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FAMILY REUNIFICATION OF PERSONS GRANTED INTERNATIONAL PROTECTION

Thesis

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List of Abbreviations

ACHR	American Convention on Human Rights
ACHHR	African Charter on Human and Peoples' Rights
AIDA	Asylum Information Database
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CoE	Council of Europe
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
ELENA	European Legal Network on Asylum
EMN	European Migration Network
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
OAS	Organization of American States
OAU	Organization for African Unity
UDHR	Universal Declaration on Human Rights
UNHCR	Office of the United Nations High Commissioner for Refugees

Introduction

In the last couple of years the number of people seeking international protection in Europe has risen dramatically, from 435 760 in 2013 and more than 660 000 in 2014 to a peak of 1 392 155 applications in EU+ countries¹ in 2015.² In 2016 there was only a small decrease of 7% to 1 291 785.³ The dramatic jump in asylum applications in the last two years led to a rapid growth in the number of the first-instance decisions on asylum applications; in 2013 and 2014 the number in EU+ countries was around 328 050 and 390 000, respectively; in 2015 the number jumped to 624 160 and in 2016 there was a record number of 1 148 680.⁴

With a view to reducing this unprecedented migration flow, the EU countries responded in two ways. First, there was a shift from granting refugee status to providing subsidiary protection (subsidiary protection is described further in sub-chapter 1.2). Second, the EU countries limited the right to family reunification of beneficiaries of subsidiary protection. In 2015 the EU+ countries were roughly divided into two groups. The first group, represented amongst others by Germany, France, United Kingdom, Switzerland, Austria, Belgium, Denmark, Greece, Norway or Bulgaria, issued more refugee statuses than residence permits for beneficiaries of subsidiary protection. The second group issued fewer residence permits for refugees than for beneficiaries of subsidiary protection.⁵ In the following year, there was a distinct rise in first-instance

¹ The actual content of the abbreviation ‘EU+ countries’ in annual reports of the European Asylum Support Office (EASO) changed slightly from 2013 to 2016. In 2013 the EASO analyzed data from 28 EU member states, data from 28 EU member states + Norway and Switzerland were included in 2014 and 2015 annual reports, and 28 EU member states + Norway, Switzerland, Liechtenstein and Iceland sent data for the year 2016.

² EASO, *Annual Report on the Situation of Asylum in the European Union 2013* (Publications Office of the European Union 2014) 7 (EASO Annual Report 2013); EASO, *Annual Report on the Situation of Asylum in the European Union 2014* (Publications Office of the EU 2015) 7 (EASO Annual Report 2014); EASO, *Annual Report on the Situation of Asylum in the European Union 2015* (Publications Office of the EU 2016) 8 (EASO Annual Report 2015).

³ EASO, *Annual Report on the Situation of Asylum in the European Union 2016* (Publications Office of the EU 2017) 8 (EASO Annual Report 2016).

⁴ EASO Annual Report 2013, 2014, 2015 (n 2), EASO Annual Report 2016 (n 3).

⁵ EASO Annual Report 2015 (n 2) 21. The EU countries also issue a third type of decisions – humanitarian protection. Since the humanitarian protection is granted pursuant to national law

decisions on subsidiary protection. Although still more than half of all positive decisions awarded refugee status, subsidiary protection counted for 37%. That means that in comparison to 2015 the percentage of decisions which awarded a refugee status declined by 19 points.⁶ In 2016 significant changes were also made to national laws. EU member states recognize the right to family reunification of refugees. Some of the states that have allowed family reunification of beneficiaries of subsidiary protection planned or introduced legislative measures to restrict the right of family reunification of those beneficiaries of subsidiary protection.⁷ For example, Germany changed its law in August 2015 to allow family members of beneficiaries of subsidiary protection to be given the same rights to family reunification as family members of refugees.⁸ But at the beginning of 2016, due to the huge numbers of people requesting international protection and asking for family reunification, the right to family reunification of beneficiaries of subsidiary protection was suspended for two years.⁹ In November 2015 Sweden announced a temporary law restricting the right to family reunification, so that beneficiaries of subsidiary protection do not have a right to family reunification if they submitted their asylum application after 24 November 2015.¹⁰ Family members of persons who received subsidiary protection in Austria have to wait three years before being they can apply to join their relatives.¹¹ Similar waiting periods were introduced in Denmark and

only in some EU member states and is not harmonized on the EU level nor it is an international legal concept, it is not further considered in this thesis.

⁶ EASO Annual Report 2016 (n 3) 24.

⁷ European Migration Network (EMN), '2016 Annual Report on Migration and Asylum' <https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/reports/nationalreports_en> accessed 19 June 2017, 6, 16.

⁸ EMN 'Country Factsheet: Germany 2015' <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/country-factsheets/11_germany_country_factsheet_2015.pdf> accessed 19 June 2017, 2.

⁹ *ibid.*

¹⁰ EMN, 'Country Factsheet: Sweden 2015' <https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/country-factsheets/27a_sweden_country_factsheet_2015.pdf> accessed 19 June 2017, 2.

¹¹ § 35 Abs. 2 AsylG 2005.

Switzerland; Greece, Cyprus and Malta fully exclude beneficiaries of subsidiary protection from family reunification.¹²

Inspired by these events, this thesis focuses on the family reunification of persons granted international protection, both refugees and beneficiaries of subsidiary protection. Besides European countries, many states that provide protection to refugees have also adopted other protection mechanisms, such as the United States of America (the United States), Australia, South Africa, Tanzania or Russia.¹³ When there are differences in treatment of refugees and beneficiaries of subsidiary protection, they often concern the duration of the residence permit, the right to travel documents and family reunification.¹⁴ In this thesis I focus on the differences in treatment between refugees and beneficiaries of subsidiary protection regarding the right to family reunification. The main research question is whether beneficiaries of international protection can derive a right to family reunification from international law. Chapter one describes types of international protection and different international law instruments relating to the principle of *non-refoulement*. Chapter two then considers whether the right to family reunification can be derived from the status of refugee and beneficiary of subsidiary protection. Chapter three examines the right to family life and family unity in international law and examines the question of whether the right to family reunification is included in other instruments of international law. Chapter four considers whether the different treatment, in national and supranational legislation, of refugees and beneficiaries of subsidiary protection, as far as the right to family reunification is concerned, is justified.

¹² Asylum Information Database (AIDA), 'Content of Protection' <<http://www.asylumineurope.org/comparator/protection#family-reunification>> accessed 19 June 2017.

¹³ Ruma Mandal, 'Protection Mechanisms Outside of the 1951 Convention ("Complementary Protection")' (UNHCR 2005) UN Doc. PPLA/2005/02, 31.

¹⁴ *ibid* xii.

1. Forms of International Protection

Answering the main research question requires first to identify sources of international law on international protection. The research question addressed in this chapter is: what are forms of international protection and which international law instruments contain the principle of *non-refoulement*? Both universal and regional approaches to the protection of refugees are examined along with instruments which fall outside the scope of international refugee law but still provide protection from *refoulement*.

1.1 International Legal Framework of Refugee Protection

The Convention Relating to the Status of Refugees (Refugee Convention) and its supplementary Protocol Relating to the Status of Refugees from 1967 (Protocol) constitute the basis of contemporary universal international refugee law.¹⁵ After the Second World War, it was decided that the only way that states could cope with massive waves of refugees was by international cooperation with the Office of the United Nations High Commissioner for Refugees (UNHCR).¹⁶ Later, several regional instruments were adopted as a result of large migration waves of refugees in Africa, Latin America and the Middle East.

1.1.1 Refugee Convention

The Refugee Convention is often characterized as the cornerstone of international refugee law. Its purpose is to ‘revise and consolidate previous international agreements relating to the status of refugees and to extend the

¹⁵ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention); Protocol Related to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 16 (Protocol).

¹⁶ Refugee Convention (n 15) Preamble.

scope of and the protection' of refugees and 'assure refugees the widest possible exercise of fundamental human rights and freedoms'.¹⁷

The core element of international refugee law is protection.¹⁸ Article 33(1) of the Refugee Convention prohibits the expulsion or return (*refouler*) of refugees to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. This means that the principle of *non-refoulement* concerns refugees as defined in Article 1A(2) of the Refugee Convention, i.e. persons having an individual well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion in a country of their nationality.¹⁹ The scope of protection was extended by the Protocol which extended the temporal scope of the Convention to events occurring after 1 January 1951. The UNHCR has stressed that the principle of *non-refoulement* applies to persons 'irrespective of whether or not they have been formally recognized as refugees'.²⁰ That is to say that the recognition of a refugee status is a declaratory and not a constitutive act and a person becomes a refugee as soon as he or she fulfills the criteria in the Refugee Convention.²¹

Protection under the Refugee Convention is provided on an individual basis and when the protection is no longer needed, the Refugee Convention ceases to apply, as stipulated in Article 1C. In this sense the protection is temporary in nature. The idea behind the cessation clause in Article 1C is that when the situation in the country of origin changes and a refugee can and voluntarily does enjoy again the protection of this country (or any other country), the protection provided by the Refugee Convention ceases. When the threatening

¹⁷ *ibid.*

¹⁸ Čestmír Čepelka, Dalibor Jílek, Pavel Šturma, *Azyl a uprchlictví v mezinárodním právu* (Masarykova univerzita Brno 1997) 54.

¹⁹ Guy S Goodwin-Gill, Jane McAdam, *The refugee in international law* (3rd edn, OUP 2007) 232.

²⁰ UNHCR, 'A Thematic Compilation of Executive Committee Conclusions' (7th edn, 2014) <<http://www.unhcr.org/publications/legal/53b26db69/thematic-compilation-executive-committee-conclusions-7th-edition.html>> accessed 22 October 2017, 387.

²¹ UNHCR, 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees' HCR/1P/4/ENG/REV.3 (2011) 9 (UNHCR Handbook).

situation ends, so does the protection. The Refugee Convention also provides for situations where protection does not apply even though the person fulfils the criteria of being a refugee, such as when they receive UN protection or assistance (Article 1D), they acquire rights and obligations connected with the nationality of a country of protection (Article 1E), or they do not deserve protection because of serious reasons for considering that they have committed international crimes, serious non-political crimes or are guilty of acts contrary to the purposes and principles of the UN (Article 1F).

The Refugee Convention does not guarantee absolute protection and the principle of *non-refoulement* is not absolute.²² According to Article 33(2) of the Refugee Convention, a refugee ‘whom there are reasonable grounds for regarding as a danger to the security of the country [...] or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country’ cannot benefit from the prohibition against *refoulement*. Although it may appear that Article 33(2) and the exclusion clause of Article 1F serve the same purpose, their consequences are different.²³ While a person is denied a refugee status under Article 1F because of acts he or she has committed, Article 33(2) affects only the state’s obligation of *non-refoulement* and the person remains a refugee and is eligible for the protection of the UNHCR or any other country.²⁴ This is clear when considering that pursuant to Article 33(2) such a refugee represents a future danger to national security (of the state that provides protection) or to a particular community (by committing a serious crime).²⁵ Bearing in mind the reason for the protection of refugees and the consequences of *refoulement*, exceptions to the principle of *non-refoulement* must be interpreted narrowly; the threshold for applying Article 33(2) is very high and the danger to national security should be serious.²⁶ According to the UNHCR,

²² Goodwin-Gill, McAdam (n 19) 234.

²³ *Pushpanathan v Canada* (Minister of Citizenship and Immigration), [1998] 1 SCR 982, 1998 CanLII 778 (SCC) para 58.

²⁴ James C Hathaway, *The Rights of Refugees under International Law* (CUP 2005) 344.

²⁵ Goodwin-Gill, McAdam (n 19) 236.

²⁶ Elihu Lauterpacht, Daniel Bethlehem, ‘The scope and content of the principle of non-refoulement: Opinion’ in Erika Feller, Volker Türk, Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP 2003).

these are ‘extreme cases’.²⁷ It is important to note that even when states apply Article 33(2), they have obligations of *non-refoulement* under international human rights law that protect all persons without discrimination and regardless of their status, including asylum seekers and refugees, in their territory or jurisdiction (see further sub-chapter 1.2).²⁸

A substantial part of the Refugee Convention consists of provisions on the legal status of refugees. As Jílek states whilst agreeing with Hyndman, these provisions do not provide refugees with ‘rights’; upon closer examination one sees that the Refugee Convention provides benefits, also because obligations are imposed upon states.²⁹ These benefits are divided into three categories depending on the treatment regime: a national regime, the most-favored-nation treatment regime and a regime which provides at least the same treatment as aliens generally.³⁰

1.1.2 Regional Instruments on the Protection of Refugees

Besides the Refugee Convention, there are some regional instruments on the protection of refugees. Article I(1) of the Organization for African Unity Convention which deals with the specific aspects of refugee problems in Africa (OAU Convention) defines a refugee in a similar way to Article 1(2) of the Refugee Convention.³¹ The second paragraph of Article I of the OAU Convention, however, broadens the scope of refugee protection to ‘every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality’. This extension clearly goes further than the Refugee Convention and its Protocol,

²⁷ UNHCR Handbook (n 21) 30.

²⁸ Lauterpacht, Bethlehem (n 26) 138.

²⁹ Dalibor Jílek, *Odpověď mezinárodního práva na hromadné uprchlictví* (Masarykova univerzita Brno 1996) 89.

³⁰ *ibid.*

³¹ Organization for African Unity Convention governing the specific aspects of refugee problems in Africa (10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 (OAU Convention).

which the Preamble of the OAU Convention recognized as basic and universal instruments relating to the status of refugees. Jílek points out that the explanation lies in the historic circumstances surrounding the genesis of the OAU Convention. He specifically refers to the decolonization process in Africa and the national-liberation struggles that caused a mass exodus of people on the continent and explains that the aim was to enable collective admission of refugees in accordance with objective circumstances in their countries of origin.³² The prevalent character of the Refugee Convention explains why the OAU Convention only scarcely covers the legal status of refugees. Obligations of states in the OAU Convention are limited to the one general provision of Article I(1) to ‘secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality’. The most important is Article II(3) on the principle of *non-refoulement*, which, unlike Article 33(1) of the Refugee Convention, does not allow any exceptions.

The Cartagena Declaration on Refugees (Cartagena Declaration) is a Central-American non-binding instrument on refugee protection.³³ The Cartagena Declaration calls to mind Article I(2) of the OAU Convention and expresses the necessity to consider enlarging the concept of a refugee to persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or by other events seriously disturbing public order. As was the case with the OAU Convention, the extension of the definition of refugees was brought about by massive flows of refugees in the region.³⁴ Just like with the OAU Convention, the principle of *non-refoulement* has no exceptions.

Arabic-speaking countries have also had to deal in recent years with an influx of refugees from within their region. Many of these countries are not

³² Jílek (n 29) 105-06.

³³ Cartagena Declaration on Refugees adopted by Colloquium on the International Protection of Refugees in Central America, Mexico and Panama (1984) <<http://www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html>> accessed 29 June 2017 (Cartagena Declaration).

³⁴ Jílek (n 29) 112.

signatories to the Refugee Convention (for example Jordan, Iraq or Lebanon) while others are, although with reservations (such as Egypt). Besides the expressed encouragement to ratify the Refugee Convention and its Protocol,³⁵ the Arab Convention on Regulating Status of Refugees in the Arab Countries was adopted but has not come into force.³⁶ The definition of a refugee goes beyond that in the OAU Convention, as refugees also include persons taking refuge in another country because of the occurrence of natural disasters.³⁷ The convention is silent as to the legal status of refugees, though in the preamble the Refugee Convention and its Protocol are 'confirmed'.³⁸

There is no Asian regional binding instrument on refugees.

1.2 Other Forms of International Protection

The drafters of the Refugee Convention hoped that it would 'have value as an example exceeding its contractual scope and that all nations would be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides'.³⁹ Although the temporal and geographical restrictions of the Refugee Convention were overcome by the Protocol, there are still people in need of protection who fall outside the scope of the Refugee Convention. They enjoy the so called complementary or subsidiary protection that applies, in the most general interpretation, to all situations in which states afford protection to people who fall outside the scope of the Refugee Convention and are obliged to observe the principle of *non-refoulement* beyond the Refugee Convention.⁴⁰ Virtually

³⁵ Declaration on the Protection of Refugees and Displaced Persons in the Arab World (1992) <<http://www.refworld.org/publisher,RRI,RESOLUTION,452675944,0.html>> accessed 21 October 2017.

³⁶ Arab Convention on Regulating Status of Refugees in the Arab Countries (1994) <<http://www.refworld.org/docid/4dd5123f2.html>> accessed 21 October 2017.

³⁷ *ibid* 1.

³⁸ Arab Convention on Regulating Status of Refugees in the Arab Countries (n 36) Preamble.

³⁹ Refugee Convention (n 15), Recommendation E of the Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.

⁴⁰ Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007) 2.

immediately after the adoption of the Refugee Convention the harmonized approach to the protection of persons falling outside the Convention was discussed but no binding international instrument has been adopted.⁴¹ Instead, the obligation of protection from *refoulement* has over the years been either expressly incorporated into international human rights treaties or implied from their provisions. The following instruments have been generally recognized as sources of alternative protection mechanisms of *non-refoulement* (for the purposes of this thesis, they are called ‘subsidiary protection’ mechanisms).

1.2.1 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The principle of *non-refoulement* is explicitly stated in Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) that prohibits the expulsion, return (*refoulement*) or extradition of a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.⁴² Acts of torture are defined in Article 1 CAT and cover unlawful acts causing both physical and mental severe pain and suffering of an individual, which are attributable to a state. The prohibition of *refoulement* is absolute and non-derogable and protection against torture applies to all persons including asylum-seekers, refugees or others under international protection,⁴³ irrespective of their conduct.⁴⁴ Therefore, a refugee who lost protection pursuant to Article 33(2) of the Refugee Convention may invoke the absolute prohibition of *refoulement* under Article 3 CAT. However, if successful, it would not mean he or she can regain (or rather keep) the refugee status. This was confirmed by the Committee against Torture established by the CAT, namely in the case of *Aemei v Switzerland* where the Committee stated that a violation of Article 3 does not

⁴¹ Goodwin-Gill, McAdam (n 19) 296.

⁴² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT).

⁴³ Committee against Torture, ‘General Comment No 2’ (2008) UN Doc. CAT/C/GC/2.

⁴⁴ *Tapia Paez v Sweden*, Communication No 39/1996 (1997) UN Doc. CAT/C/18/D/39/1996, para 14.5.

affect the state authorities' decision concerning the granting or refusing of asylum.⁴⁵ Gorlick argues that if the Committee finds that a state has to find a solution to provide protection against *refoulement*, it is logical that this should include granting the person protection (asylum, refugee status or other).⁴⁶ However, the CAT does not impose any obligations on state parties regarding the legal status of persons enjoying protection from *refoulement*.⁴⁷ Thus, under current international law Article 3 CAT is the basis for protection outside the Refugee Convention, i.e. subsidiary protection. The purpose of the CAT was to establish torture as an international crime; states have to take steps to prevent the crime from being committed and ensure that, where it is, offenders are prosecuted punished.⁴⁸ It was not meant to be another protection mechanism.⁴⁹ It does not contain, therefore, any provisions as to the rights of victims of torture save for allowing the possibility to submit to the Committee against Torture an individual complaint regarding the violation of the prohibition of torture.⁵⁰

1.2.2 International Covenant on Civil and Political Rights

Article 7 of the International Covenant on Civil and Political Rights (ICCPR) prohibits torture or cruel, inhuman or degrading treatment or punishment.⁵¹ The prohibition of ill-treatment in Article 7 is non-derogable and absolute and the Human Rights Committee has stated that it constitutes a prohibition of *refoulement* when there are substantial grounds for believing that a person faces a real risk of irreparable harm as envisaged in Articles 6 and 7 ICCPR.⁵² The prohibition of *refoulement* applies not only to the country to

⁴⁵ *Aemei v Switzerland*, Communication No 34/1995 (1997) UN Doc. CAT/C/18/D/34/1995, para 11.

⁴⁶ Brian Gorlick, 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees' (1999) 11 Intl J Refugee L 479, 487.

⁴⁷ *M.B.B. v Sweden*, Communication No 104/1998 (1999) UN Doc. CAT/C/22/D/104/1998, para 6.4.

⁴⁸ Goodwin-Gill, McAdam (n 19) 301.

⁴⁹ Goodwin-Gill, McAdam (n 19) 301.

⁵⁰ A state must to this end recognize the jurisdiction of the Committee against Torture (art 22 CAT).

⁵¹ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁵² Human Rights Committee, 'General Comment No 20' and 'General Comment No 31' in 'Note by Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2004) UN Doc. HRI/GEN/1/Rev.7.

which the person should be removed but also to any country where he or she may be moved subsequently.⁵³ All rights under the ICCPR belong to all persons, including asylum seekers and refugees, within the territory of a state or in its jurisdiction and all persons enjoy protection under the ICCPR.⁵⁴ Since the right to *non-refoulement* is only one of the rights listed in the ICCPR, no special status or any other rights are attached to it under the Covenant.

1.2.3 European Convention on Human Rights

The principle of *non-refoulement* can be read into regional human rights treaties. Article 3 of the European Convention on Human Rights (ECHR) prohibits torture or inhuman or degrading treatment or punishment, in like manner to from Article 7 ICPPR.⁵⁵ As with the ICCPR, Article 3 ECHR constitutes an absolute, non-derogable right that belongs to all persons within the territory of a state or within its jurisdiction, including asylum seekers and refugees. Although the ECHR is a regional international treaty, its importance is emphasized by the extensive case law of the European Court of Human Rights (ECtHR) regarding the absolute nature of the prohibition of torture and ill-treatment (in contrast to non-binding decisions of the Human Rights Committee). The ECtHR jurisprudence has interpreted Article 3 ECHR as precluding the removal of an individual to a territory where they would reasonably be at risk of such treatment.⁵⁶ The ECtHR in the *Soering* case stated that extradition to a country where a person would face capital punishment or an extended period of detention on death row may violate Article 3 ECHR.⁵⁷ In *Chahal*, the ECtHR established the absolute nature of the prohibition of torture and ill-treatment, irrespective of conduct, which was re-iterated many times afterwards.⁵⁸ The ill-

⁵³ Human Rights Committee, 'General Comment No 31' (n 51).

⁵⁴ *ibid.*

⁵⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 3, 5, 8, 11 and 14 (adopted 4 November 1950, entered into force 3 September 1953) ETS No. 5 (ECHR); in art 3 ECHR the word 'cruel' is omitted.

⁵⁶ *McAdam* (n 40) 9.

⁵⁷ *Soering v UK* (1989) Series A no 161, para 111.

⁵⁸ *Chahal v UK* ECHR 1996-V, para 79, 80; *Ahmed v Austria* ECHR 1996-V; *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 March 2003); *Saadi v Italy* ECHR 2008; *Ramzy v The Netherlands* App No 25424/05 (ECtHR, 20 July 2010).

treatment under Article 3 must reach a certain level of severity and the ECtHR assesses the circumstances of each case, such as ‘the duration of the treatment, its physical or mental effects, and, in some cases, the sex, age and state of health of the victim, etc’.⁵⁹ So, in *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* the court held that the deportation of a 9-year old unaccompanied child was in itself a violation of Article 3 ECHR.⁶⁰ The court’s consistent position is also that the applicant is not a victim of the expulsion order, which is not enforceable.⁶¹ Thus, states fulfill their obligations by the mere abstention from expulsion.⁶² Protection from *refoulement* under Article 3 ECHR does not guarantee any rights or legal status; neither Article 3, nor any other provision of the ECtHR guarantees a right to a residence permit as such.⁶³ Still, in *M.S.S. v Belgium and Greece* the court considered that inaction on the part of Greek authorities leading to a situation where an asylum seeker lived on the street for several months without resources and means of providing for his essential needs, and without prospects of improvement, reached the level of severity required to fall under the scope of Article 3 ECHR.⁶⁴ As in the case of Article 3 CAT, people who are not granted or who lose a refugee status may claim the protection of the principle of *non-refoulement* under Article 3 ECHR.⁶⁵

1.2.4 Other regional instruments providing international protection

The prohibition of *refoulement* of aliens is also expressed in Article 22(8) of the American Convention on Human Rights which forbids deportation or the return of an alien to a country where ‘his right to life or freedom is in danger of being violated because of his race, nationality, religion, social status, or political

⁵⁹ eg *Raninen v Finland* ECHR 1997-VIII, para 55.

⁶⁰ *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* ECHR 2006-XI 267, para 71.

⁶¹ *I v the Netherlands* App no 24147/11 (ECtHR, 10 July 2012) para 42; *K v the Netherlands* App no 33403/11 (ECtHR, 10 October 2011) para 47.

⁶² Hemme Battjes, ‘Subsidiary Protection and Other Alternative Forms of Protection’ in Vincent Chetail, Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar Publishing Ltd. 2014) 547-48.

⁶³ *H v the Netherlands* App no 37833/10 (ECtHR, 18 October 2011) para 41.

⁶⁴ *M.S.S. v Belgium and Greece* ECHR 2011-I 255, para 263.

⁶⁵ *Ahmed v Austria* (n 58).

opinions' and Article 13 of the Inter-American Convention to Prevent and Punish Torture that constrains extradition of a person if 'there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting State'.⁶⁶

1.3 EU Qualification Directive

The UNHCR repeatedly makes reference to the Cartagena Declaration and the OAU Convention and underlines their value as regional instruments on the protection of refugees, because of their broad definitions of refugees.⁶⁷ By virtue of these instruments, subsidiary protection is not applicable in these regions and generally speaking, the legal status of refugee within the Refugee Convention applies to the broader group of refugees within the meaning of the OAU Convention.⁶⁸ The concept of subsidiary protection is also absent in the Middle East and Asia since a very limited number of states there have ratified the Refugee Convention and its Protocol.⁶⁹ On the other hand, Europe is characterized by a proliferation of national regulations on subsidiary protection.⁷⁰ However, there is no binding instrument of international law that prescribes the same treatment for refugees and beneficiaries of subsidiary protection. Nor there is an international law concerning the status of beneficiaries of subsidiary protection.

The only binding regional instrument that defines the status of beneficiaries of subsidiary protection is the EU Qualification Directive, which

⁶⁶ American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No. 36 (ACHR); Inter-American Convention to Prevent and Punish Torture A-51 (adopted 12 September 1985, entered into force 28 February 1987) OAS Treaty Series No. 67.

⁶⁷ UNHCR, 'General Conclusion No 77', 'General Conclusion No 99', 'Conclusion on the Provision on International Protection No 103' in 'A Thematic Compilation of Executive Committee Conclusions' (n 20).

⁶⁸ Mandal (n 13).

⁶⁹ Mandal (n 13) xi.

⁷⁰ Mandal (n 13).

harmonized the legislation of EU member states on subsidiary protection.⁷¹ The purpose of this ‘supranational legal instrument’⁷² was to harmonize the national legislations of EU member states and lay down 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 (Article 1 of the EU Qualification Directive). The definition of a refugee is the same as in the Refugee Convention. A person eligible for subsidiary protection is, according to Article 2(f) of the EU Qualification Directive, ‘a third- country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm [...], and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country’. A ‘serious harm’ could mean, according to Article 15, (a) death penalty or execution, (b) torture or inhuman or degrading treatment or punishment or (c) serious and individual threat to life or person by reason of indiscriminate violence in international or internal armed conflict. It is clear that this provision refers to the various international law treaties mentioned in subchapter 1.2. The subsidiary protection can only be granted to a person who does not meet the conditions for a refugee status. This condition implements Recital 33 of the EU Qualification Directive which emphasizes the fact that subsidiary protection is complementary to and additional to the protection afforded to refugees under the Refugee Convention.

⁷¹ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

⁷² Goodwin-Gill, McAdam (n 19) 296.

1.4 Interim Conclusion

International protection from *refoulement* is granted in two ways. The first type is the protection of refugees and the second is the protection afforded by international human rights treaties against torture and other ill-treatment. The two forms differ with regard to the rights are granted to the beneficiaries of the protection. International law provides for the legal status of refugee but beneficiaries of subsidiary protection are expressly guaranteed protection from *refoulement* only. Many countries have adopted measures to regularize the stay of persons eligible for international protection based on their obligations of *non-refoulement* in international human rights treaties.⁷³ However, the rights afforded to beneficiaries of subsidiary protection is a matter left to the discretion of individual states since international treaties do not provide any guidance and international courts and treaty bodies have tended to avoid this issue.⁷⁴

⁷³ UNHCR, 'Conclusion on the Provision on International Protection No 103' in a 'Thematic Compilation of Executive Committee Conclusions' (n 20).

⁷⁴ Goodwin-Gill, McAdam (n 19) 330.

2. Right to Family Reunification Based on the Status of Beneficiary of International Protection

The research question addressed in this chapter is whether there is a right to family reunification based on the status of beneficiary of international protection. To answer this question, international instruments on the protection of refugees and on the status of the beneficiary of subsidiary protection are analyzed and differences between refugees and beneficiaries of subsidiary protection are identified.

2.1 Right to Family Reunification Based on the Status of Refugees

The Refugee Convention, as described in sub-chapter 1.1.1, defines in some detail the criteria to be applied in determining who qualifies for the legal status of refugee and provides for a certain level of treatment with regard to individual rights. The list of these rights (or benefits) is not exhaustive and, for example, does not impose an obligation on states to provide a right to family reunification to refugees. However, at the time of adoption of the Refugee Convention, family unity was considered to be ‘an essential right of the refugee’ and the Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons recommended governments ‘to take necessary measures for the protection of the refugee’s family’, especially to ensure family unity and the protection of minors.⁷⁵ The UNHCR addressed the issue of family reunification of refugees in many guidelines and conclusions of the Executive Committee.⁷⁶ Although these are non-binding documents, they are generally recognized as important soft-law instruments.⁷⁷ According to the UNHCR, the majority of

⁷⁵ Refugee Convention (n 15), Recommendation B of the Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons.

⁷⁶ UNHCR, ‘A Thematic Compilation of Executive Committee Conclusions’ (n 20).

⁷⁷ Council of Europe (CoE) ‘Issue Paper: Realising the rights to family reunification of refugees in Europe’ (2017) 20.

states observe the recommendation adopted in the Final Act, even though they are not parties to the Refugee Convention.⁷⁸

Regional instruments relating to refugees do not say much about the subject of family reunification. Neither the OAU Convention, nor the Arab Convention on Regulating Status of Refugees in the Arab Countries contains any specific reference to family reunification. Conclusion III(13) of the Cartagena Declaration, on the other hand, acknowledges that reunification of refugee families constitutes a fundamental principle and should be the basis for humanitarian treatment in the country of asylum.⁷⁹ The Declaration on the Protection of Refugees and Displaced Persons in the Arab World also emphasizes the importance of reunification of refugee families.⁸⁰

Thus, international law instruments, including the Refugee Convention, only promote and emphasize the importance of the unity of the family of refugees and states are merely obliged to facilitate the family reunification of refugees. Nevertheless, in spite of a lack of express positive obligations on states to admit family members of refugees to their territory, the family reunification of refugees is recognized by EU member states.⁸¹ Many other developed countries allow refugees to be reunited with their families, too.⁸² For example, Australia allows family reunification of refugees who obtain one of the refugee visas but not if they have arrived by boat (i.e. illegally) on or after 13 August 2012.⁸³ Refugees in the United States may also apply for family reunification with their immediate family members within the first two years of residence.⁸⁴ Canada allows refugees to apply for family reunification after they have become permanent residents

⁷⁸ UNHCR Handbook (n 21) 31.

⁷⁹ Cartagena Declaration (n 33) 37.

⁸⁰ Declaration on the Protection of Refugees and Displaced Persons in the Arab World (n 35) art 10.

⁸¹ Hélène Lambert, 'The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion' (1999) 11 *Intl J Refugee L* 427, 449.

⁸² Hathaway (n 24) 535.

⁸³ Australian Government, Department of Immigration and Border Protection, 'Refugee and Humanitarian Programme' <<http://www.border.gov.au/Trav/Refu>> accessed 29 November 2017.

⁸⁴ U.S. Citizenship and Immigration Services, 'I-730, Refugee/Asylee Relative Petition' (2017) <<https://www.uscis.gov/i-730>> accessed 29 November 2017.

(provided the application is made within 180 days).⁸⁵ Ecuador, South Africa and Tanzania allow family reunification too.⁸⁶

2.2 Right to Family Reunification Based on the Status of Beneficiaries of Subsidiary Protection

Given that an overwhelming majority of states are parties to the CAT, ICCPR and ECHR, the principle of *non-refoulement* is widely recognized. In addition, most western countries provide some form of subsidiary protection.⁸⁷ Nevertheless, the legal status of beneficiaries of subsidiary protection is less clear, since there are no rights specifically attached to the ‘status’ of beneficiaries of subsidiary protection. It follows that it is up to national states to decide whether or not to provide for a right to family reunification.

For example, in Australia, the Minister for Immigration and Multicultural Affairs had until 2012 personal discretion as to whether or not to issue a protection visa to people facing a real risk of significant harm prohibited by the ICCPR, the CAT and the Convention on the Rights of the Child; then, after the respective law was amended, a new mechanism with a right of appeal was introduced.⁸⁸ However, if a person enters Australia unlawfully, he or she is eligible only for a temporary protection visa that does not allow for family reunification.⁸⁹ The United States, following the implementation of the CAT in 1998, has provided for the ‘withholding of removal’ of persons who ‘it is more

⁸⁵ Government of Canada, ‘Family Sponsorship’ (2017) <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/family-sponsorship.html?_ga=2.262897928.588766202.1512578900-451781334.1512578900> accessed 6 December 2017; Mandal (n 13) 71.

⁸⁶ Mandal (n 13) 73, 83, 84.

⁸⁷ Goodwin-Gill, McAdam (n 19) 330.

⁸⁸ *Migration Amendment (Complementary Protection) Act 2011* (Cth) No. 121, 2011, amending the Migration Act 1958, and for related purposes; Administrative Appeal Tribunal, ‘Guide to Refugee Law: Complementary Protection’ <http://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Guide%20to%20Refugee%20Law/Chapter10_ComplementaryProtection.pdf> accessed 30 October 2017.

⁸⁹ Temporary Protection Visa <<http://www.border.gov.au/Trav/Visa-1/785->>> accessed 30 October 2017.

likely than not' would be tortured in the country of removal'.⁹⁰ Persons who are not eligible for 'withholding of removal', for example because they have committed certain crimes, may be granted a 'deferral of removal', which is temporary and more easily terminated (*inter alia* on the basis of 'assurances that the alien will not be tortured if returned').⁹¹ As for the legal rights of such persons, protection under the CAT enables the beneficiaries to apply for a work permit but does not allow them to obtain a lawful permanent immigration status or to bring their family members to the United States.⁹² The right to family reunification is not included in the EU Qualification Directive. Article 23 of the directive only obliges EU member states to ensure that the family unity of refugees and beneficiaries of international protection can be maintained.

2.3 Interim Conclusion

As described in this chapter, international law does not oblige states to grant a right to family reunification to refugees and beneficiaries of subsidiary protection. However, most developed states grant a right to family reunification to refugees who fall under the scope of the Refugee Convention.⁹³ When states grant a right to family reunification to beneficiaries of subsidiary protection, it is generally more restricted and subject to conditions.⁹⁴

⁹⁰ 8 CFR § 208.16 and § 208.17.

⁹¹ 8 CFR § 208.16 and § 208.17; U.S. Department of Justice, 'Fact Sheet: Asylum and Withholding of Removal Relief Convention Against Torture Protections' (2009) (U.S. DoJ Fact Sheet) <<https://www.justice.gov/sites/default/files/eoir/legacy/2009/01/23/AsylumWithholdingCATProtections.pdf> > accessed 29 October 2017.

⁹² U.S. DoJ Fact Sheet (n 91).

⁹³ Hathaway (n 24) 535.

⁹⁴ Mandal (n 13) xii.

3. Right to Family Reunification Based on Other Instruments of International Law

In the previous chapter we saw that the right to family reunification cannot automatically be derived from a status of refugee or beneficiary of subsidiary protection. This chapter focuses on the question of whether the right to family reunification of refugees and beneficiaries of subsidiary protection can be derived from other sources of international law.

3.1 Introduction

International human rights law recognizes the family as a fundamental unit of society that must be protected by society and state.⁹⁵ Everyone, without distinction to their status, has the right to be protected from arbitrary interference with family life and has the right to protection of the law against such interference or attacks.⁹⁶ Within the framework of family life, human rights treaties have specifically established the right to marry at a certain age, the right to found a family, protection from forced marriages, equality of rights, and the responsibilities of spouses and the protection of children.⁹⁷ An inherent part of the right to family life is the right to family unity.⁹⁸ The right to family unity, however, is not an explicit right. With respect to non-nationals, it conflicts with the jurisdiction of states to control migration and to decide who can enter and

⁹⁵ Universal Declaration of Human Rights (adopted 10 December 1948 United Nations General Assembly Resolution 217 A(III) (UDHR), art 16(3); art 23(1) ICCPR; art 17(1) ACHR; African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217 (AChHPR), art 18(1); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR), art 10(1).

⁹⁶ Art 12 UDHR; art 17 ICCPR; art 8 ECHR; art 11(1) ACHR.

⁹⁷ Arts 23(2) – (4) and 24 ICCPR; art 17(2) – (5) ACHR; art 12 ECHR; Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, arts 9 and 10.

⁹⁸ Kate Jastram, Kathleen Newland, 'Family Unity and Refugee Protection' in Erika Feller, Volker Türk, and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP 2003) 556.

remain on their territory.⁹⁹ The jurisdiction of a state over the admission, residence and exclusion of aliens is governed by general rules of international law and treaty provisions.¹⁰⁰ The right to family life and family unity restricts states' jurisdiction over the residence and expulsion of aliens. These rights comprise the right to family reunification.

3.2 Right to Family Reunification in International Law

Two international treaties refer specifically to the right to family reunification. The first is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.¹⁰¹ The second, more relevant to the topic of this thesis, is the Convention on the Rights of the Child. In addition, international humanitarian law specifically addresses family reunification of dispersed families. Other instruments of international law recognize the importance of family unity. The question arises when and under what conditions a state has an obligation to allow the family reunification of refugees and beneficiaries of subsidiary protection.

3.2.1 Convention on the Rights of the Child

Article 10 of the Convention on the Rights of the Child obliges states to deal with the family reunification of a child with his or her parents in a positive, human and expeditious manner. This should be read together with Article 3(1) of the same convention which provides that in all actions concerning children by state authorities the best interests of the child shall be a primary consideration. The Committee on the Rights of the Child, established by the Convention on the

⁹⁹ Kate Jastram, 'Family Unity: The New Geography of Family Life' (2003) Migration Policy Institute <<http://www.migrationpolicy.org/article/family-unity-new-geography-family-life>> accessed 7 December 2017.

¹⁰⁰ Lucius Caflisch, 'Family, Right to, International Protection' (2011) MPEPIL <<http://opil.ouplaw.com.ezproxy.leidenuniv.nl:2048/view/10.1093/law:epil/9780199231690/law-9780199231690-e799>> accessed 25 July 2017.

¹⁰¹ International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (adopted 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3.

Rights of the Child, describes the principle of the best interests of the child as a substantive right, a fundamental, interpretative legal principle and a rule of procedure.¹⁰² Jastram and Newland argue that although there is no obligation to approve family reunification in the Convention of the Rights of the Child, there is ‘at least a positive presumption in favor of approval’.¹⁰³ Anderfuhren-Wayne on the other hand points to the wide discretion of states when applying Article 10 of the convention.¹⁰⁴ In addition, the Committee on the Rights of the Child itself recognized that although family unity should be taken into account, there is a need for ‘a degree of flexibility’ when applying the principle of the best interests of the child because Article 3(1) covers ‘a wide range of situations’.¹⁰⁵ So, family unity is just one of the elements that should be evaluated. As Klaassen observes, there is no provision for the right of a family to remain in a state.¹⁰⁶ Thus, a state’s jurisdiction over who may be admitted to its territory may prevent the family reunification of a child with his or her parents.

Special attention is paid to refugee children. Article 22(2) of the Convention on the Rights of the Child obliges state parties to co-operate with the UN, inter-governmental organizations and non-governmental organizations in protecting and assisting a child refugee to trace its parents or other members of its family in order to obtain information necessary for reunification with his or her family.¹⁰⁷ The Committee on the Rights of the Child stated that whenever family reunification in the country of origin is not possible, because of the refugee status given to the child or because it is not in the best interests of the child, then

¹⁰² Committee on the Rights of the Child, ‘General comment No 14’ (2013) UN Doc. CRC/C/GC/14, part I.A.

¹⁰³ Jastram and Newland (n 98) 578.

¹⁰⁴ Cynthia S Anderfuhren-Wayne, ‘Family Unity in Immigration and Refugee Matters: United States and European Approaches’ (1996) 8(3) Intl J Refugee L 347, 351.

¹⁰⁵ Committee on the Rights of the Child, ‘General Comment No 14’ (n 102) part IV.A.4.

¹⁰⁶ MAK Klaassen, *The right to family unification* (Meijersreeks 2015) 34.

¹⁰⁷ Similar provision is included in Article 23(2) of the African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999), UNHCR, Collection of International Instruments and Legal Texts Concerning Refugees and Others of Concern to UNHCR (2007) 1058.

the obligations of Articles 9 and 10 of the Convention should govern the state's decision on family reunification.¹⁰⁸

3.2.2 ICCPR

A right to family reunification can be derived from Articles 17 and 23 ICCPR, which protect family life and the family unity of all persons, including asylum seekers and refugees.¹⁰⁹ The question is what specific positive steps states should take to protect the right to family reunification.¹¹⁰ The Human Rights Committee has acknowledged that states are generally free to decide whom they admit to their territory and aliens do not have a right to enter or reside in a particular state.¹¹¹ However, states sometimes have to adopt appropriate domestic measures to ensure family unity and the reunification of families, especially in cases of separation for political, economic or similar reasons.¹¹² When examining the right to family unity and family reunification, the Human Rights Committee uses a similar methodology to that of the ECtHR, which is described below in sub-chapter 3.2.3. There is a basic presumption of the existence of genuine family life¹¹³ and it considers whether there is a possibility to establish family life elsewhere.¹¹⁴

The Human Rights Committee has addressed issues of family unity in many cases concerning both the expulsion of foreign nationals and the admission of family members, although it has not formulated positive obligations in the

¹⁰⁸ Committee on the Rights of the Child, 'General Comment No 6' (2005) UN Doc. CRC/GC/2005/6, para 83.

¹⁰⁹ Human Rights Committee, 'General Comment No 31' in 'Note by Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2004) UN Doc. HRI/GEN/1/Rev.7.

¹¹⁰ Hathaway (n 24) 548.

¹¹¹ Human Rights Committee, 'General Comment No 15' in 'Note by Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2004) UN Doc. HRI/GEN/1/Rev.7 para 5.

¹¹² Human Rights Committee, 'General Comment No 19' in 'Note by Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies' (2004) UN Doc. HRI/GEN/1/Rev.7 para 5.

¹¹³ *A. S. v Canada*, Communication No 68/1980 (1984) UN Doc. CCPR/C/OP/1 at 27, para 8.2 (b).

¹¹⁴ eg *Ngoc Si Truong v Canada*, Communication No 743/1997 (2003) UN Doc. CCPR/C/77/D/743/1997, para 7.4.

admission cases.¹¹⁵ For example, in the case of *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v Mauritius* the committee recognized the right of states to restrict admission and to expel aliens based on security reasons if they are not arbitrary or discriminatory.¹¹⁶ The positive obligations of a state towards family reunification of refugees are the subject of the Human Rights Committee's decision in the case *Dernawi v Libya*.¹¹⁷ The applicant was granted asylum in Switzerland and family reunification was approved; however, his wife and children were barred by Libyan authorities from leaving the country.¹¹⁸ The committee considered a violation of Articles 17, 23 and 24 ICCPR to have occurred because Libya's action resulted in 'a definite, and sole, barrier to the family being reunited in Switzerland', since the applicant 'cannot reasonably be expected to return to his country of origin'.¹¹⁹ A violation of Article 23 was found to have occurred in respect of all family members.¹²⁰ A state has positive obligations to allow family members to leave its territory and to reunite with a refugee because there is an objective obstacle to them living in the country of their origin. It could be argued that these positive obligations extend to admitting family members of a refugee to the refugee's state of residence.

3.2.3 ECHR

The most influential international law provision on the right to family life is Article 8 ECHR which provides that everyone has the right to respect for his or her family life and public authorities cannot interfere with the exercise of this right unless it is in accordance with law and necessary in a democratic society for one of the specified reasons. The ECtHR case law on Article 8 ECHR is the most prolific international jurisprudence concerning the right to family life. It can be divided into two groups of cases.¹²¹ The first group concerns families already

¹¹⁵ Klaassen (n 106) 25-26.

¹¹⁶ *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v Mauritius*, Communication No 035/1978 (1981) UN Doc. CCPR/C/12/D/35/1978, para 9.2 (b) 2 (ii) 3; Klaassen (n 106) 26.

¹¹⁷ *Dernawi v Libya*, Communication No 1143/2002 (2007) UN Doc. CCPR/C/90/D/1143/2002.

¹¹⁸ *ibid* para 2.2.

¹¹⁹ *Dernawi v Libya* (n 117), para 6.3.

¹²⁰ *ibid*.

¹²¹ Lambert (n 81) 427; Klaassen (n 106) 37.

living on the territory; the claimants argue that expulsion of one of the family members would violate their right to family life. The second much smaller group of cases deals with family members who seek admission to the territory (i.e. family reunification cases). The court has stated that the boundaries between the positive obligations of a state (to admit a family member) and the negative obligations (not to interfere with the right to family life) are not clear and the applicable principles are similar: the ECtHR seeks to find a fair balance between the individual interests and the interests of community as the whole; and in both contexts states enjoy a certain margin of appreciation.¹²²

In cases concerning removal from the territory, the court balances the possibility to live in another country against the interests specified in Article 8(2) ECHR.¹²³ Under Article 8(2) ECHR, an interference of a public authority with the exercise of the right to respect for (private) and family life is possible only if it is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In admission cases, the ECtHR has highlighted the positive obligations of states to ensure the protection of family life and family unity. These have eroded the traditional principle of state sovereignty and jurisdiction as to who to admit to its territory without restriction by any international obligations on states to admit aliens.¹²⁴ The cornerstone decision of the ECtHR in this regard is *Marckx v Belgium* from 1979¹²⁵ in which the court ruled that aside from the prohibition of arbitrary interference with the right to family life by public authorities, 'there may be positive obligations inherent in an effective "respect" for family life'.¹²⁶

¹²² *Gül v Switzerland*, ECHR 1996–I, para 38; Lambert (n 81) 438.

¹²³ Lambert (n 81) 441.

¹²⁴ Kay Hailbronner, Jana Gogolin, 'Aliens' (2013) MPEPIL <<http://opil.ouplaw.com.ezproxy.leidenuniv.nl:2048/view/10.1093/law:epil/9780199231690/law-9780199231690-e744?rskey=RMbbsx&result=4&prd=OPIL>> accessed 28 July 2017, para 14.

¹²⁵ *Marckx v Belgium* (1979) Series A no 31.

¹²⁶ *ibid* para 31.

The primary consideration for the ECtHR when considering whether Article 8 has been violated is the ‘family life elsewhere doctrine’.¹²⁷ The court systematically holds that ‘a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence’ and that the ECHR ‘does not guarantee the right of an alien to enter or to reside in a particular country’.¹²⁸ In *Gül v Switzerland*, the court specified that ‘the extent of a state’s obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest’.¹²⁹ The court also regularly provides that ‘where immigration is concerned, Article 8, taken alone, cannot be considered to impose on a State a general obligation to respect a married couple’s choice of country for their matrimonial residence or to authorize family reunification on its territory’.¹³⁰ It follows that the margin of appreciation of a state is very wide and the ECtHR is reluctant to declare a violation of Article 8 and has only rarely found that a state is subject to positive obligations.¹³¹

The ECtHR has established several principles, which it regularly applies in its decisions concerning the scope of positive obligations of states under Article 8. The court regularly checks whether there is a genuine family life and strong family ties between the family members and whether there are insurmountable obstacles to establishing a family life elsewhere.

3.2.3.1 Genuine Family Life

The pre-condition for recognizing a right to family life in admission cases is the existence of genuine family life and strong family ties.¹³² The ECtHR has

¹²⁷ Klaassen (n 106) 43.

¹²⁸ *Nunez v Norway* App no 55597/09 (ECtHR, 28 June 2011) para 66.

¹²⁹ *Gül v Switzerland* (n 122) para 38.

¹³⁰ eg *Biao v Denmark* App no 38590/10 (ECtHR, 24 May 2016) para 117; *Jeunesse v the Netherlands* App no 12738/10 (ECtHR, 3 October 2014); *Tuquabo-Tekle and Others v the Netherlands* App no 60665/00 (ECtHR, 1 December 2005).

¹³¹ Lambert (n 81) 438-39; Klaassen (n 106) 50, 95.

¹³² Lambert (n 81) 438, 440.

confirmed the existence of family life within the nuclear family and with other relatives. In *Abdulaziz, Cabales and Balkandali v the United Kingdom* the ECtHR stated that Article 8 ‘presupposes the existence of family’, which not only covers actual family life but the situation of a lawful and genuine marriage, even if family life has not been yet established.¹³³ Family life is established by marriage, even if questions about its validity have been raised.¹³⁴ In *Al-Nashif v Bulgaria*, the court found family life to exist in the case of *de facto* relationships with relevant characteristics (for example children born from the relationship, parties living together, length of the relationship).¹³⁵ More recently, the ECtHR has also recognized that family life may exist in the case of same sex relationships¹³⁶ and in the case of same-sex couples who do not live together for ‘professional and social reasons’.¹³⁷ The existence of family life between children and their parents can be established even if they do not live together because the bond between a child and its parent, which amounts to family life, exists as from the child’s birth.¹³⁸ This bond may be broken only in exceptional circumstances.¹³⁹ In addition, the ECtHR has also recognized that the relationship between grandparents and grandchildren can amount to family life.¹⁴⁰ The provision of correct and truthful information by the applicant is of the utmost importance.

3.2.3.2 Insurmountable obstacles to establishing family life elsewhere

The ECtHR, when considering the possible violation of Article 8, also examines whether there are ‘insurmountable obstacles’ to the family living in the country of origin.¹⁴¹ Traditionally, if it was possible to establish family life in

¹³³ *Abdulaziz, Cabales and Balkandali v the United Kingdom* (1985) Series A no 94, para 62.

¹³⁴ *ibid* para 63.

¹³⁵ *Al-Nashif v Bulgaria* App no 50963/99 (ECtHR, 20 June 2002) para 112.

¹³⁶ *Schalk and Kopf v Austria* ECHR 2010–IV 409, para 95.

¹³⁷ *Vallianatos and Others v Greece* ECHR 2013–VI 125, para 73.

¹³⁸ *Berrehab v the Netherlands* (1988) Series A 138, para 21; *Hokkanen v Finland* (1994) Series A no 299-A, para 54.

¹³⁹ *Gül v Switzerland* (n 122) para 32.

¹⁴⁰ *Marckx v Belgium* (n 125) para 45.

¹⁴¹ *Jeunesse v the Netherlands* (n 130) para 107.

another country, the ECtHR would hold that there had been no violation of Article 8 ECHR.¹⁴² However, a refugee's right to family life and family unity in the country of residence is established by the same principle as the one which establishes their residence in that country – the principle of *non-refoulement*. Still, it may sometimes be possible to establish family life in a third country and in that case the state is under no obligation to grant a right to family reunification.¹⁴³

The court has also looked at the reasons why the family has been separated¹⁴⁴ because Article 8 does not guarantee 'a right to choose the most suitable place to develop family life'.¹⁴⁵ In the court's view, the mere fact that the parents left their children behind in the country of origin, even for a prolonged time, does not mean that they 'irrevocably decided to leave their children in the country of origin, and thereby abandoned any idea of a future family reunion'.¹⁴⁶ The ECtHR has found there to be no violation of Article 8 in a case when there was evidence that the parents always wanted their children to join them.¹⁴⁷ Further, the court noted several times that it is not a conscious decision of a refugee to leave their family behind when he or she flees the country due to a serious fear of persecution.¹⁴⁸

¹⁴² eg *Abdulaziz, Cabales and Balkandali v the United Kingdom* (n 133) para 68; *Gül v Switzerland* (n 122) para 42; *Ahmut v the Netherlands* ECHR 1996–VI, paras 70-73.

¹⁴³ *E.P. and A.R. v the Netherlands* App No 43538/11 and 63104/11 (ECtHR, 11 July 2017) para 91.

¹⁴⁴ Louise Halleskov Storgaard, 'National Law Restrictions on Family Reunification Rights of International Protection Beneficiaries from a ECHR/EU Law Perspective' (2016) Working paper presented at SLS 2016 Annual Conference St Cathrine's College, University of Oxford <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2853458> accessed 8 June 2017, 6.

¹⁴⁵ *Ahmut v the Netherlands* (n 142) para 71; *Knel and Veira v the Netherlands* App no 39003/97 (ECtHR, 5 September 2000); *I.M. v the Netherlands* App no 41226/98 (ECtHR, 25 March 2003).

¹⁴⁶ *Sen v the Netherlands* App no 31465/96 (ECtHR, 21 December 2001).

¹⁴⁷ *I.A.A. and Others v the United Kingdom* App no 25960/13 (ECtHR, 8 March 2016).

¹⁴⁸ *Tuquabo-Tekle and Others v the Netherlands* (n 130) para 47; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (n 60) para 75; *Tanda-Muzinga v France* App no 2260/10 (ECtHR, 10 July 2010) para 74; *Mugenzi v France* App no 52701/09 (ECtHR, 10 July 2014) para 53.

3.2.3.3 *Other principles*

In *Nsona v the Netherlands*, the fact that the applicant was denied a refugee status and granted a residence permit on humanitarian grounds played no role.¹⁴⁹ However, for the purposes of the balancing test, the applicant's status and specific circumstances are important. The court has repeatedly described refugees and asylum seekers as 'a particularly underprivileged and vulnerable population group in need of special protection'.¹⁵⁰ It emphasized that 'family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life'.¹⁵¹ Further, the ECtHR observed 'that there exists a consensus at international and European level' that refugees should enjoy more favorable conditions for family reunification than other aliens and specially mentioned the activities of the UNHCR and the standards specified in the EU Family Reunification Directive.¹⁵² The court did not indicate, though, whether it understood the term broadly, so that is also covered beneficiaries of subsidiary protection. In this context, it must be borne in mind that the ECtHR does not review states' decisions on refugee protection and asylum.¹⁵³ It follows that if an individual is subject to an exclusion clause of the Refugee Convention and a decision has been taken in accordance with domestic law in pursuance of the legitimate aims set out in Article 8(2) ECHR, the right to family unity does not outweigh public interest considerations.¹⁵⁴ There have also been instances when the court did not decide on the question of a breach of Article 8 ECHR or declared the application to be inadmissible, even though very special circumstances existed. The applicant in *Gül v Switzerland* was not granted asylum but was granted a temporary residence permit for humanitarian reasons.¹⁵⁵ The ECtHR upheld the rejection of his application for family reunification with his son living

¹⁴⁹ *Nsona v the Netherlands* ECHR 1996-V, paras 8, 112 and 113.

¹⁵⁰ *M.S.S. v Belgium and Greece* (n 64) para 251; *Tarakhel v Switzerland* ECHR 2014-VI 195, para 97; *Hirsi Jamaa v Italy* ECHR 2012-II 97, para 155; *Tanda-Muzinga v France* (n 148) para 75; *Mugenzi v France* (n 148) para 54.

¹⁵¹ *Tanda-Muzinga v France* (n 148) para 75.

¹⁵² *Tanda-Muzinga v France* (n 148) para 75.

¹⁵³ *E.P. and A.R. v the Netherlands* (n 143) para 74.

¹⁵⁴ *E.P. and A.R. v the Netherlands* (n 143) paras 93, 95.

¹⁵⁵ *Gül v Switzerland* (n 122).

in Turkey because the reasons for applying for political asylum were no longer valid (he had visited his son in Turkey several times) and there were no obstacles to him enjoying family life in Turkey as he could continue to receive his invalidity pension there and his wife proper medical care there, too. In *Haydarie v the Netherlands* the court found the requirement that an alien who seeks family reunion should have sufficient financial means (excluding any welfare benefits) to be able to provide for his or her family members to be reasonable.¹⁵⁶ The applicant was first granted a residence permit for the purposes of asylum and later obtained the Dutch nationality. According to the court, she had never made any serious effort to find gainful employment and chose instead to take care of her invalid sister, without having shown that it was not impossible to entrust the care for her sister to a specialized agency.¹⁵⁷ Therefore, the Netherlands had not failed to strike a fair balance between the applicant's interests and its own interest in controlling immigration and public expenditure when rejecting the application for family reunification.¹⁵⁸

The ECtHR has found a state to be under a positive obligation to grant family unification in only a few cases and only because of the particular circumstances of those cases. The cases of *Sen v the Netherlands* and *Tuquabo-Tekle and Others v the Netherlands* concerned settled immigrant parents who sought to reunite with their children. Even though the children had strong ties with the country of origin, the ECtHR ruled that family reunification should be allowed because the parents had been living in the Netherlands for a number of years, had obtained Dutch nationality and had other children who were born and lived in the Netherlands and were Dutch nationals.¹⁵⁹ In the case *Rodrigues da Silva and Hoogkamer v the Netherlands*, the ECtHR even decided, that the applicant should be granted a residence permit despite her illegal presence in the Netherlands for several years.¹⁶⁰ Although the father had custody of the applicant's child, their daughter had been raised jointly by the applicant and her

¹⁵⁶ *Haydarie v the Netherlands* App no 8876/04 (ECtHR, 20 October 2005).

¹⁵⁷ *ibid* 13-14.

¹⁵⁸ *Haydarie v the Netherlands* (n 156) 14.

¹⁵⁹ *Sen v the Netherlands* (n 146); *Tuquabo-Tekle and Others v the Netherlands* (n 130).

¹⁶⁰ *Rodrigues da Silva and Hoogkamer v the Netherlands* ECHR 2006-I 223.

paternal grandparents with whom she had very close ties. The expulsion of the applicant would lead to the ties with her daughter being broken, as she could not take her daughter with her.¹⁶¹ Similarly, the ECtHR ruled in the case of *Nunez v Norway* that Norway was under a positive obligation to grant a residence permit because so doing was in the best interests of the children and regular contact with both parents was thereby ensured.¹⁶² It follows that when children are involved, the principle of the best interests of the child is of paramount importance and it seems to be a very persuasive argument for the ECtHR when deciding on a states positive obligation even when the applicant is irregularly residing on the territory in question.¹⁶³ According to the ECtHR, ‘whilst alone [the best interests of the child] cannot be decisive, such interests certainly must be afforded significant weight’ and decisions of national authorities must be feasible, practical and proportionate.¹⁶⁴ However, the best interests of the child are not ‘a trump card which requires admission of all children who would be better off living in a Contracting State’.¹⁶⁵ In *Tuquabo-Tekle and Others v the Netherlands* the applicant’s daughter was 15 years old; but the ECtHR is generally reluctant to find a violation of Article 8 in cases where teenage and older children are involved, stating that relationships and normal emotional ties between adult relatives are usually protected by Article 8 only if there are further elements of dependency.¹⁶⁶

It can be concluded from the ECtHR case law described above that the court decides on the right to family reunification on a case by case basis and there are no decisive factors. The court has stated that the ECHR ‘cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law of which they form part’.¹⁶⁷ The ECtHR takes into account the relevant rules of international law, ‘in particular the rules concerning

¹⁶¹ *ibid*, paras 42-43.

¹⁶² *Nunez v Norway* (n 128).

¹⁶³ *Jeunesse v Netherlands* (n 130) para 109.

¹⁶⁴ *Jeunesse v Netherlands* (n 130) para 109.

¹⁶⁵ *I.A.A. and Others v the United Kingdom* (n 147) para 46.

¹⁶⁶ *A.A.Q. v the Netherlands* App no 42331/05 (ECtHR, 30 June 2015) para 64; *E.P. and A.R. v the Netherlands* (n 143) para 89.

¹⁶⁷ *E.P. and A.R. v the Netherlands* (n 143) para 90.

international protection of human rights'.¹⁶⁸ Although there are not many instances in which the ECtHR has found Article 8 to have been violated, when it has, common reasons for doing so included the best interests of the child and insurmountable obstacles to establishing family life elsewhere.

3.2.4 European Social Charter

The state parties to the European Social Charter have committed to the facilitation as far as possible of the family reunion of foreign workers established in their territory. This provision, to be found in Article 19(6), read together with the Appendix to the European Social Charter is also applicable to refugees, provided the state is a party to the Refugee Convention and the Protocol.¹⁶⁹

3.2.5 International Humanitarian Law

Refugees who are on the territory of a state that is a party to an armed conflict are protected by international refugee law and also by international humanitarian law that specifically deals with the right to family reunification. It is a rule of customary international law that family life must be respected as far as possible.¹⁷⁰ Article 26 of the Fourth Geneva Convention of 1949 provides for the facilitation of enquiries made by family members of families dispersed owing to war with the aim of renewing contact and possible meeting.¹⁷¹ This obligation was extended in the Additional Protocol I of 1977 that obliges the state parties to facilitate reunion of families dispersed as a result of armed conflicts and encourages the work of humanitarian organizations (Article 74).¹⁷² This duty has

¹⁶⁸ *E.P. and A.R. v the Netherlands* (n 143) para 73.

¹⁶⁹ European Social Charter (revised) (adopted 3 May 1996, entered into force 1 July 1999) ETS No. 163, Appendix, para 2.

¹⁷⁰ Jean-Marie Henckaerts, Louise Doswald-Beck & Comité international de la Croix-Rouge, *Customary international humanitarian law* (Cambridge University 2005) 379, rule 105.

¹⁷¹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

¹⁷² Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1979) 1125 UNTS 3; Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

to be observed not only by the states that are parties to the armed conflict but also by contracting parties who are not involved in the conflict.¹⁷³

These provisions of international humanitarian law apply also to internally displaced persons ‘who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters’.¹⁷⁴ Internally displaced persons are not covered by international refugee law because they have not crossed an internationally recognized state border.¹⁷⁵ The only international treaty that specifically addresses internally displaced persons is the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).¹⁷⁶

3.3 EU Family Reunification Directive

It is clear that the obligations under the European Social Charter and the ECHR have lost their practical importance for EU member states after the adoption of the EU Family Reunification Directive.¹⁷⁷ The scope of this supranational legislative instrument extends beyond that of the above mentioned international instruments. It establishes a subjective right to family reunification and imposes positive obligations to authorize family reunification without states having any margin of appreciation left.¹⁷⁸ The aim of the directive is to lay down common criteria for the admission of family members of non-EU citizens legally

¹⁷³ International Committee of the Red Cross (ICRC), ‘Commentary of 1987 Reunion of Dispersed Families’ <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=9351217FBF127563C12563CD00436755>> accessed 28 November 2017.

¹⁷⁴ UNHCR, ‘Guiding Principles on Internally Displacement’ (1998) ADM 1.1, PRL 12.1, PR00/98/109.

¹⁷⁵ ICRC, ‘International Humanitarian Law: Answers to Your Questions’ (2015) 68-69.

¹⁷⁶ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) (adopted 23 October 2009, entered into force 6 December 2012).

¹⁷⁷ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251.

¹⁷⁸ Case C-540/03 *Parliament v Council* [2006] ECR I-5809, para 60.

residing in one of the EU member states. According to the directive, ‘family reunification is a necessary way of making family life possible’ and ‘[m]easures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law’.¹⁷⁹ Special attention is paid to refugees who enjoy a privileged status and more favorable conditions when exercising the right to family reunification than other categories of ‘third-country nationals’. There is no requirement for a minimum period of stay on the territory before family reunion can take place and there are also applicable exemptions concerning the requirement for suitable accommodation, health insurance and available financial resources for the whole family as long as the application for family reunification is submitted within 3 months of granting the refugee status. The EU member states may refuse the admission of family members of refugees on grounds of public policy, public security or public health.

3.4 Interim Conclusion

International human rights law does not establish a right to family reunification for refugees and beneficiaries of subsidiary protection. This said, international human rights courts and bodies have found states to be under a positive obligation to allow family reunification, most notably the ECtHR. Although the special position of refugees has been highlighted, the positive obligation of states has been more frequently justified by special circumstances arising in individual cases, such as insurmountable obstacles to establishing family life elsewhere and the best interests of the child.

¹⁷⁹ Council Directive on the right to family reunification (n 177) Preamble, Recital 4, 2.

4. Different Treatment of Refugees and Beneficiaries of Subsidiary Protection Regarding the Right to Family Reunification

States have the right to control immigration and decide who will enter their territory, which leaves the door open to treating family members of refugees and beneficiaries of subsidiary protection differently. As shown above, some states grant preferential treatment to refugees regarding their reunification with other family members, for example the United States and Australia. The EU Family Reunification Directive specifically excludes beneficiaries of subsidiary protection and provides a more favorable treatment to refugees. Nevertheless, there are recommendations to grant the same rights and benefits to refugees and beneficiaries of subsidiary protection and also some development can be seen in international jurisprudence. The research question addressed in this chapter is whether the different treatment in national and supranational legislations of refugees and beneficiaries of international protection with regard to family reunification, is justified.

4.1 Recommendations for the Same Treatment of Refugees and Beneficiaries of Subsidiary Protection

The UNHCR noted in 1998 that the traditional feature of protection of refugees, the principle of *non-refoulement*, has been incorporated into human rights treaties but that it was somewhat different in scope and that the areas of complementarity and differences needed to be further examined.¹⁸⁰ Since then, the UNHCR has been advocating that the term refugee should be understood in a broader sense as ‘persons outside their countries who are in need of international protection because of a serious threat to their life, liberty or

¹⁸⁰ UNHCR, ‘Note on International Protection’ (UNHCR Standing Committee 1998) UN Doc. EC/48/SC/CRP.27, para 11.

security of person in their country of origin as a result of persecution or armed conflict, or serious public disorder'.¹⁸¹ It encouraged states 'to provide for the highest degree of stability and certainty by ensuring the human rights and fundamental freedoms of such persons without discrimination, taking into account the relevant international instruments and giving due regard to the best interests of the child and family unity principles'.¹⁸² Other international bodies and academics have also argued for the equal and non-discriminatory treatment of refugees and beneficiaries of subsidiary protection. The necessity to remove limitations on the rights of beneficiaries of subsidiary protection in order to comply with the principle of non-discrimination was also recognized by the European Commission when preparing for the EU Qualification Directive.¹⁸³ McAdam even suggested that given the same circumstances of granted protection (*non-refoulement*), differentiation between the rights of refugees and beneficiaries of subsidiary protection is not justified.¹⁸⁴

Generally, refugees and beneficiaries of subsidiary protection share a common basis for protection, the principle of *non-refoulement*, and they should not be treated differently. However, there may be instances that justify different treatment, for example in the case of those individuals who fall within the scope of Article 1F of the Refugee Convention.¹⁸⁵ They still enjoy the protection of *non-refoulement* but the state is probably not obliged to grant them the same rights as refugees who 'deserve' the status.¹⁸⁶

¹⁸¹ Mandal (n 13) ix.

¹⁸² UNHCR, 'Conclusion on the Provision on International Protection No 103' in 'A Thematic Compilation of Executive Committee Conclusions' (n 20) 123.

¹⁸³ 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 (Recast) [2009] COM(2009) 551 final, 8.

¹⁸⁴ McAdam (n 40) 251.

¹⁸⁵ Jason Pobjoy, 'Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection' (2010) 34 *Melb. U. L. Rev.* 223.

¹⁸⁶ *ibid* 224.

4.2 Right to Family Reunification of Refugees and Beneficiaries of Subsidiary Protection in International Law

It has also been argued that refugees and beneficiaries of subsidiary protection should enjoy the same treatment regarding the right to family reunification.¹⁸⁷ The UNHCR has issued several non-binding conclusions on this matter, calling for facilitated entry of family members of refugees and other beneficiaries of international protection.¹⁸⁸ This view is shared by non-governmental organizations and scholarly literature.¹⁸⁹ Jastram and Newland have claimed that the fact that the Refugee Convention does not include a specific obligation to provide for the family reunification of refugees and that consequently refugees have to rely on international human rights law and international humanitarian law, as do beneficiaries of subsidiary protection, means that enjoyment of this right does not depend on the formal status of a person.¹⁹⁰ The Council of Europe points out that in practice the nature of the protection provided (refugee status or subsidiary protection) depends on many political and institutional factors and it differs from one state to another.¹⁹¹ This is evidenced by the different assessment of applications for international protection by the EU member states as shown in the introduction to this thesis. The different treatment of the right to family reunification of refugees on the one hand, and that of beneficiaries of subsidiary protection, on the other, does not derive from international law but from the EU Family Reunification Directive; the question which then arises is whether or not this distinction is not discriminatory under international law.¹⁹²

¹⁸⁷ Mandal (n 13) 55-57.

¹⁸⁸ UNHCR, 'Family Reunification in Europe' (2015) <<http://www.unhcr.org/56fa38fb6.pdf>> accessed 5 November 2017.

¹⁸⁹ See eg The European Council on Refugees and Exiles (ECRE) and The European Legal Network on Asylum (ELENA), 'Information Note on Family Reunification for Beneficiaries of International Protection in Europe' (2016) <<https://www.ecre.org/information-note-on-family-reunification/>> accessed 27 June 2017, para 25; ECRE and the Red Cross EU Office, 'Disrupted Flight: The Realities of Disrupted Refugee Families in the EU' (2014) <<https://www.ecre.org/ecre-publications/publications/>> accessed 27 June 2017.

¹⁹⁰ Jastram, Newland (n 98) 586.

¹⁹¹ CoE, 'Issue Paper: Realising the rights to family reunification of refugees in Europe' (n 77) 14.

¹⁹² Pobjoy (n 185) 195.

As far as international jurisprudence is concerned, no distinction is made between refugees and beneficiaries of subsidiary protection with regard to the right to family reunification. Rather, the same arguments can be used to justify a right to family reunification for both categories of international protection. Needless to say, beneficiaries of subsidiary protection have to prove the existence of genuine family life in the same way as other applicants for family reunification. Because beneficiaries of international protection are granted protection on the basis of a well-founded fear of persecution or serious risk of torture or other ill-treatment in their country of origin, they face the same insurmountable obstacles, as a result of the principle of *non-refoulement*, to establishing family life in their country of origin, as refugees do.

Beneficiaries of subsidiary protection often receive residence permits valid for a shorter period of time than those of refugees.¹⁹³ This could be seen as a feature which distinguishes refugees from beneficiaries of subsidiary protection, the status of the latter being seen as more temporary. But in reality this is not the case because the status of both refugees and beneficiaries of subsidiary protection is subject to cessation when the reasons for protection end.¹⁹⁴

The different treatment of various categories of immigrants as regards family reunification was also an issue in the ECtHR case of *Hode and Abdi v the United Kingdom*.¹⁹⁵ Although the court was considering the right of family reunification of refugees and student and migrant workers, rather than refugees and beneficiaries of subsidiary protection, it made some statements that argue against having different conditions for family reunification for refugees and beneficiaries of subsidiary protection. The ECtHR ruled that states enjoy a margin of appreciation which can justify the different treatment of people in similar situations but this justification must be objective and reasonable, must

¹⁹³ Art 24 EU Qualification Directive; Mandal (n 13) xii.

¹⁹⁴ CoE 'Issue Paper: Realising the rights to family reunification of refugees in Europe' (n 77) 25.

¹⁹⁵ *Hode and Abdi v the United Kingdom* App no 22341/09 (ECtHR, 6 November 2012).

pursue a legitimate aim and be proportionate.¹⁹⁶ The margin of appreciation will vary according to the circumstances, the subject matter and the background; the court acknowledged that a wide margin is usually allowed when it comes to general measures of economic or social strategy.¹⁹⁷ Furthermore, the fact that the United Kingdom fulfilled its international obligations when allowing family reunification of refugees with spouses whom they married before they fled their country of origin, does not itself justify the different treatment of people in an analogous situation (in this case the state did not allow family reunification with spouses whom they married post-flight).¹⁹⁸ It follows that justification is lacking for generally treating beneficiaries of subsidiary protection differently from refugees in family reunification cases. Nevertheless, the reason for providing subsidiary protection may be important and denial of the right to family reunification may be justified, as seen in the ECtHR case *E.P. and A.R. v the Netherlands*. The court found that the denial of a residence permit to applicants who had been refused asylum pursuant Article 1F did not violate Article 8 ECHR, even though their spouses and children were granted asylum.¹⁹⁹

4.3 Interim Conclusion

All sources mentioned in this chapter suggest that there are no valid reasons for making a distinction between refugees and beneficiaries of subsidiary protection with regard to their right to family reunification in general. It can be argued that the right to family reunification of refugees has become customary international law based on significant state practice, backed by *opinio juris*. Hence, states should also as a matter of general principle recognize the right to family reunification of beneficiaries of subsidiary protection.

¹⁹⁶ *ibid* para 52.

¹⁹⁷ *Hode and Abdi v the United Kingdom* (n 193) para 52.

¹⁹⁸ *Hode and Abdi v the United Kingdom* (n 193) para 55.

¹⁹⁹ *E.P. and A.R. v the Netherlands* (n 143) para 97.

Conclusion

The main research question addressed in this thesis is whether beneficiaries of international protection can derive a right to family reunification from international law. In order to answer this question I focused on the different types of international protection available, the right to family reunification in international law instruments and the different treatment of family reunification of refugees and beneficiaries of international protection in national and supranational legislation.

In Chapter one I dealt with the question of what types of international protection are available. The Refugee Convention has become the most important and widely recognized instrument which provides protection to people fleeing their countries of origin because of a fear of persecution. The other group of international protected persons, in this thesis called beneficiaries of subsidiary protection, consists of persons enjoying protection from *refoulement* on the basis of various international human rights treaties, especially CAT, ICCPR and ECHR. The main distinction between refugees and beneficiaries of subsidiary protection relates to the rights that attach to their status. While the Refugee Convention established the legal status of and guarantees refugees a certain level of treatment, the only specific right of beneficiaries of subsidiary protection is the right to *non-refoulement*. That means a legal status of beneficiary of subsidiary protection does not exist in international law and their rights are guaranteed by states' obligations to observe rights, belonging to all persons, in international human rights treaties. Only the EU countries have established the legal status of beneficiary of subsidiary protection in line with the EU Qualification Directive.

Chapter two examined the question of whether the right to family reunification attaches to the status of refugee and beneficiary of subsidiary protection. The right to family reunification is not explicit in the Refugee Convention or any other international instrument of refugee law. The intention of states to ensure the unity of refugee families and a determination to adopt

additional measures to this end is nevertheless apparent from Recommendation B of the Final Act of the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. The UNHCR has also repeatedly emphasized the fundamental principle of family unity and stressed the importance of the reunification of refugees' families. As a result, the right to family reunification of refugees is now widely recognized by states. By way of contrast, the right to family reunification of beneficiaries of subsidiary protection is considered to be entirely a matter for national legislation and it is up to individual states as to how they approach it. Hence, practice varies. The EU Qualification Directive obliges states to ensure the family unity of both refugees and beneficiaries of subsidiary protection. However, the beneficiaries of subsidiary protection are expressly excluded from the scope of the EU Family Reunification Directive. States can, however, afford them more favorable treatment and many of them have done so and enabled family reunification. Outside Europe, many states that recognize subsidiary protection also allow family reunification, yet the right is often restricted.

Chapter three explored the question of whether the right to family reunification is established by other instruments of international law. Only a few international treaties expressly mention the right to family reunification and this right is mostly implied from the right to family life and family unity established by international law. The UNHCR, scholars, and non-governmental organizations have stressed that family reunification is a natural and inherent part of the right to family unity. Human rights law bodies and international courts, such as the Human Rights Committee and most notably the ECtHR hold that in some cases states have to take some positive measures to fulfill their obligation to protect family life and family unity. In particular, the ECtHR has developed several principles, which it applies regularly when deciding Article 8 ECHR cases, namely the existence of genuine family life and a balancing test in which the interest of the individual is weighed against that of society as a whole. It can be said that factors such as the best interests of the child and

insurmountable obstacles to establishing family life elsewhere are often decisive in deciding whether or not there has been a violation of Article 8 ECHR.

Finally, Chapter four considered the question of whether or not the different treatment of refugees and beneficiaries of international protection with regard to the right to family reunification is justified. International human rights bodies and some scholars have been calling for the same conditions of family reunification to apply both of refugees and beneficiaries of subsidiary protection. The ECtHR has recognized the special status of refugees in comparison with other foreign nationals and stated that family unity is a basic right of refugees and family reunification is a fundamental element of their protection. Principles applied by the ECtHR in its decisions concerning Article 8 ECHR apply, however, in equal measure to refugees and to beneficiaries of subsidiary protection.

The sources of states' *non-refoulement* obligations extends from the Refugee Convention to other international human rights treaties. There are two categories of persons who enjoy international protection, refugees and beneficiaries of subsidiary protection and both enjoy the right to *non-refoulement*. The right to family reunification of beneficiaries of international protection, the focus point of this thesis, cannot be based on the status of refugee or beneficiary of subsidiary protection. Both categories can derive a right to family reunification only from international human rights treaties as other categories of migrants. Although it is not recognized as an explicit right in any international treaty, the international jurisprudence of human rights courts and bodies establishes that in some cases states have positive obligations to admit family members of migrants residing on their territory. In practice, the right to family reunification is fragmented and states often only grant the right to family reunification to refugees, or restrict the right to family reunification of beneficiaries of subsidiary protection with refugees enjoying preferential treatment. In conclusion, to answer the main research question I have argued that the right to family reunification of refugees has become customary international law as a result of significant state practice, supported by *opinio juris*. However, I have also found

no valid reasons to differentiate between refugees and beneficiaries of subsidiary protection regarding family reunification. Hence, when states grant the right to family reunification to refugees, they should also generally recognize the right to family reunification of beneficiaries of subsidiary protection.

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