

## Temporariness of Refugee Protection: For What and in Whose Interest? Cessation of Status as Related to Revocation of Residence Permits

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### Abstract

Temporariness of refugee protection has started to emerge as a new standard in the policies of European countries. Given this development, the article focuses on one specific issue related to this temporariness: how refugee status intertwines with the conditions for the granting, revocation and prolongation of national residence permits. What are the interconnections between refugee status, including its cessation and revocation, on the one hand, and national residence permits and their revocation and prolongation, on the other? How are these interconnections regulated by international law, EU law and national law (with Sweden as an example)? In addition to the detailed analysis of the relevant legal norms, the article situates the questions within a more general discussion about residence in the national community. In this way, it is shown how temporariness creates tensions at national level where the refugee *qua* resident in the national community, benefits from safeguards in favour of individual certainty. This explains why residence permits, as opposed to refugee status, have central organizing role at national level.

**Keywords:** refugee status, residence permit, cessation of refugee status, revocation of refugee status, renewal of residence permits

### 1. Introduction

The protection granted by the Refugee Convention is not envisioned as having a permanent character.<sup>1</sup> Article 1(C) of the Convention, framed as a cessation clause, refers to circumstances when the Convention ceases to apply to the person. In addition, pursuant to Article 33(2) of the Convention a State can under certain circumstances *refouler* a refugee, in this way bringing the him or her outside the state jurisdiction. As a consequence, the person cannot claim the protection of the Convention against the specific State since the latter cannot anymore be formulated as a bearer of obligations under the Convention in relation to this person.<sup>2</sup> Despite these two possibilities allowed by the Refugee Convention that illustrate the temporariness of its protection regime, Western European States have rarely formally assessed whether their obligations under the Convention have ceased pursuant to its Article 1(C).<sup>3</sup> In addition,

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<sup>1</sup> Convention relating to the Status of Refugees, 189 UNTS 150; J. Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press, 2021) p. 1128; M. Gil-Bazo, 'Asylum as a General Principle of International Law', 27 *International Journal of Refugee Law* (2015) p. 9.

<sup>2</sup> J Hathaway, *The Rights of Refugees under International Law*, p. 183.

<sup>3</sup> See *Evaluation of the application of the recast Qualification Directive (2011/95/EU) Final report* (EU 2019) p. 12, 13 and 101: '[t]he cessation provisions seemed to be seldom applied by Member States.'

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although these States are allowed to *refouler* a person under the terms of Article 33(2) of the Convention, in this way also ceasing their obligations under the Convention, other international law obligations might prevent them from engaging in such a conduct,<sup>4</sup> or national laws might still allow the person to remain on various grounds.

Overall, the temporariness of the application of the Refugee Convention has not had much traction since once a person is within the jurisdiction of the State and able to invoke rights against this particular State, a whole gamut of other interrelated legal frameworks is triggered (e.g. human rights law, EU law, national migration and administrative law). It is ultimately the national legal order (as harmonized with the minimum standards originating from international law and EU law) that directly governs the situation of the person. The temporary character of the protection afforded at the level of international law, by the Refugee Convention, might be rendered irrelevant by this legal order. From the perspective of the national legal order, temporariness can be even more generally viewed as undesirable given all the resources devoted for the assessment of refugee status with all the implied procedural guarantees and the administrative and financial burden that status review and reassessment of decisions will incur. The assumption of permanence that has been reflected in the actual practice of Western European States is also understandable, given all the resources that these welfare States invest in integration so that refugees become productive members of the community.<sup>5</sup> Even if we ignore resources specifically targeted at refugees, once the refugee is a resident in the specific country, she has access to multiple resource demanding frameworks (i.e. health care, schooling of the children) and it is not in the interest of the sustainability of these frameworks to simply 'lose' people who are supported and do not subsequently and continuously contribute back.<sup>6</sup> In sum, although fear of persecution was the basis for being allowed to stay in the country, once the refugee is admitted in the host community (i.e. granted residence permit), she becomes a resident and a participant in the life of this community. This brings into effect other frameworks with their own logic, where temporariness might not be pursued or might be even considered as injurious.

Recently, however, this assumption in favour of permanence has started to be undermined. Temporariness has started to emerge as a new standard in the asylum policies of European countries.<sup>7</sup> This can be observed in light of recent national practices.<sup>8</sup> At the level of the EU, a

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<sup>4</sup> E.g. Articles 3 or 8 Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 055) (ECHR).

<sup>5</sup> J Fitzpatrick, 'The End of Protection: Legal Standards of Cessation of Refugee Status and Withdrawal of Temporary Protection' 13 *Georgetown Immigration Law Journal* (1999) p. 352.

<sup>6</sup> For examination of the tension between immigration law and other areas of law such as labour and welfare laws, see *Migrants at Work. Immigration and Vulnerability in Labour Law* (Oxford University Press, 2014); for an argument how the sustainability of welfare policies might be dependent on migrants, see G. Noll, 'Viciously Circular. Will Ageing Lock the EU into Immigration Exclusion?' in V. Stoyanova and S. Smet (eds.) *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press, 2022), p. 94.

<sup>7</sup> A conceptual distinction is due here. I am not addressing the issue of 'temporary protection' in the sense of the EU Temporary Protection Directive that was activated on 4<sup>th</sup> March 2022. See Council Implementing Decision (EU) 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection.

<sup>8</sup> J. Brekke, S. Birkvad and M. Erdal, 'Losing the Right to Stay: Revocation of Refugee Permits in Norway' 34(2) *Journal of Refugee Studies* (2021), p. 1637; N. Feith Tan, 'The End of Protection. The Danish 'Paradigm Shift' and the Law of Cessation' 90 *Nordic Journal of International Law* (2021) p. 76. For not that recent discussions of temporariness, see M. Gibney, 'Between Control and Humanitarianism: Temporary Protection in Contemporary Europe' 14 *Georgetown Immigration Law Journal* (2000) p. 689; J. Hathaway, 'Temporary Protection of Refugees: Threat or Solution?' in J. Handmaker (eds.) *Perspectives on Refugee Protection in South Africa* (Lawyers for Human Rights, 2001) p. 41.

proposal for a compulsory status review has been put forward. If the proposal is successful, this will mean that MS will be under an obligation as a matter of EU law to

to carry out systematic and regular status reviews in case of significant changes in the situation in the country of origin as well as when they intend to renew the residence permits, for the first time for refugees and for the first and second time for beneficiaries of subsidiary protection.<sup>9</sup>

Given these developments, in this article I would like to focus on one specific issue related to the temporariness of refugee protection: how refugee status intertwines with the conditions for the granting, revocation and prolongation of national residence permits. What are the interconnections between refugee status, including its cessation and revocation, on the one hand, and national residence permits and their revocation and prolongation, on the other? How are these interconnections regulated by international law, EU law and national law? As opposed to the conditions when refugee status might cease, such as for example the meaning of re-availing oneself of the protection of the country of origin or change of circumstances in the country of origin, that have been an object of exploration,<sup>10</sup> the interconnections between refugee status and validity, revocation and prolongation of residence permits, have remained largely unexplored. Such an exploration is warranted in light of the emergence of temporariness as the standard in asylum policies. In addition to the detailed analysis of the relevant legal norms, this paper situates the questions within a more general discussion about residence in the national community. The starting point in this discussion is that despite the involvement of international law frameworks, such as the Refugee Convention and EU law, issues of residence are ultimately determined and regulated at national level by the specific national community. This makes the inclusion of national legislation in the analysis very important since it shows how the refugee *qua* resident in the national community, benefits from safeguards that favour individual certainty.

Section 2 clarifies the three levels (i.e. the Refugee Convention, the Common European Asylum System (CEAS) and the national level) that regulate the issue of cessation of refugee protection. These levels are distinguished in terms of their rationale, limitations (in terms of competence to regulate), specificity of framing rules and implementation logic. Section 3 then merges the first two regulatory levels to examine how they regulate five issues: refugee status, residence permit based on this status, revocation and cessation of status,<sup>11</sup> revocation of the permit and prolongation of the permit. Despite their differences as highlighted in Section 2, the Refugee Convention and CEAS represent the international level, which implies that they remain distinct from issues of residence and participation in a specific national community. This explains why Section 3 merges the two international frameworks. Section 4 then examines how the above mentioned five issues are regulated at the level of the national legislation with the Swedish Aliens Act chosen as an illustration, a choice that is justified in Section 2.3

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<sup>9</sup> Proposal for a regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents COM(2016) 466 final, p. 5.

<sup>10</sup> M. O'Sullivan, *Refugee Law and Durability of Protection* (Routledge, 2019).

<sup>11</sup> As clarified below, cessation is a possible basis for revocation of status. See Article 14(1), Directive 2011/95/EC of the European Parliament and of the Council of 13 December 2011 on the standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9 (the EU Qualification Directive).

## 2. Regulatory levels: rationale, limitations, level of specificity and implementation

### A. *The Refugee Convention*

Typically for international treaties, the Refugee Convention is framed in general and abstract terms. The obligations contained in the Convention aim to regulate the relationship between States and individuals, i.e. refugees, and to find a way to balance their respective interests.<sup>12</sup> The regulation of this relationship is limited to certain issues and accordingly, many other remain outside the Convention's regulatory reach (e.g. procedural issues and granting of residence permits). Even for those issues within its reach, States have a choice of how to implement their obligations domestically.<sup>13</sup> The Convention is thus dependent on its reception in the national legal order and a variety of receptive methods exist.<sup>14</sup> In addition, the Convention does not require its primacy in the national legal systems. These two features (i.e. no direct applicability and no primacy) distinguish it from EU asylum law.<sup>15</sup>

### B. *EU Asylum Law*

The second regulatory level is EU law that introduces its own system with its own rationale. The CEAS is embedded within a larger project that has its own *telos*. Similarly to the Refugee Convention, it regulates the relationship between the MS and individuals by imposing obligations upon the former. However, another relationship, namely the one between MS is at the fore, which affects the balancing of the respective interests.<sup>16</sup> The premises inherent in the larger project are mutual trust between MS and free movement within the EU. The latter is invoked as a justification for the need to guard the EU external borders, which in turn has justified the regulation of refugee protection at the EU level. The motivation for the EU asylum policy must thus be found in factors external to refugee protection and intrinsically linked to the political construction of the EU and the functioning of the internal market.<sup>17</sup>

With the Lisbon Treaty, however, the EU asylum law has evolved from a 'flanking measure' to the internal market, to a policy with its own goals.<sup>18</sup> Yet this has not changed its construction in at least two important ways that are relevant to the forthcoming analysis. First, the protection remains a national protection and there is no uniform refugee status valid throughout the EU, as Sections 3.1.3 will further explain. Second, regulating the relationship between MS continues to be at the fore and to have serious repercussions.<sup>19</sup> One of them is the objective of MS not to make themselves more attractive to asylum-seekers in comparison with other MS by keeping their national legislation within the EU minimum standards. This dynamic has had important repercussions at national level, as the national example developed in Section 4, shows.

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<sup>12</sup> J Hathaway, *The Rights of Refugees under International Law*, p. 183.

<sup>13</sup> C. Chetail 'Are Refugee Rights Human Rights?' in R Rubio-Martin (ed.) *Human Rights and Immigration* (Oxford University Press, 2014) p. 51.

<sup>14</sup> G. Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (Brill, 2000) p. 35.

<sup>15</sup> Directives can under certain circumstances directly confer rights. See e.g. Case C-578/08 *Rhimou Chakroun v. Minister van Buitenlandse Zaken*, EU:C:2010:117, para. 41.

<sup>16</sup> G. Noll, *Negotiating Asylum* p. 22.

<sup>17</sup> C. Chetail, 'The Common European Asylum System: Bric-a-brac or System?' in V. Chetail, P. De Bruycker and F. Maiani (eds.), *Reforming the Common European Asylum System* (Brill, 2016) p. 11; J. Durieux, 'The Vanishing Refugee: How EU Asylum Law Blurs the Specificity of Refugee Protection' in H. Lambert et al. (eds.) *The Global Reach of European Refugee Law* (Cambridge University Press, 2013) p. 238.

<sup>18</sup> E. Tsourdi and C. Costello, 'The Evolution of EU Law on Refugees and Asylum' in P. Craig and G. de Burca (eds.) *The Evolution of EU Law* (Oxford University Press), p. 797-8.

<sup>19</sup> D. Thym, 'Constitutional Framework and Principles of Interpretation' in D. Thym and K. Hailbronner (eds.) *EU Immigration and Asylum Law. Article-by-Article Commentary* (C.H. Beck/Hart/Nomos, 2022) p. 5.

Asylum is a competence shared between the EU and the MS. Only certain issues are regulated at EU level, some with facultative provisions others with provisions formulated as obligations. This implies a scope for national variations. Even in relation to the provisions formulated as obligations, MS can adopt more favorable standards. Specifically, the issue of residence and the extension of permits remains largely a national concern and as Section 3.5. will show, EU law barely regulates these issues. This implies that to actually truly understand the temporariness of refugee protection, a detailed engagement with the national level is crucial.

In contrast to the Refugee Convention, CEAS contains more detailed rules and in this way it specifies some of the provisions of the Convention. The premise in this specification is that the EU asylum law has to be compatible with the Refugee Convention.<sup>20</sup> The central role of the Refugee Convention in the adoption, interpretation and application of the EU secondary law, is repeatedly confirmed.<sup>21</sup> It follows that EU asylum law through secondary implementation (i.e. through the medium of directives) and as a result of the case law of the ECJ, can be viewed as a 'conduit for the interaction of international law and municipal law.'<sup>22</sup>

### C. The national level

Finally, the national level is the most crucial one for understanding the temporariness of refugee protection, as this article aims to demonstrate. The objective of balancing competing interests (those of the refugees and the specific political community) is equally valid at national level, as at the other two levels. However, this balancing is specific for the particular State, since ultimately after the refugee status determination procedure, the person gains access to a specific national community that offers protection. How and where the balance is to be found is also determined by rationales that are absent from the two levels discussed above. Such rationales could be related to the national welfare system.<sup>23</sup> They could be also related to some formal administrative law principles such as *res judicata*.

The national level suffers from no limitations as to what and how it can regulate, as long as the minimum standards originating from the two levels discussed above are met. The national regulation has to be very detailed so that the national authorities can be guided how to implement it. EU asylum law is helpful here to guide the national level due to its detailed provisions; yet, MS continue to be bound by their obligations under the Refugee Convention whose meaning might be more difficult to delineate.<sup>24</sup> Crucially, EU law cannot alter Convention obligations.<sup>25</sup>

The exploration of the national level requires engagement with national asylum legislation that as already suggested above, can vary across MS. Since the analysis has to be made manageable

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<sup>20</sup> Article 78 (1) Treaty on the Functioning of the European Union OJ C 326/47; Article 18, Charter of Fundamental Rights of the European Union OJ C 202/389 [2016].

<sup>21</sup> Jointed Cases C-199/12 to C-201/12 *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel*, EU:C:2013:720, para. 39.

<sup>22</sup> D. Bethlehem, 'International Law, European Community Law, National Law: Three Systems in Search of a Framework' in M. Koskeniemi (ed) *International Law Aspects of the European Union* (Maritinus Nijhoff, 1998) p. 173.

<sup>23</sup> See e.g. C. Albrekt Larsen (ed) *Migrants and Welfare States. Balancing Dilemmas in Northern Europe* (Edward Elgar, 2022).

<sup>24</sup> Difficulties exacerbate by the fact that there is no body mandated to authoritatively interpret the Convention and the role of the national authorities is crucial in this respect.

<sup>25</sup> G. Noll, 'International Protection Obligations and the Definition of Subsidiary Protection in the Qualification Directive' in C. de Sousa and P. de Bruycker (eds.), *The Emergence of a European Asylum Policy* (Bruylant, 2004) p. 194.

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and in any case the objective here is not a comparative analysis, a choice of a national jurisdiction is due. I have chosen to analyze the Swedish Aliens Act for the following reason. In 2021 Sweden introduced a major change in its legislation that implied that refugees will not anymore receive immediately permanent residence permit, but rather a time-limited permit.<sup>26</sup> Two main justifications were forwarded in favor of this change: adjusting the Swedish legislation to the EU minimum standards and deterrence (i.e. making Sweden less attractive so that asylum seekers remain in other Member States).<sup>27</sup> Yet a detailed analysis of the national legislation, as it relates to the Refugee Convention and the EU asylum law, will demonstrate that temporariness is not necessary in the State's interest. External frameworks, such as the Refugee Convention and the CEAS, and the related deterrence arguments, are invoked to justify the shift towards temporariness. Yet, at the same time, a tension emerges. This tension can be only understood at national level because it is at this level where the refugee also appears as a resident and a participant in a welfare community and, relatedly, as a beneficiary of certain administrative law principles that favour individual certainty. In this sense, Sweden as a welfare State,<sup>28</sup> offers a particular context for understanding temporariness and the tension that it produces. This tension will be revealed through a detailed analysis of the national legislation that Section 4 will offer. The analysis will show how despite the changes that fully comply with the minimum standards of the two international frameworks, the national law also seeks to mitigate the shift towards temporariness.

### **3. The Refugee Convention and EU Asylum Law**

An answer to the questions posed in the beginning of the article demands an initial understanding of what refugee status is (Section 3.1) and how the latter leads to the granting of a residence permit (Section 3.2). Only then the temporariness of both, the status and the permit, can be explained (Sections 3.3 – 3.5).

#### *A. Refugee status is a national status*

Although the requirements for being a refugee have been widely examined, the issue of refugee *status* itself has barely been discussed in more details. There seems to be a general assumption that the Refugee Convention gives rise to a particular distinctive legal status.<sup>29</sup> If status is understood as delineation of a group of people and imposition of certain obligations upon States in relation to individuals belonging to the group,<sup>30</sup> then the usage of the term 'status' might be understandable. However, this section shows that the Refugee Convention does not grant a specific legal status.<sup>31</sup>

A textual interpretation is helpful in the beginning. Article 1(A) of the Refugee Convention defines to whom the term 'refugee' shall apply, in this way delimiting the Convention's

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<sup>26</sup> R. Stern, 'Proportionate or Panicky? On the Developments in Swedish and Nordic Asylum Law in Light of the 2015 'Refugee Crisis'' in V. Stoyanova and E. Karageorgiou (eds.) *The New Asylum and Transit Countries in Europe during and in the Aftermath of the 2015/2016 Crisis* (Brill, 2019) p. 245.

<sup>27</sup> En långsiktigt hållbar migrationspolitik, Betänkande av Kommittén om den framtida svenska migrationspolitiken SOU 2020:54.

<sup>28</sup> The welfare approach implies that migrants as residents have the same formal rights to welfare as citizens. M. Karlsen, *Migration Control and Access to Welfare. The Precarious Inclusion of Irregular Migrants in Norway* (Routledge, 2021) p. 17.

<sup>29</sup> J. Hathaway, 'The Architecture of the UN Refugee Convention and Protocol' in C. Costello, M. Foster and J. McAdam (eds) *The Oxford Handbook of International Refugee Law* (Oxford University Press, 2021) p. 171.

<sup>30</sup> J. McAdam, *Complementary Protection* (Oxford University Press, 2007) p. 198-200.

<sup>31</sup> Chapter II of the Refugee Convention has the title 'Juridical Status' and addresses issues related to personal status such as marriage, property rights and access to courts.

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personal scope of application. Article 1(C) regulates when the Convention ceases to apply. Articles 1(D), (E) and (F) formulate certain categories of persons to whom the Convention does not apply. The remaining provisions in the Convention formulate obligations that the State Parties have in relation to refugees. The issue of status is a procedural issue since it implies an identification of whether a person belongs to specific group. As other procedural issues, it is not regulated by the Convention.<sup>32</sup> The issue about status can be regulated by the national legal order that can establish a particular legal status, i.e. refugee status, so that certain rights can be attached by the national legislation to this status so that the State implements its international law obligations. The establishment of a distinctive legal status at national level is thus one possible method of implementation of the Convention.<sup>33</sup> Ultimately, however, the status is grounded in the particular national legal order and the attachment of rights to this status is also performed by the same legal order. Although the refugee definition and certain obligations are internationally grounded in the Refugee Convention, domestic proceedings and domestic legislation determine the status. This can be also illustrated through the multiple references to the domestic legal order made by the text of the Convention itself. As Chetail has noted, 'there exist as many refugee statuses as State Parties to the Geneva Convention, insofar as the content of the applicable standards to aliens and nationals is primarily determined by the legislation of each individual state.'<sup>34</sup>

There is no obligation under the Convention formulated at such a level of specificity as to demand that States establish a specific national administrative status. Neither is there an obligation to establish a status at international level that might imply mutual legal recognition by all State Parties.<sup>35</sup> In other words, the Refugee Convention does not foresee and demand the granting of a distinct legal status.<sup>36</sup> The Convention might demand the achievement of certain results (i.e. the delimitation of certain individuals in relation to which certain benefits need to be extended), however, it is within the discretion of the State Parties how this result will be achieved. So, if we were to talk about 'refugee status', it needs to be highlighted that it is a particular State that offers the status and the protection that it implies, not the international community.<sup>37</sup> The issue of status is a national matter in the same way as the issue of the procedure is, i.e. how it is determined that a person should be granted a certain legal position, i.e. a status, so that she has certain entitlements.

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<sup>32</sup> Although no specific procedure is mentioned in the Convention, it does presuppose some kind of an identification process. See its Articles 9 and 31(2).

<sup>33</sup> This explains the absence of formal status determination procedures in some States Parties.

<sup>34</sup> V. Chetail 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in R. Rubio-Martin (ed) *Human Rights and Immigration* (Oxford University Press, 2014) p. 42.

<sup>35</sup> According to para 7 of the Schedule to the Refugee Convention '[t]he Contracting States shall recognize the validity of the documents issued in accordance with the provisions of Article 28 of this Convention.' This mutual recognition of the travel documents does not mean mutual recognition of the underlying refugee status by other State Parties. S. Peers, 'Transfer of International Protection and European Union Law' 24 *International Journal of Refugee Law* (2012) p. 529. The obligation to mutually recognize the travel documents has been, however, invoked in support of the argument that the determination of refugee status by one States has 'extraterritorial effect', which means that it should be recognized by other States. See 'Note on the Extraterritorial Effect of the Determination of Refugee Status' EC/SCP/9. Yet, the Note does acknowledge the absence of uniform state practice in this respect.

<sup>36</sup> Case C-391/16 *M v. Ministerstvo vnitra*, EU:C:2013:720, para. 90.

<sup>37</sup> Refugee status determination by the UNHCR remains beleaguered with legal issues. M. Kagan, 'The Beleaguered Gatekeeper: Protection Challenges Posted by UNHCR Refugee Status Determination' *International Journal of Refugee Law* (2006) p. 1.

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In this sense, the Refugee Convention does not regulate the issue of cessation of status. Actually, the text of Article 1(C) of the Convention does not even refer to cessation of *status*. It refers to circumstances when *the Convention shall cease to apply*.<sup>38</sup> Cessation of status and any consequences flowing from it are a matter of national law, and an object of regulation by EU law, a point to which I will return below.

It follows that from a legal perspective the statement that 'refugee status is not a status that is granted by States; it is rather simply recognized by them' cannot be correct.<sup>39</sup> The reason is not only that, as already mentioned above, the status and any attached entitlements are based on the national legal order (indeed as a possible way of implementing international law obligations), but more generally rights are ensured by and within the structures of the State. The reason is that, despite all the rhetoric about universality, we are politically organized in communities called nation States and within these communitarian structures our rights are guaranteed.<sup>40</sup> Refugee status and any entitlements flowing from it are not in any way different in this respect.

As to the idea that being a refugee is a matter of objective factual reality, that exists without being legally cognizable,<sup>41</sup> first, it can be questioned whether refugee status precedes legal validation,<sup>42</sup> and second, it can be also asked whether there is a point in objectively being a refugee, if no legal consequences (i.e. rights and corresponding obligations) flow from this. The claimed declaratory nature of refugee status is invoked to support the argument that it is justifiable for the law to extend certain rights before legal validation of refugee status, since a person might be in fact a refugee even prior to the legal validation.<sup>43</sup> Indeed, extension of certain rights (such as *non-refoulement*) prior to granting of a status is crucial given the irreversible damage that can be caused. However, it is not the claimed declaratory nature that achieves this objective. What national law and EU law actually do is to create another legal status so that certain rights can be extended for safeguarding the very purpose of the regime. This status is called an asylum seeker. In the context of EU law, the terms used is 'an applicant for international protection,' as defined in Article 1(c) of the EU Procedures Directive.<sup>44</sup>

In contrast to the Convention, EU law does regulate the issue of status.<sup>45</sup> A pertinent question that emerges then is whether EU law establishes an EU status, in this way possibly undermining

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<sup>38</sup> This has led to confusion. Authors have suggested that Article 1(C) RC can only be invoked in 'situations where a person has already been accorded the status of a refugee'. S. Kneebone and M. O'Sullivan, 'Article 1C' in A. Zimmerman (ed.), *The 1951 Convention relating to the Status of Refugees and its Protocol: A Commentary* (Oxford University Press, 2011) p. 485 - 486. Hathaway has objected to this and has argued that Article 1C can apply, 'whether or not formal assessment of status has taken place.' Article 1(C) (5) and (6) do, however, refer to 'recognized as a refugee.' J. Hathaway, *The Law of Refugee Status* (Cambridge University Press, 2014) p. 462, footnote 3.

<sup>39</sup> J. Hathaway and M. Foster, *The Law of Refugee Status* (Cambridge University Press, 2014) 1. UNHCR Handbook, para. 28.

<sup>40</sup> G. Noll, 'The Exclusionary Construction of Human Rights in International Law and Political Theory' IIS Discussion Paper 2003 10.

<sup>41</sup> See Recital 21 of the EU Qualification Directive that refers to the declaratory nature of refugee status.

<sup>42</sup> M. Zagor, 'Recognition and Narrative Identities: Is Refugee Law Redeemable?' in K. Rubenstein, M. Nolan and F. Jenkins (eds) *Allegiance and Identity in a Globalized World* (Cambridge University Press, 2014) p. 311; T. Luker, 'Performance Anxieties: Interpellation of the Refugee Subject in Law' 30 *Canadian Journal of Law and Society* (2014) p. 107; G. Noll, 'Evidentiary Assessment under the Refugee Convention' in G. Noll (ed) *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Brill, 2005) p. 145.

<sup>43</sup> J. Hathaway, 'The Architecture of the UN Refugee Convention and Protocol' in *The Oxford Handbook of International Refugee Law* p. 175.

<sup>44</sup> Directive 2013/32 of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

<sup>45</sup> Case C-391/16 *M v. Ministerstvo vnitra*, EU:C:2013:720, para. 85.



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the argument that refugee status is a national status.<sup>46</sup> The idea of 'a uniform status of asylum' mentioned in Article 78(2) TFEU seems to imply a mutual recognition of *positive* asylum decisions.<sup>47</sup> Yet, such a uniform status does not exist in the EU.<sup>48</sup> It is not only that the MS grant the status, but the status granted remains ultimately a national status since any benefits attached to the status are available only within the boundaries of the specific MS. In this sense, there is nothing European in the status *and its content*.<sup>49</sup>

The granting of the refugee status does not lead to the conferral of EU mobility rights unless beneficiaries can bring themselves under the purview of the EU Long-Term Residence Directive. Crucially, it is the 5 year legal residence and the fulfillment of additional requirements, not the refugee status, which gives the basis for the EU long-term residence status recognizable by the other Member States.<sup>50</sup> Directive 2011/51/EC extending the scope of the Long-Term Residence Directive to beneficiaries of international protection, is clear to the effect that '[t]ransfer of responsibility for protection of beneficiaries of international protection is outside the scope of this Directive'. This reaffirms that the refugee status 'remains attached to a specific Member State.'<sup>51</sup> As to freedom of movement between MS, this freedom applies to refugees to the extent that they hold a residence permit,<sup>52</sup> and fulfill the entry conditions.<sup>53</sup> Refugees thus have freedom to travel within the EU *qua* residents, not *qua* individuals with refugee status.

#### *B. Residence permit based on refugee status*

Similarly to the issue of refugee status, the Refugee Convention does not regulate the issues of residence and permits.<sup>54</sup> In practice, States might have decided to implement their obligations via the extension of permits; however, this is simply their choice for implementation. A choice that is understandable given that refugees, as all migrants, need to be granted a permit so that their stay in the country is regulated. In contrast, EU law links the refugee status with the granting of a residence permit.<sup>55</sup> Notably, according to the EU Qualification Directive, it is the refugee status, not the residence permit, that gives access to benefits. For this reason, MS cannot deny or reduce the benefits guaranteed by Chapter VII of the EU Qualification Directive when they revoke a residence permit of a person with a refugee status.<sup>56</sup> In the logic of the EU Qualification Directive, the residence permit should not have an intermediary role for accessing the benefits.<sup>57</sup> The status has to be revoked so that access to benefits is denied.

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<sup>46</sup> Under EU law, refugee status must be afforded to a person where she meets the standards. Member States exercise no discretion in this respect. Case C-373/13 *H.T. v. Land Baden-Württemberg*, EU:C:2015:413, para. 63.

<sup>47</sup> European Agenda on Migration COM(2015) 240, 13 May 2015, 17.

<sup>48</sup> The issue of mutual recognition of positive asylum decisions is not mentioned at all in the Communication from the Commission on the New Pact on Migration and Asylum COM(2020) 609 final.

<sup>49</sup> This situation can be sharply contrasted with the mutual recognition so that Member States shield themselves from the presence of applicants and refugees (and thus do not have to be responsible for the extension of any rights and benefits) and from the examination of claims. See e.g. Article 33(2)(a) EU Procedures Directive.

<sup>50</sup> S. Peers, 'Transfer of International Protection and European Union Law' 24 *International Journal of Refugee Law* (2012) p. 550.

<sup>51</sup> D. Thym, 'Long-Terms Residence Directive 2003/109/EC' in D. Thym and Hailbronner (eds) *EU Immigration and Asylum Law* (C.H. Beck/Hart/Nomos, 2022) p. 589.

<sup>52</sup> Art 21, Schengen Convention ([2000] OJ No L239).

<sup>53</sup> See Article 21(1) Schengen Implementing Convention as amended by Regulation (EU) No 265/2010 (OJ 2010 L 85/1).

<sup>54</sup> M. Gil-Bazo, 'Refugee Protection under International Human Rights Law: From Non-refoulement to Residence and Citizenship' 34 *Refugee Survey Quarterly* (2015) p. 40.

<sup>55</sup> Article 24(1) EU Qualification Directive.

<sup>56</sup> C-373/13, *H.T. v. Land Baden-Württemberg*, para. 96 (emphasis added).

<sup>57</sup> Case C-713/17 *Ahmad Shah Ayubi v Bezirkshauptmannschaft Linz-Land*, EU:C:2018:929, para. 27.

### *C. Revocation of, ending of or refusal to renew refugee status*

Given the central role of the refugee status in the logic of the EU Qualification Directive, it is important to clarify when it can end. As already clarified above, the Refugee Convention does not regulate the issue of conferral of status and in this sense, it does not regulate the issue of the temporal limitations of the status, including the ending of the status. Neither does it regulate the issue of revocation for the simple reason that it does not have to. From the perspective of the Convention and its high level of abstraction, if exclusion applies (even if retroactively) or if incorrect information was supplied (even if it is retroactively discovered that the information is incorrect), the 'term' refugee has never applied to person, i.e. the person has never been a refugee in the meaning of the Convention. In this sense, there is nothing to revoke.

In contrast to the Refugee Convention, the EU Qualification Directive does regulate the issue of status, including its revocation, ending and refusal to renew. First we need to understand under what conditions EU law obliges and allows Member States to revoke, end or refuse to renew the status. Then we can turn to the procedural aspect – how does EU regulate the trigger of the examination that might lead to revocation, ending or refusal to renew status?

#### *1. Conditions in EU law that justify revocation, ending of or refusal to renew status*

Article 14 of the EU Qualification Directive regulates the revocation, ending and refusal to renew status, by invoking various situations (i.e. ceasing to be a refugee, the person has never been a refugee, exclusion, misrepresentation of facts, and the person is a danger to the security and the community of the Member State). In the invocation of these situations, the text of the EU Qualification Directive does not distinguish in which one of them specifically revocation, as opposed to for example ending of status, applies.

Let's start with cessation as one of the situations that can be invoked. If one of the circumstances under which a person ceases to be a refugee (enumerated in Article 11 EU Qualification Directive that corresponds to Article 1(C) of the Refugee Convention) arise, MS are under the *obligation* to revoke, end or refuse to renew the refugee status. Once a person ceases to be a refugee in the sense of Article 11 EU Qualification Directive, MS shall *end* the refugee status pursuant to Article 14(1) EU Qualification Directive. Here it is important to clarify that cessation can materialise only under the specific circumstances indicated in Article 11 EU Qualification Directive; cessation does not materialize when more generally the person ceases to have a well-founded fear of being persecuted. There are at least two arguments that support this contention. First, a person might still be a refugee and accordingly, has well-founded fear of persecution, but voluntarily decides to re-establish himself in the very country that she left due to the well-founded fear of persecution. In this case, according to Article 1(C)(4) of the Convention, the Convention ceases to apply to this person and, according to Article 11(1)(d) of the EU Qualification Directive, she ceases to be a refugee. Crucially, cessation has nothing to do with whether or not the person can still be exposed to risk of persecution. This illustrates the mismatch between being a refugee and ceasing to be a refugee.<sup>58</sup>

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<sup>58</sup> One can argue that there is no mismatch since if the person has in fact re-established himself in the country that she left, she is not anymore outside her country and in this sense she does not fulfill the definition of 'being a refugee'. The strength of this argument however depends on the meaning and interpretation of 're-establishment'. Can some visits and periods of stay be interpreted as re-establishment? The person might have done such visits and stays, but she might still be outside her country at the time when the issue of cessation might arise.

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The second argument in favour of this mismatch is the reference to circumstances where the person 'can no longer, because the circumstances in connection with which he or she has been recognized as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality' (i.e. change of circumstances). Article 1(C)(5) of the Refugee Convention has been interpreted to the effect that even if the circumstances in connection with which the person has been recognized as a refugee have ceased to exist, the Convention does not cease to apply to her. The reason is that for the Convention to cease to apply, its Article 1(C)(5) also demands that the person can receive 'protection' in the country and 'protection' is arguably not the same as absence of persecution.<sup>59</sup>

This interpretation, however, has not been supported by the ECJ. In *Abdulla*, the ECJ noted that Article 11(1)(2) of the EU Qualification Directive means that

refugee status ceases to exist, when, having regard to a change of circumstances of a significant and non-temporary nature in the third country concerned, the circumstances which justified the person's fear of persecution [...], on the basis of which refugee status was granted, no longer exist and that person has no other reason to fear being 'persecuted'.<sup>60</sup>

*Abdulla* thus implies that cessation occurs when there is no reason to fear persecution and the notion of 'protection' in Article 11(1)(e) of the EU Qualification Directive has meaning that is not wider than absence of persecution.

In addition to this mismatch that arguably puts EU law on a collision course with the Refugee Convention, Article 14(1) of the EU Qualification Directive causes additional confusion since it applies the terms revocation and refusal to renew status. Labelling cessation due to change of circumstances in the country of origin, as a basis for revocation and refusal to renew refugee status, is not appropriate. First, the whole idea of renewal of refugee status should be rejected as incorrect and, actually nonsensical. The reason is that the status is not framed as having a specific duration, a feature that distinguishes it from the residence permit.

The second reason why the terminology in the EU Qualification Directive appears inappropriate relates to the utilisation of the term revocation in the text of Article 14(1) as also describing cessation. The status can indeed be revoked, as being *inappropriately* granted. However, this is very different from cessation where the following circumstances are envisioned - the status was granted because the person actually fulfilled the material conditions for being a refugee, however, subsequently because of certain events and changes (as indicated in Article 11 EU Qualification Directive), the status ceased (ended).<sup>61</sup> Calling cessation revocation and the utilisation of the term revocation, is not only confusing, but it also risks blurring the meaning of cessation. The correct terms that should be applied are cessation or ending of the status.

Additional source of terminological confusion is that the very same terms (i.e. revocation of, ending of or refusal to renew refugee status) are used in Article 14 of the EU Qualification Directive to describe three other situations. First, when the person has never been a refugee.<sup>62</sup>

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<sup>59</sup> M. O'Sullivan, *Refugee Law and Durability of Protection* (Routledge, 2019) p. 151.

<sup>60</sup> Cases C-175/08, C-176/08, C-178/08, C-179/08 *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi and Dler Jamal v Bundesrepublik Deutschland*, EU:C:2010:105.

<sup>61</sup> Without prejudice to the argument that Article 1(C) of the Refugee Convention is not a mirror to the refugee definition.

<sup>62</sup> Article 14(2) EU Qualification Directive.

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Second, when she should have been or is excluded from being a refugee.<sup>63</sup> Third, when she misrepresented facts decisive for the granting of refugee status.<sup>64</sup> In these situations, the person has never been a refugee anyway and the refugee status can be revoked since it should never have been granted in the first place. This has nothing to do with cessation of the status.

Finally to make things even more confusing, Article 14(4) of the EU Qualification Directive adds two other situations where Member States *may* revoke, end or refuse to renew refugee status. Member States have this discretion when generally the person can be regarded as a danger to the host society. The Refugee Convention itself does not allow cessation in these situations; its Article 33(2) rather allows the removal of the person. This discrepancy has led to the argument that Article 14(4) of the EU Qualification Directive is not compatible with the Refugee Convention.<sup>65</sup> In *M v Ministerstvo vnitra* the ECJ rejected this argument by invoking the distinction between 'being a refugee' for the purpose of the Refugee Convention and 'refugee status' for the purpose of EU law. As already clarified, the latter is not regulated by the Convention; it is however regulated by EU law that allows its revocation even when the person is considered a danger to the host society. By invoking this distinction, the ECJ avoided incompatibility of EU law with the Convention. Yet, the reasoning in *M v Ministerstvo vnitra* is not unproblematic. It ignores the implementation practice of the MS: the latter guarantee the protection demanded by the Refugee Convention through a formal procedure leading to the granting of a refugee status. In this sense, 'being a refugee' in itself does not mean much without a legal validation, as already mentioned before.

## 2. Conditions in EU law that may trigger an assessment about revocation

Having explained the conditions under which status must or may be revoked, ended or refused to renew, the procedural question what might trigger an examination that might lead to revocation, ending or refusal to renew status, can be now addressed. The starting point is Article 44 of the Procedures Directive that imposes an obligation upon MS to ensure that there is a procedure at national level for examining the validity of refugee status. However, and this is crucial, the Procedures Directive does not impose an obligation upon MS to commence such an examination. This follows from the formulation of Article 44 of the Procedures Directive: 'Member States shall ensure that an examination to withdraw international protection from a particular person *may* commence when ... [emphasis added]'. Article 44 of the Procedures Directive regulates what triggers the procedure for withdrawal of refugee status: 'new elements and findings' that indicate that there are 'reasons to reconsider the validity'. Yet, no obligation to trigger the examination can be identified in the text. Once triggered, however, and if the requirements are met, there is an obligation to withdraw status under Article 14(1) and (3) EU Qualification Directive. In contrast, Article 14(4) EU Qualification Directive imposes no obligation upon MS to withdraw status when the person is considered a danger to the community, even if the procedure is triggered at national level.

### D. Revocation of, ending of or refusal to renew a residence permit

Having explained under what conditions refugee status can be revoked and ended, the issue of residence permits can be addressed. Article 24(1) EU Qualification Directive provides that MS

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<sup>63</sup> Article 14(3)(a) EU Qualification Directive.

<sup>64</sup> Article 14(3)(b) EU Qualification Directive.

<sup>65</sup> UNHCR comments on the European Commission's proposal for a Directive on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551 of 21 October 2009).

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'shall issue to beneficiaries of refugee status a residence permit'. While the refugee status is the basis for a residence permit, the two are also detached. The reason is that the EU Qualification Directive does not link the revocation of the permit with the revocation of the status in a general way. There is no provision that says that when refugee status is revoked, the permit has to be necessarily revoked as a consequence. This can be contrasted with Article 21(3) EU Qualification Directive that generally links the removal of the person (i.e. *refouled*) with the revocation of the residence permit. A similar provision that generally links the revocation of refugee status with revocation of the permit is absent.

Another illustration of the detachment is that Article 24(1) of the EU Qualification Directive allows a situation where status can be granted, but a permit may be refused, due to 'compelling reasons of national security and public order'. Article 21(3) of the EU Qualification Directive also allows the revocation, ending or refusal to renew or to grant a *permit* to a refugee when she is considered 'a danger to the security of the Member State' or 'having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community of that Member State.' From the perspective of the national legal order, these situations lead to an anomaly since for MS to comply with the EU Qualification Directive, they have to continue to ensure the entitlements related to the refugee status, such as access to employment, social welfare, healthcare etc., and yet this person *might* be denied a residence permit or such might be revoked.<sup>66</sup>

#### *E. Renewal and prolongation of the residence permit*

As it has become clear so far, the EU Qualification Directive regulates the initial granting of the permit and the conditions for its revocation. It also regulates the minimum duration of the permit initially granted to a person with refugee status (i.e. three years) and stipulates that the permit needs to be renewable. It does not, however, regulate the conditions for the renewal (i.e. prolongation) of the permit and how these are affected by the refugee status of the person, including any withdrawal of this status. It is therefore crucial to see how these issues are regulated at national level.

### **4. The National level**

#### *A. Refugee status in Sweden*

Chapter 1 Section 3 Swedish Aliens Act provides that '[i]n this Act 'asylum' means a residence permit granted to an alien because he or she is a refugee or in need of subsidiary (alternative) protection.' It is clear from this provision that protection means the residence permit, not the refugee status. It follows that the national legal order is framed from the perspective of the residence permit as a necessary condition for lawful stay. The substance of the asylum application is the residence permit,<sup>67</sup> seen as a type of benefit that the person applies for within administrative proceedings.<sup>68</sup>

This is further confirmed by Chapter 4, Section 3 Aliens Act that stipulates that an alien, who by invoking protection reasons applies for a residence permit, *shall* be declared a refugee, if she meets the refugee definition and is not excluded. This provision is framed in such a way that immediately after the words 'shall be declared a refugee', the following term is added in brackets '(flyktingstatusförklaring)' that can be translated as '(declaration of refugee status)'. The addition of the text in the brackets can be confusing since it raises the question whether

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<sup>66</sup> Case C-373/13 *H.T. v Land Baden-Württemberg*, para. 95.

<sup>67</sup> MIG 2007:31.

<sup>68</sup> I. Karlander, *Officialprincipen i migrationsprocessen. Domstolens utredningsansvar* (2021) p. 157.

there is any difference between declaring a person a refugee and granting her a declaration of refugee *status*. The Migration Court has explained that no distinction is meant between the two.<sup>69</sup> A pertinent question is then why the national law contains these different terms and configurations (i.e. declaring a person a refugee versus granting him/her a declaration of refugee *status* framed in brackets in the legal text). The answer can be found in the preparatory works that refer to the EU Qualification Directive according to which it is the status that gives right to benefits. The national legislator, however, notes that the national legal order is organized differently. In the Aliens Act, the central concept is residence permit.<sup>70</sup> Accordingly, pursuant to the national legislation an alien who needs protection is granted a residence permit, without the authorities making a *separate* formal decision granting her a refugee status. The only decision taken at national level is the decision on the residence permit. This decision shows on which ground the permit has been granted; for example, one such ground is that the alien is declared to be a refugee. However, a specific status, such as refugee status, is not *separately* granted.<sup>71</sup> The national legislator justified the above approach by reference to the nature of the EU law instrument that regulates the matter, namely a directive that is binding only as to the result to be achieved.<sup>72</sup>

The national legislator has chosen to adjust the Aliens Act to the system established in the Directive, by introducing the term 'declaration of refugee status' in brackets and by ensuring that the conditions for the granting of refugee status correspond to the conditions for granting a residence permit. In this way, the determination of the two issues (status and residence permit) happens at the same time and leads to one single administrative decision. It is, however, the residence permit that gives the protection (allowing the person to stay in the country) and the access to rights at national level.<sup>73</sup> The concept of refugee status was inserted in the national legal order for the sake of dispersing any doubts that Swedish law might not comply with EU law that has made the concept of refugee status central.

#### *B. Residence permit based on refugee status*

As it has become clear, pursuant to the Swedish legislation the recognition that an alien is a refugee can only happen within a procedure for applying for a residence permit. The legislation is framed from the assumption that the person does not have a permit and applies for a permit by invoking protection grounds, which necessitates an assessment whether declaration of refugee status should be made within the procedure that aims to determine whether the alien has a basis to remain and can be granted a residence permit.<sup>74</sup> The diminished importance of the refugee status in the national legal order can be also demonstrated with reference to the provisions in the Aliens Act that aim to ensure that Sweden complies with its *non-refoulement* obligations, including those originating from the Refugee Convention. Compliance with the obligation not to *refoule* is guaranteed at national level with provisions regulating obstacles for execution of removal decisions ('verkställighetshinder') (Chapter 12, Sections 18 and 19,

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<sup>69</sup> MIG 2011:13, 13 June 2011.

<sup>70</sup> Prop. 2009/10:31, 97-98.

<sup>71</sup> Prop. 2009/10:31, 97-98.

<sup>72</sup> Article 249 TFEU.

<sup>73</sup> Migrationsverket Rättsligt ställningstagande. Förutsättningar för att återkalla en skyddsstatusförklaring RS/054/2021 (version 3.0) p. 3.

<sup>74</sup> Chapter 4, Section 3 c, the Aliens Act contains a provision that allows situations when persons who already have residence permits in Sweden to apply for refugee status. This will be relevant to individuals who have a permit on a ground, for example, related to family or work, however, the circumstances in their country of origin change and they might also have a protection claim that can be a basis for another permit. It needs to be however noted that a person can have only one type of residence permit, which means that the legality of her residence in the country can be based on only one single ground.

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Aliens Act). These describe circumstances when the Migration Board can grant *ex officio* a residence permit to an alien who has a removal order that is already in force, but there are obstacles to the execution of the order due to risk of *refoulement*. In addition, and if the Migration Board does not grant *ex officio* a residence permit, the alien can initiate a new procedure to ask the Migration Board for a residence permit after a removal decision that has entered into force.<sup>75</sup> What is interesting here is that the above described national provisions that offer a possibility for granting a permit due to risk of *refoulement*, including risk in the sense of Article 33 of the Refugee Convention, do not refer to the granting of a refugee status in these circumstances. The provisions rather prescribe the granting of a permit because of obstacles for execution of a deportation decision due to risk of *refoulement*.<sup>76</sup> This means that it is not the status that forms the basis for the permit. It is rather directly the prohibition on *refoulement* and the institution of refugee status does not play any intermediary role.

### C. Revocation of status

#### 1. Conditions that justify revocation

Although no separate administrative decision on the status is issued, a decision that grants a residence permit indicates its basis, i.e. declaration of refugee status, which means that one legal consequence from the decision concerns that status and which in turn explains why the Aliens Act contains provisions about revocation of status. Similarly to the analysis performed in relation to the EU Qualification Directive, we need to first understand under what conditions refugee status can be revoked pursuant to the Aliens Act and then we can turn to the question how the national law regulates the trigger of a revocation procedure. In the process of this enquiry, convergences and divergences with EU will be identified.

Chapter 4 Section 5b of the Aliens Act envisions the following four situations when the status can be revoked ('återkallelse av flyktingstatusförklaring'). While the first two imply an obligation upon the authorities to revoke the status, the last two grant the authorities discretion as to whether to revoke the status. As it will become clearer below in section 4.3.2, this distinction (i.e. revocation as an obligation versus a discretionary measure) might influence the triggering of a revocation procedure (i.e. the examination that might lead to revocation).

The first situation corresponds to Article 14(1) of the EU Qualification Directive, which implies that the declaration of refugee status *shall* be revoked, if it transpires that the alien cannot be considered to be a refugee. This means that if one of the circumstances where a person ceases to be a refugee materializes, there is an obligation to revoke the declaration of refugee status.<sup>77</sup> While the circumstances when the national legislation demands cessation correspond to circumstances described in Article 1(C) RC and Article 11 EU Qualification Directive, there is no complete convergence. The reason is that Sweden applies cessation related to change of circumstances in a narrower way. In particular, according to the national legislation, a person ceases to be a refugee because of essential and lasting changes *in the country of origin*. As opposed to Article 11(1)(e) EU Qualification Directive that refers to cessation of 'circumstances in connection with which he or she has been recognized as a refugee', the Swedish legislation

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<sup>75</sup> This provision (Chapter 12, Section 19 Aliens Act) corresponds to subsequent application provision in the EU Qualification Directive, which means that the alien has to invoke new circumstances that could not be invoked before.

<sup>76</sup> Admittedly, the reasons for granting a permit after a removal decision that has entered into force, extend beyond risk of persecution in the sense of the Convention. Such a reason could be also that the country of origin refuses to readmit the person or that there are medical or other special considerations for not executing the removal order. Yet, Convention related reasons are also among them.

<sup>77</sup> MIG 2011:13.

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refers only to changes in the country of origin. Any other changes in the circumstances that have led to the recognition as a refugee, cannot justify cessation. For example, the Migration Board has clarified that changes in the circumstances related to the person herself cannot be a basis for cessation.<sup>78</sup> This discrepancy has been justified with reference to the nature of the EU Qualification Directive as only introducing minimum standards.

The second situation when status shall be revoked corresponds to Article 14(3) EU Qualification Directive. In particular, the declaration of refugee status *shall* be revoked, if it transpires that the alien cannot be considered to be refugee since she should not have been recognized as such in the first place. This can cover circumstances when the status was initially granted based on incorrect information,<sup>79</sup> or the person should have been excluded. This means that the Aliens Act imposes an obligation to revoke the status when the person falls within the exclusion clauses.

Third, the declaration of refugee status *may* be revoked when the alien has committed a particularly grave crime, which can be a basis for considering her as a serious danger for the order and security to allow her to stay in Sweden. Fourth, a declaration of refugee status *may* also be revoked if the alien is engaged in activities considered as a danger to the state security and there are reasons to consider that she would continue these activities in Sweden. In sum, a declaration of refugee status may be revoked when the person is considered a danger to the host community.

A clarification is due here as to the relationship between the provisions quoted in the previous paragraph that give discretion to revoke the status and the issue of exclusion from refugee status. According to Chapter 4 Section 2 b of the Aliens Act, a person is excluded if there is special reason ('synnerlig anledning') to consider that she has committed a serious non-political crime outside of Sweden before she came to Sweden.<sup>80</sup> It follows from this text that a person who was granted a declaration of refugee status and who *commits a crime in Sweden* that can be characterized as serious non-political crime, is not excluded from refugee status. This implies that there is *no obligation* to revoke the status on the ground that there were reasons for exclusion. The same person could be regarded as a danger to the host community since the crime is considered as a particularly serious crime. This *may* justify a revocation of the status, but there is no obligation to revoke it. In this way the national legislation differs from the EU Qualification Directive. The reason is that pursuant to Article 14(3)(a) EU Qualification Directive, if the person should have been or is excluded from being a refugee, the MS *shall* revoke the refugee status.

## 2. Conditions that may trigger an examination about revocation

The Aliens Act is silent as to what might trigger an examination about cessation and thus revocation of status. The reason, as suggested by the preparatory works leading to the adoption of Chapter 4 Section 5b Aliens Act that regulates the revocation of status, is that EU law does not demand that MS continuously and on their own initiative assess whether the conditions for being a refugee are constantly fulfilled.<sup>81</sup> Rather, pursuant to the preparatory works there needs

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<sup>78</sup> Migrationsverket Rättsligt Ställningstagande. Förutsättningarna för att återkalla en skyddsstatusförklaring, RA/090/2021, p. 8.

<sup>79</sup> This includes incorrect information provided by the person himself or when the authorities themselves have made a mistake and the person has not misled them. Case C-720/17 *Mohammed Bilali v Bundesamt für Fremdenwesen und Asyl*, EU:C:2019:448.

<sup>80</sup> In implementation of Article 12(2)(b) EU Qualification Directive.

<sup>81</sup> Prop. 2009/10:31, p. 113.



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to be 'a specific reason' ('särskild anledning') as a trigger. This has been further clarified by the Migration Board in a Legal Position on Revocation of Status.<sup>82</sup> This document clarifies that 'if indications appear that the applicant [for prolongation of the permit] ceased to be a refugee or in need of protection or should have never been declared to be in need of protection, this needs to be investigated further.'<sup>83</sup> An examination can be thus triggered when relevant indications reach the Board regarding a specific case. This means that unless there are some specific indicators pointing to revocation, an examination should not be triggered at all when the person applies for prolongation of the residence permit or for any other reasons comes in contact with the Migration Board (i.e. applying for a travel document or for a family reunification).

What is not clear is whether the Board will actively search for such indicators when there is an open case, for example, regarding permit prolongation, or whether the Board will remain passive. The Legal Position on Revocation of Status clarifies that from an administrative law perspective, the granting a refugee status is a consequence of a decision that has entered in force (it is *res judicata*) to the benefit of the individual and in this sense, a *general reassessment* of the decision cannot be allowed. Although, this is not very helpful to understand how active the Migration Board might actually be in searching for indicators, from a general administrative law perspective, the individual should benefit from certainty.

According to the Legal Position, specific indicators can emerge from the information in the case file that the Migration Board already has, and in this sense, there is no new information that has reached the Board. Such indicators that are accessible to the Board from the initial file, for example, should have prompted the Migration Board when it initially considered the case to engage in a detailed examination whether the person should have been excluded. If such an examination had not been done, when the person was granted status, the Board is under an obligation to do it when the person applies for a prolongation of the permit, given that according to Chapter 4 Section 5 b Aliens Act, it is obligatory to revoke the status when the person cannot be considered a refugee. The Legal Position at the same time clarifies that if an assessment regarding exclusion has been done when refugee status initially granted, the Migration Board only in exceptional circumstances can engage in a detailed examination regarding exclusion when the person applies for a prolongation of the permit. Such an engagement is justified when the initial assessment is obviously incorrect or new circumstances have emerged that can support a different assessment.

According to the Legal Position, a revocation assessment can be also triggered when the person obtains a passport from her home country, when the Board receives information that the person has provided incorrect information or has travelled to her home country. The Migration Board has adopted a separate Legal Position regarding return of home passport upon declaration of refugee status and revocation of refugee status,<sup>84</sup> that explains the connection between possession of a home passport and revocation. In particular, when the person applies for a residence permit by invoking protection grounds, she has to submit her passport to the Board.

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<sup>82</sup> Migrationsverket Rättsligt Ställningstagande. Förutsättningarna för att återkalla en skyddsstatusförklaring, RA/090/2021, page 5 (Swedish Migration Board Legal Position on Revocation of Status). Legal positions adopted by the Migration Board are not formally a legal source in Sweden; they rather reveal the interpretation adopted by the Board on specific issues.

<sup>83</sup> Swedish Migration Board Legal Position on Revocation of Status, p. 24.

<sup>84</sup> Migrationsverket Rättsligt Ställningstagande. Återlämnande av hemlandspass vid flyktingstatusförklaring och utfärdande av resedokument samt återkallelse av flyktingstatus, RS/021/2021, 12 March 2021.

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If refugee status granted, she is entitled to travel documents issued by Sweden.<sup>85</sup> The person can, however, ask that her national passport be returned and the Board has no national legal basis to refuse the return. According to the Legal Position, if the person maintains her request to receive her passport back or does not return her passport to the Board (when the passport had been given back to the individual), this constitutes a specific reason ('särskild anledning') to initiate a case for revocation of the refugee status, given that the person has travel documents issued by Sweden. The reasoning underpinning this position is that the conduct of the person (i.e. retention of the passport) can be interpreted to the effect that she has the intention to re-avail himself of the protection of her country.

As to revocation due to change of circumstances in the home country, in principle a general legal statement by the Migration Board about the change in the specific country is required. The Board's Legal Position also adds that if a person has received refugee status due to risk of persecution by a specific regime and this regime has irreversibly lost power, the question of revocation can also become relevant.

#### *D. Revocation of a residence permit*

The revocation of refugee status does not necessarily imply revocation of the residence permit that was granted to the person when she applied for it by invoking protection grounds. Even if refugee status is revoked due to the actualization of the relevant conditions, the requirements that govern the revocation of the resident permit are separate. A distinctive chapter in the Aliens Act regulates the issue of revocation of residence permits. This means that the status can be revoked, but the person continues to have the permit unless some of the conditions in Chapter 7 Aliens Act are fulfilled.<sup>86</sup>

It needs to be initially noted that Chapter 7 of the Aliens Act, that generally regulates the issue of revocation of residence permits, does not contain a provision about the revocation of residence permits granted *specifically* on the basis of refugee status recognition. This means that the national law does not establish a direct link between revocation of status and revocation of the permit.<sup>87</sup> Rather the permit that was initially granted based on invocation of protection grounds and that is still valid (i.e. it has not expired given its timeframe), can be revoked only under the general conditions for revocation as indicated in Chapter 7 Aliens Act. This necessitates an enquiry as to whether and how the conditions that justify revocation of status, already explained in the previous section, relate to any of the conditions that justify revocation of a valid residence permit. Below I have identified three possible ways in which revocation of status relates to revocation of a permit.

##### *1. No revocation of permit if status revoked due to cessation and exclusion*

The national law does not allow revocation of a residence permit after revocation of status due to cessation. Neither does the national law allow revocation of a residence permit after revocation of status due to exclusion. It follows that the status *shall* be revoked, if it transpires that the alien cannot be considered to be a refugee (due to cessation or exclusion), but the residence permit itself cannot be revoked on these grounds.

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<sup>85</sup> Article 28, Refugee Convention; Article 25, EU Qualification Directive (recast); Chapter 4, Section 4 Swedish Aliens Act.

<sup>86</sup> Prop 2009/10:31, p.114.

<sup>87</sup> This can be contrasted with the clear link in the law between an initial denial of status and denial of permit.

## 2. *Conditioned revocation of permit if status revoked due to incorrect information*

Pursuant to Chapter 7 Section 1 of the Aliens Act, residence permits *may* be revoked if an alien has knowingly supplied incorrect information or knowingly suppressed circumstances that have been important for obtaining the permit. This possibility partially overlaps with one of the conditions that justify revocation of the status. As discussed in Section 4.3, the declaration of refugee status *shall* be revoked, if it transpires that the alien cannot be considered to be refugee since she should not have been recognized as such in the first place, due to incorrect information. There is, however, an important difference. The status shall be revoked even if the authorities themselves had made a mistake and used incorrect information,<sup>88</sup> and for this reason the person should not be considered a refugee. In contrast, the permit cannot be revoked when it was the authorities that made a mistake and the person has not misled them in any way.

Even if the revocation of the permit due to supply of incorrect information is a possibility, it is an object of important limitations, both procedural and substantive. First, procedurally since a revocation of a permit implies a revocation of an administrative decision favorable for the person, safeguarding the person's certainty is a relevant consideration. This implies that the Migration Board has the burden to prove that the person knowingly supplied incorrect information that was of relevance for the granting of the permit. It is also the Migration Board that has the burden to prove that there are exceptional grounds to revoke the permit.<sup>89</sup> This brings us to the substantive limitation. Namely, pursuant to Chapter 7 Section 1 Aliens Act, if the alien has been in Sweden for more than four years on a residence permit (even if the permit was temporary) when the question of revocation of the permit is examined by the authority that makes the first decision in the matter, the residence permit may only be revoked if there are *special grounds* ('synnerliga skäl') for this. The starting point underpinning Chapter 7 of the Aliens Act is that there should be strong guarantees for the individual and revocation of a residence permit should not be done easily. This is based on general administrative law principle that when the authorities consider to revoke a decision that is beneficial for a person, guaranteeing the person's certainty and security is an important consideration.<sup>90</sup>

When an assessment is made as to whether the permit should be revoked, Chapter 7 Section 4 of the Alien Act further indicates that the person's connection to the Swedish society and other reasons that might militate against revocation, shall be considered. Within this assessment, the authorities are under the obligation to take into consideration the person's living circumstances, whether she has children and how the revocation of the permit can affect them, other family relationships and the length of stay in Sweden.

## 3. *No revocation of permit if status revoked due to danger to the host society*

Pursuant to Chapter 4, Section 5 b Aliens Act, if a person is considered a danger to the host community, since for example, she has committed a particularly serious crime, her refugee status may be revoked. This is a reflection of Article 14(4) EU Qualification Directive. Articles 21(3) and 24(1) EU Qualification Directive invoke the same reason (i.e. danger to the host community), as a basis for the revocation of the residence permit of a refugee. Sweden, however, does not allow this option. Chapter 7 Aliens Act does not envision a revocation of a valid permit on this ground (i.e. commission of a particularly serious crime). The person continues to hold the permit. The fact that the person has committed a crime might become relevant when she applies for a prolongation of the permit, because as the Legal Position on

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<sup>88</sup> Case C-720/17 *Mohammed Bilali v Bundesamt für Fremdenwesen und Asyl*.

<sup>89</sup> MIG 2015:3, 26 February 2015.

<sup>90</sup> MIG 2014:6; MIG 2015:3, 26 February 2015.

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Revocation of Status adopted by the Swedish Migration Board notes, commission of a crime can be an indication that can trigger an examination of status revocation.<sup>91</sup>

#### *E. Prolongation of a residence permit*

It follows that the national legislation contains strong guarantees that make revocation of a valid permit difficult. The final issue that needs to be considered is how the risk of revocation and the actual revocation of status relates to the prolongation of the residence permit. This is a key issue for two reasons. First, a refugee is granted an initial permit limited to three years that can each time be prolonged with two years. Second, the granting a permanent residence permit is complicated by certain requirements,<sup>92</sup> which might make it difficult to obtain and which implies that refugees might have to apply multiple times for prolongation of permits. As already mentioned, the key issue of prolongation of permits is not regulated by EU law and international law. As I will also demonstrate here, the national law has also barely regulated it.

Two issues need to be initially distinguished. First, the relationship between the procedure for permit prolongation, that a refugee necessarily has to go through if her lawful stay in the country on the basis of the refugee status is to be prolonged, on the one hand, and the trigger of an examination about revocation of status, on the other. Second, the relationship between a decision to revoke the status and existing possibilities for the person to obtain a residence permit. This section will not investigate further the second issue. It suffices to note that even if refugee status is revoked, the Alien Act offers other bases for granting of a permit. These can be family-related or work-related. The reasons for the revocation of the status (cessation, exclusion, incorrect information, danger to the host society etc.) might or might not affect these other possibilities.

Prolongation (renewal) of a residence permit implies that the same basis for a permit is invoked by the applicant as the basis that underpinned the permit that is about to expire. This means that the refugee status is invoked as the basis for the prolongation, which raises the question whether the validity of this basis will be an object of examination within the application for permit prolongation. Similarly to the omission of the Aliens Act to regulate what triggers an examination that might lead to status revocation, the relationship between the permit prolongation and the examination of the basis for the permit, is not specifically addressed. The text of the Aliens Act itself does not link the prolongation of the permit with the provisions about cessation and revocation of status. The Act does not refer to any specific conditions that need to be fulfilled so that prolongation is granted.<sup>93</sup> It can be suggested that the prolongation of the permit is conditioned on the continued possession of this status. Ultimately, however, the person applies for a prolongation of a permit, not prolongation of status. This militates against automatic and general reexamination of the permit's basis, a position that reflects the current practice of the Migration Board as expressed in the Board's Legal Positive on Revocation of Status.<sup>94</sup>

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<sup>91</sup> Migrationsverket Rättsligt Ställningstagande. Förutsättningarna för att återkalla en skyddsstatusförklaring, RA/090/2021.

<sup>92</sup> Pursuant to Chapter 5 Section 1a and Section 7 of the Aliens Act, permanent residence permit can be granted if, among other conditions, the alien can ensure her own subsistence.

<sup>93</sup> In contrast, the conditions for the granting of a permanent residence permit to a refugee are specifically indicated. See Chapter 5, Section 1 a, third paragraph.

<sup>94</sup> For an empirical study see När skyddsbehovet tar slut. Rapport om upphörande av skyddsbehov inom förlängningsprocessen (UNHCR and Swedish Refugee Law Center, 2021).

## 5. Conclusion

Despite the special regime established with the Refugee Convention, refugees appear in the national legal order *qua* non-nationals and residents. As non-nationals, refugees need to invoke a basis for their stay in the national territory. Formal validation that they have well-founded fear of persecution, is a basis that can be invoked at national level for the conferral of a residence permit. As residents, this initial basis continues to have significance since its validity might be crucial for the prolongation of the residence permit. Yet, refugees *qua* residents, benefit from certain safeguards unrelated to the initial basis for the permit. This explains the clear disjunction between the rules governing revocation of refugee status and revocation of residence permits. While as demonstrated in Section 3.4, EU law does link the two in some limited and specific ways, Section 4.4. showed that the national legal order, completely separates the two.

EU asylum law has been introduced as an intermediate regulatory level between the Refugee Convention and the national legal orders. It has taken certain concepts and rules from the former and added others, for the purpose of building a common system (i.e. the CEAS) that has its specific rationale. The concepts of 'refugee status' and revocation of such status are some of the additions. Given that issues surrounding residence and conferral of residence permits are within the realm of the national legal orders, it can be understood why 'refugee status' has been given such a central role in the CEAS whose rationale is some level of harmonization across Member States. Yet, these additions (i.e. refugee status and its revocation) are inevitably linked with issues regulated by the Refugee Convention, such as cessation and *non-refoulement*. They are also linked with issues regulated at national level, such as conferral of residence permits and prolongation of permits. The EU Qualification Directive performs these linkages in ways that are open for criticism in some respects since they might lead to inconsistencies with the Refugee Convention and to discrepancies with organizing principles applied at national level.

Such a discrepancy emerges in relation to the refugee status that has a central role in the logic of the EU Qualification Directive and that serves as a basis for conferral of benefits, only one of which is a residence permit. This implies that the termination of the benefits can happen with the revocation of the status, which in turn makes the issue of the temporariness of the status important in the logic of EU law. In contrast, in the national legal order the residence permit has a central role, which also means that the conditions for the revocation and the prolongation of the permit are rather crucial, not the status.

The issue of prolongation of the residence permit is of paramount importance. It is the national level that regulates it. The regulation is far from detailed since the assumption is that the basis for the initially granted permit (i.e. well-founded fear of persecution) continues to be valid. Only 'special reasons' might trigger a reexamination of this basis. The currently valid EU law does not impose an obligation for triggering the reexamination. In this sense, EU law does not exercise any restraining functions. Once and if reexamination triggered, EU law only regulates the validity of the refugee status, i.e. one possible basis of the permit. In addition, as the careful comparison between the EU law and the relevant national law shows, the national law is more beneficial to the individual since it has narrowed down the circumstances where cessation applies. In addition, national administrative law contains certain basic principles to safeguard individual certainly, which militate against changes to the individuals' detriment.

This detailed examination of the provisions emerging from the three regulatory levels, leads to the general conclusion that refugee status determination is about admission into a particular

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national community.<sup>95</sup> International law and EU law govern the passing of the threshold (e.g. when a person qualifies as a refugee), however, once the threshold is passed the refugee gains access in a protective community and becomes a resident therein via the extension of a national residence permit. There is no other protective community, but the national one, even at the level of the EU. *Qua* resident in the national community, the rules governing the threshold, including the temporal limitations of the protection, tend to lose their significance. This corresponds to Bosniak metaphor 'hard on the outside, soft on the inside.'<sup>96</sup> Given the organizational structures of this community,<sup>97</sup> it is not in its interests to foster and even tolerate temporariness and insecurity and in this sense to be 'hard on the inside'. Yet, as Bosniak also describes the inside and the outside are not separated, which explains why temporariness of the protection has been invoked as a means of deterrence.<sup>98</sup> Without inquiring into the empirics behind this invocation, its tension with the communitarian structures needs to be navigated. The best place where this should happen is at national level. In this sense, EU interventions (such as the proposal for a compulsory status review or, more generally, transforming the EU Qualification Directive into a regulation, which will imply making refugee status a central organizing principle at national level also) can be viewed as undesirable.

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<sup>95</sup> G. Noll, 'Re-mapping Evidentiary Assessment in Asylum Procedures' in G. Noll (ed) *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Brill, 2005) p. 3.

<sup>96</sup> L. Bosniak, *The Citizen and the Alien. Dilemmas of Contemporary Membership* (Princeton University Press 2006) p. 124.

<sup>97</sup> These refer not only to the welfare state mentioned before, but also to liberal values that can be breached if individuals within the national territory are kept insecure, exploitable and in limbo.

<sup>98</sup> Proposal for a regulation on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents COM(2016) 466 final, 4: 'The absence of checks on the continued need for protection gives the protection a de facto permanent nature, thereby creating an additional incentive for those in need of international protection to come to the EU rather than to seek refuge in other places, including in countries closer to their countries-of-origin.'