The Grey Areas of Refugee Protection

The legal and political dimensions of a restrictive temporary status for war refugees

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Abstract

While there exists in the literature on refugees’ rights a broad consensus on the existence of an overlapping and common ground between IHRL and IRL, gaps continue to exist in state implementation of these two legal systems. Concepts of sovereignty and border control continue to take predominance when refugees are the rights-bearers, and this tendency is more pronounced in the event of complementary protection. This thesis investigated the recent creation of a temporary protection status in the Danish Aliens Act by legal method and political case study to understand the interrelation of these systems, as manifested by the ECHR and the Refugee Convention. The legal analysis revealed the amendments’ misinterpretation of the principle of good faith of treaty interpretation. The political reasoning behind the amendment was used to shed light on domestic alignment with international law, in order to clarify the political and moral function of human rights. It was suggested that the main challenge to such misinterpretations remains the separation of human rights with its inherent moral purpose.
# Table of contents

List of abbreviations p. 5

I. Introduction p. 6
1. Amendment to the Danish Aliens Act p. 6
2. Research problem p. 7
3. Aim and research questions p. 8
4. Theory, method and material p. 8
5. Chapter outline p. 8
6. Previous research p. 9

II. Method p. 13
1. Case study p. 13
2. Legal method & material p. 14
3. Material p. 15
4. Delimitations p. 16

III. Theory p. 17
1. Human rights and sovereignty p. 17
2. Political theory on functionality p. 19
3. Political philosophical theory on moral legitimacy and implementation p. 19
4. The application in the ECtHR p. 20

IV. Background p. 21
1. The conflict in Syria p. 21
2. Characterization of conflict p. 21
3. Historical overview of refugee protection in Denmark p. 22

V. Legal analysis p. 23
1. The legal components of Law 153 p. 24
2. Applicable law p. 25
   2.1 Refugee status p. 25
   2.2 Guidelines from the UNHCR p. 26
   2.3 Cessation and return p. 28
   2.4 Summary conclusion p. 31
3. Applicable law on family reunification p. 32
   3.1 The CRC p. 32
   3.2 The ECHR p. 33
   3.3 The Refugee Convention and the UNHCR p. 36
   3.4 Summary conclusion p. 37
<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>VI. Political analysis</td>
<td>p. 37</td>
</tr>
<tr>
<td>1. Conceptual confusion</td>
<td>p. 38</td>
</tr>
<tr>
<td>1.1 Mass influx and temporary protection (TP)</td>
<td>p. 38</td>
</tr>
<tr>
<td>1.2 Complementary protection</td>
<td>p. 38</td>
</tr>
<tr>
<td>1.3 Refugee, alien or asylum seeker?</td>
<td>p. 39</td>
</tr>
<tr>
<td>2. The political reasoning and context</td>
<td>p. 39</td>
</tr>
<tr>
<td>2.1 The general use of legal systems</td>
<td>p. 40</td>
</tr>
<tr>
<td>2.2 Restriction</td>
<td>p. 41</td>
</tr>
<tr>
<td>3. Relation to human rights</td>
<td>p. 42</td>
</tr>
<tr>
<td>3.1 Alignment with jurisprudence of the ECtHR</td>
<td>p. 42</td>
</tr>
<tr>
<td>3.2 Alignment with provisions of the CRC and the ECHR</td>
<td>p. 42</td>
</tr>
<tr>
<td>3.3 Consideration of IRL</td>
<td>p. 45</td>
</tr>
<tr>
<td>4. Conception of armed conflict</td>
<td>p. 45</td>
</tr>
<tr>
<td>4.1 Uncertainty and conjecture</td>
<td>p. 46</td>
</tr>
<tr>
<td>4.2 Cessation and return</td>
<td>p. 47</td>
</tr>
<tr>
<td>4.3 Do new wars make new refugees?</td>
<td>p. 47</td>
</tr>
<tr>
<td>5. Conception of temporary protection</td>
<td>p. 48</td>
</tr>
<tr>
<td>5.1 The institution of asylum</td>
<td>p. 48</td>
</tr>
<tr>
<td>5.2 Protection needs</td>
<td>p. 49</td>
</tr>
<tr>
<td>5.3 Higher burden = higher threshold</td>
<td>p. 49</td>
</tr>
<tr>
<td>VII. Discussion</td>
<td>p. 50</td>
</tr>
<tr>
<td>1. Legal systems of compliance and constraint</td>
<td>p. 50</td>
</tr>
<tr>
<td>1.1 ECtHR jurisprudence: The margin of appreciation and sovereign decision-making</td>
<td>p. 50</td>
</tr>
<tr>
<td>1.2 Legitimacy</td>
<td>p. 51</td>
</tr>
<tr>
<td>1.3 Constraint</td>
<td>p. 52</td>
</tr>
<tr>
<td>2. Human Rights</td>
<td>p. 53</td>
</tr>
<tr>
<td>2.1 The function of human rights</td>
<td>p. 53</td>
</tr>
<tr>
<td>2.2 The rationale of Human Rights</td>
<td>p. 53</td>
</tr>
<tr>
<td>VIII. Conclusion</td>
<td>p. 55</td>
</tr>
<tr>
<td>Suggestions for future research</td>
<td>p. 55</td>
</tr>
<tr>
<td>Bibliography</td>
<td>p. 56</td>
</tr>
</tbody>
</table>
List of abbreviations

IRL: International refugee law
IHRL: International human rights law
IHL: International humanitarian law
Refugee Convention: 1951 Convention relating to the Status of Refugees
CoE: Council of Europe
ECHR: European Convention on Human Rights
ECtHR: European Court of Human Rights
UNHCR: United Nations High Commissioner for Refugees
Vienna Convention: Vienna Convention on the Law of Treaties
UDHR: Universal Declaration of Human Rights
ICCPR: International Covenant on Civil and Political Rights
CAT: Convention Against Torture
CRC: Convention on the Rights of the Child
ICJ: International Court of Justice
ICC: International Criminal Court
L72: The proposed amendment to the Aliens Act
WWII: World War II

List of terms

Explanatory memorandum: The notes presented to parliament containing the intention of the law
I. Introduction

1. Amendment to the Danish Aliens Act

On the World Refugee Day on the 20th of June 2014, the UNHCR reported that forced displacement is the highest since WWII and exceeds 50 million people.\(^1\) To deal specifically with the high number of Syrian asylum applications, The Social Democratic and Social Liberal parties (Socialdemokraterne og Radikale Venstre) of the Danish government recently instigated a change to the Aliens Act. The amendment, which came into effect in February 2015, has three major components: the creation of a temporary protection status\(^2\), a reinterpretation of the grounds for forced return and a limit on family reunification within the first year.

Explicit within the amendment is the idea that conflicts such as the Syrian civil war create refugees which are not within the scope of the Refugee Convention\(^3\), although in fact, most of the refugees fleeing the Syrian conflict had so far actually qualified for Convention status by the Danish Immigration Service.\(^4\) Yet, while having knowledge of this, the press release issued in conjunction with the law proposal (hereinafter L72) originally claimed that the situation of most Syrians would fit this new status.\(^5\) L72 was to be passed in haste, in order to increase its applicability to the forthcoming arrivals of asylum seekers.\(^6\) The subsequent realization that the amendment may not have as far-reaching ability as promised has been the subject of much political controversy. The main right-wing opposition parties Danish Peoples Party (DF) and the Liberal Party (Venstre) claim that the government oversold its bill as restrictive, when it was in fact the loosening of asylum rules in disguise.\(^7\) These parties question why the government is changing

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\(^1\) UNHCR, 2014c

\(^2\) Midlertidig beskyttelses status. The term is confusing, because it incorporates elements from temporary protection in mass influx situations and that of complementary protection schemes. This aspect will be considered at more length in Section VI:1

\(^3\) L72, p. 3

\(^4\) Folketinget: 2014b

\(^5\) ibid

\(^6\) Folketinget: 2014a, p. 3

\(^7\) Folketinget: 2014a, p. 2.
legislation for only a small proportion. In my opinion, this dramatic political discussion has overshadowed components in the legislation that are complicated and potentially problematic. It is therefore important to critically assess the components through a human rights perspective that scrutinizes the function of complementary protection and IRL, in order to assess the legitimacy of arguments put forth by the government.

2. Research problem

L72 claims that IRL is unequipped to deal with the question of individuals fleeing the indiscriminate violence of modern warfare. In this absence, rules from the CoE system govern instead, specifically that of non-refoulement to torture or other inhuman or degrading treatment. Thus, the amendment to the Aliens Act reflects a larger question of whether IRL is equipped to tackle refugee movements of today, or whether there is political merit in categorizing movements of forced migrations such as the Syrians as one that invariably falls outside the scope of IRL. The discussion needs to take into account whether there has been some substantial change in armed conflicts, to understand why this view of IRL’s limitations occurs now.

The amendment’s restrictions call into question certain human rights: the right not to be returned to persecution as found within the Refugee Convention Art. 33, and in terms of the ECHR the right not returned to ill treatment in Art 3, as well as the right to family life of Art. 8 of the ECHR and the right to family reunification of children in the CRC’s Art. 10. On the other hand, there is no right to asylum, as it has always been especially limited by the concept of a state’s right to control its borders. It is worded as the right to “seek and enjoy” asylum in Art 14 of the UDHR for this reason and failed to become included in the ICCPR. Although a more comprehensive set of rights were introduced with the Refugee Convention, it still posits the actual granting of asylum at the discretion of the state. In the advent of complementary protection, which is formally treated as being beyond the refugee definition in Art. 1A(2) of the Refugee Convention, the chasm

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8 L72, p. 3
9 See also the ICCPR: Art 7. and CAT: Art 3. I have not given further considerations to these treaties, as my analysis restricts itself to the ECHR and the Refugee Convention.
10 Edwards: 2005, p. 298-300
between individual rights and the states’ sovereign right to control its borders becomes more abstract, leaving these individuals in a potential legal gap.

This thesis closer investigates how these differing conceptions are to be understood and conceptually reconciled to give meaning to how domestic legislating should uphold the human rights of refugees fleeing war.

3. Aim and research questions

My overarching aim is to analyse the legal and political components of the amendment from an interdisciplinary human rights perspective. At the first level, I will explore the relevant components of international law as applied to the amendment. At the second level, I will compare these findings with the political reasoning behind this proposal. This is important because it can shed light on how the political rhetoric plays out in relation to bound international rules. This will contribute to an understanding of how national discussion, at a time of legislating, incorporates and uses the systems of IHRL and IRL, to illuminate the extent of which the meaning of these are included.

1. How does the recent amendment to the Aliens Act align with international law?

2. What role did alignment with international law play in the political discourse of enacting the amendment?

4. Theory, method and material

My method is a case study surrounding L72, with the data that of domestic legal sources and international law. The case study has a significant legal method dimension for the first question, as well as a second dimension guided by political theory, in order to dissect the legal results and answer my second question. My theoretical framework takes elements from human rights political theory, as well as more normative strands of political philosophy to make sense of the data.

5. Chapter outline

After a discussion of previous research on refugee law and political restrictionism, I will go into more depth on the choice of method and material, and present my theoretical framework. Thereafter, there will be a short background section to illuminate the example
of Syria and how armed conflict today complicates certain aspects of public international law. The legal analysis will then scrutinize the components of the amendment, which will be further scrutinized in the political analysis through observations guided by the framework of international law and theory. The discussion section will highlight the primary observations from the foregoing sections and seek to problematize them further. Lastly, a conclusion and suggestions for future research will be offered.

6. Previous research

Legal conceptualization

There is no single academic tradition related to my question, as it is informed by both literature on legal and political aspects of refugee law.

The human rights of refugees fleeing armed conflict brings into the fore the legal regimes of IRL, IHRL and IHL. There is a broad consensus among legal scholars of the interrelatedness of these legal regimes. Still, Moreno-Lax has documented how different approaches have been employed across courts, scholars and regional systems, when it comes to choosing how to approach legally overlapping refugee questions.

According to Edwards, maintaining the distinction between IRL and IHRL benefits governments who want to keep refugee protection minimal. The difficulties presented by vague conceptualization between IRL and IHRL become more apparent with the advent of complimentary protection of refugees. To McAdam, complementary protection threatens the very idea of the interconnectedness of IHRL and IRL. She argues that the refugee regime is already informed by developments in human rights law, making an inclusiveness of “extra-Convention refugees” into its framework not only possible, but also needed.

12 Moreno-Lax: 2014
13 Edwards: 2005, p. 294
14 Durieux: 2008, p. 8-9
15 McAdam: 2006, p. 13-15
16 McAdam: 2006, p. 3, 16
Instead of falling into the trap of proclaiming one legal regime as *lex specialis*\(^{17}\), Moreno-Lax argues that the regimes instead can be seen to complement each other in a cumulative sense.\(^{18}\) Her point becomes relevant in the relationship between the legal system of Refugee Convention and that of the ECHR. In the European system, the evolving jurisprudence that centres on *non-refoulement* to treatment in another state amounting to the scope of Art. 3 has influenced the handling of complementary protection.\(^{19}\) Many states have different frameworks in place to address these two systems, which often establishes the primacy of the Refugee Convention and the regional solutions to those falling outside of it.\(^{20}\) McAdam argues that such a structure threatens to undermine refugee protection, by its very categorization. She says: “Conceptually, the affirmation of the Convention’s primacy is, in effect, a commitment to respect its protection principles and refrain from diluting its scope by developing the law outside its boundaries.”\(^{21}\)

However, despite this understanding of the Refugee Convention system, it remains that its positive protection principles are very different from the form and meaning of the human rights outlined in the ECHR. In the system of ECtHR, the national legislature is supposed to exercise their own competence in the marking of the delimitations of human rights, as expressed in the margin of appreciation.\(^{22}\) Letsas uses legal interpretivism as a tool to make sense of its case law on the margin of appreciation\(^{23}\) that has been criticised by others\(^{24}\) for being confusing and incoherent on this point. Sweeney also acknowledges

\(^{17}\) A good example of this can be seen in Storey (2012) wherein he proclaims that IHL should act as *lex specialis* when dealing with the specific provision that mentions armed conflict within the EU Qualification Directive. In a critique of this, Durieux (2012) has highlighted the fact that IHL does not have its focus on the central component of IRL (i.e. persecution) as an argument why IHL is legally inadequate as *lex specialis*.


\(^{19}\) Durieux: 2008, p. 5-6


\(^{21}\) McAdam: 2006, p. 14

\(^{22}\) Koch & Vedsted Hansen: 2006, p. 9

\(^{23}\) Letsas: 2006, p. 705-706

the dangers of the doctrine, yet understands it to be institutionally competent, since it is a tool to recognize the variations of local implementations. In this structural sense (as opposed to the substantive use), the doctrine aids an understanding of the legitimacy of legal systems. Lambert argues that while the ECtHR has been limiting towards claims of refugees, it does contain promising scope for the future in terms of the development of new case law.

Policies of restriction and the EU
There has been a lot of scholarly critique on the restrictive policies in Europe and elsewhere aimed at preventing the arrival of people in the first place, and a lot of literature on refugee rights has thus been held up against this restrictive development, both to determine its legality and its political roots. There is focus on the EU as the driver of a new regime, where the meanings of international law have been reinterpreted. Scrutiny of EU’s response to those fleeing the former Yugoslavia has led Joly to term its practice as “harmonized restriction.” Some of this literature focuses on the advent of “Convention fundamentalists”, wherein a narrowing of the refugee definition suits political ends. Carlier seeks to answer why the definition is used liberally when aliens are welcome as workers and exclusively when they are not, and offers the explanation that the vagueness the definition suffers enables politicians to interpret it differently in different times. It is not intended to be legally giving; yet that has been its effect. This overview permitted me to localize the overarching problems, wherein I focused on one specific restriction.

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25 Sweeney: 2005, p. 474
26 Lambert: 2005
29 Joly: 1999, p. 355
31 Carlier: 1999, p. 40
32 Carlier: 1999; see also McAdam: 2006, p. 7. Also to note here, the lack of an enforcement body allows for broader political interpretation of the Convention, as explored further in the next section.
The gap between armed conflict and judicial understandings is often mentioned in the literature on legal refugee policy, a point that especially found its way into the debate on EU law. The EU’s Qualification Directive of 2004 was the first supranational instrument that sought to harmonize national policies on subsidiary protection. While the practice of complementary forms of protection had been around for a while, the codification of the practice was a new phenomenon. Lambert and Farrell operate on a conceptual level and argue that the individual risk test in the EU’s Qualification Directive (QD) and the Elgafaji case from 2009 needs to take into account the changing character of armed conflict. In the QD, it is Art. 15(c) which has been the most controversial part of the Directive, which refers to individuals fleeing armed conflict. In a close analysis of its components, Juss underlines its poor drafting and how it is fraught with linguistic chaos that renders it bizarre and non-sensical. Nykänen analyses how the Finnish Aliens Act relates to the Qualification Directive, and finds that it has created ground for more ambiguity and inconsistency in relation to the two kinds of complementary protection; now with the addition of “subsidiary protection” to the former, still preserved “humanitarian protection”. Durieux also notes the ambiguity of the definitions contained in the Directive, which he fears has the danger of making the refugee definition redundant.

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35 However novel it may be in the European arena, it should be noted that the regional Cartagena declaration as well as the AOU Convention have recognized people as eligible for asylum under a broader refugee definition than specified directly by the Convention, and does therefore not employ the same notion of complementary/subsidiary protection.
36 McAdam: 2005, p. 461
37 Lambert & Farrell: 2010
38 European Council on Refugees and Exiles, 2010, p. 3; McAdam: 2005
39 Juss: 2013, p. 127-128
40 The Finish legal protection is broader than the Danish, both because subsidiary protection is directly informed by the EU directive that requires the granting of certain rights, and because of the addition of a humanitarian protection that encompasses even those that do not flee war.
41 Durieux: 2008, p. 16
In sum, many scholars and practitioners have located the existence of normative gaps in the case of complementary protection that mainly stem from faulty interpretations of the law rather than the law itself. Such a gap permits more political freedom with regards to questions affecting the rights of those individuals. Yet how this protection gap is to be grasped from a human rights perspective that takes into account political aspects related to international law has been less grappled with.

II. Method

1. Case study

Generally put, this is a case study that will investigate how a national political scene aligns with international law. The strength of the political case study is that it can provide a rich qualitative view of reality, with numerous empirical examples and perspectives. Yet, it has often been criticized for being too narrow to make generalizations upon.\textsuperscript{42} As my case study seeks to uncover the function of human rights within a political discourse pertaining to the open-ended interpretations of refugee protection, I need to pay attention to the different themes located in my analysis in order to make coherent, interrelated observations. In this way, the single-case study provides a way to pay close attention to human rights dynamics in the interaction between the legal norms and the practice.\textsuperscript{43} The focused depth of my study in these two dimensions (i.e. legal and political) can provide useful observations on the components of their interrelation, by being aware of the shortfalls of overarching generalizations.

The case consists of three major themes, which will be considered at both stages of my analysis. First of all, the legal functions and relations between the applicable sources and institutions, which inherently also has a political dimension. Secondly, the creation of a temporary protection status: where the main analysis concerns the legal interpretation of status and of return. Finally, special attention will be given to the specific restriction of family reunification.

\textsuperscript{42} Flyvbjerg: 2006, p. 224
\textsuperscript{43} Landman: 2005, p. 565
My study has been guided by induction, in that I noted a problem-field and sought to understand it through a legal and social science lens. I found that I could neither exclusively apply political theories concerning effects on human rights on states\textsuperscript{44} nor on how states behave in face of changing sovereignty\textsuperscript{45}. Instead, I found that a conceptual and analytical framework of international law provided the platform from which to understand state behavior in my case. In this sense, I use the content of international law as a starting point.\textsuperscript{46}

The perspectives offered and suggested by the amendment contribute to the relevance of my case. Denmark has a special arrangement with the EU where it is not bound by EU Directives on asylum.\textsuperscript{47} Therefore, it operates on a more autonomous basis when it comes to asylum and immigrant law. In proposing this law, the government refers to case law of the ECtHR, while only minimally and comparatively mentioning EU law. It therefore serves as a relevant case for understanding the relationship between the ECtHR and a contemporary, domestic application.

While I cannot attempt to critically address all the rhetoric devices of the government and the opposition, my case study will highlight the meaning of the general features that are indicative of the case at hand. This means that I will look into the overt reasoning of the amendment, and the recurring statements thereto in conjunction with their legal meanings.

2. Legal method & material

The main component of my case study consists of a legal question. It follows the legal positivist tradition, where law is separated from politics, as opposed to the more prescriptive methods of policy-oriented legal approaches.\textsuperscript{48} Legal method enables one to securely assess how the components relate to international law, instead of taking the

\textsuperscript{44} See e.g. Hafner-Burton & Tsutsui: 2005
\textsuperscript{45} See e.g. Guiraudon & Lahav: 2009
\textsuperscript{46} Landman: 2005, p. 553
\textsuperscript{47} Protocol on the position of Denmark
\textsuperscript{48} See Lambert (2009) for an overview of positivist, transnational and participatory approaches in international refugee law.
governments assessment for good value. Article 31(3)(c) of the Vienna Convention requires that an interpretation takes into account “Any relevant rules of international law applicable in the relations between the parties”.

The sources of international law are those derived from Art. 38 of the ICJ Statute. This principle article shows that although there is no doctrine of *stare decisis* in international law, judicial decisions as well as the writings of publicists at the forefront of scholarship are valid for determining the norms based in treaty (Art. 38.a), custom (Art. 38.b) and general principles (Art. 38.c). 49

The rules of interpretation are derived from the Vienna Convention, which takes further the fundamental principle of good faith and the binding quality of treaties enshrined in Art. 26. Legal questions do not only pertain to a close reading of legal text, they require consideration of context, object and purpose, as stated by Art 31 (1): *A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.* In practice this means that one should begin with the text of the treaty, and then seek to understand the text in relation to the general meaning of the context, alongside its other provisions and especially its Preamble, as well as the *travaux preparatoires* and subsequent agreements towards interpretation. 50 In the case of the Refugee Convention, such subsequent agreements are e.g. the Excom conclusions on international protection reached by consensus across member states’ participation. 51

As my question deals with the rights of refugees, in relation to the problem of status, return and family reunification in L72, I have identified the main legal treaties as the Refugee Convention, the ICCPR, the CAT, the CRC and the ECHR. The Universal Declaration is also important for the determination of customary law in this area. It is outside the scope of this paper to attempt to answer how these all sources contribute to my question. For this reason, and for the sake of clarity between my two questions, I have decided to deal with the international treaties dealt with directly in explanatory

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49 Hall, 2007: p. 182-183
50 Hathaway: 2005, p. 74
51 Hathaway: 2005, p. 74
memorandum of L72. These legal sources are the Refugee Convention, the ECHR and the CRC. This choice is reasoned, due to the specialist position occupied by the Refugee Convention, which differs in its operation and is seen to have its own legitimacy, as it alone can determine a status that needs to be recognized in domestic law.52

Also the ECHR is required by my question, because of the entrenched position of the ECtHR in Europe and its developed case law on return and family reunification.53

Finally, the question of family reunification in my case brings in the rights of children, and disregarding this treaty on this question would leave this thematic aspect incomplete.

3. Material

Apart from the primary legal sources listed above, Law n. 153 that enacted L72 will be the primary domestic legal source. To shed light on the meaning of its provisions, the explanatory memorandum of L72 will be used, as well as the press release, and clarifying answers from the government in the legislative process. This extra data is useful to understand the intended interpretation.

Findings from the legal material guided my choice of secondary theoretical material. Previous research on refugee law, complementary protection and conceptual choices were also useful secondary material in order to take an informed approach to my legal material.

All material related to L72 was obtained via the Danish parliaments’ website, including the hearing statements from NGO’s. No material of direct relevance to L72 in legal or political terms was omitted. I have avoided biased material by using neither news sources nor political commentary for my analysis.

4. Delimitations

I begin my legal focus upon the arrival of refugees within the Danish borders, in order to study the political response thereto. It does therefore not consider the responsibility of states that cause an outflow. Moreover, it does not uncover the emergence of different

52 McAdam: 2006, p. 5
53 It has also been noted that European applicants are more likely to claim their rights under the ECHR than the HRC, which gives rise to a binding judgment. See Durieux citing McAdam and Goodwin-Gil: 2008, p. 4-5
non-entry procedures and “third country” schemes to prevent refugees from arriving at the territory of developed states, which has already been criticised to a large extent by scholars. 54 These policies are indeed problematic for refugees making any claims at all. I have also disregarded the relevant perspective of the historical developments in refugee law that provide arguments for and against the inclusion of people fleeing armed conflict and so-called generalized violence. A reasonable objection to this cases study is its limitability in terms of inadequate references to global processes of forced migration 55, which is beyond the scope of this paper and which would to a higher extent incorporate the sociology of law.

In terms of content, I will not consider the changes in the Aliens Act to first country asylum rules, as their implications are complex and channel a larger spectrum of EU law, which would stray me from the stated purpose. 56 I am also aware that I could delve much further into the meanings of each of my identified themes, but for the cohesion of this thesis in its investigation of L72, I chose to take a broader approach.

III. Theory

I have shaped my own theoretical framework from different domains of political theory, in order to bring the results of the legal analysis to the next dimension. This approach permitted me to build an understanding of how human rights function in regard to aliens in its political and philosophical sense, in order to scrutinize the findings of international law and its domestic interpretations.

1. Human rights and sovereignty

It is well noted among human rights philosophers that a root paradox exists between human rights and the sovereignty of states. Benhabib locates this central issue in the works of Kant and Arendt’s understanding of the nation-state as the basis for rights

55 See eg. Castles: 2003
56 Advokatrádet: 2014
claiming, with resulting exclusivity for those remaining outside, such as aliens.\textsuperscript{57}

Thereafter, Benhabib questions this idea from the standpoint of considerable developments in international law, such as the Refugee Convention and the creation of the ICC.\textsuperscript{58} One can say that the problem of those standing outside the protection of the state has shaped the creation of universal human rights.\textsuperscript{59} This development is also what leads Ignatieff to claim that nothing permits a defence of sovereignty to override fundamental human rights, even if a state may claim that security for its citizens is a higher concern.\textsuperscript{60}

Yet, refugees are still less protected by states and often experience discrimination on various levels.\textsuperscript{61} It cannot be overlooked that there is something specific about the refugee situation that to a larger extent enhances the concept of sovereignty. Benhabib explains how the UDHR enshrined rights of aliens, yet were left without specific addressees and obligations.\textsuperscript{62} The obligation to grant asylum remains defended by states as their sovereign privilege.\textsuperscript{63} An overweight on the defence of sovereignty often relies on the idea of the cohesiveness of the nation-state and the threat of the other.\textsuperscript{64} Benhabib reveals the fallacy in justifying closed borders on the basis of cultural homogeneity, which she argues does not exist empirically and is a methodological fallacy.\textsuperscript{65} Yet, refugee law scholars continue to reiterate states’ emphasis on border control, the politicized dimension of asylum.\textsuperscript{66} Often the state in its institutional sense and the community in its cultural sense are interchangeable variables in defences of

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\textsuperscript{57} Benhabib: 2004, see especially p. 66-69.
\textsuperscript{58} ibid: p. 67.
\textsuperscript{59} Smith: 2012, p. 15-23
\textsuperscript{60} Ignatieff: 2001
\textsuperscript{61} UNHCR: 2006, p. 5-6
\textsuperscript{62} Benhabib: 2004, p. 11
\textsuperscript{63} ibid, p. 69
\textsuperscript{64} ibid: p. 118-128
\textsuperscript{65} Benhabib: 2004, p. 65.
\textsuperscript{66} Nicholson & Twomey: 1999, p. 3; Hathaway & Gammeltoft-Hansen: 2014
sovereignty.\textsuperscript{67} In sum, somewhat contradictorily, when the subject matter is aliens, sovereignty remains a more legitimate claim in the landscape of international politics than it actually is in the content of IHRL.

2. Political theory on functionality

Since my second question is focused on the political function of human rights, I need to rely on theories that further explain what human rights \textit{does}, apart from its counter weight to claims of sovereignty. There is a growing consensus that the effects of human rights are ambiguous and context-dependent.\textsuperscript{68} Generally this has fallen into either positive or negative exclamations.\textsuperscript{69} To reconcile these contradicting observations, Hafner-Burton and Tsutsui explain that human rights have been a double-edged sword; a “paradox of empty promises”.\textsuperscript{70} They find that ratification of human rights gives the state legitimacy, yet it only supplies weak institutional enforcement, making it possible to continue human rights abuses unabated. On the other hand, the treaties also mobilize human rights activism to approve the actual human rights on the ground.

3. Political philosophical theory on moral legitimacy and implementation

However, there is also a third aspect not wholly considered by their theoretical explanation, in that the acceptance of human rights by states is also a moral promise. Highlighting the cosmopolitan nature of rights, Benhabib pinpoints the significance of international public law.\textsuperscript{71} In altering the relations between states and in this global civil society, humans are rights bearing in a cosmopolitan sense and recognized for their humanity.\textsuperscript{72} Thus, the functional universality of human rights carries a significant change in the status of human beings. In Benhabib’s understanding, cosmopolitan norms that are embedded within this institutional framework even challenge processes of

\textsuperscript{67} Benhabib: 2004, p. 120
\textsuperscript{68} Hafner-Burton: 2014, p. 208
\textsuperscript{69} Hafner-Burton & Tsutsui: 2005, p. 1377
\textsuperscript{70} ibid: p. 1378
\textsuperscript{71} Benhabib: 2011, p. 16
\textsuperscript{72} ibid
As she states, human rights have an important legitimacy function: “human rights straddle the line between morality and justice; they enable us to judge the legitimacy of law.” Such a function explains how the reasoning behind an amendment, which voices its relation to human rights, can reveal how this legitimation works in practice. At the same time, this functional universality is relative, because it relies on the states’ treatment of human rights instruments as authoritative. Subsequently, implementation of human rights norms can differ greatly. Such variation permits us to understand how human rights work in practice; in a world were universality does not mean uniformity. With the doctrine of appreciation, wherein the Court sets the minimal threshold and states are allowed to differ in terms of how they achieve this threshold, this kind of implementation is especially envisaged by the CoE system.

4. The application in the ECtHR

Letsas reviews the margin of appreciation, and argues that there is a gap between normative theories from an earlier time and international adjudication on human rights. In such an absence, he argues, the ECtHR can balance interests on an ad hoc basis. He argues that a normative interpretative theory of the ECHR must not offend the moral values of human rights nor overlook the considerable difference of the ECHR. While most supranational institutions mainly monitor human rights, the ECtHR is able to enforce its jurisprudence on member states. Therefore, when reviewing decisive jurisprudence of the ECtHR, it is important to keep in mind that the justification of interference with human rights brings in a much larger question of political morality. In this sense, the theoretical foundations of my legal and political questions inform each other.

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73 Benhabib: 2009, p. 702
74 Benhabib citing Dworkin: 2011, p. 13
75 Donnelly: 2007, p. 289
76 Letsas: 2006, p. 718
77 ibid: p. 715
78 Donnelly: 2007, p. 283
79 Letsas: 2006, p. 709
IV. Background

1. The Conflict in Syria

The basis for this law was the increase in Syrian refugees on Danish soil. In the press release and the law proposal, the government referred to wanting to help, yet needing to restrict the number of asylum seekers.\(^\text{80}\) For the sake of illuminating the content of the amendment, it is important to consider the kind of example that Syria serves.

The conflict in Syria has had devastating human consequences. The UNHCR writes of the severe violations of humanitarian law and human rights: “Parties to the conflict are reported to commit war crimes and gross violations of human rights, including acts amounting to crimes against humanity, with widespread impunity”\(^\text{81}\). The latest figure of people fleeing the borders of Syria is at almost 4 million.\(^\text{82}\) The main hosting countries are located in the region. Lebanon, Turkey and Jordan have taken the highest number of refugees, together hosting 95% of Syrian refugees\(^\text{83}\) to such an extent that it has had a destabilizing effect on their communities.\(^\text{84}\)

In Denmark, 7185 Syrian asylum seekers were recorded in the year of 2014.\(^\text{85}\) Over the summer months, approximately a doubling of the numbers in asylum seekers occurred, which prompted the government to introduce L72 through a haste procedure.

2. Characterization of conflict

The nature of war has changed so dramatically that it raises new questions about the paradigms and doctrines of public international law. The second half of the 20\(^\text{th}\) century has seen a rise in internal armed conflicts, which are characterized by the systematic targeting of civilians and the lack of boundaries between war and peace, combatants and

\(^{80}\) Justitsministeriet: 2014; L72, p. 3
\(^{81}\) UNHCR: 2014a, p. 4 (footnotes omitted)
\(^{82}\) Specifically 3,975,842 refugees as of April 10 2015. Source: UNHCR: 2015.
\(^{83}\) UNHCR: 2014b, p. 2.
\(^{84}\) UNHCR: 2014a, p. 16-17
\(^{85}\) Udlændingestyrelsen: 2015, p. 5
At the same time, the framework for protecting the refugees of internal armed conflicts remains problematic. The Refugee Convention applies both in times of peace and war. Yet, the UNHCR, the main organ charged with overseeing refugee rights, has formally justified the differentiation between Convention refugees and “war refugees”. In the principle Handbook of the UNHCR, reissued in 2011, “war refugees” are treated as an exceptional category that normally falls outside the scope of Convention definition. In cases where they can qualify as persecuted within the meaning of the Convention, reference is made to concepts of “foreign invasion” and “occupation”, characteristics not necessarily applicable to most modern conflicts. The UNHCR has expanded on this viewpoint in recent years, yet the limiting problematization of the war refugee as fundamentally non-persecuted has had implications.

3. Historical overview and context of refugee protection in Denmark

The Danish state has had a long tradition of making no practical distinction between refugees. Denmark had a practice of including de facto refugees within its ambit since the mid 1960’s, which became codified in the Aliens Act in 1983. It is probable that these early legal distinctions started to create a chasm between “genuine” Convention refugees and those of de facto status. The right-wing Liberal-coalition government abolished this practice in 2002, and replaced it with a “protection status” (B-status) in Section 7.2, on the grounds that Denmark had far surpassed its international obligations for too long. Section 7(2) was developed with reference to Article 3 of the ECHR and Article 1 of Additional Protocol 6. Section 7(2) changed the category: from now on, they were

86 UNHCR: 2012, p. 2.
87 UNHCR, 2011, §164
88 ibid: §165
89 UNHCR, 2012 & UNHCR, 2014b
90 See e.g Juss: 2013 p. 122-128; McAdam: 2005
91 Kjær: 2003, p. 256.
92 Sztucki: 1999, p. 64, 69
93 Kjær: 2003, p. 254-5
defined as aliens, not refugees.\textsuperscript{95} At this time, it was also established that all refugees were to be met with an initial 7-year period of temporary protection\textsuperscript{96} and that spousal reunification first was possible when both parties are 24 years old, the controversial 24-year-rule.\textsuperscript{97} These restrictions came as the direct result of a new nationalistic rhetoric coming with the rise of the Danish People’s Party, whose party platform called for stricter, anti-immigration policies.\textsuperscript{98} In general, asylum and immigration law has become a political tug of war in Denmark in the past three decades, with more than 100 amendments, of which 57 of these were made in the years from 2002-2011.\textsuperscript{99} After a political term of abolishing restrictive policies enacted by the former Liberal government, the government introduced this amendment in November 2014 as a restriction.

V. Legal analysis

1. The legal components of Law 153

In this section the three identified major components of the amendment will be outlined, in order to apply international law to assess their legality.

The text of the law reads:

§7.3: In cases covered by §7.2, where the risk of death penalty or of being subjected to torture or inhuman or degrading treatment or punishment has its background in a particularly severe situation in the home country characterized by indiscriminate violence and attacks on civilians, a temporary residence permit will be granted.\textsuperscript{100}

\begin{footnotes}
\textsuperscript{95} Jønsson & Petersen: 2010, p. 197
\textsuperscript{96} Mansouri et al: 2009, p. 136
\textsuperscript{97} Jønsson & Petersen: 2010, p. 197
\textsuperscript{98} ibid
\textsuperscript{99} Gammeltoft-Hansen & Jørgensen: 2014
\textsuperscript{100} Law 153. Note that I have done my own translation with words derived from the vocabulary of the UNHCRs hearing statement (2014b)
\end{footnotes}
The explanatory memorandum expands on the meaning of the text. The threshold, which needs to be met to fall under §7.3, is §7.2; the provision that codified ECHR law (B-status). The difference between these two sections therefore depends on the background of the risk of death penalty or torture or inhuman or degrading treatment. If it depends on a person’s individual circumstances, it falls within the ambit of B-status. However, if the circumstances are a particularly severe situation in the home country it will lead to recognition of temporary protection status. The case of Sufi and Elmi v. United Kingdom and its definition of generalized violence will be used to identify cases of temporary protection.101

The main goal was defined in L72 as follows:

The government wishes to live up to its international obligations and secure this group of asylum seekers protection, as long as is needed. At the same time, the government wishes to ensure that those aliens, whose protection needs are more temporary, can be sent back as soon as the situation in the home country makes this possible.102

Therefore, the time frame is set to 1 year, where after the individual can have their case revisited. If the “worst troubles” are over in the home country, they are to be returned, and if not, after the 1-year initial period, they may have their case extended for another period of 2 years. If granted temporary protection status, there is no ability for family reunification within the first year.103 There is a limitation to this rule; where family reunification is allowed if there are “special grounds” for this.104 In their explanation,

101 L72, p. 3.
102 ibid. Regeringen ønsker at leve op til sine internationale forpligtelser og sikre denne gruppe af asylansøgere beskyttelse, så længe de har behov herfor. Samtidig ønsker regeringen at sikre, at disse udlændinge, hvis beskyttelsesbehov er mere midlertidigt, kan sendes tilbage, så snart situationen i hjemlandet muliggør dette.

103 Section 9 lays down the grounds for family reunification for aliens. The amendment has changed the §9.1(c) to those who have received a residence permit under §7.1 and §7.2, specifying thereby that those covered by §7.3 be excluded.

104 L72, p. 3
such grounds are exemplified as a disabled spouse or seriously sick underage children\(^{105}\) or when the principle of the child’s best interest in Art. 3.1 of the CRC gives meaning to the need for family reunification.\(^{106}\)

### 2. Applicable law

#### 2.1 Refugee status

Refugee status is a legal category and an international status, which is recognized by states.\(^{107}\) A person is a refugee, based on the *de facto* circumstances, as found in Art. 1.A(2). It is important to note that temporary protection status functions in a complementary function, which means that it should be triggered if the Convention status is not met. The appearance of a new status should not invalidate claims that would be met under 1.A(2) of the Refugee Convention. According to the Convention as amended by its Protocol, a refugee is someone who

…owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

It is important to note that “well-founded fear” directly relates to the likelihood of “persecution”. In the text there is neither the requirement that the fear itself is individualized, nor that it cannot be generalized. This is an important insight in light of the interpretation contained in the amendment. Furthermore, as a human rights treaty and a living document, it is important that the refugee definition takes into account changing forms of persecution.\(^{108}\) The grounds listed (the “reasons of”) mean that persecution can

\(^{105}\) ibid: p. 10

\(^{106}\) ibid: p. 10

\(^{107}\) Hathaway & Gammeltoft-Hansen: 2014, p. 3.

occur when armed conflicts are fought along sectarian lines. Moreover, when civilians are targeted for reason of a perceived or real affiliation with a nexus to one of the outlined grounds. As such, whole communities can be at risk of persecution.\textsuperscript{109} In the Syria conflict, it has been documented that whole neighbourhoods are at risk (i.e. “well-founded fear”) of persecution due to how their allegiances are perceived.\textsuperscript{110} Moreover, violations of humanitarian law weigh in as factors to determine claims to refugee status.\textsuperscript{111} As noted in the introductory chapter, such violations are plentiful in Syria.

### 2.2 Guidelines from the UNHCR

The UNHCR is entrusted in Art. 35 of the Refugee Convention with the “duty of supervising the applications of the provisions of this Convention” and provides instrumental guidance on interpretation. Yet, without enforcement power, its recommendations remain non-binding on states. Its competence \textit{ratione personae} has since been extended by the UN to include individuals also outside the immediate scope of the Convention.\textsuperscript{112} The UNHCR has distinguished between those individuals that \textit{should} fall within Convention status, but who do not in state practice, and those that do not fall within in the legal sense, but who have valid reasons for claiming protection.\textsuperscript{113} As argued above, states need to ensure the ambit of Convention rights for refugees that legitimately fall within its definition. As for those individuals that do not fall within the definition of the Refugee Convention, the UNHCR states:

Universal human rights principles argue for persons permitted to remain for protection reasons being afforded a status that allows them to continue their lives with human dignity. Given the disruption they have suffered, a suitable degree of

\textsuperscript{109} UNHCR: 2014b, §11
\textsuperscript{110} UNHCR: 2014a, p. 7-8
\textsuperscript{111} Jaquemet: 2001, p. 652
\textsuperscript{112} UNHCR: 2008, p. 2
\textsuperscript{113} UNHCR: 2000, p. 164
certainty and stability is necessary. A mere withholding of deportation is, in UNHCR’s view, not sufficient.\textsuperscript{114}

The association with universal human rights principles reminds us of the important link with IHRL. The Convention is not a separate treaty, but a specialist treaty acting alongside human rights treaties and is informed by developments in human rights.\textsuperscript{115} Recalling its mandate, the UNHCR must provide states with information of “the implementation” of the Convention (Art. 35.2.b) and other laws that relate to refugees (Art. 35.2.c), which can be both human rights law in treaty and custom. Reciprocally, states agree to “cooperate” with the organ.\textsuperscript{116} Therefore, while non-binding, its interpretation of complementary protection and IHRL cannot be wholly dismissed.

Elaborating more on what a complementary form creating stability should contain, the UNHCR states: “The status should extend for a period of time, which is long enough to allow the beneficiaries to regain a sense of normalcy in their lives. It should last for as long as protection is required.”\textsuperscript{117}

It is important to reiterate that in the amended Aliens Act, people fleeing armed conflicts can fall into all three of the status’ depending on the nature of their risk. As seen, temporary protection status departs from the central concepts contained in the Refugee Convention’s definition, because it instead relies on the risk of death penalty or of being subjected to torture or inhuman or degrading treatment or punishment coupled with a background of severe, indiscriminate attacks on civilians, instead of the risk of persecution. This status codifies practice based on the ECtHR, which is invariably linked with non-refoulement jurisprudence on Art. 3. and therefore, the question of status cannot be seen in isolation of the question of return, which will be scrutinized further in the next part.

\textsuperscript{114} ibid: p. 165
\textsuperscript{115} McAdam: 2006, p. 8
\textsuperscript{116} Art. 35.1
\textsuperscript{117} UNHCR, 2000, p. 167
2.3 Cessation & Return

Under the Refugee Convention, there are concrete grounds dealing with cessation of status, at which time forcible return is permitted. In the ECHR the assessment differs and it is only when return does not amount to the treatment prohibited by Art. 3. In speculating the return of refugees, Denmark must ensure that it does not institute laws that counter Art. 1. C or Art. 33 of the Refugee Convention nor violate the absolute nature of Art. 3 of the ECHR or the Art. 1 of its Protocol 6.

Art 1.C of the Refugee Convention: Cessation

Art 1.C determines when refugee status ceases and the special protection that comes with being a refugee. Important to note here, it is the state that must provide the burden of proof. Especially applicable in the case of armed conflict, Art. 1C (5) provides that protection ceases when “circumstances in connection with which he has been recognized as a refugee have ceased to exist”. Also Art. 1C (6) deals with changed circumstances permitting return for those without a nationality. Cessation means literally reviewing the definition of status in Art. 1.A.2 and assessing whether the persecution based on one or more of the grounds have ceased to exist; is to be made on an individual basis, with regard to the precise grounds for persecution. However, in case of an individual who has fallen short of the refugee criteria, yet has been seen to possess a protection need, new questions arise as to whether the same cessation procedure applies.

As the text itself contains no firm answer to this question, it is important to turn to principles of treaty interpretation in Art 31(1) of the Vienna Convention.

It can be established that the non-Convention refugee has still fled from circumstances that have led to the flight in the first place. A protection need has been recognized and thus a relation to the Convention is at hand, due to its significance as a specialist treaty. There is therefore no reason to dismiss the ordinary purpose of the refugee definition being as it were annulled by Art. 1.C. Interpreting this parallel scenario with recourse to the good faith of treaty interpretation means that we cannot overlook the ordinary

118 Goodwin-Gil, 1996: p. 86-7
meaning of it. In looking closer at the object and purpose of the treaty, it is noted that the rationale is to ensure stability for the refugee.\textsuperscript{119} Stability is a central concept to rebuild to the life of the refugee, and it is built into the logic of the cessation clause i.e. the burden of proof being on the state and the listing of concrete circumstances. It is also important to note that the Convention contains the non-refoulement clause in Art. 33, which is closely related to its object and purpose and which has guided the development of this principle in international law.\textsuperscript{120} A strict reading of the cessation clause was clarified by Excom in 1992, where they state that there has to be a “fundamental, stable and durable change” in the circumstances as well as a change in the individual basis for persecution.\textsuperscript{121} The UNHCR holds the view that the cessation principle should guide those in a complementary regime, and further states that the ending of complementary status should be based on objective criteria and not be arbitrary.\textsuperscript{122} For these reasons therefore, if someone is not recognized as a refugee under Art.1.A(2), yet there still exists circumstances that have led to that person fleeing and having recognized protection needs, then the cessation clause calls for a fundamental change in the circumstances, i.e. in this case the armed conflict needs to undergo some significant change.

\textit{Art. 3 of the ECHR: The prohibition against torture and non-refoulement}

\textit{Soering v. UK} set the precedent for cases involving return in breach of Art. 3. There are three elements in the Court’s formulation of legal standard and principle: “where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment”\textsuperscript{123}. Since this principal case, these connected elements (the evidentiary requirement, the real risk test and the minimal level of severity that amounts

\textsuperscript{119} UNHCR: 2005, p. 58
\textsuperscript{120} The principle of non-refoulement is stronger in Art. 3 of the ECHR because it is absolute and contains no derogation, as with the Refugee Convention.
\textsuperscript{121} UNHCR: 1992
\textsuperscript{122} UNHCR: 2000, p. 168
\textsuperscript{123} Soering v. United Kingdom §91. (my emphasis)
to such treatment) have been developed with regards to expulsion to areas where the risk is connected to an armed conflict.

The first element requires a rigorous judgment of merits, due to the absolute character of Art. 3. The evidentiary requirement is less strict in a situation where the applicants have fled an armed conflict, due to the practical difficulties. The real risk test is linked with the difficulty for the state in foreseeing future scenarios. The requirement of real risk in armed conflict situations means that the likelihood cannot merely be a possibility, as established by Vilvarajah, concerning the level of violence in Sri Lanka. With regard to the third element, the Court has identified a higher threshold for meeting Art. 3 in expulsion and extradition cases than as Art. 3 is otherwise defined, and moreover, in cases of armed conflict the prohibition against ill-treatment is not absolute. The case NA v. United Kingdom established that art. 3 is triggered in “the most extreme cases of general violence”. The level of violence must be of such intensity that all people are at risk by mere presence. The (non-exhaustive) criteria for assessing such intensity was later laid down in Sufi and Elmi:

first, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localised or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting.

In expulsion cases, the Court has outlined the applicability of Art. 3 as, on the one hand,
the respect for the state’s right to control the entry, residence and expulsion of aliens, while, on the other hand, providing for an individuals’ right not to be subject to treatment contrary to Art. 3. A low threshold on Art. 3 would mean that states bound by the ECHR would be limited in border control, a fundamental principle of international law. The Court has reiterated through its case law that an expulsion to a general situation of violence is not enough to trigger the scope of Art. 3. In Vilvarajah, the Court recognized the possibility, yet the applicants failed to show the “special distinguishing features” of their cases. It was first in NA. that the Court stated that an extreme case of violence alone could violate Art. 3, and it was first in Sufi and Elmi in June 2011 that such a basis was found. In Sufi and Elmi, the Court also elaborated on the existence of an internal flight availability. In such a case, return would not violate Art. 3 if the State can guarantee that Art. 3 will not be violated as the individual relocates, which means that, among other things, the person must be able to travel and settle there, without being subjected to ill-treatment. Then, in September 2013, a similar case came before the ECtHR, that of K.A.B v Sweden. Here the Court found that the level of general violence had gone down in Mogadishu, so that it was not plausible that the applicant faced a real risk of being subjected to ill treatment upon return to Somalia. However, the situation was still seen to be serious, fragile and unpredictable.

2.4 Summary Conclusion

This first part of my legal analysis has found that the Refugee Convention does not permit the state to return individuals to places where there are circumstances that have led to the grounds for the recognized status in the first place. It would violate the good faith principle of treaty interpretation if it could be claimed that complementary cases do not

132 Chahal v United Kingdom §73-74
133 See e.g. Vilvarajah v. United Kingdom §102 ; Larsen & Cybulska, 2015: p. 34
134 See especially NA. v. United Kingdom §113-115 for an overview.
135 Vilvarajah v. United Kingdom §111-112
136 Sufi and Elmi v. United Kingdom §266
137 K.A.B v Sweden §86-90, 97
138 K.A.B v Sweden §91
parallel the prescriptions of the treaty, and that the principle of cessation nor non-
refoulement does not apply. In the parallel system of the ECtHR, the evolution of its case 
law on non-refoulement to armed conflict has set a high threshold on Art. 3, and in this 
sense aligns with the wording and meaning of L72.

3. Applicable law on family reunification
Taking the Syrian example as does L72, it is mainly men who reach the territory of 
Denmark to lodge an asylum claim. Therefore, it is mainly their wives and children filing 
requests for family reunification.139

3.1 The CRC
Limits to family reunification are identified to call into question Art. 3.1, 9.1, Art. 10.1 
and Art. 22.1 of the CRC, as well as its Preamble.

Art. 10.1 shows that “in accordance with the obligation of States Parties under article 9” 
there is a positive obligation on the part of the state to deal with applications of family 
reunification. The addition of the qualifiers “humane” and “expeditious” specify the 
obligation. Thus, it remains unfounded to let a child wait for 1 year for the possibility of 
applying in light of this article seen together with the child’s best interest principle not to 
be separated from its parents against their will in Art. 3.1 and 9.1.

L72’s exception to this restriction with the addition of when the child’s best interest gives 
meaning to the need for family reunification is problematic, because in the meaning of 
the CRC it is clearly in the child’s best interest, as enshrined in Art. 3.1, that the child 
remains with its family.

Furthermore, the CRC contains a specific responsibility towards children seeking refugee 
status in Art. 22.1. The positive duties are inherent in the meaning of “shall take 
appropriate measures”. Although the child may be present on the territory of the home 
state or a neighbouring state, i.e. a refugee camp, an application on its behalf for family

139 Before the amendment was proposed, the requests for family reunification in 2014 until September totalled 2250 
Syrians, whereof 720 were women, 100 were men, and the last 1430 were children under the age of 18. In fact, almost 
half the total number of applicants for family reunification was under 12 years old. Source: Altinget: 2014.
reunification implies that the child is in the process of seeking refugee status in a hosting state. Here, the interpretation takes into account the meaning of seeking refugee status, as the parents are separated from the child in the contracting state (Art. 9.1 and Art. 10.1).

The recognition of the family afforded a special place in the protection of children’s rights is important to shed light on the good faith of the proper interpretation of the treaty. In the Preamble of the CRC, two references to the family are made:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community… Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment…

The conclusion is that the CRC contains a clear objective to keep the family unified, especially with the inclusion of the positive duty to provide family reunification for refugee children: Art. 22.1 seen in conjunction with Art. 10.1. This interpretation is furthermore in line with the “best interests of the child” as laid out in Art. 3.1 and 9.1. Moreover, the absence of a derogation clause in the CRC underlines the importance of all the articles assessed. If the state directly obstructs the unity of the family by the implementation of laws preventing family reunification of children, the state violates Art. 10.1 in conjunction with Art. 9.1 and the special protection afforded to refugee children enshrined in Art. 22.1. The state cannot forego this violation by specifying exceptions to this fundamentally recognized right.

3.2 The ECHR

Everyone can seek protection of their rights under the ECHR, if they are present on the territory of a state party to the ECHR. Limits to family reunification are identified to call into question Art. 8 and Art. 14.

In Art. 8 “family life” is not an absolute human right, due to the limitations clause found in Art 8.2. It is only when a violation of the right has been found that the court assesses whether this violation is “in accordance with the law” and “necessary in a democratic
society” with the grounds listed in 8.2. Composed in this way, the article provides a balancing test for the ECtHR, where it must weigh the rights at stake on the one hand, and the interests of the community on the other.\textsuperscript{140}

The prohibition against discrimination of Art. 14 is included for its applicability, as L72 differentiates between status’, and in this regard, limits family reunification for those under Section 7.3. Although Art 14 must be invoked in conjunction with a substantive provision, it only has to fall within the ambit of one of the rights outlined. Due to the limitations clause of 8.2, the discriminatory element needs to have no objective or reasonable justification nor legitimate aim.\textsuperscript{141}

\textbf{Jurisprudence}

For an interpretation of the meaning of “family life”, I will turn to the case law of the ECtHR. The ECtHR has distinguished between two categories: 1) protection against expulsion, when family members are still present within the member state and 2) the entry of the family of an individual present in the territory of a member state. The duty of the state differs, as the first category entails a negative duty not to expel and the second category entails a positive duty to admit someone, especially with regards to the principle of margin of appreciation. While the first category has been dealt with, the second has had less deliberation.\textsuperscript{142} Furthermore, cases by refugee applicants have been even fewer.\textit{Abdulaziz} from 1985 dealt with the right to family reunification for migrants in the context of the entry of the three applicants’ husbands to reside in the UK. The case set the legal standard, in that there must be 1) an existing or intended family life and 2) obstacles preventing family life in another country.\textsuperscript{143} Since the applicants did not show how serious difficulties prevented them from pursuing life in the husbands home country, Art. 8 was not breached.\textsuperscript{144} The Court emphasized the wide margin of appreciation concerning

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\textsuperscript{140} Lambert: 1999, p. 428. \\
\textsuperscript{141} Lambert: 2005, p. 51 \\
\textsuperscript{142} Lambert: 2005, p. 39-40. For cases of the first kind, see e.g. Nunez v. Norway \\
\textsuperscript{143} Abdulaziz v. United Kingdom §62 and §68 \\
\textsuperscript{144} ibid: §68-69
\end{flushleft}
Art. 8 when it comes to positive obligations, because the state has the “right to control the entry of non-nationals into its territory”\textsuperscript{145}. However, Art. 8 was breached in conjunction with Art. 14, because of sexual discrimination in regulations related to the entry of a non-national spouse.\textsuperscript{146} Based on this judgment, it is possible that the ECtHR would view the legislation in violation of Art. 8 in conjunction with Art. 14, because it is only TP status recipients that have the right to family life limited for 1 year, as opposed to those recognized under Section 7.1 and 7.2. Yet, based on its previous case law that distinguishes between those in personal risk and those in general risk, the ECtHR may view the discriminate aim as legitimate.

In July 2014, the Chamber of the ECtHR unanimously found a violation of Art. 8 in both of the similar cases \textit{Mugenzi v. France} and \textit{Tanda-Muzinga v. France} concerning the family reunification right of refugees. The facts were that the French consular authorities had refused to issue visas for the applicants’ children, although the principle of family reunification had been recognized in both cases. The Court turned its attention to the decision-making procedure, on the grounds that the recognition of refugee status and family reunification required an “obligation to institute a procedure that took into account the events which had disrupted and disturbed their family lives and had led to their being granted refugee status”\textsuperscript{147}. In light of this, the Court reiterated the importance of family reunion for refugees, which enables them to regain a normal life after persecution.\textsuperscript{148} To this, the court referred to a broad international and regional consensus that refugees benefit from more favourable rights than other aliens.\textsuperscript{149} This consensus was drawn by taking into account other legal developments, notably, the recommendations from the

\textsuperscript{145} ibid: §67
\textsuperscript{146} ibid: §83.
\textsuperscript{147} ECtHR: 2014, p. 4
\textsuperscript{148} Affaire Tanda-Muzinga c. France: 2014, §75; Affaire Mugenzi c. France, §54
\textsuperscript{149} ibid: §75; ibid: §54
Final Act of the Plenipotentiaries and the UNHCR\(^{150}\), as well as an EU Directive on family reunification\(^{151}\).

The Court found that the decision-making procedure failed to take into account the special circumstance of refugees, which would require the authorities to take in relevant submissions of other evidence of family ties when official documents are insufficient or non-existing. The Court found that the procedure had not offered requisite guarantees of flexibility, promptness and effectiveness. For this reason, France had failed to strike an appropriate balance as permitted by Art. 8.\(^{152}\) To assess a violation of Art. 8, the Court referred to the standard set by the court in *Nunez v. Norway*\(^{153}\), and noted that the applicants were without fault in the break up of family life, and that it was not possible to take up family life anywhere else.\(^{154}\) Moreover, the Court emphasized that when there are children concerned, the state must give precedence to their interest.\(^{155}\)

### 3.3 The Refugee Convention and the UNHCR

In its *traveaux preparatoires*, the drafters expressed the hope that states would apply the provisions of the Refugee Convention to those refugees falling beyond its scope.\(^{156}\) Also in its guidelines regarding complementary protection, the UNHCR highlighted the importance of family reunification: “Any complementary protection regime should build in appropriate provisions for close family members to be reunited, over time, in the host country.”\(^{157}\) UNHCR has specified that more than 6-month of delay on family reunification is unreasonable, because of the direct effect it is seen to have on the difficulty of rebuilding a new life for the individual in the country of asylum.\(^{158}\)

\(^{150}\) ibid: §44; ibid: §32  
\(^{151}\) ibid: §45-46; ibid: §32  
\(^{152}\) ibid: §82; ibid: §62  
\(^{153}\) ibid: §66; ibid: §44; Nunez v. Norway §70.  
\(^{154}\) ibid: §74; ibid: §53  
\(^{155}\) ibid: §67; ibid: §45  
\(^{156}\) Final Act of the Plenipotentiaries: Recommendation E; McAdam: 2006, p. 10-13  
\(^{157}\) UNHCR: 2000, p. 168  
\(^{158}\) Affaire Tanda-Muzinga c. France §47
3.4 Summary Conclusion

The second part of my legal analysis has found that the absence of family reunification in the Refugee Convention does not exclude nor negate its presence in other human rights treaties, and the intention of the drafters and the UNHCR for this to form part of protection. As subjects of human rights law, refugee children under 18 are protected by the CRC. In the European system, it remains unclear, due to the limitations clause. *Mugenzi* and *Tanda-Muzinga* gives reason to find a violation of Art. 8 alone, with due regard to the special circumstances of refugees. Yet, since the ECtHR acknowledges a distinction between the individually targeted ill-treatment and the general, as seen in its jurisprudence on *non-refoulement* to armed conflict, it remains possible that it may see L72 as a legitimate restriction of this right with regard to 8.2, and view the discriminate component as a legitimate aim. However, notably, it is by citing other sources that the ECtHR highlights the importance of IRL, as well as regional developments\(^\text{159}\) on the question of family reunification, in forming what it terms as a consensus on states’ positive duty in providing means for family reunification. Yet, without adjudication on the rights of beneficiaries of complementary protection, as such perhaps impossible within the confines of its jurisdiction, it remains unclear whether L72 is in violation of Art 8 and 14.

VI. Political analysis

1. Conceptual confusion

I will assess the terminology and the meanings referred thereto, because the status “temporary protection status” convolutes the application of different terms in notable ways.

\(^{159}\) ibid: §48-49; Affaire Mugenzi c. France §32
1.1 Mass influx and temporary protection (TP)

TP is an exceptional emergency device to respond to a mass influx of refugees. Such a protection response has a lower threshold, meaning that the exceptional circumstance permits the stalling of benefits, which are to be granted over time. The framework for mass influx has to do with the processing power of the state, and is therefore neither a question of numbers nor the type of situation. Mass influxes trigger a lower standard of proof, in which large numbers of people only need to prove that they come from place A in time B to get status recognition, until the state has the processing capabilities to deal with each application. Recalling the statistics, the processing power has not yet been compromised because of Syrian refugees in Denmark. Yet, notably, this practice is surrounded by haziness. The UNHCR has underlined the importance of distinguishing clearly between TP and complementary protection. Yet, at the same time, TP is also a legal answer to the “problem” that is the result of non-refoulement, and in this sense aligns with an ECtHR conception in relation to armed conflicts. In this understanding, TP is a platform on which protection principles can be developed, while awaiting a durable solution: non-refoulement over time. At the same time, however, it remains that TP is a tool, not a protection status. Therefore it is a misconfiguration of the international practice in this area when the Danish government uses the term TP status.

1.2 Complementary protection (CP)

The term CP signifies that there is a framework put in place to provide protection for people falling outside Convention status. This term more aptly applies to what the new amendment has created: an entrenched system, wherein individuals can be the beneficiaries of a complementary protection status. However, the significant difference is that these individuals should be treated in conformity with their needs and protected

160 UNHCR: 2000, p. 168
162 ibid: p. 63.
163 UNHCR: 2000, p. 169
164 Goodwin-Gil: 1996, p. 201
under the Convention. In sum, the amendments’ TP status is actually similar in form to CP status, but not in its content.

1.3 Refugee, alien or asylum seeker?

In the discourse surrounding the legislation, the government has avoided use of the term refugee to refer to the instigating of temporary protection status, instead preferring the term alien (udlænder) or asylum seeker (asylsøger). The latter word emerged in the late 1970’s in the context of formal screening procedures in Europe. Since the word seeks to delineate when a person is an asylum seeker as opposed to a refugee, the word suggests that previously, the individual was a non-refugee. As noted above, this suggestion is not consistent with the declaratory nature of refugee status as an international status.

2. The political reasoning and context

The general context behind the proposal was illuminated by the then Minister of Justice, Karen Hækkerup who stated in the press release “The present Danish asylum system is based on rules from 2002, and that does not take into account the current refugee-picture”. More specifically, the reasoning in L72 was that too many asylum seekers had become included on the basis of Section 7.2, despite not being individually targeted within the “original purpose” (oprindelige hensigt) of that provision. In the press release, the government claimed that most of the Syrian asylum seekers are not individually persecuted, which also finds expression in L72 in more general terms describing refugees fleeing general situations as recipients of TP status.

165 L72, p. 3
166 Sztucki: 1999, p. 70.
167 See Section V. 2.1 on Refugee status
169 L72, p. 3
170 Justitsministeriet: 2014. Note that “most” was later changed to “a substantial part” (en væsentlig del), due to the controversy caused by this statement.
171 L72, p. 7
2.1 The general use of legal systems

By applying these claims to the results from the legal analysis, some problematic aspects appear. First of all, Section 7.2 was limited. Individuals that did not meet the threshold of the individual risk of ill-treatment contrary to Art. 3 or Protocol 6 in Section 7.2, nor could be handled within the strict confines set around the Refugee Convention criteria in Section 7.1, were left in a “legal limbo”, where they were not eligible for actual protection, yet secured by non-refoulement.\footnote{UNHCR: 2014b} The emphasis on the individual component in the risk of persecution of 7.1, and the individual in the risk of such treatment of 7.2, effectively excludes certain people that have a protection need, but whom do not meet the threshold of ill-treatment, persecution, or one of the protected grounds. Therefore, it is not an exceptionally broad approach from an IRL perspective that the asylum authorities included war refugees in this second provision. In fact, it is in line with UNHCR guidelines that Non-Convention refugees with protection needs are met with a protection status.\footnote{UNHCR: 2000 & 2014b} Furthermore, the objective claim that most Syrians are not individually persecuted is contested by evidence of the highest authority dealing with the refugee situation in Syria, the UNHCR.\footnote{UNHCR: 2014a & 2014b.} Yet, although this claim has no empirical evidence\footnote{Even claiming that most are not individually persecuted even refutes national practice, where 2/3 of Syrian asylum seekers are men who become recognized on the Convention ground of being military evaders. See: Folketinget: 2014a, p. 3} in the interpretation of persecution within Refugee Convention, it does align with the ECtHR’s understanding of the individual risk when it applies Art. 3. The difference between the assessment criteria in the Refugee Convention and the ECtHR thus becomes apparent, with the government not unexpectedly embracing the latters’ criteria with its higher threshold of risk and what constitutes such treatment of Art. 3 in a general situation. In the very act of introducing this status, the chasms between the two legal systems becomes apparent, which manifests itself further in the consideration of its international obligations.\footnote{This will be considered at more detail in section 3 below.}
2.2 Restriction

It was highlighted several times in L72 that this amendment would by no means open up ways to get asylum in Denmark.\textsuperscript{177} The government needed to convince the opposition parties for a vote, as its own coalition party SF was sceptical towards restriction (and accordingly, voted against in the end). As forcible returns to fragile conditions may be a precarious option for the future government (in a year or two) wanting to retain its legitimacy, the main and current component of L72 is actually the prevention of family reunification.

It is apparent that this restriction is set to limit the amount, which both comes as a direct result of the barring of family members and the possible signal effect this may send to others on their way to Denmark. The government has not embarked on any defences to family separation, and prefers to speak of it more abstractly as the balance that needs to be struck.

Often the restrictionist discourse combines criticism of the human rights system, the lack of sovereignty, and a hard-line approach to issues such as migration and minority issues, as can be gleaned in the response to L72.\textsuperscript{178} Progressive interpretations on whom constitutes a refugee, even if these are permitted within the confines of the Refugee Convention\textsuperscript{179}, are not popular. The largest opposition parties (\textit{Venstre} and \textit{DF}) were especially critical towards L72, and suggested further changes for more restrictions.\textsuperscript{180} DF is especially sceptical of international law, and calls for policies that “restrict the non-western part of the immigration”\textsuperscript{181}. In this sense, their nationalist ideological outlook on sovereignty sees the people as a \textit{homogenous entity}, wherein only national law binds their will.\textsuperscript{182}

\begin{itemize}
\item \textsuperscript{177} L72, p. 3, 7, 19
\item \textsuperscript{178} Folketinget: 2014a
\item \textsuperscript{179} As in the guidelines of the UNHCR (2006)
\item \textsuperscript{180} Folketinget: 2014a
\item \textsuperscript{181} ibid: p. 2: ”Helt overordnet er der brug for en udlændingepolitik, som begrænser den ikkevestlige del af indvandringen.”
\item \textsuperscript{182} Folketinget: 2015, p. 3-4. See also Benhabib: 2009, p. 693
\end{itemize}
3. Relation to human rights

The amendment specifically refers to IHRL and uses human rights in two general ways: the alignment with the ECtHR, and the alignment with specific provisions of the ECHR. It ignores lengthy analysis of IRL, yet it presents TP status as one supported under the demarcated confines of the Refugee Convention definition and it reiterates that due to Section 7.1 the Convention is adhered to.\(^{183}\)

3.1 Alignment with jurisprudence of the ECtHR

L72 takes into account the evolving jurisprudence of the ECtHR on general violence in armed conflict triggering Art.3 and the judgement in *Sufi and Elmi* as the basis that establishes the need for a new status.\(^{184}\)

The government frames the amendment as legitimate because it follows from European case law and legal obligations to Strasbourg. It is clear that the government acknowledges the authority of human rights mechanisms, in terms of the *Sufi and Elmi* judgment as the stated reason for this temporary legislation being needed, and structurally, in terms of legal obligations that bind the state to abide by the judgements (Art. 46) and to provide just compensation to the victim (Art. 41).

3.2 Alignment with provisions of the CRC and the ECHR

Subsequently, the L72 considers how the amendment aligns with the provisions, without looking at case law. It includes consideration of the application of ECHR’s Art. 8 and Art. 14.\(^{185}\) In its consideration of Art. 8, the government highlights the idea of a fair balance.\(^{186}\) It also predicts that the ECtHR will give considerable weight to the “public interest in keeping an effective immigration control, cf. the regard to ‘economic welfare

\(^{183}\) L 72, p. 7, para. 2.1.2. In 2001, the government also defended the abolition of de facto status in 2001 with reference to the Convention, see Kjær: 2003, p. 255

\(^{184}\) L72, p. 4-5

\(^{185}\) L72, p. 16-18

\(^{186}\) ibid, p. 16-17
of the country’ after article 8.2.”\(^\text{187}\) It is assumed that Art. 14 will not raise an issue, because the situation of recipients of TP status is not comparable to the situation of refugees of Convention status or the protection status in 7.2.\(^\text{188}\) L72 incorporated the following articles of the CRC into its explanatory memorandum: Art. 3.1, Art. 9.3, Art 10, and Art. 12.1 of the CRC as well as parts of its Preamble. After stating these provisions, it concludes that the CRC “does not acknowledge a general and unconditional right to family reunion of children”\(^\text{189}\)

In the government’s own consideration of alignment with IL, a number of observations were made. Reoccurring throughout the explanatory memorandum is the notion of striking a fair balance, which is especially revisited on Art. 8. Since Denmark is a small country, it needs to secure adequate integration for the individual, as well as for the community in a welfare state.\(^\text{190}\) In this line of reasoning, “economic wellbeing” as worded in Art. 8.2 of the ECHR is seen as the ground for striking this balance.\(^\text{191}\) When assessing competing interests between the individual and the community as a whole, the ECtHR employs a strikingly similar rhetoric.\(^\text{192}\) In this way, the assumption is made that the ECtHR would lead to the same conclusion through the same application of principles. However, there is no precedent in the ECtHR of that specific balance being reasonable. The memorandum does not refer to any case law, contrarily to the consideration of Art. 3 mentioned above. Therefore L72 does not consider either the Chamber’s recent judgements in *Mugenzi* and *Tanda-Muzenga* on the meaning of family life of refugees. Another objection to the fair balance principle being the decisive factor against finding a violation of Art. 8 is that L72 does not explain the difference between Convention

\(^{187}\) ibid, p. 18 “…”offentlige interesse i at opretholde en effektiv immigrationskontrol, jf. hensynet til ’landets økonomiske velfær’ efter artikel 8, stk. 2”

\(^{188}\) ibid, p. 17

\(^{189}\) ibid, p. 18 “FN’s børnekonvention anerkender således ikke en generel og ubetinget ret til familiesammenføring af børn.”

\(^{190}\) ibid, p. 3, 17

\(^{191}\) ibid, 16-17

\(^{192}\) See i.e. Nunez v. Norway §68; Soering v. United Kingdom §89. See also Letsas: 2006, p. 711-713
refugees and recipients of Section 7.2 protection as opposed to Section 7.3 recipients. If it is not a violation of the ECHR in the case of TP status, then why not extend family reunification limitations on all recognized refugees? That is, if Art. 8’s limitations clause justifies economic well-being in this case, wouldn’t that also work for other refugees; in this case, what sets them apart? In this case, the fair balance principle should be able to extend to all refugees. However, the basis that the government has relied on to justify this distinction has been the temporary nature of this category of refugees. It has thus acknowledged the existence of the right to family reunification, yet stressed that there is no reason why this right cannot be withheld for one year. The government holds that the short stay in Denmark and the particular situation of war refugees has an effect on the interpretation of Art. 8. The argument is that temporary stay prevents the making of close ties to Denmark, so that it will not be in violation. This logic is circular and functions in the following way: 1) The creation of a temporary basis with return as soon as possible. 2) This temporary measure in itself will conclude that the person does not have close ties, and thus, the person cannot have Art. 8 violated. In this way, problematically, the law has created the premise on which judgment is made.

In the presentation of the CRC, the government omits the relevant assessment of the specific provision that deals with refugee children. Read together as done in the previous legal analysis, the CRC contains a clear objective to keep the family united, with an emphasis on the special protection afforded to refugee children in Art. 22. The government’s conclusion that there is no “general and unconditional right to family reunion of children” does not align well with international law. The omission of Art. 22 and the meaning of the citations of the Preamble disregard the principle of good faith. It appears that the articles are simply added to the legislation without any proper argumentation as to why they do not apply. While the consideration of the international treaty legitimises the legislation and makes it appear as if the amendment endorses the rights, on the other hand, the absence of arguments as to why the rights are not “unconditional” invalidates the restriction of family reunification for refugee children.

193 L72, p. 17
194 See Section V, 3.1
3.3 Consideration of IRL

L72 considers cessation of status and the UNHCR guidelines, but ultimately dismisses it as not relevant.\(^\text{195}\) Yet, even in the argument that rejects the practicality of the Refugee Convention to current situations of forced displacement, it is still seen as the main legal authority to respect.

The historical purpose was to address the refugees that had arrived in European countries as a result of WWII.\(^\text{196}\) There was therefore a specific circumstance that influenced the wording of the definition “refugee”. To fill the gaps where the Convention was silent, it was intended to look to IHRL.\(^\text{197}\) A verbal commitment to the Refugee Convention is easy to make, because the UNHCR cannot adjudicate on it. Yet, the effects of misrepresenting it remain important. Such effects can be seen in the critical hearing statements from NGO’s and the criticism from the UNHCR\(^\text{198}\). Also, the ECtHR’s consideration of IRL’s authority in Mugenzi and Tanda-Muzenga are important and suggests more synergy with the UNHCR on the aspect of family reunification.

4. Conception of armed conflict

The conflict in Somalia has been the example portraying the variable factors in assessing the threshold of a violation triggering Art. 3 in terms of armed conflicts in the ECtHR.\(^\text{199}\) Since such assessments have led to different findings within short time periods, the government reasons that it is legitimate to claim that armed conflict situations are defined by temporary characteristics and thus time limited protection needs.\(^\text{200}\) Because of adjudication that takes into account general factors in the background amounting to the flight, it is claimed that a preliminary 1-year temporary stay is sufficient to review the

\(^{195}\) L72, p. 12
\(^{196}\) See Art. 1A(2) and Art. 1B(1). The territoriality and time was later broadened in the Protocol of 1967.
\(^{197}\) The inclusion of “the right to seek and to enjoy asylum from persecution” in Article 14 of the UDHR clearly places refugees rights within the human rights paradigm. Moreover, reference in the Refugee Conventions Preamble to the UN Charter, the UDHR and “the principle that human beings shall enjoy fundamental rights and freedoms without discrimination” shows that they not regimes acting entirely in isolation.
\(^{198}\) Folketinget: 2014d; UNHCR: 2014b
\(^{199}\) L72, p. 20
\(^{200}\) Folketinget: 2014b
conditions once again. In the press release, the government stated that most of the asylum seekers from Syria experience “indiscriminate attacks in regions of Syria”\textsuperscript{201}. Finally, as aliens with protection status are not implicated by the Refugee Convention, L72 notes that the process of cessation does not need to require that the improvements in the country are “fundamental, stable and lasting”, but that they can be “still serious and may be considered as fragile and unpredictable”. \textsuperscript{202}

4.1 Uncertainty and conjecture

The main difficulty with the assessment of armed conflicts is the consistent level of uncertainty and ambiguity.\textsuperscript{203} Although the ECtHR has used evidence from NGO’s to reach their decisions, it still involves conjecture in the sense that the decision needs to determine whether the level of violence has reached the sufficient threshold. Moreover, the usage of the word indiscriminate (\textit{vilkårlig}) connotes that the violence affects all people in random, similar ways. People fleeing the effects of generalised violence thus seem to present a departure from the concept of persecution as originally understood. However, the term fails to refer to the complex nature of armed conflicts today. The usage fails to consider that indiscriminate is a term used to denote that it does not differentiate between civilians and military targets.\textsuperscript{204} The fact that such attacks occur does not downplay the risk of (discriminate) persecution. In Syria, there is evidence of the state directly targeting cities or areas that are deemed aligned with the opposition.\textsuperscript{205} In such cases, one ground (or more) for refugee status is triggered. As mentioned earlier, violations of IHL actually increase the chances of the risk assessment criteria of a Convention ground. Therefore, the rhetoric makes a false dichotomy between persecution

\textsuperscript{201} Justitsministeriet: 2014

\textsuperscript{202} L72, p. 12, para. 2.5.2. “Udlændinge med beskyttelsessatus, jf. udlændingelovens § 7, stk. 2, og midlertidig beskyttelsessatus efter den foreslåede bestemmelse i § 7, stk. 3, er derimod ikke omfattet af flygtningekonventionen, og der skal således ikke som betingelse for inddragelse stilles krav om, at der er sket funda- mentale, stabile og varige ændringer i hjemlandet…. trods forbedringerne – fortsat er alvorlige og må betegnes som skrobelige og uforudsigelige.”

\textsuperscript{203} Juss: 2013, p. 146.

\textsuperscript{204} Lambert & Farrell: 2010, p. 242-243

\textsuperscript{205} Durieux: 2012, p. 165-166
and indiscrimination. By relying on these distinctions in contemporary internal armed conflicts, and omitting the discriminate elements in seemingly random warfare, there is a danger of strengthening the demarcations between “victims of armed conflict” as a case of IHL and “refugees fleeing persecution” as a case of IRL.

4.2 Cessation and return

The opting out of the cessation clause for Section 7.3 is legally and morally unfounded. There is nothing that makes these other refugees with recognized protection needs not guarded by the core principles of IRL. Moreover, arguing against the “fundamental, stable and lasting” criteria is problematic from a human rights perspective, not least because non-refoulement has become a part of customary law. Incidentally, this means that people can be sent back to their death or to treatment amounting to torture. The wording regions of Syria suggest that there are safer spots in the country and that there is an internal flight option, which has been refuted by evidence on the ground. UNHCR is especially weary of an internal flight option in countries plagued by internal conflict. However, as shown in section V. 2.3, the ECtHR has voiced this option on occasions, so that non-refoulement is only a robust duty in cases of armed conflict, when there is no option for internal relocation. Furthermore, L72 fails to account for the previous availability of only granting a 2-year preliminary stay within the earlier sections, if it was seen that the prospect of cessation of persecution was within reach in the home country. As this option was not used within recent times towards Syrian asylum seekers, nothing seems to suggest that the Danish Immigration Service agrees that the conflict in Syria would be ending anytime soon.

4.3 Do new wars make new refugees?

It is important to note that people fleeing the effects of war are hardly a new

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206 UNHCR: 2007, p. 7-8
207 UNHCR: 2014a
208 UNHCR: 2005
209 Folketinget: 2014c
phenomenon\textsuperscript{210}, and it is important to take a critical perspective as to why this argumentation occurs now. As noted, new wars blur the boundaries to a larger extent and as noted, the definition was drafted to respond specifically to the aftermath of WWII. It appears likely that there are political benefits to taking a strict interpretation of IRL.\textsuperscript{211} In keeping with the rigorous assessment that is needed for the assessment of a refugee claim, it is problematic that the government provides a general, ill-supported view of the Syrian situation (as a backdrop for other war refugees as recipients of TP status), which does not take into account the context of the conflict and the violence.

5. Conception of temporary protection

Defences of the practice of temporary protection take different forms. The press release states: “We are bound by human rights to help these people. But on a longer term, it isn’t sustainable to empty Syria of Syrians.”\textsuperscript{212} TP is seen as a solitary gesture, instead of the unsustainable institution of asylum. This statement suggests that when an entire population is potentially at risk, TP is more fitting. Moreover, the idea of a protection need is a recurring one. Asked about the validity of the practice of return, the government answered that it is a fundamental principle that protection ceases when there is no longer such need, and that this principle is even more relevant as Denmark and Europe receives a historically high number of asylum seekers.\textsuperscript{213}

5.1 The institution of asylum

There is something dangerous in the way of presenting asylum as permanent contrary to a sustainable temporary status that rightly returns people, because the institution of asylum was never meant to be sustainable. It is an exceptional measure in itself, which ceases based on 1.C. As such, it is the circumstances in Syria that determine whether or not someone flees and regardless, Syrians will continue to flee if there is a risk of persecution in Syria. Following the rational argument that the amendment contributes to the non-

\textsuperscript{210} See i.e. McAdam: 2006
\textsuperscript{211} Nicholson & Twomey: 1999
\textsuperscript{212} Justitsministeriet: 2014
\textsuperscript{213} Folketinget: 2014e
emptying of Syria by return, the government fails to consider the option that if returned to a continuing risk of persecution, Syrians may well continue to flee. The statement suggests a departure from basic principles of IRL. In this way, the alignment to the formal principles of the Refugee Convention does not come automatically with an alignment to its moral commitments.

5.2 Protection needs

Assuming that war refugees falling into this new category have less of a protection need than other groups of refugees is problematic; it may be different in form, if falling short of a well-founded risk of persecution, it may amount to a real risk of treatment contrary to Art. 3, or it may fall short of that, but it is not possible to collectively declare a protection need based on objective assessments. Such an approach defeats the declaratory nature of refugee status, as well as the approach taken by the ECtHR, of careful assessment to each applicable situation.

5.3 Higher burden = higher threshold

The statement that the principle of cessation should somehow apply more forcefully when there are more refugees is also problematic. It is indirectly stated that the balance tips in favour of the collective’s “burden” when receiving more refugees. There is no legal precedence for such an assessment. Therefore, the connection between the cessation principle (as contained in refugee law) and a historically high number of refugees is a delusion. It suffices to keep in mind that the whole human rights project was created legally and politically in the wake of WWII\(^\text{214}\): an exceptional situation indeed. Only in mass influx situations, as explained above, can such an argument be reasonable.

\(^{214}\) Smith: 2012
VII. Discussion

In this section I will further problematize the results from the legal and political analysis.

1. Legal systems of compliance and constraint

In the two ways of alignment\textsuperscript{215}, it becomes clear that more weight is placed on the jurisprudence of the ECtHR and its status, than the text of the Convention itself or the CRC. As signatories to the Refugee Convention with a Preamble that expresses the importance of international cooperation as well as the international scope and nature of the refugee problem, it is noteworthy that the Danish government makes no attempts to hide its goal as the restriction of asylum seekers. The CRC and IRL are not taken seriously, in the early dismissal of the Refugee Convention, the statement that the Refugee Appeals Board in some cases disregards the position of the UNHCR and the overt rejection of the meaning of the included provisions of the CRC.\textsuperscript{216}

1.1 ECtHR jurisprudence: The margin of appreciation and sovereign decision-making

L72 highlights the doctrine of the margin of appreciation, which it states is relatively broad in the interpretation and application of Art. 8.\textsuperscript{217} This is also consistent with the defence of states before the ECtHR; it is not only the Court that can introduce this principle into a given case.\textsuperscript{218} The logic of the margin of appreciation varies from case to case, but it is mainly set to underline the competence of the domestic system for setting the exact limitations. In Vilvarajah, the UK put forth such worries as permitting the entry of a very large class of people if the applicants could not show distinguishing features.\textsuperscript{219} The states’ anxiety of a lowering of the threshold for refugee determination was perceived as reasonable.\textsuperscript{220} In a similar way, the government beats the chase by

\textsuperscript{215} Outlined in section VI. 3.
\textsuperscript{216} L72, p. 5-6
\textsuperscript{217} L72, p. 16-17
\textsuperscript{218} Sweeney: 2005, p. 462
\textsuperscript{219} Vilvarajah v United Kingdom §105
\textsuperscript{220} Vilvarajah v United Kingdom §105, §111
attempting to prematurely define Syrians as war-refugees and non-Convention refugees, and call the margin of appreciation on the basis of economic wellbeing.

The underlying nexus to states’ rights of sovereign decision-making when problematizing asylum is also seen consistently in ECtHR case law on both Art. 3 and Art. 8, and as such, opens the space for overshadowing to a larger extent the rights of refugees than citizens. As summarized, the case law on Art. 3 in cases of armed conflict may determine how the Court approaches Art. 8 too. As this connection between aliens and border control is to a certain extent validated and upheld by the very judicial organ that is charged with rigorously upholding human rights in Europe, it operates to the detriment of the “refugee phenomenon” being viewed equally so from a perspective of human rights.

1.2 Legitimacy

The domestic and the regional systems reciprocally reinforce their legitimacy. The ECtHR needs the support of member states to be effective. It would justifiably create an uproar if the ECtHR where to deviate from its jurisprudence or its case law so far. Moreover, it frequently exercises judicial restraint, in the form of the margin of appreciation. In the governments’ efforts to control migration, and mitigate or respond to the new binding rules carved by Sufi and Elmi, the government highlights the needs of the community in order to legitimize its own decision on family reunification restriction, to call into effect the structural margin of appreciation. However, the ECtHR also employs a dynamic interpretation to the ECHR so that the rights remain “practical and effective”, and so that new conditions can be responded to. Refugee rights appears to be set in an unpredictable space, held in check by legitimacy considerations; the efficiency of the system in its upholding of sovereign decision-making.

Constraint

Although implementation can vary, human rights principles are generally not up for review by states after ratification. Withdrawal from the CoE or the Refugee Convention

221 Larsen & Cybulska: 2015, p. 23-24, 37-38
222 Vedsted-Hansen & Koch: 2006, p. 11-12
would result in an uproar from internal and external NGOs and IOs. In the face of constraint, it becomes clear that the government has been creative in employing two grey areas in which to make their restrictions. The first is that of complementary protection for people fleeing armed conflict, which has a wide range of allowance if looking at the spectrum with the Refugee Convention and UNHCR on the one side, and the ECHR and the ECtHR’s limited interpretation on the other. In this sense, the government has chosen to align with the most restrictive practice and interpretation. Yet, as this system does not adjudicate IRL, it is a significant downgrade from the protection promises and provisions contained therein.

The second grey area is the question of family reunification, which is not explicit within the Refugee Convention and takes the form of soft law of the UNHCR guidelines, but which is handled by the ECtHR through a wide margin of appreciation. While it must be added that the ECtHR has developed the meaning of the right to family life of the refugee that takes into account the special circumstance of the refugee by referring to IRL, the formal separation between these two systems and the ECtHR conception of armed conflict invariably contributes to this grey area.

Therefore, the government here instead constructs a new refugee category that can limit in specific ways, by its reference to specific ECtHR case law on an article that principally has to do with torture and degrading and inhuman treatment. In this way, it appears as an attempt to have a new position on asylum. However, while the legislation may appear legitimate, there is reason to believe that the government is constrained in carrying forcible returns out. Once a denial of renewal is set for returning TP recipients to fragile conditions, it will appear less legitimate in view of the concrete breaking of human rights principles as understood in Benhabib’s sense of the moral function of human rights. On this background the act of legislating seems like a pseudo attempt of appearing to be in greater control of its sovereignty in the face of bound human rights.

223 Hafner-Burton & Tsutsui: 2005
2. Human Rights

The functionality of human rights

In the absence of a judicial organ, the positive obligations of the Refugee Convention are left without concrete case treatment and continue to be vague, despite the guidance of the UNHCR. Therefore, the state can claim that its own interpretation is sound. In this sense, the situation aligns with Hafner-Burton and Tsutsui’s compliance gap, where the state stands opposite claims of the NGOs. Such an approach is not possible before the ECtHR, where interference with human rights has a wholly different placement, with an emphasis of political morality, wherein the state preliminarily gets to set the boundaries. Without much to say about asylum and a limited case law on these aspects related to refugees (from Cruz Varas in 1991 on the question of return\textsuperscript{224} to Mugenzi and Tanda-Muzinga in 2014), refugee rights are set up for a different kind of implementation by domestic systems.

The rationale of Human Rights

Because of the implementation freedom of human rights, there are different ways of operating with human rights as a principle. IHRL can guide and shape law in its positive sense, or at the finalization of domestic law, it instead can be held against IHRL. In the latter case, human rights are used as a checklist in asking whether there is a violation in the negative sense. The answer to this way of questioning seems to run through the explanatory memorandum and the clarifying answers in parliament, in the loose justification that even if it is somewhat outside the law, it is not in direct contradiction to the law, as especially seen with regard to the ECHR and the CRC, or in the argument that the law does not apply in parallel scenarios, as with the Refugee Convention. The bottom line remains in this interpretation that the international obligations are respected. Due to IRL’s non-enforcement aspect, states’ discretion in the matter of letting people into its borders, and the “margin of appreciation”, it is hard to see how asylum restrictions can

\textsuperscript{224} Cruz Varas was the first to challenge his impending return. See Cruz Varas v. Sweden: §69-70
ever amount to a full-scale violation. Especially as they are incrementally implemented over the years and the changes have been to a confusing and staggering degree.\textsuperscript{225}

The restrictionist justification that denies the positive promise of human rights, so brazenly written into the explanatory memorandum, may be a result of sovereignty built into the logic of those human rights that deal with refugees, as Benhabib notes with recourse to Arendt and Kant.\textsuperscript{226} But as a moral promise, human rights do not yield such a minimal interpretation.\textsuperscript{227} Even if a law or practice does not violate a specific article, it can still undermine the fundamental rationale of human rights. In the case of L72, there remains no fundamental consideration of such moral claims. In the hearing statements, NGO’s referred to such principles, yet the amendment passed into law with these fundamental components unchanged. In fact, the opposition called for even more restrictions.

The separation of families has far reaching consequences that cannot be justified on balancing grounds, as it defeats the fundamental notions of stability and dignity of IRL, in preventing the individual in the host state to restart their life and potentially lead to the family members left behind to take on dangerous journeys through Europe. For the individuals granted the temporary protection status, this is a significant downgrade in protection.

The principle of \textit{good faith} of legal interpretation helps illuminate the moral promise of human rights, and often this can be gleaned in the preamble. The challenge for the human rights project then is to not lose sight of the morality that binds the provisions together and properly gives meaning to this principle, and not to sink to textual interpretations that omit the moral considerations. Ultimately, morality is what has the potential to illuminate the grey areas of IHRL. The rationale of refugee protection is the adherence to human rights in their moral and legal sense.

\textsuperscript{225} See section IV.3
\textsuperscript{226} Benhabib: 2004, p. 66
\textsuperscript{227} Benhabib: 2011, p. 16
VIII. Conclusion

The government separated the domains of IHRL and IRL and applied them in different ways in the discourse of enacting this amendment. The components of L72 were found to be problematic, through legal method that accordingly does not separate between treaty obligations, but considers them cumulatively. However, I also found that these obligations are restricted particularly due to the individual requirement in armed conflict, sovereign decision-making, and the non-existing enforcement powers of the UNHCR. A grey area arises with the blurring of new conflicts, complementary protection and a lack of absolute and binding laws on family reunification. Only in the CRC did the obligation appear clear-cut, yet remarkably, this was dismissed in L72 by inserting uncomforting exceptions. I offered the explanation that the amendment represented the direct targeting of these grey areas, in order to pass a restriction in the face of constraint. In this way, is an attempt at recreating an interpretation of concepts within IRL, notably that of protection, stability and cessation. In my discussion, I suggest that theories that take into account the inherent morality of human rights as a positive promise help to elucidate the problems with the negative approach of “check listing” human rights during legislating.

Suggestions for future research

The claims contained herein can be used to compare in more regional and small-n comparative analysis, especially if a similar country (yet e.g. tied by the EU) makes a similar amendment.228 I am limited to considering the actors broadly as the Danish parliament and the ECtHR. A future analysis would have to take into account other important actors, in order to contribute to a further recognition of the specific “embeddedness” of the units of analysis.229 It would also be interesting to examine whether the waiting time for family reunification in the context of close relatives being in armed conflict situations could amount to inhuman or degrading treatment as within the meaning of Art 3. Potentially, this could be configured as a philosophical and a legal argumentation.

228 Landman: 2005, p. 554
229 Landman: 2005, p. 572
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