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**The Two Equilibriums Arising from the EU Qualification Directive on the
Scope and Content of International Protection**

The Impact of the Development of International Human Rights Law on the International
Protection Regime and an Examination of the Latest EU Law on International Protection

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Introduction

In 1951, the Convention Relating to the Status of Refugees (Refugee Convention) was adopted in the wake of the Second World War and the Holocaust.¹ The Convention recognizes the right of refugees to seek asylum from persecution outside of their home countries. It originally applied only to European countries and to refugees who fled their home countries before 1951, and it was not until 1967 when the Protocol removed the geographic and time limits.² After the 1967 Protocol, the Convention entered an era of universal coverage.

Various human rights norms have originated, evolved, and matured over the past several decades. It is difficult to determine when a norm transitions from an illusory promise to a widely enforced norm, but the codification and jurisprudence of these norms have expanded and fertilized the development of underpinning notions embedded in the Refugee Convention. The overarching conceptual foundation of the Convention is the idea of international protection. This idea is, in turn, supported by two pillars, the principle of *non-refoulement* and a set of rights refugees are entitled to in the host countries. While *non-refoulement* is considered a negative right, the set of rights are regarded as inducing affirmative obligations on the part of the host countries. The development of international human rights norms has enriched both notions and given new blood to the idea of international protection.

Non-refoulement is the principle that a country is prohibited from removing people when, in the most broad and general sense, their life, integrity, or freedom will be at risk. Over the years, the prohibition of removal of people to places where they will face torture, cruel, inhuman or degrading treatment (CIDT) has received almost universal consensus. This consensus expands

¹ Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 U.N.T.S. 137 (entered into force 22 April 1954) [hereinafter "Refugee Convention"].

² Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 U.N.T.S. 267 (entered into force 4 October 1967).

the contour of the principle of *non-refoulement*. Before, countries were prohibited from removing people only if they would face persecution on one of five enumerated grounds in the Convention, that is, race, religion, nationality, political opinion, or membership in a particular social group. Now, the grounds of non-removal go beyond the original list of five. As a result, more people, especially those who do not fall into the Convention definition of refugees, are protected by *non-refoulement*. Those people who are not refugees but who are nevertheless in need of international protection are called beneficiaries of complementary protection. In this paper, the term “subsidiary protection” will be used to mean “complementary protection” as the focus of this paper is on the EU asylum system, and the official term the EU adopts to mean what is encompassed by “complementary protection” is “subsidiary protection.”

The second pillar of international protection is the set of rights people in need of international protection is entitled to in the countries where they seek asylum. This pillar, again, is informed by the development of human rights norms over the past several decades. The most important codification and jurisprudence of affirmative obligations come from the International Covenant on Civil and Political Rights (ICCPR),³ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴ and regionally, the European Convention on Human Rights (ECHR),⁵ and the Charter of Fundamental Rights of the European Union (EU Charter).⁶ Both beneficiaries of subsidiary protection and refugees are enjoying a growing set of rights as a result of countries’ incorporation of affirmative obligations in these instruments into domestic law.

³ International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) 21 U.N. GAOR. Supp. (No. 16) 52, U/N/Doc. A/6316 at 52 (1966); entered into force on March 23, 1976 [hereinafter “ICCPR”].

⁴ International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6136 at 490 (1966); entered into force on January 3, 1976 [hereinafter “ICESCR”].

⁵ European Convention on Human Rights, as amended, opened for signature 4 November 1950, 213 U.N.T.S. 221 (entered into force 3 September 1953) [hereinafter “ECHR”].

⁶ Charter of Fundamental Rights of the European Union, OJ 2000 No. C364/1 [hereinafter “EU Charter”].

Despite the fact that human rights norms enriched the notion of international protection, they are at the same time contributing to an increasingly confusing picture of where exactly the boundaries are with respect to both the principle of *non-refoulement* and the content of affirmative obligations. First, on the issue of *non-refoulement*, while countries agree that there are certain cases where people are absolutely not to be removed, they do not agree on other grounds that may also justify such non-removal. For instance, debates center around whether the person has to face individual risk or it suffices that he or she faces generalized violence. Controversy also exists as to whether the danger has to come from armed conflict, or that gross systematic human rights violations is a sufficient ground.

Second, as regard to affirmative obligation, the picture is even more convoluted because countries enjoy huge discretion in determining the set of rights refugees or beneficiaries of subsidiary protection enjoy. Positive rights, such as the rights to housing and education, are almost always written in vague and general language. They at best set up aspirational norms that countries should follow, but most decisions are left to the political process in individual countries. Therefore, as they filter into domestic law, countries have wide discretion deciding how many or how few rights they are willing to designate to people in need of international protection.

Uncoordinated and varying jurisprudence regarding the treatment of refugees and beneficiaries of subsidiary protection is detrimental to their rights. Because countries that give more generous treatment do so at the risk of attracting more applicants for international protection, thus overloading themselves with more cases than countries that adopt less generous rules, in the long term, even the originally more generous countries tend to shake off the additional burden they have shouldered as a result of their generosity by lowering their standards.

As such, there is a tendency for countries to race to the bottom in the treatment of people in need of international protection. On the other hand, countries, especially EU member states do not want to be criticized for treating applicants badly because they are always considered and consider themselves as the pioneer for human rights protection, racing to the bottom is not necessarily a politically and diplomatically wise choice. The cure to such dilemma is to codify a new set of rules in a binding supranational instrument so as to press the pleats of varying country practices flat. The EU has been in the exact process of cleaning up the uneven terrain of international protection regimes in the past decade. It first culminated in the 2004 “Directive on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted” (Qualification Directive).⁷ All European Union member states are almost always considered bound to directives unless they express intention to the contrary.⁸ In 2011, a recast Directive was adopted, closing most of the gaps between benefits enjoyed by refugees and those by beneficiaries of subsidiary protection.⁹ However, the recast Directive kept its scope of *non-refoulement* obligations ambiguous.

As the name of the Directive suggests, it aims to create a clear and uniform system for refugees and beneficiaries of subsidiary protection across the EU. In spite of this grand aim, the amorphous contour of *non-refoulement* obligations and the legacy of national direction individual countries exercised in the pre-Directive era are plaguing the clarification and convergence of standards across EU member states. The Directive establishes minimum

⁷ Council Directive 2004/83/EC of 29 April 2004 on Directive on Standards for the Qualification of Third-Country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted, OJ L 304/12.

⁸ See Treaty on the Functioning of the European Union, OJ C 115/51, 9 May 2008, art. 288.

⁹ Council Directive 2011/12/13 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), OJ L 337/9 [hereinafter “Qualification Directive”].

standards that each member state has to comply with, but it does not prevent member states from adopting more favorable standards.

The argument of this paper is that the mechanism of minimum standards and more favorable treatment creates uncertainty to the prospect of the international protection regime in the EU, thereby inducing applicants of international protection to continue country shopping, both within the EU and between the EU and other jurisdictions. The Directive produces two equilibriums: an internal EU equilibrium and an external equilibrium between the EU and the rest of the world. As long as divergence still exists between individual EU member states with respect to their treatment of applicants to the extent that applicants are not indifferent, they will continue country shopping to the extent they can, although the choice is usually very limited, and the EU as a whole in turn will keep adjusting its coordinating point. The point at which applicants become indifferent is the internal equilibrium within the EU, and at this point, there is no incentive for any member state to deviate from the coordinated minimum standards. Similar to the internal equilibrium, the same thing exists for an external equilibrium, the point at which applicants are indifferent between the EU as a whole and other destinations. Whether applicants are incentivized to country shop between the EU and other jurisdictions depends on the relative scope of *non-refoulement* and the relative robustness of the international protection rights regime. Although whether the Directive makes the EU as a whole a more appealing destination for asylum seekers is unknown, it is fairly reasonable to say that the external equilibrium is much more difficult to achieve, as it requires political compromise on the global scale. Unlike the EU, which has a strong consensus mechanism, the prospect for a global coordination of minimum standards and burden sharing is bleak.

The paper proceeds as follows. Section I delineates the development of important human rights norms in the area of international protection and how it is reflected in the codification of these norms in the Directive. Section II discusses in detail the problems associated with the fertilization of human rights norms on the interpretation and application of the principle of international protection as manifested in the Directive. This is followed by Section III, a discussion of how the minimum standards mechanism and the possibility of more favorable treatment in the Directive affects potential applicants' incentives of country shopping within the EU itself and between the EU and the rest of the world, and how the EU might respond by adjusting its internal and external equilibriums.

I. Fertilization of International Human Rights Norms on the Idea of International Protection

The idea of international protection originated from the Refugee Convention, and it composes of two interweaving notions: the principle of *non-refoulement* and a set of rights recognized refugees are entitled to in the host country. While *non-refoulement* is a negative right, only prohibiting countries from removing asylum seekers, host countries also have affirmative obligations to provide recognized refugees with certain rights, such as the rights to education and employment.¹⁰

The scope of *non-refoulement* in the Convention is limited, only granted to people whose life or freedom would be in danger due to five enumerated grounds. The development of international human rights norms on the notion of prohibition of death penalty, torture, and CIDT provides alternative legal basis of *non-refoulement* for persons falling outside of the Convention definition of refugees. As such, one does not have to face persecution on one of the five original grounds to be protected by *non-refoulement*. People who are not refugees but who cannot

¹⁰ Refugee Convention, *supra* note 1 at arts. 3-34.

otherwise be removed are called beneficiaries of subsidiary protection in the EU. The Qualification Directive establishes three grounds on which subsidiary protection can be given.

Because it is generally agreed that beneficiaries of subsidiary protection need just as much protection as refugees, a corollary of the expansion of *non-refoulement* obligations is that they are no different from refugees when it comes to host countries' affirmative obligations. While beneficiaries of subsidiary protection still enjoy a weaker set of rights than refugees in the EU, as the notion of non-discrimination has become more inclusive and comprehensive in the past decades, scholars have suggested that it can be used as legal tool to bridge any gap in the rights regime between that designed for refugees and that for beneficiaries of subsidiary protection.

A. Non-refoulement

Article 33(1) of the Refugee Convention stipulates that

[n]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹¹

As is clear from the text, *non-refoulement* could only be applied to people if the danger to their lives or freedom come from one of the five enumerated grounds. In comparison, in the Directive, while refugees still exist as a category of people protected by *non-refoulement*, a second group of people, "persons eligible for subsidiary protection," are added to the category of people who need international protection. They, just like refugees, cannot be removed from any member state. A person eligible for subsidiary protection is defined as someone

who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15. . .¹²

¹¹ *Id.* at art. 33.

¹² Qualification Directive, *supra* note 9 at art. 2(f).

The linchpin of provisions on subsidiary protection is Article 15, which lays down three situations of serious harm that applicants can rely upon to assert a claim for subsidiary protection.

They consist of:

- (a) the death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.¹³

The first two situations are a direct result of the evolution of human rights norms in the past several decades. With regard to situation (a), while the abolition of death penalty has not achieved global consensus, it has achieved consensus within the EU. Article 1 of the 6th Protocol to the ECHR, the protocol on the abolition of death penalty, prohibits death penalty in peacetime.¹⁴ Article 2 of the EU Charter prohibits death penalty, and Article 19 prohibits expulsion of a person to a state where he “would be subjected to the death penalty.”¹⁵ Both the ECHR and the EU Charter are binding on all EU member states, although the former one is a treaty-based instrument and the European Court of Human Rights (ECtHR) is the organ interpreting the treaty, whereas the latter one is EU law, the final authority of interpretation lying in the European Court of Justice (ECJ). Together, these provisions build stepping blocks for the inclusion of death penalty as a form of serious harm for the establishment of *non-refoulement* claims. Having abolished death penalty in their own countries, it is not surprising that EU member states all agree that removing applicants to other countries where they would be subject to death penalty is prohibited.

¹³ *Id.* at art. 15.

¹⁴ ECHR, *supra* note 5 at art. 1, Protocol No. 6.

¹⁵ EU Charter, *supra* note 6 at arts. 2 and 19.

Compared to the prohibition of death penalty, which has only achieved regional consensus, the prohibition of torture and CIDT has achieved universal consensus. This corresponds with situation (b) in the Directive. Both international human rights treaties and regional instruments such as the ECHR and the EU Charter have established a well-developed jurisprudence on the prohibition of removal in the face of torture and CIDT. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) is the only international treaty besides the Refugee Convention that contains an explicit obligation of *non-refoulement*.¹⁶ Article 3 stipulates that “[no] State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁷ While ICCPR does not expressly mention the principle of *non-refoulement*, Article 6 says that everyone has the inherent right to life and Article 7 prohibits torture and CIDT.¹⁸ The Committee interpreting the ICCPR has stated that when read together with Article 2 which requires all state parties to respect and ensure rights recognized in the Covenant, these two provisions entail an obligation not to remove a person where there are substantial grounds for believing there is a real risk of irreparable harm.¹⁹

The two regional instruments binding on all EU member states are additional sources for the expansion of the principle of *non-refoulement*. In fact, they are more forceful sources because both documents are subject to binding interpretations of supranational courts, which, over the past several decades, have created a rich jurisprudence identifying torture and CIDT as grounds

¹⁶ Jason Pobjoy, *Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection*, 34 MELBOURNE U.L.R. 181, 189 (2010). Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 U.N.T.S. 85 (entered into force 26 June 1987) [hereinafter “CAT”].

¹⁷ *Id.* at art. 3.

¹⁸ ICCPR, *supra* note 3 at arts. 6 and 7.

¹⁹ Pobjoy, *supra* note 16 at 190. Human Rights Committee, General Comment No. 31, U.N. Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004). ICCPR, *supra* note 3 at art. 2.

for *non-refoulement*. Decisions from the ECtHR and the ECJ are binding on member states. Compared to the committees overseeing the implementation of the ICCPR and the CAT, whose interpretations of law have no binding power on state parties, ECtHR and ECJ's jurisprudence is the real force behind the penetration of human rights law into the international protection discourse, at least in the EU context. Article 3 in the ECHR and Article 4 in the EU Charter prohibits torture and CIDT.²⁰ These two provisions cross-fertilizes each other as the ECJ, the body that interprets the EU Charter, granted special significance to Article 3 of the ECHR and its jurisprudence when interpreting the corresponding Article 4 of the EU Charter.²¹ In addition, Article 19 of the Charter explicitly underscores member states' obligations of *non-refoulement* in the face of torture and CIDT.²²

In contrast to the first two situations that are supported by a well-developed jurisprudence of human rights law on recognizing death penalty, torture and CIDT as grounds for *non-refoulement*, the third situation lacks a mature underlying jurisprudence from international human rights law. Therefore, it is vulnerable to uncertainty and controversy, a topic that Section II will address in more detail.

B. Affirmative Obligations

Development in human rights law may independently form grounds for non-removal, but for the exact reason that they are external to and independent of the Refugee Convention, the instruments provide only a trigger for protection and do not elaborate a resultant legal status for applicants who are recognized as people eligible for subsidiary protection.²³ Whereas a grant of

²⁰ ECHR, *supra* note 5 at art. 3. EU Charter, *supra* note 6 at art. 4.

²¹ Helene Lambert, *Introduction: European Refugee Law and Transnational Emulation*, in THE GLOBAL REACH OF EUROPEAN REFUGEE LAW 1, 22 (2013).

²² *Id.*

²³ Jane McAdam, *The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection*, in FORCED MIGRATION, HUMAN RIGHTS AND SECURITY 263, 273 (2008)

Convention refugee status entitles recipients to the full gamut of rights listed in the Convention, no comparable human rights instrument has provided a similar set of rights for beneficiaries of subsidiary protection.²⁴ In any event, even the Refugee Convention has left details of the implementation of rights to each individual country, and the determinative thing of what rights refugees receive in a certain country depends on domestic law.

While human rights treaties may be used as guidance in the creation of rights to beneficiaries of subsidiary protection because those instruments apply to everyone who is within an individual state's jurisdiction, regardless of his or her immigration status, those instruments, just like the Refugee Convention, contain only vague and general language on each right. The final decision is still almost subject entirely to national discretion. Section II will address problems that arise from the vagueness and generality issues in more detail.

Leaving aside the question what set of rights refugees receive as a result of the Refugee Convention, complemented by other human rights treaties, one specific provision in the ICCPR at least provides a theoretical justification in bridging any gap that might exist between the rights refugees enjoy and those beneficiaries of subsidiary protection are entitled to. Article 26 of ICCPR states that

[all] persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, [color], sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁵

This non-discrimination clause is a free-standing clause that applies outside the rubric of ICCPR.²⁶ It is an independent and autonomous guarantee of non-discrimination.²⁷ It is different from other non-discrimination clauses that are usually included at the beginning of each human

²⁴ *Id.* at 267.

²⁵ ICCPR, *supra* note 3 at art. 26.

²⁶ Pobjoy, *supra* note 16 at 204.

²⁷ *Id.*

rights instrument, stating that the rights in the specific instrument should be applied without discrimination. Article 26, on the other hand, is a right in and of itself. One caveat is that non-discrimination does not necessarily mean equality.²⁸ If the criteria for differentiation are reasonable and objective and if the aim is to achieve a legitimate purpose, difference is justified.²⁹ However, this is not the case with respect to refugees and beneficiaries of subsidiary protection. Because there is no conceivably reasonable and objective justification for a differentiation in the allocation of rights between these two categories of people in need of international protection, any unequal treatment will be discrimination.³⁰

II. Problems Associated with the Fertilization of Human Rights Norms on the Idea of International Protection

While the development of human rights norms contributed to the expansion of the scope of international protection, it also brought about accompanying problems as can be seen in the Qualification Directive. The most common ones arise from the fact that many norms are ambiguous and undefined, which, in turn, invites competing interpretations on the same norm. The uncoordinated infiltration of norms into domestic law as a result of national discretion is another challenge. With respect to the Directive itself, the narrow interpretation of Article 15(c) that justifies the protection of *non-refoulement*, the high standard of proof for serious harm, and the continuing practice of national discretion at determining affirmative obligations receive the most criticism.

A. Article 15(c)

As a reminder, the third provision in Article 15 of the Directive states that a serious harm can be defined as a

²⁸ *Id.* at 207-09.

²⁹ *Id.*

³⁰ *Id.* at 223. McAdam, *The Refugee Convention as a Rights Blueprint*, *supra* note 23.

(c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.³¹

This provision is subject to criticism on two grounds. First, scholars criticize the requirement of an “individual threat,” which gives member states the freedom to only accept applicants who have been personally targeted or applicants who face greater risk of harm than the rest of the population. While there is no basis in international treaty law yet for a protection obligation towards persons fleeing indiscriminate violence in situations of armed conflicts, the fact that a person in an area of indiscriminate violence will need to at least show that he or she is personally at risk, rather than simply being able to claim subsidiary protection status by virtue of geographical location, creates logical inconsistency with another asylum-related directive in the EU, the Temporary Protection Directive. The Temporary Protection Directive provides protection to victims of systematic or generalized violence without the requirement for individualized risk. The difference between the protection provided under this Directive and that under the Qualification Directive is that the need for temporary protection is recognized only when applicants arrive in mass influx, not individually.³² However, the rationale behind temporary protection is that the size of the influx makes it inefficient or impossible to process claims in the normal way, not that the nature of the threat is unique to mass influxes. Therefore, for legal and logical consistency, subsidiary protection should be granted to persons fleeing individually or in small groups from situations which, in a mass influx, would result in protection.³³

³¹ Qualification Directive, *supra* note 9 at art. 15(c).

³² Lyra Jakuleviciene, *Is There a Need for an Extension of Subsidiary Protection in the European Union Qualification Directive*, 120 JURISPRUDENCE 215, 224 (2010). Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences Thereof OJ L 212 [hereinafter “Temporary Protection Directive”].

³³ Jane McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, 17 INT. J. REFUGEE L. 461, 483 (2005).

To clarify the requirement of an individual risk, the first case brought to the ECJ after the adoption of the Directive is to seek clarification on the scope of the third situation. In *Elgafaji*, the ECJ reasoned that in contrast to the first two situations, the third situation covers a more general risk of harm, using the term “indiscriminate” to reinforce that. The term “individual” is to be understood as covering harm to all civilians, where violence reaches such a high level as to show substantial grounds to believe that a civilian, if returned, would face a real risk solely on the basis of being present. The more the applicant can show an individual risk due to factors particular to their personal circumstances, the ECJ continued, the lower the level of indiscriminate violence that must be shown. While this decision clarified some aspect of Article 15(c), meaning that an individual risk is not necessarily required to establish serious harm, it is still unclear exactly how serious the indiscriminate violence has to be to have the requirement waived entirely.³⁴

The second criticism of this provision is with regard to the exclusive source of violence, international and internal armed conflicts. Excluded from this provision is widespread human rights violations that might not arise from armed conflicts. This exclusion is problematic for two reasons. First, there is no agreed definition of armed conflict in international law.³⁵ This lack of clear definition gives EU member states leeway to narrow the scope of this provision. Second, a comparison with the Temporary Protection Directive again reveals logical inconsistency of this narrow scope. Victims of systematic or generalized human rights violations are covered by the temporary protection regime, so it is unclear, as one scholar argues, what added value “international and internal armed conflicts” brings to a legal provision on subsidiary protection, as persons who face a real risk of serious harm due to indiscriminate violence and widespread

³⁴ Jakuleviciene, *supra* note 32 at 225-26. Lambert, *supra* note 21 at 19-21. *Elgafaji v. Staatssecretaris van Justitie*, C 465/07, European Court of Justice, 17 February 2009.

³⁵ Jakuleviciene, *supra* note 32 at 226.

human rights violations are in need of international protection regardless of whether the context is classified as an armed conflict or not.³⁶

B. Standard of Proof

In addition to logical inconsistency between the Qualification Directive and the Temporary Protection Directive, the Qualification Directive is also criticized for adopting a strict standard of proof among competing standards in international law on the establishment of the obligation of *non-refoulement*. The test adopted in the Directive is inconsistent with that used in the Refugee Convention. But even if the test in the Directive can be justified on the ground that it is inspired by the standard used by the CAT committee, which is different from that in the Refugee Convention, the wording of the standard in the Directive reveals that it complicates and confuses the established standard in the CAT rather than directly borrowing from it.

To recall, the standard of proof adopted in the Directive is “substantial grounds . . . for believing that the person would face a real risk of suffering serious harm.”³⁷ There has long been a debate in international law on whether the standard of proof for persecution or harm should be “well-founded fear” or “substantial grounds for believing.” The main difference between the two tests is that “well-founded fear” is an entirely subjective test whereas “substantial grounds” is an objective test.³⁸ “Well-founded fear” is usually considered as the lower and easier standard because it does not require an objective finding of persecution or harm, which is indeed difficult to prove.³⁹ This is the test adopted in the Refugee Convention on the establishment of the obligation of *non-refoulement*. The CAT committee, on the other hand, has adopted the “substantial grounds” test, and it is interpreted as involving a “foreseeable, real and personal

³⁶ *Id.* Temporary Protection Directive, *supra* note 32.

³⁷ *Supra* note 12.

³⁸ McAdam, *The European Union Qualification Directive*, *supra* note 33 at 470-74.

³⁹ *Id.*

risk.”⁴⁰ “Foreseeable, real and personal” is only used to explicate the meaning of “substantial grounds” instead of forming an additional element of the test. Therefore, the test in the EU Directive, if read literally, requires a “foreseeable, real and personal risk” of a “real risk.” The duplicative “real” requirement in the test is confusing at best.⁴¹

C. National Discretion on Affirmative Obligations

The previous two issues are both associated with the principle of *non-refoulement*. The problems arising from the development of human rights law do not stop there, however. The proliferation of norms on countries’s affirmative obligations to people in need of protection has led to an array of ad hoc domestic practices that vary from one country to another. Divergence in the set of rights individual countries give to refugees and beneficiaries of subsidiary protection is a direct consequence of the incorporation of international norms into domestic law in an uncoordinated way. Even if Article 26 of the ICCPR, as Section I suggests, can bridge the gap between the rights regime for refugees and that for beneficiaries of subsidiary protection, that provision does not solve the fundamental question of what set of rights either group is entitled to.

Before the adoption of the Directive, European states have traditionally allowed persons who are not technically refugees, but who nonetheless have a valid need for protection, to remain in their territories. Yet, the rights associated with their stay have varied widely between countries, ranging from mere tolerance of presence (*non-refoulement*) to the issuance of legal permits authorizing stay and access to certain benefits.⁴² Although the Refugee Convention, the ICCPR, the ICESCR, the ECHR, and the EU Charter have all enumerated an array of rights that in theory can be used as guidance in the creation of a list of rights for refugees and beneficiaries of subsidiary protection, the determinative thing is how these instruments are incorporated into

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 461-62.

domestic law.⁴³ The generality and vagueness of those rights inevitably lead to a wide range of divergence.⁴⁴ As will be discussed in Section III, as long as divergent practices between countries are not minimal to the extent that potential applicants become indifferent to which country they want to seek asylum in, they will keep country shopping and engage in secondary movement, which in turn will incentivize EU member states to coordinate their practice and share the burden evenly.

III. The Mechanism of Minimum Standards and More Favorable Treatment

Although one of the objectives of the Qualification Directive is to set common state practice with regard to the international protection regime, because of the mechanism of minimum standard adopted in the Directive, member states still have huge discretion in determining their own specific set of affirmative obligations. The preamble states that the Directive is to ensure that a minimum level of benefits is available for those persons in all Member States,⁴⁵ but Article 3 says that

Member States may introduce or retain more [favorable] standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.⁴⁶

In theory, the combination of the establishment of minimum standards and the possibility of more favorable treatment creates uncertainty to the upgrading or downgrading of international protection within the EU as a whole.

On the one hand, there is the lowest common denominator concern. If member states with more favorable standards retain a more liberal regime, they are likely to expose themselves to

⁴³ McAdam, *The Refugee Convention as a Rights Blueprint*, *supra* note 23 at 269.

⁴⁴ *Id.* at 267.

⁴⁵ Qualification Directive, *supra* note 9 at preamble.

⁴⁶ *Id.* at art. 3.

increased numbers of applications.⁴⁷ As long as applicants are not indifferent between the set of rights they receive in different countries, and they are not likely to be indifferent unless the minimum standards that each country promises are appealing enough to the applicants, those countries have the incentive to scale back their standards until they are in conformity with the minimum standards. This, of course, is to the detriment of applicants. It is also contrary to the objective of the Directive, which is to even out burden sharing and stave off secondary movement.⁴⁸ On the other hand, the countries with more favorable standards might not be willing or able to lower their standards, and in order not to increase their share of burden, they will exert pressure on other countries so that they can reach a consensus on the minimum standards, ideally to the point where applicants will be indifferent.

A comparison of the 2004 Directive with the 2011 recast version reveals that member states have increased the set of rights applicants enjoy, although it is unclear whether the new minimum standards have reached the threshold for indifference.⁴⁹ The point of indifference is an internal equilibrium from which no country within the EU will deviate from. That is because, as long as divergence in state practice within the EU still exists and that applicants are not indifferent to the different treatment they will receive in different countries, their incentives of country shopping will sustain. The continuing practice of country shopping will further incentivize member states to strive for uniform standards because that is the only way for them to share the burden in an even way. It is difficult, however, to determine whether the standards at the equilibrium will be higher or lower than what is currently written in the Directive. In the

⁴⁷ Carina van Eck and Ryszard Piotrowicz, *Subsidiary Protection and Primary Rights*, 53 INT'L. & COMP. L.Q. 107, 114 (2004).

⁴⁸ *Id.*

⁴⁹ European Council on Refugees and Exiles, *ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011*, 3. Available at <http://www.ecre.org/topics/areas-of-work/protection-in-europe/92-qualification-directive.html>.

vacuum of contact between the EU and other jurisdictions, the equilibrium can settle at any point. But because the EU is not an isolated system, the decision of which has no rippling effect beyond its boundary, for political and diplomatic reasons, the EU might face a restraint on the extent to which it can decrease the minimum standards. It has perceived itself and been perceived as the most progressive human rights protector in the world, and therefore, the standards at the internal equilibrium is unlikely to be below those standards in other popular jurisdictions such as the United States, Canada, New Zealand or Australia.

Any decision the EU makes implicates the prospective flow of applicants to its shore vis-a-vis other destinations. As a result, besides the internal EU equilibrium, there exists an external equilibrium. This external equilibrium depends on two factors, the scope of the obligation of *non-refoulement* and the substantive rights applicants are entitled to. First, the scope of the obligation of *non-refoulement* can be seen as a tool of external border control because it determines who can stay and who can be removed from the EU. Within the EU, member states have not elaborated any further on the scope of the third situation for *non-refoulement* in the recast Directive.⁵⁰ That is to say, some people who need international protection but do not belong to any ground upon which the EU members agree that *non-refoulement* should be granted might be incentivized to seek asylum outside the EU where the scope of *non-refoulement* is broader. Second, they may also be incentivized to seek asylum beyond the EU if they think that the rights regime provided by the EU is not as robust as that some other country. Whether this is true or not is beyond the scope of this paper, as it requires comparative empirical study on countries' different rights regimes towards international protection. However, it is fairly reasonable to say that this equilibrium is much harder to achieve as it involves political

⁵⁰ Jakuleviciene, *supra* note 32 at 218.

compromise on the global scale. Unlike the EU, which has a strong consensus agreement and enforcement mechanism, the world as a whole is much worse at coordinating and burden sharing.

Conclusion

In spite of the fact that the development of human rights norms broadened the categories of persons to whom international protection is owed beyond the Refugee Convention, it cannot be denied that the development of human rights law has complicated, in the example of affirmative obligations, and confused, in the case of *non-refoulement*, the exact contours of the international protection regime. While the EU Qualification Directive is the first supranational instrument after the Convention that codifies such development on a specific area of law, international protection, the Directive is a product of deliberate political compromise than a purely legal analysis of the new law.⁵¹

The things that EU member states and applicants care about are different, but they do overlap. The place where they overlap creates both an internal equilibrium within the EU and an external equilibrium for the EU and the rest of the world. For the EU member states, their primary objective is even burden sharing, and they can do so through adopting the same standards. In theory, they do not care whether the standards increase or decrease as long as no country is overloaded with applicants while others benefit from free-riding. The only caveat to this theory is that the EU as a whole does not want to see itself as the least protector of refugees and other people in need of international protection's rights. Therefore, even if the standards they adopt decrease, they are unlikely to drop to the extent that all applicants will turn away from the EU and seek asylum somewhere else. On the other hand, the EU does not have the incentive to increase its standards too rapidly as doing so will make it more appealing than other destinations, which will bring a disproportionate number of applicants to its border. This, of course, is built

⁵¹ McAdam, *The European Union Qualification Directive*, *supra* note 33 at 465.

upon the assumption that applicants have the freedom to country shop without technical or geographic restraints. In reality, however, the freedom potential applicants have with regard to venue shopping is very limited.

For the applicants, they care about two things. The first thing is whether to seek asylum in the EU or other jurisdictions, and if they decide to do so in the EU, the second question is in which EU member state. As mentioned above, because the EU has always seen and been seen as a pioneer in human rights protection, it is unlikely that it as a whole is willing to design an international protection regime lower in standards than all the other popular destinations. Therefore, what really matters to the EU with respect to applicants' choice is that no member state shoulders too much or too little share of a burden.

This is where the two sides' incentives intersect, and the interplay hinges on one factor, that is, whether the minimum standards are good enough that the applicants are indifferent. The internal equilibrium within the EU is reached when applicants are indifferent, but this internal equilibrium also implicates the external equilibrium, which is much harder to achieve because coordination and burden sharing on the global scale requires much more political compromise than what is required in the EU. Even when the EU has reached its internal equilibrium, it may be subject to further fluctuation because if the minimum standards at which the internal equilibrium stays are higher than those in other jurisdictions, more applicants will flock to the shore of the EU, thereby inducing it to downgrade its rights regime or narrow the scope of *non-refoulement* obligations to repel potential applicants. In any event, coordination, even if it is currently achievable only on a regional scale, is a good thing both for people in need of international protection and for the host countries. It is the assurance of burden sharing that makes every party in the asylum seeking and granting realm better off.