Who deserves international protection in Europe? A critical analysis of the unequal treatment given to Convention refugees and beneficiaries of subsidiary protection in the European Union

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Abstract

The aim of this dissertation is to investigate the establishment of the Common European Asylum System (CEAS) and its successive reformulations, focusing on the EU policy on standards for the qualification of third-country nationals or stateless persons as refugees or beneficiaries of subsidiary protection. It analyses how hierarchies are constructed for the different policy target groups and how each categorised group is entitled to human rights to a different extent. Subsidiary protection has been seen as a minor status, with reduced human rights, compared to refugee status. It uses qualitative research and refers to a critical view on the categorization of policy targets, through the lenses of Zetter's theory on the fractioning of the label 'refugee'. The present study has poststructuralist approach and applies the Howarth and Griggs method to Critical Policy Analysis. Having analysed a selection of nine key policy documents covering three phases of development of the CEAS, no argument was found capable of objectively justifying the limitation on the human rights of beneficiaries of subsidiary protection. This examined the rules around the qualification of a protected person as a refugee or a beneficiary of subsidiary protection, what are the features used to distinguish the two statuses, and the rights associated to each of these statuses, and how those policy instruments conceptualise 'persecution' and 'serious harm'. I also looked for the arguments used to justify the differential treatment given to refugees and beneficiaries of subsidiary protection. Indeed, the analysis confirmed the fact that the 'fractioning of the refugee label' in two different statuses is part of the securitization project to restrict access to the refugee status and its correlated rights.

Key words: convention refugees; subsidiary protection; legal status; persecution; serious harm; CEAS; European Union.

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List of acronyms and abbreviations

ACHPR - African Charter on Human and Peoples' Rights

ACHR - American Convention on Human Rights

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

CEAS - Common European Asylum System

UDHR - Universal Declaration of Human Rights

ECHR - European Convention for the Protection of Human Rights and Fundamental Freedoms

ECRE - European Council on Refugees and Exiles

EU - European Union

ICCPR - International Covenant on Civil and Political Rights

ICESCR - International Covenant on Economic, Social and Cultural Rights

Refugee Convention / Geneva Convention - Convention Relating to the Status of Refugees

TEU - Treaty on the European Union

UNHCR - United Nations High Commissioner for Refugees

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Chapter 1 - Introduction

1.1. Problem statement and research question

Subsidiary protection has been seen as a minor form of protection compared to refugee protection since its introduction into EU law. This understanding relies mainly on the idea of primacy of the Convention status and the alleged temporary nature of subsidiary protection. The result has been a lesser legal status with lesser rights to beneficiaries of subsidiary protection. Both justifications have already been proven to be inaccurate, as it will be further explained in the following chapters, but EU policy-makers insist on keeping the differential treatment between the two statuses. In practical terms, this means that the European Union policy on standards for the qualification of third-country nationals or stateless persons as refugees or beneficiaries of subsidiary protection have been denying basic rights to protected persons who does not fall into the legal definition of refugee, in clear violation to international human rights.

Despite the evident harm this policy has been causing to people who come to seek international protection in the European Union, there is no in-depth critical study problematizing the categorization of protected persons and analysing how the constructed hierarchy between the two different policy target groups in need of international protection has led to limitations on the human rights of the beneficiaries of subsidiary protection. Filling this gap is the greatest merit and contribution of the present dissertation to existing theory.

In this context, the purpose of this dissertation is to investigate the establishment of the Common European Asylum System (CEAS) and its successive reformulations, focusing on the qualification policy for refugees and beneficiaries of subsidiary protection. It will analyse how hierarchies are constructed for the different policy target groups (convention refugees and beneficiaries of subsidiary protection) and how each categorized group is entitled to human rights to a different extent.

In this scope, the research question that will guide this investigation can be formulated as follows:

How have the successive reformulations of the Common European Asylum System (CEAS) comprehended and justified different legal statuses for subsidiary protection and convention refugees, and impacted the human rights associated with these statuses?

1.2. Relevance of the study

After a substantial growth in the number of asylum applications in 2015, Europe watched to a curtailing of the human rights of beneficiaries of subsidiary protection by EU Member States in their national laws, including restrictions on the rights to social welfare, family unity and the length of residence permits (Salomon 2022). Following this tendency, in 2016 the European Commission submitted a package of 7 legislative proposals to the Parliament and the Council of the European Union. The idea was to change the entire EU body of legislation on asylum and migration. One of those the proposals was to replace the current Qualification Directive into a regulation in order to ensure its rules will be legally binding to all Member States.

Said that, dissolving the distinction between refugees and beneficiaries of subsidiary protection has become even more urgent now, because if the new regulation is approved, its rules will be compulsorily reproduced in the domestic legislation of all EU Member States. As per the proposal sent to Parliament, beneficiaries of subsidiary protection will continue to suffer limitations on their human rights, and this can become the scenario in all countries of the European Union, if approved as a regulation.

The present work will present arguments that might contribute to the debate currently underway between the European Parliament, the Council of the European Union, the European Commission and the Member States, and could possibly play a role towards the creation of a more equal legislation for all people in need of international protection.

1.3. Dissertation outline

This dissertation is divided in 7 chapters. In chapter 1, I introduced the problem and research question, presented the purpose of this study and explained its relevance.

Chapter 2 is the background. I will contextualize the problem and presents the evolution of the Common European Asylum System since its establishment until the present, focusing on the EU policy on standards for the qualification of third-country nationals or stateless persons as refugees or beneficiaries of subsidiary protection.

In chapter 3, I will introduce and engage with the existing literature about international protection in human rights law, complementary protection and subsidiary protection.

In chapter 4, I will explain Zetter's concept of fractioning the label 'refugee', while also discussing other relevant scholars for the formation of a theoretical framework critical on the categorisation of policy targets.

In Chapter 5, I will present the methodology and research design, the primary data sources used in this research and the method applied for data analysis.

In Chapter 6, it is finally time for the actual analysis and findings. This chapter is divided in 3 sections, and each one of the sections represents one of the phases of the establishment of the CEAS.

Chapter 7 will bring the conclusion and recommendations.

Chapter 2 - Background

The elimination of internal borders within the European Union was the "primary driving force" (Chetail 2016, p. 4) of the Common European Asylum System (CEAS). In 1985, the first Schengen Agreement was adopted – and in 1986 the Single European Act –, aiming the abolition of internal frontiers and the establishment of a free movement area for goods, persons, services and capital among signatory states. Although it was mainly focused on the abolition of internal borders and no mention was made about asylum-seekers and refugees, the formal adoption of the first Schengen Agreement was already a spark for the discussions around asylum and immigration to begin, laying down "the foundations of a common policy in a field traditionally rooted in state sovereignty" (Chetail 2016, p. 4). Therefore, when the second Schengen Agreement was adopted in 1990, 36 of the 142 articles were dealing with migration and asylum, while only one was related to the consolidation of the free movement area (Lavenex 2001). That was the turn a key moment, and when the European authorities became aware of the need to deal transnationally with the 'problem' of asylum, as a collateral effect of the abolition of internal borders, and no longer as a matter belonging to the sovereignty of each state.

At the same time, it can be affirmed that the second driving force behind the CEAS was the entry into force of the Treaty on the European Union (TEU) in 1993, which has allocated asylum within its Third Pillar: Justice and Home Affairs. The establishment of the CEAS was since the very beginning part of a wider securitization project. According to Lavenex (2001), the co-operation on the pillar of Justice and Home Affairs, which included migration, asylum and a set of criminalized activities all together, was built as a compensation measure to ensure security in a Europe with no internal border control. Actually, this securitization approach has been in place since the 1960's and 1970's economic crisis, but gained *momentum* in the 1980's, when the high number of incoming asylum-seekers was increasingly portrayed as a threat to the internal security in Europe (Lavenex 2001).

Huysmans (2000) points out that since the 1960's and 1970's economic crisis, the representation of migration[1] has been shifted from something beneficial for the European labor market to a burden and a danger to the European cultural and identity integrity, public order and, especially, social welfare stability. The "social construction of migration as a security question" (Huysmans 2000, 752) arises from a strong political and societal dynamic that reifies migration as a force which threatens the quality of life in west European societies.

Compared to other systems governing specific and practical aspects of the Geneva Convention regionally, the Common European Asylum System is relatively new. The CEAS was installed in 1999, whereas the Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted in 1969 and the Cartagena Declaration on Refugees entered into force in Latin America in 1984. Different from the two other systems, the CEAS aims to create a completely common system among its Member States. Including not only a common interpretation of the Geneva Convention and a definition of the term 'refugee' and the human rights composing the refugee status, the CEAS pursues to cover areas such as asylum reception and procedure rules, and to establish new categories of international protection, named as temporary and subsidiary protection (Chetail 2016) – whereas the latter will be the focus of this study.

The EU Qualification Directive 2004/83/EC, which entered into force on April 29 of 2004, was the first supranational instrument seeking to harmonize the treatment given to refugees and beneficiaries of subsidiary protection regionally. Indeed, it was the first time the term 'subsidiary protection' was used in a transnational policy instrument to refer to an international protection granted to asylum-seekers who are not qualified to receive the refugee status under the Geneva Convention of 1951 and its 1967 Protocol. However, the issue brought into discussion in this dissertation is that the 2004 Directive created a hierarchy – not prescribed by the Geneva Convention – between the two categories of protected persons: refugees and beneficiaries of subsidiary protection, in such a way that the latter suffered and still suffer limitations on their human rights, such as the length of residence permits, the issuance of travel documents, family reunion, access to social welfare and social assistance rights.

[1] From now on, I will be using 'migration' as a broader term, including asylum-seeking, refuge and subsidiary protection as genres of forced migration.

This hierarchisation was mainly built upon the following two arguments: (a) the subsidiary protection has a temporary nature; and (b) the hierarchy between refugee and subsidiary protection beneficiaries is necessary to guarantee the primacy of the Geneva Convention. However, in practice, according to the United Nations High Commissioner for Refugees (UNHCR), "the need for subsidiary protection is often just as long-lasting as that for protection under the 1951 Convention" (UNHCR 2001, p. 17, para. 45).

Recognizing its previous mistake and with the purpose of approximating the rights granted to the two statuses, in 2009, the Commission proposed to recast the EU Qualification Directive 2004/83/EC. During the drafting process, the Commission consulted Member States, the UNHCR and civil society organizations. According to the Accompanying Impact Assessment annexed to the proposal, the majority of Member States agreed on approximating the content of rights ensured to refugees and beneficiaries of subsidiary protection, and so did the UNHCR and civil society organizations consulted (Commission 2009).

The Recast Directive promoted an uniformization of the benefits in some fields, as the right to family unity, the issuance of travel documents, and the equal access to employment, healthcare system and integration facilities. However, regarding residence permits and social assistance, contrarily to the Commission's proposal, the new directive allows the Member States to limit the human rights of beneficiaries of subsidiary protection (Bauloz and Ruiz 2016).

In 2016, the European Commission made a proposal to replace the Qualification Directive with a Regulation towards the uniformization of the standards for the qualification of persons in need of international protection and the rights granted to them. It was started as an Ordinary Legislative Procedure (COD) and the proposal is now awaiting Parliament's position in 1st reading. Nonetheless, the differences in the length of residence permits and the possibility for Member States to limit social assistance for beneficiaries of subsidiary protection to core benefits are still present. In addition, it also proposes to bring back the restrictions on the issuance of travel documents to beneficiaries of subsidiary protection.

Chapter 3 - Literature review

3.1. International Protection in Human Rights Law: refugee protection vis-à-vis complementary protection

The study of international protection is not something new in human rights literature. However, for many years it was centered in the protection for Convention-refugees (Goodwin-Gill 1986). Jane McAdam was the first scholar to make a comprehensive study about complementary forms of protection on her book Complementary Protection in International Refugee Law, published in 2007, which was based on her doctoral thesis submitted to the University of Oxford in 2004[2]. Although some other (limited) scholars have demonstrated interest in the topic, she continues to be the reference in the study of complementary forms of protection[3].

Having made this brief introduction, we cannot ignore the efforts of some scholars who came before her either. In this regard, two of the most cited authors for contributing to forthcoming research on complementary protection were Goodwin-Gill and Hathaway. Goodwin-Gill (1986) has pointed out the failure of the 1951 Geneva Convention and its 1967 Protocol to cover other situations which could lead for the necessity of international protection, besides persecution, "such as famine, drought, war, or civil strife" (Goodwin-Gill 1986, p. 898). Hathaway has made an initial study about the "various alternative protection labels" (Hathaway 2003, p. 2). Accordingly, if the objective of creating "the various alternative protection labels and their accompanying "temporary protection systems" is to evade the obligation to guarantee Convention rights, "they are legally untenable" (Hathaway 2003, p. 5). Continuing, he added that

> Under international law, the alternative labels grant states no broader discretion to withhold rights than does formal recognition of refugee status, and formal recognition of refugee status does not require governments to grant asylum any more than a decision to bestow an alternative protection label. In short, *the label assigned just does not matter*. (Hathaway 2003, pp. 5-6, highlighted by the author).

[2] See McAdam, J. (2004). Seeking refuge in human rights: complementary protection in international refugee law [PhD thesis]. University of Oxford.
[3] Other of Jane McAdam's works in complementary protection are listed on the bibliography of this study.

Other relevant studies include those by Aycock and Hashimoto (2021), McAdam and Wood (2021), Frelick (2020), Lister (2019), Hart (2016), Storey (2016), Chetail (2014), Harvey (2014), Foster (2009), McAdam (2005, 2007, 2010a, 2010b, 2021), Mandal (2005) and Turk and Nicholson (2003), whose literature have served as background research for the present work.

International protection is the protection someone is entitled to when national protection fails. States should be able to provide to their citizens protection against all forms of human rights violations, and when a State cannot encompass the protection needed or it is the agent of human rights violations itself, international protection comes into play. In McAdam words, "international protection provides a substitute for national protection" (McAdam 2007, p. 20). The basis for the right to international protection is the principle of *non-refoulement*, which is explained in literature as a negative obligation on States to not return individuals to where their life or freedoms are at risk (Chetail 2014; McAdam 2007; Allain 2001).

According to McAdam (2007, p. 10), the Refugee Convention and its 1967 Protocol are "the clearest sources of international protection", nonetheless they are not the only ones: international human rights law and customary international law are also sources of international protection. The *non-refoulment* principle is outlined in article 33(1) of the Refugee Convention, but it can also be found in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), articles 6 and 7 of the International Covenant on Civil and Political Rights (ICCPR), article 2 of the European Convention on Human Rights (ECHR), article 5 of the American Convention on Human Rights (ACHR), article 5 of the African Charter on Human and Peoples' Rights (ACHPR), among other international and regional human rights treaties (McAdam 2021). Since the principle of *non-refoulement* is present in a large number of supranational instruments, and that it is a well-known and widely respected norm, many scholars agree that it can be classified as a norm of customary international law (Chetail 2014; McAdam 2007; Mandal 2005; Turk and Nicholson 2003). That was also the opinion stated at the Declaration of States Parties to the 1951 Convention and or its 1967 Protocol relating to the Status of Refugees in 2002. In addition, the UNHCR (1985), later endorsed by a relevant body of literature (McAdam 2007; Turk and Nicholson 2003; Allain 2001), argues that this principle has achieved the patamar of a norm of *jus cogens*.

It is to say that, when interpreting the Refugee Convention and its norms of international protection, one must consider that there has been an important improvement in universal human rights law since 1951, both in international and regional levels, including the adoption of the prementioned conventions. Those interstate instruments have expanded the range of people who States are prohibited to remove (McAdam and Wood 2021; Aycock and Hashimoto 2021; McAdam 2021, 2010; Mandal 2005), and are considered to codify "a broader protection status based on human rights law" (McAdam 2007, p. 3).

According to this human rights-based approach to international protection, the Refugee Convention has established the eligibility criteria to refugee protection (article 1A(2)) and the content of refugee status (from article 2 to 34), but the content of protection was and continue to be extended by other norms of international human rights law and customary international law (McAdam 2007). In McAdam's words:

> Since universal human rights law is coextensive with Convention status, it follows both as a matter of principle and of law that Convention status should not be used to read down rights. Rather, where human rights law provides more favourable standards, these should be interpolated to improve Convention rights. (McAdam 2007, pp. 10-11)

For Hart (2016), the protection of human beings in international refugee law has been limited by the restrictive concept of refugee delineated in the Geneva Convention. A great amount of people in need of international protection are more likely to not be able to prove that the risk of human rights violations they are submitted to qualifies as persecution on one of the five grounds prescribed by article 1A(2) of the Convention: race, religion, nationality, membership of a particular social group or political opinion.

According to McAdam (2007, 2010), the majority of the drafts of the Refugee Convention included the possibility to expand the concept of refugee in the future. Although this provision was not approved, the drafters appended to the Refugee Convention the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, recommending extending the treatment provided by the Convention to

people who are not encompassed by the its legal terms[4] (Costello and Foster 2022; Hart 2016; Battjes 2014; McAdam 2007, 2010; Piotrowicz and van Eck 2004).

McAdam (2007) and Harvey (2014) have pointed to the development of complementary forms of protection as a reflection of the human rights obligations outlined in international human rights instruments beyond the Geneva Convention. According to Harvey (2014), a human rights-based approach for international protection is necessary for the States to cover a more extended range of reasons to flee and thus be able to protect a larger group of people in need, the so-called *de facto* refugees. In that sense, McAdam (2007) argues that protection is a dynamic and contingent concept. Over time, international protection has been given by States to the most diverse groups of people, who not rarely fall outside the legal definition of refugee.

Even though a considerable number of States have been traditionally respecting the extended *non-refoulement* obligations to other categories of protected persons, there has been a reluctancy in conferring to those people a legal status similar to the refugee status or including them into refugee protection (McAdam 2007). For McAdam, "while human rights law widens threshold eligibility for protection, the Convention remains the blueprint for rights and legal status" (McAdam 2010, p. 13). Albeit the complementary protection, as it is called, has become more and more used in domestic law and regional agreements, there is no international instrument setting a complementary protection status (Hart 2016). What characterizes this type of international protection as 'complementary' is that its sources are derived from instruments other than the Refugee Convention, such as human rights treaties and customary international law (McAdam 2005, 2010a, 2010b, 2021; Chetail 2014; Foster 2009; Mandal 2005).

Hart defines complementary protection precisely as "a form of international protection conferred on *individuals who are in refugee-like situations* but *do not satisfy the strict legal test* for refugee status" (Hart 2016, pp. 171-172, highlight by the author). According to McAdam (2007), the recognition that beneficiaries of complementary protection are in

[4] "(…) the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will 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." (Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN doc A/CONF.2/108/Rev.1, 25 July 1951, recommendation E)

refugee-like situations means that they should be granted refugee-like status. She conceptualizes complementary protection as a "merely descriptive label" (McAdam 2007, p. 2) to categorize people who falls outside the strict Refugee Convention definition. From this perspective, complementary protection does not imply "a lesser duration or quality of status but simply assesses international protection needs on a wider basis than the 1951 Convention" (McAdam 2007, p. 23).

For Lister (2019), complementary protection is provided to those who need international protection and are not expressly covered by the Refugee Convention. According to article 1A(2) of the 1951 Geneva Convention, refugee protection is granted to those who own a well-founded fear of being persecuted on the grounds of race, religion, nationality, membership of a particular social group or political opinion, and, owing to such fear, is unwilling to return to their country of origin. Thus, what differentiates those who are granted complementary forms of protection from those who are granted refugee status is that in the first case it is not possible to demonstrate any of the five strict Convention grounds for persecution, despite of the seriousness of the danger they might face (Lister 2019; Hart 2016; McAdam 2007).

3.2. Complementary Protection in the European Union: the advent of a Subsidiary Protection regime and the hierarchisation of protected persons

When it comes to complementary protection in the European Union – named subsidiary protection by EU policy-makers – literature is equally scarce. The majority of the doctrine focuses on conceptualizing and analysing if the subsidiary protection regime complies with international human rights law, especially with regard to the principle of non-discrimination (Costello and Foster 2022; Salomon 2022; Bauloz and Ruiz 2016; Battjes 2014; Pobjoy 2010; Gil-Bazo 2006; McAdam 2005; Piotrowicz and van Eck 2004: Hailbronner 2002; Spijkerboer 2002; Storey 2002[5]). Also, on investigating if the limitations on the rights of the beneficiaries of subsidiary protection in relation to refugee

[5] Study presented at the International Association of Refugee Law Judges, European Chapter Conference, in Dublin, May 2002, and not available online. His ideas are discussed in the paper 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' by McAdam (2005).

rights are objectively justified (Costello and Foster 2022; Salomon 2022; Bauloz and Ruiz 2016; Pobjoy 2010; McAdam 2005).

On the other hand, the study about the evolution of the qualification policy in the European Union and a critical analysis of its changes over time is very limited, and have been only detailed in the studies of Bauloz and Ruiz (2016), and Salomon (2022). Here it is important to mention that most of the studies are related to the first phase of the CEAS and the Council Directive 2004/83/EC. Added to this is the fact that there is no in-depth critical study problematizing the categorization itself and analysing how the constructed hierarchy between convention refugees and beneficiary of subsidiary protection has led to limitations on the human rights of the beneficiaries of subsidiary protection.

According to Bauloz and Ruiz, international protection in the European Union has a "double nature" (Bauloz and Ruiz 2016, p. 240). In one side there is the refugee status guaranteed by the Geneva Convention of 1951 and it's 1967 Protocol, and in the other, there is the subsidiary protection, relied upon the *non-refoulement* principle. The subsidiary protection is granted to asylum-seekers that are not qualified to receive the refugee status under the Geneva Convention[6].

In Europe, the Council Directive 2004/83/EC[7] was the first regional instrument to codify existing practices from Member States and to harmonize subsidiary protection into a single document (Salomon 2022; Pobjoy 2010; Gil-Bazo 2006; McAdam 2005). This document established an unjustifiably hierarchy between refugees and beneficiaries of subsidiary protection in terms of rights and statuses (McAdam 2005). Accordingly, beneficiaries of subsidiary protection have been receiving less benefits and more limited rights in comparison with refugees (Salomon 2022; Bauloz and Ruiz 2016; McAdam 2005).

It is worth to be reminded that whereas the Council Directive 2004/83/EC codified existing practices of complementary protection in the EU, it did so in the midst of a

[6] According to the Geneva Convention of 1951 and it's 1967 Protocol, to receive a refugee status, a person might have a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" in her or his country of origin and because of that is unable to return to its territory (Geneva Convention 1951, article 1 A (2)).

[7] Council Directive 2004/83/EC of 29 of April of 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

political atmosphere that is hostile to migrants and refugees, securitizes migration policies and demonstrates concern about the supposedly large number of protection-seekers trying to enter the European space (McAdam 2005). Visibly, the scope of the EU directive was strongly influenced by those assumptions. Since there was no binding international instrument on subsidiary protection, Member States were able to freely define its content within an approach "suspicious of asylum-seekers" (McAdam 2005, p. 465). In that sense, Hailbronner (2002) argues that subsidiary protection is nothing more than a regionalized political manifestation of the wider concept of complementary protection.

Nevertheless, existing practices in Member States regarding to subsidiary protection were deeply varied, for the EU institutions to come up with harmonized norms and get all States to agree, many political compromises have had to be made (Salomon 2022; McAdam 2005). As a result, the norms agreed for the Council Directive 2004/83/EC were not a reflect of the best existing practices to qualify beneficiaries of international protection and the content of rights guaranteed, but a political trade-off, "conservative in its scope" (McAdam 2005, p. 474). Accordingly, the elimination of some of the rights of beneficiaries of subsidiary protection was used as a bargaining chip in this transaction towards the passing of the 2004 Directive (Salomon 2022).

Moreover, contrarily to what the Commission has said in the Explanatory Memorandum for its proposal[8], the Directive would not result in more people receiving international protection. The implementation of a subsidiary form of protection regionally does not equates to a creation of a new regime that encompass new beneficiaries supposedly outside of the Geneva Convention scope, but a limiting interpretation of existing practices in the Member States (Spijkerboer 2002).

Instead of merely interpreting and supplementing the Geneva Convention, the European Union has been criticized for trying to substitute the international system of refugee protection with a regional one (Storey 2002 cited in McAdam 2005). By establishing a stricter interpretation of the concept of 'persecution', the Council Directive 2004/83/EC ultimately restricted access to refugee status. McAdam calls it as a "regional aberration" (McAdam 2005, p. 470).

[8] 'Explanatory Memorandum' in Commission of the European Communities Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection COM (2001) 510 final (12 Sept. 2001).

Bauloz and Ruiz defends that, since both refugees and beneficiaries of subsidiary protection are subjected to risks of same nature, i.e., risks of serious human rights violations, they have "similar protection needs" (Bauloz and Ruiz, 2016, p. 263), and for that reason they should be entitled to the same rights (Bauloz and Ruiz, 2016). This is also the argument presented by McAdam (2005), Pobjoy (2010) and Salomon (2022). Taking this into account, many scholars argues that differential treatment would only be accepted if the State is able to objectively justify it, otherwise, it would constitute discrimination, expressly prohibited by article 26 of the ICCPR, and also by articles 2 of the UDHR, 2(1) of the ICCPR, 2(2) of the ICESCR and 14 of the ECHR (Costello and Foster 2022; Salomon 2022; Bauloz and Ruiz 2016; Pobjoy 2010; McAdam 2005).

There is a significant debate around the principles of equality and non-discrimination among international law scholars. It would be impossible to do justice to all work done around this topic within the limited length of the present dissertation. Said that, this study will be limited to including in this literature review what is most relevant for the scope of this work.

Pobjoy (2010) quote Aristotle's famous justice formula, according to which people in like situations should be treated alike while those in unalike situations should be treated unalike, proportionate to the variances among them, to explain that even when the statuses are different, they should be treated on the same way if there is no reason for differentiation. Scholars following Pobjoy's theory believe that people eligible for refugee status and those eligible for subsidiary protection shouldn't share the same status, nevertheless they should be entitled to the same rights, since there is no reasonable and objective basis for differentiation (Salomon 2022; Pobjoy 2010). Contrariwise, the theory led by McAdam, with which this research is aligned, argues that the principle of *non-refoulement* itself is the basis for ensuring refugees and beneficiaries of subsidiary protection with the same status (Bauloz and Ruiz 2016; McAdam 2005, 2007).

After examining both understandings, one can notice that regardless of which theory is used, the result of applying the principle of non-discrimination will be always the promotion of equal rights for both groups of protected persons. Pobjoy (2010) suggests that the appropriate question for this context is whether the differences on the type of human rights violations they suffer make beneficiaries of subsidiary protection less vulnerable and can justify having lesser rights. Is this difference a reasonable justification

to reduce their social welfare rights, for instance? For Salomon (2022), when we follow this logic, it is hard to find which objective reason would be able to justify the lesser status and lesser rights granted to beneficiaries of subsidiary protection.

The two main justifications for the differential treatment between the refugee status and the subsidiary protection status in the Council Directive 2004/83/EC were: 1) the alleged necessity to preserve the primacy of the Geneva Convention; and 2) the supposed temporary nature of the need for subsidiary protection[9]. Even though the European Commission later admitted that the practice has shown they were wrong about the temporary nature of subsidiary protection[10], and with all the warnings made by the UNHCR, ECRE and many scholars, policy-makers still didn't come up with new justifications until now (Salomon 2022; Bauloz and Ruiz 2016). The very idea of refugee status being inherently superior to subsidiary protection status has been legitimating the provision of more restricted human rights to the latter by EU policy-makers (McAdam 2005). From a first reading, these two arguments are already problematic, but the literature goes further on that.

According to Bauloz and Ruiz (2016), subsidiary protection essentially is the *non-refoulment* principle codified into a complementary protection regime. From an international law perspective, it is not reasonable to justify the supremacy of a treaty over a principle of customary international law (Chetail 2014; McAdam 2007; Mandal 2005; Turk and Nicholson 2003) and a norm of *jus cogens* (McAdam 2007; Turk and Nicholson 2003; Allain 2001). As a result, considering the refugee status superior to the subsidiary protection status based on 'the primacy of the Geneva Convention' argument is not in consonance with international law (Bauloz and Ruiz 2016).

Additionally, there is no empirical evidence to support the argument that subsidiary protection needs are of a shorter duration compared to refugee protection (Salomon 2022;

[9] See the 'Explanatory Memorandum' in Commission of the European Communities Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection COM (2001) 510 final (12 Sept. 2001).

[10] In the European Commission proposal for a recast of the Council Directive 2004/83/EC, they admitted they were wrong about the temporary nature of the subsidiary protection and that the differential treatment between refugees and beneficiaries of subsidiary protection can no longer be justified.

Bauloz and Ruiz 2016; Pobjoy 2010; McAdam 2005). Actually, according to the definition of international protection in international human rights law, both the refugee status and the subsidiary protection status are of a temporary nature, they cease when the risk of persecution or serious harm in the country of origin ceases to exist. (Salomon 2022; Bauloz and Ruiz 2016; Pobjoy 2010; McAdam 2005). Article 1C(5) of the Refugee Convention determines that the refugee status lasts as long as the well-founded fear of persecution exists.

Accordingly, all the arguments used to justify the differential treatment given to refugees and beneficiaries of subsidiary protection in the European Union are flawed (Bauloz and Ruiz 2016; Pobjoy 2010; McAdam 2005). For McAdam (2005), there is no international legal basis to support this differential treatment. Relevant scholars point to the fact that the limitations on the human right of the beneficiaries of subsidiary protection are not reasonable and cannot be objectively justified (Bauloz and Ruiz 2016; Pobjoy 2010; McAdam 2005).

Costello and Foster (2022) add to this discussion arguing that examining whether an alleged discriminatory policy or practice is in fact objectively justified, requires testing if it pursues a legitimate aim, and the proportionality of the measures taken to achieve that aim. The authors affirm that in the context of migration, courts usually take for granted the legitimacy of the aim of official practices. In other words, courts assume that any policy related to immigration control are measures that serve "the general interests of the economic well-being of the state", and thus pursue a legitimate aim (Costello and Foster 2022, p. 252). Once the legitimate aim is verified, it is necessary to check if the relation between the aim and the measures proposed by the policy being analysed are proportional. In the migration context, policies are generally based on generalizations. In the specific case of the differential treatment given to refugee and beneficiaries of subsidiary protection in EU policies, the measures involve generalizations about the risks each group faces, which is unlikely to do justice to all members of both groups, and thus unlikely to be proportionate (Costello and Foster 2022).

Although the main objective of recasting the Qualification Directive 2004/83/EC, was to further harmonize the protection standards, there still remain some limitations on the rights of beneficiaries of subsidiary protection in comparison to refugee rights, but again

the official arguments are still not able to objectively justify the differential treatment (Bauloz and Ruiz 2016). Neither the Recast Directive 2011/95/EU, currently in force, and the 2016 Proposal for a Regulation, presented a consistent argument to maintain the limitations on the length of residence permits, and on the rights to social welfare and travel documents, even after the 'temporary duration' argument has been discarded.

One last important issue found in literature is around the concept of persecution. According to Bauloz and Ruiz (2016), once persecution is not defined by the Geneva Convention, it has become common sense to interpret this concept using international human right law. Both the 2004 Qualification Directive and the 2011 Recast Directive characterize acts of persecution as a severe violation of human rights, especially those rights from which derogation cannot be made under Article 15(2) of the ECHR[11]. Serious harms are also constituted by serious violations of human rights[12]. Based on this logic, Bauloz and Ruiz (2016) argue that it is hard to understand why serious harms would justify less protection than persecution does. In addition, those scholars affirm that their study has demonstrated that hierarchical categorization of protected persons can no longer be maintained.

[11] Article 9 (1) in both Directives.
[12] Article 15 in both Directives.

Chapter 4 - Theoretical approach: a critical view on the categorization of policy targets and the fractioning of the label ‘refugee’

The use of categories to distinguish between policy target groups is profoundly politicised (Crawley and Skleparis 2018). Indeed, policy targets are politically and socially constructed, meaning they are deeply influenced by social, political and economic factors happening in the background (Scherschel 2011). This fact becomes even more evident when we analyse international protection policies in the European Union context. The categories of ‘refugee’ and ‘beneficiary of subsidiary protection’ are used to differentiate people by their reasons to flee and seek protection in Europe. This classification carries a connotation of deservingness, or even legitimacy, hidden between the lines (Crawley and Skleparis 2018).

The very idea of subsidiarity explicit in the term 'subsidiary protection' brings with it a tone of a lesser status. People to who the ‘subsidiary label’ is attributed receive the *non-refoulement* protection granted by article 33(1) of the Refugee Convention, but when it comes to the content of protection and the rights assigned, especially those related to social welfare, freedom of movement and residence permits, they do not receive a refugee-like treatment. In practical terms, the beneficiaries of subsidiary protection have been granted with lesser rights. Those practices have been effectively denying *de facto* refugees their Convention rights (Hathaway 2003).

The Refugee Convention settled the definition of ‘refugee’, but its interpretation and application occur at the State level and reflects political and economic interests, which can vary along time (Crawley and Skleparis 2018). This means that, although policy categories might seem fixed and neutral, they are actually subjected to a great amount of uncertainty (Gauci et al. 2015; Zetter 2007). Alterations on the political, social and economic context can at the same time insert some people in the category of ‘refugee’ and exclude others (Crawley and Skleparis 2018; Gupte and Mehta 2007). In Crawley and Skleparis’ words,

> Choosing to label – or equally not label – someone as a 'refugee' is a powerful, and deeply political, process, one by which policy agendas are established and which position people as objects of policy in a particular way. (Crawley and Skleparis 2018, p. 52, highlighted by the author).

For Wood, labelling is a concept related to the process of building policy agendas and, especially, to the way in which people, as object of policies, are characterized in "convenient images" (Wood 1985, p. 1). In refugee studies, the concept of labelling[13] was deeply explored in Zetter's work 'Labelling Refugees: Forming and Transforming a Bureaucratic Identity', in 1991. This study is extremely relevant for critical policy analysis in refugee studies, and it was selected by Oxford University Press as one of the 100 most influential papers published by them during their first 100 years of journal publications. In this initial study he argued that labelling is an activity which reproduces political interests and, for that, it deserves a more critical analysis by the doctrine (Zetter 1991). However, due to the construction of the Fortress Europe in the late 1980's and its rapidly incorporation in the early to mid-1990's, the continent watched a constantly re-labelling of the legal conditions for obtaining the refugee status, and Zetter recognised the necessity of revisiting his theory (Zetter 2007).

According to him, as part of the security strategies for the Fortress Europe, the attempt to harmonize asylum policy at the regional level was mirrored by a process of radically transforming the refugee label from what was determined by a Convention interpretation. This process was named by Zetter as the "fractioning of the refugee label" (Zetter 2007, p. 181). The goal was to stem the increase in asylum seekers arrivals, perceived as a threat to which European countries failed to stop within domestic policies (Zetter 2007). The idea behind the concept of the 'fractioning the refugee label' is building a whole new range of bureaucracies and categories to deter access to the label 'refugee', and consequently to Conventions rights (Zetter 2007).

[13] In this present work I won't go further on the differentiation between categorizing and labelling due to the thesis' space limitation. I don't agree that there is a relevant difference in significance between them, and I will be using both expressions as synonyms. However, I do need to point out that Zetter prefers to use 'labelling'. In his words, "As opposed to other terms, for example, 'category', 'designation' or 'case', the word 'label' better nuances an understanding which: recognizes both a process of identification and a mark of identity; implies something independently applied, but also something which can be chosen and amended; has a tangible and real world meaning, but is also metaphorical and symbolic." (Zetter 2007, p. 173).

For Zetter (2007),

> the label 'refugee', and its many sub-categories, reflect a political discourse on migration which has deconstructed and reinvented interpretations and meanings in order to legitimize state interests and strategies to regulate migration. Labels reveal the political in the apolitical. (Zetter 2007, p. 188, highlighted by the author)

The fractioning of the refugee label authorizes exclusionary practices against *de facto* refugees. This concept is particularly important to observe during periods of 'crises' in Europe, where the fragmentation of the refugee label is used as a tool to discourage people from seeking asylum and at the same time reduce the obligations in relation to those who even though came for asylum but were excluded from the refugee label (Crawley and Skleparis 2018; Zetter 2007).

In Crawley and Skleparis (2018) study about the categorical fetishism and the politics of bounding in Europe's 'migration crisis', the authors criticise the understanding according to which categories are no more than "empty vessels into which people can be placed in some neutral ordering process" (Crawley and Skleparis 2018, p. 49). Crawley and Skleparis (2018) question how much the act of categorising people leaves out the complexities of different social realities and to which extent we are able to make a clear distinction between categories of migrants. They invite us to think about the political process where the boundaries between the different categories are built (Crawley and Skleparis, 2018).

According to Foucault (2008), categorization of policy targets is required as part of the governance strategy to maintain the order. For post-structuralists, nothing just exists separate from discourses. Policy targets do not essentially exist by themselves, but they were brought into being through policy discourses (Foucault 2008). Bacchi stresses this really well when she points that:

> Thinking about such categories as the effects of policies rather than as necessary and natural ways of grouping people creates an opening to consider how they are produced and how they translate into diverse lived realities. (Bacchi & Goodwin 2018, p. 6).

In line with Foucault (1980), the categorization of policy targets has a close relationship with the distribution of power. This process of creating and labelling people into different and hierarchically separated categories is essential to the maintenance of the prevailing social order and its values. Although this issue remains largely overlooked and unquestioned by the doctrine, according to Moncrieffe (2007) it should occupy a more significant place in policy analysis.

In the same way as all other ordering regimes, migration policies also produce "hierarchical systems of rights" (Crawley and Skleparis 2018, p. 51; Scherschel 2011, p. 74). For Harvey, the problem might not be apparent to those who are benefiting from the categories created, but it is latent to the other side, "for those who find that the categories equate to ill-treatment" (Harvey 2014, p. 44). For Crawley and Skleparis, this act of naming new categories for protected persons – or fragmenting the refugee label, to use Zetter's concept – "is not merely an issue of semantics. Categories have consequences. They entitle some to protection, rights and resources whilst simultaneously disentitling others" (Crawley and Skleparis 2018, p. 59).

Having a critical approach to the construction of hierarchical categories in refugee policy is essential to understand the political reasoning behind the limitation on the human rights of beneficiaries of subsidiary protection. Starting from this frame of reference, we are able to criticise the hierarchy constructed between the two categories and the differentiation in rights attributed to each of them. Lastly, applying this theory will help us with the process of bounding into consciousness (Crawley and Skleparis 2018) and challenging the use of categories to differentiate and discriminate protected persons.

Chapter 5 - Methodology, methods and data

5.1. Methodology and research design

The present study does a critical policy analysis, within a poststructuralist approach. The poststructuralist shift in policy studies can be defined by a turn from a rationalist, empiricist and quantitative model of analysis to an interpretative or critical analysis, which is characterized by an exploration of the linguistic, ideational, and normative aspects of public policy (Lövbrand and Stripple, 2015, p. 92).

Critical policy analysis highlights the importance of language and discourse in creating the structures of social reality and focuses on problem representation and how the framing of policy problems influences possible policy responses (Bacchi 1999). Browne et. al. synthetizes this idea explaining that "(…) first, policy problems are not pre-existing givens, but are historically and culturally produced. Second, the policy process is understood as a process of discourse and argumentation". (Browne et al. 2018, p. 1038).

Particularly, a poststructuralist approach on critical policy analysis will focus on exploring how policy subjects are created throughout the process of policy-making (Howarth and Griggs 2012). In other words, this approach focuses on the productive nature of policies. According to Bacchi, "In this approach, rather than focusing on how people make policy, *attention turns to the way policy makes people*" (Bacchi & Goodwin 2018, p. 8, emphasis by the author). Poststructuralist analysts discards essentialist approaches on which policy subjects are understood by their alleged fixed essences (Howarth and Griggs 2012).

Since the aim of this study is to examine the evolution and changes of the CEAS' qualification policy throughout time and to investigate how its successive reformulations comprehend and justify different legal statuses for convention refugees and beneficiaries of subsidiary protection, and the rights associated with these statuses, I decided to apply a methodology that, at first, can help me understand the creation and categorization of policy subjects.

Secondly, applying a poststructuralist approach will enable me to critically investigate how this regime with two separate status and a different content of protection for each has been "formulated, accepted, and implemented, rather than others" (Howarth and Griggs 2012, p. 309), and maintained even after successive reforms.

Thirdly, the poststructuralist approach tries to demystify taken for granted truths and to expose their exclusionary logics whilst opening our eyes to an alternative or counter-hegemonic logic (Howarth and Griggs, 2012). In that sense, it will help me to question the idea of primacy and superiority of the refugee status and expose the exclusionary logic of the CEAS' qualification policy. Indeed, one of the main goals of undertaking a critical policy analysis is to be able to expose the exclusionary and oppressive logic hidden behind policy texts (Howarth and Griggs 2015).

Lastly, this dissertation builds on the premise that academic research must be politically and socially engaged. Paraphrasing Howarth and Griggs, "meaningful policy analysis (…) must have a critical and normative commitment" (Howarth and Griggs 2012, p. 310). I cannot dissociate my research from social reality. For me, it would not make sense to conduct research with a purely academic bias which contributes nothing to society. I share the same view of Bacchi (2012) when she affirms that academic research can be decisive in transforming social realities, and this is the main objective I am expecting to achieve, having chosen to carry out a critical policy analysis.

This dissertation applies a qualitative method, in consonance with the theoretical body, and suitable to analyse the EU policy for the qualification and status of refugees and beneficiaries of subsidiary protection. With that in mind, the present study will start by an analysis of the EU political strategy on asylum governance and its evolution since the creation of the Common European Asylum System (CEAS) in 1999 until 2023, while going through the political context in which the common policy documents have been produced. This approach, known as Foucault's effective historicism or genealogy, entails shifting the analytical attention towards the contextual and contingent factors that shape the formation of concepts.

Throughout his academic career, Foucault adopted a nominalist perspective, which implies that for him there were no universal or pre-existing forces separately from the constantly changing flow of history. Therefore, the fundamental inquiry that must be made about concepts like 'the state', 'politics' or 'power' is not about their essence (the hat), but rather about the methods and strategies through which they are implemented (the how), and the resulting impact of those practices (Triantafillou 2012). In agreement with Walters (2012, p. 18), the strategy is not to simply examine objects as if they are inherently given, but instead, to focus on the "historically contingent practices" that actually create these objects and subjects as effects.

In parallel, I will critically scrutinize the political rationalities behind CEAS' qualification policy and their compliance with international human rights. Studies that are critical of legal documents "cannot detach itself too much from existing political and legal realities" (Salomon, 2022). EU official arguments will be exposed and analysed, whereas juxtaposed against human rights standards and international law.

5.2. Data sources

I have chosen the primary sources to be used in the present research observing the most striking policy instruments from each one of the three phases of development of the CEAS[14], from where I will collect data. The first phase (from 1999 to 2004) started with the Tampere Conclusions and ended with the adoption of a range of legislative documents intended to harmonize the EU asylum policy, among which was the Council Directive 2004/83/EC. The second phase (from 2004 to 2013) was initiated by the adoption of the Hague Programme in 2005 and it was characterised by the reformulation of the policy instruments adopted in the first phase, including the recast of the 2004 Directive, which was then replaced by the Directive 2011/95/EU of the European Parliament and of the Council – currently in force. The third phase has initiated in 2016 with the proposal from the European Commission of a set of new legislative reforms, including the adoption of a Regulation of the European Parliament and of the Council on standards for the

[14] There is no consensus in the doctrine about how to divide the CEAS' legislative phases. We can find a slightly variation on the time frame of each period and the important documents included, but overall, the starting and ending dates of each phase are signalized by a legislative reform.

qualification of third-country nationals or stateless persons as beneficiaries of international protection, to replace the Directive 2011/95/EU.

This dissertation applies an interdisciplinary approach, drawing off from previous research in the field of international law, political science and sociology. To help me building the critique, both the work of other scholars and reports from UNHCR and ECRE were used as secondary source.

The references of primary data will be presented in detail in the Appendix, but for better fluidity I've listed the data to be analysed below:

From 1999 - 2004

Policy texts

- Presidency conclusions from the Tampere European Council, 15 and 16 of October, 1999;
- Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM(2001) 510 final, submitted by the Commission on 30 October 2001;
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

From 2004 - 2013

Policy texts

- The Hague Programme: strengthening freedom, security and justice in the European Union (2005/C 53/01), presented by the Council in 03.03.2005.
- Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009) 551 final, the Impact Assessment and its annexes, submitted by the Commission on 21.10.2009.

- 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).

From 2016 - present

Policy texts

- Communication from the Commission to the European Parliament and the Council towards a reform of the Common European Asylum System and enhancing legal avenues to Europe. COM(2016) 197 final. Brussels, 6.4.2016.
- Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents External Aspects, COM(2016) 466 final, submitted by the Commission on 13.7.2016.
- Amended mandate on the Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents External Aspects, approved by the Permanent Representatives Committee of the Council on 20 December 2022.

In order to preserve a certain level of uniformity, for each of the three time periods I applied the same logics in choosing the policy texts to be analysed. I decided to go first for the documents responsible for the start of each phase, which was the Tampere

Conclusions for the first phase, the Hague Programme for the second, and the Communication from the Commission to the European Parliament and the Council towards a reform of the Common European Asylum System for the third phase. The content of both documents can summarise the hegemonic political ideas around asylum in the EU during each period and have been responsible to shape the direction the CEAS was going to take. Therefore, they are essential for understanding the political rationalities behind each of the policy instruments that followed them.

The next policy texts to be analysed are the Commission's proposals in each phase. Usually, Commission's proposals to start an Ordinary Legislative Procedure (COD) contain an explanatory memorandum where the Commission literally explains the grounds and objectives of the proposal, its legal basis, the impact assessment and a short introduction for each of the articles. Therefore, analysing the proposal is indispensable to access the initial idea of the drafters for the legislation to come, and the official arguments presented by them. It is also interesting as an object to compare with when I start analysing the approved directives in the first two phases and the amended proposal in the third phase.

5.3. Method for data analysis

Before I start going into detail about the method I have chosen, I consider to be important to tell the reader about my journey to finding a method which would be able to help me building my critique. Critical thinking can find an obstacle within the necessity to restrain itself in order to conform to a traditional model of scientific research. Fisher and Forester argue that if an analysis is overly concerned about attending organizational and institutional conditions, perhaps it will end up sacrificing its own "substantive integrity" and being "irrelevant to decision makers" (Fischer and Forester 1993, p. 3).

'The argumentative turn' in policy studies, as it was coined by Fisher and Forester (1993), although there were other influences before it, can be considered a milestone in the shift away from a stricter, purely empirical policy analysis to a more critical-oriented method (Fischer et al. 2015). Since then, the critical orientation has evolved to encompass empirical and theoretical work in discourse analysis (Fischer et al. 2015), while preserving the understanding that "Policy analysis and planning are practical processes

of argumentation" (Fisher and Forester 1993, p. 2). In 2012, Fisher and Gottweis revisited 'the argumentative turn' in order to further advance the studies initiated in 1993. In accordance with them:

> "Argumentation" traditionally refers to the process through which people seek to reach conclusions through reason. Although influenced and shaped by formal logic, the study of argumentation has also turned informal logic and practical reason (Fisher and Gottweis 2012, p. 9, emphasis by the author).

With that in mind, I concluded that the most productive way to effectively scrutinise the CEAS' qualification policy was with a systematized set of arguments couched in terms of logic and capable to dismiss the hegemonic practice. The present research applies the Howarth and Griggs (2012) five-steps method to Critical Policy Analysis[15], which can be systematized as outlined from here: (1) it starts by problematizing a particular phenomenon; (2) followed by proceeding "backyard to furnish an account of how and why this is so"; (3) then we couch the argumentation "in terms of logics rather than laws, causal mechanisms, or contextual self-interpretations" (Howarth and Griggs 2012, p. 324); (4) the logics used "must be linked together in relation to a particular set of circumstances to render a problematic phenomenon intelligible" (Howarth and Griggs 2012, p. 324); and (5) it must draw to "an internal connection between explanation, critique and policy evaluation" (Howarth and Griggs 2012, pp. 324-325).

Inspired into action with this method and in order to build a viable object of research, I started my analysis by contextualising the 'problem' of asylum in the European Union. In line with Crawley and Skleparis theory,

> We can, and should, approach migration categories, particularly those used by politicians and policy-makers to exclude or position certain groups in a particular way, from a far more critical perspective, where appropriate questioning the way in which 'the problem' has been defined. (Crawley and Skleparis 2018, p. 60)

[15] The Howarth and Griggs (2012) method to Critical Policy Analysis is part of the book 'The Argumentative Turn Revisited' edited by Fischer and Gottweis to further advance the argumentative turn in policy analysis initiated by Fisher and Forester in 1993 (Fisher and Gottweis 2012, p. 1).

As for the second step, the goal was to bring light to the social and political circumstances that shaped the problem in the three phases of the construction of the Common European Asylum System. Thirdly, I investigated the logics that could help me answering my research question. As specified by Howarth and Griggs, couching the argumentation in terms of logic can help to understand social practices in multiple contexts, and "This is because they are as many logics as there are various situations that an investigator can explore. These logics can capture economic, social, cultural, and political process" (Howarth and Griggs 2012, p. 329). For the purpose of this work, I focused on political logics, since they can be used to explain and at the same time criticize the development of a regime (Howarth and Griggs 2012), which is precisely what this research intends to do.

In sequence, I started to build my critique to the analysed phenomenon. For that, I have carefully read the 9 chosen documents, scanning for the following keywords: 'refugee', 'subsidiary protection', 'status', 'persecution' and 'serious harm'. Then, I examined the rules around the qualification of a protected person as a refugee or a beneficiary of subsidiary protection, what are the features used to distinguish the two statuses, and the rights associated to each of these statuses, and how those policy instruments conceptualise 'persecution' and 'serious harm'. I also looked for the arguments used to justify the differential treatment given to refugees and beneficiaries of subsidiary protection. This step was important to help me formulating an understanding about the governing practices around the problematised phenomenon and the political rationalities behind those practices.

Afterwards, I tried to link the theory and literature together with the collected data to produce a coherent narrative explaining the phenomena. The conclusion was drawn from a connection between the explanation and critique, and finished with an evaluation of the policy in its current status and recommendations for its improvement.

For the sake of validity of the present work, it is important to reaffirm that the method chosen and the data collected are appropriate to answer the research question. As the aim of this study was to perform a critical policy analysis, using a traditional method would not be suitable as mentioned before, so I chose a method developed by relevant scholars in critical policy studies and specifically made for critical policy analysis. This research

was grounded in renowned authors to form its theoretical approach and it builds on extensive and relevant literature. All the papers used as references were published in peer-reviewed format. In addition, as for reliability, previously in this chapter, I did explain all the steps followed through this research, since the contextualization until conclusions and recommendations.

Finally, I did not find necessary to open a section discussing the ethical issues. I only analysed documents publicly available and my dissertation doesn't contain any personal data. I also don't have any personal interest on the topic.

Chapter 6 - Analysis and findings

6.1. The first phase of the CEAS and the qualification rules: from 1999 to 2004

When analysing a policy, it is essential to understand from where it comes from, or in other words which ideas are supporting it – its framework – and what was the initial goal or what 'problem' the policy-maker was trying to solve (Crawley and Skleparis 2018). In October 1999, the European Council had a special meeting in Tampere – Finland, aimed at creating an "area of freedom, security and justice in the European Union" (European Council 1999, p. 1), where it was proposed the creation of a common European policy on migration and asylum. The European Council has literally treated migration and asylum as 'issues', affirming that "The separate but closely related *issues* of asylum and migration call for the development of a common EU policy" (European Council 1999, p. 3, emphasis added), which would include four elements: "Partnership with countries of origin", "A Common European Asylum System", "Fair treatment of third country nationals" and "Management of migration flows" (European Council 1999, pp. 3-5).

After cautiously analysing the Tampere Conclusions, it is clear that the CEAS was never under the human rights umbrella, but it was built under a security and defense framework. The European Council made it very explicit during the Tampere meeting, stating that security is one of the milestones of the Union's work for the years that were about to come, and that a common European security and defense policy should be developed, while it "requires the Union to develop common policies on asylum and immigration" (European Council 1999, p. 2).

Chetail (2016) shares this same view. For him, the CEAS has a different 'driving force' when compared to other regional instruments, like the Specific Aspects of Refugee Problems in Africa and the Cartagena Declaration on Refugees in Latin America. Whereas those other systems were installed within a human rights framework and designed to adapt the Geneva Convention provisions to the specific realities of each region, the CEAS was idealised as a complementary security measure to the removal of internal borders in the European Union (Chetail 2016). The Article 3(2) of the Treaty on

European Union (TEU) clearly emphasises the security framework hidden behind the rules concerning asylum and immigration in the Union, by placing them alongside crime-fighting policies. Accordingly, the free movement ensured for all EU citizens within the establishment of an "area of freedom, security and justice without internal frontiers" might be complemented by "appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime" (TEU 2009, Article 3(2)).

Not only the abolition of borders, but the CEAS itself is an inseparable element of the EU construction,

> where asylum and the fight against criminality have been put on equal footing. This background represents a unique feature of the EU policy on asylum and migration. It constitutes in turn a key characteristic for understanding the complex evolution of the CEAS. (Chetail 2016, p. 4)

At the same time, what Lavenex (2001) calls 'Europeanization of Refugee Policies' favored the implementation of a securitised and state-centred policy framework. She states that this interdependence between the EU foundational norms, the abolition of internal borders and the emergence of the asylum question "increased the resonance of the securitarian asylum frame and justified limitations on the post-war refugee regime in the name of European integration" (Lavenex 2001, p. 860). She complements affirming that throughout the process of europeanization of refugee policies and the construction of the CEAS, international protection was not framed by universal human rights principles, and not even driven by the truly desire to build a common policy, but "as a side issue of the single market project, with co-operation occurring only insofar as it was deemed necessary to safeguard internal security" (Lavenex 2001, p. 860).

The presidency conclusions of the Tampere European Council introduced for the first time the idea of complementing the protection granted by the Geneva Convention with "subsidiary forms of protection" (European Council 1999, p. 4). In October 2001, the Commission of the European Community, following the Council suggestions, submitted a proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection. It is significant that in the first paragraph of the preamble,

the Commission's proposal reaffirms the foundational idea behind the construction of a common asylum policy, which frames the CEAS as "a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice" (European Commission 2001, recital 1).

Protection-seekers are, thus, seen as a security problem threatening the European internal order, welfare system and identity. While trying to protect the internal borders alongside the European Union, the idea is to strengthen the external borders, keeping unwanted persons away. Since Member States are bound by the Geneva Convention to protect refugees[16] and by the international principle of *non-refoulement* to guarantee that no one will be sent back to where they are in risk of persecution or serious harm, the strategy is to lay down a common – and extremely strict and rigid – interpretation of who is protected by the Refugee Convention, in order to ensure greater flexibility to the protection granted to those who fall outside the scope of the Geneva Convention, and at the same time make the European Union less attractive to them. In accordance with Zetter's theory on the 'fractioning of the refugee label', choosing who is going to be labelled as a refugee and who will not is a deeply powerful and politicised practice towards reducing the number of asylum seekers arriving in Europe (Zetter 2007).

Lavenex (2001) did a comprehensive analysis of the EU *acquis* on asylum-related policies, including binding documents, such as the Schengen agreements and the Dublin conventions, and soft law documents. As a result, she came to the conclusion that legislation on asylum at the EU level focuses on decreasing the number of asylum-seekers coming to Europe, and for this reason all those documents emphasise on restrictive measures. She exemplifies her idea mentioning the protection for those who fall outside the scope of the Geneva Convention and the restrictive measures related to temporary protection. Drawing on her analysis, the present study has identified a pattern guiding EU governance in asylum. The political rationality behind enduring the protection rules and restricting human rights on asylum policies is to reduce the number of asylum-seekers and consequently Member States' obligations under international law.

[16] The Geneva Convention is described as the "cornerstone of the international legal regime for the protection of refugees" in the paragraph 3 of the Council Directive 2004/83/EC.

In the recital 6 of the preamble of the 2004 Directive, its two main objectives are settled, which are: 1) "to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection"; and 2) "to ensure that a minimum level of benefits is available for these persons in all Member States" (Council Directive 2004/83/EC, recital 6).

Here the analysis revealed that while the Directive is strict on the matter that the rules for identification of refugees and beneficiaries of subsidiary protection should be uniform in all Member States, the assurance of rights to each of those categories were made more flexible. Regarding the content of rights, the Directive only imposes a minimum standard to comply with international law, other than that the Member States are free to limit access to some rights, as we will see below. The same pattern is confirmed in recitals 16[17], 17[18], 18[19], 24[20] and 25[21]. Recital 24 also reaffirms the complementary nature of subsidiary protection and the primacy of the Geneva Convention and its refugee status.

As a consequence, the Union strategy of harmonizing the policy throughout the adoption of only minimum standards, according to Chetail, has created a "race to the bottom" among Member States (Chetail 2016, p. 12). The will to become as least attractive as possible among their peers has led Member States to opt for the adoption of very restrictive measures regarding qualification of refugees and beneficiaries of subsidiary protection and the content of rights guaranteed for each group. At the same time, the adoption of more restrictive national rules also intended to influence the elaboration of future EU norms.

In that sense, it is also important to notice the use of the word 'genuinely' to identify those who deserve the benevolence of European Union. Behind the description of "persons

[17] "(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention."
[18] "(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention."
[19] "(18) In particular, it is necessary to introduce common concepts of protection needs arising sur place; sources of harm and protection; internal protection; and persecution, including the reasons for persecution."
[20] "(24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention."
[21] "(25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States."

genuinely in need of international protection" (Council Directive 2004/83/EC, recital 6), there is the assumption that some people are abusing the goodwill of the European Union, and that is why the law needs to be so strict on identifying who deserves protection. In addition, among those who deserve protection, there is a hierarchy, which restricts even more the access to human rights in relation to a big parcel of those seeking protection.

In practical terms, Member States still have the duty to respect the Geneva Convention and the rights guaranteed there, this is the reason why making the identification rules so strict. In that way, only a few people who apply for asylum would be considered refugees, and therefore Member States would only be obliged to ensure full respect to the Geneva Convention to this group of people. This policy allows Member States to limit the human rights of everyone else who falls outside their rigid definition of refugees.

Article 2 brings the definitions of refugees and beneficiaries of subsidiary protection. Accordingly, the refugee status is only guaranteed to third-country nationals who have a well-founded fear of persecution because of their race, religion, nationality, political opinion or membership of a particular social group, and cannot return to their country of origin (Council Directive 2004/83/EC, Article 2 (c) and (d)). On the other hand, the subsidiary protection is guaranteed to people who, although are not fleeing persecution, cannot return to their country of origin due to a real risk of suffering serious harm (Council Directive 2004/83/EC, Article 2 (e) and (f)).

Based on the principle of non-discrimination, that enriches all human rights law, people in alike situations (e.g., forced migrants) should receive equal treatment. Exception is only allowed when the differentiation can be objectively justified (Costello and Foster 2022; Salomon 2022; Bauloz and Ruiz 2016; Pobjoy 2010; McAdam 2005). In fact, there is a blurry line separating the 'persecution' that defines the refugee status in the terms of article 1 A (2) of the Geneva Convention, from the 'risk of serious harm' that qualify the person eligible to subsidiary protection on the grounds of the Directive 2004/83/EC. It is difficult to define 'what is' persecution and 'what is not' in order to be considered a refugee. In practice, the delimitation of who should get refugee protection and who should get subsidiary protection becomes vague and imprecise.

Whereas the Refugee Convention did not provide a concept for persecution, this is open to interpretation by signatory states. Hence, cases that have been treated by the European Union as subsidiary protection since 2004 could have been perfectly addressed as refugee protection instead if the Union had chosen to adopt a more open interpretation of the term. Restricting the concept of persecution and consequently the granting of refugee status was a political choice made by the European Union in order to create a hierarchy among the beneficiaries of international protection and exempting itself from ensuring human rights in relation to people, who not being refugees, would not be protected by the Geneva Convention. Indeed, the analysis of the selected policy documents from the first phase of the CEAS, in consonance with theory and previous researches, showed that there is no technical differentiation between refugees and beneficiaries of subsidiary protection, the limitation of human rights on the basis of this differentiation was and still is a political strategy established to restrict the number of persons holding the Convention rights.

In that sense, McAdam (2005) points to a lack of any ground in international law for drawing differentiations between the rights conferred to refugees when compared to beneficiaries of subsidiary protection. Moreover, according to her there is no legal reason "why the source of protection should require differentiation in the rights and status accorded to a beneficiary" (McAdam 2005, p. 498). On the same wise, the UNHCR (2001) has declared that the content of rights should be based on the needs and not on the reasons why a person was given protection. Therefore, there is no legal motive to consistently be treating beneficiaries of subsidiary protection differently from refugees.

Article 9(1), from the Council Directive 2004/83/EC, describes what kind of acts should be accepted as acts of persecution by Member States' authorities responsible for deciding over asylum applications. Accordingly, acts of persecution must be severe enough to constitute a violation of basic human rights (paragraph 1(a)) or be a succession of measures that includes violations of human rights as severe as the ones described in (a) (paragraph 1(b)). For its part, article 9(2) exemplifies what types of acts can be considered persecution[22].

[22] "9(2). Acts of persecution as qualified in paragraph 1, can, *inter alia*, take the form of: (a) acts of physical or mental violence, including acts of sexual violence; (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; (c) prosecution or punishment, which is disproportionate or discriminatory; (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment; (e) prosecution or punishment for refusal to

Furthermore, article 15 of the Council Directive 2004/83/EC specify (but not exhaustively) in what consists the serious harm mentioned above, which characterizes the subsidiary protection, and all of the three paragraphs that follows it are "manifestations of the principle of *non-refoulement*" (Bauloz and Ruiz 2016, p. 261), namely the death penalty or execution (article 15(a)); torture or inhuman or degrading treatment or punishment (article 15(b)); and serious and individual threat to a civilian's life or person by reason in situations of international or internal armed conflict (article 15(c)). These serious harms are human rights violations that can be as severe and long-lasting as persecution. Moreover, they could also be interpreted as persecution in the grounds of article 1 A (2) of the Geneva Convention. According to McAdam (2005), the concept of serious harm did not even exist in international law, it was created on the grounds of the Directive.

Sharing the same understanding, the UNHCR has argued, firstly at its observations on the Commission of the European Communities' proposal, that the types of serious harms listed non-exhaustively in Article 15:

> *may indeed indicate a strong presumption for Convention refugee status* (…) the elements listed under Article 15 would need to be revisited to ensure that the applicability of the 1951 Convention and the 1967 Protocol is not in effect undermined by resorting to subsidiary forms of protection. (UNHCR 2001, p. 11, emphasis added)

Since no significant changes have been made on this matter for the approval of the Council Directive 2004/83/EC, the UNHCR reinforced, at its Annotated Comments on the Council Directive 2004/83/EC, that death penalty or execution, and torture or inhuman or degrading treatment or punishment, would normally indicate persecution linked to the Geneva Convention, except, for the latter, when it is driven by purely criminal rationale. Even in situations of indiscriminate violence, it is only when there is absolutely no link with one of the five Convention grounds that subsidiary protection is applied.

perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2); (f) acts of a gender-specific or child-specific nature" (Article 9, paragraph 2, Council Directive 2004/83/EC).

In that sense, subsidiary protection should be an exception, used only when it is impossible to make any connection between the inflicted or well-feared serious harm and one of the 5 grounds for persecution of the Convention for persecution. The creation of a subsidiary protection regime was of great value to protect those who cannot fulfill this linkage, and solely them, other than that it ends up weakening the international protection regime (UNHCR 2005). According to the UNHCR,

> This presupposes that individuals who fulfil its criteria are granted Convention refugee status, rather than being accorded subsidiary protection. To this end, the refugee definition should be interpreted progressively and with the necessary flexibility to take changing forms of persecution into account. (UNHCR 2005, p. 31)

Even the European Commission itself has acknowledged that subsidiary protection measures should be executed in a way to not undermine the existing international protection regime (Commission 2001)[23].

Also, considering subsidiary protection as a manifestation of the principle of *non-refoulement* has another important implication. As this principle can be characterised as a norm of *jus cogens* (Allain 2001), or in other words a peremptory norm of general international law[24], the Geneva Convention cannot be considered hierarchically superior to the principle of *non-refoulement* and consequently to the subsidiary protection. Both are in the same patamar, there's no legal reason to prioritise one over another.

After gradually building up the hierarchy between the two policy target groups, from Article 23 onwards, the Directive begins to deal with the content of the rights guaranteed to beneficiaries of international protection. The analysis of those articles showed that there are limitations on beneficiaries of subsidiary protection's rights to family unity, the

[23] Explanatory Memorandum presented by the European Commission accompanying the Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (COM(2001)510 final, 12.9.2001).

[24] According to the article 53 of the Vienna Convention on the Law of Treaties of 1969 "a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". Also, it says that if a treaty conflicts with a norm jus cogens, it will be considered void.

issuance of travel documents, social welfare, health care and integration, and on the length of their residence permits.

Firstly, regarding family unity, the Council Directive 2004/83/EC allowed Member States to define conditions for the extension of benefits to family members of beneficiaries of subsidiary protection (Article 23 (2)), while family members of refugees could enjoy the same rights as the refugee. Secondly, Member States only had the obligation to issue travel documents when the beneficiary of subsidiary protection was unable to obtain a national passport, but this condition was not present in relation to refugees (Article 25). Thirdly, access to social assistance and health care for beneficiaries of subsidiary protection could be limited to core benefits (Articles 28 and 29). Fourthly, beneficiaries of subsidiary protection would only be granted access to integration facilities when the Member State consider it appropriate, while for refugees Member States have no scrutiny (Article 33). Finally, regarding residence permits, refugees had the right to a residence permit valid for at least three years and renewable (Article 24(1)), while for beneficiaries of subsidiary protection, it was valid for at least one year and renewable (Article 24(2)).

6.2. The second phase of the CEAS and the qualification rules: from 2004 to 2013

The first phase of the CEAS and the adoption of the Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection were strongly criticised by the European Commission itself (Commission 2009).

In the end of 2004, the Council of the European Union launched the Hague Programme, aimed at strengthening freedom, security and justice in the European Union. Concerns about asylum, migration and external borders policy were placed together with terrorism, crises management, organised crime and corruption. The document emphasises the need to build "a Europe for citizens" (Council 2004, p. 11). More specifically, the Council argued that after the 9/11 events in the United States and the terrorist attacks suffered in Madrid on March 2004, European citizens were claiming for a more effective border

control within the union, in order to combat ‘illegal’ migration, smuggling, terrorism and organised crime.

The Hague Programme boosted the second phase of development of a common asylum and migration system started in 2004, highlighting the role of the CEAS as a policy solution to the so-called cross-border problems. Therefore, this phase was also strongly marked by securitisation. Another important fact to notice about this document is that, in addition to the establishment of a securitised asylum procedure common to the European Union, one more goal of the programme was to establish “a uniform status for those who are granted asylum or subsidiary protection” (Council 2005, p. 03).

In 2009 the European Commission submitted a proposal to recast the Council Directive 2004/83/EC, stating, in summary, that the minimum standards settled in the first phase were pretty much “vague and ambiguous” (Commission 2009, p. 03) and that they were not aligned with international human rights and refugee law. In its proposal, the Commission demonstrated a more ambitious approach towards a further approximation of the two statuses, but the Council negotiations have undermined the content of the Commission’s proposals, amending it to be more restrictive, without giving any justification. Having that in mind, I will start by analysing the Commission’s proposal before getting to the Recast Directive 2011/95/EU of the European Parliament and of the Council.

Indeed, the analysis of the 2009 proposal showed that the Commission tried to make clear its shift in understanding. Instead of being in favour of keeping two different statuses, the Commission, from that time on, started agreeing with the idea that both kinds of beneficiaries of international protection face risks of similar nature and that there is no reasonable justification for the difference in treatment. According to the Commission, approximating the rights between the beneficiaries of international protection would at the same time simplify the procedure and reduce costs (Commission 2009). The Commission recognised that when the concept of subsidiary protection was created, the protection needs claimed by these persons were believed to be temporary. For this reason, the 2004 Directive gave Member States the flexibility to limit the human rights of the beneficiaries of subsidiary protection to a certain level, but practice has shown that this assumption was incorrect. In that sense, the Commission argued that “It is thus necessary

to remove any limitations of the rights of beneficiaries of subsidiary protection which can no longer be considered as necessary and objectively justified." (Commission 2009, p. 08).

Additionally, the Commission corroborated with the same view shared in the present dissertation that the approximation between the two statuses in terms of rights and benefits is essential to comply with the principle of non-discrimination, as interpreted in the cases Niedzwiecki v Germany and Okpisz v Germany of the ECtHR, and with the UN Convention on the Rights of the Child (Commission 2009). On this wise, paragraph 37 of the Commission's proposal reaffirms that to give full respect to the principle of non-discrimination, beneficiaries of subsidiary protection should be granted with the same rights and benefits as refugees, with the only exception for necessary and objectively justified derogations[25].

The analysis of the proposal to recast the 2004 Directive showed that, in order to approximate the two statuses, in every time the Council Directive 2004/83/EC referred to beneficiaries of 'refugee or subsidiary protection', the Commission changed it for 'international protection'. Indeed, in Article 2 of the proposal, the Commission explained that, for the purposes of the Directive, "international protectional" is a term englobing refugee status and subsidiary protection status (Article 2 (b))[26], in a way that instead of dealing with two separate statuses, the directive would henceforth deal with the beneficiary of international protection in a unified way. Even in the title of the directive, the Commission has changed 'refugees or as persons who otherwise need international protection' for 'beneficiaries of international protection'. Moreover, in all articles a distinction was made between refugees and beneficiary of subsidiary protection in the 2004 Directive, the Commission removed the distinction and made them equal for all beneficiaries of international protection, as we will see below. The only exception was in

[25] "(37) It is necessary to ensure full respect for the principle of non-discrimination, while responding to the call of the Hague programme for the establishment of a uniform status. To that effect, and with the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection should be granted the same rights and benefits as refugees, and should be subject to the same conditions of eligibility." (Commission 2009, preamble, recital 37)

[26] "Article 2 - For the purposes of this Directive the following definitions shall apply: (…) (b) "beneficiaries of international protection" means persons who have been granted refugee status or subsidiary protection status as defined in (e) and (g);" (Commission 2009, article 2)

relation to travel documents (Article 25(2))[27]. With no further explanation, and deviating from the rationality adopted in the rest of the proposal, the Commission has decided to keep the condition imposed to beneficiaries of subsidiary protection, who would have travel documents issued for them only when they are not able to obtain a national passport.

In Article 23, the Commission included the beneficiaries of subsidiary protection on the right to maintain family unity, removing the authorization given before to Member States to introduce conditions for that group to access this right. Regarding the length of residence permits, the Commission proposed to make it equal to both policy targets, being valid for three years for all beneficiaries of international protection (Article 24). In the same way, the Commission also proposed to give equal rights to access to employment for both refugees and beneficiaries of subsidiary protection (Article 26). In relation to social welfare and health care rights, the Commission proposed to remove the permission given to Member States to limit the beneficiaries of subsidiary protection's social assistance and health care rights to core benefits (Article 29(2)). Finally, regarding access to integration facilities, the Commission proposed to eliminate the flexibility given in the 2004 Directive to State Members in relation to beneficiaries of subsidiary protection, to grant access to integration programmes only when the State Member consider it to be appropriate. The idea now is to make integration facilities available equally for both beneficiaries of international protection.

Here the analysis revealed that even the Commission, who had introduced the subsidiary protection in the first place, did not see any objective justification to keep the differentiation between refugees and beneficiaries of subsidiary protection legal status, as practice has shown that this attitude is not only more burdensome, does not comply with international human rights and refugee law and violates the principle of non-discrimination, but also is not justified by any kind of difference in nature and duration of protection needs.

[27] "25(2) Member States shall issue to beneficiaries of subsidiary protection status who are unable to obtain a national passport, documents which enable them to travel outside their territory, unless compelling reasons of national security or public order otherwise require." (Commission 2009, article 25(2)).

After negotiations in the Council and deliberations in the European Parliament and before being approved as the Recast Directive 2011/95/EU, the Commission's proposal suffered severe changes. The main critique that can be made against the recast directive is that in many aspects the provisions of the Council Directive 2004/83/EC have remained the same. Substantially, we cannot call the recast of the Council Directive 2004/83/EC a reform, but a mere reformulation.

The analysis brought to light the fact that the securitization framework is still permeating the Recast Directive 2011/95/EU, in the sense that this legal document is put as a constituent part of the "European Union's objective of progressively establishing an area of freedom, security and justice" (Recast Directive 2011/95/EU, recital 2). Also, showing that the main objective of the recast directive has not changed in comparison to the previous one. There is still a need, on the one hand, to create common criteria to identify persons 'genuinely' in need of international protection, and on the other hand, to guarantee a minimum standard for rights and benefits for these people (Recast Directive 2011/95/EU, recital 12).

Paradoxically, at the same time that the primacy of the Geneva Convention and its refugee status, and the complementary nature of the subsidiary protection are still endorsed, the recast directive affirms that beneficiaries of subsidiary protection and refugees should enjoy equal rights and benefits, except from necessary and objectively justified derogations (Recast Directive 2011/95/EU, recital 39). Right after it, in recital 45, the recast directive contradicts itself again allowing Member States to limit social assistance rights to core benefits, even though it has just stated for the equality between refugees and beneficiaries of subsidiary protection.

In this regard, whereas there was an advancement in the rights of family unit, access to employment, health care and access to integration facilities, the differentiation on the length of residence permits - now "valid for at least 3 years and renewable" for refugees (Article 24(1)), and "for at least one year, and, in case of renewal, for at least 2 years" for beneficiaries of subsidiary protection (Article 24(2)) – and on social assistance rights (Recital 45 w/ Article 29)[28] were maintained with no further explanation by the Council

[28] "(45) Especially to avoid social hardship, it is appropriate to provide beneficiaries of international protection with adequate social welfare and means of subsistence, without discrimination in the context of

and the European Parliament, even after been removed by the European Commission on its proposal.

6.3. The third phase of the CEAS and the qualification rules: from 2014 to 2022

After a comprehensive analysis of the European Commission's policy proposals to recast the Council Directive 2004/83/EC in 2009 and then for a regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection in 2016, with their respective explanatory memorandums[29], it is possible to notice a step back regarding the Commission's position since the election of Jean-Claude Juncker for the presidency of the European Commission in 2014. As it has been afore demonstrated, from 2004 to 2013, during the mandates of José Manuel Barroso, a progressively more human rights' framed discourse was coming from the European Commission towards the improvement of the CEAS and the qualification norms. Elected in October of 2014, Jean-Claude Juncker affirmed in his Political Guidelines that to assure a truly common migration and asylum policy at the Union level, it would be vital to strengthen the European external borders[30]. He has brought back the securitisation frame to the Commission's work, which would be reflected on the subsequent proposals to reform the CEAS, as it will be broken down below.

The European Agenda on Migration, settled up by the European Commission on the 13th of May of 2015, was the first substantial document on migration and asylum launched under the new presidency, and would guide the European Union's future actions in this area. More than that, it would herald the change in the discourse adopted by the

social assistance. With regard to social assistance, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting such assistance to core benefits is to be understood as covering at least minimum income support, assistance in the case of illness, or pregnancy, and parental assistance, in so far as those benefits are granted to nationals under national law" (Recast Directive 2011/95/EU, recital 45).
"Article 29 (1) Member States shall ensure that beneficiaries of international protection receive, in the Member State that has granted such protection, the necessary social assistance as provided to nationals of that Member State. (2) By way of derogation from the general rule laid down in paragraph 1, Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same level and under the same eligibility conditions as nationals." (Recast Directive 2011/95/EU, article 29).

[29] For more information on that, please check the appendix.

[30] To read more about Juncker's political guidelines, please visit:
https://commission.europa.eu/publications/president-junckers-political-guidelines_en

Commission, outlining the objectives of the European Union regarding migration and asylum, in which securing a strong and protected Europe would be the final and guiding goal. Thereafter, on the 10th of February of 2016, the Commission sent a communication to the European Parliament and the Council on the State of Play of Implementation of the Priority Actions under the European Agenda on Migration, stressing the need for "a radical strengthening of the EU migration system" (European Commission 2016, p. 2), intending to reduce the migration and asylum flows. According to the Commission, in 2015 Europe lived its most acute refugee crisis since the World War II, with unprecedented 'irregular migrants' number, what has increased security concerns (European Commission 2016a, p. 2). In this regard, the Commission suggested strengthening borders as one on the seven priority actions to the EU's asylum system, reinforcing the return of the securitization framework underlying the Commission's work.

In April 2016, as a response to the 'ongoing crisis', the Commission suggested they were open to help member states ensuring protection to external borders and to the integrity of the Schengen Area. Moreover, on the same communication[31], the Commission manifested its desire to reform the CEAS. From its statements, it is possible to extract that, for the Commission, migration is a poignant problem. The Commission used the term "defining issue for Europe" (European Commission 2016b, p. 2) to state that migration has been and it will continue to be one of the major contemporary problems of Europe[32].

Additionally, the communication towards a reform of the CEAS has an explicit concern about reducing migration flows, confirming the pattern presented by Zetter (2007). The Commission repeats eight times the importance of better controlling and managing 'irregular' migration flows and strengthen the external borders. In page 2, they use expressions like "stem disorderly irregular migration flows, protect our external borders, and safeguard the integrity of the Schengen area", "better manage migration flows" and "uncontrolled and irregular migratory flows". In page 3 we have it more directly in "reducing irregular flows to and within Europe, and protecting our external borders".

[31] Communication from the Commission to the European Parliament and the Council towards a reform of the Common European Asylum System and enhancing legal avenues to Europe. COM(2016) 197 final. Brussels, 6.4.2016.
[32] In the Commission's own words, "Migration has been and will continue to be one of the defining issues for Europe for the coming decades." (European Commission 2016b, p. 2).

Pages 4, 14, 16 and 19 brings, consecutively, “effectively control irregular inflows at the external border”, “addressing irregular flows”, “management of migration flows” and “effective management of migratory flows” (European Commission 2016b).

Another important finding after analysing the mentioned communication is that the Commission admits that sometimes protection-seekers coming from the same countries get different status when applying to different Member States, which means that the understanding around what is to be a refugee or a beneficiary of subsidiary protection varies. On this subject, the Commission affirms “There is also a lack of adequate convergence as regards the decision to grant either refugee status (…) or subsidiary protection status (…) for applicants from a given country of origin”. (Commission 2016b, p. 5).

At the end, there is no objective feature that can clearly differentiate acts of persecution from serious harm, it is always a matter of subjective interpretation of the normative text. Indeed, death penalty or execution and torture or inhuman or degrading treatment or punishment can be – and in many times are – tools for persecution. Even indiscriminate violence in situations of international or internal armed conflict can be caused by the willingness of persecuting a group or some groups. As ECRE (1995, p. 4) has pointed, “generalised violence does not preclude individual persecution”. Adding to that, UNHCR argues that international or internal armed conflict are in mostly cases “rooted in ethnic, religious or political differences which specifically victimise those fleeing. War and violence are themselves often used as instruments of persecution” (UNHCR 2001, p. 10).

This ends up generating very unbalanced and unfair decisions, where people who are fleeing the same situation get different status and rights depending on the Member State to which they apply. It also testifies to the argument that has been raised in this thesis before that there is no technical and objective differentiation between the two groups in need of international protection. The separation was merely a political manoeuvre to reduce the number of people under whom member states would be obliged to ensure all the rights set out in the Geneva Convention.

Even when death penalty or execution and torture or inhuman or degrading treatment or punishment and indiscriminate violence is not part of a persecution, they are all threat of

equal seriousness and similar juridical nature, and for that reason there is no objective justifiable reason to give different treatment to refugees and beneficiaries of subsidiary protection.

As a solution, the Commission believes that the reform on the legislation should prioritize clarifying the supposed difference between both groups and further the differentiation in rights related to each one (Commission 2016b, 10). Despite arguing in this way, the Commission does not take the opportunity to explain what this difference is and to justify why this difference would lead to the limitation of the rights of one group in relation to the other. These are the key questions that have remained unanswered since the first proposal to rule on the qualification of refugees and beneficiaries of subsidiary protection until the most recent proposal to create a regulation. Once approved, this regulation will be mandatory and its rules will be replicated in all Member States and consequently lead to a standardization from below, which makes this lack of response even more poignant.

Following the logic of reducing the 'problem of migration' by reducing numbers, presented in its previous communications, the Commission submitted to the European Parliament and the Council, on the 13th of July of 2016, a proposal for a regulation 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. On its explanatory memorandum, the idea of only protecting those who are 'genuinely' in need of international protection is held in evidence again, as in both previous qualification directives, in an attempt to separate who deserves international protection from alleged abusers. In fact, the Commission's proposal did not show any increase in the differentiation, but still the differentiated treatment was maintained regarding the duration of the residence permit and the limitation on the social assistance rights of beneficiaries of subsidiary protection to core benefits.

The Commission also wanted to make clear that the proposal was aligned with President Juncker's securitising four pillars, which are "reducing the incentive for irregular migration, securing the Union's external borders and saving lives, as well as ensuring a strong asylum policy and a new policy on legal migration" (Commission 2016, p. 6), confirming what we have argued in the beginning of this section.

In the subsection of the proposal called "Detailed explanation of the specific provisions of the proposal" (Commission 2016, pp. 12-17), despite the name, no detailed explanation is provided. Regarding the residence permits, the Commission says that they decided to keep the differences between refugees and beneficiaries of subsidiary protection with no further explanation. In the Commission's own words:

> Article 26 provides for a new explicit harmonisation of both the validity period and the format of the residence permit, *but keeping the difference between beneficiaries of subsidiary protection and refugees*. For subsidiary protection, the residence permit will be valid for 1 year renewable for 2 years (1+2+2 years formula) and for refugees the residence permit will be valid for 3 years renewable for 3 years (3+3+3 year formula). (Commission 2016, p. 16, emphasis added)

Regarding social assistance rights, again the Commission only mentioned that they decided to keep the differentiation, simply like that: "The current possible limitation of the granting of social assistance to core benefits in respect of beneficiaries of subsidiary protection is kept" (Commission 2016, p. 16).

On the 20th of December of 2022, the Council of the European Union voted and approved for negotiations with the European Parliament some amendments to the Commission's proposal. The first thing to observe is that the notion of subsidiary protection as complementary to the refugee protection stated at the Geneva Convention remains untouched (Council 2022, recital 32). In the same recital, the Council admits that "While the grounds for protection differ between refugee and subsidiary protection, the ongoing need for protection could be similar in duration" (Council 2022, recital 32). The supposed temporary nature of subsidiary protection was used by the Commission, when they first proposed a directive to rule the qualification of beneficiaries of international protection, as the main justification to limit human rights of beneficiaries of subsidiary protection. Even though this belief was demystified by the Commission itself when they proposed to recast the directive in 2009, and now again by the Council, they decided to maintain the limitations on the rights to a residence permit, the issuance of travel documents and social assistance without adding any further justification.

Limiting human rights without providing any objective justification for the necessity and proportionality of the measure violates international human rights law, and this is what the European Union, through its competent institutions – European Commission, Council and Parliament –, has been repeatedly doing

Chapter 7 - Conclusions and recommendations

7.1. Conclusions

The present dissertation aimed at investigating the establishment of the Common European Asylum System (CEAS) and its successive reformulations, focusing on the qualification policy for refugees and beneficiaries of subsidiary protection, and the difference in treatment it promotes for each status. In that sense, the research question was put as follows: How have the successive reformulations of the Common European Asylum System (CEAS) comprehended and justified different legal statuses for subsidiary protection and convention refugees, and impacted the human rights associated with these statuses?

Reviewing the existing literature, it became evident that most of the research on this topic focuses on testing the compliance of the CEAS' qualification policy with international law. And this is not to deny the importance of investigating whether the qualification standards are in line with international law. The present dissertation also used instruments of international human rights law when analysing the selected documents, but the analysis should not focus solely and exclusively on the legal aspects. To fully understand the complexity of the problem it was necessary to apply an interdisciplinary approach.

Drawing from critical theory on the categorization of policy targets and the fractioning of the label 'refugee' facilitated the investigation of the political rationalities behind the implementation and maintenance of two different legal statuses with different rights associated. The process of building a hierarchy between categories of protected persons was a strategy used with the ultimate aim of restricting the number of people with access to refugee status and consequently to the rights attached to it, contributing to the wider securitization policy in the European Union.

The CEAS has been comprehending the nature of subsidiary protection as complementary to the Convention status, and referring to it as an international protection granted to people whose reasons to seek for protection are not able to be conformed to one of the 5

Convention grounds for persecution. According to the CEAS understanding, also, the needs for protection in that case are of a shorter duration. The combination of all these features would make the subsidiary protection a lesser status with lesser rights.

Even though the official arguments about the temporariness of subsidiary protection and the primacy of the Convention status have been dismissed by both the doctrine and the UNHCR, the European Union continues to maintain subsidiary protection as an inferior status and with fewer rights without presenting any new arguments. The Directive currently in force (Recast Directive 2011/95/EU) managed to reduce the gap in rights between refugees and beneficiaries of subsidiary protection, if compared to the Qualification Directive 2004/83/EC, and the proposal for a regulation did not add any new restrictions, but there are still unjustified limitations on the length of residence permits and social welfare rights.

Having thoroughly analysed the key instruments in each of the 3 phases of the establishment of the CEAS, no argument was found capable of objectively justifying the limitation on the human rights of beneficiaries of subsidiary protection. Indeed, the analysis confirmed the fact that the 'fractioning of the refugee label' in two different statuses is part of the securitization project to restrict access to refugee status. According to the theoretical approach adopted in this dissertation, being able to choose who will be labeled refugee and who will not be a powerful tool, deeply used for setting the asylum and migration agenda and the position each one of the policy targets will occupy.

7.2. Recommendations

This dissertation will provide recommendations on policy and research, as follows.

Policy

For the European Commission, the Council of the European Union and the European Parliament:

Considering that the European Commission's proposal to replace the Recast Directive 2011/95/EU with a Regulation towards the uniformization of the standards for the qualification of persons in need of international protection and the rights granted to them

it is still awaiting Parliament's position in 1st reading, it is time to rediscuss articles 26, 27, 34, in which the limitations on the rights of beneficiaries of subsidiary protection are still maintained with no further justification. Since refugees and beneficiaries of subsidiary protection are both subjected to risks of same nature, i.e., risks of serious human rights violations, in their country of origin, and that is the reason why they cannot return, they should be entitled to the same rights.

Research

For further research:

Academic research also plays an important political role and can influence social change. Critical studies on the limitations of the human rights of beneficiaries of subsidiary protection in the context of the CEAS are still very scarce. Future research can build on the discussions initiated in this dissertation to go further in questions such how this differentiation in treatment have been affecting the integration of beneficiaries of subsidiary protection into the host societies.

In case the European Commission's proposal to replace the Recast Directive 2011/95/EU with a Regulation is approved and enter into force with no alterations, continuing analysis should be conducted. Research should focus on investigating how was the implementation of the regulation in the Member States and what were the effects of it on national agendas for migration and asylum. It is also worth investigating how much the implementation of a regulation contributed to the uniformization of asylum policy among EU Member States, since the CEAS has not been effective in this regard until the present.

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Appendix - List of Collected Data

From 1999 - 2004

Policy texts

- Presidency conclusions from the Tampere European Council, 15 and 16 of October, 1999:
  Fontaine, N. (2019). Presidency conclusions. *Tampere European Council*. Tampere, 15 and 16 October 1999, pp. 1-13. Available from: https://www.europarl.europa.eu/summits/tam_en.htm [accessed 09 March 2023].

- Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM(2001) 510 final, submitted by the Commission on 30 October 2001:
  Commission of the European Communities. (2001). *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52001PC0510 [accessed 21 June 2023].

- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted:

  Directive (EC) 2004/83 of the Council of the European Union of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

From 2004 - 2013

Policy texts

- The Hague Programme: strengthening freedom, security and justice in the European Union (2005/C 53/01), presented by the Council in 03.03.2005:

  European Council. (2005). *The hague programme: strengthening freedom, security and justice in the European Union*. Available from: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005XG0303%2801%29 [accessed 01 November 2022].

- Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009) 551 final, the Impact Assessment and its annexes, submitted by the Commission on 21.10.2009:

  Commission of the European Communities. (2009). *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*. Available from: https://www.unhcr.org/media/european-commissions-proposal-directive-minimum-standards-qualification-and-status-third [accessed 21 June 2023].

- 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):

Directive (EU) 2011/95 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).

From 2016 – present

Policy texts

- Communication from the Commission to the European Parliament and the Council towards a reform of the Common European Asylum System and enhancing legal avenues to Europe. COM(2016) 197 final. Brussels, 6.4.2016:

  European Commission. (2016a). *Communication from the commission to the European Parliament and the council towards a reform of the common European asylum system and enhancing legal avenues to Europe*. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:197:FIN [accessed 01 November 2022].

- Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents External Aspects, COM(2016) 466 final, submitted by the Commission on 13.7.2016:

  European Commission. (2016b). *Proposal for a regulation of the European Parliament and of the council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and*

amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents. Available from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0466 [accessed 01 November 2022].

- Amended mandate on the Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents External Aspects, approved by the Permanent Representatives Committee of the Council on 20 December 2022:

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