(In)Compatibility of Article 14 (4) and (6) of the Qualification Directive with the 1951 Refugee Convention

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1. Introduction

The paper explores a long debated issue of compatibility of Article 14 (4) and (6) of the Qualification Directive 2011/95/EU with the 1951 Convention Relating to the Status of Refugees. A number of commentators as well as UNHCR have repeatedly criticized this provision for going beyond what is permissible under the Refugee Convention, confusing its cessation provision under Article 1C with the exception to the principle of non-refoulement set out in Article 33 (2) of the Convention.

The relevance of this topic has been reinforced lately by two particular developments. First of them is a reference for preliminary ruling submitted to the Court of Justice of the European Union (CJEU) by the Czech Supreme Administrative Court in June 2016, which deals with this topic and asks whether Article 14 (4) and (6) of the Qualification Directive is incompatible with the Refugee Convention and thus invalid for it infringes the relevant provisions of the founding treaties of the European Union setting out accordance of its common policy on asylum with the Refugee Convention. Second development has been the intensification of restrictive and security-oriented discourse which pervades recent debate on refugees and asylum seekers in Europe and which once also formed part of the context that lead to the adoption of the contested provisions into the Qualification Directive.

The aim of this paper is to provide an insight into the issue of possible normative conflict between the relevant provisions of the Qualification Directive and the Refugee Convention. It explains the background and scope of the preliminary question asked by the Czech Supreme Administrative Court, analyses legal arguments related to the (non)compliance of Article 14 (4) and (6) of the Qualification Directive with the Refugee Convention, and, last but not least, addresses some of the more general considerations pertaining to the issue of criminal refugees and the tension between the protection needs of refugees and security interests of the country of asylum, explaining the delicate balance of these values as reflected in the relevant provisions of the Refugee Convention.

2. Setting out the scene: relevant legal regulation

2.1. Relevant provisions of the Refugee Convention and Qualification Directive

Article 1C contains cessation clauses of the refugee definition, setting out an exhaustive list of six reasons for cessation. Under this provision:

„C. This Convention shall cease to apply to any person falling under the terms of section A if:

1 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted
(1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily re-acquired it; or
(3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
(4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
(5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
(6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.

Article 33 (1) of the Refugee Convention may be described as a cornerstone of the refugee protection guaranteed under the Convention, containing one of the most fundamental rights accorded to refugees, the principle of non-refoulement. According to this principle: “No 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.”

Article 33 (2) of the Refugee Convention provides for an exception to the principle of non-refoulement. According to this exception, the benefit of the principle of non-refoulement “may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.“

Article 14 (4) of the Qualification Directive stipulates that “Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:
(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;
(b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.”

Article 14 (6) of the Directive further adds that “Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31, 32 and 33 of the Geneva Convention in so far as they are present in the Member State.”

2.2. Relationship between the Refugee Convention and Qualification Directive
Since the main topic of this paper is the issue of possible normative conflict between the Refugee Convention and particular provisions of the Qualification Directive, it seems useful to briefly sketch out the mutual relationship between these sources of law.
The Refugee Convention represents a foundation of the international refugee protection regime. Most of the countries of the world and all the Member States of the European Union are parties to the Convention. The Common European Asylum System of the EU is based on the Refugee Convention and explicitly acknowledges the Convention as a fundament of international obligations of the EU Member States towards refugees.

In the EU primary law reference to the Refugee Convention is included in Article 78 (1) of the Treaty on the Functioning of the EU which provides that “The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.” (emphasis added)

Further, Article 18 of the Charter of the Fundamental Rights of the EU states that “[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.” (emphasis added)

In the EU secondary law, the central role of the Refugee Convention in the adoption, interpretation and application of the Qualification Directive is repeatedly confirmed by the text of the Directive itself in its preamble.

Recital 3 of the preamble states that the Common European Asylum System is “based on the full and inclusive application of the Geneva Convention …”. The following recital 4 provides that “The Geneva Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees.” Further reference to the Refugee Convention appears in recital 23 of the preamble according to which “[s]tandards 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.” (emphasis added) The list is completed by recital 24 of the preamble which provides that “It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.”

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2 There are currently 145 State Parties to the Convention and the Protocol of 1967.
3 The recital 3 of the Qualification Directive in full reads as follows: “The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the Status of Refugees (‘the Geneva Convention’), as supplemented by the New York Protocol of 31 January 1967 (‘the Protocol’), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.”
The CJEU has also repeatedly confirmed in its case-law that the Refugee Convention is the primary source and guiding document of the Qualification Directive and the application of EU asylum law.4

3. Rationale behind Article 14 (4) and (6) of the Qualification Directive: reflections from the drafting history

Article 14 (4) and (6) of the Qualification Directive provides for the possibility to end, revoke or refuse renewal of refugee status under the Directive based on security concerns of the Member States.

The drafting history of the text of the first Qualification Directive 2004/83 (the wording of the relevant provisions has been adopted into the recast Directive 2011/95 without any changes) reveals strong impetus on part of the Member States to project their security concerns into the Qualification Directive. This impetus emanated from the tense security situation prevailing at that time, following the terrorist attacks in the U.S. and Europe. As pointed out by Elspeth Guild and Madeline Garlick, “[n]egotiations on the Qualification Directive text had begun in the aftermath of the attacks of 11 September 2001 on the US, and were continuing when bombs killed civilians in the Spanish metro system in 2004, in a period when European and other States were deeply engaged in efforts to analyse, predict, and address the threat of terrorist action inside their own borders.”5

As observed by Maria Tereza Gil-Bazo, the Commission’s original proposal on non-refoulement was first amended to include an exception to the principle, mirroring Article 33(2) of the Geneva Convention. A few weeks later this newly added paragraph had been deleted and security concerns had instead become a ground for exclusion, rather than an exception to non-refoulement. Member States then became divided over these two options of incorporating security concerns into the Directive. “Belgium, Finland, the Netherlands, and Sweden – supported by the Commission – opposed security concerns as a ground for exclusion, which they understood as being contrary to the Geneva Convention by effectively expanding Article 1F of the said treaty. In their view, security considerations should constitute an exception to the principle of non-refoulement, given that a provision in this regard would mirror Article 33(2) of the Geneva Convention.”6

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4 See e.g. judgment of the Court of Justice of the European Union (Grand Chamber) of 9 November 2010 (C-57/09 and C-101/09), Bundesrepublik Deutschland v B and D, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0057, para 77: “…that the 1951 Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the directive for determining who qualifies for refugee status and the content of that status were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria (Salahadin Abdulla and Others, paragraph 52, and Case C-31/09 Bolbol [2010] ECR I-0000, paragraph 37).”


Eventually, arrangement under Article 14 (4), (5) and (6) has made its way into the final text of the Directive.

In its assessment for the proposal of the recast Qualification Directive, the European Commission briefly assessed also the provisions of Article 14 (4) and (6). It hinted that the current wording of the provisions was not in compliance with the Refugee Convention: “By completely eliminating the possibility for derogation from the level of rights that should be guaranteed to beneficiaries of international protection, option 2 would raise the standards provided by the current Qualification Directive. It would also ensure full compatibility of its standards with the Geneva Convention and consistency in the application of these standards throughout the EU.” 7 The Commission concluded that option 2 would have “higher positive effects” in terms of raising standards and ensuring consistency and “should be part of the preferred option.” 8

However, no amendment to the wording of Article 14 (4) and (6) of the Directive has been adopted in the recast Qualification Directive.

4. Reference for preliminary ruling to CJEU by the Czech Supreme Administrative Court

Since its adoption, doubts have been expressed both by commentators and UNHCR regarding the incompatibility of Article 14 (4) and (6) of the Qualification Directive with the Refugee Convention. These concerns have not been settled throughout the years of implementation of the Directive (both first and recast version).

Based on these controversies, the Supreme Administrative Court of the Czech Republic (Nejvyšší správní soud) suspended 9 the first case which appeared before it involving the application of Section 17 para. 1 let. j) of the Asylum Act 10 implementing Article 14 (4) (b) of the Qualification Directive into the Czech domestic law 11 and submitted a reference for preliminary ruling to the CJEU.

The national proceeding concerned Mr. M., a refugee from Chechnya who flee from persecution he had faced (and would face if returned) for his involvement in activities for the independence of Chechnya. He had been repeatedly tortured and many members of his family had been killed. Mr. M. was granted asylum in the Czech Republic according to Section 12

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9 The full text of the Czech Supreme Administrative Court’s decision on suspension of the case and reference for preliminary ruling to the CJEU of 16 June 2016 (No. 5 Azs 189/2015) is available (only in Czech) at: http://nssoud.cz/files/SOUDNI_VYKON/2015/0189_5Azs_1500036_20160701123820_prevedeno.pdf
10 Act No. 325/1999 Coll. on Asylum, as amended.
11 It has been the first case of the application of Article 14 (4) of the Qualification Directive in the Czech Republic to the author’s knowledge and definitely the first such case which has been subject to judicial review by Czech courts.
let. b) of the Czech Asylum Act in 2006. In 2007, Mr. M. was convicted by the Czech criminal court for committing a robbery and extortion and sentenced to nine years imprisonment, with the aggravating circumstance being that he has been a repeat offender (he had already been convicted in 2004 of a robbery and sentenced to three years imprisonment, being released on parole after one year in 2005). In 2008, the Ministry of Interior initiated a proceeding under Section 17 para. 1 let. j) of the Czech Asylum Act, implementing Article 14 (4) (b) of the Qualification Directive, which resulted in a decision of 2014 to revoke the asylum (refugee status under the Qualification Directive) previously granted. Mr. M. appealed to the regional administrative court against the decision, arguing with the incompatibility of Article 14 (4) and (6) of the Qualification Directive (and consequently also of the respective national implementing provisions and the decision based on them) with the Refugee Convention. Following an affirmative judgment of the regional court, Mr. M. lodged a complaint to the Supreme Administrative Court in 2015. The proceeding before the Supreme Administrative Court has subsequently been suspended by a decision of 16 June 2016, referring the case for a preliminary ruling by the CJEU.12

Registered by the CJEU as a case C-391/16 (M v Ministerstvo vnitra), the question asked by the Czech Court is as follows: “Is Article 14(4) and (6) of Directive 2011/95/EU 1 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 invalid on the grounds that it infringes Article 18 of the Charter of Fundamental Rights of the European Union, Article 78(1) of the Treaty on the Functioning of the European Union and the general principles of EU law under Article 6(3) of the Treaty on European Union?”13

Currently, there is no further information publicly available on the proceedings before the CJEU on this question. The opinion of the General Advocate has not yet been submitted.

The submissions of the parties in the national proceedings of Mr. M. as well as the decision of the Supreme Administrative Court submitting the reference for preliminary ruling reflect the main arguments which have been shaping the debate over the (in)compatibility of Article 14 (4) and (6) of the Qualification Directive with the Refugee Convention and which are briefly presented and analysed below.

5. Analysis of legal arguments related to the (in)compatibility of Article 14 (4) and (6) of the Qualification Directive with the Refugee Convention

5.1. Arguments for incompatibility

The main arguments suggesting the incompatibility of Article 14 (4) and (6) of the Qualification Directive with the Refugee Convention are the following.

12 For more details see the Czech Supreme Administrative Court’s decision of 16 June 2016 (No. 5 Azs 189/2015), op. cit.

Article 1C of the Refugee Convention contains an exhaustive list of reasons for cessation of refugee status. It is only in these situations when one ceases to be a refugee under the Refugee Convention. Correspondingly, only these circumstances can result in a cessation of the status (asylum) granted to a person based on the fact that he or she is a refugee under the Refugee Convention. Article 1C is one of the provisions to which no reservations are allowed under Article 42 (1) of the Refugee Convention, representing one of the fundamental provisions characterizing the legal regime of the protection of refugees under the Convention. Therefore, adding further reasons for cessation (ending, revocation) of the refugee status is incompatible with the Refugee Convention.

On the other hand, reasons for revocation, ending or refusal to renew the refugee status under Article 14 (4) of the Qualification Directive copy the reasons which allow exception to the principle of non-refoulement under Article 33 (2) of the Refugee Convention (person being a danger to the security of the host country or a danger to the community of that country following a conviction by a final judgment of a particularly serious crime). However, Article 33 (2) of the Refugee Convention does not provide for a cessation of refugee status. A person to whom Article 33 (2) of the Convention applies does not cease to be a refugee under the definition contained in Article 1 of the Convention (the reasons for cessation of a refugee status are enumerated solely in Article 1C of the Convention). On the contrary, a refugee to whom Article 33 (2) of the Convention applies continues to be a refugee under the Convention, including all the corresponding rights accorded by the Convention with the sole exception of one of these rights, the right not to be refouled. This is also confirmed by the very wording of the provision under which the benefits of a principle of non-refoulement according to Article 33 (1) of the Refugee Convention may not “be claimed by a refugee whom there are reasonable grounds …“. (emphasis added)

It follows that the Refugee Convention and the rights it acknowledges to refugees (with the possible exception to the principle of non-refoulement), continue to apply to the person who falls within the scope of Article 33 (2), if – and so long as – he stays in the territory of the host country. The ECRE and ELENA analysis reaches the same conclusion, observing that “[a] refugee without Convention protection against refoulement nevertheless remains a refugee, and, if remaining on the territory of the host state, retains those Convention rights, other than non-refoulement, that accrue to a refugee lawfully present in a host state.”

Therefore, the provisions permitting revocation of, ending of or refusal to renew refugee status under Article 14 (4) of the Qualification Directive do not in reality implement Article 33 (2) of the Refugee Convention, but instead enlarge the list of reasons for cessation of refugee status under the Article 1C of the Refugee Convention. Since such an enlargement is

14 Article 42 (1) of the Refugee Convention: „At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1, 3, 4, 16(1), 33, 36-46 inclusive.”


16 Moreover, this provision of the Refugee Convention has been by far rendered obsolete by the absolute prohibition of refoulement under both customary and conventional international law of human rights.
forbidden by the exhaustive nature of Article 1C, it follows that Article 14 (4) of the Qualification Directive (or rather the actions of the Member States it allows) is in breach of the Member States’ commitments from the Refugee Convention.

By the same token, it has been argued that Article 14 (4) of the Qualification Directive is contrary to Article 1F of the Refugee Convention. Article 1F of the Refugee Convention sets out an exhaustive list of reasons for excluding a person from a definition of a refugee because of the abhorrent acts he or she has committed. According to Article 1F, “[t]he provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

There are no temporal or geographical limits to application of the exclusion clauses under Articles 1Fa) and 1Fc) of the Refugee Convention and it has been accepted that even acts committed after the entry to the territory of the host country and a recognition as a refugee can lead to the exclusion of the person from the refugee definition and thus from the scope of the Convention. However, this has not been the case for serious non-political crimes falling under Article 1Fb) exclusion ground. These crimes can only lead to exclusion if committed “outside the country of refuge prior to his admission to that country as a refugee”. Crimes committed after the admission (entry) of a refugee to the host country can (and should) be prosecuted and punished by the host country, as they are committed within its jurisdiction. However, they cannot lawfully lead to exclusion of that person (already a recognized refugee) from the refugee definition under Article 1F.

It follows that by allowing for the refugee status to be revoked for reasons foreseen by Article 33 (2) of the Refugee Convention, Article 14 (4) of the Qualification Directive arguably serves as an additional exclusion ground. This represents a prohibited widening of the scope of the exclusion clauses under Article 1F of the Refugee Convention, as there is also an exhaustive list of exclusion grounds while no reservations to Article 1F are allowed under Article 42 (1) of the Convention.17

As illustrated below, there has been a rather strong support for this line of argumentation both among commentators and professional associations, such as European Council on Refugees and Exiles, European Legal Network on Asylum or International Association of Refugee Law

17 A separate, although interconnected issue concerns the Article 14 (5) of the Qualification Directive and its (in)compatibility with Article 1F of the Refugee Convention. However, this is beyond the scope of the present paper. For more on the issue see e.g. GUILD, Elspeth; GARLICK, Madeline. Refugee Protection, Counter-Terrorism, and Exclusion in the European Union. Refugee Survey Quarterly. 2011, Vol. 29, No. 4, p. 73. See also UNHCR. UNHCR comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, (COM(2009)551, 21 October 2009), 29 July 2010, pp. 13-14, available at: http://www.refworld.org/docid/4c503db52.html
Judges. In the same spirit, objections regarding the incompatibility of Article 14 (4) and (6) of the Qualification Directive with the Refugee Convention have also been presented by UNHCR.

According to Helene Lambert, Article 14 (4) of the Qualification Directive “is contrary to the Refugee Convention because it is based on a misreading of the purpose of Article 33 (2) in the Refugee Convention. Article 33(2) provides that a refugee whom there are reasonable grounds for regarding as a danger to the security or the community of the country in which he or she took refuge may not claim the benefit of the principle of non-refoulement; it does not provide that such a person may not benefit from the provisions of the Refugee Convention at large. Article 33(2) is not an exclusion clause.”

Maria Tereza Gil-Bazo also concludes that „Article 14 paragraphs 4 and 5 include what constitute de facto provisions on exclusion, going beyond what is permissible by the Geneva Convention“.

The author speaks of an “unfortunate wording of these provisions”.

According to Elspeth Guild and Madeline Garlick, “Articles 12, 14, and 17 of the Qualification Directive clearly highlight the concerns harboured by Member States regarding the possibility that people who had engaged in heinous acts could seek protection within their territories. … This political and legislative climate, in which far-reaching legal tools were sought to address the apparent dangers, resulted in negotiations on the new Directive at EU level that failed to closely question the need for exclusion clauses going beyond previous standards in refugee law. With the European Parliament in a purely consultative role at that time, Member States’ perspectives dominated the process. Thus the various amendments that took the Qualification Directive’s exclusion provisions beyond the Refugee Convention and Protocol, and apparently sought to restrict other complementary forms of protection, prevailed.”

Similarly, the authors to the Commentary to the Czech Asylum Act conclude that Article 14 (4) of the Qualification Directive is contrary to the Refugee Convention. It effectively breaches Article 42 (1) of the Refugee Convention prohibiting any reservations by the State Parties to Article 1 of the Refugee Convention since it confuses cessation clauses stipulated in Article 1C with an exception to the prohibition of refoulement under Article 33 (2) of the Refugee Convention. Consequently, Section 17 para. 1 let. i) and j) of the Asylum Act implementing Article 14 (4) of the Qualification Directive into the Czech domestic law.

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20 Ibid, p. 16.
should never be applied in order to live up to the obligations of the State under the Refugee Convention.”

European Council on Refugees and Exiles and European Legal Network on Asylum reach a similar conclusion, stating that “Article 14(4) serves no purpose other than to attempt to expand the criteria for exclusion from refugee status in ways the Convention does not permit” and “purports to permit state practices that literally cannot fail to violate the Refugee Convention.” Therefore, „Member states have no lawful alternative but to never apply article 14(4).”

The manual for refugee law judges relating to the Qualification Directive issued by the International Association of Refugee Law Judges concludes in relation to Article 14 (4) of the Qualification Directive that the Directive is “here seeking to introduce an additional basis for exclusion not previously known to either the Convention or international refugee law” and allows for a termination of a refugee status to persons who are entitled to it under the Convention.

Last but not least, the conclusion regarding the incompatibility of Article 14 (4) of the Qualification Directive with the Refugee Convention has been repeatedly stated by UNHCR. According to its statement, „Article 14 (4) expands the grounds for exclusion far beyond the clauses enshrined in Article 1 (F) of the 1951 Convention and … deprives the concerned individual from the refugee status on the grounds that he/she poses a danger to the security or to the community of the host Member State. … Article 14 (4) of the Directive runs the risk of substantive departure from the exclusion clauses of the 1951 Convention, by adding the provision of Article 33 (2) of the 1951 Convention (exceptions to the non-refoulement principle) as a basis for exclusion from refugee status. Under the Convention, the exclusion clauses and the exception to the non-refoulement principle serve different purposes.” As a result, “UNHCR recommends that when assessing cessation, revocation, or exclusion, Member States should refer to the 1951 Convention rather than to the Directive’s corresponding provisions.” UNHCR has raised similar objections already to the proposal of the first Qualification Directive 2004/83, stressing that “Article 33(2) was not, however, conceived as a ground for terminating refugee status (see comments to Article 21 (2-3).

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24 Ibid. (emphasis added)
Assimilating the exceptions to the non-refoulement principle permitted under Article 33(2) to the exclusion clauses of Article 1 F would therefore be incompatible with the 1951 Convention. Moreover, it may lead to a wrong interpretation of both Convention provisions.²⁹

5.2. Arguments for compatibility and their assessment

Generally, there are considerably less voices to be found in favour of compatibility of Article 14 (4) and (6) of the Qualification Directive with the Refugee Convention in the academic discourse. The arguments in favour of the compliance are usually reflected in the positions of Member States.³⁰ In addition to their resonance in the preparatory works on the Qualification Directive, the author extracts these arguments from the position of the Czech Ministry of Interior in the case of Mr. M. and positions of several other Governments of Member States intervening in the proceedings before the CJEU in the present case, as they have been cited by the representatives of the Czech Ministry of Interior on several occasions.³¹

Qualification Directive sets out higher standard than the Refugee Convention

One of the leading arguments is that Article 14(4) and (6) of the Qualification Directive is compatible with the Refugee Convention because the Directive sets a higher standard of protection and rights in the refugee status accorded based on its provisions. Therefore, stripping a person of this standard has no bearing on the commitments of the state following from Article 1 of the Refugee Convention, since the Refugee Convention does not foresee granting any form of a distinct legal status or residence permit.

This argument is therefore essentially based on the distinction between the terms refugee and status of refugee within the meaning of the Qualification Directive and the provisions of the Refugee Convention.

A refugee is defined in Article 1A (inclusive definition) and Articles 1D, 1E and 1F (exclusion clauses) of the Refugee Convention. One becomes a refugee at the moment he or she fulfils the definition in the Refugee Convention. As the UNHCR Handbook explains, „[t]his would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but


³⁰ As pointed out by the Czech Supreme Administrative Court in its decision referring the case for preliminary ruling to the CJEU: “One cannot overlook that these arguments [in favour of compatibility] have been and currently are subject to a discussion and criticism. However, they cannot be completely ignored.” (“Nutno připustit, že tyto názory byly a stále jsou předmětem diskuse a kritiky, nicméně nelze je zcela přehlžet.”) Czech Supreme Administrative Court’s decision on suspension of the case and reference for preliminary ruling to the CJEU of 16 July 2016 (No. 5 Azs 189/2015), op. cit.

³¹ E.g. arguments presented by the representatives of the Czech Ministry of Interior presented at the Expert Seminar for Judges of Administrative Courts on Asylum (20-22 March 2017 in Kroměříž, Czech Republic) or at the Conference on Current Issues of Asylum and Migration Law organized by the Office of the Public Defender of Rights (14 September 2016 in Brno, Czech Republic). It follows that all of the several intervening Member States presented the views in favour of compatibility of Article 14(4) and (6) with the Refugee Convention.
declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.\(^\text{32}\)  

The definition of a refugee is reflected in Article 2(d) of the Qualification Directive, according to which “‘refugee’ means a third-country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply”. The definition is not completely identical to the definition contained in Article 1A of the Refugee Convention.\(^\text{33}\)  

Pursuant to Article 2(e) of the Qualification Directive “‘refugee status’ means the recognition by a Member State of a third-country national or a stateless person as a refugee”. Döring emphasizes the term recognition in this provision, reminding that the recognition of refugee status is a declaratory act.\(^\text{34}\)  

Article 13 of the Qualification Directive further stipulates that “Member States shall grant refugee status to a third-country national or a stateless person who qualifies as a refugee in accordance with Chapters II and III.” This provides for an enforceable right of the person concerned to be granted the refugee status. The person who has been accorded the refugee status under Article 13 enjoys the rights provided for by the Directive in Chapter VII.\(^\text{35}\)  

This implies that the recognition of a person as a refugee materializes in the form of granting a refugee status pursuant to Article 13 of the Directive. However, as Battjes points out, there are three different statuses for persons recognized as refugees under the European asylum law\(^\text{36}\) – in addition to the “regular” refugee status under Article 13, there are two additional types of statuses for persons who fall under the definition of refugee (and have been recognized as such in the past) but are not entitled to the benefits of the refugee status under Article 13. First of them is “Article 14 (6) refugee status” (entitled only to a limited set of rights following the application of Article 14 (4) of the Directive) and the second is “Article 24 (1) refugee status” (not entitled to a residence permit provided for in this provision).\(^\text{37}\) For the purpose of this paper, Article 14 (6) refugee status is relevant for further enquiry.  

Ingo Kraft points out the difference in terminology between Article 13 and its use of a term “refugee status” on the one hand and Article 14 (4) of the Qualification Directive with its use  


\(^{34}\) Ibid, p. 1124. (emphasis included in the original text)  

\(^{35}\) Ibid.  


\(^{37}\) This categorization is used e.g. by Hemme Battjes. Ibid, p. 486 et seq.
of a term “the status granted to a refugee” on the other. The recital 32 of the Directive provides that “[a]s referred to in Article 14, ‘status’ can also include refugee status.” (emphasis added) It is doubtful whether there is a substantial difference between the term “refugee status” under Article 13 and “status granted to a refugee” under Article 14 (4), since the headline of Article 14 speaks of “revocation of, ending of or refusal to renew refugee status”. As Ingo Kraft observes, the use of the term “refugee status” has been changed from the original proposition of Article 14B(4) during the negotiation of the final text in the legislative process in order to “accommodate different views of Member States concerning the issue of status of persons, to whom Article 33(2) GC applies”. However, according to Battjes, the preamble recital 32 should be read as dealing only with situations concerning Article 14 (5) of the Directive. Most probably, the refugee status granted under Article 13 of the Directive is the same refugee status which is revoked, ended or refused to renew under Article 14 (4) of the Directive.

Article 14 (6) of the Qualification Directive enumerates certain rights under the Refugee Convention to which refugees are entitled after Article 14 (4) of the Directive have been applied on them. According to Article 14 (6) they “are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31, 32 and 33 of the Geneva Convention in so far as they are present in the Member State.” According to Ingo Kraft, the purpose of this provision is to “bridge a possible gap” between still being a refugee in the sense of Article 1 and Article 33 (2) of the Refugee Convention and despite of that being excluded from the Directive’s refugee status set out in Article 2(e) of the Directive. As he put it, Article 14 (6) is a compromise in the “dogmatic controversy” of how the concept of Article 33 (2) of the Refugee Convention should be integrated into the Directive.

In general, the scope of rights under the Refugee Convention is construed (and should be interpreted) as to increase following the recognition of a person as a refugee under the Convention. This follows i. a. from the UNHCR’s position on the rights of asylum seekers under the Convention:

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38 The same applies also to Article 14 (5) of the Qualification Directive.
41 This is supported also by Ingo Kraft’s conclusion according to which “[i]t is doubtful, whether in regard to these provisions the conclusion can be drawn that the Directive acknowledges the existence of the attribution of a status which is not identical to the formal recognition leading to a ‘refugee status’ in the sense of Article 2(e).” KRAFT, Ingo. Asylum Qualification Directive 2011/95/EU (Articles 11-14), op. cit., p. 1224.
43 Ibid. However, Article 33 (2) of the Refugee Convention is integrated into the Qualification Directive by a different provision, namely Article 21 (2) of the Directive, according to which “[w]here not prohibited by the international obligations mentioned in paragraph 1, Member States may refund a refugee, whether formally recognised or not, when: (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.” Pursuant to Article 21 (3) of the Directive, “Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies.” See also GIL-BAZO, Maria Tereza. New Issues in Refugee Research. Research Paper No. 136. Refugee status, subsidiary protection, and the right to be granted asylum under EC law, op. cit., p. 15.
“A closer examination of the 1951 Convention reveals that the benefits provided under the various provisions of the 1951 Convention have different levels of applicability depending on the nature of the refugee's sojourn or residence in the country. The most fundamental rights (Articles 3 and 33), and some others [see, for example, Articles 7(1), 8, 13] are extended to all refugees. Other basic rights are applicable to any refugee present “within” the country (for example Articles 2, 4, 20, 22, 27), even illegally (see Article 31). Other provisions apply to refugees “lawfully in” the country (Articles 18, 26 and 32), while certain of the more generous benefits are to be accorded “to refugees lawfully staying [résidant régulièrement] in [the] territory” of the country concerned [Articles 15, 17, 19, 21, 23, 24 and 28; see also Articles 14, 16(2) and 25]. The drafting history shows that the English term “lawfully staying” is based on the French, and that a distinction was intended between basic rights accorded to all refugees (and that would, to some extent at least, include asylum seekers whose refugee status has not yet been determined) and other rights and benefits accorded to those accepted as legal residents. These gradations in treatment allowed by the 1951 Convention are therefore a useful yardstick in the context of defining reception standards for asylum seekers, from the perspective of international refugee law.”

Based on the argument of gradations in treatment provided for by the Refugee Convention it follows that once a person has been recognized as a refugee (i.e. it has been determined that he or she fulfils the definition of a refugee under the Convention) and continues to fulfil the refugee definition, he or she should be entitled to the scope of rights under the Convention which is undoubtedly wider than the minimal scope of rights usually acknowledged to asylum seekers.

The Refugee Convention does not require the State Parties to issue a residence permit to refugees on their territory. At the same time, it does not condition the enjoyment of Convention Rights by an issuance of a specific residence permit. Even admitting that the Convention allows Contracting States to make the stay of an (already determined) refugee “unlawful” within the meaning of the Convention, which means stripping the refugee of the rights that are to be accorded “to refugees lawfully staying in the territory”, it is difficult to see that it also, based on the application of Article 33 (2) of the Refugee Convention reasons, allows for stripping the refugee of the rights connected with the “lawfully in” status. It may be inferred by interpretation that such a conduct by states may not be in accordance with the object and purpose of the Convention. A fortiori, if the Convention accords some of the rights and benefits to refugees even before a formal recognition of refugee status, its provisions should all the more so apply (and arguably with a wider scope of rights) after the formal recognition of a refugee status has taken place.

This is supported also by James Hathaway’s understanding of the gradation of rights connected to different modes of stay of a refugee in the host country. As James Hathaway observes, the rights of refugees physically present “follow automatically and immediately from the simple fact of being a Convention refugee within the effective jurisdiction of a state party. These primary protection rights must continue to be respected throughout the duration of refugee status, with additional rights accruing once the asylum-seeker’s presence is regularized, and again when a refugee is allowed to stay or reside in the asylum country.”

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45 HATHAWAY, James, C. Rights of Refugees under International Law. Cambridge: Cambridge University Press, 2005, p. 278. (emphasis added) There are altogether five different stages of attachment of a refugee to the host country connected to an expanding scope of rights as the refugee’s relationship with the host country...
With regard to the “lawfully in” standard under the Refugee Convention, James Hathaway explains that “[a]s the degree of attachment between a refugee and a state party increases, so too do the rights which the refugee may claim. All of the rights acquired by simple physical presence … continue for the duration of refugee status. But once a refugee is not only in fact under the jurisdiction of a state party to the Convention, but also lawfully present in that country, he or she acquires three additional rights.” These rights are enshrined in Articles 18, 26 and 32. Hathaway enumerates three circumstances under which a refugee is “lawfully in” the host country under Refugee Convention: first, period of time for which his or her admission is authorized (even if only for a few hours), second, while his or her claim to refugee status is being verified, and third, if the reception state opts not to verify his or her refugee status, including when formal status determination procedures are suspended in favour of temporary protection regimes.

As to the “lawfully staying” standard under the Refugee Convention, Hathaway explains that “a refugee is lawfully staying (résidant régulièrement) when his or her presence in a given state is ongoing in practical terms. … So long as the refugee enjoys officially sanctioned, ongoing presence in a state party, he or she is lawfully staying in the host country; there is no requirement of a formal declaration of refugee status, grant of the right of permanent residence, or establishment of domicile.” As Hathaway further explains, “[m]ost fundamentally, ‘résidence régulière’ is not synonymous with such legal notions as domicile or permanent resident status. Instead, the drafters emphasized that it was the refugee’s de facto circumstances which determine whether or not the fourth level of attachment is satisfied. The notion of ‘résidence régulière’ is ‘very wide in meaning … [and] implie[s] a settling down and, consequently, a certain length of residence.’ While neither a prolonged stay nor the establishment of habitual residence is required, the refugee’s presence in the state party must be ongoing in practical terms.” According to Grahl-Madsen, lawful stay may be implied from an officially tolerated state since the refugee is allowed to remain in the country, even without securing a residence permit: “a refugee is ‘résident régulièrement’ (‘lawfully staying’) . . . if he is in possession of a residence permit (or its equivalent) entitling him to remain there for more than three months, or if he actually is lawfully present in a territory beyond a period

depens (these five stages include being simply subject to a state’s jurisdiction, being physically present within a state’s territory, being lawfully present within the state, being lawfully staying in the country and finally, being able to demonstrate durable residence in the asylum state. James Hathaway calls it a “five-part assimilative path”. See HATHAWAY, James, C. Rights of Refugees under International Law. Cambridge: Cambridge University Press, 2005, p. 156.

48 HATHAWAY, James, C. Rights of Refugees under International Law, op. cit., p. 730.
49 HATHAWAY, James, C. Rights of Refugees under International Law. Cambridge: Cambridge University Press, 2005, p. 186-187. (references omitted) The author further adds that it was not accepted to be translated by “lawfully resident” in the English language version. Ibid., p. 186.
of three months after his entry (or after his reporting himself to the authorities, as the case may be).”\textsuperscript{50}

Similarly, the UNHCR explains that:

“The last term “lawfully staying” is based on a translation of the French term “resident régulièrement”, and implies more than mere presence; it may be described as a “permitted, regularized stay of some duration”. Indeed, while there is no definitive definition of this term, it is reasonable to conclude that “stay”, while not necessarily implying a durable residence, does clearly mean more than a transit stop, and “embraces both permanent and temporary residence, but not the situation of refugees in transit or temporarily visiting a country for special reasons and for a specific period.” The “lawful” part of the expression, is normally to be assessed against national laws and regulations. The drafting history thus reveals that a distinction was intended between the basic rights accorded to all refugees (including asylum-seekers) and other rights and benefits accorded to those accepted as legal residents (persons with lawful stay). Formally recognized refugees (based on individual or group recognition as prima facie refugees) whose status in the country has been permitted and regularized by the granting State and who reside (i.e. have temporary or permanent residence) in the country of asylum, would therefore be considered to have “lawful stay” in their host country, and consequently, the right to the maximum and full range of rights and benefits accorded by the 1951 Convention.”\textsuperscript{51}

As already explained, the revocation of refugee status within the meaning of the Article 14 (4) Qualification Directive means only the revocation of a refugee status previously granted under Article 13 of the Directive, but has no bearing on the fact that the person continues to be a refugee under the Refugee Convention (and also the Directive) definition.\textsuperscript{52}

Furthermore, as confirmed by the CJEU in H. T., if the residence permit issued to beneficiaries of international protection is abolished based on “compelling reasons of national security or public order” pursuant to Article 24 (1) of the Qualification Directive, the person concerned (a refugee under the Convention) does not lose his or her entitlement to stay on the territory of the state on a legal basis different from Article 24 (1) and continues to retain the refugee status under the Directive and all the corresponding rights, unless Article 14 (4) is used to revoke the status.\textsuperscript{53} By analogy, similar logic should also apply to the loss of a refugee status pursuant to Article 14 (4). Accordingly, losing the Directive’s refugee status and the residence permit that goes with it because Article 14 (4) has been applied does not imply a loss of the refugee’s entitlement to stay in the territory of the state on a different legal basis. In any case, the application of Article 14 (4) of the Directive has no automatic bearing on the


\textsuperscript{52} This is supported also by the wording of Article 13 of the Qualification Directive: “Member States shall grant refugee status to a third-country national or a stateless person who qualifies as a refugee in accordance with Chapters II and III.” (emphasis added)

\textsuperscript{53} See para. 94 of the CJEU judgment: “… it is also necessary to add that the main consequence of a Member State implementing the derogation provided for in Article 24(1) of Directive 2004/83 is that the refugee in question loses his residence permit, even if he, as in the case at issue in the main proceedings, is authorised, on another legal basis, to remain lawfully in the territory of that Member State.” Judgment of the Court of Justice of the European Union of 24 June 2015 (C-373/13), H. T. v Land Baden-Württemberg, para. 94, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=165215&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=342149
classification of stay of the person from the point of view of the Refugee Convention, since the Convention adopts a more nuanced approach as explained above.

According to Battjes, “[t]he Qualification Directive does not imply that the concerned refugees [refugees under Article 14 (6) of the Directive] are ‘lawfully present’ (although it does not prohibit Member States from granting a permit to them).” 54 However, this seems a rather contradictory conclusion in light of the above cited analysis of the “lawfully present” and “lawfully staying” terms under the Refugee Convention. At the same time, it is rather inconsistent from a practical point of view. As ECRE and ELENA rightly observe, indeed, “[a] refugee who loses the Convention right to non-refoulement but cannot be returned to the country of origin, has obviously undergone a process of law, and having been allowed to remain in the host state, remains lawfully present.” 55 Practically, persons to whom Article 14 (4) of the Qualification Directive has been applied and who cannot be returned to their country because of the absolute prohibition of non-refoulement under international human rights law would (or should) indeed be staying in the territory of the state on some form of a de iure or de facto tolerated stay or leave to remain. 56 This understanding has been also supported by the European Commission’s reading of the provision presented in its assessment for the proposal of the recast Qualification Directive where the Commission stated that “the limitation of rights under Article 14(4)-(6) relates to a certain kind of ‘tolerated’ status for the persons concerned.” 57

It follows that the person to whom Article 14 (4) of the Qualification Directive has been applied is, despite the fact of being deprived of the refugee status under Article 13 of the Directive, nevertheless still entitled not only to the minimal scope of rights accorded by the Refugee Convention to refugees physically present, even illegally, on the territory, but also – at minimum – to the treatment corresponding to the “lawfully in” standard under the Refugee Convention (i.e. with entitlements to rights under Articles 18 or 26), and arguably even to the “lawfully staying” standard of rights.

UNHCR position seems to incline to the lower, “lawfully in” standard, as it concludes that “‘[s]tatus granted to a refugee’ is therefore understood to refer to the asylum (‘status’) granted by the State rather than refugee status in the sense of Article 1A (2) of the 1951 Convention (see comment on Article 2(d)). States are therefore nonetheless obliged to grant the rights of the 1951 Convention which do not require lawful residence and which do not foresee exceptions for as long as the refugee remains within the jurisdiction of the State concerned.” 58

56 See below for more information on this issue.
Comparing this conclusion to the standard guaranteed by Article 14 (6) of the Qualification Directive, it follows that the scope of the Convention rights guaranteed by Article 14 (6) obviously provides a lower standard and narrower scope of rights than is accorded by the Refugee Convention for refugees for that situation (be it the situation of a “lawfully in” or “lawfully staying” refugee).

The selection of the rights acknowledged within the Article 14 (6) status does not make the analysis easier. Even considering that the Article 14 (6) status has been meant to encompass only the rights that the Refugee Convention guarantees for the lowest standard of stay, i.e. to refugees physically (even illegally) present on the territory of the State, there are some of these rights omitted (e.g. Articles 13, 20 or 27). As such, this might not be perceived as a problem for, as Battjes observes, since the Directive refugee status does not address all the rights under Refugee Convention explicitly, it is not surprising that Article 14 (6) of the Directive does not mention all the relevant Convention benefits either. However, the inconsistency of selection of rights accorded under Article 14 (6) of the Directive goes even further, as there are rights not explicitly enshrined in the Directive’s refugee status under Article 13 which are, on the other hand, enlisted in Article 14 (6) status. This concerns rights under Article 3 (non-discrimination) and Article 4 (religion) of the Refugee Convention. As Battjes points out, “[i]n this respect, the legal position of refugees meant in Article 14(6) QD is therefore, surprisingly, stronger than that of Directive refugee status beneficiaries.” This would seem to suggest that the list of rights under Article 14 (6) is, contrary to the refugee status under Article 13 of the Directive, meant as an exhaustive reference to rights under the Refugee Convention which the Member States are obliged to guarantee to refugees to whom Article 14 (4) had been applied.

To sum up, application of Article 14 (4) of the Qualification Directive would most probably result in non-compliance with the required standard of treatment and rights provided for by the Refugee Convention. It is important to note that Article 14 (4) of the Qualification Directive does not oblige Member States to end, revoke or refuse to renew the refugee status if the conditions are met, it only provides for such a possibility dependent on Member States’ discretion. However, should the Member States apply this provision, it follows that they are in risk of breaching their obligations under the Refugee Convention in individual cases.

Article 33 (2) of the Refugee Convention permits refoulement which effectively implies loss of all the other rights under the Convention too

60 Ibid.
61 Practically, one of the rights which is almost certainly guaranteed to these persons under the Refugee Convention (connected to the “lawfully in” standard) and which might not be guaranteed to refugees in individual cases under the respective national legislation implementing the Article 14 (6) refugee status is the right to self-employment under Article 26 of the Convention. As J. Hathaway explains, “refugees who are lawfully present are explicitly entitled to engage in self-employment. While permission to engage in employment or professional practice may be withheld until the refugee is authorized to remain in the asylum state (for example, consequent to the formal recognition of refugee status), mere lawful presence entitles the refugee to engage in independent income-gathering activities. This right is pragmatic means by which to allow refugees to fund their own necessities of life, but without thereby sanctioning integration into the more organized structures of the asylum state’s economic life.” HATHAWAY, James, C. Rights of Refugees under International Law. Cambridge: Cambridge University Press, 2005, p. 657. (references omitted)
Another argument proposes that since the Article 33 (2) of the Refugee Convention permits to refoüle the person concerned, which means to remove him from the territory of the State, it effectively implies a loss of all the other rights accorded to refugees under the Convention too. According to this argument, by a “normal” operation of Article 33 (2) of the Refugee Convention the person would leave the territory of the host state and be returned to his or her country of origin which would automatically mean losing entitlement to all the other rights under the Convention. However, because of the development of the principle of non-refoulement in the international human rights law, this result foreseen by the Refugee Convention under Article 33 (2) of the Convention cannot take place. Despite that, it follows that even though the Member States are not allowed to remove the person, they are nevertheless not obliged to provide him or her the rights connected to the status of refugee because from the Refugee Convention’s point of view the person would not be present in the territory of the State at all. Therefore, the standard offered by the Qualification Directive to these persons is even higher than the Refugee Convention, since it acknowledges at least some basic rights stipulated by the Refugee Convention which are enlisted in the status under Article 14 (6) of the Directive.

However, this argument seems to overlook the fact that Article 33 (2) of the Refugee Convention in no way counts with the fact that all of the persons possibly falling within the scope of that provision will be necessarily and surely removed from the territory of the host country. The provision of Article 33 (2) only admits the possibility for the State Parties to refoüle a refugee if the conditions laid down in its provisions are met. Surely, even without the parallel development of the principle of non-refoulement in international human rights law there would be cases when the application of Article 33 (2) of the Convention would not eventually lead to the refugee’s leaving the country. There might be other legal (e.g. lack of cooperation of the receiving state) or actual (e.g. grave health condition of the person concerned making him physically unable to travel) obstacles to removing the person which would effectively prevent the refoülement. Despite that, the Refugee Convention does not provide for any special or different status and treatment of the person falling within the scope of Article 33 (2) in such a scenario.

* A contrario, it follows that if the refugees to whom Article 33 (2) of the Refugee Convention applies remain in the territory of the host country, they are entitled to all the corresponding rights under the Convention as they does not cease to be refugees falling within the personal scope of the Convention. Therefore, it seems to contradict the Refugee Convention to strip such a person of the right accorded by the Convention to (recognized) refugees – which the Article 14 (4) and (6) of the Qualification Directive effectively does – based on the argument that if the person would not be present in the territory of the host country anymore, which the Article 33 (2) makes possible, these rights would not apply either.

* **Protection of security of the host country**

As illustrated above, security concerns of the individual Member States shaped the environment of discussions during preparatory work on the text of the Directive, in the atmosphere of the aftermath of 11 September 2001. Indeed, it has repeatedly been one of the
arguments presented in favour of the Article 14 (4) of the Directive, stating that Member States must be able to protect its security and society from refugees posing danger to them and therefore must be able to deny him the benefits of the refugee status to such a person in accordance with the Directive.

Admittedly, the purpose of Article 33 (2) of the Refugee Convention is the protection of security of the host country against a refugee whose (usually criminal) conduct endangers its national security and/or community, even though it would mean refoulement of the person. However, the development of the absolute prohibition of refoulement in the international law of human rights has made this provision effectively obsolete. As concluded by Sir E. Lauterpacht and D. Bethlehem, “[i]n contrast to the position regarding refugees, the question of exceptions to non-refoulement in a human rights context is straightforward. No exceptions whatever are permitted.” As a result, basically all refugees to whom Article 33 (2) of the Refugee Convention – as well as Article 14 (4) of the Qualification Directive – would apply, cannot be sent back to their countries of origin where they would face a real risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. Therefore, unless they could be expelled to some other third country pursuant to Article 32 of the Refugee Convention, they will stay on the territory of the host country (probably for a considerable period of time, at minimum usually a couple of years, in some cases even decades), despite the application of Article 14 (4) of the Qualification Directive.

In such a situation, it is difficult to see how stripping them of the refugee status under the Directive with all the rights it entails – and effectively stripping them also of most of the rights accorded to them under the Refugee Convention, if applying the standard of Article 14 (6) of the Directive – while at the same time keeping them in the territory of the state should be conducive to enhance the national security and protect community of the country.

The person benefiting from the protection of an absolute prohibition of non-refoulement who may not be removed will be de iure or de facto tolerated on the territory of the state. De iure toleration of the person on the territory would entail some provisional type of residence permit such as a tolerated stay permit or exceptional leave to remain. De facto toleration of the person would effectively mean sanctioning an unregulated and undocumented stay of the person on the territory. The practice of individual Member States in this regard varies, as has been enquired recently by the European Migration Network. For example in Austria, the stay of a person to whom Article 14 (4) and (6) of the Qualification Directive apply “is tolerated”, however, [t]his does not mean that the stay … is legal” and no form of a residence permit is issued to the person. Similarly in Belgium, the person “will have no legal right to

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64 Ibid, response of Austria.
stay on the territory. “When a refugee status was withdrawn, an additional decision is required by the Minister or his representative to also withdraw the residence permit” which entails consideration of proportionality in relation to the ties of the person to the country. There is no real possibility of obtaining a residence permit of any ground, even on humanitarian purpose.\textsuperscript{65} In Luxembourg, “[t]he postponement of removal does not grant any type of residence status. It only allows the individual to remain on the territory” when the person “shall be given humanitarian assistance”.\textsuperscript{66} On the other hand, in the Czech Republic, Germany or Italy there is a possibility to obtain a tolerated stay permit.\textsuperscript{67}

Undoubtedly, at least some form of a residence permit for tolerated stay if a desired solution, as it regularizes the stay of the person on the territory in the domestic legal system in some way and provides a certain guarantee of access to basic rights, if only to the minimum list of rights enumerated in Article 14 (6) of the Directive. There are many practical obstacles to enjoyment of even some fundamental rights, let alone social and economic rights, faced by irregular and undocumented migrants.\textsuperscript{68} With a \textit{de facto} tolerated stay the situation of the person is effectively the same as for other irregular migrants. On the other hand, even a tolerated stay permit usually does not entail a working permit and access to social security system (or only in a very limited scope). Either way, the standard and effective enjoyment of rights of such a person (still being a recognized refugee under the Convention) would be compromised. There is an increased risk of all the accompanying negative phenomena such as illegal work (accompanied by vulnerability to labour exploitation or trafficking) and economic and social marginalization. This may be further exacerbated by the criminal record of some of these persons – at minimum all those falling under Article 14 (4) (b) of the Directive who have been convicted by a final judgment of a particularly serious crime. Reintegration of ex-prisoners into the community, especially after serving a long sentence, is a challenge nevertheless the other circumstances. The precarious legal position and stay of the person (including a possible lack of identification documents and other issues) only adds to this. For example, having a criminal record is a rather serious obstacle to finding a job in itself. Combined with only a tolerated status (even if it would entail a work permit), it makes it almost impossible.

It is difficult to see how these living circumstances resulting from the application of Article 14 (4) and (6) of the Qualification Directive could possibly reduce the danger posed by such a person to the security of the state or prevent him from repeated commission of crimes. On the contrary, these factors which would drive these refugees into poverty and push them to the edge of society seem to increase, rather than decrease, the probability that they will not represent a danger to the society in the future.

\textbf{Conclusion}

\textsuperscript{65} Ibid, response of Belgium.
\textsuperscript{66} Ibid, response of Luxembourg.
\textsuperscript{67} Ibid.
\textsuperscript{68} For more on this issue see e.g. DEMBOUR, Marie-Benedicte; KELLY, Tobias (eds.). \textit{Are Human Rights for Migrants? Critical Reflections on the Status of Irregular Migrants in Europe and the United States}. Oxon-New York, Routedge, 2011.
There has been an on-going debate on the issue of (in)compatibility of Article 14 (4) and (6) of the Qualification Directive with the Refugee Convention both in the academic discourse and among practitioners for a considerable time. Many commentators as well as UNHCR have expressed their view on the implications of Article 14 (4) and (6) of the Qualification Directive for the commitments following from the Refugee Convention.

Now, the voice of CJEU will join this debate and hopefully shed some light to the above-mentioned issues and dilemmas. As Pieter Boeles put it, “[t]he question of the Czech court is important. In my view, a well-reasoned answer can only be given if the ambivalent structure of the Qualification Directive on this point is acknowledged and addressed.”\(^{69}\) It remains to be seen what the result before the CJEU will be. Anyhow, the underlying and more general issue of balancing the security interests and concerns of the States with their human rights obligations under international law will continue to shape the debate and law-making (not only) at the EU level and influence the future heading of the Common European Asylum System. We can only hope that the primacy of the Refugee Convention in this complex setting will not remain only on paper, but will be lived up to also in the practice of Member States who are parties to the Convention.