qualification Directive is the best known piece of asylum legislation for reasons that it contains the definition of persecution and ensures common criteria for complementary protection.¹⁷⁸ Further Storey writes that at a jurisprudential level the EU asylum legislation has helped a great amount with reducing inconsistencies such as whether to recognize persecution by non-state actors and how to assess sur place claims.¹⁷⁹ It is important to make note of this through all the criticism, that while there are flaws in the legislation both the CEAS in general and the Qualification Directive specifically have amounted to several benefits as well, for example the ones mentioned above by Storey.

When researchers from different bodies such as the European Legal Network on Asylum (ELENA), the UNHCR and the European Council on Refugees and Exiles (ECRE) started to reveal that in the aftermath of the Qualification Directive and other legislation there were still staggering divergencies in recognition rate the law-makers of the EU decided that to reach real harmonization something more was needed.¹⁸⁰ There was a need for a more horizontal practical

¹⁷⁵ Storey on Consistency, 115.

¹⁷⁶ Storey on Consistency, 115.

¹⁷⁷ Storey on Consistency, 117-118.

¹⁷⁸ Storey on Consistency, 118.

¹⁷⁹ Storey on Consistency, 118.

¹⁸⁰ Storey on Consistency, 119.

harmonization through training rather than top-down vertical standard setting through case-law and legislation, and thus, the European Asylum Support Office (the EASO) was born.¹⁸¹

Storey writes that the two greatest advances that has been made to improve consistency concerning the ‘country dimension’¹⁸² of an individual’s asylum claim concern the use of lead cases and of COI.¹⁸³ Regarding the use of COI Storey writes that the importance of COI to decisions-makers at all levels are well established nowadays thanks to initiatives by both governments and NGOs which have resulted in substantive criteria to be applied when evaluating COI.¹⁸⁴ Some examples of these are that it is accurate, reliable, relevant and up to date information that has been gathered in an impartial and transparent manner and to make use of all sources of information, both from governmental organisations, NGOs and international organisations.¹⁸⁵ An important note that Storey brings up is that an area that is less clear is the procedural norms that govern the use of COI and he quotes a report from 2011 made by the Hungarian Helsinki Committee which states that the EU MS employ a wide range of practices when it comes to obtaining COI, in some the judges obtain it themselves in different ways such as through an administrative asylum authority or professional NGO COI providers but in other cases the COI used in an assessment is solely the one provided by the parties.¹⁸⁶

Another part of the aforementioned ‘country dimension’ of an individual’s asylum claim is the use of lead cases. Storey describes the situation well by stating that in the ‘country dimension’ the focus is not the individual personal facts but rather general circumstances in the country of origin and that in such assessments objective considerations are involved.¹⁸⁷ Storey also points out that the ECtHR has developed case law¹⁸⁸ to go with this recognition in cases that deal with general issues of risk that some or all persons from a particular country are subject to.¹⁸⁹ Critique has been voiced towards the use of lead cases, claiming that it leads to formulaic

¹⁸¹ Storey on Consistency, 119.

¹⁸² Storey uses Robert Thomas’s description of how there are two different dimensions of an individual’s claim for asylum, ‘[the individual dimension] first, whether the asylum applicant’s story is credible; and [the country dimension] secondly, whether conditions in the relevant country would place him or her at risk of persecution or serious ill treatment if were returned’, Robert Thomas, ‘Refugee Roulette: A UK Perspective’, in Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag (eds.), *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*, New York, London, New York University Press, 2009, 168-186.

¹⁸³ Storey on Consistency, 120.

¹⁸⁴ Storey on Consistency, 121.

¹⁸⁵ Storey on Consistency, 121.

¹⁸⁶ Gábor Gyulai & Tudor Rosu, *Structural Differences and Access to Country of Origin Information (COI) at European Courts Dealing with Asylum*, Budapest, Hungarian Helsinki Committee, July 2011, 5.

¹⁸⁷ Storey on Consistency, 121.

¹⁸⁸ See for example on Afghanistan, *H. and B. v. the United Kingdom*, nos. 70073/10 and 44539/11 §§ 92-101, 9 April 2013, on Somalia, *Sufi and Elmi v. the United Kingdom*, nos. 8319/07 and 11449/07, §§ 241-250, 28 June 2011 and *Salah Sheekh v. The Netherlands*, no. 1948/04, §§ 138-149, 11 January 2007 or on Sri Lanka, *NA. v. the United Kingdom*, no. 25904/07, §§ 123-137, 17 July 2008.

¹⁸⁹ Storey on Consistency, 121.

or stereotyped decision-making however Storey means that such criticism is based on a misconception of what lead cases are.¹⁹⁰ According to Storey lead cases are not used with the intention to ‘treat their conclusions as binding axioms which must be applied irrespective of the particular circumstances of any asylum case’ nor do they work towards the displacement of the fundamental principle that every asylum claim requires an individual examination.¹⁹¹ The purpose that lead cases try to serve is to be a basis of a comprehensive examination of the relevant expert witnesses conducted and background evidence to establish what said evidence means in regards to levels of risk to a particular class or category of persons.¹⁹² What prevents the use of lead cases from being stereotyped decision-making is that the extent to which the guidance the lead case provides will depend fully on the nature of the guidance and the findings regarding the individual circumstances of the claimant.¹⁹³ Storey writes that lead cases help to ‘ensure consistency in the treatment of the similarly situated’.¹⁹⁴

The preciously quoted DELMI report will here be used as a starting point for further discussion on harmonization and its importance as it contains a section on the relationship between the principle of fairness and harmonization of asylum matters.¹⁹⁵ The report contains an empirical part with an analysis of EU MS first-instance decisions on asylum between 2008 and 2016.¹⁹⁶ The question that the empirical data was set to answer was whether there was a trend that EU MS decision-making practice in asylum cases has become more harmonized over time.¹⁹⁷ This data is of interest to highlight the stark divergencies that exists within the CEAS in the application of EU asylum and migration law. Parusel and Schneider writes in the report that given the importance that has been attributed to harmonized decision-making throughout the years, since the 1999 decision in Tampere, some progress on the area has been made already.¹⁹⁸ This is true and while this thesis’ main goal is to highlight the problematic elements that still remain it is important to realize that harmonization of the law in such a great area as the EU in such a complex field of the law as migration law is difficult and full and complete harmonization will more than likely never be achieved. However, it does not have to, the divergencies will need to be fewer or be less extensive, or both.

The data collected in the report shows that there are still great divergencies in recognition

¹⁹⁰ Storey on Consistency, 122.

¹⁹¹ Storey on Consistency, 122.

¹⁹² Storey on Consistency, 122.

¹⁹³ Storey on Consistency, 122.

¹⁹⁴ Storey on Consistency, 122.

¹⁹⁵ DELMI Report, 83-92.

¹⁹⁶ DELMI Report, 23.

¹⁹⁷ DELMI Report, 23.

¹⁹⁸ DELMI Report, 84.

rate. For example, when looking at the recognition rate for international protection for individuals whose country of origin is Iraq the data shows that in 2016 Sweden granted protection to 27.1%, Denmark 12.5% and in Belgium 58.8%.¹⁹⁹ The countries chosen were picked at random to show a spectrum of different rates and illustrates well that the divergencies are still stark between EU MS. After the important discussion on consistency and the help of the DELMI report to establish that consistency in decision-making across EU MS does in fact not exist one can easily make the connection to the principle of procedural fairness and see how the two are not suitable for each other. This will be further developed in section 3.3 below with concluding remarks.

3.2 Linguistical Challenges & Legal Certainty

Directives from the EU are legally binding texts and thus contain strict obligations for MS to follow. Stefania D'Avanzo writes that MS are obliged to achieve the same result as is envisioned in the directive by adapting the rules that are established in it into national law.²⁰⁰ This is an important notion to make in the argument of harmonization as there is an obligation to have the MS national law in line with the EU Directive however the national law can still be formulated differently between MS. Sometimes the national laws of a MS may already comply with a new EU Directive and in such cases no action will be required other than keeping the already existing law in place, however MS are often required to make changes in their law to meet the obligations set by a new EU Directive in a process that is commonly referred to as 'transposition'.²⁰¹ The transposing of EU Directives is a way of respecting nation state sovereignty and the pluralistic nature of the EU while still setting common standards of EU law, however this is not always without problems.

D'Avanzo's book that was quoted above is a linguistic study and contains a study on to what extent the language used in certain EU Directives has been a contributing factor in a failure to adopt common procedures for granting refugees human rights.²⁰² It is a fascinating study that is certainly worth a read however only certain more general conclusions will be recounted for here. On vagueness in legal texts D'Avanzo writes that legal texts must satisfy two central requirements, firstly it has to be precise and determinate but secondly, and perhaps

¹⁹⁹ DELMI Report, Table 14, 98.

²⁰⁰ D'Avanzo, Stefania, *Europe: home of migrants built on sand: EU political and legal discourse on immigration and asylum*, Cambridge Scholars Publishing, Newcastle upon Tyne, 2012, 55 [hereinafter 'D'Avanzo'].

²⁰¹ D'Avanzo, 55.

²⁰² D'Avanzo, 57.

contradictorily, it has to ‘offer a wide range of enforceability’.²⁰³ This is something that is true for all types of legal texts and not just directives however it is equally true for Article 15(c). As has been shown through CJEU case law the article is written in such a vague manner that the CJEU has been required to clarify its content completely. It is also a problem with international law that legal texts that are written to ‘rigidly’ might not allow for the kind of dynamic interpretation that is required in an ever-changing world order. D’Avanzo also stresses the difference between ‘vague’ and ‘ambiguous’ stating that a legal text can be considered vague if the receiver is unable to decide the words true value in every context however with a legal text that is ambiguous the receiver are aware of a certain set of different meaning of a legal text.²⁰⁴ This connects back to the foreseeability requirement and that individuals that are subject to the law, in the case of this study individuals who apply for subsidiary protection based solely on the security situation in their country of origin, shall be able to know the value of the words that are used. This is not to say that every word has one clear value, however for example the word ‘indiscriminate’ can be said to have no clear meaning as it is dependent on an assessment by a decision-maker of COI and can vary significantly due to a multitude of factors.

Satvinder S. Juss wrote an article in 2013 as a rejoinder to two previous articles, one written by Hugo Storey and one by Jean-François Durieux. Some of the discussions in the articles have since then been dealt with by the CJEU however they still raise a lot of interesting points in regard to the discussion about Article 15(c). Juss writes that the international community has been both clumsy and boorish in recognizing the rights of war refugees and that protection was not automatic for them.²⁰⁵ The plight of war refugees has been problematic and existed as a mix of international refugee law and international humanitarian law.²⁰⁶ Juss points out that the aforementioned judgment in *Elgafaji* was the first case before the CJEU and therefore it was an inexperienced and inexpert court that left just as many questions as it answered.²⁰⁷ After this he poses a few questions, the first one of which is how ‘armed conflict’ is defined, something that was dealt with by the CJEU a mere year later in the *Diakité* judgment.²⁰⁸ However, he also asks what the threshold of ‘indiscriminate violence’ in a country is and if it refers to a whole or part of a territory. Further if there exists an agreed definition of what ‘indiscriminate violence’ entails, if it refers to intensity of the violence, its geographical spread, frequency of violent acts,

²⁰³ D’Avanzo, 58.

²⁰⁴ D’Avanzo, 59.

²⁰⁵ Satvinder S Juss, ‘Problematizing the Protection of ‘War Refugees’: A Rejoinder to Hugo Storey and Jean-François Durieux’, (2013) 32 Refugee Survey Quarterly 122, 122-123 [hereinafter ‘Juss’].

²⁰⁶ Juss, 123-124.

²⁰⁷ Juss, 124.

²⁰⁸ Juss, 124.

numbers of casualties etc. Juss also asks the very relevant question what the basis should be for an ‘individual threat’ to civilian life. He concludes that ‘the formula in Article 15 is full of contradictions and ambiguities and States differ in their practical to all these questions. He then exemplifies that some States choose to focus in ‘armed conflict’, something that is incorrect since Diakité while others focus on ‘indiscriminate violence’, some sets out to establish a level of violence while others are apt to individualize threat. This is the ‘sliding scale’ that was established in Elgafaji, however Juss questions if there are any principles to work with at all.²⁰⁹

Hugo Storey offered a solution to the problem of Article 15’s interpretation by suggesting that when one is considering the ‘victims of armed conflict’ the norms of IHL should be treated as a primary reference point as they are *lex specialis* in situation of armed conflict compared to international refugee law or international human rights law.²¹⁰ Jean-François Durieux on the other hand challenged this by claiming that the circumstances of armed conflict are better to be understood as contextual and therefore in a sense neutral and that it is the effects of the violence associated with a conflict with no element of persecution that drives displacement.²¹¹

In his rejoinder to the aforementioned contributions Juss suggests that Article 15(c) can only be understood as a *sui generis* provision, meaning that the provision is unique to the special circumstances of ‘war refugees’ that it seeks to address.²¹² The application of Article 15(c) has always provided a challenge because of its less than ideal wording. One of the main flaws is the fact that an applicant had to show an ‘individual’ risk that came from an ‘indiscriminate source’ making it not specifically targeted towards to individual. Juss writes that it is not clear how to merge the two conditions and that, according to him, ‘indiscriminate violence’ is a misnomer and what the provision should say and what the authorities assessing the case should measure is ‘indiscriminate impact’ of the indiscriminate violence.²¹³

3.3 Summary & Concluding Remarks

To summarize one can see that there definitely exists a conflict between the rule of law and the functioning of Article 15(c) as it is formulated today. The two different aspects of the rule of law that is affected by this is the principle of legal certainty and the principle of procedural fairness. EU law and EU asylum and migration law specifically is such a politicized and complex area of the law with many aspects playing a role. The structure of this thesis may

²⁰⁹ Juss, 125.

²¹⁰ Juss, 125.

²¹¹ Juss, 126.

²¹² Juss, 126.

²¹³ Juss, 127.

appear fragmented due to the many different aspects that it has needed to cover to create the big picture of how Article 15(c) is interpreted and applied in the EU MS.

The problem that was presented was the lack of legal certainty for the applicant when applying for asylum in an EU MS due to the lack of harmonization. It has been shown that while one could also argue that potentially the lack of harmonization is due to EU MS having different political climate and ideas on refugee reception it is also the case that Article 15(c) as it is worded stands in its own way. According to the author it is remarkable that the article has remained the same throughout the years as it has been shown how complex its application is. Yes, the CJEU has clarified the scope, especially in *Elgafaji*, however what it did was to create a new test of indiscriminate violence for the EU MS apply, arguably just as difficult as the article was to interpret before the ruling. In the world today where individuals are forced to flee violence and war a functioning regime for subsidiary protection is vital. As has been raised in this thesis the 1951 definition for refugee status is starting to be somewhat dated and one can see that subsidiary protection is becoming the kind of protection that is most often granted in many cases, simply due to that individuals are now often fleeing general situations and are not specifically persecuted.

The realization that this is the case is a sad testament to the world, however it also highlights the need to protect. In a world fragmented by violence and evil where areas in the country echo empty due to that everyone has had to flee for their lives international protection is needed and it needs to work. This is a thesis in human rights and having read it you might question this and say that it is too legally heavy, and it is about semantics of the law. What the author will say to that is asylum and migration law is human rights by its very nature, its sole purpose is to protect individuals fleeing for their lives or risking horrible human rights violations. International asylum law and EU asylum specifically need to work to hinder this.

Procedural fairness and legal certainty, both key aspects of the rule of law, something that the EU claims is a cornerstone of the entire cooperation, are both at risk when having Article 15(c) be interpreted and applied as it is today. This has been shown throughout this thesis, with the difficult test set out in *Elgafaji*, with the linguistically backwards way it is written and with both assessments of internal flight alternative and COI as aspects that in themselves can raise questions for their legitimization. What can be hoped for with this thesis is to bring this discussion to light even more. There is indeed no shortage of writings on the topic already as can be seen by the vast amount of articles cited, however the problem still remains and it is for legal and human rights scholars to bring it up enough until it is fixed.

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