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RECENT DEVELOPMENT OF SOCIO-ECONOMIC RIGHTS IN INTERNATIONAL HUMAN RIGHTS LAW: ANALYSIS OF ASYLUM CLAIMS BASED ON SOCIO-ECONOMIC RIGHTS VIOLATIONS

Master's Thesis

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ABBREVIATIONS

Board of Immigration Appeals (United States) – BIA.

European Convention on Human Rights – ECHR.

European Court of Human Rights – ECtHR.

Committee on Economic Social and Cultural Rights – CESCR.

Immigration and Asylum Tribunal (United Kingdom) – IAT.

International Covenant on Civil and Political Rights – ICCPR.

International Covenant on Economic, Social and Cultural Rights – ICESCR.

Membership to a Particular Social Group – MPSG.

Minister for Immigration and Ethnic Affairs (Australia) – MIEA.

Minister for Immigration and Multicultural Affairs (Australia) – MIMA.

Particular Social Group – PSG.

Convention Refugee Determination Division (Canada)- CRDD

Refugee Protection Division of Immigration and Refugee Board (Canada) - RPD.

Refugee Status Appeals Authority (New Zealand) – RSAA.

Refugee Review Tribunal (Australia) – RRT.

United Nations High Commissioner for Refugees – UNHCR.

United Nations Human Rights Committee – HRC.

Universal Declaration of Human Rights – UDHR.

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"People leaving their home countries because of violations of their economic and social rights have generally not been granted the same level of protection as those fleeing violations of their civil and political rights. The denial of civil and political rights is considered as a 'violation', while the denial of economic and social rights is generally viewed as an injustice."[1]

INTRODUCTION

Relevance and problematic issues. More and more people leave their countries and ask for international protection not because of political reasons, such as torture or aggressive acts of the government, but because their social and economic rights are grossly violated. People face deprivation of the right to work, right to education, right to adequate standard of living or other severe socio-economic rights violations. They live in extremely poor conditions, without even certain minimal resources, facing very low economic prospects, often without help from their own state, because it is unable or unwilling to protect them, therefore the alternative is to stay and perhaps face the death through starvation or to flee to more stable and prosperous countries looking for refugee protection and better life. A diversity of emerging socio-economic refugee status claims resulted in great judicial confusion. In 2008, this issue, namely, *"emerging jurisprudence concerning economic, social and cultural claims as a basis for refugee applications"*[2] was presented in Research Workshop on Critical Issues in International Refugee Law in York University, where current critical problems were addressed by the most significant leading academics, judges and government representatives.

Undeniably, asylum claims based on serious socio-economic rights violations raise a lot of legal issues, since majority of scholars works, publications and decision-makers associate fundamental international instrument for the protection of refugees, the 1951 Refugee Convention[3], with a protection of civil-political rights. Despite the United Nations High Commissioner for Refugees (Hereafter – UNHCR) warning that distinction between economic migrants and refugees can be *"blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear"*[4], decision-makers often

[1] Human Rights Watch, International Catholic Migration Committee and the World Council of Churches, *NGO Background Paper on the Refugee and Migration Interface,* 28-29 June, 2001. Available at: https://www.hrw.org/sites/default/files/reports/ngo_refugee.pdf

[2] James C. Simeon, *Critical Issues in International Refugee law: Strategies Toward Interpretative Harmony* (Cambridge: Cambridge University Press, 2010), XIII.

[3] United Nations General Assembly: *Convention Relating to the Status of Refugees*. United Nations, 28 July 1951, Treaty Series, vol. 189, p. 137. Available at: http://www.refworld.org/docid/3be01b964.html

[4] United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para. 63

follow narrow Refugee Convention interpretation that results to the exclusion of asylum applications based on socio-economic threat, reasoning that they are not genuine refugees, but rather economic migrants looking for better living conditions. Definitely, it can be very hard to make a distinction between economic migrants and refugees in practice. In cases where applicant is looking for a better live, education opportunities, employment, health care or other welfare services, just after comprehensive evaluation of all the relevant circumstances it can appear that behind severe socio-economic rights deprivation there are racial, religious, nationalistic, political aims or discrimination directed against particular social group, therefore refugee protection should be considered. As Goodwin-Gill correctly acknowledged: "*As soon as you start talking to refugees you realize there's always a mixture of motives.* […] *The pure refugee does exist, but there are many others who face insecurity because of economic problems and persecution"*[5].

This distinction between economic migrants and refugees represents one of the main international human rights law problems reflected in Refugee law, which is historically established hierarchy between socio-economic and civil-political rights with the main focus on civil and political rights, which results in belief that socio-economic rights are just aspirational, not justiciable and less worth of protection. Nevertheless, the socio-economic rights become more and more discussed in recent human rights law literature and the understanding of socio-economic rights always described as "second generation" rights comparing to superior "first generation" civil and political rights, is changing. Socio-economic rights such as "*the rights to access food, water, housing, preventive or curative health care, social security, education, labour protections, basic services in sanitation or electricity, and to new forms of property"*[6] became considered as fundamental to human dignity and their value become increasingly accepted[7]. Moreover, recently human rights courts and tribunals have confirmed the interdependence of all human rights. Most significantly, the European Court of Human Rights (Hereafter - ECtHR) jurisprudence represents the ability of the European Convention on Human Rights[8] (Hereafter - ECHR), traditionally related to civil and political rights protection, to protect socio-economic rights.

However, refugee decision makers consider socio-economic rights violation as less significant, thus reject such claims or impose high test, requiring that socio-economic harm would either threaten life or freedom or would be combined with traditional civil and political harm in order to constitute persecution. Consequently, socio-economic threats are more rarely accepted as

[5] IRIN, Has the Refugee Convention outlived its usefulness? [accessed 2016-04-20]. http://www.irinnews.org/analysis/2012/03/26/has-refugee-convention-outlived-its-usefulness

[6] Katherine G. Young, *Constituting Economic and Social Rights* (Oxford: Oxford University Press, 2012), 1.

[7] Guy S. Goodwin – Gill and Jane McAdam, *The refugee in international law* (Oxford: Oxford University Press, 2007), 134.

[8] Council of Europe: *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*. Council of Europe, 4 November 1950, ETS 5. Available at: http://www.refworld.org/docid/3ae6b3b04.html

persecution than traditional civil-political rights harm. Moreover, different countries establish unlike standards, therefore the concept of socio-economic persecution remains unclear and inconsistencies exist even between the judicial institutions of the same country. After analyses of refugee decision maker's attempt to evaluate when socio-economic violation is so sufficiently serious that amount to persecution it is clear that there is no objective standard, decision makers often applies variable subjective notions and "*the extent to which the ICESCR is engaged with is highly variable"*[9]. Such inconsistency and subjective approach of different decision-makers is a real threat that refugee application will be dismissed just because of some subjective grounds.

Therefore, the main problem is whether and under which circumstances a person, fleeing because of difficult economic situation, severe socio-economic rights violation, famine or extreme poor general economic situation in a country of origin, may be granted refugee status under 1951 Refugee Convention.

The main purpose of the Thesis is to identify the scope of 1951 Refugee Convention application toward socio-economic rights violation claims in the light of recent growing importance of socio-economic rights in human rights law.

In order to achieve this objective, the following tasks are to be completed:

1. To assess and prove the recently growing importance of socio-economic rights status in human rights law through history, academic and ECtHR jurisprudential development.

2. To analyse how growing importance of socio-economic rights status in human rights law is reflected in refugee law.

3. To evaluate, under which circumstances the claims based on person's socio-economic rights infringement can fall within the scope of the 1951 Refugee Convention.

The value and novelty of the work. Majority of academics like E. Koch[10], E. Palmer[11], I. Trispiotis[12] are debating and trying to clarify social and economic rights importance, enforceability and meaning in the human rights law, therefore the novelty and originality of the Thesis is that, socio-economic rights importance and enforceability is going to be analysed in the refugee law, taking into consideration significant developments made in human rights law.

[9] BG (Fiji), New Zealand: Immigration and Protection Tribunal, NZIPT 800091, 20 January 2012, para. 91. http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4f425a932&skip=0&query=BG%20(Fiji)
[10] Ida Elisabeth Koch, *Human rights as indivisible rights: the protection of socio-economic demands under the European Convention on Human Rights*. (The Netherlands: Martinus Nijhoff Publishers, 2009).
[11] Ellie Palmer, "Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights". Erasmus Law Review, 2 (4), (2009). Available at: http://repub.eur.nl/pub/20576
[12] Ilias Trispiotis, "Socio-economic rights: Legally enforceable or just aspirational?" Opticon1826, 8, (2010): 2.

Since the socio-economic rights become increasingly accepted in human rights law, in recent year asylum claims based on socio-economic rights violation have received some attention in refugee law. However, it is just first steps, where most of the scholars raise the problems but do not suggest solutions, for example, D. Debono[13] presents the problem of poverty and socio-economic deprivation in the refugee law context, however, she admits that the aim of her work is not to propose any policies or practical recommendations, but rather to show current inconsistencies. Some scholars emphasize the general importance of human rights developments and principals reflection in refugee law[14] but do not specify socio-economic rights developments, or discuss human rights development importance in other aspects of refugee law, like gender-related persecution[15], or represents just very narrow sphere like socio-economic right to food deprivation as a basis to refugee status[16]. The international and human rights law expert, M. Foster[17], is a foremost scholar, who provides analyses regarding refugee law, human rights law and claims based on socio-economic rights deprivation, however, her book received not just positive but also critical assessment[18] it was argued that "*it is too early to note the reception […] or report any developments*"[19] of suggested ideas. Different approaches, standards and criteria applied by refugee decision makers and discussed by scholars led to practical problems and inconsistencies. This work provides further examination of the issue and gives suggestions based on legal acts interpretation, wide diversity of case law, various publications of authoritative international institutions, international refugee and human rights scholar's writings.

[13] Daniela DeBono, "Poverty-induced cross border migration: socio-economic rights and international solidarity," From: The fight against poverty: civil society project report and conference proceedings. Xuereb, Peter G (ed.) (European Documentation and Research Centre, University of Malta, 2008), 181.
[14] International Association of Refugee Law Judges (IARLJ), Rodger Haines QC, Deputy Chair, Refugee Status Appeals Authority. "The intersection of Human Rights Law and Refugee Law: on or off the map? The challenge of locating appellant S395/2002." Australia/New Zealand Chapter Meeting, Sydney, 2004; Hathaway, James C. and Michelle Foster, *The law of refugee status* (2nd edition). Cambridge, Cambridge university press, 2014.
[15] Haines, Rodger "Gender-related persecution". From *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Erika Feller, Volker Turk and Frances Nicholson, 329-330. Cambridge, Cambridge University Press, 2003.
[16] Hathaway, James C. "Food Deprivation: A Basis for Refugee Status?" *Soc. Res*. 81, 2 (2014): 327-339.
[17] Michelle Foster, *International Refugee Law and Socio-Economic Rights: refuge from Deprivation* (Cambridge: Cambridge University Press, 2007)
[18] Rebecca Heller, Book Review, *Yale International Law Journal 33, (2008), 517. (*Reviewing Michelle Foster, *International Refugee Law and Socio-Economic Rights: refuge from Deprivation* (Cambridge: Cambridge University Press, 2007); John Mathiason, Connecting the Conventions: Refugees, Economic, Social and Cultural Rights and Due Diligence. Review of Michelle Foster, International Refugee Law and Socio-Economic Rights: refuge from Deprivation. H-Human Rights, H-Net Reviews, 2008.
[19] DeBono, D., op. cit., p. 183.

Statements of defence:

1. Acknowledged importance of socio-economic rights in human rights law has influenced refugee law and interpretation of Refugee Convention requirements for granting of refugee status.

2. The 1951 Refugee Convention interpreted in the human rights based approach is able to encompass severe socio-economic rights deprivation claims based on Conventional reason.

The structure of the Thesis. The work herein is divided into two sections. The first provides a general overview of the current approach regarding the status of economic and social rights in international law. Thus the first chapter of this part begins with the brief historical human rights overview and goes on to consider recent changes of socio-economic rights status in human rights law. In the second chapter Author proceeds to examine in more details the importance and protection of socio-economic rights under the ECHR. The second section forms the heart of this Thesis, where Author is analysing how socio-economic rights status changes in human rights law has influenced traditional understanding of refugee definition. Moreover, how these developments influence the capability of the Refugee Convention to accommodate claims based on socio-economic rights deprivation, in particular, under which circumstances claims based on socio-economic rights deprivation can be successful refugee claims.

Methods of the research. In the thesis author has used historical, analytical, linguistic, comparative and generalization methods. Historical method was applied when analysing approach development to the socio-economic rights compared to civil and political rights in order to give an overview of two sets of rights status changes. Analytical method was used for studying the legal acts, scholars' articles as well as relevant case law. Linguistic method was applied when analysing the provisions of case law and legal acts, mostly the ECHR and the Refugee Convention. In order to compare different approaches taken by legal authors as well as to evaluate refugee law practice differences the comparative method was used. The generalization method was applied for formulating conclusions.

The scope of this paper will be limited to evaluate to which extent the Refugee Convention is able to encompass claims based on socio-economic rights violation. Other measures such as subsidiary protection, temporary protection or use of the *non-refoulment* principle are not going to be analysed.

"There is no simple or authoritative division, of human rights in general or of Convention rights, into the two categories [...] Enjoyment of economic, social and cultural rights is inextricably intertwined with enjoyment of civil and political rights"[20].

I. GROWING SOCIO-ECONOMIC RIGHTS IMPORTANCE: PROTECTION DEVELOPMENT AND OBSTACLES

One of the main international human rights law problem is that traditionally civil and political rights have always been treated as much more important than socio-economic rights. This distinction between civil-political and socio-economic rights in human rights law has influenced different rights treatment in refugee law, which is a "*part and parcel of international human rights law*"[21]. Consequently, refugee decision makers consider civil and political rights as superior and are predisposed to uphold claims based on political and civil rights violation while they often dismiss or impose higher requirements to the claims related to socio-economic threat, arguing that socio-economic rights are "*second generation*" [22] or "*lower order rights*"[23].

Nevertheless, in the last decades there has been a lot of concern about socio-economic rights in statutory regulations, case law and international literature, which helped to provide a meaningful content to socio-economic rights and to challenge this simplistic dichotomy in human rights law.

1.1 Interdependence of socio-economic and civil-political rights

"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis"[24]. This quotation from 1993 Vienna Declaration and Programme of Action is a fundamental source for the understanding that all human rights are indivisible, interrelated and interdependent whether they are civil and political rights, or economic and social rights. Historically, the 1948 Universal Declaration of Human Rights[25] (Hereafter – UDHR) is considered as a primary legal foundation for both systems of rights with no distinction

[20] UN Committee on the Rights of the Child (CRC), *General Comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, para 6. Available at: http://www.refworld.org/docid/4538834f11.html

[21] James C. Hathaway, *The Rights of the Refugees under International Law* (Cambridge: Cambridge University Press, 2005), 4.

[22] Refugee Appeals No 732/92, New Zealnad: Refugee Status Appeals Authority, 5 August 1994; Refugee Appeals No 74754, 74755, New Zealnad: Refugee Status Appeals Authority, 7 January 2004, para 42.

[23] Horvath v. Secretary of State for the Home Department, United Kingdom: House of Lords, 6 July 2000, 57.

[24] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, Section 1, para. 5.

[25]UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Available at: http://www.refworld.org/docid/3ae6b3712c.html

or hierarchy of rights. At that time the General Assembly had to make a policy decision, where socio-economic rights would be included in one single international Covenant on Human Rights, with the idea of interdependence of all human rights, which was mentioned in 1950 UN General Assembly resolution 421 (V)[26]. General Assembly affirmed that: "*the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent*"[27], moreover, "*when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man*"[28]. However, because of Cold War politics and doctrinal differences Separation Resolution 543 (VI)[29] was adopted, where General Assembly decided to separate rights into two covenants, namely, the International Covenant on Economic, Social and Cultural Rights (Hereafter - ICESCR)[30] and the International Covenant on Civil and Political Rights (Hereafter - ICCPR)[31], but the idea of interdependence and interconnection was still acknowledged. At the European level the indivisibility, interdependence and interrelation of all human rights is implicit from the Preamble to the ECHR, which secures "*the universal and effective recognition and observance of the Rights therein declared*"[32]. However, this Convention is considered as "*the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration*"[33], therefore the ECHR has the limited scope and is focused on the traditional civil and political rights.

This short historical overview demonstrates that all human rights: civil, political, economic, social and cultural have always been considered as indivisible, interdependent and interrelated. As Acting President of the General Assembly in sixtieth anniversary of the UDHR celebration emphasized, there is a fundamental importance of economic, social and cultural rights realization to civil and political rights, where diminished attention to some human rights has a harmful effect to all human rights, therefore greater efforts must be dedicated to protect and fully realize all human rights.*[34]*

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[26] UN General Assembly, *Draft International Covenant on Human rights and measures of implementation: future work of the Commission on Human Rights*, 4 December 1950, A/RES/421. Available at: http://www.refworld.org/docid/3b00f07b58.html

[27] Ibid.

[28] Ibid.

[29] UN General Assembly, A/RES/543(VI), Preparation of two Draft International Covenants on Human Rights, 5 February 1952.

[30] United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993.

[31] United Nations General Assembly, *International Covenant on Civil and Political Rights,* 16 December 1966, United Nations, Treaty Series, vol. 999.

[32] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS No.5. Preamble. http://conventions.coe.int/treaty/en/treaties/html/005.htm

[33] Ibid.

[34] UN General Assembly, 63rd Session, UN Doc A/RES/63/117 (2008), Official Records, 66th Plenary meeting, U.N. Doc. A/63/PV. 66, Wednesday 10 December 2008.

1.2 Human rights hierarchy issue

Despite the fact that all human rights are considered as indivisible, interrelated and interdependent, it has always existed a gap between the attention paid to socio-economic rights compared to civil and political rights. The hierarchy of different types of rights has always been and still is an important issue not just in international human rights law but also refugee law. The hierarchy of norms raises an essential practical question, whether a violation of civil and political rights considered as superior is innately more serious than violation of socio-economic rights. Which in refugee law would consequently mean that a risk to superior civil-political rights category would be accepted as serious harm that constitute persecution, while risk to social or economic rights would not. For example, *in Horvath v. Secretary of State*, the UK Secretary of State argued that breach of socio-economic rights "*could never amount to persecution*"[35], moreover suggested that discriminatory acts related to socio-economic rights are not sufficiently serious even if considered cumulatively to constitute persecution.[36] It seems that some refugee decision makers follow the hierarchy approach, for example, stating that the right to education proclaimed in the ICESCR but not incorporated in the ICCPR is a social, "*second generation, third level human right in the sense that it is not an absolute human right linked to civil and political status*"[37].

1.2.1 Human rights generations issue

In practice, civil-political rights and socio-economic rights have always been considered as two objectively distinct categories of rights and consequently were treated differently. Because of number apparently clear historical, religious, political and cultural differences, there exists a classical human rights division into generations. This is confirmed by Elisabeth Koch, who explains that *"human rights have evolved in generations beginning with the classical first generation freedom rights emerging from the 18th century such as the United States' Constitution from 1787 and the French Declaration of the Rights of Man and Citizens from 1789: personal freedom, freedom of speech, freedom of association and assembly, freedom of religion, etc."*[38]. Those first generation human rights are liberal civil or political by nature, laid down in the 1948 UDHR and ICCPR. E. Koch continue to explain that *"19th century, added a number of second generation rights emerging from Bismarck's welfare schemes for German workers and later reinforced in the beginning of the 20th century by a widespread recognition of rights to housing,*

[35] Horvath v Secretary of State for the Home Department, [2000] INLR 15, [2000] Imm AR 205, [1999] EWCA Civ 3026, para. 31.
[36] Ibid.
[37] Refugee Appeals No 732/92, New Zealnad: Refugee Status Appeals Authority, 5 August 1994; Refugee Appeals No 74754, 74755, New Zealnad: Refugee Status Appeals Authority, 7 January 2004, para 42.
[38] Koch, I.E., *supra* note 10, p. 6.

health and welfare services, education, etc."[39], now established in UDHR and the ICESCR. Such a different rights construct is based on political philosophies representing the different relationship between individuals and the state, which means that nature of civil-political and socio-economic rights is indeed dissimilar, however, "*despite the polarization of these ideological constructs since the end of World War II, a more holistic conception of social democracy has prevailed"*[40]. The International Commission of Jurists (Hereafter – ICJ) report acknowledges that this opposition is influenced by political, but not legal reasons and all rights should be taken equally serious[41], therefore the following analyses shows that hierarchy between sets of rights is simplistic and unsustainable.

1.2.2 Different aspects challenging hierarchy of human rights

1.2.2.1 Justiciability of rights: challenging the approach that socio-economic rights are not as legitimate as civil and political rights

Justiciability question is a general human rights issue. Because of hierarchy issue, the justiciability of social and economic rights has been always questioned and even denied, declaring that economic and social rights are not as legitimate as civil and political rights. This means that victims of socio-economic rights violations were not able to submit a complaint before an independent authority and request for adequate remedies for violation[42]. Indeed, when in 1966, the UN General Assembly adopted two separate Covenants, only ICCPR provided an individual complaints mechanism through an optional protocol, while ICESCR did not include any mechanism.

Socio-economic rights justiciability question was also raised in refugee case law, which has a significant practical importance. For example, New Zealand Appeals Authority were analysing whether ICESCR rights are justiciable and refugee claimant can rely on socio-economic rights in order to get surrogate international protection[43]. Indeed, there has been much debate of social and economic rights justiciability "*on the grounds that the rights are too vague and require positive action and that it raises concerns of democratic illegitimacy, institutional incompetence*"[44] but the new approach to socio-economic rights by treaty bodies, courts and scholars have challenged this attitude.

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[39] *Ibid.*
[40] Palmer, E., *supra* note 11, p. 400.
[41] The International Commission of Jurists (ICJ) Report, *Courts and the Legal Enforcement of Economic Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: ICJ 2008), 1. Available at: http://www.refworld.org/docid/4a7840562.html
[42] Ibid.
[43] Refugee Appeal No. 75221, 75225, New Zealand: Refugee Status Appeals Authority, 23 September 2005.
[44] Malcolm Langford, "*Closing the gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*," Nordisk Tidsskrift for menneskerettigheter 27, 1 (2009): 9.

Firstly, it is often argued that states do not have immediate duties in respect of socio-economic rights, and because of progressive implementation it is hard to identify violations of such rights. Argument that obligations imposed by the ICESCR are only programmatic but not immediately binding is also met in refugee case law[45], however it is not consistent with present socio-economic rights understanding in international human rights law. Indeed, the ICESCR rights is subject to the progressive realization and does not generally provide for immediate results, nevertheless some rights in the ICESCR imposes obligations of immediate application.[46] Firstly, the guarantee that all socio-economic rights have to be exercised without discrimination is an immediate obligation.[47] The CESCR has emphasized that the principle of non-discrimination is "*immediately applicable and is neither subject to progressive implementation nor dependent on available resources"*[48], therefore states have an immediate obligation to respect the principle of non-discrimination regarding socio-economic rights. Moreover, the negative duties to refrain from interfering directly or indirectly with the enjoyment of a right are also immediate obligation.[49] Furthermore, states have to act immediately and to take steps in order to achieve full realization of socio-economic rights. Despite the progressive realization, different review standards, indicators and benchmarks were established, in order to monitor situation, thus state reporting system helps to assess the state performance in the implementation of social and economic rights. On the basis of experience examining States' reports, the CESCR has established minimum core obligation, which is an immediate duty "*to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights*"[50] without which the right would be meaningless. The Committee has determined the minimum core obligation for different ICESCR rights in its General Comments[51] and clarified that if "*significant number of individuals is deprived of essential foodstuffs, of*

[45] Refugee Appeals No 732/92, New Zealnad: Refugee Status Appeals Authority, 5 August 1994; Refugee Appeals No 74754, 74755, New Zealnad: Refugee Status Appeals Authority, 7 January 2004, para 42.
[46] The International Commission of Jurists (ICJ) Report, *Courts and the Legal Enforcement of Economic Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: ICJ 2008), 25-27. Available at: http://www.refworld.org/docid/4a7840562.html
[47] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23. Para. 1.
UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: *The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, para. 10.
[48] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.18, Article 6: the equal right of men and women to the enjoyment of all economic, social and cultural rights (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006). Para. 33.
[49] The International Commission of Jurists (ICJ) Report, op. cit., p. 27.
[50] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23. Para. 10.
[51] For example: CESCR, *General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant)*, 13 December 1991, E/1998/22.; CESCR, *General Comment No 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, E/C.12/1999/5; CESCR, *General Comment No 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10; CESCR, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4; *General Comment No 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11.

essential primary health care, of basic shelter and housing, or of the most basic forms of education" it means that State fails to fulfil its obligations under the Covenant.[52] Moreover, the Committee emphasized that *"a State party cannot, under any circumstances whatsoever, justify its non-compliance*" [53] with minimum core obligation. Thus, cases of discrimination, withdrawal of socio-economic rights or non-compliance with minimum core obligation are not subject to progressive application.

Secondly, the claim of alleged vagueness and uncertainty of socio-economic rights as compared with the more precise civil and political rights has lost its force[54]. This argument "*of vagueness has emphasised both the brevity of the articulation of the rights but also their programmatic as opposed to legal nature"*[55]. It is argued that economic and social rights are framed in less concrete terms than civil and political rights, thus while civil and political rights provide clear guidance for implementation, social and economic rights are so uncertain that their content cannot be adequately defined and consequently they are impossible to adjudicate. This argument is, however, not convincing because can be equally applied to civil-political rights, on the basis that many civil and political rights are also framed in extremely vague terms and require interpretation.[56] ICJ report acknowledged that most of legal rules are expressed in broad terms, therefore uncertainty and vague content is the problem of all right, moreover, it was admitted that "*'classic' rights such as the right to property, freedom of expression, equal treatment or due process face this hurdle to the same extent as ESC rights. Yet, this has never led to the conclusion that these 'classic' rights are not rights, or that they are not judicially enforceable*"[57]. In recent years much work has been done by treaty bodies, international experts and legislature in order to provide normative content socio-economic rights, therefore great progress on socio-economic rights justiciability issues in international law is acknowledged.[58] The CESCR provides concluding observations reflecting on state party reports and General Comments interpreting socio-economic rights. Moreover, some soft law instruments, such as the *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*[59] and The

[52] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23. Para. 10
[53] CESCR, General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4. para. 47.
[54] Trispiotis, I., *supra* note 12, p. 2.
[55] Langford, M., *supra* note 44, p. 10.
[56] Kim Robinson, "False Hope or a Realizable Right? The Implementation of the Right to Shelter Under the African National Congress' Proposed Bill of Rights for South Africa." Harvard Civil Rights-Civil Liberties Law Review 28 (1993): 521.
[57] The International Commission of Jurists (ICJ) Report, op. cit., p. 15.
[58] Simeon, J. C., *supra* note 2, p. 26.
[59] UN, The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, E/CN.4/1987/17, Annex; and Human Rights Quarterly, Vol. 9 (1987)

Maastricht Guidelines on Violations of Economic, Social and Cultural Rights[60] were issued to clarify the legal duties arising from social and economic rights. Socio-economic rights are codified not just at the international level, but also at the regional level[61] and already have been recognized in a number of domestic constitutions worldwide[62].

Moreover, a greater support to economic and social rights was provided when UN Optional Protocol to the International Covenant On Economic, Social and Cultural Right[63] was issued. This creation of an enforcement mechanism for the ICESCR was a fundamental step forward, since the right to legal remedies has always been considered as one of the most fundamental rights. In 2008, the Optional Protocol to the ICESCR was adopted, establishing an individual complaints mechanism, which makes socio-economic rights justiciable in the international sphere. This Optional Protocol closes "*a historic gap in human rights protection […] making a strong and unequivocal statement about the equal value and importance of all human rights"*[64], moreover, the Acting President of the General Assembly has emphasized that this optional protocol finally gives "*the same degree of protection to economic, social and cultural rights that has existed for civil and political rights since 1976*"[65].

Overcoming the falsehood of socio-economic and civil-political rights distinctions has been a major challenging task of economic, social and cultural rights advocates in the past decades, however nowadays the discussion is concentrated on the socio-economic rights enforcement and implementation measures improvement.[66]

1.2.2.2 Misperception of positive-negative obligations

For many year hierarchy of human rights was based on mistaken view that civil and political rights impose only negative duties on the state, while socio-economic rights impose only positive duties and require the expenditure of resources in order to be fulfilled. However, this positive versus negative dichotomy has been challenged in the contemporary literature submitting

[60] International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997.
[61] For example: Council of Europe, European Social Charter (Revised), 3May 1996, ETS 163, Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[62] The International Commission of Jurists (ICJ) Report, *supra* note 46, p. 4.
[63] UN General Assembly, Optional Protocol to the International Covenant On Economic, Social and Cultural Right, A/RES/63/117, 10 December 2008.
[64] Human Rights based approaches portal (HRBA Portal), "No.4: Optional Protocol to the International Covenant on Economic, Social & Cultural Rights," Accessed 2016 04 14, http://hrbaportal.org/insights/optional-protocol-to-the-international-covenant-on-economic-social-cultural-rights
[65] UN General Assembly, 63rd Session, UN Doc A/RES/63/117 (2008), *Official Records*, 66th Plenary meeting, U.N. Doc. A/63/PV. 66, Wednesday 10 December 2008.
http://www.un.org/en/ga/search/view_doc.asp?symbol=A/63/PV.66
[66] United Nations High Commissioner for Refugees (UNHCR), Economic, Social and Cultural Rights *Handbook for National Human Rights Institutions, United Nations publication,* No. E.04.XIV.8, 2005.

evidence that every human right imposes both positive and negative obligations.[67] This has been also emphasized by Ellie Palmer, who is analysing the protection of socio-economic rights through ECHR, inherently considered as solely protecting civil and political rights. She notes that "*when we examine the full range of positive obligations across the ECHR rights, although not articulated by the ECtHR, we find that the implication of affirmative duties has been consistent with the recognition that threats to all human rights require a range of protective and preventive measures*"[68]. It is widely accepted that neither socio-economic rights nor civil and political rights offer a single model of duties, contrary, almost all human rights contain both positive and negative obligation elements.

In order to negate this misleading positive versus negative obligations dichotomy and break down the hierarchy issue, a tripartite obligations classification was proposed for the different types of State's obligations imposed by any human right stating that: *"Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil"*[69] and all three obligations have budgetary implications. These can be briefly described as follows: the duty to respect is the negative obligation which requires to "*refrain from interfering with the enjoyment of economic, social and cultural rights*"[70]. It requires State to abstain from action infringing rights and intervening in a way that deprives people of the guaranteed right. The duty to protect "*requires States to prevent violations of such rights by third parties*"[71]. And the duty to fulfil is the positive obligation requiring positive action by the State "*to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation*"[72]. Indeed, failure to implement any of those three obligations is considered as violation. This tripartite obligations can be illustrated by practical example, for instance, the right to life, traditionally classified as civil negative right, requires not just to respect the right refraining from interfering, but also to protect violations of such rights by third parties and positive duty to fulfil, which require "*to take all positive measures to reduce infant mortality and to increase life expectancy*"[73]. While,

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[67] The International Commission of Jurists (ICJ) Report, *supra* note 46, p. 10; Palmer, E., *supra* note 11, p. 404. Council of Europe, *Positive obligations under the European Convention on Human Rights: A guide to the implementation of the European Convention on Human Rights*, January 2007, Human rights handbooks, No. 7, available at: http://www.refworld.org/docid/49f183a32.html

[68] Palmer, E., *supra* note 11, p. 404.

[69] International Commission of Jurists (ICJ), *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, 26 January 1997, Guideline 6. Available at: http://www.refworld.org/docid/48abd5730.html

[70] Ibid.

[71] Ibid.

[72] Ibid.

[73] UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life), 30 April, 1982, para. 5.

for instance, a social right to adequate housing inflicts positive obligation to make housing accessible, it also includes immediate negative obligation to respect by refraining from forceful eviction without justification. This classification demonstrates that not just social rights can be considered as negative rights, but also civil rights as positive rights and fulfilment of any right demand resources.

Tripartite obligations to respect, protect and fulfil is widely supported by non-governmental organisations, scholars and even the Committee on Economic, Social and Cultural Rights. Countless scholars works challenges established dichotomy suggesting tripartite, quadruple or quintuple obligations, nevertheless, "*now, almost everyone involved in these discussions realizes that typologies are not the point*"[74], the most important is understanding that there is no clear division between civil-political and socio-economic rights, all human rights include different obligations that can overlap. Socio-economic rights also encompass negative cost-free nature obligations and may be implemented immediately, while civil and political rights can have positive costly obligations and to some extent be implemented progressively. Moreover, socio-economic rights are not vague or indeterminate, contrary, they have content, which is clarified and developed by treaty bodies, international expert and legislature, therefore a longstanding argument that socio-economic rights are not suitable for adjudication have lost its force.

To sum up, this chapter has shown that socio-economic rights have been misinterpreted as having a weaker normative force. The view that social and economic rights are inferior to civil and political rights is denied, arguing that all rights are indivisible, interrelated and interdependent whether they are civil and political rights, or socio-economic rights, therefore, the hierarchy of different rights is meaningless and is not compatible with contemporary thought in international law. Accordingly, in many respects socio-economic right must be considered as serious as civil-political rights. Professor J. C. Hathaway emphasize that "*now-established principle that all human rights are equal and indivisible* […] *categories of rights are not hermetically sealed, but are rather quite permeable in practice*"[75]. These current socio-economic rights status developments in international law promise hopeful changes in refugee law. As Professor Goodwin-Gill assumes, increasingly accepted value of certain economic and social rights could expand the list of fundamental interests protected by refugee law[76], moreover some refugee

[74] Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy*, Princeton University Press, 2nd Edition, 1996, p. 160. (Cited in: Ida Elisabeth Koch, "The Justiciability of Indivisible Rights." Nordic Journal of International Law 72, 1 (2003):10).
[75] James C. Hathaway and Michelle Foster, *The law of refugee status* (2nd edition). Cambridge, Cambridge university press, 2014, 207.
[76] Goodwin-Gill, G. S., *supra* note 7, p. 134.

adjudicators positively acknowledges that "*overly rigid categorisations of rights in terms of hierarchies*"[77] should be avoided.

In the following chapter we are going to analyse the integrated human rights approach to positive and negative obligations taken by the ECtHR. The developed jurisprudence of positive obligations represents the ability of the ECHR, traditionally related to civil and political rights protection, to protect socio-economic rights, which confirms that all human rights are interrelated and interdependent.

[77] Refugee Appeal No. 75221, 75225, New Zealand: Refugee Status Appeals Authority, 23 September 2005.

II. ANALYSIS OF ECHR'S JURISPRUDENCE DEVELOPMENT REGARDING THE PROTECTION OF SOCIO-ECONOMIC RIGHTS

The interdependence and indivisibility of different human rights has long been generally accepted. The CESCR has significantly noted that, for example, socio-economic right to education, has been differently classified *"as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realization of those rights as well. In this respect, the right to education epitomizes the indivisibility and interdependence of all human rights"*[78]. And vice versa, it has been generally accepted that civil-political right "*the 'right to life' in art 6 of the ICCPR overlaps with and draws upon the essential interests protected by various ICESCR rights such as those respecting health*"[79].

Human rights courts and tribunals jurisprudence confirm the interdependence of different human rights. This was confirmed by body overseeing the interpretation of the ICCPR, the Human Rights Committee (Hereafter - HRC). The HRC clarified that some of ICCPR provisions include socio-economic aspects, thus "*Canada's failure to take adequate measures to prevent and respond to homelessness represents a failure to ensure rights to housing, health and life itself. Positive measures must be taken to tackle this combined rights violation"*[80], thus found that such a failure to ensure socio-economic rights can result in violation of the right to life.

Interdependence of different human rights was confirmed by regional human rights treaty bodies, most significantly in the ECtHR jurisprudence. More than 65 years ago the ECHR[81] was considered as a document that focused entirely on the traditional civil and political rights and primarily provided negative obligations on states action[82]. This notion has been repeatedly noted by the ECtHR, however recent Court decisions shows a significant shift in the jurisprudence regarding the ability of the ECHR to protect socio-economic rights. The latest ECtHR interpretation of civil and political rights recognize interrelated nature of civil-political and socio-economic rights. The Court has always emphasized that "*The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective"*[83], moreover

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[78] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, 10 May 1999, E/1992/23, para.2. Available at: http://www.refworld.org/docid/4538838c0.html

[79] Craig Scot and Philip Alston. "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's Legacy and Grootboom's Promise." South African Journal of Human Rights 16 (2000): 226

[80] Craig Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally, into the Spotlight?" (1999a) 10(4) Constitutional Forum 10, 4 (1999): 102.

[81] Council of Europe: European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14. Council of Europe, 4 November 1950, ETS 5.

[82] Palmer, E., *supra* note 11, p. 405.

[83] Case of Airey v. Ireland, European Court of Human Rights, App. No. 6289/73, Judgment of 9 October 1979. para. 24.

Convention is a living instrument and "*must be interpreted in the light of present-day conditions*"[84]. Consequently, analysis in this chapter suggests that ECHR secures some socio-economic rights in order to guarantee effectiveness of protected civil and political rights.

The first significant change in ECtHR jurisprudence regarding socio-economic rights protection was 1979 *Airey v. Ireland case*[85]. In this case an applicant was Irish woman Mrs. Airey, which wanted a judicial separation from her aggressive husband, but did not have enough finances for assistance of a lawyer, moreover, she had little formal education, therefore applicant argued that Art. 6(1) of the ECHR was violated. The Court found violation of Art. 6(1) and held that in some exceptional cases the right to fair trial in civil cases established in Art. 6(1) require a state to provide free legal aid to the person, which cannot afford it "w*hen such assistance proves indispensable for an effective access to the court*"[86]. The Court explicitly recognized that there exists an overlap between civil-political and socio-economic rights in the ECHR and there is no *"water-tight"* division separating those two sets of rights.[87] Moreover, in this case the Court importantly asserted that "*the Convention must be interpreted in the light of present-day conditions*"[88] and acknowledged that "*Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature".*[89] After *Airey v. Ireland case,* through the step-by-step interpretation of civil and political rights, the ECtHR developed socio-economic rights jurisprudence and established the positive state obligations across the full range of Convention rights. Therefore, through the development of the ECtHR jurisprudence, some socio-economic rights, such as rights to health, food, water, education, work, social security, housing and etc. could be protected in particular circumstances.

Thus, we are turning to consider the extent to which the ECHR is able to protect some of socio-economic rights through civil and political right. The scope of evaluation will be limited to analyse the ECtHR jurisprudence under Art. 2 (the right to life) and Art. 3 (protection from inhuman and degrading treatment) of the ECHR in dealing with socio-economic rights. However, from the ECHR jurisprudence it is clear, that there is potential socio-economic rights protection through other ECHR articles too.[90]

[84] Council of Europe: European Court of Human Rights, *Practical guide on admissibility criteria,* 2010, 7. Available at: http://www.refworld.org/docid/4ee1d19f2.html
[85] Airey v. Ireland, *supra* note 83.
[86] Ibid., para. 26.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Palmer, E., *supra* note 11, p. 398.

2.1 The right to life and protected socio-economic rights (Art. 2)

ECtHR case-law has established that according to Art. 2 of ECHR state has not just negative obligation to respect but also positive obligations to protect the life of individuals, namely the State has *"not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction*"[91]. According to case law, there is no general conventional requirement under Art. 2 for states to insure the lives of the poor people or to provide a particular type or level of health care, however, the states have to take adequate measures to protect life, therefore ECtHR has established some positive obligations to the states. In *Kilic v. Turkey* case, ECtHR clarified that *"For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual […] and that they failed to take measures within the scope of their powers"*[92]. For example, *Anguelova v. Bulgaria case,* suggest that the right to life may impose on a state positive duties to provide medical treatment to people within the custody, because "*persons in custody are in a vulnerable position and the authorities are under an obligation to account for their treatment*"[93]. It is important to emphasize that to find infringement of Art. 2, failure to protect does not necessary need to result in death. ECtHR explained that Art. 2 "*read as a whole, covers not only situations where certain action or omission on the part of the State led to a death complained of, but also situations where, although an applicant survived, there clearly existed a risk to his or her life*"[94].

The state's positive obligations arising from Art. 2 can also be applied to the public health care. In a case of *Cyprus v. Turkey*[95] it was argued that there is no adequate health care to the Greek Cypriots and Maronite populations in Turkish occupied Cyprus territory, which can result to a violation of Art. 2. The Court observed that *"an issue may arise under Article 2 of the Convention where it is shown that the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally"*[96] and repeated that State has not only negative obligation to refrain from intentional taking of life, but also to take appropriate steps to protect lives. However, Court evaluated the

[91] Case of L.C.B. v. the United Kingdom, The European Court of Human Rights, App. No. 23413/94, Judgment of 9 June 1998. para. 36.
[92]Case of Kilic v Turkey, The European Court of Human Rights, App. No. 22492/93, Judgment of 28 March 2000, para. 63.
[93] Case of Anguelova v. Bulgaria, The European Court of Human Rights, App. No. 38361/97, Judgement of 13 June 2002, para. 110.
[94] Case of Kolyadenko and others v. Russia, The European Court of Human Rights, App. No. *17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673/05,* Judgement of 28 February 2012. Para 151.
[95] Case of Cyprus v. Turkey, The European Court of Human Rights, App. No. 25781/94, Judgement of 10 May 2001.
[96] Ibid., para. 219.

circumstances of the case and found no violation of Art. 2, because it has not been established that medical treatment was withheld deliberately or any death occurred on account of delay.

A significant importance has a recent ECtHR judgement in *Nencheva et al v. Bulgaria case*[97] that is directly connected to the right to life and social provision. In this case Court found violation of Art. 2 where fifteen children and young adults died in a state home for physically and mentally disabled young people because of cold, shortages of food, sanitation, medical treatment and basic necessities. From all circumstances of the case the Court considered that the authorities should have known that there was a real risk to the lives of the children in the home but failed to take action to protect them. In this decision ECtHR decided that failure of Bulgaria to provide necessary medical treatment, food, heating and sanitation was violation of right to life.

The ECtHR jurisprudence establishes that States have to take appropriate steps to safeguard the lives and violation of right to life may appear if state fails to ensure some necessary social rights.

2.2 Inhuman and degrading treatment and protected socio-economic rights (Art. 3)

Art. 3 of the ECHR is acknowledged as one of the most fundamental provisions of the Convention. The ECtHR has held that under Art. 3 of ECHR states are required *"to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such treatment administered by private individuals"*[98]. Recent jurisprudential development gave a potential to protect some basic socio-economic rights through Art. 3 of ECHR, especially in the cases were states may be liable for the intolerable harm resulted from socio-economic rights deprivation, such as failure to ensure elementary health and welfare needs. However, not every type of ill-treatment results to degrading or inhuman treatment within the meaning of Art 3. Therefore, in numerous cases the ECtHR clarified that ill-treatment have to attain *"a minimum level of severity and involves actual bodily injury or intense physical or mental suffering"*[99] or where it *"humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance"*[100]. Court explained that this minimum level of severity depends on the circumstances of the case, namely,

[97] Case of Nencheva and Others v. Bulgaria, The European Court of Human Rights, App. No. 48609/06, Judgment of 18 June 2013. Press Release issued by the Registrar of the Court http://hudoc.echr.coe.int/eng-press?i=003-4403795-5289773#{"itemid":["003-4403795-5289773"]}

[98] Case of Pretty v. the United Kingdom, The European Court of Human Rights, App. No. *2346/02*, Judgement of 29 April 2002, para. 51

[99] Ibid., para. 52; Case of Ireland v. United Kingdom, The European Court of Human Rights. Judgment of 18 January 1978, para. 167.

[100] Pretty v. the United Kingdom, op. cit. para. 52.

"the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim"[101].

There are a lot of examples of cases, where state responsibility was engaged because the individuals subject to ill-treatment were in custody. The ECtHR has found breaches of Art. 3 in cases of failure to insure sufficient food, water, recreation, appropriate medical care and physical conditions of detention. For example, in *Dougoz v. Greece case*[102], applicant complained about very poor detention conditions, including hygiene, sanitation, overcrowding, intermittent hot-water, the lack of fresh air. The ECtHR took into consideration the length of detention and European Committee report regarding highly critical detention conditions, thus found the violation. In similar *Poltoratskiy v. Ukraine case*[103], concerning a lack of water, poor hygiene and sanitation, where despite the Government arguments of difficult economic circumstances at the time of the applicant's detention, court importantly emphasized that *"lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention"*[104] and found violation. Thus, it must be emphasized that states have to fulfil certain conditions of detention and lack of resources cannot justify a deviation from these standards. In *Price v. UK*,[105] an applicant with a severely impaired mobility was imprisoned in a cell without any special modifications for a disabled person, therefore, she had to sleep in her wheelchair, she could not reach the emergency buttons and light switches, moreover, she was unable to use the toilet since it was higher than her wheelchair. The failure to accomplish applicant's special medical and physical needs was considered as violation of Art 3. This case is particularly important because impose positive obligations for states to provide basic services appropriate to special health and welfare needs of disabled individuals.

Beyond the context of compulsory detention, states obligations under Art. 3 have also been analysed in cases where states failed to provide medical treatment or welfare needs of vulnerable claimants. One of the most significant jurisprudential developments is the case *D v. the United Kingdom*,[106] where the ECtHR emphasized the link between the prohibition of cruel, inhuman and degrading treatment and maintenance of health care services. The UK proposed to deport applicant to his country of origin, but at that time applicant was in an advanced stage of the

[101] Case of Price v. the United Kingdom, The European Court of Human Rights, App. No. *33394/96*, Judgement of 10 July 2001. Para. 24; Case of Soering v. United Kingdom, The European Court of Human Rights, App. No. 14038/88, Judgement of 7 July 1989, para. 100.
[102] Case of Dougoz v Greece, The European Court of Human Rights, App. No. *40907/98*, Judgement of 6 March 2001.
[103] Case of Poltoratskiy v. Ukraina, The European Court of Human Rights, App. No. *38812/97*, Judgement of 29 April, 2003.
[104] Poltoratskiy v. Ukraina, *supra* note 104, para. 148.
[105] Price v. the United Kingdom, *supra* note 102.
[106] Case of D. v. the United Kingdom, Council of Europe: European Court of Human Rights, App. No. *30240/96*, Judgement of May 2, 1997.

AIDS virus. The Court found that, if returned, the applicant would be subject to inhuman and degrading treatment contrary to Art. 3 because in country of origin was generally a very low standard of healthcare, lack of sanitation, moreover, treatment for AIDS sufferers was almost not available, thus he would have been exposed to the risk of dying under the most painful circumstances. However, the ECtHR stressed that, in general, alien do not have any right to stay in a State for the sole purpose of continuing to benefit medical, social or other forms of State assistance.[107] Nevertheless, in this case the ECtHR took into consideration the advanced stage of the applicant's illness and the lack of any societal or familial support in country of origin, therefore concluded that in those exceptional circumstances the proposed deportation amount to violation of Art. 3.[108] In this case a clear doctrinal position has been established that: *"The suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible"*[109]. In another important case, *Z and others v. UK*[110], four young children suffered carelessness, limited and neglectful parenting that resulted in physical and mental abuse by their parents. There was a lack of food, hygiene and sanitation, children spend most of the day in their bedrooms, rarely being allowed out to play. In this decision Court considered that *"The authorities had been aware of the serious ill-treatment and neglect suffered by the four children over a period of years at the hands of their parents and failed, despite the means reasonably available to them, to take any effective steps to bring it to an end*"[111] and emphasized that the government had a positive obligation to protect children from this ill-treatment. Therefore, Art. 3 requires states to take positive measures to ensure that "*individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals*"[112].

The ECtHR case-law has clearly established that Art. 3 does not entail any general obligation to provide the right to a certain standard of living or the right to housing[113] and the issue whether a state's refusal or failure to provide basic services in circumstances of poor living conditions, could constitute inhuman or degrading treatment is largely unsettled.[114] Nevertheless,

[107] D. v. the United Kingdom, *supra* note 106, para 54.
[108] Ibid., para 51-53.
[109] D. v. the United Kingdom, *supra* note 106; Pretty v. the United Kingdom, *supra* note 100, para. 52; Case of Ireland v. United Kingdom, The European Court of Human Rights. Judgment of 18 January 1978, para.52.
[110] Case of Z and others v. United Kingdom, The European Court of Human Rights, App. No. 29392/95, Judgement of 10 May 2001.
[111] Ibid., para. 70.
[112] Ibid., para. 73.
[113] Case of M.S.S v Belgium and Greece, European Court of Human Rights, App. No 30696/09, Judgement of 21 January 2011, para 249.
[114] Walter Kalin and Jorg Kunzil, *The Law of International Human Rights Protection* (Oxford: Oxford University Press, 2010), 336.

important case concerning complain under Art. 3 because of poor general living conditions, which amounts to degrading treatment was *M.S.S. v. Belgium and Greece*. In this case, an asylum seeker was deported from Belgium to Greece, which was first country of entrance and according to Dublin II Regulation[115] responsible for examining this asylum application. The applicant claimed that "*the state of extreme poverty in which he had lived since he arrived in Greece amounted to inhuman and degrading treatment within the meaning of Article 3*"[116]. Applicant was homeless and lived in extreme poverty. He had not received any information about possible accommodation or asylum procedure, accommodation had never been offered, therefore he lived in Athens park as many other Afghan asylum-seekers, without any sanitary facilities, spending days looking for food.[117] Therefore, such a physical and psychological deprivation amounted to inhuman and degrading treatment. In this case ECtHR pointed out that "*Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home"*[118], however despite the fact that there is no general obligation Court had to "*determine whether a situation of extreme material poverty can raise an issue under Article 3*"[119] and found that such a living conditions reached the required minimum level of severity and clarified that Greek authorities "*must be held responsible, because of their inaction, for the situation in which he has found himself for several months, living on the street, with no resources or access to sanitary facilities, and without any means of providing for his essential needs. The Court considers that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention*"[120]. However, it has to be admitted that ECtHR has not confirmed that living in extreme poverty could itself constitute violation of Art. 3, rather Court emphasized specific vulnerability of the claimant as an asylum seeker and Greek authorities' failure to fulfil positive obligations, namely, to provide asylum seeker with an accommodation, food, clothing, health services.

[115] European Union: Council of the European Union, Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. 18 February 2003, OJ L. 50/1-50/10; 25.2.2003, (EC)No 343/2003.
[116] M.S.S v Belgium and Greece, *supra* note113, para. 235.
[117] Ibid., para. 236-239.
[118] Ibid., para. 249.
[119] Ibid., para. 252.
[120] Ibid., para. 263.

As it was mentioned above, Art. 3 does not provide the right to housing[121], however in *Moldovan and Others v. Romania* case[122] ECtHR recognized that state failure to provide conditions of existence that satisfy the fundamental right of all humans to be treated with dignity in relation to their basic needs, including the need for shelter violates Art. 3 of ECHR. In this case Romania failed to provide justice in connection with a 1993 pogrom, where Roma people have been killed, their houses and property were destructed. As a result, applicants lived in unsanitary, overcrowded environment, suffering extremely harmful effects on their health and well-being. The Court found that *"applicants' living conditions and the racial discrimination to which they have been publicly subjected by the way in which their grievances were dealt with by the various authorities, constitute an interference with their human dignity which, in the special circumstances of this case, amounted to "degrading treatment" within the meaning of Article 3 of the Convention"*[123]. In another similar case, *Dulas v. Turkey*, ECtHR found inhuman and degrading treatment, where applicant's "*home and property were destroyed before her eyes, depriving her of means of shelter and support, and obliging her to leave the village and community, where she had lived all her life*" [124].

The analysis of ECtHR jurisprudence on Art. 3 has established that there is no general right to a certain standard of living or the right to housing, consequently there is no general duty to rescue the poor, however in some special circumstances states' failure to discharge positive obligation in sufficiently serious situations, where people are suffering from extreme poverty, elementary health and welfare needs, can constitute a degrading or inhuman treatment within the meaning of Art. 3. To sum up, this integrated human rights approach taken by the ECtHR jurisprudence disproves non-justiciability of socio-economic rights and reflects the contemporary understanding that all human rights are interrelated and interdependent, without clear *"water-tight"* division separating those two sets of rights. It demonstrates a significant changes regarding the ability of the ECHR to protect some socio-economic rights and dissolves the line between two sets of rights. Since it is agreed that ECHR is a living instrument intended to guarantee practical and effective rights, latest ECtHR jurisprudential interpretation recognizes interrelated and indivisible nature of civil-political and socio-economic rights and impose positive duties for the protection of rights established in the ECHR. Reflecting analysed ECtHR jurisprudence it is clear that states have positive obligations when people are in state's detention or care institutions, which includes states duty to ensure humane and not degrading conditions in those institutions, taking

[121] M.S.S v Belgium and Greece, *supra* note113, para 249.
[122] Case of Moldovan and Others v. Romania (No. 2), European Court of Human Rights, App. No 41138/98 and 64320/01. Judgment of 12 July 2005.
[123] Ibid., para. 113
[124] Case of Dulas v. Turkey, European Court of Human Rights, App. No. 25801/94, Judgement of 30 January, 2001.

into considearation special needs of those people and lack of resources cannot justify poor, inhumane conditions. States obligations beyond the context of detention or other care institutions is not so clear. It was established that "*the Convention does not guarantee, as such, socioeconomic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living*"[125], in other words, there is no general socio-economic rights protection under analysed Art. 2 and Art. 3 or any other ECHR article. Nevertheless, it is recognized that in some special circumstances state's failure to provide necessary socio-economic services such as essential health care, basic food, shelter, water for people in need can result to violation of right to life or constitute cruel, inhuman or degrading treatment, thus fall within the Art. 2 or Art. 3 of ECHR. In respect of Art. 2 the ECtHR clarified that there is a positive obligation to "*take appropriate steps to safeguard the lives"*[126], therefore states have obligation to provide public health and welfare specially for vulnerable people. In connection to Art. 3 the ECtHR emphasized the respect for psychological and physical integrity and human dignity, thus clarified that State has a positive obligation to ensure appropriate medical care, welfare for vulnerable individuals that could include accommodation, food, clothing, water, sanitation in the extreme circumstances.

All the arguments presented in the first chapter of the thesis and the developed ECtHR positive obligation jurisprudence analysed in second chapter demonstrates contemporary human rights understanding, where all rights are not subject to hierarchical order, but rather regarded as interdependent, interconnected and have to be treated in an equal manner. This current understanding has some practical consequences to socio-economic rights status in refugee law that is going to be analysed in following chapter. First, this socio-economic rights status development requires fresh understanding of economic and social rights in the context of refugee law, where violation of any human right despite categorization should be accepted as serious and could constitute persecution, therefore we are going to analyse how current developments of socio-economic rights in international human rights law is implemented in refugee law, in particular, when violations of socio-economic rights can amount to persecution within the meaning of the Refugee Convention. Moreover, the integrated human rights approach establish that socio-economic rights can be given protection through civil and political rights, this approach is of particular importance in refugee law cases, where severe socio-economic rights deprivation or failure to provide essential socio-economic services could constitute a breach of civil and political

[125] Case of *Pancenko v Latvia,* The European Court of Human Rights, App. No. 40772/98, Judgement of 28 October 1999, 6.
[126] L.C.B. v. the United Kingdom, *supra* note 92, para. 36.

rights, such as analysed right to life or prohibition of cruel, inhuman and degrading treatment, that unquestionably shows the extreme severity of the serious harm.

"Refugee status determination has been acknowledged as one of the most challenging tasks in the legal world."[127]

III. ASYLUM CLAIMS BASED ON SOCIO-ECONOMIC PERSECUTION

Analysis made in previous chapter shows that historically socio-economic rights have received less attention than civil and political ones. However, understanding of economic and social rights status has significantly changed and "*the era of the hierarchizing of human rights is more or less over*"[128]. Since social and economic rights are recognized as equal in human rights law, this development requires fresh understanding of economic and social rights in the context of refugee law.

It is acknowledged that poverty has been one of the main reasons for the movement of persons, however classically understood Refugee Convention is not very sympathetic to claims concerning poverty and violation of socio-economic rights, people fleeing their home countries because of socio-economic reasons are often automatically concerned as economic migrants not deserving protection under refugee law. Therefore, modern significant changes in human rights law, discussed in previous chapter should be taken into consideration by refugee law decision maker, consequently interpretation of Refugee Convention should be reassessed.

The following analyses is going to show that there are already some important changes. As leading refugee law expert J. C. Hathaway positively acknowledged: *"the good news is that over the course of the past two decades there has been a major judge-led challenge to many traditional ways of thinking about the refugee definition"*[129]. Thus in this part of the thesis we are going to analyse what changes are implemented in refugee law, and in which circumstances claims based on socio-economic rights violation could fall within the scope of the Refugee Convention.

3.1 The 1951 Convention Relating to the Status of Refugees and problems regarding the refugee definition

Fundamental international instrument for the protection of refugees, the 1951 Convention Relating to the Status of Refugees (Hereafter-Refugee Convention)[130] and the 1967 Protocol[131] establish criteria for asylum seekers to become a refugee. Thus, refugee status can be granted to a

[127] BG (Fiji), *supra* note 9, para. 109.
[128] Danilo Turk, The New International Economic Order and the Promotion of Human Rights: Realization of Economic, Social and Cultural Rights (Preliminary Report), UN Doc. E/CN.4/Sub.2/1989/19 (1989).
[129] Hathaway, J. C., *supra* note 16, p. 330.
[130] United Nations General Assembly: *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, vol. 189, p. 137. Available at: http://www.refworld.org/docid/3be01b964.html
[131] United Nations General Assembly: *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations Treaty Series, vol. 606, p. 267.

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

Among all the requirements that an individual must meet before they can obtain the refugee status, the element of being persecuted is the most important. However, this term is neither defined in any international legal instrument nor the Refugee Convention defines what harm rises to the level of persecution. Nevertheless, Refugee Convention indicates some requirements in connection to term persecution. First, Conventional text is very clear that fear of being persecuted may be just for the reasons of race, religion, nationality, membership of a particular social group or political opinion. Secondly, Art. 33 of the Refugee Convention indicates that threat to life or freedom on Conventional grounds is always persecution, thus it is generally agreed that persecution is a risk of serious harm, however not limited to threat to life or freedom.[132] Moreover, a necessary link between persecution and the absence of state protection is acknowledged as "*an integral part of the refugee definition*"[133] and the "*central to the whole system*"[134]. Therefore, it is commonly accepted that term persecution is constructed of two essential elements, namely the risk of serious harm and failure of state protection, which can be showed by formulation: Persecution = Serious Harm + The Failure of State Protection[135].

Nevertheless, as the UNHCR Handbook confirms: "*there is no universally accepted definition of persecution"*[136]. Many commentators and scholars suggest that this term was intentionally left undefined in order to ensure flexibility of the Convention that could cover new emerging types of persecution.[137] Indeed, this advantage given by indeterminacy *"have materialized in the Convention's practise of application: the concept of "persecution" has expanded to include forms of harm that were certainly not present to the Convention's drafters,*

132 Francesco Maiani, "The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach", presentation given at the workshop "On Persecution", EUI, Florence, 17 October 2008, 2. https://dossiersgrihl.revues.org/3896

133 Goodwin-Gill, G. S., *supra* note 7, p. 10.

134 Horvath v. Secretary of State for the Home Department, United Kingdom: House of Lords (Judicial Committee), 6 July 2000, p. 3.

135 Haines, R., *supra* note 15, p. 329-330; BG (Fiji), *supra* note 9, para. 96

136 United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para. 51.

137 International Association of Refugee Law Judges (IARLJ), *supra* note 14, para. 14. James C. Hathaway, *The law of refugee status*. (Toronto: Butterworths, 1991), 102. Lauren Michelle Ramos. "A New Standard for Evaluating Claims of Economic Persecution Under the 1951 Convention Relating to the Status of Refugees." Vanderbilt Journal of Trans national Law, 44, 2 (2012): 504.

such as domestic abuse"[138]. Unfortunately, since there is no international authority charged to issue definitive interpretation of refugee law and the explanation of this meaning was left to judicial national interpretation, it results in confused and inconsistent jurisprudence, for example, "*that only 5 % of would-be refugees from Algeria are granted asylum if they make their application in France, whereas 80 % of such applicants are successful if applying in the United Kingdom"*[139]. Professor J. C. Hathaway notes that "*States often applied a subjective lens to assess whether a given risk rose to the level of persecutory harm, and in practice were more predisposed to accept claims of risk to physical security or basic civil rights than those grounded in threats to socioeconomic wellbeing"*[140].

Indeed, it has to be admitted that Refugee Convention has been often associated with civil and political rights, making a clear distinction between economic migrants and genuine refugees. This narrow interpretation applied in many countries results to exclusion of asylum applications based on socio-economic rights violations, reasoning that they are just economic migrants looking for better living conditions. Indeed, "*as classically understood, the 1951 Convention refugee definition would likely not be terribly sympathetic to the claims of persons in flight from famine or food deprivation*"[141] or other socio-economic harm. However, a range of emerging refugee claims, based on the complexity of the different reasons, challenges this simplistic dichotomy. The Handbook admits that this distinction between economic migrants and refugees is "*sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear"*[142]. Moreover, the interdependence and overlap between civil-political and socio-economic rights is recently confirmed by human rights courts and tribunals, where, for example, the ECtHR explicitly noted that there is no *"water-tight"* division separating those two sets of rights.[143] In practise, refugee decision makers often fail to distinguish cases of economic migrants and persons who fear persecution because of economic proscription. As Professor J. C. Hathaway explains, states often persecute by the systematic denial of economic opportunities that results in "*substantially deprived of the ability to earn a livelihood, or at least so constrained that their opportunities for employment are in no sense commensurate*

[138] Francesco Maiani, "The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach", presentation given at the workshop "On Persecution", EUI, Florence, 17 October 2008, 3.
[139] Case of Regina v. Secretary of State for The Home Department, Ex Parte Adan et Aitseguer, House of Lords, Judgment of 19 December 2000, 226.
[140] Hathaway, J. C., *supra* note 16, p. 330.
[141] Ibid., 329.
[142] United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para. 63
[143]Airey v. Ireland, *supra* note 84, para 26.

with their training and qualifications"[144]. Therefore, cases where applicant looks like an economic migrant looking for a better life in wealthier countries, should not be automatically rejected but rather have to be carefully evaluated since practice shows that very often behind economic reasons can be actual persecution.

It could be argued that the definition established in 1951 Refugee Convention does not correspond to many of current refugee situations, since it was made in the context of the post-war years,[145] thus the diversity of emerging socio-economic refugee status claims requires reconsideration of traditional Refugee Convention interpretations. However, the Author of the Thesis does not aim to redefine the Conventional definition, moreover any suggestions to expand refugee definition or Conventional grounds for refugee status is rejected. Optimistically, the language of the Convention has shown a remarkable flexibility to be liberally interpreted and deal with new threats.[146] Therefore, the wide interpretation of narrow refugee definition established in Refugee Convention is presented, where human rights approach as an objective and uniform standard should be used for Refugee Convention interpretation. This effective approach insures international coherence and give a possibility to include a wide range of people that indeed need refugee protection.

3.2 The human rights based approach to the interpretation of Refugee Convention

Refugee law is closely related to human rights law. Professor J. C. Hathaway has admitted that the Refugee Convention is a *"part and parcel of international human rights law"*[147] more specifically, *"a remedial or palliative branch of human rights law"*[148]. Despite the fact that refugee law provides just a surrogate protection to individuals while human rights law is monitoring violations of human rights and hold states accountable, historically both, refugee law and human rights law, have always been interrelated. The following analyses illustrate that human rights law has been an important informer and transformer of the refugee law[149] and especially significant changes was made in understanding of term being persecuted in refugee law jurisprudence.

When Refugee Convention was drafting, the term being persecuted was at least understood as threat to life or freedom, which follows from systematic analysis of Art. 33 of the

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[144] James C. Hathaway, "Selective Concern: An Overview of Refugee Law in Canada." *McGill L. J.* 33, 4 (1988): 711-712. http://lawjournal.mcgill.ca/userfiles/other/8290193-hathaway.pdf

[145] United Nations High Commissioner for Human Rights, Fact Sheet No. 20, *Human Rights and Refugees 1997. A*vailable at: http://www.unhchr.ch/html/menu6/2/fs20.htm

[146] William Thomas, Worster, "The Evolving Definition of the Refugee in Contemporary International Law." Berkeley Journal of Internationa Law, 30, 1 (2012):105.

[147] Hathaway, J. C., *supra* note, 21, p. 4.

[148] Ibid., 5.

[149] Vincent Chetail, "Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law." From Human Rights and Immigration, Ruth Rubio-Marin (Oxford, Oxford University press, 2014), 22.

Refugee Convention and is confirmed by UNHCR Handbook that "*threat to life or freedom* […] *is always persecution*"[150]. However, at that time it was argued that other threats to human dignity should constitute persecution, thus persecution should be understood as "s*evere measures and sanctions of an arbitrary nature, incompatible with the principles set forth in the Universal Declaration of Human Rights*"[151]. Since the Refugee Convention itself makes an explicit reference to the human rights law in its Preamble with an important commitment to ensure fundamental human rights and freedoms without discrimination[152], courts have decided that "*this overarching and clear human rights object and purpose is the background against which interpretation of individual provisions must take place*".[153] Significant contribution to define persecution has been made by J.C. Hathaway who clarified the impact of Preamble of the Refugee Convention stating that : "*The dominant view, however, is that refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systemic denial of core human rights is the appropriate standard"*[154]*.* This approach has significantly influenced the interpretation of many elements of refugee definition, for example, the undefined concept of persecution has been described as "*sustained or systemic violation of basic human rights demonstrative of a failure of state protection*"[155].

This human right approach and understanding of persecution is now widely adopted by nearly all scholars[156]. They consider the human rights approach as a dominant trend without "*respectable alternative"*[157], where "*comprehensive analysis requires the general notion of persecution to be related to developments within the broad field of human rights*"[158]. Thus, while the interpretation was left to each state party, the need for objective and principled Refugee Convention application "*prompted scholars to define persecution by reference to the new and growing body of human rights standards*"[159]. A leading authority on international refugee law, M.

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[150] United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para. 51.
[151] Jacques Vernant, The Refugee in the Post-War World. Yale University Press, 1953, at 8. (Quoted in: Ingo Venzke, How Interpretation Makes International Law On Semantic Change and Normative Twists, Oxford, Oxford University Press, 2012. 123.)
[152] United Nations General Assembly: Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, vol. 189, p. 137. Preamble para 1.
[153] Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, Canada: Supreme Court, 4 June 1998, 45.
[154]James C. Hathaway, The law of refugee status. (Toronto: Butterworths, 1991), 104-105; Case of Canada (Attorney General) v. Ward, Canada: Supreme Court, 1993 S.C.R. 689., 70 Available at: http://www.refworld.org/docid/3ae6b673c.html
[155] Case of Canada (Attorney General) v. Ward, Canada: Supreme Court, 1993 S.C.R. 689., 71
[156] Hathaway J.C., Foster, M., *supra* note 76, p. 197.
[157] Hugo Storey, Responds to John Tobin, NYU Journal of International Law and Politics 44, 2. Available at: http://opiniojuris.org/2012/03/08/dr-hugo-storey-responds-to-john-tobin/
[158]Goodwin-Gill, G. S., *supra* note 7, p. 91.
[159] Chetail, V. supra note 149, p. 26.

Foster[160] gives a comprehensive and cohesive analysis of the emerging tendency to use human rights standard. Through treaty interpretation principles established in the Vienna Convention on the Law of Treaties she analysed the Refugee Convention in "*accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*"[161] and concluded that "*the text of the Refugee Convention reveals its overriding human rights purpose*"[162].

This view is also followed by national adjudication authorities, where most of the courts have associated the notion of a serious persecutory harm in refugee law with a denial of a core human right. As some domestic courts have acknowledged, refugee definition is "*to be understood as written against the background of international human rights law*"[163]. For example, in *Canada v. Ward* case the Supreme Court of Canada asserted that refugee law often refers to human rights law, which "*sets the boundaries for many of the elements of the definition of "Convention refugee*"[164]. This human rights approach has also been accepted in the United Kingdom, for example, *Horvath v. Secretary of State* case[165] and New Zealand jurisprudence: "*the human rights approach to being persecuted 'adopted in New Zealand uses core international human rights treaties as the basis for determining its extent"*[166]. Moreover, in the whole Europe the link between human rights law and refugee law is now formally instructed by Art. 9 of the EU Qualification Directive[167], therefore human rights based approach is a dominant.

However, the problem is not really entirely solved because some jurisdictions do not completely support this approach. Despite some cases in the United States, that confirms importance of human rights approach, for example, in *Stenaj v. Gonzalez case*: "*Whether the treatment feared by a claimant violates recognized standards of basic human rights can determine whether persecution exists"*[168], approach is still not unanimously followed. Situation in Australia

[160] Foster, M., *supra* note 17, Chapter II.
[161] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, 31.
[162] Foster, M., *supra* note 17, p. 45.
[163] A and Another v Minister for Immigration and Ethnic Affairs and Another, [1997], Australia: High Court, 24 February 1997, available at: http://www.refworld.org/docid/3ae6b7180.html
[164] Case of Canada (Attorney General) v. Ward, Canada: Supreme Court, 1993 S.C.R. 689., 79; Chan v. Canada (Minister of Employment and Immigration), [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995, 213. Available at: http://www.refworld.org/docid/3ae6b68b4.html
[165]Horvath v. Secretary of State for the Home Department, [2000] UKHL 37, United Kingdom: House of Lords (Judicial Committee), 6 July 2000.
[166] BG (Fiji), *supra* note 9, para. 89.
[167] European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26, Art. 9.
[168] Case of Stenaj v. Gonzales, United States Court of Appeals 6th circuit, No. 05-4456, F. 3d 429, 2007, 9. Available at: http://cases.justia.com/federal/appellate-courts/ca6/05-4456/07a0153n-06-2011-02-25.pdf?ts=1411012476

is also not so clear and fundamental divergence of opinions appears[169]. Nevertheless, important contribution was made by D. Vanheule, which has examined approximately 5000 decisions of 13 Europe countries, Canada and United States in order to find more consistent interpretation of refugee. After her analyses she came up with a conclusion that "*the only essential criterion applied, either expressly or implicitly, by the courts appears to be the disproportional or discriminatory violation of basic human rights for one of the reasons mentioned in the Geneva Convention*"[170].

The UNHCR has also been strongly supporting the human rights based approach, asserting that "*refugees are owed international protection precisely because their human rights are under threat*"[171], therefore "*Human rights principles […], should inform the interpretation of the definition of who is owed that protection*".[172]

To sum up, notwithstanding inconsistencies, this short overview shows that human rights based approach is accepted as a dominant view used for Refugee Convention interpretation, which has influenced many of refugee definition features and contributed to refugee law significant changing. It can be argued that human rights law is an *"ultimate benchmark for determining who is a refugee*"[173]. The core norms of international human rights law provide a universal and disciplined framework for contradictory and often subjective Refugee Convention interpretation. The international human rights law objectivity is especially valuable because provides "*the ideal alternative to reliance on decision-makers' personal views about what is 'intolerable', 'offensive', or 'illegitimate*'"[174]. Well described impact of international human rights law on the refugee definition is submitted by V. Chetail that: "*The selective approach permeating all the components of the refugee definition has been substantially informed – and to some extent mitigated – by the subsequent development of human rights law*"[175]. Moreover, the international human rights law has always been authoritatively interpreted, which gives an essential possibility to interpret the Refugee Convention in a progressive manner and to "*address new threats to human dignity through refugee law*"[176]. Consequently, the Refugee Convention can act as a living instrument with a more principled understanding of new emerging problems such as claims based on socio-economic rights deprivation. Therefore, growing importance of socio-economic rights in human

[169] Minister for Immigration & Multicultural Affairs v Khawar, N 1379 of 1999, Australia: Federal Court, 23 August 2000, available at: http://www.refworld.org/docid/3ae6b6f80.html; International Association of Refugee Law Judges (IARLJ), *supra* note 14, para. 24.
[170] Dirk Vanheule, "A Comparison of the Judicial Interpretations of the Notion of Refugee," In *Europe and Refugees: a Challenge?* Jean-Yves Carlier and Dirk Vanheule (The Hague Kluwer Law International, 1997), 99.
[171] UN High Commissioner for Refugees (UNHCR), Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, April 2001, 1-2. *Available at: http://www.refworld.org/docid/3b20a3914.html*
[172] Ibid.
[173] Chetail, V. *supra* note 149, p. 28.
[174] Hathaway J.C., Foster, M., *supra* note 75, p. 194.
[175] Chetail, V. *supra* note 149, p. 28
[176] International Association of Refugee Law Judges (IARLJ), *supra* note 14, para. 28.3.

rights law should be considered as a sphere, where human rights law development can contribute to refugee law changes.

3.3 Socio-economic persecution

Since human rights based approach is a dominant one used for Refugee Convention interpretation, the most difficult practical question appears: which human rights violations can amount to serious harm constituting persecution. Therefore, important task is to identify human rights sources which could be used for Refugee Convention interpretation. Professor J. C. Hathaway has acknowledged that "*there is now general agreement that core norms of international human rights law [...] should be the principled point of reference for understanding how to identify a risk of being persecuted"*[177]. It has to be admitted that sometimes human rights approach is considered as over inclusive, hence in order to ensure that suggested human rights approach would be accepted as serious, law-based and not over inclusive, the reference should be made only to "*a highly select group of human rights treaties"*[178]. The Refugee Convention itself refers to Universal Declaration of Human Rights indicating that those human rights norms are core and may be used for refugee status determination. Indeed, the most fundamental international human rights are established in the International Bill of Rights, comprised of Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), which is the core human rights instrument and essential to understand state's minimum duty to its nationals, therefore can be reasonably used for refugee definition interpretation.[179]

The international human rights law is constantly evolving, therefore it is considered that the Refugee Convention "*should afford continuing protection for refugees in the changing circumstances of the present and future world. […] the Convention has to be regarded as a living instrument*"[180]. Thus taking into consideration important developments in human rights law, reference may be also made to other treaties that enjoys universal states support such as the Convention on the Elimination of all Forms of Racial Discrimination, 1966 (CERD)[181], the Convention on the Elimination of Discrimination Against Women, 1979 (CEDAW)[182] and the Convention on the Rights of the Child, 1989 (CRC)[183].[184] Moreover, it is recognised that refugee decision makers follow applied international human rights instruments interpretation suggested by

[177] Hathaway, J. C., *supra* note 16, p. 332.
[178] International Association of Refugee Law Judges (IARLJ), *supra* note 14, p. 35.
[179] James C. Hathaway, *The law of refugee status*. (Toronto: Butterworths, 1991), 106.
[180] Sepet (FC) and Another (FC) v. Secretary of State for the Home Department, United Kingdom: House of Lords (Judicial Committee), 20 March 2003, 6.
[181] New York, 7 March 1966, in force 4 January 1969, 660 UNTS 195.
[182] New York, 18 December 1979, in force 3 September 1981, 1249 UNTS 13.
[183] New York, 20 November 1989, in force 2 September 1990, 1577 UNTS 3.
[184]Hathaway, J. C., op. cit. 106-107.

"treaty bodies" such as the Committee on Economic, Social and Cultural Rights which is considered as a persuasive authority[185]

Using the international human rights norms to clarify forms of serious harm that amounts to persecution, assessment should not be restricted only to the International Bill of Rights norms application and claims should not be rejected if they are based on derogable rights or is of progressive implementation nature[186]. In other words, severe violation of any human right: civil, political, economic or social could constitute persecution. Professor J. C. Hathaway has positively acknowledged that "*refugee law has increasingly taken on board the view that all human rights are properly understood to be equal and indivisible"*[187]. Evaluation of recent case law shows that there are series of refugee claims related to socio-economic harm, which can be successful refugee cases. The New Zealand refugee jurisprudence recognizes that breaches of ICESCR rights are relevant and may "*be relied on to found a refugee claim as rights in themselves"*[188]. Moreover, the Tribunal underlined that other jurisdictions, namely, Australia[189], Canada[190], United Kingdom[191] has also recognized that claims based on socio-economic discrimination may be valid for refugee status, however admitted that "*the extent to which the ICESCR is engaged with is highly variable"*[192]. Indeed, recent international refugee case law demonstrates that all jurisdiction generally accepts that violation of socio-economic rights can amount to a risk of serious harm that constitutes persecution, however confusions and inconsistencies exists. For example, "*while economic harm must meet a higher standard in Australia and in some US federal courts of appeal and the US Board of Immigration Appeals, it is assessed against the same standard or similar standard to the general test for persecution in New Zealand, the United Kingdom, other US federal courts of appeal, and Canada*"[193]. Both M. Foster and Professor K. Jastram claim that refugee law has "*largely failed to reflect the growth of a more sophisticated and complex understanding within the human rights realm of the content of economic, social and cultural rights*"[194].

However, it has to be admitted that not every breach of human rights is equally serious and amounts to persecution. It can be situation where civil and political rights are violated, but this

[185] *Refugee Appeal No. 74665*, No. 74665, New Zealand: Refugee Status Appeals Authority, 7 July 2004, 73.
[186] Hathaway J.C., Foster, M., *supra* note 75, p. 204.
[187] Hathaway, J. C., *supra* note 16, p. 332.
[188] BG (Fiji), *supra* note 9, para. 90.
[189] Chan v. Canada (Minister of Employment and Immigration), [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995.
[190] Liang v. Minister of Citizenship and Immigration, 2008 FC 450, Canada: Federal Court, 8 April 2008.
[191]R v Secretary of State for the Home Department, ex parte Adam [2006] AC 396 at [55].
[192] BG (Fiji), op. cit., para. 91.
[193] James C. Simeon, "Research Workshop on Critical Issues in International Refugee Law," Canada's Journal on Refugees, Vol 25, No 2 (2008), 207.
[194] Kate Jastram, "Economic Harm as a Basis for Refugee Status and the Application of Human Rights Law to the Interpretation of Economic Persecution" in James Simeon (ed), *Critical Issues in International Refugee Law: Strategies for Interpretative Harmony* (forthcoming 2010), 207.

threat is not so severe that would amount to persecution and it could be socio-economic harm that in the context of all circumstances will be considered sufficiently severe to constitute persecution. Therefore, the evaluation weather harm reach the level of persecution mainly depends not on the category of the right, but on evaluation "*of factors which include not only the nature of the right threatened, but also the nature of the threat or restriction and the seriousness of the harm threatened"*[195].

From the analyses above it can be concluded that persecution can rise from any core human rights violation, taking into consideration both risk to socio-economic and civil-political rights. Thus, every case requires comprehensive consideration of the facts and circumstances whether generally accepted and in international law codified right is violated[196] and if the breach is so serious that amounts to persecution.

The following part of the Thesis analyses different ways, when violation of socio-economic rights may amount to persecution. First, socio-economic rights violation itself or on accumulation with other harm can be so severe that results to deprivation of life or freedom and always constitute persecution. Also, other types of serious socio-economic harms itself or in accumulation with other less serious violations or in a case of discrimination, leading to consequences of substantially prejudicial nature can amount to persecution. Moreover, the failure of a state protection can be considered as persecution.

3.3.1 Physical harm.

Historical overview above shows that originally, persecution has always been understood at least as physical harm and severe violation of civil and political rights. According to the Refugee Convention and UNHCR Handbook "*threat to life or freedom* […] *is always persecution*"[197]. It has to be admitted that courts have recognized both: deprivations of civil-political and socio-economic rights can be so severe that constitute threat to life or freedom. Professor J. C. Hathaway has stated that *"the deprivation of certain socio-economic rights, such as the ability to earn a living, or the entitlement to food, shelter or health care, will at an extreme level be tantamount to the deprivation of life or cruel, inhuman or degrading treatment, and hence unquestionably constitute persecution"*[198]. Same position is confirmed by United Nations High Commissioner for Human Rights that: "*From a human rights perspective* […] *if the emphasis is placed on threats to*

[195] R*efugee Appeals Nos. 72558/01 & 72559/01*, 72558/01 & 72559/01, New Zealand: Refugee Status Appeals Authority, 19 November 2002, para. 114. Available at: http://www.refworld.org/docid/402a661d4.html
[196] Hathaway J.C., Foster, M., *supra* note 75, p. 204.
[197] United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para. 51.
[198] Hathaway, J.C., supra note 179, p. 111.

life and freedom, there is little to distinguish between a person facing death through starvation and another threatened with arbitrary execution because of her political beliefs"[199]. Indeed, from the adoption of refugee Convention it was established practice that the cases of "*economic proscription, so severe as to deprive a person of all means of earning a livelihood*"[200] constituted persecution and was considered as appropriate claim encompassed by Convention. This was confirmed in the 1961 US court of Appeals *Dunat case* where economic proscription was considered as persecution because it is *"equivalent to a sentence to death by means of slow starvation"*[201]. Therefore, for example, complete systematic denial of employment, which deprives from all means of earning a livelihood is so sufficiently serious that often amounts to persecution. A denial of medical treatment, especially in a case where person suffers from a life threatening illness, could also be considered as inhuman or degrading treatment that amounts to persecution. In some cases, combination of harm to different socio-economic rights, such as right to work, to education or health can be affected in such an extreme extent that as considered together results to deprivation of life or inhuman and degrading treatment and undeniably amounts to persecution.

Indeed, the risk to life or cruel, inhuman or degrading treatment can result not only "*from direct forms of physical harm, but also from severe deprivations of socio economic rights*"[202]. This can be explained by interdependence and interrelatedness of all human rights, recently confirmed by tribunals, human rights courts jurisprudence and literature. UN Office of the High Commissioner for Human Rights (Hereafter - OHCHR) confirms that "*Human rights are interdependent, indivisible and interrelated. This means that violating the right to food may impair the enjoyment of other human rights, such as the right to health, education or life, and vice versa*"[203]. The New Zealand RSAA agreed that, for example, "*the right to life […] in conjunction with the right to adequate food […] should permit a finding of ''being persecuted'' where an individual faces a real risk of starvation*"[204].

Analyses of the ECtHR jurisprudence in the first part of the Thesis confirms a clear overlap between civil-political and socio-economic rights, where many of civil and political rights "*have implications of a social or economic nature"*[205], therefore severe violation of social and

[199] United Nations High Commissioner for Human Rights, Fact Sheet No. 20, *Human Rights and Refugees 1997. A*vailable at: http://www.unhchr.ch/html/menu6/2/fs20.htm
[200] Atle Grahl-Madsen, The Status of Refugees in International Law (Sijthoff, Leyden Vol 1, 1996), 208.
[201] Case of Dunat v. Hurney, US Court of Appeals for the Third Circuit - 297 F.2d 744 (3d Cir. 1961)
[202] Hathaway J.C., Foster, M., *supra* note 75, p. 212.
[203] UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 34, The Right to Adequate Food*, April 2010, No. 34, 5. Available at: http://www.refworld.org/docid/4ca460b02.html
[204] Refugee Appeal No. 74665, No. 74665, New Zealand: Refugee Status Appeals Authority, 7 July 2004, para. 89. Available at: http://www.refworld.org/docid/42234ca54.html
[205] Airey v. Ireland, *supra* note 83, para. 26.

economic rights can implicate civil and political rights violations. In a case where asylum seeker is claiming severe socio-economic rights deprivation, such as right to health, food, water, education, work, social security or housing, this violation, on the facts of the case, could inflict a risk to life or cruel, inhuman or degrading treatment and amount to persecution. ECtHR jurisprudence has established that states failure to provide health care and public welfare may in certain circumstances inflict state responsibility under Art. 2 of ECHR, moreover, in special circumstances, suffering from extreme poverty, elementary health and welfare needs can constitute a degrading or inhuman treatment within the meaning of Art 3.

For example, New Zealand Immigration Tribunal in BG (Fiji) case[206] after evaluation whether experienced socio-economic deprivation is so severe that amount to persecution, considered if socio-economic deprivation could constitute breach of right to life or prohibition of cruel, inhuman and degrading treatment, which constitute persecution. Appellant was a Banaba Islander, forcibly relocated from Ocean Islands to Rabi Island in Fiji because of environmental reasons. General socio-economic situation in Fiji was very poor: high poverty rates, poor housing conditions, limited employment opportunity, just some basic health and education services, limited administrative or commercial services, moreover constitutional amendments shut Banabans community from development programmes.[207] However, the Tribunal considered that neither occasional fishing prevention or stolen corps by ethnic Fijians, nor deliberate policy of socio-economic marginalisation have result in deprivation of livelihood and have not reached a sufficient level of harm to constitute threat to life or inhuman and degrading treatment. Findings of this case and ECtHR practise demonstrates that socio-economic rights violation amount to risk to life or inhuman and degrading treatment just in very extreme, exceptional circumstances.

Additionally, it should be mentioned that each socio-economic right has a minimum core obligation, that is an essential minimum of political right that has to be protected. For example, General Comment No. 15 concerning right to water notes that water is "*fundamental for life and health*"[208], therefore, in such a case, where state does not ensure access to the minimum essential amount of water, the situation can be so severe that inflicts violation of right to life or prohibition of inhuman and degrading treatment and constitute persecution. The OHCHR has explained essential link between the right to water and other human rights: "*Access to safe drinking water is a fundamental precondition for the enjoyment of several human rights, including the rights to*

[206] BG (Fiji), *supra* note 9.
[207] Ibid., para. 25-26.
[208] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11,

education, housing, health, life, work and protection against cruel, inhuman or degrading treatment or punishment"[209].

To sum up, in some situations, violation of social and economic rights can be so extremely severe that results in civil and political rights violations, such a right to life, prohibition of cruel, inhuman and degrading treatment, that unquestionably constitute persecution. Thus while analysing socio-economic deprivation cases, decision makers should evaluate physical harm, which is interrelated, since deprivation of essential socio-economic rights like medical services, water or food can inflict physical harm. However, it has to be emphasized that it is not a necessary requirement that socio-economic breach has to reach such an extreme, life-threatening level in order to constitute persecution, other types of socio-economic rights violations can also constitute persecution.

3.3.2 Other types of harm

It is canonical in the literature and in international practice that term persecution "*cannot be defined as including only threats to life and freedom*"[210]. Presented historical analyses reveal that understanding of term persecution where changing since the times when Refugee Convention was drafted. Consequently, analysis of Art. 33 of the Refugee Convention and UNHCR Handbook shows that nowadays the term persecution is not limited to threat to life or freedom, but also includes other serious violations of human rights.[211] Moreover, international jurisprudence clarifies that term persecution is capable to encompass forms of harm other than direct physical mistreatment, therefore this extreme severity, namely, that socio-economic harm would constitute a threat to life or freedom is not an acceptable requirement. For example, in the case *Chan v. MIEA*, the high court of Australia confirmed that "*to constitute "persecution" the harm threatened need not be that of loss of life or liberty. Other forms of harm short of interference with life or liberty may constitute "persecution"*"[212]. It was admitted that "*persecution on account of race, religion and political opinion has historically taken many forms of social, political and economic discrimination. Hence, the denial of access to employment, to the professions and to education* […] *may constitute persecution if imposed for a Convention reason"*[213]. In *Oyarzo v. Minister of*

[209] UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 35, The Right to Water*, August 2010, No.35, 12. Available at: http://www.refworld.org/docid/4ca45fed2.html
[210] Francesco Maiani, "The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach", presentation given at the workshop "On Persecution", EUI, Florence, 17 October 2008, 2.
[211] United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para. 51.
[212] Chan Yee Kin v. Minister for Immigration and Ethnic Affairs; Soo Cheng Lee v. Minister for Immigration and Ethnic Affairs; Kelly Kar Chun Chan v. Minister for Immigration and Ethnic Affairs, Australia: High Court, 12 September 1989, para. 36. Available at: http://www.refworld.org/docid/3ae6b70a4.html
[213] *Ibid.*

Employment and Immigration case the Federal Court of Appeal in Canada rejected that persecution requires a deprivation of liberty and concerning all the facts of the case held that loss of employment because of political activities constituted persecution.[214] In similar case of Canada, a teacher was deprived of her profession as a punishment for expressing her political opinion and forced make a living as a farmhand, the Court concluded that "*Permanently depriving an educated professional of his or her accustomed occupation and limiting the person to farm and factory work constituted persecution*"[215]. Moreover, in the United States a liberal view of the term persecution is established, where extreme severe life-threatening deprivation of all means of earning is rejected as clearly too narrow,[216] therefore, for example "*a sweeping limitation of opportunities to continue to work in an established profession or business may amount to persecution even though the applicant could otherwise survive*"[217]. Nevertheless, analyses of jurisprudence concerning economic harm cases reveal a general confusion and inconsistencies. Since the United States courts and administrative authorities have established and applied different standards of economic harm, in 2006 the Second Circuit asked the BIA[218] for clarification in *Mirzoyan v. Gonzales*[219] economic persecution case: which of the many various standards should be used to evaluate economic harm that amounts to persecution. Whether it should be the Dunat standard: *"economic proscription so severe as to deprive a person of all means of earning a livelihood may amount to physical persecution"*[220]; Kovac standard: *"probability of deliberate imposition of substantial economic disadvantage",* Acosta standard *"threat to* […] *life or freedom"* or possibly some other standard.[221] In *Mirzoyan v. Gonzales case,* Mirzoyan had been denied the opportunity to earn a livelihood because of her ethnicity. She was denied admission to a more prestigious college, was unable to find a job related to her profession, finally she found a job as an unskilled courier but was discharge because of discrimination against ethnic Armenians. In this case the Court importantly emphasized that the decision of the case may depend on the standard applied. It was unlikely that she could prevail under *Acosta* or the similarly stringent *Dunat* standard, but she

[214] Oyarzo v. Minister of Employment and Immigration (1982) 2 FC 779 the Federal Court of Appeal of Canada, 782-783, (Cited in *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs; Soo Cheng Lee v. Minister for Immigration and Ethnic Affairs; Kelly Kar Chun Chan v. Minister for Immigration and Ethnic Affairs*, Australia: High Court, 12 September 1989, para. 36)
[215] He v. Canada (Minister of Employment and Immigration) (1994), 25 Imm. L.R. (2d) 128 (F.C.T.D.). (Referred in: Canada: Immigration and Refugee Board of Canada, *Interpretation of the Convention Refugee Definition in the Case Law*, 31 December 2005, 3-13. Available at: http://www.refworld.org/docid/47137db52.html)
[216] In re T-Z-, 24 I&N Dec. 163, (BIA 2007), United States Board of Immigration Appeals, 9 May 2007, 173.
[217] Ibid., p. 174.
[218] The Board of Immigration Appeals, the highest U.S. administrative authority for immigration issues.
[219] Case of Mirzoyan v. Gonzales, US Court of Appeals, Second Circuit, 457 F.3d 217, 221 (2d Cir. 2006).
[220] Case of Dunat v. Hurney, US Court of Appeals for the Third Circuit - 297 F.2d 744 (3d Cir. 1962), para. 45.
[221] Mirzoyan v. Gonzales, op. cit.

might prevail under the more lenient *Kovac* standard.[222] This statement shows how important is to establish the appropriate standard for evaluation of economic persecution.

In 2007, the re T-Z- decision BIA clarified that harm in the claims considering economic persecution does not need to be physical and may take other forms,[223] thus the correct standard governing economic persecution claims is: "*deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment or other essentials of life".*[224] The BIA clarified that the first clause of this standard refers to *"situations in which, for example, an extraordinarily severe fine or wholesale seizure of assets may be so severe as to amount to persecution, even though the basic necessities of life might still be attainable"*.[225] While the second clause refers to economic persecution which *"may involve the deliberate deprivation of basic necessities such that life or freedom is threatened"*.[226] Rich case law overviewed in T–Z– case established some criteria that could help to evaluate particular cases: *"Persecution requires a showing of more than mere economic discrimination.* […] *The economic difficulties must be above and beyond those generally shared by others in the country of origin and involve noticeably more than mere loss of social advantages or physical comforts.* […] *Rather, the harm must be "of a deliberate and severe nature and such that is condemned by civilized governments.* […] *An applicant, however, need not demonstrate a total deprivation of livelihood or a total withdrawal of all economic opportunity in order to demonstrate harm amounting to persecution."*[227]. However, in this case the BIA did not propose any concrete method, but used a number of illustrative examples that could be guidance in assessing whether economic harm is sufficiently severe to amount to persecution, although they do not threaten persons life or freedom.[228] For example, availability of other sources of income was considered as an important criterion to assess in cases where person is deprived of his occupation. Thus, in *Capric v. Ashcroft, "the court found that the alien's loss of a job and an apartment based on religion and ethnicity did not amount to past persecution where the government had given him 8 months to find a new residence, his wife had remained employed, he had not attempted to find other work, and the regional economic conditions in general were harsh"*[229]. Therefore, in every case evaluation of all relevant circumstances has a significant importance.

[222] Mirzoyan v. Gonzales, *supra* note 219.
[223] In re T-Z-, 24 I&N, *supra* note 216, p. 170.
[224] *Ibid.*, p. 171.
[225] *Ibid*.
[226] *Ibid.*
[227] *Ibid.*, para. 172-173.
[228] *Ibid*., para. 174.
[229] Capric v. Ashcroft, 355 F.3d 1075, 1092-93 (7th Cir. 2004), (Cited in re T-Z-, 24 I&N Dec. 163, (BIA 2007), United States Board of Immigration Appeals, 9 May 2007, 174).

Unfortunately, despite the fact, that the standard and some criteria were established in T–Z– case, with a clear intent that there is no necessity to demonstrate threat to life or freedom or total deprivation of livelihood, courts continue to impose high test requiring that economic harm would threaten life or freedom to constitute persecution.[230] Inconsistencies also appear in other jurisdictions, where despite the well-established practise, that all human rights are equal and persecution is not limited to the life threatening harm, some refugee decision makers consider socio-economic rights violation as less significant, thus impose high standard, requiring extreme socio-economic harm that results to threat to life or freedom. Analysis made by Professor K. Jastram of the recent economic harm case law related "*to employment, education, and punitive fines, in five countries—Australia, Canada, New Zealand, the United Kingdom, and the United States"*[231] reveals that applicable economic persecution standard requires *"severity rising to the level of a threat to life or the capacity to subsist"*[232]. For example, the UK IAT required that *"economic hardship must be extreme and the discrimination must effectively destroy a person's economic existence before surrogate protection can be required*"[233]. Likewise, the New Zealand RSAA has stated that *"serious restrictions on his right to earn his livelihood will amount to persecution only to the extent that, at the extreme level, the restrictions are tantamount to the deprivation of life or cruel, inhuman or degrading treatment*"[234]. Indeed, refugee mass influx and fear of growing refugee numbers negatively affects the concept of persecution, by narrowing it to essential minimum – threat to life or freedom[235], however, it is, of course, in conflict with the well-established principle that persecution is not limited to extreme, only life-threatening harm. Invocation of such an erroneously high test for socio-economic harm has an extremely negative impact on applicants claims, as it was importantly emphasized in *Mirzoyan v. Gonzales case*, the outcome of a case directly depends on the standard applied.

[230] For example, Makatengkeng v. Alberto R. Gonzales, Attorney General, No. 06-1630, United States Court of Appeals for the Eighth Circuit, 3 August 2007; Bereza v. Immigration and Naturalization Service, No. 96-3041, United States Court of Appeals for the Seventh Circuit, 30 May 1997. Ngengwe v. Mukasey, No. 07-3702, United States Court of Appeals for the Eighth Circuit, 18 September, 2008. Discussed in: Fatma E Marouf and Deborah E. Anker, Socio-Economic Rights and Refugee Status: Deepening the Dialogue Between Human Rights and Refugee Law, American Journal of International Law, Vol. 103, 2009, 794-796; Foster, M., supra note 17, p. 127-128.
[231] Simeon, J. C., *supra* note, 193, p. 207.
[232] Ibid.
[233] El Deaibes v. Secretary of State for the Home Department [2002] UKIAT 02582, para. 13 (As Cited in Michelle Foster, *International Refugee Law and Socio-Economic Rights: refuge from Deprivation* (Cambridge: Cambridge University Press, 2007, 124).
[234] Refugee Appeal No. 71605/99, RSAA, 16 December 1999, at 7. (As Cited in Michelle Foster, International Refugee Law and Socio-Economic Rights: refuge from Deprivation (Cambridge: Cambridge University Press, 2007, 124).
[235] Francesco Maiani, "The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach", presentation given at the workshop "On Persecution", EUI, Florence, 17 October 2008, 3. https://dossiersgrihl.revues.org/3896

3.3.2.1 Socio-economic discrimination as persecution

Socio-economic discrimination is also considered as suffered harm, which could constitute persecution, since Refugee Convention is considered as a "*international community's commitment to the assurance of basic human rights without discrimination"*[236]. However, it is normal that different treatment of different groups exists in society, thus "*Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution*"[237]. Widely accepted refugee law principle confirms that discrimination itself is not sufficient[238] and may amount to persecution just in special circumstances, where discriminatory measures "*lead to consequences of a substantially prejudicial nature for the person concerned*"[239]. The difference between discrimination and persecution is a "*degree, which makes a hard and fast line difficult to draw*"[240], therefore serious economic and social discriminatory measures such as discriminatory taxation, denial of work permit, education, health services, trading rights restriction directed against a claimant or a particular group may be considered as persecution only in a case, where consequences are *"of a substantially prejudicial nature".*

For example, in a case where individual claims that state provides free education to all its citizens but discriminatory excludes him on a conventionally prohibited ground, could amount to persecution and refugee status could be granted. Because Art. 2(2) of the ICESCR imposes an immediate obligation "*to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination"*[241], moreover, the Economic Committee has clarified that this prohibition against discrimination "*is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination"*[242]. In addition, UNHCR Handbook acknowledges that denial of access to normally available educational facilities is such a discrimination that has consequences of a substantially prejudicial nature[243]. This position is support by case law, for instance, in *Zhang v. Gonzales,* court confirmed that *"Denial of access to*

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[236] Case of *Canada (Attorney General) v. Ward, Canada: Supreme Court, 1993 S.C.R. 689., 79.*

[237] United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para. 54.

[238] BG (Fiji), *supra* note 9, para. 99.

[239] United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para. 54.

[240] Bucur v. Immigration and Naturalization Service, 109 F 3d 399 (7th Cir. 1997) http://caselaw.findlaw.com/us-7th-circuit/1385259.html

[241]UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. Available at: http://www.refworld.org/docid/3ae6b36c0.html

[242] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, Art. 13.

[243] United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para. 54.

educational opportunities available to others on account of a protected ground can constitute persecution"[244]. Same position was expressed in *Bucur v. INS case*, where the US Court of Appeals noted that: "*If Romania denied its Ukranian citizens the right to higher education enjoyed by ethnic Romanians, this would be, we imagine, a form of persecution*"[245]. However, the final decision could be made just after evaluation of all the circumstances of the case, taking into consideration, for example, the level of higher education, also if denial of education is absolute or partial.

In another case, *RN [Returnees] Zimbabwe CG*, concerning right to food, it was recognised that "*Discriminatory exclusion from access to food aid is capable itself of constituting persecution for a reason recognised by the Convention"*[246]. In this case, extremely difficult general living conditions and major economic crisis in Zimbabwe, the food shortages, collapsed health and education services, no real prospect of employment, a discriminatory exclusion from access to food on the basis of political affiliation, where governmental food distribution was deployed as a political weapon, resulted in completely deprivation of the basic human rights of some nationals. The UK Tribunal recognized refugee status and noted that: "*the government of Zimbabwe has used its control of the distribution of food aid as a political tool* […] *to perceived political opponents, taken together with the disruption of the efforts of NGOs to distribute food* […] *amounts to persecution of those deprived access to this essential support*"[247]. This example demonstrates that, the discriminatory violation of right to food, which is a "*critical aspect of the right to an adequate standard of living*"[248] established in the ICESCR, can at least in very exceptional circumstances amount to persecution itself. Moreover, it shows that persecution could be established where right to food, water or other socio-economic rights are severe violated even when a general living conditions in a country of origin is very poor. M. Lister confirms that even in severe poverty cases, asylum could be reasonably considered at least in the cases where poverty or famine is "*not randomly distributed but rather imposed on certain groups for political reasons*".[249] Thus right deprivation has to be done because of reason established in Convention, like in this case, government intentionally used discriminatory food distribution against a group of people on the basis of political affiliation.

[244] Case of Zhang v. Gonzales, No. 01-71623, United States Court of Appeals, Ninth Circuit, 26 May 2005, para. 9.
[245] Bucur v. INS, 109 F.3d 399 (7th Cir. 1997) As cited in Zhang v. Gonzales, No. 01-71623, United States Court of Appeals, Ninth Circuit, 26 May 2005, para. 9.).
[246] RN (Returnees) Zimbabwe v. Secretary of State for the Home Department, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 19 November 2008, para. 249.
[247] *Ibid.*, para. 250.
[248] Hathaway, J. C., *supra* note 16, p. 333.
[249] Matthew Lister, "Who are refugees?" University of Denver Sturm College of Law, Legal Research Paper Series, Working Paper No. 12-40, 22.

Unfortunately, socio-economic rights discrimination is more rarely accepted as persecution than traditional civil-political rights discrimination and amount to persecution just in very extreme circumstances.[250] The problem is that in socio-economic discrimination cases, decision makers often assume that this kind of breach is a mere discrimination, therefore impose a high test, that requires support by other rights violations, especially civil-political ones.[251] Moreover, despite the fact that person suffers sufficiently severe discriminatory socio-economic rights deprivation based on the Conventional grounds, such as denial of access to education, health care facilities or employment, courts often concentrates on social economic migration reasons and concludes that applicant is an economic migrant looking for better life in welfare countries, which becomes automatically excluded from refugee status.

However, it has to be emphasized that successful refugee claim can be made even in cases where it looks that applicant does not try to escape from persecution, but rather is looking for a better job, education, health services or want to improve the prospects of family. It can appear that this person has faced severe discrimination in obtaining employment, education or other welfare services because of his race, religion, nationality, membership of a particular social group or political opinion and this discrimination was so severe that amounts to persecution. A good example is Australian RRT decision, where Tribunal found that Uzbekistan women left Uzbekistan "*wanting to improve her economic situation in the context of a declining economy and consequent limited employment opportunities in Uzbekistan, especially for women*"[252]. However, Tribunal considered those circumstances cumulatively with her later experience of being trafficked and a real chance of future harm, thus found that the applicant has a well-founded fear of persecution. Therefore, such a high test concerning socio-economic right discrimination is unacceptable and unreasonable, since it is generally agreed that discrimination can amount to persecution itself. However, in the situations where discriminatory measures do not inflict severe consequences themselves, persecution could be established on accumulative grounds in combination with other less serious types of harm.

3.3.2.2 Socio-economic persecution based on accumulative grounds

While mere socio-economic discrimination may not amount to persecution itself, it could do it on accumulative grounds. This has a significant practical influence, since it can be case where none of harassment acts amount to persecution individually, however a combination of numerous

[250] Eric Fripp, Rowena Moffatt and Ellis Wilford, The Law and Practice of Expulsion and Exclusion from the United Kingdom: Deportation, Removal, Exclusion and Deprivation of Citizenship (United Kingdom: Hart Publishing, 2015), 87.
[251] Foster, M., *supra* note 17, p. 132-133, 167.
[252] RRT Case No. N02/42226 RRTA 615, Australia: Refugee Review Tribunal, 30 June 2003. Available at: http://www.refworld.org/docid/4b17c2b02.html

harms considered in the context of a general atmosphere of insecurity in the applicant's country, produces a cumulative effect which could create a well-founded fear of persecution.[253] Indeed, persecution because of socio-economic rights denial most likely appear from the violation of the right to an adequate standard of living[254], where the composite nature of this right, including adequate food, clothing, housing, and improvement of living conditions[255], prompts that the impact of the socio-economic rights violation should be evaluated cumulatively.

Recent refugee case law reveals essential development, that decision makers tend to assess the situation on accumulative grounds. The New Zealand RSAA has explained: "*It is recognised that various threats to human rights, in their cumulative effect, can deny human dignity in key ways and should properly be recognised as persecution for the purposes of the Convention*"[256], therefore it is important to consider: *"(a) whether only one or a multiplicity of socio-economic rights are affected; and (b) the extent to which the identified attributes are enjoyed across the range of affected rights"*[257].

Undeniably, it is one of the best practical possibilities, when claim based on socio-economic deprivations amount to persecution. In numerous cases various combinations of socio-economic deprivation in connection with other less serious socio-economic or civil-political rights violations were so sufficiently severe that constituted persecution. For example, in *Li v. Attorney General* case of the U.S the Third Circuit concluded that *"while Li's family did not reach near-starvation levels* […] *in the aggregate, a fine of more than a year and a half's salary; blacklisting from any government employment and from most other forms of legitimate employment; the loss of health benefits, school tuition, and food rations; and the confiscation of household furniture and appliances from a relatively poor family constitute deliberate imposition of severe economic disadvantage which could threaten his family's freedom if not their lives"*[258]. Court decided that viewed in the aggregate, treatment amount to economic persecution. For example, in *Cheung v. Canada* decision Court considered that if a minor child, born outside one-child policy in China, would be sent back to China, she would "*experience such concerted and severe discrimination, including deprivation of medical care, education and employment opportunities and even food, so as to amount to persecution. She was poignantly described as a "black market person," denied the*

[253] United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para. 53.
[254] Hathaway J.C., Foster, M., *supra* note 76, p. 228.
[255] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, Art. 11.
[256] Refugee Appeal No. 71427/99, New Zealand: Refugee Status Appeals Authority, 16 August 2000, para. 53(a).
[257] BG (Fiji), *supra* note 9, para. 102.
[258] Case of Li v. Attorney General, No. 03-1930, Court of Appeals, Third Circuit, 10 March 2005, 169.

ordinary rights of Chinese children"[259]. Such an extreme hardship that would be experienced by a child is a severe discrimination, amounting to persecution. In another case Canadian court has ruled that the cumulative socio-economic discrimination where there is no access to public health care, severe restrictions on work, limited access to education suffered by stateless Palestinian living in a refugee camp in Lebanon gives rise to a refugee protection.[260]

Very important is *Tchoukhrova v. Gonzales case*[261], concerning the asylum claim of Russian disabled child with cerebral palsy who was isolated in state institution in inhumane circumstances. He lived in very poor conditions, including insufficient food, hygiene, sanitation, overcrowding, suffered continuing discrimination to access appropriate medical care and to get elementary education. US Court stated that "*Although most of these harms could rise to the level of persecution independently, there is no doubt that, when taken together, they constitute persecution*"[262]. Court evaluated harm collectively and decided that denial of medical care or education because of race, ethnicity, religion, political opinion, or membership in a particular social group is "*at a minimum, discrimination, where the denial seriously jeopardizes the health or welfare of the affected individuals, a finding of persecution is warranted*"[263]. It should be noticed, that this case could be compared or actually is identical to those ill-treatment detention cases which ECtHR considered in the context of Art. 3 of ECHR. Indeed, situation of disabled child institutionalised in inhumane circumstances in Russia is equal or even worse than those custody cases, where ECtHR decided that failure to insure sanitation, sufficient food, water, recreation, appropriate physical conditions of detention or to accomplish applicant's special medical and physical needs amounts to inhuman and degrading treatment, therefore is a violation of Art. 3 of ECHR. The factual circumstances of the *Tchoukhrova v. Gonzales case*, show that deprivation of rights and treatment in this case was so severe that reach a level of inhuman and degrading treatment, which unquestionably is sufficiently severe harm equal to persecution. Moreover, in this case court emphasized that State's financial difficulties cannot justify deprivation of essential services to human survival and development.[264] This position is in consistence with international practice and ECtHR decision, where court ruled that the *"lack of*

[259] Cheung v. Canada (Minister of Employment and Immigration), [1993] 2 F.C. 314, Canada: Federal Court of Appeal, 1 April 1993.
[260] The RPD in KCS (Re), No. MA1-03477, Canada Immigration and Refugee board (CRDD) No. 5, 16 January 2002 http://caselaw.canada.globe24h.com/0/0/federal/immigration-and-refugee-board-of-canada/2002/01/16/x-re-2002-52679-irb.shtml
[261] Case of Tchoukhrova v. Gonzales, No, 03-71129, United States Court of Appeals, Ninth Circuit, 21 April 2005.
[262] Ibid., para. 4577.
[263] Ibid., para. 1194.
[264] Ibid., para. 4580.

resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention"[265].

It could be summarized that a wide range of socio-economic claims have been successful on accumulation grounds, in practice, persecution in such a claims is found more often than in discrimination cases. However, as the UNHCR Handbook notes *"it is not possible to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status. This will necessarily depend on all the circumstances"*[266]. Presented case law shows that accumulation of various socio-economic violations such as deprivation of medical care, education, employment, food, housing, in their cumulative effect, can deny human dignity where the denial seriously jeopardizes, constitute deliberate imposition of severe economic disadvantage and may be recognised as persecution.

The problem concerning socio-economic persecution based on accumulative grounds is that, decision makers tend to impose high requirement that socio-economic harm must be based on accumulation with other socio-economic rights violation or combined with traditional civil and political harm, in order to be considered persecution. For example, in *Horvath v. Secretary of State* case, it was suggested that social and economic rights violation as "*third category rights, are not in our view sufficiently serious, even when treated cumulatively, as to amount to persecution*" [267], social and economic rights was referred as "*lower order rights*"[268]. In this case an appellant and his family were Roma, known as gypsies, feared widespread severe discrimination in Slovakia. They were attacked by skinheads, but state police failed to provide protection, moreover, applicant was not able to find a work, was not afforded the normal public facilities. Regardless of severe socio-economic discrimination in the field of employment, the right to marry and education against Roma minority in Slovakia, the UK Court of Appeal supported tribunals conclusion that this discrimination did not amount to persecution.[269] Another irrational decision was made in *Yadegar Sargis v. Immigration and Naturalization service* case, where applicant "*had been forced to wear the Muslim grab for fear of being attached, that she had suffered discrimination with respect to food rationing because she was Armenian, and that her son was forced to go to abroad to study*

[265] Poltoratskiy v. Ukraina, *supra* note 104, para. 148
[266]United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para. 53.
[267] Horvath v. Secretary of State for the Home Department, Appeal No:17338, United Kingdom: Asylum and Immigration Tribunal/ Immigration Appellate Authority, 28 September 1998, 48.
[268] Ibid., 57.
[269] Horvath v. Secretary of State for the Home Department, [2000] UKHL 37, United Kingdom: House of Lords (Judicial Committee), 6 July 2000.

his native language and culture" [270], however, court surprisingly considered that it is not persecution, but just a harassment.

3.3.3 The minimum core obligation standard

The evaluation of refugee case law demonstrates that, taking into consideration the modern understanding of human rights, where the principle of equality, indivisibility and interdependence of all human rights is accepted, both socio-economic and civil-political threat can amount to persecution. While recognised human rights approach and J. C. Hathaway suggestion to use core norms of international human rights law gives a good practical framework to establish a risk of being persecuted[271], however the methodology is basically unclear. In practice, courts evaluate all the circumstances of the case and decide when in their opinion (that is often variable and subjective) socio-economic violation is so sufficiently serious, essential, significant, threatened in a fundamental way that amounts to persecution. For example, in *Canada v. Ward* Supreme Court said that persecution will arise when "*actions deny human dignity in any key way"* and that *"the sustained or systemic denial of core human rights is the appropriate standard"*[272]. In *Chan v. Canada* Court noted that essential question is whether the persecution "*threatens his or her basic human rights in a fundamental way*"[273]. Therefore, the question and real issue is, what objective coherent standard could be used in every case in order to decide objectively, which socio-economic threat is sufficiently serious that amounts to persecution.

Following the evolving developments in human rights law and refugee decision makers' attempt to evaluate when socio-economic violation is so sufficiently serious that amount to persecution it could be suggested that persecution occurred if the core content of socio-economic right, which is "*the absolute minimum needed, without which the right would be unrecognizable or meaningless*"[274], has been violated. Under General Comment No 3 the CESCR has established minimum core obligation "*to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights*"[275], thus minimum core obligation standard widely discussed, developed and recognized in human rights law may help to identify, when a harm is so serious that results to persecution in refugee law. A proposal of minimum core obligation standard is an innovative suggestion making one step forward and reflecting significant developments in human rights law.

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[270] Case of Yadegar Sargis v. Immigration and Naturalization service, US Court of Appeals, Seventh Circuit, No. 01-3693, 2002. http://caselaw.findlaw.com/us-7th-circuit/1260602.html
[271] Hathaway, J. C., *supra* note 16, p. 332.
[272] Case of Canada (Attorney General) v. Ward, Canada: Supreme Court, 1993 S.C.R. 689.
[273] Chan v. Canada (Minister of Employment and Immigration), [1995] 3 S.C.R. 593, Canada: Supreme Court, 19 October 1995, at 635.
[274] The International Commission of Jurists (ICJ) Report, *supra* note 46, p. 23.
[275] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23, para. 10.

This minimum core obligation approach would remove variable subjective criteria applied by decision-makers and insure objective and principled assessment of socio-economic rights deprivation cases.

Significant contribution was made by the Economic Committee General Comments specifying the minimum core obligation for each ICESCR right, including the right to housing,[276] food,[277] education,[278] health,[279] water[280]. Of course, those General Comments were not specially directed to refugee status determination, nevertheless they provide with a good guideline for refugee law decision maker. It should be admitted that, despite the progressive socio-economic rights nature, a minimum core obligations are immediately enforceable, "*a State party cannot, under any circumstances whatsoever, justify its non-compliance*"[281], moreover "*such minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties*"[282]. The Committee has noted that this minimum core of the main economic, social, and cultural rights has become customary international law and is therefore binding on all states,[283] because protection from starvation, assurance of healthcare, primary education is a minimum requirement to live a dignified life, which has to be ensured by every government.

Some scholars such as C. Scott and P. Alston, support this method as analytically useful, however admits that "*adjudicators' failure to utilize this concept signals ideological resistance to economic, social, and cultural rights"*[284]. F.E. Marouf and D. Anker agree that minimum core obligation could be a reasonable standard to evaluate when socio-economic harm constitutes persecution in refugee status determination because it requires just "*simply an individualized decision about whether someone should receive international protection based on a very*

[276] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), 13 December 1991, E/1992/23.
[277] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.12: The Right to Adequate Food (Art. 11 of the Covenant), 12 May 1999, E/C.12/1999/5.
[278] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10.
[279] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4.
[280] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, E/C.12/2002/11.
[281] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, para. 47.
[282] International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, 9.
[283] UN Committee on Economic, Social, and Cultural Rights: Concluding Observations, Israel, 26 June 2003, E/C.12/1/Add.90, para. 31.
[284] Craig Scott and Phillip Alston, *Adjudicating Constitutional Priorities in a Transnational Context: A Comment on* Soobramoneys *Legacy and Grootboom 's Promise,* South African Journal on Human Rights 16 (2000), 213 (Referred in: Fatma E Marouf and Deborah E. Anker, Socio-Economic Rights and Refugee Status: Deepening the Dialogue Between Human Rights and Refugee Law, *American Journal of International Law, Vol. 103, 2009*, 792).

particular set of facts"[285]. Professor J. C. Hathaway also makes a difference between harm that does not amount to persecution because it "*does not go to the heart of the right as elaborated in international law*"[286] and "*serious risk to core human rights*"[287] which is persecution. Moreover, the UNHCR Guidelines concerning child asylum claims repeats that despite progressive nature of economic, social and cultural rights established in the ICESCR, they impose immediate obligations: to avoid taking retrogressive measures, to satisfy minimum core elements of each right and to ensure non-discrimination in the enjoyment of these rights.[288] Guidelines continue to explain that "*A violation of an economic, social or cultural right may amount to persecution where minimum core elements of that right are not realized"*[289]. And suggest an example where "*the denial of a street child's right to an adequate standard of living (including access to food, water and housing) could lead to an intolerable predicament which threatens the development and survival of that child*"[290].

This minimum core obligation is strongly supported by human rights and refugee law expert M. Foster. She observes that this standard is valuable since "*it provides a principled method of distinguishing between fundamental or key breaches and less serious violations*"[291]. M. Foster argues that suggested minimum core obligation method reflects what decision-makers are effectively doing now.[292] She provides analysis of the cases related to different socio-economic rights violations and shows that Court upholds the claims based on violation of the core of the right, while dismiss those based mere on peripheral violations. For example, violation of the core of the right to work, where person is completely denied of the right to work or to earn livelihood is considered as persecution, while such claims based on peripheral violations like minor discrimination in the workplace would not alone establish persecution.[293] Indeed, case law shows that Courts reject the claims that are solely based on some negligible discrimination in the workplace such as low or reduced pay, denial of opportunity for promotion or senior, better-paid job that is not sufficient to constitute persecution.[294]

Another example presenting how minimum core obligation could be used is persecution in a context of fundamental human right to education violation. There is a considerable consensus

[285]Fatma E Marouf and Deborah E. Anker, Socio-Economic Rights and Refugee Status: Deepening the Dialogue Between Human Rights and Refugee Law, *American Journal of International Law, Vol. 103, 2009*, 792-793.
[286] Hathaway, J.C., supra note 179, p. 120.
[287] Ibid.
[288] UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, para. 34.
[289] Ibid., para. 35.
[290] Ibid.
[291] Foster, M., *supra* note 17, p. 200.
[292] Ibid, 198.
[293] Ibid.
[294] Grahl-Madsen, A., *supra* note 200, p. 208-209.

reached on the minimum core content of the right to education *"that is, universal, free and compulsory primary education*"[295]. The Economic Committee has acknowledged that *"obligation to provide primary education for all is an immediate duty"*[296] constituting a part of the minimum core obligation[297] and *"neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education"*[298]. Despite the fact that right to education is considered as a progressive realization right, states have immediate obligations to take deliberate, concrete and targeted steps towards full realization of the right to education, also to guarantee that right to education would be exercised without discrimination.[299] The UNHCR Guidelines concerning child persecution recognize that a violation of an economic, social or cultural right may amount to persecution where minimum core elements of that right are not realized[300] and emphasize a fundamental importance of education, where denial of right to education has a significant negative impact for the future of a child.[301] Australian Refugee Review Tribunal has acknowledged that *"Discriminatory denial of access to primary education is such a denial of a fundamental human right that it amounts to persecution"*[302]. In Australia *Ali v. Minister of Citizenship and Immigration* case, it was concerned that the only way to avoid persecution for 9-year-old girl from Afghanistan is to refuse to go to school. The court explained that "*Education is a basic human right and I direct the Board to find that she should be found to be a Convention refugee*"[303]. Decision could be made just after evaluation of all the circumstances of the case, taking into consideration, for example, the level of higher education, also the level of denial, where the applied principle could be that: the more "*attributes identified as forming the core content of the right will be denied, the closer the claimant's predicament may amount to serious harm and justify a finding of being persecuted*"[304].

Actually, the role of minimum core obligation method is explicitly supported by some jurisprudence. For example, New Zealand Tribunal consider the notion of a minimum core obligation as a useful aid in the context of refugee status determination.[305] Tribunal decision in

[295] The International Commission of Jurists (ICJ) Report, *supra* note 46, p. 23.
[296] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, 8 December 1999, E/C.12/1999/10, para. 51.
[297] Ibid., para. 57.
[298] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, 10 May 1999, E/1992/23, para. 6.
[299]General Comment No. 13, op. cit., para. 43.
[300] UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, para. 36.
[301] Ibid.
[302] RRT Case No. V95/03256 [1995] RRTA 2263, Australia: Refugee Review Tribunal, 9 October 1995, para. 47. Available at: http://www.refworld.org/docid/4538838c22.html
[303] Ali v. Minister of Citizenship and Immigration, IMM-3404-95, Canada: Immigration and Refugee Board of Canada, 23 September 1996. Available at: http://www.refworld.org/docid/4b18e21b2.html
[304] BG (Fiji), *supra* note 9, para.100.
[305] Ibid., para. 107.

New Zealand BG (Fiji) case (*presented above*)[306] could be taken as a good example how cases should be evaluated taking into consideration suggested minimum core principle. In this case, the Tribunal accepted that the poor general socio-economic situation of Banabans has been further negatively affected by employment discrimination and 1990 Constitutional reclassification[307], therefore analysed if employment discrimination is so serious that amount to persecution. Tribunal referred to ESCR Committee's General Comment No. 18, which describes the right to work, and considered that appellant has not been denied the core of his right to work, rather has enjoyed it to a substantial level.[308] The factual situation represented that with some short interventions applicant had a stable employment related to his trade, even received vocational and technical training, therefore concluded that a minor discrimination "*did not deny him substantial enjoyment of the various attributes which make up the right to work*"[309]. Tribunal admitted that applicant has some networks or community in Fiji, which can be used to look for a job in future, moreover appellant's sister continues to work in her profession which shows that while it is difficult to find a work, however is "*neither legally nor practically unobtainable for Banabans*"[310]. Therefore, Tribunal found no evidence that any discrimination in employment would "*have such a detrimental effect on his right to work that he will be effectively denied the right or denied it to any substantial extent"*[311].

However, this standard of a minimum core obligation *"is neither universally accepted nor finally settled"*[312] and the validity of this concept has been broadly challenged. For example, Katharine G. Young is very sceptic about core obligations approach in general and rejects the minimum core concept. She argues that there exist large inconsistencies and the core obligations approach is "*far from coherent"*[313]. Many scholars asserted that courts fail to apply international documents that explains the minimum core obligation[314]. Rebecca Heller criticize this approach and notes that *"it is unclear whether the idea of the "core" of a right in the refugee context would serve as more than a metaphor for a "serious human rights violation," because there is no real analysis of how this would shift the existing framework of asylum jurisprudence"*[315].

Important practical question was raised by scholars, weather refugee decision-makers are capable to define the content of economic and social rights in order to identify violations of

[306] Page 44 of the Thesis.
[307] BG (Fiji), *supra* note 9, para.120.
[308] Ibid., para. 126-127.
[309] Ibid., para. 127.
[310] Ibid., para. 129.
[311] Ibid., para. 132.
[312] Ibid., para. 106.
[313] Katharine G. Young. "The Minimum Core of Economic and Social Rights: A Concept in Search of Content." *Yale International Law Journal* 33, (2008): 154.
[314] Marouf, F., Anker, D., supra note 285, p. 792.
[315] Heller, R., supra note 18, p. 517.

minimum obligations.[316] Professor K. Jastram warns that minimum core obligations approach in refugee status determination "*imposes significant interpretative challenges, which would benefit from greater engagement by judges, scholars and the UNHCR*"[317]. However, since the Economic Committee issued General Comments specifying the minimum core obligation for ICESCR rights giving good guidelines for refugee-decision maker, the risk of misunderstanding becomes lower. The refugee cases[318] demonstrate that refugee decision makers effectively use minimum core obligation by reference to Economic Committee General Comments without major difficulties to find whether breach of socio-economic rights is so serious that constitutions persecution. In recent New Zealand case, the Refugee Status Appeals Authority analysed submitted country information and considered if a state has taken immediate steps to realize ICESCR obligations by various legislative measures and other policies, moreover the Appeals Authority evaluated if there was sufficient level of enjoyment of established core minimums of right to housing, food, education and public health by reference to General Comments.[319]

It should be reminded that refugee law is "*a palliative branch of human rights law"*[320] which provides just a surrogate protection, therefore refugee decision makers does not monitor human rights violation or establish states' responsibility. In addition, a minimum core obligation method should be understood just as a guidance, which does not require "*the construction of a categorical list of […] those cases that will always amount to persecution and those which will not*"[321], because final decisions will always depend on evaluation of all circumstances in a particular case.

Therefore, Author of the Thesis suggests that this rational minimum core obligation method, based on understandable clarification of essential attributes of particular rights in General Comments is a very beneficial, objective standard. It could be used as a yardstick in assassination when breach of socio-economic rights constitutions persecution. Thus, in situations where minimum core obligation identified in any General Comment is not fulfilled it could be much easier to establish the real risk of serious harm. However, whether persecution exist or not depends on individual applicant's situation, therefore the fact of real risk of serious harm always depend on an evaluation of all relevant circumstances of the case rather than the simplistic identification if socio-economic rights are enjoyed or not.

[316] Marouf, F., Anker, D., supra note 285, p. 793.
[317] Simeon, J. C., *supra* note, 193, p. 208.
[318] Refugee Appeal No. 75221, 75225, New Zealand: Refugee Status Appeals Authority, 23 September 2005; BG (Fiji), New Zealand: Immigration and Protection Tribunal, NZIPT 800091, 20 January 2012.
[319] Refugee Appeal No. 75221, 75225, New Zealand: Refugee Status Appeals Authority, 23 September 2005, 127-123.
[320] Hathaway, J. C., *supra* note 21, p. 5.
[321] Foster, M., *supra* note 17, p. 200.

3.3.4. The discriminatory failure of state protection as persecution

Professor J. C. Hathaway has explained that persecution is a "*failure of state protection in relation to one of the core entitlements which has been recognised by the international community*"[322]. Refugee jurisprudence recognizes that, persecution may arise not just by governmental or non-government entity actions, but also failure of a state protection itself can constitute persecution within the meaning of the Refugee Convention. For example, in *Chan v. MIEA* case the high court of Australia confirmed that: "*The threat need not be the product of any policy of the government of the person's country of nationality. It may be enough, depending on the circumstances, that the government has failed or is unable to protect the person in question from persecution*"[323]. Thus, in some situations deliberate governments' failure to take steps to protect people in situations of general famine or poverty may constitute persecution.

In *Khawar* case, it was noted that there have to be states' legal duty to act in order to establish its failure.[324] International human rights law informs states about their legal obligations, however assessment of duty to act in the socio-economic rights context is a challenging task. The Committee on Economic, Social and Cultural Rights has established that under the ICESCR states have both: obligations of positive and negative conduct (to respect and protect) and obligations of result (to fulfil). Despite the fact that the ICESCR rights are subject to the progressive realization it imposes some obligations of immediate application, namely, states have to take immediate steps in order to achieve full realization of socio-economic rights and to guarantee that all socio-economic rights would be exercised without discrimination. Therefore, states have to take actions to ensure that at least minimum essential levels of each of the rights may be satisfied.[325] Thus, in this context, the importance and utility of suggested minimum core obligation principle in refugee law may be emphasized, because minimum core obligation could be useful not just to identify when serious harm exists but also to indicate the failure of state protection concerning socio-economic rights. Since minimum core obligation is of immediate application nature, a failure by the state to discharge this minimum core obligation can show failure of state protection. However, it has to be emphasized that person is not entitled to refugee status in every situation when state does not provide socio-economic rights. As New Zealand Tribunal clarified, since ICESCR rights are subject to progressive realisation, the fact that a claimant complains about lower standard of

[322] Hathaway, J.C., *supra* note 179, p. 112.
[323] *Chan Yee Kin v. Minister for Immigration and Ethnic Affairs; Soo Cheng Lee v. Minister for Immigration and Ethnic Affairs; Kelly Kar Chun Chan v. Minister for Immigration and Ethnic Affairs*, Australia: High Court, 12 September 1989, para. 36. Available at: http://www.refworld.org/docid/3ae6b70a4.html
[324] M*inister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14, Australia: High Court, 11 April 2002, para. 28. Available at: http://www.refworld.org/docid/3deb326b8.html
[325] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, E/1991/23. Para. 10

living does not itself prove a failure of state protection.[326] However, where states fail to fulfil the minimum core obligation and do not ensure even basic levels of food, shelter, health care, housing or education, a failure of state protection may be established.

Moreover, in order that failure of state persecution could constitute persecution and refugee status could be granted, there has to be a causal connection to at least one of the five grounds enumerated in the Convention. Traditionally, there has been a problematically narrow persecutory intent view, which required established nexus between the intentions of the persecutor and one of Convention ground.[327] This approach is still predominant in the US case law, where "*the deliberate*"[328] or "*the intentional imposition of substantial economic disadvantage*"[329] is required. However, case law practice has shown that in some cases it can be very hard or even impossible to prove the motives of persecutor. In practice, this traditional approach is problematic in relation to claims by woman persecuted by their husbands because of personal, but not Conventional motives, moreover this approach is *"failing to recognize refugee status in the case of those who, within a situation of generalized risk such as famine, did not benefit from state protection because of their race, religion, or other protected ground"*[330]. Therefore, according to this narrow understanding, in the situations where persecutor has no conventional motives, however state fails to protect person because of conventional grounds, refugee status would not be granted. The House of Lords discussing a question of causation gave a very good example reflecting such a situation: suppose if Nazi government did not actively threaten Jews, but also would not provide any protection against violence subjected to Jews. When Jewish shopkeeper is threatened by an organised competitor gang motivated by economic, competition, profit making motives, but not Conventional reason, the question arises if this Jews shopkeeper is persecuted on grounds of race? In House of Lords opinion, this person is persecuted on ground of race, because "*An essential element in the persecution, the failure of the authorities to provide protection, is based upon race*"[331]. Competitors attacked him, because they knew that Jewish people had no protection granted by state because he was a Jew.[332]

Recent significant jurisprudential changes show that there are two possibilities to fulfil conventional causal connection requirement *"for reasons of"* clause. Since it is accepted that the

[326] BG (Fiji), New Zealand: Immigration and Protection Tribunal, NZIPT 800091, 20 January 2012, para. 105.
[327] Hathaway, J. C., *supra* note 16, p. 335.
[328] *Korablina v. Immigration and Naturalization Service*, 97-70361, United States Court of Appeals for the Ninth Circuit, 23 October 1998, 1044.
[329] Matter of Laipenieks, BIA, 1983 BIA LEXIS 16; 18 I & N Dec. 433, 8 September 1983.
[330] Hathaway, J. C., *supra* note 16, p. 330.
[331] Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.), Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, 18. Available at: http://www.refworld.org/docid/3dec8abe4.htm.
[332] *Ibid.*

term persecution is made up of two elements, namely the risk of serious harm and failure of state protection, changes in recent jurisprudence shows that the nexus requirement between the Convention reason and the persecution can be established if anyone of two constitutive elements is for reason of a convention ground, because "*the summative construct is itself for reason of a Convention ground*"[333]. Therefore, there are two possibilities to fulfil nexus requirement and to establish persecution "*either by the serious harm limb or by the failure of the state protection limb"*[334]. This jurisprudential changes have a significant influence. Since persecution may be characterized by the government's failure to act, even in the generalized risk or famine situation the persecution can be found if state fails to protect person individually or as part of a group for one of conventional grounds. Hathaway explains that "*a person from whom protection is withheld for a Convention reason is as much in the predicament of "being persecuted" for a Convention reason as is the person initially targeted for harm for a Convention reason"*[335].

Therefore, in the case of general starvation where is no discriminatory intention but only government's failure to protect generalized famine deprivation on one of conventional reasons, gives a reasonable possibility that refugee status could be granted. However, practice reveals that refugee decision makers are not very sympathetic to claims in the generally poor countries with generally depressed economy. In such a cases, for example, "*the inability to obtain employment may be the combined result of a general scarcity of work and the efforts of the government or its agent to ensure that whatever minimal opportunities may exist are denied to the refugee*"[336]. Professor Hathaway explains that in such a case dismissal of a claim is inappropriate, because the fact that states opportunities are limited "*is not pertinent to the issue of whether the claimant has been disadvantaged beyond the norm as a result of the government's persecutory acts*"[337]. However, decision makers often refuse not just claims where a failure of state protection could constitute persecution, but also those, based on severe discriminatory socio-economic deprivation against particular individual or group in the generally poor countries. For example, In Canada *Vera case* the Board did not found that "*the sole barrier to employment for [the claimant] was his political involvement. High unemployment and his lack of work experience are major factors that cannot be discounted as reasons for his lack of success..."*[338]. In another case, the claim was rejected because "*the difficulty in finding work, in this particular case, may be attributable just as*

[333] Haines, R., *supra* note 15, p. 340.
[334] BG (Fiji), New Zealand: Immigration and Protection Tribunal, NZIPT 800091, 20 January 2012, para. 96.; Haines, R., *supra* note 15, p. 340.
[335] Hathaway, J. C., *supra* note 16, p. 335.
[336] Hathaway, J, C, supra note 144, p. 713.
[337] *Ibid.*
[338] Vera (12 November 1981), I.A.B. 81-9344. (Cited in James C. Hathaway, "Selective Concern: An Overview of Refugee Law in Canada." McGill L. J. 33, no. 4 (1988):713).

much to the economic situation in India as to discrimination by the party in power"[339]. Or in case of Mangra it was found that: "*In a country with known economic problems and high unemployment, [the claimant's] job changes, eventual dismissal and inability to find further employment cannot be seen as persecution...*"[340]. Moreover, in one New Zealand case appellant from Bangladesh faced governmental and societal discrimination because of his Bihari ethnicity. He was denied entry into primary school, from time to time refused employment because of insufficient education, lack of experience, or because he was a Bihari, even when applicant was working, he received lower salary than others because of his ethnicity. However, RSAA considered that Bangladesh is one of the poorest countries, therefore concluded that "*the appellant's difficulties in obtaining full employment were not predominantly because of his Bihari origins but were overwhelmingly a function of Bangladesh's economic situation"* [341]. This range of cases shows that decision makers intend to impose a higher test on applicants from poor countries. This position is obviously inappropriate and justifying discrimination in economically depressed countries.

Of course, it is clear and generally accepted principle by refugee adjudicators that Refugee Convention is not an anti-poverty treaty and is not aimed to protect all people that suffers poverty.[342] Thus, important to emphasize that not every generalized risk will be persecution based on Conventional ground which results in refugee status. While preamble to the Refugee Convention presents its broad human rights concern, the Refugee Convention has a limited application to provide surrogate international protection, which is not aimed to protect every suffering individual. However, in the cases where people are suffering from serious socio-economic harm in general famine or poverty situations and state is aware of the harm, but selectively and intentionally fails to protect people because of Conventional reason may result to the application of Refugee Convention.

3.3.5. The importance of special circumstances evaluation

While analysing case law and trying to find a generally applicable standard, it was emphasized that always very important is to consider all the relevant circumstances of the particular case in order to evaluate whether harm would amount to persecution. The UNHCR Handbook confirms that *"Due to variations in the psychological make-up of individuals and in*

[339] Arshad (18 September 1981), I.A.B. 81-9474. (Cited in James C. Hathaway, "Selective Concern: An Overview of Refugee Law in Canada." *McGill L. J.* 33, no. 4 (1988):713).
[340] Mangra (5 November 1982), I.A.B. 82-9448. (Cited in James C. Hathaway, "Selective Concern: An Overview of Refugee Law in Canada." *McGill L. J.* 33, no. 4 (1988):713).
[341] Refugee Appeal No. 70618, New Zealand: Refugee Status Appeals Authority, 30 June 1998, 15-18. Available at: http://www.refworld.org/docid/477e00c12.html
[342] Refugee Appeal No. 75221, 75225, New Zealand: Refugee Status Appeals Authority, 23 September 2005, 135.

the circumstances of each case, interpretation of what amounts to persecution are bound to vary"[343]. The UNHCR admits that decision makers "*need to have both a full picture of the asylum-seeker's personality, background and personal experiences, as well as an analysis and up-to-date knowledge of all the relevant objective circumstances in the country of origin"*[344]. For example, New Zealand High Court importantly stated that *"discrimination in employment may amount to persecution but it can never be said as a matter of law that it must do so. It is a matter of fact and degree depending upon all the circumstances"*[345]. Art. 4(3) of the Qualification Directive of the European Union also requires the assessment of all relevant facts including individual position and individual's personality "*such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm"*[346].

In this context, it is clear that socio-economic harm has a very a different impact because of individual claimant vulnerabilities such as background, age, gender or physical condition. Proposed human rights approach confirms the necessity to scrutinize particular circumstances of the case. For example, in UNHCR Guidelines concerning child asylum claims, special attention is given to the claims involving children because of their vulnerability caused by age.[347] Therefore, a child-sensitive interpretation of the 1951 Convention is proposed, which means that the level of discrimination should be lower than in cases regarding adult.[348] For instance, in *Chen Shi Hai case* the High Court of Australia has explained that *"Ordinarily, denial of access to food, shelter, medical treatment and, in the case of children, denial of an opportunity to obtain an education involve such a significant departure from the standards of the civilized world as to constitute persecution"*[349]. Moreover, Court found that "*what may possibly be viewed as acceptable enforcement of laws and programmes of general application in the case of the parents may nonetheless be persecution in the case of the child*"[350]. In another case two girls from Dominican Republic were denied the right to nationality and education. State refused to issue birth certificates,

[343] United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*. January 1992, HCR/IP/4/Eng/REV.1, para. 52.
[344] UN High Commissioner for Refugees (UNHCR), Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, April 2001, para. 8.
[345] H v. Chief Executive of the Department of Labour**,** High Court of New Zealand, Case No. AP 183/00, 20 March 2001, para. 19. http://www.refugee.org.nz/Casesearch/HighCourt/hvceodol.html
[346] European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26.
[347] UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08,
[348] *Ibid.*, para. 1.
[349]Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs, [2000] HCA 19, Australia: The High Court, 13 April 2000.
[350] *Ibid.*, para. 79.

that resulted in situation of "*continued illegality and social vulnerability, violations that are even more serious in the case of children"*[351].

Fundamental importance of education is emphasized, where denial of right to education has a significant negative impact for the future of a child.[352] In Canada case law, it has been accepted that school attendance may be unbearable, because of experienced harassment of school children, which may amount to persecution. Canadian RPD found that two Chinese origin minor claimants born and raised in Peru had a well-founded fear of persecution in Peru based on their race or ethnic origin, because of treatment received at school. There was no respect to their cultural identity and values, children were singled-out, harassed and bullied in the school, that they no longer wished to attend school. Moreover, school authorities were aware, but did not try to help, parents could not find other school where children would be treated better. Canadian RPD recognized that this serious harm involved a denial of human dignity in a key way and has fundamentally affected children education, which is "*essential to the development and well-being of a child*"[353]. This treatment was considered as the sustained and repeated acts that in accumulation amounts to persecution.[354]

These examples concerning special attention given to children because of their vulnerability caused by age demonstrates how important is to evaluate all the circumstances of the case, since the outcomes can directly depend on those specific circumstances.

3.4. Persecution grounds

One of the main obstacles to get refugee status is the requirement that socio-economic persecution has to include discriminatory element, therefore under Refugee Convention only race, religion, nationality, membership of a particular social group or political opinion can be appropriate ground to grant a refugee status. Case law practise reveals that in socio-economic persecution asylum cases a membership of a particular social group (Hereafter - MPSG) ground is a most promising, giving a possibility to encompass new types of claims, since it is accepted that this group was inserted with the aim to fulfil the gap left by other four categories[355]. Therefore, a MPSG understood as an evolutionary term is "*open to the diverse and changing nature of groups*

[351] Case of the Yean and Bosico Children v. The Dominican Republic, Inter-American Court of Human Rights, 8 September 2005. Available at: http://www.refworld.org/docid/44e497d94.html.
[352] UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, 166, para. 36.
[353] Decision VA1-02828, VA1-02826, VA1-02827 and VA1-02829, VA1-02828, VA1-02826, VA1-02827 and VA1-02829, Canada: Immigration and Refugee Board of Canada, 27 February 2003. Available at: http://www.refworld.org/docid/4b18e03d2.html
[354] Ibid.
[355] Case of Canada (Attorney General) v. Ward, Canada: Supreme Court, 1993 S.C.R. 689., 70.

in various societies and evolving international human rights norms"[356] that gives a potential to include a wide range of socio-economic rights violations claims based on diverse social groups such as children, woman, disabled, ill or even poor. Nevertheless, this ground has limits and is not all-encompassing [357], therefore a difficult questions for refugee decision makers and scholars arise: what is the limits of PSG category and what criteria should be applied to establish a MPSG under the Refugee Convention. Refugee case law is not unanimous in respect to this question, however, in current refugee case law two dominant approaches can be found, namely, the "*protected characteristics*" and "*social perception*" approach.

The first, "protected characteristics" approach is based on *ejusdem generis* doctrine, where members of PSG have to "*share a common, immutable characteristic*"[358] were initially established in US *Matter of Acosta case*. Later, the Supreme Court of Canada in the *Canada v. Ward decision* accepted test proposed in *Acosta case* and identified three possible categories of groups that can constitute PSG: 1) people defined by an innate or immutable characteristic; 2) people voluntarily associated for reasons so fundamental to their human dignity that they should not be required to leave the association; 3) people connected by a former voluntary status, which is unalterable because of its historical permanence[359]. This approach is well established and supported, however does not include some groups that may be recognised as a PSG in a society. Thus another "*social perception*" approach was established in a leading Australian High Court case of *Applicant A*[360], which differs from "*protected characteristics*" approach, because group is perceived by society. In this case the Court has recognised that PSG should be given a broad interpretation, where collection of persons must share certain uniting common characteristic that set them apart from the whole society and thus be cognisable as a group in society. [361] The core question appears, which of approaches may be applied in assessment if PSG exists. The UNHCR Guidelines suggest the MPSG definition where both approaches are included: "*A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which*

[356]United Nations High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Content of Article 1 A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/02. Available at: http://www.refworld.org/docid/3d36f23f4.html

[357] T. Alexander Aleinikoff, "Membership in a Particular Social Group: Analysis and Proposed Conclusions," Background Paper for "Track Two" of the Global Consultations, 2002, 29.

[358] Case of Acosta v. Immigration and Naturalisation Service, Board of Immigration Appeals, No. 2986, 1 March 1985, 233.

[359] Case of Canada (Attorney General) v. Ward, Canada: Supreme Court, 1993 S.C.R. 689., 70

[360] A and Another v Minister for Immigration and Ethnic Affairs and Another, Australia: High Court, 24 February 1997.

[361] Ibid., para. 27-29.

is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights"[362].

This definition and categories of groups defined in *Canada v. Ward case* shows that there cannot be any exhaustive list of groups considered as a PSG within the meaning of Refugee Convention, rather MPSG has to be considered in an evolutionary manner and new groups can be established in accordance with established criteria. Unfortunately, the MPSG category is with the least clarity and so complex that goes beyond the scope of these Thesis, therefore this category is not going to be analysed in detail, rather examples of particular social groups (hereafter - PSG) established in jurisprudence and possible in social-economic persecution cases is going to be submitted.

International refugee law jurisprudence established a wide variety of possible social groups confirming that Conventional MPSG ground is able to encompass a wide range of groups. For example, many common law and civil law jurisdictions have recognized "women" or "gender" based groups as a particular social group.[363] In its Guidelines on International Protection on Gender-Related Persecution, the UNHCR has established that "*sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men"*[364]. This was confirmed in the leading *Canada v. Ward* case, where court identified that PSG is a groups defined by an innate or immutable characteristic, that includes persons fearing persecution because of their gender.[365] The broad category "women" or "gender" is recognized to constitute a social group, likewise more detailed categories can be found such as a group of educated women[366] that was established in earlier mentioned *Ali v. Minister of Citizenship and Immigration* case. Analysed cases demonstrate that despite the fact that age is not innate or permanent feature, children may also constitute a PSG, because being a child is directly relevant to person's identity, which cannot be disassociate, therefore it is generally accepted that "*child is in effect an immutable characteristic at any given point in time*"[367], thus can constitute PSG. In practice, children's age

[362] United Nations High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 2: 'Membership of a Particular Social Group' within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/02, 7 May 2002, para. 11.
[363] United Nations High Commissioner for Refugees (UNHCR), *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group*", August 2012, PPLA/2012/02, 40-41. Available at: http://www.refworld.org/docid/4f7d94722.html
[364] United Nations High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No.1: Gender-Related Persecution Within the Context* of Article 1 A (2) of the 1951 *Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, para. 30.
[365] Case of *Canada (Attorney General) v. Ward, Canada: Supreme Court, 1993 S.C.R. 689., 70*
[366] *Ali v. Minister of Citizenship and Immigration*, IMM-3404-95, Canada: Immigration and Refugee Board of Canada, 23 September 1996.
[367] UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, para. 49.

and other characteristics can result in more detailed groups like: second child born outside the one-child policy in China[368], children with disabilities[369], unregistered or black children[370]. In jurisprudence even a "street children" [371] was considered as a PSG, because those children "*share the common characteristics of their youth and having the street as their home and/or source of livelihood*"[372] and this lifestyle is fundamental to their identity, which is difficult to change, moreover they can be connected by some common past experiences such as sexual abuse or domestic violence. There is an opinion that poverty or "being poor" may be considered as a characteristic capable to constitute PSG that would have a significant importance in socio-economic persecution claims. It is argued that "being poor" is clearly capable to constitute a PSG, because poverty is effectively immutable, in reality people cannot disassociate from being poor.[373] The Federal Court of Appeal in Canada has also recognized that being poor or more detailed "*poor and disadvantaged people of Haiti*"[374] may constitute a social group. Although, in some cases this possibility of social groups of being poor was rejected as nor immutable neither innate, or without close members affiliation with each other as it was stated in US *Jin Ying Li v. Immigration and Naturalization Service case, that* "*Populations whose only common characteristic is their low economic status do not form a social group for asylum purposes*"[375]. It is agreed that characteristic of "being poor" could intersects with other unchangeable features such as gender, age or race, and establish more detailed PSG such as "*poor street children*".[376]

Claims based on a well-founded fear of persecution because of applicant's wealth, land ownership or occupation is also very controversial in jurisprudence, however, a fear of being persecuted for reason of a person's employment or occupation could be recognized as falling

[368] *Cheung v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 314, Canada: Federal Court of Appeal, 1 April 1993.
[369] Case of Tchoukhrova v. Gonzales, No 03-71129, 404 F 3d 1181, United States Court of Appeals, Ninth Circuit, 21 April 2005, para. 1194
[370] RRT Case No. 0901642, Australia: Refugee Review Tribunal, 3 June 2009.
[371] Afghanistan v. Secretary of State for the Home Department, [2008] U.K. AIT 00005, 15 Mar. 2007, As cited in UNHCR Guidelines on International Protection No. 8, p. 20.
[372] UNHCR Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, para. 52 i.
[373] United Nations High Commissioner for Refugees (UNHCR), *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group*", August 2012, PPLA/2012/02,68.
[374] Sinora, Frensel v. M.E.I. (F.C.T.D., no. 93-A-334), July 3, 1993 (Cited in Canada: Immigration and Refugee Board of Canada, *Interpretation of the Convention Refugee Definition in the Case Law*, 31 December 2005, note 37.)
[375] Jin Ying Li v. Immigration and Naturalization Service, United States Court of Appeals for the Ninth Circuit, 19 August 1996. Available at: http://www.refworld.org/docid/3ae6b68128.html
[376] United Nations High Commissioner for Refugees (UNHCR), *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group*", August 2012, PPLA/2012/02, 68.

within the social group category, since right to choose occupation is a basic human right.[377] This is confirmed and clarified by UNHCR Guidelines by application of "*social perception*" approach that, in a cases where social group's shared characteristics are "*neither unalterable or fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognizable group in that society*"[378]. Guidelines provides a very good example: "*owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart*"[379].

Moreover, some authorities have recognized disabled and ill people as capable to constitute PSG for the purposes of Refugee Convention. This is significant in the cases where disabled or ill claimants are denied socio-economic rights, such as education, employment, health care or other basic human rights just because of their disability. Immigration and Refugee Board of Canada explained that particular social groups defined by an innate or immutable characteristic includes individuals who are physically disabled, because this condition is permanent and unchangeable, therefore concluded that feared persecution in Poland because of membership in a particular social group, defined as a disabled minor is relevant.[380] In previously analysed *Tchoukhrova v. Gonzales case*[381], decision maker considered weather disabled children in Russia constitute a particular social group. Court explained that: "*While not all disabilities are innate or inherent, in the sense that they may be acquired, they are usually, unfortunately, immutable*"[382]. Additionally, it was emphasized that only persons with serious and long-lasting, permanent disabilities can constitute MSPG. Court ruled that Russian disabled children constitute a MPSG since they share not only common characteristics but also a common experience, that results in stigmatizing labelling, lifetime institutionalization, severe violations, denial of basic socio-economic rights and violent harassment.[383] Jurisprudence has also established that individuals with serious illness such as HIV-Positive can be regarded as a members of a particular social group.[384]

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[377]United Nations High Commissioner for Refugees (UNHCR), *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group*", August 2012, PPLA/2012/02, para. 71-73.

[378] UNHCR, Guidelines on International Protection No. 2: 'Membership of a Particular Social Group' within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/02, 7 May 2002, para. 13.

[379] Ibid.

[380] Decision TA0-05472, TA0-05472, Canada: Immigration and Refugee Board of Canada, 30 May 2001, 5-6. Available at: http://www.refworld.org/docid/49c796412.html

[381] Case of Tchoukhrova v. Gonzales, No 03-71129, 404 F 3d 1181, United States Court of Appeals, Ninth Circuit, 21 April 2005.

[382] *Ibid*., para. 4570.

[383] *Ibid*., para. 4571.

[384] RRT Case No. V95/03256 [1995] RRTA 2263, Australia: Refugee Review Tribunal, 9 October 1995, para. 45.

To sum up, MPSG ground has a substantial importance in refugee law, because it is significantly acknowledged that the social group cases is "*pushing the boundaries of refugee law*"[385] and raising new issues such deprivation of socio-economic rights, discrimination against the disabled, ill, minors or even poor people. Presented possible social groups established in international refugee jurisprudence illustrate that the term MPSG has to be considered in an evolutionary manner and is capable to encompass a wide range of particular groups, which indicates that a greater diversity of socio-economic deprivation claims can be encompassed by Refugee Convention.

[385] Aleinikoff, T. A., supra note 357, p. 2.

CONCLUSIONS

1. Analysis reveals that socio-economic rights have been misinterpreted as being inferior to civil-political rights and demonstrates recent developments where all human rights are taken as equally serious and important. A great progress was done by treaty bodies, international expert, legislature and adjudicators to overcome this distinction by providing socio – economic rights with a meaningful content, solving justiciability issues by creation of an enforcement mechanism and concentrating on rights practical implementation. Those recent developments break down the historical divisions and practically confirms that all rights are indivisible, interdependent, interrelated and equally important.

2. The analysed ECtHR jurisprudence highlights that ECHR is a living instrument intended to guarantee practical and effective rights, therefore Court developed integrated human rights approach, which disproves non-justiciability of socio-economic rights, recognizes interrelated and indivisible nature of civil-political and socio-economic rights and demonstrates significant changes regarding the ability of the ECHR to protect some socio-economic rights. Examined developed ECtHR jurisprudence regarding Art. 2 (the right to life) and Art. 3 (protection from inhuman and degrading treatment) of the ECHR disclosed that ECHR does not guarantee general socio-economic rights protection, however, in some special circumstances states have positive obligation to provide public health and other welfare services under Art. 2 and Art. 3 of ECHR.

3. Socio-economic rights recognition as equal and indivisible in human rights law requires different understanding of economic and social rights violation in the context of refugee law. Analyses revealed that nearly all scholars and majority refugee decision refer to international human rights law to interpret the Refugee Convention terms. Thus, human rights based approach is widely accepted as a dominant and common international standard for Refugee Convention interpretation, which gives a possibility to include a wide range of people that need refugee protection and treat Refugee Convention as a living instrument. Following this approach, recent international refugee case law demonstrates that majority of refugee decision makers progressively accept equality and indivisibility of all rights, consequently they agree that violation of socio-economic rights can amount to a risk of serious harm that constitutes persecution.

4. Analysed refugee case law demonstrate that severe socio-economic rights violation can amount to persecution under the 1951 Refugee Convention in few different ways. Persecution commonly takes the form of violations of the rights to life or freedom, where both deprivations of civil-political or socio-economic rights can be so sufficiently severe that constitute threat to life or freedom. In addition, taking all the relevant circumstances into consideration, a severe violation of socio-economic rights may amount to persecution itself but particularly in accumulation with other less serious violations, also in a case of discrimination, leading to consequences of substantially prejudicial nature, or by failure of a state protection.

5. Individuals claiming well-founded fear of socio-economic persecution can be granted refugee status only if socio-economic persecution is on the basis of race, religion, nationality, membership of a particular social group or political opinion. Presented variety of possible particular social groups established in refugee law jurisprudence demonstrates increasing expansion of refugee law margins, where membership of a particular social group ground gives a plausible potential to encompass a wide range of socio-economic persecution claims.

6. Recent significant jurisprudential changes show that there are two possibilities to fulfil conventional causal connection requirement, namely, if the serious harm is for reason of a convention ground or failure of state protection is for reason of a convention ground. This essential development has a significance importance since it broadens the understanding of nexus requirement, which gives a possibility to include socio-economic claims that would fall outside the traditional approach requiring discriminatory intention.

7. The minimum core obligation principle developed and recognized in human rights law may be used in refugee law as an objective and principled guideline to identify the level of socio-economic harm, which is so sufficiently serious that amount to persecution. Moreover, minimum core obligation principle helps to indicate when the failure of state protection concerning socio-economic right appears. However, the final decision should be made after evaluation of all the relevant circumstances of the case.

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ANNOTATION

Master Thesis takes into consideration recent growing importance of socio-economic rights in human rights law and analyses under which circumstances person, fleeing deprivation of the right to work, right to education or other severe socio-economic rights deprivation in a country of origin, may be granted refugee status under 1951 Refugee Convention. Thesis presents recent positive changes of socio-economic rights status in human rights law, which shows that the hierarchy of different rights is meaningless and all human rights must be treated in an equal manner. Moreover, analysed integrated human rights approach taken by the European Court of Human Rights jurisprudence, reflects the contemporary understanding that all human rights are indivisible, interrelated and interdependent. Finally, it is revealed how developed understanding of socio-economic rights in international human rights law has influenced refugee law, in particular, under which circumstances claims based on socio-economic rights deprivation could be successful refugee claims.

The examination revealed that the 1951 Refugee Convention interpreted in the human rights based approach is able to encompass severe socio-economic rights deprivation claims based on Conventional reason, however analysed case-law is different and inconsistent.

Keywords: Social and economic rights, ECHR positive obligations, socio-economic persecution, refugee status.

ANOTACIJA

Magistro baigiamajame darbe atsižvelgiama į didėjančios socialinių-ekonominių teisių reikšmės pripažinimą tarptautinėje žmogaus teisių srityje ir analizuojama kokiomis aplinkybėmis asmeniui, bėgančiam iš savo kilmės šalies dėl teisės į darbą, mokslą ar kitų šiurkščių socialinių, ekonominių teisių pažeidimo gali būti suteiktas pabėgėlio statusas pagal 1951 m. Konveciją dėl pabėgėlių statuso. Baigiamajame darbe aptarti socialinių-ekonominių teisių statuso pokyčiai žmogaus teisių srityje neigia žmogaus teisių hierarchiją ir rodo, kad visos žmogaus teisės turi būti traktuojamos vienodai. Analizuotas integruotas žmogaus teisių požiūris Europos Žmogaus Teisių Teismo jurisprudencijoje atspindi šiuolaikinę vyraujančią nuomonę, kad visos žmogaus teisės yra nedalomos, tarpusavyje priklausomos ir susijusios. Galiausiai atskleidžiama, kaip didėjantis socialinių-ekonominių teisių reikšmės pripažinimas tarptautinėje teisėje įtakoja pabėgėlių teisę, t.y., kokiomis aplinkybėmis prieglobsčio prašymai grindžiami socialinių-ekonominių teisių pažeidimais gali būti sėkmingi.

Daroma išvada, kad 1951 Konvecija dėl pabėgėlių statuso aiškinama žmogaus teisių kontekste gali apimti prašymus grindžiamus sunkių socialinių-ekonominių teisių pažeidimu dėl Konvencijoje nustatytų pagrindų, tačiau analizuota teismų praktika yra skirtinga ir nenuosekli.

Pagrindinės sąvokos: socialinės ir ekonominės teisės, EŽTK pozityvios pareigos, socialinių-ekonominių teisių pažeidimas kaip persekiojimas, pabėgėlio statusas.

SUMMARY

The Master Thesis presents recent developments of socio – economic rights status in international human rights law and how this recent growing importance is reflected in refugee law. A diversity of emerging refugee claims based on severe socio-economic rights violation resulted in great judicial confusion, where socio-economic threats are rarely accepted as persecution. Therefore, the main purpose was to identify the scope of 1951 Refugee Convention application, namely, under which circumstances a person, fleeing because of deprivation of the right to work, right to education or other severe socio-economic rights violations in a country of origin, may be granted refugee status.

In the first part of the Thesis recent positive changes of socio-economic rights status in human rights law was presented, which shows that the hierarchy of different rights is meaningless, all human rights are interdependent and must be treated in an equal manner. We have analysed integrated human rights approach taken by the European Court of Human Rights jurisprudence, concerning indirect socio-economic rights protection under European Convention on Human Rights, which reflects the contemporary understanding that all human rights are indivisible, interrelated and interdependent.

The second part forms the heart of this Thesis, where Author is examining the importance of human rights development to the refugee law and how socio-economic rights status changes in human rights law has influenced traditional understanding of refugee definition. Following the international refugee jurisprudence, scholar's writings and treaty interpretation principles human rights approach is accepted as dominant and appropriate to interpret Refugee Convention terms. After analyses of refugee decision maker's attempt to evaluate when socio-economic violation is so sufficiently serious that amount to persecution it is clear that there is no objective standard, decision makers often applies variable subjective notions that leads to practical inconsistencies, different interpretation and application of Convention.

The examination revealed that the 1951 Refugee Convention interpreted in the human rights based approach is able to encompass severe socio-economic rights deprivation claims, however they have to be based on race, religion, nationality, membership of a particular social group or political opinion ground. The term persecution can be considered as both risk of serious harm and a failure of state protection, therefore conventional causal connection requirement can be established if anyone of those constitutive elements is for reason of a convention ground.

SANTRAUKA

Magistro baigiamajame darbe analizuojama didėjančios socialinių ir ekonominių teisių reikšmės pripažinimas tarptautinėje žmogaus teisių srityje bei kaip šie pokyčiai įtakoja pabėgėlių teisę. Prieglobsčio prašymų, grindžiamų šiurkščiais socio-ekonominių teisių pažeidimais įvairovė sukėlė didelę teismų praktikos painiavą, todėl socio-ekonominių teisių pažeidimai retai pripažįstami kaip persekiojimas. Taigi pagrindinis darbo tikslas buvo nustatyti 1951 m. konvecijos dėl pabėgėlių statuso taikymo sritį, t.y., kokiomis aplinkybėmis asmeniui, bėgančiam iš savo kilmės šalies dėl teisės į darbą, mokslą ar kitų šiurkščių socialinių, ekonominių teisių pažeidimo gali būti suteiktas pabėgėlio statusas pagal Konveciją dėl pabėgėlių statuso.

Pirmoje darbo dalyje aptarti socialinių-ekonominių teisių statuso pokyčiai žmogaus teisių srityje, neigia žmogaus teisių hierarchiją ir rodo, kad visos žmogaus teisės yra tarpusavy priklausomos ir turi būti traktuojamos vienodai. Analizuotas integruotas žmogaus teisių požiūris Europos Žmogaus Teisių Teismo jurisprudencijoje dėl socialinių, ekonominių teisių netiesioginio gynimo atspindi šiuolaikinę vyraujančią nuomonę, kad visos žmogaus teisės yra nedalomos, tarpusavyje priklausomos ir susijusios.

Antroji dalis sudaro šio darbo pagrindą, kurioje autorius analizuoja žmogaus teisių vystymosi reikšmę pabėgėlių teisėje bei kaip socio - ekonominių teisių reikšmės pripažinimas tarptautinėje žmogaus teisių srityje įtakoja tradicinę pabėgėlio sampratą. Remiantis tarptautine jurisprudencija, moksliniais darbais bei sutarčių aiškinimo principais nustatyta, jog tarptautinė žmogaus teisė ir jos normos yra pripažįstama dominuojančiu kriterijumi naudotinu aiškinant konvecijos dėl pabėgėlių statuso terminus. Analizuojant prieglobsčio prašymų nagrinėjančių institucijų vertinimus, kada socialinių-ekonominių teisių pažeidimai yra tokie rimti, kad prilygsta persekiojimui, paaiškėjo jog nėra objektyvaus standarto, o sprendimų priėmėjai dažnai taiko subjektyvius kriterius, kurie veda į praktikos nenuoseklumą, skirtingą konvencijos aiškinimą bei taikymą.

Daroma išvada, kad 1951 m. konvecija dėl pabėgėlių statuso aiškinama žmogaus teisių kontekste gali apimti prašymus grindžiamus sunkių socio-ekonominių teisių pažeidimu, tačiau jie turi būti grindžiami rasės, religijos, tautybės, politinių pažiūrų ar priklausymo tam tikrai socialinei grupei priežastimi. Paminėtina, kad persekiojimu gali būti laikoma tiek šiurkštus socialinių ekonominių teisių pažeidimas, tiek valstybės apsaugos nebuvimas, todėl priežastiniam ryšiui nustatyti užtenka konvencinės priežasties ryšio su vienu iš elementų.