RIGA GRADUATE SCHOOL OF LAW

CJEU and Qualification Directive

BACHELOR THESIS

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DECLARATION OF HONOUR:
I declare that this thesis is my own work, and that all references to, or quotations from, the work of others are fully and correctly cited.

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RIGA, 2018

SUMMARY

The aim of the paper is to analyse how and in what situations the CJEU applies and interprets international law and what margin of appreciation it leaves for national courts when applying the Qualification Directive. The main focus is on exploration of the strategies of the Court towards Convention and Qualification Directive in asylum cases related to terrorism and public security.

In the first part of the thesis, competences of the CJEU, principle of legal certainty and the aim of the preliminary ruling procedure are analysed. There are two judicial roles that the Court exercises when it engages with cases related to asylum. One is administrative role that promotes uniform application of EU law and the other is constitutional role that enforces fundamental rights and general principles of EU law. The legally complex situation between Qualification Directive, Convention, TFEU and the Charter has set the Court in a position where its effectiveness is questionable and passive.

The second part of the research focuses on interactions between EU, international and national law to better understand the Court's position and how it could possibly better provide guidance by seeing all international actors at once. First, the hierarchy of EU legal order and the status of EU itself are examined where EU within legal personality can still be bound by customary international law. Second, as Qualification Directive is a part of common asylum policy, it is a shared competence between EU and Member States. Moreover, it embeds explicit references to the Convention. As Member States are left with a certain margin of appreciation in the asylum field it is relevant to overview the solidarity principle where states rather choose to disclose into different political and economic goals. Third, the position of the Convention depends on CJEU's monist and dualist approaches towards international law that is analysed in a case-law that contributes to the research analogically.

The third part of the thesis analysis case-law related to asylum, terrorism and public security. The rulings of CJEU crystallizes approaches towards international and national law. The Court's overall approach manifests into principle of proportionality where the Court engages with the international law as far as it concerns uniform application of EU law, but the individual assessment and interpretation of the facts of the case leaves for the national authorities. The margin of appreciation left for states rather engages with application of human rights and responsibility towards international commitments.

The research has shown that the CJEU is put in a difficult position to stand up as an administrative and constitutional court and there is a need to amend TFEU and the Qualification Directive to overcome the existing collision between EU law and the Convention. CJEU is the final judicial body that can provide guidance about uniform application of EU law, but if it is set in a complex context where rather ambiguously formulated treaty provisions interact with the Charter and the Convention then it comes as no surprise that it stays passive and reluctant towards international law.

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LIST OF ABBREVIATIONS

Common European Asylum System	CEAS
Court of Justice of the European Union	CJEU
Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted	Qualification Directive
European Council on Refugees and Exiles	ECRE
European Union	EU
European Convention on Human Rights	ECHR
European Charter of Fundamental Rights	Charter
1951 Convention and Relating to the Status of Refugees	Convention
Treaty on Functioning of European Union	TFEU
Treaty on European Union	TEU
United Nations High Commissioner for Refugees	UNCHR
United Nations	UN
United Nations Security Council	UNSC

INTRODUCTION

The on-going migration crisis from the Middle East has set the European Union (EU) and the EU law in ever unexpected pressure internally between Member States and externally between EU and international arena. Currently, EU is one of the major actors in anti-terrorism and asylum law and they interact in the Qualification Directive, the Convention, the Charter and Treaty on the Functioning of the European Union (TFEU).[1] The core legal instrument that protects the rights related to the status of refugee is the Convention.[2] It is also the yardstick of EU asylum policy where TFEU, the Charter and the Qualification Directive embed explicit references to the Convention. While the Charter, TFEU declare fundamental right to asylum, the Qualification Directive restricts the criteria for the applicant. For example, if the asylum seeker applies for a refugee status and has previously supported local group of armed militia, all aforementioned legal instruments apply. The problem question arises about the provision of the Qualification Directive that restricts the right even more than the same provision in the Convention and might be considered as a breach of international law. In other words, the Qualification Directive bears broader exclusion criterion when there is reasonable danger to the security of the Member State. Obviously, one could not simply be a refugee and a terrorist, but what can be regarded as reasonable danger also is unclear and leaves the authority with broad interpretation.

Court of Justice of the EU (CJEU) is the judicial authority that shall provide a clear answer when the Qualification Directive is challenged. However, there is a lack of enforcement because also the CJEU is very reluctant to apply international law and it can be observed that the Court has developed certain strategies concerning common asylum policy. Nevertheless, the CJEU is put in a very complex position in where rather ambiguously formulated Treaty provisions interact with the Charter (right to asylum) and international human rights standards. Moreover, it is asked to act almost like an international refugee court which it is not.[3] For example, in *Qurbani* case, the CJEU was asked to interpret Article directly from the Convention.[4]

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[1] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *OJ L* 337, 20.12.2011, pp. 9–26. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0095. Accessed May 11, 2018. Charter of Fundamental Rights of the European Union *OJ C* 326, 26.10.2012, pp. 391–407. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT. Accessed May 11, 2018. United Nations High Commissioner for Refugees (UNHCR). *1951 Convention and Relating to the Status of Refugees*. Available on: http://www.unhcr.org/3b66c2aa10.pdf. Accessed March 5, 2018. Treaty on the Functioning of the European Union (Consolidated version 2012), *OJ C* 326, 26.10.2012. Available on: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:12012E/TXT. Accessed May 5, 2018.

[2] United Nations High Commissioner for Refugees (UNHCR). *1951 Convention and Relating to the Status of Refugees*, Introductory note by the Office of the UNHCR, p.2. Available on: http://www.unhcr.org/3b66c2aa10.pdf. Accessed March 5, 2018. Moritz Baumgärtel, "Part of the Game," in *The Changing Practices of International Law*, ed. Tanja Aalberts, Thomas Gammeltoft-Hansen, 103–28. (Cambridge: Cambridge University Press, 2018), p.104.

[3] Geert De Baere, "The Court of Justice of the EU as a European and International Asylum Court," Leuven Centre for Global Governance Studies Working Paper No.118-August 2013, p.1, Available at: https://lirias.kuleuven.be/bitstream/123456789/414528/1/wp118-de-baere.pdf. Accessed May 10, 2018.

[4] See judgement in *Qurbani*, C‑481/13, ECLI:EU:C:2014:2101, paragraph 16.

Common European Asylum system (CEAS) was developed to ensure uniform rights for asylum seekers within the EU.[5] Nevertheless, CEAS is a shared competence and dilemma because the Convention is not signed by the EU, but by Member States. Therefore, the tension is also noticeable internally where the sovereignty overtops the principle of solidarity and number of Member States have opted-out from adaption of the Qualification Directive. Even thought, a shared competence divides responsibility between Member States and the Union, EU by embracing its legal personality is still bound by customary international law.[6] Therefore, in a case of a breach, EU must face consequences and international responsibility.

The research question is how and in what situations the CJEU applies and interprets international law and what margin of appreciation it leaves for Member States when applying Qualification Directive. The initial hypothesis is that the final decision when applying the Qualification Directive is balanced between the CJEU and national authorities. Additionally, the CJEU has developed certain strategies to bypass international law in order not to undermine the overall legal certainty of the EU system.[7] Therefore, the role and the competences of the Court are very decisive elements that will be analysed.

Methodology

The research engages with primary and secondary sources from the angle that is the role of CJEU. The following study is mainly based on case-law analysis where the main focus is on exploration of the strategies of the Court towards Convention and Qualification Directive. The study also includes analysis of CJEU's competences, its dualist and monist approaches, and interactions between EU, international and national law. Moreover, the thesis engages with analysis of case-law that contributes to the research analogically to better comprehend approaches of CJEU with EU and international law.

The main source of information is case-law and works of scholars Ziegler, Lenaerts, Bank and Peers as they have contributed the most to the research of interaction between EU and international level concerning Qualification Directive and CJEU. The principles of customary international law and legal certainty will be also analysed where an attitude of minimal guidance could be seen as Court's reluctance towards international law or rather exceptional approach that cannot be regarded as its main practice.

Scope

The study is focused on Qualification Directive and Convention in asylum cases related to terrorism and public security. The aspects how the CJEU interprets or engages with international law and how much discretion it leaves for Member States will be analysed also beyond the Qualification Directive and Convention. Mainly the Court's struggle between its administrative and constitutional role in the general institutional framework within the context of asylum will be analysed. Considering the margin of appreciation left for Member States it is relevant to overview the solidarity principle that will be addressed in the context of asylum. Terms as roles, trends and approaches are synonyms.

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[5] Tampere European Council 15 and 16 October 1999 Presidency Conclusions, paragraph 13-15. Available on: http://www.europarl.europa.eu/summits/tam_en.htm. Accessed May 10, 2018.

[6] Katja Ziegler, "Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU law, Human Rights and International Law," in *Research Handbook on EU Law and Human Rights*, ed. by Sionaidh Douglas-Scott et al. (Elgar, 2017), pp. 274-276.

[7] Boštjan Zalar, "Comments on the Court of Justice of the EU's Developing Case Law on Asylum." *International Journal of Refugee Law* 25(2): p.1.

Structure

The following research consists of three parts. It starts with examination of the competences of CJEU, overview of case-law related to Qualification Directive. The second part analysis interactions between EU and international law as well as EU and national law including examination of EU itself and principle of solidarity. The second part complements the following analysis of case-law (facts) in the third part. The final part examines rulings of CJEU and possible approaches the Court has towards international and national law.

1. LEGAL SETTING OF CJEU

After the Lisbon Treaty the CJEU was granted full jurisdiction in the field of asylum.[8] It means that after this amendment if it was not clear how to apply EU law, national bodies were on their way to ask for preliminary ruling question because the CJEU had jurisdiction. One of the reasons of preliminary reference procedure is to ensure that there is uniformity of EU provision or concept when it is applied.[9] Additionally, as commented by Zalar, the Court has to provide legal certainty, exercise effective judicial administration and facilitate deeper integration of EU law in all judiciary levels in case law of asylum.[10] However, it can be argued that, the Court's position in the EU institutional framework within asylum context not always ensures clarity about proper application of EU law, especially in application of the common asylum policy.

In 2015 Europe experienced a high number influx of asylum seekers.[11] It could be as a consequence due to the geographical location, however, there is a number of asylum seekers that use the situation as economic migrants[12]. In the EU, where all Member States share the same fundamental values and borders, CEAS was adopted to provide a uniform integration of third country nationals and to guarantee rights to refugees. Even more, Convention was established as the yardstick of the common asylum policy and therefore have to be treat like a basic norm of it.[13] This migration crisis is a topical issue because the fundamental values of EU are challenged and brought before the CJEU.[14] Moreover, there is a perception that CJEU should act as an international refugee court which is not actually its competence.[15] Even though, it has interpreted and applied the Convention, it acts within certain limits.

Nevertheless, Article 267(b) TFEU sets out that the CJEU has the mandate to examine the validity of secondary EU law (Qualification Directive) that explicitly refers to international law (Convention), it is stated in the Article 263 TFEU that the Court can interpret acts that are in its jurisdiction - acts of institutions, bodies, offices or agencies of the Union.[16] Therefore, it means that the Court has a jurisdiction to interpret only EU law not international law which means that it cannot review the Convention itself even though it is a central core of the EU asylum policy.[17]

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[8] Christian Kaunert and Sarah Leonard, "The European Union Asylum Policy after the Treaty of Lisbon," *Refugee Survey Quarterly* 31(4) (2012), pp.1, 16.
[9] Thomas de la Mare and Catherine Donnelly, "Preliminary Rulings and EU Legal Integration," in *The evolution of EU law*, ed. Paul Craig and Grainne De Bâurca p.379.
[10] Supra 7, p.377.
[11] In 2015 there were 1 322 800 applications in total. "Asylum applications (non-EU) in the EU-28 Member States, 2006–2017," source: Eurostat. Available on: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics. Accessed May 15, 2018.
[12] Isaac Kfir, "Refugeeship and Natural Law: The European Court of Human Rights," *Netherlands Quarterly of Human Rights*, Vol. 33/4 (2015): p.138.
[13] Supra 5, paragraph 13.
[14] Silja Klepp, "A Contested Asylum System: The European Union between Refugee Protection and Border Control in the Mediterranean Sea," *European Journal of Migration and Law* 12 (2010): pp.19-20.
[15] Supra 3, p.1.
[16] Treaty on the Functioning of the European Union (Consolidated version 2012), *OJ C* 326, 26.10.2012. Available on: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:12012E/TXT. Accessed May 5, 2018.
[17] Roland Bank, "The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law," *International Journal of Refugee Law* 27/2 (2015): p.221.

Article 6(3) TEU sets out general principles of the EU law where one of them are respect for human rights and fundamental freedoms and rule of law.[18] It means that the CJEU must place international law within the EU legal arrangement when deciding on effectiveness of international law.[19] However, even though the Court still can apply international law instead of EU law, the recent case law show that its approach has changed to be more dualistic to apply EU law instead of international law that brings up to overthink limitations of the Court's mandate. It can be observed, that the Court recognizes the fundamental rights for asylum seeker, but stays reluctant to refer or apply the Convention.[20] One of the reasons that could explain Court's attitude is that it strives to secure the effectiveness of EU law. Yet, rulings are partly ambiguous and leave broader room for interpretation to national courts. For example, discretion left for national bodies is reasoned in *B and D*, *Lounani* and *H.T* cases.[21]

Furthermore, there is a duty of sincere cooperation and the principle of judicial protection between all judicial authorities in Member States to make a deeper integration of EU law.[22] It means that in order to ensure uniform application and further integration of valid EU law, the CJEU is the final body that can provide guidance or examine the validity of the contested EU norm. Furthermore, common asylum policy is a combination of national law, EU law, European Convention of Human rights (ECHR), international law and other treaties meaning that Member States implement EU directive, they are bound by ECHR, Convention and the Charter.[23] Hence, for example, if the national body is not sure whether provision of Qualification Directive is valid (that includes broader exclusion criteria than the Convention), in order to ensure a uniform and correct application of EU legal instrument, national court must refer to CJEU. However, meanwhile the Court struggles to secure the effectiveness and uniform and correct application of secondary EU law, there is a tension arising due to protection of individual fundamental rights that influence the application. Therefore, the CJEU has become in a very complex position to balance between its administrative and constitutional role.[24]

In the last years cases like *B and D*, *Lounani* have challenged the Court's judicial role concerning asylum policy to deal with issues that have put it in different types of discourses. From the point of preliminary reference procedure, two different functions of the CJEU in the context of asylum related matters can be observed.[25] First, the CJEU exercises a function of an administrative court when it promotes a uniform and effective application of secondary EU law and provides a guidance for national courts.[26] Although, the Court is not providing the

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[18] Treaty on European Union (Consolidated version 2012), *OJ C* 326/13, 26.10.2012. Available on: http://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF. Accessed May 16, 2018.

[19] Christina Eckes, "International Law as Law of the EU: The Role of The Court of Justice," Centre for the Law of the EU External Relations 6 (2010): p.5.

[20] See judgements in *Bundesrepublik Deutschland v B and D,* joined cases C‑57/09 and C‑101/09, ECLI:EU:C:2010:661, judgement in *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani,* C-573/14, EU:C:2017:71 and judgement in *H. T. v Land Baden-Württemberg*, C‑373/13, ECLI:EU:C:2015:413.

[21] Ibid.

[22] Supra 9, p.376.

[23] Supra 1. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. Available on: https://www.echr.coe.int/Documents/Convention_ENG.pdf. Accessed 16 May 2018.

[24] Supra 17, p.240.

[25] See judgements in *Bundesrepublik Deutschland v B and D,* joined cases C‑57/09 and C‑101/09, ECLI:EU:C:2010:661, judgement in *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani,* C-573/14, EU:C:2017:71.

[26] Supra 17, p.240.

final ruling in particular case, its decision on the interpretation of EU law contributes to the national court's final ruling.[27]

Second, there are fundamental values that are located within the EU legislation and enforced by the Court. The fundamental human rights and general principles are the core strengths of EU law.[28] Accordingly, the enforcement of fundamental rights by the Court is an exercise of a constitutional court because those rights are from higher legal force.[29] Therefore, the Court has to overcome a very complicated situation when the EU law coincides with fundamental human rights. Even more, the Court's authority is challenged when Member States themselves cannot find a balance and their national constitutional values are faced.[30]

Moreover, from a different perspective, there could be also a tension between fundamental rights of the EU sovereign and fundamental rights of the individual (asylum seeker who has criminal background) from the third country. In more detail, the idea is whether the rights of the sovereign from the EU are not infringed when the rights of the individual are enforced in the national court or CJEU. Article 3(1) TFEU sets out that one of the goals of EU is the well-being of its citizens. Moreover, Article 3(2) TFEU adds that the Union shall offer its citizens secure environment. And even more, Article 2 TFEU emphasizes that the EU is found on values that honour democracy. Therefore, it could be argued that the fundamental right to live in secure area of the sovereign of EU is infringed by elaborating that - the sovereign is the very basic of a democratic rule of law based state that is a part of EU.[31] The sovereign shall have the priority right (as his home) to live in a secured country if he feels that his rights are infringed by third country nationals that have criminal background.

Notwithstanding that the preliminary reference procedure has various functions the main goal of the procedure is to rise clarity in Member States about EU law. However, it is crucial how the national courts present questions before the Court.[32] For example, even though, the question referred is about validity of EU law, the core essence of the question might be about issue where the Court does not even have a mandate to answer.[33] As a consequence, the national court is left in a confused situation and that might be translated as the Court's passivism as it can be observed in *Qurbani* case where it was asked to interpret provision from the Convention, but the preliminary question did not contain any reference to provision from the Qualifications Directive. CJEU even deviated from the mere fact that the preamble of the Qualifications Directive include references to the Convention which means that it corresponds to the whole legal act.[34]

If the legal instruments of EU are questioned and the Court does not raise clarity about how to interpret them, that raises a question of how effective the judicial protection in EU legal order is at all. From one side the Court has a mandate to examine EU law, but it does not mean that

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[27] Supra 9, p.368.
[28] Supra 9, p 379.
[29] Supra 17, p.240.
[30] Loic Azoulai and Zane Rasnaca, "The Court of Justice of the European Union as a Self-Made Statesman," in *A Companion to European Union Law and International Law*, ed. Dennis Patterson et al. (Willey: Blackwell, 2016), p.173.
[31] Supra 16.
[32] Supra 9, p.368.
[33] Supra 4.
[34] Supra 4, paragraph 27. Recitals 3, 4, 23 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *OJ L* 337, 20.12.2011, pp. 9–26. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0095. Accessed May 11, 2018.

the Court has a competence to examine its compatibility with international law and declare it void. In that case it could mean that CJEU would be asked to interpret international law, which is definitely not its competence. From the other side even if the secondary EU law has been challenged, the Court is not very active on using its mandate even to make it void without interpretation of international law. However, on the contrary, it might be that the Court tries to find a solution how to not infringe fundamental rights but at the same time supports secondary EU law because the case law of CJEU constitutes a cornerstone of compliance.[35] Additionally, the Court's attitude might be explained because of ambiguously constructed Treaties meaning that provisions included are indefinite, they are of broad logic and it is not simply possible to review the legality of EU law within international law.[36] Overall, when providing rulings, the Court has to see the whole EU system together not only one provision from EU law.

1.1. Overview of CJEU case law

There is noticeable number of cases that have been submitted before the Court and it has become more involved in matters related to migrant rights. The success and expansion of the Court's competences in last decades today have been strategically challenged by non-governmental organisations and lawyers who specialize in asylum field.[37] Not only the importance of fundamental rights and values have been triggered, but also the institutional position of the Court itself which is in the very centre when there is any disagreement about migration policy.[38] The most significant legal interventions are about, for example, the scope of the principle of *non-refoulment*, decisions about subsidiary protection and different grounds for exclusion.[39]

Most actively EU Asylum policy regarding Qualification Directive is questioned by Germany (fourteen cases) and Netherlands (seven cases). Less references are from Ireland, Belgium, Sweden and even less – from Austria and Hungary, United Kingdom. The most referred question is about the scope of the principle of *non-refoulment,* also whether the applicant is entitled to subsidiary protection. Meaning, that in a case of his return there is possibility that

[35] Supra 9, p.376.

[36] Judgement in *International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union v Secretary of State for Transport*, C-308/06, ECLI:EU:C:2008:312, paragraph 50.

[37] Moritz Baumgärtel, "Part of the Game," in *The Changing Practices of International Law*, ed. Tanja Aalberts, Thomas Gammeltoft-Hansen, 103–28. (Cambridge: Cambridge University Press, 2018), p.106.

[38] Ibid, p.104.

[39] In total there are thirty-three cases related to Qualification Directive 2004/83/EC (Recast 2011/95/EC) with judgements and preliminary ruling references before the CJEU. A raise in caseload started after year 2011 when national lower instance courts were enabled to refer preliminary ruling questions due to the amendments of Lisbon Treaty. Currently, there are 22 judgements and 11 pending preliminary references. Moreover, a number of cases are in a close connection with Dublin Regulation because it determines the country responsible for examining the application for asylum seeker and is equivalent legal remedy to the Qualification Directive.
Other most litigated topics are about cessation of the protection, revocation of refugee status, procedural questions and grounds for exclusion. The qualification standards could not amount if there is already provided protection from the agency (for example, from United Nations Relief and Works Agency for Palestine Refugees in the Near East) or the asylum seeker cannot be granted the refugee status because of criminal acts exercised in the past, including terrorism related activities. See European Council on Refugees and Exiles and European Legal Network on Asylum. *List of Relevant Asylum Judgements and Pending Preliminary References from the Court of Justice of the European Union*. January 2018, pp.22-42. Available on: http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Recent%20Asylum%20Judgments%20and%20Pending%20Preliminary%20References%20before%20the%20CJEU%20-%20January%202018.pdf. Accessed April 1, 2018.

he will suffer a serious harm, he runs a genuine risk of, inter alia, being prosecuted or he is subjected to inhuman and degrading treatment or punishment in the country of origin. Reference questions are mostly based on sexual orientation, health issues and freedom of religion. Moreover, the references are accompanied with questions about proper interpretation of articles from the Charter.[40]

By the timeline of cases it can be observed, that the states strategically try to challenge the CJEU by referring questions that make the Qualification Directive seem to look vague. The very last preliminary references are whether the Qualification Directive where new exclusion criteria could be introduced is compatible with the Convention.[41] The most relevant cases about exclusion depending on serious threat to public security and terrorism will be discussed in the third part.

[40] Ibid. Charter of Fundamental Rights of the European Union *OJ C* 326, 26.10.2012, pp. 391–407. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT. Accessed May 11 2018.

[41] Request for a preliminary ruling from the Nejvyšší správní soud (Czech Republic) lodged on 14 July 2016, *M v Ministerstvo vnitra*, *OJ C* 350, 26.9.2016, p. 16–16, C-391/16. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CN0391. Accessed 15 May 2018. Request for a preliminary ruling from the Conseil du Contentieux des Étrangers (Belgium) lodged on 13 February 2017 — *X v Commissaire général aux réfugiés et aux apatrides*, *OJ C* 144, 8.5.2017, p. 28–29, Case C-77/17. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62017CN0077. Accessed 15 May 2018.

2. INTERACTIONS BETWEEN DIFFERENT LEGAL ORDERS

One of the main legal instruments on the common asylum policy is the Qualifications Directive. In the preamble of this directive it is established that the Convention is a cornerstone of the CEAS.[42] Moreover, all Member States are signatories to the Convention, but EU itself has not signed it.[43] It means that the Convention is binding on Member States, but not on the Union following that the responsibility in asylum field can be seen as shared and also the final decision about granting the refugee status when applying Qualifications Directive is balanced between CJEU and national authorities.[44]

However, even though the EU has not taken over obligations, the very binding heart of the Convention is also established, firstly, in the TFEU and, secondly, in the Charter.[45] One could argue that the Convention reflects base values of the Union and thereby was established within primary EU law. Consequently, the CJEU is put in a difficult position where rather vaguely constructed Treaty regulations interact with the Charter and Convention.

To better understand position of the Convention within the realm of EU law, different roles exercised by CJEU and margin of appreciation left for national authorities - interplays between EU, international and national legal orders have to be analysed. The following subsection will start with analysing hierarchy of international law within EU legal order and case-law that contributes to the research analogically.

2.1. Interaction between EU and international law

When it comes to the hierarchy of EU legal order, the meaning of what is the EU itself comes to the fore. Jan Klabbers has argued that EU is a unique international organisation of common good and cannot be treated in the same way as other organisations like, for example, World Health Organisation. Indeed, the organisation has been established by states, it has been set up by the Treaty and it has its own institutional organs. Subsequently, the concept of an international organisation is broad enough to shape it according to the situation.[46] With this in mind, the Union benefits of this notion of an international organisation in areas where the legal position, political attitude is not defined completely, meaning that the Union can form it according to the circumstances.

Moreover, EU has become largely constitutionalized and combines elements from an international organisation and a state.[47] It should therefore come as no surprise that, even

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[42] Recitals 3, 4, 23 of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, *OJ L* 337, 20.12.2011, pp. 9–26. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0095. Accessed May 11 2018.

[43] UNHCR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol as of April 1, 2011. Available on http://www.unhcr.org/3b73bOd63.html. Accessed 2 April 2018.

[44] Supra 4, paragraph 23. Koen Lenaerts, Jose A. Gutierrez-Fons, "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice," 20 Colum. J. Eur. L. (2014): p.41.

[45] Supra 16, Article 78. Article 18, Charter of Fundamental Rights of the European Union *OJ C* 326, 26.10.2012, pp. 391–407. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT. Accessed May 11 2018.

[46] Jan Klabbers, "Suis generis? The European Union as an International Organization," in *A Companion to European Union Law and International Law*, ed. Dennis Patterson et al. (Willey: Blackwell, 2016), pp.4.,11-12. Alexandra Popescu, "The EU Costs of the Refugee Crisis," *Europolity*, 10 (2016), p.118.

[47] Katja S. Ziegler, "The Relationship between EU law and International Law", in *A Companion to European Union Law and International Law*, ed. Dennis Patterson et al. (Willey: Blackwell, 2016), p.40.

though the EU is an important actor and influencer of international law, it holds sole uniqueness that can manifest into approaches of dual perspective. From one side, EU is held accountable and evaluated due to its legal personality as an international actor.[48] Form the other side, as it holds its individual framework that could be hardly comparable to any other international organisation or pre-conditions for international organisation[49], it retains a choice of dualist or monist approaches towards international law.

Nevertheless, the Article 3(5) TEU sets out general compliance towards international law that *"[t]he Union shall contribute to […] the strict observance and the development of international law,"* therefore granting the aforementioned duty to comply with international obligations.[50] The natural embeddedness of international law within realm of EU law set in Article 3(5) TEU has been also recognised by CJEU in cases when referring to international law as an essential part of EU law.[51] However, the argument here does not prove that the international law being a part of EU law make it crystal-clear what is the status of international law within EU legal order and whether does it have to be applied in the same way as EU law.[52] It is important because if the international law is directly effective in EU legal framework, it shall prevail over national law in Member States because under Article 47 TEU states have transferred their sovereignty to the Union.[53] In spite of the theory, it is necessary to analyse how CJEU in practice has defined the relationship between EU and international law, therefore case-law that analogically contributes to the research will be analysed.

2.1.1. CJEU's approaches towards international law

A recent judgement in *Kadi I* case is one of the examples how the CJEU instead of applying international law directly, reviews the EU regulation within the primary EU law.[54] Moreover, this case is an example how the rights of an individual (who was considered person who contributes to terrorism) interact with EU regulation to counter terrorism by transposing the resolution of United Nations (UN).[55] The reasoning shows that the CJEU chose to approach this matter from more constitutional/dualist perspective that can be considered one of the approaches of the Court how it deals with international law when EU primary law is challenged. There are similarities to the research object where the Qualification Directive, TFEU and Charter bear references to the Convention and how the attitude of the CJEU could be predicted in cases in the context of asylum, terrorism and security.

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[48] Ibid.
[49] Supra 46, p.5.
[50] Supra 18.
[51] Supra 47, p.44. See judgement in *International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union v Secretary of State for Transport*, C-308/06, ECLI:EU:C:2008:312, paragraph 38. See judgement *A.Racke GmbH and Co and Hauptzollamt Mainz*, C-162/96, paragraph 46.
[52] Supra 47, pp.44-45.
[53] Supra 18, Article 47. The Article sets out that "The implementation of the common foreign and security policy shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the Treaty on the Functioning of the European Union […]"
[54] Judgement in *Kadi I*, joint cases C-402/5 and C-415/05, ECLI:EU:C:2008:461.
[55] Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No 337/2000, *OJ L* 67, 9.3.2001, pp. 1–23.

Similarly, as discussed above about the binding nature of the Convention and matter of Qualification Directive - EU is not bound by the UN Charter, but Member States are which was one of the reasons the CJEU excluded the direct effect following from the international obligation.[56] Subsequently, CJEU ruled on fundamental principles of EU law without even reviewing the normative. It simply declared that there cannot be any derogation from constitutional principles of EU law as principle of judicial protection (right to be heard). However, the reasoning of *Kadi I* case has left doubts whether EU is even bound by the UN Charter as the CJEU has showed its autonomy towards international obligations being the final judicial body that enforces EU law.[57] Therefore, it raises doubts whether the Court could take similar approach concerning the Convention and Qualification Directive. In other words, would the Court dare to avoid the Convention and review the validity of the Qualification Directive from the perspective of TFEU and the Charter even if all aforementioned EU law sources refer to the Convention.

Even more, the Article 103 of the UN Charter clearly states that parties shall give prevalence to the UN Charter.[58] Therefore, aforementioned reasons could be considered as basis for exclusion for any other international obligations from international law.[59] Thus, the interplay between international and EU law has already proved to engage in more of dualist approach, but in the same time the CJEU has demonstrated that it strives to achieve balance between all international actors.[60] Again, specific rulings that do not provide full effect to international law cannot be automatically considered that now this kind of practice will follow in all other similar cases and that the CJEU has changed its approach.[61]

Furthermore, from the perspective of general principles of law, for example, the general principle of legal certainty, CJEU has declared that the secondary international law has to be interpreted "as far as possible" in the light of international law.[62] Thus, international treaties where the EU is a signatory require a consistent interpretation of secondary EU law which means that in the EU legal hierarchy international law is above secondary EU law and below primary EU law.[63] Subsequently, it shall also allow the CJEU to review the legality of secondary EU law taking into account the binding character of the international law, with a condition if the EU is a signatory to it.[64] Moreover, a 'substantive borrowing' may be used where no formal relationship has been developed. In other words, the effect to international treaty may be given in a way that it serves as gap filler in EU law.[65] Still, ambiguous rulings

[56] Supra 47, p.50. Judgement in *Kadi I*, joint cases C-402/5 and C-415/05, ECLI:EU:C:2008:461, paragraph 296. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. Available on: http://www.un.org/en/charter-united-nations/. Accessed May 15 2018. Piet Eeckhout, *External Relations of the EU* (Oxford: Oxford University Press, 2004), pp.331, 435.
[57] Supra 6, p.300.
[58] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI. Available on: http://www.un.org/en/charter-united-nations/. Accessed May 15 2018.
[59] Supra 47, pp.47-48.
[60] Ibid, p.49.
[61] Supra 19, p.16.
[62] Supra 47, p.49. Opinion of Advocate General Kokott *International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union v Secretary of State for Transport*, C-308/06, ECLI:EU:C:2007:689, paragraph 107.
[63] Supra 6, p.280.
[64] Supra 19, p.12.
[65] Supra 6, p.281.

where the CJEU provides minimal guidance do not clearly state the position of international law in the hierarchy of EU law and might cause unnecessary case load before the Court.[66]

However, even though the EU is not a party to any of aforementioned international agreements, one could argue that EU is bound by customary international law. Article 47 TEU sets out that *"[t]he Union shall have legal personality*," where it is evident that if combined with the status of international organisation, it means that EU has international legal personality.[67] The consequence is that even if the EU is not bound by international agreement, it still contributes to the development of international and customary law by deriving international responsibility as one of the actors of international arena.[68] For example, if EU will further exercise strong dualist approach towards international obligations, other third countries also might follow that could make international treaties less important.

Again, although the CJEU has acknowledged the principle of direct effect of customary international law for the validity to review EU secondary law, the criteria have been narrowed down.[69] In *AATA* case, the CJEU stated that its mandate is limited to review whether EU legislative bodies have made obvious mistakes when assessing the application of the principles of customary international law because those principles are not as precise as provisions from international treaty.[70] Moreover, in addition the CJEU also restricted criteria of the possibility to relay on customary international law for individual's right.[71] In other words, the condition, that the norm had to be clear sufficiently was not enough. So, the respective provision had to confer to individual's right to have a direct effect. It means that the later condition has decreased individuals chance to invoke application of the direct effect which is actually contrary to protected individual's interests to invoke international law (right to asylum).[72]

This aspect raises doubt about CJEU's attitude towards principle of customary international law from the perspective of the right to asylum and what shall be regarded as 'particularly serious crime' under exclusion criteria in the Convention. As what shall be regarded as 'particularly serious crime' has not been clearly defined in the Convention and there is no conferral towards states that the individual has to be granted asylum, one could guess that the CJEU would choose not to relay on the Convention even as taking it into account from the perspective of principle of customary international law.

Another example is CJEU's approach in *Intertanko* case where it clearly stated conditions that have to be met for a direct application of international treaty. First, EU has to be bound by the treaty provision. Second, the rule has to be clear enough, precise and unconditional. Third, direct effect is not precluded by the 'nature and structure' or 'broad logic' of a treaty.[73] However, the EU had not ratified the international treaty and CJEU ruled that provisions of the treaty do not confer individual right to have a direct effect as it was considered more state-

[66] Supra 7, p.381.
[67] Supra 18.
[68] Supra 6, p.270.
[69] See judgement in *A.Racke GmbH and Co and Hauptzollamt Mainz*, C-162/96, paragraph 52.
[70] See judgement in *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v Secretary of State for Energy and Climate Change*, C-366/10, ECLI:EU:C:2011:864, paragraph 110.
[71] Ibid, paragraphs 74, 84, 107. Supra 6, pp.282-283.
[72] Supra 47, p.47.
[73] See judgement in *International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Shipowners (Intercargo), Greek Shipping Co-operation Committee, Lloyd's Register, International Salvage Union v Secretary of State for Transport*, C-308/06, ECLI:EU:C:2008:312, paragraph 45.

centred in nature. Moreover, the CJEU pointed out that even though the secondary EU law has the objective to embody certain provisions from the international treaty, it is not sufficient and binding for the CJEU to review the legality of secondary EU law against international law.[74] Obviously, the CJEU already in this case has declared what are the criteria to examine, for example, Qualification Directive in the light of the Convention. However, all three criteria would not be fulfilled because EU is not bound by the Convention.

From one side, it raises doubts whether direct effect of customary international law within EU legal framework would be even possible as the Court acts like a gate opener.[75] It seems, that the CJEU is not going to review Qualification Directive in the light of the Convention even from the perspective of the principle of customary international law. From the other side, indeed, the direct application is not possible if the norms in international treaty are vaguely constructed and the EU is not a signatory to the international treaty. However, ambiguous provisions of EU law might be still valid due to the context and purpose[76] and might mean that the Court's reluctance towards international law depends on specifics of the case. Consequently, CJEU's role is set in a difficult context to deal with rather ambiguously formulated treaty provisions that interact with the Charter and human rights. Even more, it might be concluded that examination of EU law includes balancing and comprehensive approach to cover all levels of legal orders with what the EU law could interact and it seems one of the tasks of CJEU.

2.2. TFEU and the Charter

This subsection discusses explicit references to the Convention that are embedded in TFEU and the Charter. As the TFEU and the Charter are sources of primary EU law it is off utter importance to understand whether they provide direct effect to the individual and therefore, whether CJEU would have the mandate to examine the validity of the Qualification Directive with the Convention.[77]

The Article 18 of the Charter sets out that

> "[r]ight to asylum shall be guaranteed with due respect to […] Geneva Convention […] and in accordance with the TEU and TFEU,"

where it is not actually clear whether the individual has the right to be granted asylum or the Member States have the right to grant asylum. However, taking into account the general essence of the Charter, beneficiary of the right to asylum shall be every individual whose rights have been protected by international agreement as, for instance, the Convention.[78]

On the other hand, although, the Article 18 of the Charter introduces a direct right to asylum for an individual, it could be argued whether it also confers upon the right or freedom to individual of being capable to relay on Member States.[79] Indeed, when the asylum seeker enters the territory of EU, the EU law applies. It should, even so, be stressed that the asylum

[74] Ibid, paragraph 50.
[75] Supra 6, p.281.
[76] Koen Lenaerts, Jose A. Gutierrez-Fons, "To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice," 20 (2014): p.61.
[77] Supra 16. Charter of Fundamental Rights of the European Union *OJ C* 326, 26.10.2012, pp. 391–407. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT. Accessed May 11 2018.
[78] Maria Teresa Gil-Bazo, "Refugee Status, Subsidiary Protection, and the Right to be Granted Asylum Under EC Law," *Refugee Research* 136 (2006): p.6.
[79] Supra 73, paragraph 50.

seeker has the right to asylum, but with no means that provision has to be interpreted as the Member State is obliged to grant the refugee status in its territory. Therefore, migrants whose asylum application is inadmissible, are sent to Turkey that has voluntarily agreed with EU to take migrants.[80] That is to say, the principle of *non-refoulment* is not violated as the asylum seeker is not sent back to a territory where his life and freedom would be in danger.

Furthermore, Article 78(1) TFEU acknowledges that the ECAS shall be compatible with the Convention as

> "The Union shall develop a common policy in asylum […] offering status to any third country national requiring international protection and ensuring compliance with the principle of *non-refoulment*. This policy must be in accordance with the Geneva Convention […] and other relevant treaties,"

therefore acknowledging the Convention as the yardstick of the asylum policy.[81] Thus, from a general view, the explicit references to the Convention in both aforementioned articles of the Charter and TFEU would mean double breach of primary EU law if interpreted inconsistent with it.[82] Moreover, in case *NS v Secretary of State for the Home Department,* the CJEU itself pointed out that Member States when interpreting provisions form national law, they must interpret them consistent with EU law and not relay on an interpretation of an secondary legislation that would be in conflict with fundamental rights protected within the realm of EU law or general principles of EU law.[83] Consequently, again, this statement strikingly presents that even though Member States have to implement Qualification Directive that includes broader exclusion criteria, they are responsible themselves whether to comply with the exclusion criteria set in the Convention which is embedded in primary EU law.

Furthermore, it is not clear whether the prerequisite mentioned in Article 78(1) TFEU that the CEAS shall be in conformity with the Convention also empowers the CJEU to examine the compatibility of the Qualification Directive with the Convention.[84] Therefore, while it remains a major misunderstanding about the EU legal framework's hierarchical system and unclear wording in treaty articles, that leaves, firstly, Member States in a very uncomfortable situation and, secondly – the authority of CJEU has been put at risk as it shall appear as safe, final judicial institution that provides guidance and raises clarity for national courts.

2.3. Qualifications Directive and the Convention

The CJEU has never been asked to interpret or examine Article 14(5) from the Qualification Directive that is the problem issue in the research, but currently there are corresponding cases pending before the court.[85] While the reasoning by CJEU of the aforementioned collision is still in the process, the purpose, recast process of the Qualification Directive and the main problem issue between it and the Convention has to be analysed to understand the background of the EU legal instrument.

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[80] European Council. Council of the European Union. *EU-Turkey Statement, 18 March 2016*. Press release. Available on: http://www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/. Accessed 15 May, 2018.
[81] Supra 16.
[82] Supra 6, p. 392.
[83] Judgement in *N.S. v Secretary of State for the Home Department*, joined cases C-411/10 and C-493/10 paragraph 77.
[84] Supra 17, p.217.
[85] Supra 41.

In 1999 at the Tampare European Council the Union set a goal to establish a Common European Asylum System (CEAS) with a full inclusion of the Geneva Convention and ensuring that it will maintain the principle of *non-refoulement*.[86] In order to ensure uniform interpretation of asylum rights and respect to asylum seekers across the Member States, European Council issued number of directives. One of the component established within CEAS was the Qualification Directive on the qualification standards for and content of refugee and international protection.[87] However, the directive was highly criticised and therefore the European Commission submitted a recast proposal by ensuring even higher protection on the basis of full application of the Convention as well as for ECHR, the Charter and related developing case-law.[88]

Overall, the main elements amended were about clarification of legal concepts like "actors of protection", "internal protection" and "membership of a particular social group" as well as clarification of the right to subsidiary protection, duration of residence permit, but nothing amended about clarifying exclusion criteria which is one of the elements of this paper's research question.[89] After all, one could conclude that the legislator's intent was to ensure that the asylum policy is in accordance with the Convention and therefore, also has to be interpreted in the light with it.

Nevertheless, the main problem can be found between Article 12(2) and Article 14(4) and (5) of the Qualifications Directive and Article 33(2) and Article 1F of the Convention.[90]Article 12(2) of the Qualifications Directive sets out exclusion criteria from Article 1F of the Convention when a third-country national or stateless person is excluded from being a refugee. However, inconsistency of provisions appears in Article 14(4) and (5) of the Directive and Article 33(2) of the Convention where the provisions from the Qualification Directive introduce broader exclusion criteria than the Convention.

According to the Convention, the asylum seeker becomes a refugee when he has been granted the status and the asylum seeker can be excluded without having the refugee status. Article 33(2) presents criteria when the refugee is not entitled to the benefit of international protection which means that the refugee status can be revoked under

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[86] Supra 5, paragraph 13.

[87] Lillian M. Langford, "The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unrevealing of EU Solidarity," *Harward Human Rights Journal* 26 (2013): p.231. European Council on Refugees and Exiles and European Legal Network on Asylum. Comments from the European Commission Proposal to recast the Qualification Directive. March, 2010, p.2. Available on: https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-on-the-Commission-Proposal-to-Recast-the-Qualification-Directive_March-2010.pdf. Accessed 2 May, 2018.

[88] Commission of the European Communities. Proposal for a Directive of the European Parliament of the Council laying down minimum standards for the reception of asylum seekers (Recast), Brussels, 3.12.3008 COM(2008) 815 final, p.7. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008PC0815. Accessed 16 May, 2018.

[89] European Commission. Detailed Explanation of the Amended Proposal Accompanying the document amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status (Recast), Brussels, 1.6.2011. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0319&from=EN. Accessed 15 May, 2018.

[90] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ L 337, 20.12.2011, p. 9–26. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32011L0095. Accessed 15 May, 2018. United Nations High Commissioner for Refugees (UNHCR). 1951 Convention and Relating to the Status of Refugees. Available on: http://www.unhcr.org/3b66c2aa10.pdf. Accessed 12 May, 2018.

> "The benefit […] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security […] or, who, having convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

The problem is that Article 14(4) about 'revocation, ending or refusal to renew refugee status' of the Qualification Directive introduces criteria that Member States may decide to revoke a status (meaning that the asylum seeker has already the refugee status)

> "[w]hen: a) there are reasonable grounds for regarding him … as a danger to the security […] b) he […] having been convicted by a final judgement of particularly serious crime, constitutes a danger to […] Member State."

Further, Article 14(5) sets out that

> "In situations described in paragraph 4, Member States may decide not to grant status to a refugee where such decision has not yet been taken,"

which means that the Qualification Directive bears a broader exclusion criterion – other than the Convention that actually broadens the exclusion criteria set out in Article 12(2) of the directive. It means that the refugee is deprived the status under EU law where he or she corresponds to criterion described in Article 14(4) of Qualification Directive and in the same time can be refused the status as an asylum seeker not as a refugee (refused without having the refugee status) under Article 14(5). A confusion from Article 14(5) may arise because in order to revoke the refugee status, it shall have to be granted in the first place.

Furthermore, it is important to mention that Article 3 of the Qualifications Directive clearly permits Member States to introduce more favourable standards for qualification of a refugee status, but until those standards are consistent with the directive itself. Even though, the Article 14(4) is in line with the Convention, provision established in Article 14(5) is not included in Article 33 of the Convention. Therefore, taking into account Member State's obligations towards international law, the additional criteria included in Article 14(5) of the Qualification Directive provides more restrictive standards on asylum seeker's rights and clearly violates the Convention.

With this in mind, EU legislative institutions had the opportunity to recast the Qualifications Directive, but it was not considered to be contingency even after a number of comments from UNCHR and ECRE.[91] Therefore, it could be concluded, that it was legislator's will to leave that provision unchanged. Even more, the recast of the Qualifications Directive bears even less commitment than the TFEU and concentrates on minimum standards.[92] Additionally, as mentioned previously, the CJEU has the mandate to examine secondary EU law, but it can be observed that it stays reluctant in the context of asylum and national security to examine the

[91] European Council on Refugees and Exiles and European Legal Network on Asylum. Comments from the European Commission Proposal to recast the Qualification Directive. March, 2010, p.2. Available on: https://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-on-the-Commission-Proposal-to-Recast-the-Qualification-Directive_March-2010.pdf. Accessed 2 May, 2018. 6. United Nations High Commissioner for Refugees (UNHCR). UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009). Available on: http://www.unhcr.org/4c5037f99.pdf. Accessed 16 May, 2018.

[92] Julia Mink, "EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-refoulment and the Prohibition of Torture and Other Forms of Ill-treatment," *European Journal of Migration and Law* 14 (2012): p.126.

directive with the Convention. However, that could be a reason for leaving Member States to decide whether to follow their international commitment or not.[93]

Nonetheless, the common asylum policy was intended to have uniform application, in reality CEAS manifests itself like a mixed agreement between EU and Member States.[94] On the one hand, the Qualification Directive refers to the Convention where it clearly embeds the prohibition of expulsion and return.[95] On the other hand, Member States bear certain discretionary power to decide on exclusion if it relates to national security and anti-terrorism.[96]

2.4. Interplay between EU and national law

The development of common asylum policy currently is in tension between competence of EU and national sovereignty.[97] In this subsection, the principle of solidarity and possible economic effects from taking refugees shall be analysed to comprehend the openness or closeness of Member States towards common asylum policy. Even more, analysis of approaches taken by states contribute to the research of how they exercise discretionary power under the shared competence of CEAS.

The CEAS can be seen as a shared competence, nevertheless, the main goal was to ensure uniform application of it among all Member States.[98] Even though Article 80 TFEU sets out

> "The policies of the Union […] shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States […]"

number of Member States have opted not to follow this provision.[99] For example, states that have chosen national sovereignty instead of duty to transpose obligations related to asylum (sharing of responsibility) field are Ireland, Denmark.[100] However, it could be explained as a matter of inefficient management from the Union's side that obviously Member States are reluctant to agree with the same strategy of refugee crisis.[101] Additionally, it is important to note that the Qualifications Directive is in the process of its second recast which means that EU might be on its way to develop much stronger cohesion of the legal system in asylum field.[102]

The aforementioned Article 80 TFEU embeds the principle of solidarity that specifically

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[93] Supra 4 and 25.
[94] Eleftheria Neframi, "Mixed Agreements as a Source of European Union Law," in *International Law as Law of the European Union*, ed. by Enzo Cannizzaro (Martinus Nijhoff: Studies in EU external relations), p.325.
[95] Supra 42.
[96] Supra 20.
[97] Steve Peers, "EU Immigration and Asylum Law," in A Companion to European Union law and International law, ed. by Dennis Patterson et.al. (Willey: Blackwell, 2016), p.519. Frank S.J. Brennan, "Human Rights and the National Interest: The case study of asylum, migration, and national border protection," *Boston College International and Comparative Law Review* Vol.39/47 (2016):p.87.
[98] Supra 5, paragraphs 13-15.
[99] Supra 16.
[100] Council of the European Union. Final steps towards a Common European Asylum System. Luxembourg, 7 June 2013, 10411/13, PRESSE 230. Available on: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/137420.pdf.. Accessed 4 May, 2018.
[101] Radu Patrascu,"Migration, A Current Issue: The crisis of today, the challenge of tomorrow," *Europolity* 9(2) (2015): p.261.
[102] European Parliament. EU Legislation in process: Reform of the Qualification Directive. Available on: http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603914/EPRS_BRI(2017)603914_EN.pdf. Accessed 4 May, 2018.

relates to asylum, border control and migration. However, the principle itself lacks clarification within the Article 80 TFEU, for example, can it be invoked only in the case of emergency.[103] Therefore, CEAS as a matter of common interest in combination with the principle of solidarity could mean different forms of burden-sharing instruments, for example, distribution of common funds.[104] Nonetheless, the possible diverse choices by Member States might drive the CEAS counterproductive and even more drag it to failure.[105] Consequently, a lack of coherence in relation to solidarity principle might bring the whole EU system disharmonic as states that are the first entry in EU (for example, Greece, Italy) have taken on inadequate responsibility and, therefore, are placed in struggling position financially and politically.

It is obvious that the migration crisis has put EU in a very sudden situation, therefore, also the relationship between EU and its Member States is under tension. The shared competence leaves Member States with a certain discretionary power which means that actually it is voluntary for them to provide asylum, because the final decision to grant the refugee status is up for the national authority not CJEU. In other words, the event of 9/11 changed the application direction from that the exclusion clause preceded the inclusion clause for granting the status to refugee.[106] It could be understood that before 9/11, the strategy of states were open towards granting refugee status not exclude the asylum seeker in the first place. Therefore, what shall mean 'particularly serious crime' under exclusion clause leave Member States with a broad interpretation under individual assesment when their national security is under question. Still, it is off utter importance for Member States to choose between humanity and reality as the later might end as a breach of the Convention.[107]

Security and border control is one of the main issues within CEAS that decreases effectiveness of the principle of solidarity among Member States. The border control at national level and lack of harmonisation of the asylum policy influences also the EU external border control.[108] In 2015 the European Commission proposed 'The European Agenda on Migration' that set out a plan how the EU could respond to migration crisis that included also scheme of EU budget division between Member States as the influx of refugees created disproportionate burden to Member States in the south.[109] That scheme encompassed to cooperate European Asylum Support Office with Frontex, Eurojust and Europol to support Member States under pressure by helping to process asylum applications.[110] Even thought it

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[103] Neža K. Šalamon, "The principle of solidarity in asylum and migration with the context of the European Union accession process," *Maastricht Journal of European and Comparative Law* 24(5) (2017): p.689. Esin Kucuk, "The Principle of Solidarity and Fairness in Sharing Responsibility: More than Window Dressing?" *European Law Journal* 22 (2016): p.455.

[104] Ibid. 2. Hemme Battjes, "European Asylum Law and its Relation to International Law," *VU Migration Law Series* 3 (2006): pp.172, 182.

[105] Lillian M. Langford, "The Other Euro Crisis: Rights Violations Under the Common European Asylum System and the Unrevealing of EU Solidarity," *Harward Human Rights Journal* 26 (2013): pp.262-264.

[106] James C. Simeon, "Complicity and Culpability and the Exclusion of Terrorists from Convention Refugee Status Post-9/11," *Refugee Survey Quarterly* 29(4) (2011): pp.106-110. Julia Mink, "EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-refoulment and the Prohibition of Torture and Other Forms of Ill-treatment," *European Journal of Migration and Law* 14 (2012): p.129.

[107] Supra 102, p.260.

[108] Supra 106, pp.218-220.

[109] European Commission "Communication From the Commission to the European Parliament, The Council, The, European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration", Brussels 2015, http://ec.europa.eu/antitrafficking/sites/antitrafficking/files/communication_on_the_european_agenda_on_migration_en.pdf. Accessed 5 May, 2018.

[110] Ibid p.3.

was for the benefit for Member States, Austria, for example, announced that it will introduce cap on the total number of asylum seekers that it is willing to have in its territory.[111] Even more, Denmark announced that it will not take part in resettlement of refugees.[112] However, Germany declared that more unified asylum policy shall be released and processed applications regardless from where the asylum seeker entered EU.[113] It means that the tension between sovereignty of Member States and EU competence related to migration has been under pressure for number of years. Nevertheless, it could be argued that approaches towards asylum policy from Member States might bear different political and economic goals that manifest themselves into discretion left for Member States under shared competence.

Subsequently, one could argue that the upcoming strategy of Germany, for example, might be explained as that there are uncertainties about demographic growth of Germans in the future.[114] Therefore, the decision about taking refugees above resettlement quotas might be based on long-term thinking about population projections in the future. Furthermore, another benefit that could raise from taking refugees is an increase in Gross Domestic Product. However, it has been also argued that a failure to improve integration measures and qualification structure in the long term, could lead to negative economic consequences in the future.[115]

Following the aforementioned analysis, it could be concluded that the discretionary power left for Member States manifests itself into choice between principle of solidarity and national interest related to public security. Even thought, EU struggles to implement coherent common asylum policy, there still are states that choose to opt-out as Denmark. Furthermore, Germany, for instance, choose to come forward with approach intended for economic growth as 'sacrifice for benefit' to compensate demographic decrease in the future. While the interaction between EU and national level seem to introduce approaches of Member States, trends of CJEU in cases related to terrorism, Member State's security in the context of asylum will be analysed in the third part.

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[111] Reuters World News. Austria sticks to migration cap despite EU legal warning. Available on: https://www.reuters.com/article/us-europe-migrants-austria-commission/austria-sticks-to-migration-cap-despite-eu-legal-warning-idUSKCN0VR1OA. Accessed 16 May, 2018.

[112] The Local: News DK. Denmark says no to EU's 160 000 refugee plan. Available on: https://www.thelocal.dk/20150911/denmark-we-wont-take-any-of-the-160000-refugees. Accessed 2 May, 2018.

[113] The Telegraph. Germany drops EU rules to allow in Syrian refugees. Available on: https://www.telegraph.co.uk/news/worldnews/europe/germany/11821822/Germany-drops-EU-rules-to-allow-in-Syrian-refugees.html. Accessed: May 3, 2018.

[114] Susanne Schultz, "Demographic futurity: How statistical assumption politics shape immigration policy rationales in Germany," *Environment and Planning* 0 (2018): p.7.

[115] Nikolai Stähler, "A model based analysis of the macroeconomic impact of the refugee migration to Germany," *Discussion Paper*, Deutsche Bundesbank 05 (2017): p.19.

3. LEGAL TRENDS OF CJEU

The CJEU uses number of trends when it deals with the complicated round scheme of national, EU and international law relationship where a specific typology of cases (group of cases) can be distinguished that relates to terrorism and security of the Member State in the context of asylum. The reasoning of CJEU related to the Qualification Directive, the Convention and national law will be discussed in the following sub-sections to uncover the legal trends of CJEU how and in what situations it applies and interprets the Convention and what discretionary power it leaves for Member States.

Trends can be divided on how the CJEU uses the principle of proportionality. For example, the CJEU uses mere references, considerations of international law, but leaves the assessment of facts for the national courts. One could conclude that, CJEU can be seen as a regional refugee jurisprudence developer with a commitment to international arena. Therefore, the embeddedness of the Convention into secondary and primary EU law brings into attention CJEU's approaches towards international and national level. It could be argued that CJEU acts like a safeguard of its own success (developed authority)[116] by limiting itself to provide answers for preliminary ruling references. In other words, it does not step over its competences and does not intervene with national security affairs.[117]

3.1. Consideration of international law

One of the trends observed is a consideration of the international legal instrument where the CJEU acknowledges the Convention but refuses to apply it by pointing to its competences. In the *Qurbani*, the CJEU particularly pointed out its mandate limitation.[118] This case is important because the refugee is a third country national whose criminal activities have got under the consideration of the Convention, national criminal law and the Qualification Directive that are used as a basis for refusal of refugee status. The German Court of second instance had doubts about the interpretation of Article 31 that was brought up in the criminal proceeding against Mr Qurbani for the use of service of people smugglers, illegal entry, unauthorized stay and presentation of forged passport.[119] It should be added that Mr Qurbani did not enter the Member State directly from the state of persecution which means that he passed by several Member States and under national law could be punished for criminal activities.

One of the mere issues was, that the question asked did not contain any EU rule that makes *renvoi* to Article 31.[120] In particular, even though, the Article 14(6) of the Directive (that is relevant in the main proceedings) makes *renvoi* to the Article 31 of the Convention, the request did not include exactly that EU provision.[121] Moreover, the CJEU stated that, although, it has previously held in *B and D*[122] (will be discussed further) that there shall be

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[116] Supra 37, pp.2-5.
[117] Geoff Gilbert, "UNHCR and Courts," *International Journal of Refugee Law* 28(4) (2016): p.631.
[118] Supra 4.
[119] United Nations High Commissioner for Refugees (UNHCR). *1951 Convention and Relating to the Status of Refugees*. Available on: http://www.unhcr.org/3b66c2aa10.pdf. Accessed March 5, 2018.
[120] Supra 4, paragraph 28.
[121] Supra 90.
[122] Judgement in *Bundesrepublik Deutschland v B and D*, joined cases C‑57/09 and C‑101/09, ECLI:EU:C:2010:661, paragraph 71. Judgement in *Qurbani*, C‑481/13, ECLI:EU:C:2014:2101, paragraph 26.

uniform interpretation of provisions from international agreements that have been taken over by Member States and EU, the Article 31 has not been taken over by EU law even if there is a number of references to Article 31 from EU legislation. Finally, the CJEU points to lack of jurisdiction that could be regarded as the main argument in the case.

Firstly, it refers to Article 267 of TFEU where it clearly notes that it cannot directly interpret Article 31 of the Convention. Even more, the Convention itself does not contain a clause about CJEU's jurisdiction. Second, it brings up a point where it states that it has no jurisdiction to interpret international agreements concluded between Member States and non-member countries and where the Union itself is not a party. Subsequently, for no surprise, the CJEU shows that it does not want to be considered as an international refugee court and it will not step over its mandate by directly interpreting international treaty provisions. Thirdly, it reminds that in the field of CEAS, Member States hold certain part of competence, that in this case relate to the Article 31 of the Convention even taking into account the fact that it is also a part of EU law.[123]

Therefore, it could be concluded, that CJEU is very strict on its mandate to interpret provisions from international agreements, except where they copy-paste the same wording in the EU legislation. Even if there is an explicit reference included in the preamble of the Qualification Directive, actually corresponding to the whole setting of the legal act, the CJEU argues that it does not count as a *renvoi*.[124] Moreover, this approach manifests itself into showing that CJEU might not want to admit Convention as a part of EU law. Furthermore, the reasoning of the CJEU also might mean that it tries to manoeuvre from possible interaction with international law in meantime declaring its importance and actual references in EU legislation.

It also redirects the jurisdiction to interpret the international law to the court of the Member State taking into account the fact that - yes, there are certain power that EU has taken over previously exercised by Member States, but not Article 31 of the Convention, as the CEAS is shared competence. Obviously, states cannot deny their legal responsibility, but what is even less clear is when the responsibility of EU starts and jurisdiction of CEJU applies if the court has full jurisdiction in the field of immigration and asylum after the Lisbon Treaty[125]. It has raised confusion about the effect from international law in EU legislation, whether, if the German Court would have asked the question including reference to Article 14(6) of the Qualification Directive, would still the CJEU refuse to interpret the Convention.[126] However, it can be observed that in this case the approach of CJEU depended on the content of the preliminary question.

3.2. Consistent interpretation of international law

Another trend exercised by CJEU is consistent interpretation of international law which is mainly used in cases relating to asylum and terrorism. A background summary has to be provided to better comprehend this approach.

In the opinion of Ziegler, the CJEU has three approaches how it relies on international law.

[123] Judgement in *Qurbani*, C‑481/13, ECLI:EU:C:2014:2101, paragraphs 19-25.
[124] Supra 42.
[125] Supra 17, p.220. Gabor Gyulai, "The Luxemburg Court: Conductor for a Disharmonious Orchestra?" Hungarian Helsinki Committee (2012): p. 10.
[126] Supra 47, p.50.

First, it gives direct effect as mentioned in previous part.[127] To recall, it means that the court approves and protects the right involved and acknowledges its crucial influence when applying the rule.[128] Second, CJEU emphasizes the importance and application of international law when interpreting EU law, which is called consistent interpretation. Third, it uses "substantive borrowing" when there is a need to fill gaps in EU law or, for example, facilitate coherence from EU law towards international law. Aforementioned three instances are approaches used by CJEU encompassing how it relies on international law.[129] In cases discussed further, the trend undertaken by the CJEU could be defined as consistent interpretation as CJEU gives no direct effect to the Convention even there are explicit references included in Qualifications Directive, but interprets the secondary EU law as far as possible in the line with the international law.[130]

The Convention has been hardly put into attention in judgements ruled by CJEU. The rulings include short references to the Convention and articles from it are interpreted if they duplicate the provision in EU law. *B and D*[131] and *Lounani*[132] cases will be analysed where the CJEU clarifies provisions from the Qualification Directive in the line with the Convention. The central question in both cases was whether a membership of a terroristic organization fulfils criteria under Articles 12(2)(b) and (c) of Qualification Directive that states

> "A third country national or a stateless person is excluded from being a refugee, where there are serious reasons for considering that … b) he or she has committed a serious non-political crime outside the country of refuge … particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes; c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations,"

to exclude the person from refugee status. The aforementioned articles mirror the Article 1F of the Convention and even add additional wording, however, Article 1F states that

> "The provisions … shall not apply to any person … to whom there are serious reasons for considering that: … b) he has committed a serious non-political crime outside the country of refuge prior to his admission … c) he has been guilty of acts contrary to the purposes and principles of the United Nations."[133]

In addition, *B and D* is the first case where connection with terroristic activities was the basis for exclusion from refugee status.[134] *Lounani* could be considered as a development of jurisprudence of *B and D* as it expands the application of exclusion clause.[135]

In *B and D*, German authority had rejected both applications because applicants had done non-political serious crimes in the past and in addition D was guilty of acts contrary to the

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[127] Ibid, p.45.
[128] Andre Nollkaemper, "The Duality of Direct Effect of International Law," *The European Journal of International Law* 25/1 (2014): p.110.
[129] Supra 47, p.45.
[130] Ibid, p.49. Supra 129, pp.110-114.
[131] Judgement in *Bundesrepublik Deutschland v B and D,* joined cases C‑57/09 and C‑101/09, ECLI:EU:C:2010:661.
[132] Judgement in *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani,* C-573/14, EU:C:2017:71.
[133] Supra 90.
[134] Supra 39, pp.23-24.
[135] European Law Blog. Terror and Exclusion in EU Asylum Law Case – C-573/14 Louani", 2017. Available on: http://europeanlawblog.eu/?s=C-57%2F09+and+C-101%2F09+Bundesrepublik+Deutschland+v+B+and+D. Accessed 12 May, 2018.

purposes and principles of UN.[136] Even more, both were also included in the list of persons annexed to the Common Position [2001/931] who had employed terroristic methods[137]. However, it was not clear whether terroristic activity would assume as non-political serious crime or act contrary to the purposes and principles of the UN and whether acts done by applicants would fulfil exclusion criteria under national law and Qualification Directive.

First, CJEU pointed out that it has a jurisdiction to give a preliminary ruling because grounds for exclusion in Article 12(2) of the Qualification Directive in substance corresponded to those laid down in Article 1F of the Convention.[138] Second, it referred to the preamble of the Qualification Directive and noted that provisions of it shall be interpreted consistent with the Convention and the Charter.[139] Hence, while in this case the CJEU stated that the whole directive shall be interpreted in the light with the Convention, in aforementioned *Qurbani* case it did not even reflect on the treaty.[140] Moreover, CJEU does not bring itself into analysing differences into wording provided in the Qualification Directive and the Convention, which actually might raise problematics towards international law.[141] Additionally, in contrast to the reasoning of CJEU, Advocate General Mengozzi engages with detailed considerations of the Convention, UNHCR Handbook and Guidelines on International Protection to base his statements of the interpretation of Qualifications Directive on the Convention.[142]

Third, it pointed out that terroristic acts count as non-political crimes and in general are contrary to the purposes and principles of UN. Nevertheless, it noted that the fact that the person has been related to terroristic activities does not automatically exclude him from refugee status.[143] In other words, even though persons have been listed in Common Position [2001/931], there is no direct link between Common Position [2001/931] and Qualifications Directive, therefore, the exclusion decision cannot be based only on individual associated with a membership of terroristic group. Even more, CJEU also pointed out, that it also does not directly constitute the person as a threat to the security of the present Member State where the application has been submitted.[144]

Hence, as reasoned by the CJEU, it should be stressed out that fundamental right to effective legal remedy and right to asylum have been put forward than national security issues. However, CJEU has left it unclear what constitutes terroristic act. The reasoning is rather provided with vague statement that terroristic act is a violence against civilian population that does not present a definite answer.[145] Furthermore, CJEU stated that it is necessary to have an individual assessment of the facts.[146] Therefore, indeed, the reasoning of CJEU shows that it

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[136] Judgement in *Bundesrepublik Deutschland v B and D,* joined cases C‑57/09 and C‑101/09, ECLI:EU:C:2010:661, paragraphs 54 and 60.
[137] Council Decision (CFSP) 2016/628 of 21 April 2016 updating and amending the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and amending Decision (CFSP) 2015/2430, OJ L 106, 22.4.2016, p. 24–25. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016D0628. Accessed 14 May, 2018.
[138] Supra 131, paragraph 72.
[139] Ibid, paragraphs 77, 78.
[140] Supra 90.
[141] Supra 17, p.226.
[142] Ibid, pp.227-228. Opinion of Advocate General Mengozzi in *Bundesrepublik Deutschland v B and D*, joined cases C‑57/09 and C‑101/09, ECLI:EU:C:2014:287, paragraphs 44-47.
[143] Supra 131, paragraphs 81-91.
[144] Ibid, paragraph 104.
[145] Supra 17, p.233. Ibid, para 81.
[146] Supra 131, paragraph 94.

uses the principle of proportionality which manifests itself, meaning that, CJEU provides guidance for the interpretation of the norm, but the assessment of facts is left for the national authority by carrying out individual interview.[147] Yet, pointed out by Advocate General Mengozzi, the CJEU was not asked to rule on facts of the case.[148]

Similarly, in *Lounani* CJEU pointed out that provisions of Qualification Directive shall be interpreted in the light of the Convention which means that CJEU approached the Convention with consistent interpretation.[149] The core question in this case was what activities define terrorist under Article 12 of Qualification Directive. In other words, should any ancillary activities related to participation in terroristic organization be sufficient for exclusion under Article 12.[150]

Before applying for refugee status Mr Lounani, a Moroccan national, was sentenced in Belgium for providing logistical support to a terrorist group for supplying information, engaging in forgery, participating actively in recruitment of network for sending volunteers to Iraq. After imprisonment Mr Lounani applied for refugee status because he feared persecution of being returned to Morocco after his conviction. However, national authorities excluded him from the refugee status on the basis of Article 12(2)(c).[151] It was not clear whether any kind of participation in terroristic actions also can be considered as acts contrary to the principles and values of UN defined under Article 1 of the Framework Decision 2002/475 combating terrorism.[152]

Subsequently, the decision was appealed by arguing that he cannot be excluded from the refugee status as his previous activities did not constitute terrorist offences as such and did not reach the degree of seriousness that would count as activities contrary to the purposes and principles of UN.[153] Nevertheless, it should be noted, that at the time when Mr Lounani was convicted, the ruling was based on Article 2 of Framework Decision 2002/475 combating terrorism that defines offences relating to terrorist groups and includes acts of participation.[154] Therefore, the national criminal court did not base its finding on personal involvement in terroristic activities.[155] Again, a disputable question arose whether indirect terroristic acts could be considered as grounds for exclusion from refugee status.[156]

Advocate General Sharpston presented a very clear reasoning about the application of exclusion clause of Article 12(2)(c) by arguing that it should not be limited to acts included in the Article 1 of Framework Decision 2002/475 on combating terrorism.[157] First, in her opinion, it was pointed out that wording in Article 12(2)(c) of the Qualifications Directive is

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[147] Supra 18, Article 5(4).

[148] Opinion of Advocate General Mengozzi in *Bundesrepublik Deutschland v B and D*, joined cases C‑57/09 and C‑101/09, ECLI:EU:C:2014:287, paragraph 39.

[149] Judgement in *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani,* C-573/14, EU:C:2017:71, paragraph 42. Supra 135. Supra 47, p.45.

[150] Supra 135. Judgement in *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani,* C-573/14, EU:C:2017:71, paragraph 39.

[151] Judgement in *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani,* C-573/14, EU:C:2017:71, paragraphs 29-30.

[152] Supra 132, paragraphs 17, 18, 40. 3. Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l33168&from=EN. Accessed 2, May 2018.

[153] Supra 132, paragraphs 31-36. Supra 135.

[154] Supra 132, paragraphs 63, 19.

[155] Supra 132, paragraph 63.

[156] Supra 132, paragraph 40.

[157] Opinion of Advocate General Sharpston in *Commissaire général aux réfugiés et aux apatrides v Mostafa Lounani*, C-573/14, ECLI:EU:C:2016:380.

not defined by reference to the Framework Decision 2002/475 on combating terrorism. In other words, the exclusion clause cannot be limited to terroristic crimes.[158] Second, it was suggested that such an interpretation would be inconsistent with the Convention because the application of Article 1F(c) is not conditional with any findings at national or international level concerning terrorist offences.[159] Third, Qualifications Directive and Framework Decision 2002/475 on combating terrorism present different areas of law, therefore, have different purposes and cannot have the same starting points for interpretation of rules from Qualifications Directive.[160] Fourth, the application of Article 1 of the Framework Decision 2002/475 on combating terrorism would introduce new prerequisite for exclusion, meaning, that there should be a prior criminal conviction for terroristic crime. To put the same way, that approach would narrow the exclusion clause.[161] Fifth, Advocate General noted that the Framework Decision 2002/475 on combating terrorism is an instrument of variable geometry – Member States can decide not to be bound by it which would lead to inconsistency when applying Qualifications Directive.[162] Therefore, it was emphasized that the conviction of terroristic offence is not conditional to be excluded from refugee status.[163] In other words, any ancillary activities related to participation in a terroristic organization result as grounds for exclusion from refugee status.

Furthermore, it was suggested by the Advocate General that even though the criminal conviction of terroristic offences is relevant for exclusion, there shall be exercised individual assessment. First, the fact that it is a terroristic organization shall be determined.[164] Second, the nature of Mr Lounani's membership in particular organization have to be assessed (his role, position, motives, intentions). Finally, it is concluded that even if the applicant or the organization had not committed cruel act of terrorism referred in Article 1 of the Framework Decision 2002/475 on combating terrorism, the asylum seeker can still be excluded from the refugee status.[165]

Likewise in *B and D*, first, CJEU admitted that the Qualifications Directive has to be interpreted in a consistent manner with the Convention.[166] Further, generally the reasoning of CJEU does not differ much from the opinion of Advocate General. It comes as no surprise that the CJEU also emphasizes that Article 12(2)(c) (that is a reflection of Article 1F of the Convention) cannot be interpreted by attributing it to terrorist offences only.[167] With this in mind, CJEU analyses the recital 22 of the Qualifications Directive and points out that acts contrary to purposes and principles of UN are set out in particular UNSC resolutions where it is stated that "knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of UN".[168] To add, in another UNSC resolution all signatory parties to the Charter of UN are called to deny safe place for persons who support terroristic

[158] Ibid, paragraph 53. Supra 135.
[159] Supra 157, paragraph 54. Supra 135.
[160] Ibid, paragraph 55.
[161] Ibid, paragraph 56.
[162] Ibid, paragraph 57.
[163] Ibid, paragraph 58.
[164] Supra 157, paragraph 69.
[165] Ibid, paragraphs 70, 96.
[166] Supra 132, paragraph 42.
[167] Ibid paragraphs 43-48. Supra 135.
[168] Supra 132, paragraphs 45-47. Supra 157, paragraph 47. Supra 42. UN Security Council, Security Council resolution 1377 (2001) [threats to international peace and security caused by terrorist acts], 12 November 2001, S/RES/1377 (2001). Available on: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/633/01/PDF/N0163301.pdf?OpenElement. Accessed 2 May, 2018.

activities.[169] Therefore, acts contrary to the purposes and principles of UN cannot be limited to listed activities in Article 1(1) of the Framework Decision 2002/475 on combating terrorism.[170] Even more, CJEU also notes that if the EU legislature would have had an intent limit the scope of the Article 12(2)(c) of the Qualifications Directive, there would have been a reference to the Framework Decision 2002/475.[171]

Second, it followed that participation in terroristic activities as forgery of documents, assisting volunteers to travel to Iraq fell under exclusion scope even it did not constitute a direct terroristic crime committed by Mr Lounani. Aforementioned activities were serious enough and identified acts that shall be combated by States to avoid international terrorism and therefore, justified exclusion from refugee status.[172] Third, above all, CJEU recalled its judgement in *B and D* and declared that individual assessment should be undertaken which is left for the national court.[173] Deference left for national authorities will be discussed in the next section.

To sum up, there are two main takeaways from the CJEU judgement in *Lounani* case. First, the individual is excluded from the refugee status because terrorism and asylum together contradict what is globally acceptable for society. Second, the exclusion scope has been broadened from direct terroristic acts done in *B and D* to activities related to terrorism in *Lounani* case.

Despite that CJEU and Advocate General Sharpston emphasized the distinction between counter-terrorism and asylum law (no textual link, different purposes of law, different origins and nature), in practice those two fields are close and merge together. First, the CJEU admitted that there is a reference in the Qualifications Directive to the Convention and UNSC resolutions.[174] Moreover, there is a legal commitment to the society that States will combat terrorism.[175] Second, CJEU cleared out that there is a direct link in the wording between Article 12(2)(c) and Article 1F which meant that CJEU can interpret the norm directly and thus the individual can be excluded from the refugee status.[176]

Overall, still, it can be observed, that CJEU is ruling as constitutional and administrative body. From one side, as a preventive administrative mechanism it provides interpretation in *B and D* whether serious non-political crime falls within the category of terroristic activities. From other side, it analysis carefully fundamental rights of the individual.[177] Furthermore, in *Lounani* CJEU puts forward that any ancillary activities that support terroristic actions can be regarded as activities exercised against purposes and principles of UN. But at the same time notes that a fact of criminal conviction cannot be a prerequisite for exclusion in the context of asylum, in particular, when the content of the international protection is interpreted. However, as also noted by Bank, CJEU interprets the Article of international treaty only if it is duplicate

[169] Supra 132, paragraph 47. UN Security Council, Security Council resolution 1624 (2005) [on threats to international peace and security], 14 September 2005, S/RES/1624 (2005). Available on: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1624%20%282005%29. Accessed 2 May, 2018.
[170] Supra 132, paragraph 49. Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism. Available on: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l33168&from=EN. Accessed 2, May 2018.
[171] Supra 132, paragraphs 52-53.
[172] Ibid, paragraphs 70-71, 74, 76.
[173] Ibid, paragraphs 72-73.
[174] Ibid, paragraphs 42, 45, 47. Supra 135.
[175] Ibid, paragraph 47.
[176] Ibid, paragraph 48.
[177] Supra 19, p.7.

of EU norm.[178]

Reasoning in *Lounani* could be regarded as continuation of the judgment in *B and D* as CJEU emphasizes the importance of the Convention and interprets the secondary EU law as far as possible in the line with the international treaty. It even notes in both cases that individual assessment of facts is necessary and that the exclusion clause cannot be automatically applied that again approves the constitutional role of the court and also that it strives to balance between application of EU law and fundamental rights.[179] Furthermore, following Bank's reasoning that the CJEU actually refers to the Convention and continuously recognizes the yardstick function provided in Article 78 TFEU in cases related to exclusion, cessation or a refugee status revocation, it could be added that it more likely admits the importance of the Convention when interpreting EU law and uses the international instrument for gap filling rather gives it direct effect.[180] It comes as no surprise that while the CJEU will exercise its trends by moving away from international law, it might influence the possibility of lack of coherence and increase the threshold of conflicts, that should be avoided.[181] Hence, Member States are left facing their international obligations where the final word belongs to national authorities.

3.3. Margin of appreciation left for national authorities

Although the concept of margin of appreciation has been developed by ECtHR, a similar approach has been undertaken by CJEU.[182] This trend can be observed in cases where CJEU has left national authorities to deal with their international obligations - the individual assessment of facts that impacts the final decision of the case.[183] Margin of appreciation can be regarded as a discretion left for Member States with due respect to their cultural differences, resources and values.[184] As discussed in previous section, in *Qurbani* CJEU noted that certain powers are left for Member States in CEAS.[185] Even more, it has been argued that margin of appreciation is invoked when there is a possibility of broad interpretation of a vague term or when the scope is so narrow where the legislator has not predicted such norm.[186]

Terrorism is not specifically defined in the Qualification Directive which means that rather Member States are left to determine their own interpretation.[187] In *B and D*, the CJEU referred to UNSC resolutions of 'international terrorism' that must be combatted to maintain international peace and security that might be a way how it defined terrorism and acts

[178] Supra 17, p.228.
[179] Supra 135.
[180] Supra 17, p. 225. Supra 47, p.45.
[181] Piet Eeckhout, *External Relations of the EU* (Oxford: Oxford University Press, 2004), p.355.
[182] Dominic Mcgoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by Human Rights Committee," *International and Comparative Law Quarterly* 65 (2016): p.22. Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" *The European Journal of International Law* 16/5 (2006): p. 927.
[183] Supra 20. Yuval Shany, "Toward a General Margin of Appreciation Doctrine in International Law?" *The European Journal of International Law* 16/5 (2006): p. 910.
[184] Dominic Mcgoldrick, "A Defence of the Margin of Appreciation and an Argument for its Application by Human Rights Committee," *International and Comparative Law Quarterly* 65 (2016): p.23. Ida Staffans "Judicial Protection and the European Asylum Regime." *European Journal of Migration Law* 12 (2010): p.277.
[185] Supra 123, paragraph 24.
[186] Supra 94, pp.1-2.
[187] Sarah Singer, "Terrorism and Article 1F (c) of the Refugee Convention," *Journal of International Criminal Justice* 12 (2014):p.1081.

regarded contrary to the principles and purposes of UN.[188] However, one should also determine the gravity of the terroristic act concerned that it might impact the international security.[189] Therefore, definition of terrorism determined at national scope shall be at stake in order to exclude or refuse the refugee status.

Therefore, taking into account cases discussed above in the context of asylum Member States have a discretion to rule on internal matters where they face danger to public security. There can be two discretionary approaches observed that determine public security, one that relates to individual assessment of facts and the other that determines the seriousness of the crime and current danger. For example, about inclusion of asylum seeker who has been engaged in terroristic activities in the past individual assessment of facts shall be taken.

3.3.1. Individual assessment

In both *B and D* and *Lounani*, CJEU pointed out that engagement with terroristic acts and related activities do not automatically exclude the person from refugee status. It was noted that there shall be individual assessment, full investigation in all circumstances, determination of the extent to which there was a participation in terroristic activities, the role of leadership.[190] Meaning that interpretation of facts is left for national courts.

Furthermore, CJEU acted similarly in *H.T.* case where it also left discretion for national body. In this case German authorities revoked refugee status and residence permit on the basis of the fact that the applicant had in past supported goals of a terrorist organization.[191] It was left for the national court to rule on the person's involvement, role exercised in the terrorist group.[192] Therefore, CJEU exercises its power within certain limits that does not go beyond decisions of assessment of individual circumstances. It might be one of the court's strategies to draw a line between Qualifications Directive and Convention. In other words, the CJEU provides guidance to the extent until it can provide uniform interpretation.

Moreover, one could conclude that CJEU by emphasizing the fundamental right to asylum and encouraging national authorities to take all individual circumstances into account, prevents the individual from challenging other EU norm, for instance, right to effective legal remedy under Article 47 of the Charter.[193] However, discretion left for national authorities does not ensure uniform application of EU norms as there are different practices and standards in national judicial procedures.[194] Even more, it might mean that the norm is unclear and weak as CJEU cannot determine exact guidance.

3.3.2. Danger to public security

The approach of discretion between fundamental rights and security of the country of receiving asylum seekers for international protection has been put forward by CJEU. It is a

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[188] Supra 131, paragraphs 8, 10.
[189] Supra 188, p.1091.
[190] Supra 131, paragraphs 83, 91. Supra 132, paragraphs 59-60.
[191] Judgement in *H. T. v Land Baden-Württemberg*, C‑373/13, ECLI:EU:C:2015:413, paragraph 99.
[192] Ibid, paragraph 92.
[193] Ida Staffans "Judicial Protection and the European Asylum Regime." *European Journal of Migration Law* 12 (2010): p.277. Charter of Fundamental Rights of the European Union *OJ C* 326, 26.10.2012, pp. 391–407. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT. Accessed May 11, 2018.
[194] Ida Staffans "Judicial Protection and the European Asylum Regime." *European Journal of Migration Law* 12 (2010): p. 281.

possibility for refusal the refugee status if he poses threat to the Member State. This approach taken by national authorities is closely linked to public power and therefore represents the Member State's openness towards the right to international protection of asylum seeker or rather closeness due to public security.[195]

The extent of danger that the refugee might pose to the Member State was reasoned in *B and D*. There were two tips to take away from the reasoning of CJEU. First, a current danger to the public security cannot be conditional for application of exclusion clause of Qualifications Directive.[196] Even more, in this matter it would not be appropriate to apply exclusion clause of Article 12(2), but to revoke refugee status under Article 14(4)(a) of the Qualification Directive that sets out that Member States may revoke refugee status where, in particular, there are reasonable grounds for considering the individual as posing danger to security.[197] Second, the national authority cannot take additional proportionality test to measure the seriousness of the acts committed if it has already taken into account individual's responsibility and all related circumstances.[198] If the proportionality assessment would be taken it would mean that the exclusion clause is with dual objective.[199] However, one could argue that the individual was entitled also to proportionality assessment and, therefore, to due process as it was about examining individual responsibility. Furthermore, the rejection of proportionality test did not provide the national authority to grant the refugee status in the first place.[200] It should be also emphasized that, actually, the margin of appreciation left for national body provides the authority with wider competence because the final decision is left for the Member State that depends on how it approaches the matter of prevention of terrorism and exercises the individual assessment of the facts.

It can be concluded, that CJEU limits itself to the extent that does not reach sensitive issues like public security and fundamental rights for protection of an individual. It leaves national authorities to decide on case by case basis to weight on matters that relate to seriousness of the offence where the individual could be considered posing danger to public security of Member State. At the same time, CJEU acts like a supranational court and provides interpretation and application of a norm from the Convention. However, it provides this guidance only where the EU law duplicates the norm from the Convention. Overall, in *B and D*, *Lounani* and *H.T* the CJEU took similar reasoning where it clearly noted that the individual cannot be deprived from the right to international protection without taking individual assessment.[201]

[195] Ibid, p.287.
[196] Supra 131, paragraph 104.
[197] Ibid, paragraph 101.
[198] Ibid, paragraph 108-109.
[199] Ibid, paragraph 104.
[200] David Kosar, "Inclusion before Exclusion or Vice Versa: What the Qualification Directive and the Court of Justice Do (not) Say," *International Journal of Refugee Law* 25/1 (2013):p.118.
[201] Supra 20.

CONCLUSION

The purpose of this research was to examine what are the Court's approaches when applying the Qualification Directive. As the CJEU is the final judicial body that can provide guidance about uniform application of EU law, it is set in a complex context in the field of asylum where rather ambiguously formulated Treaty provisions interact with the Charter and the Convention.

The research shows that the Court has clearly defined its limits by acknowledging its competences. It does not have the mandate to interpret provisions from the Convention, however, it can do it where the EU norm includes the same wording. Moreover, it has a jurisdiction to review the validity of secondary EU law in the light of the international law if the EU is a party to the international treaty. Overall, it has been founded that the Court struggles between its constitutionalist and administrative role by balancing between effective application of EU law and enforcement of fundamental rights. Meanwhile, it is important for the CJEU to provide rulings that examine EU law comprehensively by covering all levels of legal orders with what EU law could interact. However, the Court seems reluctant towards Convention as provisions of it could be considered of broad logic and undefined.

The analysis has shown that the CJEU has three trends how it exercises its mandate when applying Qualification Directive. The overall approach manifests into principle of proportionality where the Court engages with the international law as far as it concerns uniform application of EU law, but the individual assessment and interpretation of the facts of the case leaves for the national authorities. First, it is found that the CJEU considers international law as a source, but manoeuvres from possible interaction with it by invoking the shared responsibility between Member States and the Union. Second, the Court uses consistent interpretation where it interprets EU law as far as possible in the line with the Convention. Third, it leaves the final decision for the national courts that concerns the individual assessment and public interest due to danger to security.

The margin of appreciation left for states rather engages with application of human rights and responsibility towards international commitments. However, the value of sovereignty stays crucial where tension raises between it and fundamental rights of the asylum seeker. As the CEAS is a shared competence the discretion left for Member States discloses into different political and economic goals that might undermine the principle of solidarity and even more a coherent application of the common asylum policy.

Throughout this thesis it has sought to be demonstrated that the CJEU is put in a difficult position to stand up as an administrative and constitutional court. There is a need to amend EU treaty provisions (TFEU) and the Qualification Directive to overcome the existing collision between EU law and the Convention. It has been also emphasized that CJEU cannot provide guidance by isolating EU law from other legal orders. It is important for the Court to keep the right balance between all international actors as its rulings contribute to national jurisprudence. The challenge would rather be to keep this balance in long term. Thought, if the Court has been set up as a court of EU it should stay within its limits.

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