THE QUALIFICATION DIRECTIVE: CENTRAL THEMES, PROBLEM ISSUES, AND IMPLEMENTATION IN SELECTED MEMBER STATES
The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States

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Contents

Preface iii
List of Contributors v
Introduction 1
Karin Zwaan (Centre for Migration Law, Radboud University Nijmegen)

Part One:
Central Themes

1. The Qualification Directive: An Overview 7
   Jane Mc Adam (University of Sydney)

2. The Role of the European Court of Justice 31
   Jean-Yves Carlier (University of Leuven)

Part Two:
Problem Issues

3. The European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1951 Refugee Convention and the Qualification Directive 41
   Ján Šikuta (European Court of Human Rights)

4. Subsidiary Protection and Reduced Rights 49
   Hemme Battjes (Vrije Universiteit of Amsterdam)

Part Three:
The Implementation of the Directive in Selected Member States

   Madeline Garlick (UNHCR Brussels)

   Dirk Vanheule (University of Antwerp)
7. The Qualification Directive and its Transposition into Swedish Law
   Gregor Noll (University of Lund) 79

8. The Implementation of the Qualification Directive in France: One Step
   Forward and Two Steps Backwards
   Vincent Chetail (University Centre for International Humanitarian Law,
   Geneva) 87

9. The Implementation of the EU Qualification Directive in the Member
   States: Slovakia
   Olga Sidorenko (International Criminal Tribunal for the Former
   Yugoslavia) 103

10. Transposition of the Qualification Directive in Germany
    Roland Bank (UNHCR Berlin) 109

11. Implementation of the EU Qualification Directive in the Republic of
    Lithuania
    Lyra Jakuleviciene (Mykolas Romeris University) 127

Annexes
I Directive 2004/83/EC of 29 April 2004 on minimum standards for the
    qualification and status of third-country nationals or stateless persons as
    refugees or as persons who otherwise need international protection and
    the content of the protection granted, OJ 2004, L 304/12.

II Proposal for a Council Directive on minimum standards for the
    qualification and status of third-country nationals or stateless persons as
    refugees or as persons who otherwise need international protection, COM
    (2001) 510 final
Preface

The lectures on which this book is based, were originally given during a seminar on the Qualification Directive (Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons or as persons who otherwise need international protection and the content of the protection granted). This seminar took place in Nijmegen, at the Centre for Migration Law, Radboud University, on Friday 6 October 2006. This was four days before the date the Member States should have implemented the Directive in their national legislation. In light of the very substantial level of interest, we have decided to publish a book on the results of the seminar so that people who were not able to attend may benefit from the wealth of knowledge and information which was shared. I would like to thank the lecturers – Jane Mc Adam, Jean-Yves Carlier, Ján Šikuta, Hemme Battjes, Madeline Garlick, Dirk Vanheule, Gregor Noll, Vincent Chetail, Roland Bank, and Lyra Jakuleviciene – for coming to speak and for giving permission to publish their lectures in this book. I would especially like to thank Jane Mc Adam for revising the English of some of the contributions. I am grateful for the contribution of Olga Sidorenko, who was unable to lecture on that day – but who nevertheless allowed us to publish this lecture.

Karin Zwaan
List of Contributors

Jane McAdam, BA (Hons) LLB (Hons) (Sydney) DPhil (Oxon) is a Senior Lecturer in the Faculty of Law at the University of New South Wales in Sydney, Australia, where she is also the Director of International Law Programs. She holds a doctorate from the University of Oxford. Jane is the author of Complementary Protection in International Refugee Law (Oxford University Press, Oxford 2007); and co-author with Dr Guy S Goodwin-Gill of All Souls College, University of Oxford of the third edition of The Refugee in International Law (Oxford University Press, Oxford 2007). She is the Associate Rapporteur of the Convention Refugee Status and Subsidiary Protection Working Party for the International Association of Refugee Law Judges.

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Hemme Battjes has published extensively on aliens law in general and European aliens law in particular. One of his most recent works is European asylum law and international law, (Nijhoff: Leiden/Boston 2006), a complete overview and analysis of European asylum law with particular interest for the way European law relates to international law on asylum. He further participates in several projects on the evaluation of European aliens’ law initiated by both the European Parliament and the Commission. Battjes teaches constitutional and aliens law at the Vrije Universiteit Amsterdam.

Jean-Yves Carlier is professor and president of the Department of International Law of the Catholic University of Louvain (Louvain-la-Neuve, Belgium) and practicing lawyer. His courses are relative to Human rights, Private international law and European law. He is also invited professor at the Facultés universitaires St Louis (Brussels), the universities of Liège, Paris II, Ouagadougou and Cotonou. Among his publications relative to EC law: The future of free movement of persons in the EU (ed. together with E. Guild), Brussels, Bruylant, 2006.

Vincent Chetail is Lecturer in Public International Law at the Graduate Institute of International Studies and Research Director at the University Centre for International Humanitarian Law (Geneva). He published several articles and books in the field of international migration law and international refugee law (including notably as co-editor with Alexander Aleinikoff, Migration and International Legal Norms, T.M.C. Asser Press, 2003).
Madeline Garlick studied law, politics and languages at Monash University, Melbourne, Australia. She later obtained an LL.M. from Cambridge University, UK. She is qualified as a barrister and practiced in litigation, commercial law, and represented asylum seekers and refugees in Australia. Madeline Garlick worked for ‘Justice’ (British Chapter of the International Commission of Jurists), UK, and subsequently in Bosnia and Herzegovina from 1997-1999, with the Commission for Real Property Claims of Displaced Persons and Refugees and for the Office of the High Representative. Subsequently, she joined the United Nations Peacekeeping Force in Cyprus (UNFICYP), serving in the Secretary-General’s negotiating team which sought to resolve Cyprus’ political conflict between 1999-2004. She is currently Senior EU Affairs Officer with the United Nations High Commissioner for Refugees (UNHCR) in Brussels, in charge of liaison with the EU institutions.

Olga Ferguson Sidorenko did her studies in law at the Comenius University in Bratislava. In October 2000 she moved to the Netherlands to write a Ph.D. thesis at the Faculty of Law at the Erasmus University Rotterdam. She was also lecturing on Recent Developments in European Law in a joint European Programme CELE (Certificate in European Law and Economics) at the University of Economics Bratislava. She obtained her degree of doctor (Ph.D.) in February 2006 based on the thesis European Asylum Law and Policy: The EU and Slovak Perspectives. Since July 2006 she has been working as an associate legal officer at the International Criminal Tribunal for the Former Yugoslavia.

Lyra Jakulevičienė is an Associate Professor at Mykolas Romeris University in Lithuania and has almost ten years of teaching experience in international law (human rights, refugee and treaty law in particular). She served in the capacities of Legal Adviser and later as Liaison Officer of the United Nations High Commissioner for Refugees in Lithuania in 1997-2003 and lately as the Head of the United Nations Development Programme in Lithuania. Ms. Jakulevičienė is a doctor of social sciences (law) and an author of a dozen of articles on refugee protection, as well as the first book in Lithuania on the rights of refugees. She is also a member of the Odysseus Academic Network in Europe and the Observatory on Free Movement of Workers in the EU.

Gregor Noll is a professor of international law at the Faculty of Law, Lund University, Sweden. His current research is on refugee and migration law, the theory of international law and the use of force. Until September 2002, he served as Research Director and Deputy Director General at the Danish Centre for Human Rights, Copenhagen, Denmark. Dr. Noll has been the editor-in-chief of the Nordic Journal of International Law (2000-2006) and is a board member of the Journal of Refugee Studies. He has taught international law, human rights law and refugee law at graduate and postgraduate levels in a variety of contexts. In 2000, he published his doctoral thesis on the compliance of the asylum acquis with norms of international law (Negotiating Asylum, Martinus Nijhoff Publishers, The Hague). He also authored a number of articles, inter alia on the theory of human rights, the use of force as well as on the concept of security in international law, the problem of gender and persecution, democracy theory and refugee law as well as the use of diplomatic
assurances. An updated list of his publications is at <www.jur.lu.se/Internet/Forskare/Noll.nsf>.

Ján Šikuta studied Law in Bratislava (1979 - 1983 Comenius University), he worked as a judge of the First Instance Court (1986 - 1989) and the Court of Appeal in Bratislava (1990 - 1994). In 1991 he also graduated from a postgraduate study at the Charles University in Prague. In 1992 - 1994 he was also the Vice-President of the Slovak Association of Judges. From 1994 to 2004 he joined the United Nations and worked as the Legal Officer of the United Nations High Commissioner for Refugee Office. In that capacity he contributed to the establishment of asylum systems, asylum institutions and legislations in Central European countries, lectured on human rights and asylum law at various universities and to different target groups, mostly in Central and Eastern Europe. In October 2004 he was elected by the Parliamentary Assembly of the Council of Europe as the judge of the Slovak Republic to the European Court of Human Rights in Strasbourg.

Dirk Vanheule, lic. iuris (Ghent U.), I.L.M. (Toronto), dr. iuris (U. Antwerp) teaches and conducts research in constitutional, administrative and migration law at the Faculty of Law of the University of Antwerp and is vice-director of the Centre for Migration and Intercultural Studies there. He is also member of the Ghent Bar and practices in the areas of public law and migration law.

Karin Zwaan is the academic coordinator of the Centre for Migration Law, Radboud University Nijmegen, the Netherlands. She teaches Dutch migration law and refugee law at that university. She wrote her thesis on the safe third country exception (2003) and has published widely on refugee issues (including a book on UNHCR and the European Asylum Law, Nijmegen: Wolff 2005).
Introduction

Karin Zwaan*

On 10 October 2006, the deadline for the implementation of the Directive 2004/83/EC of 29 April 2004, on minimum standards for the qualification and status of third-country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive)\(^1\) expired. By 9 October only 6 Member States (France, Austria, Luxembourg, Latvia, Slovenia and Estonia) had notified the European Commission on the measures taken for transposition.\(^2\) This book is on the central themes, problem issues, and the implementation of the Qualification Directive.

The book is divided in three sections. The first section, containing two lectures, one by Jane Mc Adam and one by Jean-Yves Carlier, goes into the central themes of the Qualification Directive. Jane Mc Adam describes how the Qualification Directive was the result of a two-and-a-half year drafting process, but was only finally agreed just two days before ten new Member States joined the European Union. In her contribution she gives an overview of the main provisions of the Qualification Directive as they relate to eligibility for international protection in the European Union and the status accorded to beneficiaries. The article of Jean-Yves Carlier describes the (future) role of the European Court of Justice. He goes into two elementary questions of this role. Firstly, the question of when. When is there a possibility or an obligation of preliminary question? Secondly, the question of what. What shall be the question? It is also the question of the direct effect of a directive and also it is a question of content. According to Carlier in theory, a solution could be found for every difficulty of interpretation of the Qualification Directive, if necessary by a preliminary rule in Luxembourg. He argues that this will not be so easy in practice.

The second part of the book is on the problem issues of the Qualification Directive. Hemme Battjes indicates the problems with regard to subsidiary protection and reduced rights. Subsidiary protection beneficiaries do partly have the same rights as refugees (for example, as regards access to accommodation and freedom of movement) but other rights are reduced as compared to those for refugees. The contribution of Ján Šíkuta makes clear that the Qualification Directive seeks to incorporate Member States’ obligations both under the 1951 Refugee Convention as well as the 1950 European Human Rights Convention (ECHR). He recalls that all EU Member States are parties to the ECHR. It is thus clear that the Qualification Directive will have its impact on national law, which in turn has an effect on the European Court of Human Rights in Strasbourg and its jurisprudence.

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The third part of the book focuses on the implementation of the Qualification Directive in a selected number of Member States. This part starts with a contribution of Madeline Garlick in which she indicates that the Office of the High Commissioner for Refugees followed closely the process of preparation and negotiation of the Qualification Directive. The European Council summit in Tampere had called for measures to establish a common European asylum system, based on the full and inclusive application of the 1951 Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement. UNHCR has signalled its concern that the codification of subsidiary protection in EC law in the Directive could potentially lead to undermining of grants of refugee status under the 1951 Convention. She reaches the conclusion that it remains difficult to assess the full impact of the Qualification Directive, and its success or otherwise in delivering protection to entitled applicants, with relatively few States having transposed it and little comprehensive data regarding its application. She notices that concerns in some key areas persist, and clarifications have not been achieved to date through Member States discussions, guidance from the Commission, through jurisprudence or otherwise.

The other six contributions are on the implementation of the Qualification Directive in selected Member States.

In Belgium, the Qualification Directive is a milestone in Belgian asylum law. It has resulted in the introduction of new grounds to obtain asylum status in Belgium, as is described by Dirk Vanheule. He indicates that with the implementation of the Directive and the introduction of subsidiary protection status, the Belgian legislator has also changed the asylum procedure.

In the contribution of Gregor Noll on Sweden he indicates that when the transposition period elapsed, Sweden had failed to notify the European Commission of its transposition measures. The incoming government decided to handle the transposition of the Qualification Directive and the Draft Directive on Asylum Procedures in one and the same process, which provided for further delay. A governmental inquiry had been assigned to draw up a comprehensive report on legislative changes necessary to transpose the Directive. The report delivered by the governmental Inquiry must be seen as the only document available offering indications on what course the Swedish transposition process might take. This article describes and analyses this document.

Vincent Chetail describes the situation in France. The position of France regarding the implementation of the Qualification Directive can best be described as unusual because France incorporated the Qualification Directive five months before its very adoption. But to be noticed is that French Parliament explicitly integrates only 7 of the 34 Articles of the Directive. Chetail notes that the necessary recognition of non-state persecution cannot divert attention from the fact that the majority of the other changes initiated by the Parliament are much more restrictive and other important aspects of the Directive were simply ignored.

In Slovakia, Olga Sidorenko stresses, that the complete harmonisation of the Slovak asylum law with the Community law had to progress in three stages, starting with the adoption of the amending 309/2000 Law. The next proposed stages have been the adoption of an entirely new Asylum Law; and finally the complete implementa-
tion of the EU law in the field of asylum achieved upon Slovakia’s accession to the European Union. Slovakia did not meet the transposition deadline; nevertheless, its transposition is in process.

For Germany, the implementation of the Qualification Directive meant that it is currently seeking to transpose into German law the Qualification Directive together with all other instruments adopted under Title IV of the EC Treaty as can be read in the article of Roland Bank. The application of the Directive before and after its transposition will provide an important impulse towards bringing German practice of refugee law in line with the 1951 Convention. As has been indicated in the other contributions on the implementation, also looking at the German draft transposition provisions in detail one may encounter various examples of selective transposition of the Directive. Bank argues that the application of the Qualification Directive in German Law with direct effect since 10 October 2006 as well as the future transposition legislation will lead to some significant changes in the German system of asylum and refugee law.

The book ends with a contribution by the hand of Lyra Jakuleviciene, who describes the implementation in Lithuania. Lithuania had started incorporating into its national law the provisions of the then draft EU legislation on asylum even before its formal adoption by the Council. But as no formal transposition has yet taken place, a number of provisions remain to be introduced into Lithuanian legislation. Currently, there are three forms of protection (asylum) recognised by the Lithuanian legislation: refugee status, subsidiary protection and temporary protection.

This book offers insight in all the different aspects of the Qualification Directive: the central themes, the problem issues and the implementation. It emerges that the Qualification Directive may play a valuable role with regard to the recognition of refugees and persons benefiting from subsidiary protection in establishing core binding obligations on member states. It is also clear that the Qualification Directive will and cannot overrule the Refugee Convention. The judicial meaning of the refugee concept is now to be found in the Refugee Convention read together with the Qualification Directive. I will conclude therefore with a reference to preamble 3 of the Qualification Directive: 'The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees'.
Part One:
Central Themes
The Qualification Directive: An Overview

Jane McAdam*

1. Introduction

On 29 April 2004, the Member States of the European Union adopted the Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted.1 This Directive represented the fourth building block in the first phase of the Common European Asylum System,2 intended to harmonize and streamline legal standards relating to asylum in the Member States of the EU.3 The Directive was the result of a two-and-a-half year drafting process, but was only finally agreed just two days before ten new Member States joined the EU. As one commentator observed,

The final impulse to reach agreement came not from the need to integrate, or even from the pressure of the May 1 deadline for completing the Amsterdam/Tampere programme. Rather, it was the need to get agreements, even imperfect ones, in place before ten new Members came to the table and made it impossible to get the perfect agreement for any, let

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3 Under the Protocol on the Position of the United Kingdom and Ireland, and the Protocol on the Position of Denmark, annexed to the Treaty on European Union [2002] OJ C325/5, those countries may elect not to adopt the asylum Directives. The UK and Ireland have, however, elected to adopt the Qualification Directive.
alone all, of the Member States. If the 15 had a hard time deciding unanimously, how would 25 manage?4

The Qualification Directive has been described as ‘unquestionably the most important instrument in the new legal order in European asylum because it goes to the heart of the 1951 Convention Relating to the Status of Refugees’5. It ‘clarifies’ the constitutive elements of the Convention refugee definition and the rights that flow from refugee status, and seeks to establish a harmonized approach towards de facto refugees in the Member States of the EU – called ‘beneficiaries of subsidiary protection’ – by setting out the eligibility criteria for persons with an international protection need falling outside the scope of the 1951 Refugee Convention, and codifying their resultant status. In doing so, the Qualification Directive is the first supranational instrument to elaborate a distinct status for extra-Convention refugees.6

It was inspired by the notion that harmonized laws on qualification for international protection ‘should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks’,7 and its main objectives are described as ensuring that (a) Member States apply common criteria for identifying people genuinely in need of international protection, and (b) a minimum level of benefits is available for such people in all Member States. The Directive therefore has two components: clarifying the eligibility or threshold criteria for protection, and setting out the resultant status for persons who qualify. Accordingly, it seeks to clarify who is a ‘refugee’ for the purposes of protection in the EU, thereby intersecting with article 1A(2) of the Refugee Convention, and who else may have an international protection need – beneficiaries of subsidiary protection. Purely humanitarian and compassionate claims fall outside the scope of the Qualification Directive, since they are not based on an international protection need. These remain subject to the discretion of individual Member States.

The Directive is based on pre-existing Member State practice, and aims simply to harmonize existing concepts by drawing on the ‘best’ elements of the Member States’ national systems.8 It is therefore not intended as a comprehensive overhaul of protec-

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tion, but as a codification of existing State practice that, as a legal instrument, has sought to balance the divergent political views of the various Member States. While this approach is a pragmatic response to the political realities of the EU and the need to create an instrument of compromise, it also means that the Directive does not the product of a systematic analysis of all protection possibilities under international and regional human rights and humanitarian law. Indeed, it has been criticized for ‘equalizing down’ at the refugee’s expense, adopting minimum standards which do not preclude Member States with higher standards in place from reducing them. Furthermore, it is probable that the Directive will not lead to more people being granted protection in the EU because it is based on a restrictive interpretation of existing practices rather than a new regime. Indeed, the instruction in the Treaty establishing the European Community (TEC) to adopt ‘minimum standards’ on asylum has been taken very literally, with the asylum Directives frequently adopting lowest common denominator standards instead of aiming for the higher standards afforded by some Member States. As such, it may be described as a regionally-specific political manifestation of the broader legal concept of complementary protection.

This paper seeks to give an overview of the main provisions of the Qualification Directive as they relate to eligibility for international protection in the EU and the status accorded to beneficiaries. Other contributions in this collection highlight national implementation and interpretation of such provisions, and the ‘fit’ between the Directive as an instrument of EC law vis-à-vis Member States’ pre-existing obligations under international law.

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10  Qualification Directive, art 3. On this point, see Lambert (n. 5).
13  This means that Member States which followed higher standards may reduce them as part of harmonization, or may choose to maintain them: Qualification Directive, art 3, recital 8. This calls into question how effective ‘harmonization’ will actually be: see e.g. H. Storey and others, Complementary Protection: Should There Be a Common Approach to Providing Protection to Persons Who Are Not Covered by the 1951 Geneva Convention? (Joint ILPA/IARLJ Symposium 6 December 1999) (copy with author).
14  On this point, McAdam (n. 1) 462. During discussions in the EU, Commission Services described subsidiary protection as an asylum issue that was ‘more of a political nature’. Note from Commission Services, ‘Horizontal Issues in the Asylum Proposals’, 13636/01 ASILE 53 (9 November 2001) 2. ‘Complementary protection’ describes protection granted by States on the basis of an international protection need outside the 1951 Convention framework, based on a human rights treaty or on more general humanitarian principles, such as providing assistance to persons fleeing from generalized violence.
2. Refugee Status under the Directive

2.1 Inclusion Clauses

Although harmonization was supposed to take place ‘in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties’,15 there are a number of areas where international law has been undermined by regional interpretations. The Directive’s definition of a ‘refugee’16 is substantively identical to article 1A(2) of the Convention with one exception: it applies only to third country nationals. This restrictive interpretation of the refugee definition has a regional precursor: the 1997 Protocol on Asylum for Nationals of Member States of the European Union.17 This has drawn sharp criticism from UNHCR and other commentators,18 who rightly argue that imposing such a restriction on the definition of a refugee contravenes article 42 of the Refugee Convention, which prohibits States from limiting the personal scope of article 1 or making reservations to article 3.

From a political perspective, one might appreciate why this is so. First, some would question whether individuals can be subject to persecution (or other forms of serious harm19) in a region in which all Member States have, as a condition of membership, accepted various human rights treaties as a matter of both law and practice. Secondly, even if it were possible for an EU national to be persecuted in his or her

15 TEC (n. 12) art. 63(1).
19 Subsidiary protection, based on human rights abuses, is also restricted to third country nationals.
country of origin, by virtue of that regional ‘citizenship’, he or she has a right to freedom of movement and can therefore escape persecution by relocating to another Member State. Accordingly, the argument goes, such a person is not a refugee and there is no need for asylum to be granted. Both these arguments are flawed, however, not least because there is evidence of groups severely discriminated against in certain parts of Europe (such as the Roma), and the right to residence in other EU countries is not as simple as having a right to free movement. As the House of Lords Select Committee on the EU noted, ‘there are occasions when even if there are supposedly safeguards in place in theory, those safeguards are not being effectively implemented and for the individuals concerned, regardless of membership of the club, they are being persecuted in their country and they are not being protected and that is what the courts here [UK], and indeed the authorities in other countries, have found in over 7,000 cases’.

Even if in practice the limitation were to have little effect on refugee recognition statistics, it is undesirable that EU States set an example of limiting the application of the Convention definition in this way and undermining international law through a tailored regional agreement. It would set ‘a most undesirable precedent in the wider international/global context.’

Member States cannot simply abrogate their responsibilities under international treaties by entering into regional agreements. Accordingly, even though EC law now contains a harmonized approach to determination of refugee status for non-EU nationals, EU citizens who are refugees must still be able to have their claims assessed on the basis of international law. How this will operate, and whether it will in substance differ from the EC law approach, remains to be seen. The defining-out of such persons from the EC Qualification Directive is a political statement, but does not ‘undo’ States’ international legal obligations.

The Directive is the first instrument to attempt a detailed elaboration of acts constituting ‘persecution’ in the specific context of article 1A(2) of Convention. It reflects very strongly Hathaway’s human rights approach to ‘persecution’, requiring persecutory acts either to

a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot

\[20\] House of Lords (n. 18) [50] (Mr Hardwick, Refugee Council).

\[21\] House of Lords (n. 18) [54]. See also comments of UNHCR at [52]. Although the Convention and human rights treaties would still apply to EU citizens, their resultant legal status would be uncertain. Additionally, the argument that EU citizens may in any case move freely within the EU does not justify the breach of international law in the Directive, nor does such freedom of movement necessarily guarantee an equivalent level of rights as provided for in the Directive, especially for citizens of the 10 new Member States.

\[22\] ‘EC law’ denotes law adopted as an instrument of the European Community.


be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).  

The assessment is therefore both quantitative and qualitative. The express link drawn between persecution and violations of ‘basic human rights’ seeks to underline the intrinsic relationship between the two but implies that if persecution is based on human rights violations, then developments in human rights law and jurisprudence may impact upon interpretations of the term ‘persecution’ in the context of refugee determinations. However, some have critiqued this approach on the grounds that ‘persecution’ may become a catch-all for all forms of treatment that do not serve ‘the general ideals of pluralist democracy under the rule of law’, and that ‘the failure in some troubled jurisdictions to accord to their citizens or inhabitants rights and freedoms which at least approximate to those enjoyed here and in other developed democracies may itself come to constitute a pressure to admit such persons as refugees’.  

In the view of Lord Justice Laws of the UK Court of Appeal, human rights law and refugee law have overlapping but nonetheless distinct mandates, particularly in the context of dualist legal systems like the UK’s where human rights law, derived from the European Convention on Human Rights (ECHR) and implemented by the Human Rights Act, forms part of municipal constitutional law and is thus open to more creative judicial interpretation, while refugee law, deriving from international treaty law, reflects an agreement between various States and the court’s task is a more limited one – ‘to secure the State’s obedience to an international contract to which it has committed itself’.  

Klug, while appreciating the flexibility of a human rights approach to persecution, observes that it may obscure other forms of persecutory treatment, such as ‘[s]evere discrimination or the cumulative effect of various measures’. This echoes UNHCR’s concerns that an interpretation of ‘persecution’ that relies too heavily on objective factors risks obscuring valid elements of subjective fear, because such an approach overlooks the situation where ‘life in the country of origin [has become] so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin.’  

Though it is important to analyse country conditions and human rights standards in assessing whether persecution may exist in a given situation, the additional subjective element of the Convention definition captures a need for protection that is outside the realm of a pure human rights assessment, and cautions against tying the concept of persecu-

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25 Qualification Directive, art. 9(1).
27 Lord Justice Laws (n. 26) [8].
tion exclusively to human rights law. As UNHCR’s Director of International Protection observed:

Persecution cannot and should not be defined solely on the basis of serious human rights violations. Severe discrimination or the cumulative effect of various measures not in themselves alone amounting to persecution, as well as their combination with other adverse factors, can give rise to a well-founded fear of persecution, or, otherwise said: make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin.29

Article 9(2) of the Qualification Directive lists examples of acts which may amount to persecution, importantly clarifying that acts of a gender-specific or child-specific nature may be persecutory, and recognizing that punishment or prosecution for refusing to perform military service under certain circumstances may amount to persecution.30 UNHCR has welcomed these points of clarification.31 Article 10 deals with the reasons for persecution by seeking to elaborate on each of the Convention grounds. UNHCR has pointed out that while this is helpful, it must not be regarded as exhaustive.32

The Directive also introduces common ‘harmonized’ concepts for a range of refugee law concepts, as outlined in articles 5 to 8. Positive steps include recognizing protection needs arising sur place, and that ‘actors of persecution or serious harm’ may be non-State agents, finally bringing French and German law into line with the rest of the Member States and UNHCR. Controversially, however, there is a provision on ‘actors of protection’, which states that protection may be provided by the State, or by parties of organizations, including international organizations, controlling the State or a substantial part of its territory. The most obvious problem with this is that non-State actors may have a limited ability to enforce the rule of law,33 and are not bound by international human rights treaties.

29 Feller (n. 28), p. 3; see also UNHCR’s Handbook (n. 28) [55]. This element is underestimated in Hathaway’s analysis of the well-founded fear standard: Hathaway (n. 24), p. 69. It is reminiscent of remarks made during the drafting of the 1951 Convention, when the Israeli delegate explained that applying objective criteria in certain cases would result in injustice, such as where persons’ ‘horrifying memories … made it impossible for them to consider returning’: Ad Hoc Committee on Statelessness and Related Problems, ‘Summary Record of the 18th Meeting’ (31 January 1950) UN Doc E/AC.32/SR.18 (8 February 1950) [13] (Israel). More recently, Hathaway and Hicks have suggested that the ‘objective’ approach to establishing well-founded fear does not exclude a particularized inquiry into individual risk: J.C. Hathaway and W.S. Hicks, ‘Is There a Subjective Element in the Refugee Convention’s Requirement of “Well-Founded Fear”?’ (2005) 26 Michigan J of Int’l L, p. 505, 543–60.
30 The provision relating to conscientious objection has been significantly curtailed since the original proposal.
32 Ibid., p. 22.
33 Ibid., p. 18.
While there is not the space here to examine each of these concepts in detail, it is important to observe that they necessarily impact upon the scope of subsidiary protection by defining the boundaries of refugee protection. However, they have been criticized as an attempt to replace the international refugee law regime with a regional one, rather than simply clarifying or complementing international law.34

2.2 Exclusion Clauses – *de jure* and *de facto*

Article 14 on ‘revocation of, ending of or refusal to renew refugee status’ seems to conflate and confuse exclusion, cessation, cancellation and revocation.35 First, article 14(3)(b) permits States to revoke refugee status if it is discovered that an individual’s misrepresentation or omission of facts were decisive for the granting of that status, although as UNHCR has observed, this should only be the case if those statements were objectively false and if there was an intention to mislead the decision-maker. In this connection, UNHCR has noted that the mere use of false documents should not render an asylum claim fraudulent.

Secondly, articles 14(4)–(5), based on article 33(2) of the Refugee Convention, expressly allow Member States to ‘revoke, end or refuse to renew’ refugee status where there are reasonable grounds for regarding a refugee as a danger to the security of the Member State, or where he or she constitutes a danger to the community of that Member State, having been convicted by a final judgment of a particularly serious crime. Paragraph 5 states that in such circumstances, ‘Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.’ This provision acts as quasi-exclusion clause, in that it permits refugee status to be denied for reasons beyond those in the Refugee Convention’s exclusion clauses.

During the drafting of the Directive, a number of Member States had lobbied for a merger of Convention articles 1F and 33(2), and such a formulation appeared in early drafts of the instrument.36 The UK government thought that it was important to exclude persons who had committed serious crimes from obtaining a protected status, but thought that using the grounds of article 33(2) to enforce this ‘would not be legally sustainable [or of] practical benefit’.37 UNHCR criticized the incorporation of article 33(2) criteria into the Directive’s exclusion clauses because article 1F deals with those excluded from refugee status, whereas article 33(2) is concerned with the treatment of people who have been found to be refugees, but who nonetheless may be removed38 (within the Convention’s scope, although perhaps not under the

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35 UNHCR’s Annotated Comments (n. 31), p. 28.

36 12620/02 ASILE 54 (23 October 2002).


38 Feller (n. 28) 5; Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum on 5–6 November 2002, 13623/02 ASILE 59 (30 October 2002) 3.
broader principle of *non-refoulement* in human rights law). Indeed, the provisions serve different functions: article 1F is motivated by the seriousness of crimes that an individual has committed, rendering him or her undeserving of refugee status, whereas article 33(2) is directed at protecting the safety of the host State, and turns on an assessment that the refugee poses a present or future threat. The ‘merger’ formulation was ultimately removed from the Qualification Directive because Member States on the whole recognized that an ‘additional exclusion clause would not be compatible’ with their obligations under the Refugee Convention.”

The exclusion–*refoulement* distinction has important consequences for the individuals concerned. A person who is excluded from refugee status is denied all the rights provided for by the Convention (and the Qualification Directive). By contrast, a refugee issued with an expulsion order in accordance with article 33(2) remains entitled to at least those rights that are not linked to lawful stay. Even though he or she may in practice not be able to benefit from them, thus rendering the difference insignificant in real terms, it is important not to entrench article 33(2) as a formal exclusion provision. Article 14(6) of the Qualification Directive recognizes that denial of the benefit of the principle of *non-refoulement* does not equate to a loss of refugee status. Accordingly, it provides that refugees to whom article 14(4) or 14(5) applies remain entitled to (some of) the Convention rights that apply to all refugees, irrespective of the legality of their presence. ‘Dangerous’ refugees remain entitled to the benefits contained in articles 3 (non-discrimination), 4 (religion), 16 (access to courts), 22 (public education), 31 (refugees unlawfully in the country), 32 (expulsion), and – curiously – 33 (*non-refoulement*). By contrast, article 19 of the Qualification Directive, on the revocation of subsidiary protection, is silent on the question of resultant rights.

Although the Qualification Directive’s refugee exclusion clauses otherwise appear to be the same as those of the Convention, there is an important distinction. Article 12(2)(b) of the Qualification Directive, based on article 1F(b) of the Convention, seeks to restrict the types of acts that constitute political crimes (and hence not exclude a person from refugee status). Although it begins by replicating article 1F(b):

\[
\text{he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee;}
\]

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39 12620/02 ASILE 54 (23 October 2002) 19 fn. 2. See also the view of the UK government in House of Commons Select Committee on European Scrutiny (n 37) [6.22].

40 Presidency Note (n. 38), p. 3–4.

41 On this point, see the decision of the French Conseil d’État SSR in Pham, Dec. No. 148997 (21 May 1997), where the court stated that although article 33(2) of the Convention permits *refoulement* in certain circumstances, it does not mean that the benefit of refugee status can be withdrawn. Lambert takes the same view, arguing that the provision ‘does not provide that such a person may not benefit from the provisions of the Refugee Convention at large. Article 33(2) is not an exclusion clause’: Lambert (n. 5), p. 178.

42 It is curious that it is phrased in this way, since even though a refugee to whom article 33(2) applies might remain protected by the wider principle of *non-refoulement* under human rights law, article 33(2) expressly deprives a refugee of the benefit of *non-refoulement* contained in article 33(1).
it then continues:

… particularly cruel actions, even if committed with an allegedly political objective, may be
classified as serious non-political crimes.43

Sweden was opposed to this clause. Spain wanted it to apply explicitly to both par-
ticipants in a crime and to instigators of it, as in the Council Joint Position on the
Harmonized Application of the Term ‘Refugee’.44 Neither the Directive nor the Joint
Position give any guidance as to how it should be interpreted. Nevertheless, it is clear
that the scope of refugee status has been narrowed under EC law by providing that
political crimes involving particularly cruel actions will result in exclusion. The House
of Lords has noted that article 12(2) ‘plainly affords a narrower ground for claiming
asylum’.45

Finally, persons who instigate or otherwise finance, plan or incite terrorist acts are
excluded from international protection under the Directive, since recital 22 regards
such acts as constituting acts contrary to the purposes and principles of the UN,
which are grounds for exclusion under article 1F(c) of the Refugee Convention (and
article 12(2)(c) of the Directive). This is particularly problematic since ‘terrorism’ is
not defined in international law.46 A person excluded on this basis will necessarily
also be denied subsidiary protection, because article 17(1)(b) of the Directive excludes
any person who has committed a ‘serious crime’.

3. Subsidiary Protection
3.1 Inclusion Clauses

The definition of a ‘person eligible for subsidiary protection’ is set out in article 2(e):

a third country national or a stateless person who does not qualify as a refugee but in re-
spect of whom substantial grounds have been shown for believing that the person con-
cerned, if returned to his or her country of origin, or in the case of a stateless person, to his
or her country of former habitual residence, would face a real risk of suffering serious harm
as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or,
owing to such risk, unwilling to avail himself or herself of the protection of that country.47

43  Directive art. 12(2)(b), introduced by 12199/02 ASILE 45 (25 September 2002).
44  12199/02 ASILE 45 (25 September 2002) 17, referring to Council Joint Position on the Har-
monized Application of the Definition of the Term ‘Refugee’ in Article 1 of the Geneva Con-
1996).
45  Sepet (FC) v Secretary of State for the Home Dept [2003] UKHL 15 [16] (Lord Bingham) (referring to
previous numbering as art. 14(2)).
46  On this issue, see B. Saul, Defining Terrorism in International Law, Oxford: OUP 2006.
47  7944/04 ASILE 21 (31 March 2004) art. 2(e). It was originally art. 5, but was moved to the
definitions section in art. 2 by 11356/02 ASILE 40 (6 September 2002).
It raises four points of interest. The first concerns its application to ‘third country nationals or stateless persons’ only, discussed above in the refugee context. Of course, because the Directive is the first instrument to define subsidiary protection at an inter-governmental level, this restriction does not breach international law in the same way that the limitation on refugee eligibility contravenes the Refugee Convention, but it still constricts the scope of subsidiary protection status. In any case, Member States’ human rights law obligations may prevent them from removing individuals who fall outside the strict terms of the definition.

Secondly, a person is only eligible for subsidiary protection where he or she ‘does not qualify as a refugee’. This is premised on the idea that the Refugee Convention should be given a full and inclusive interpretation, and is particularly pertinent in the context of the Qualification Directive regime where refugee status affords a higher quality of protection than subsidiary protection status. The result of wrongly characterizing a claim therefore has serious consequences in terms of rights.

Thirdly, the standard of proof for subsidiary protection is ‘substantial grounds … for believing’. This is an objective test, by contrast to article 1A(2) of the Convention which contains both objective and subjective elements, requiring an applicant to demonstrate a ‘well-founded fear’ of persecution. The ‘belief’ in the present definition does not relate to the applicant’s belief (unlike the applicant’s well-founded fear), but rather to the decision-maker’s judgment that substantial grounds (based on objective circumstances) exist for believing that the applicant would face harm.

The reference to ‘substantial grounds’ stems from the case law of the European Court of Human Rights on article 3 of the ECHR and the Torture Committee on article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and was deliberately selected in order to avoid divergence between international and Member States’ practice. The Torture Committee has consistently held that ‘substantial grounds’ involve a ‘foreseeable, real and personal risk’ of torture. They are to be assessed on grounds that go ‘beyond mere

48 This contravenes article 42 of the Refugee Convention, which prohibits States from limiting the personal scope of article 1 (the refugee definition) and making reservations to article 3 (non-discrimination).
49 E.g. ECHR art. 3, CAT art. 3, ICCPR art. 7.
50 Council of the European Union Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum on 25 September 2002 Doc 12148/02 ASILE 43 (20 September 2002) 5. The Netherlands supported Sweden’s argument that wording from decisions of the Torture Committee should be taken into account to avoid different rulings from different courts of bodies concerning similar situations: 12199/02 ASILE 45 (25 September 2002) 3 fn 3.
As can be seen from this explanation of ‘substantial grounds’, the Directive effectively incorporates a circular, if not a double, threshold. Whereas the Torture Committee considers ‘substantial grounds’ to be met by a ‘foreseeable, real and personal risk’, the Directive requires that there are (a) substantial grounds for believing that (b) there is a real risk to the applicant. Accordingly, the Directive requires a foreseeable, real and personal risk of a real risk. It may in fact be easier to demonstrate a well-founded fear of persecution, and precisely this has occurred in Canada, where the courts have determined that a lower standard of proof applies to Convention refugee claims than to complementary protection cases. Under section 96 of the Canadian Immigration and Refugee Protection Act, the test for a refugee’s well-founded fear of persecution is a ‘reasonable chance’ or ‘serious possibility’ of persecution, whereas individuals fearing removal on the grounds of a personal risk to life or cruel and unusual treatment or punishment under section 97 must demonstrate that the risk of ill-harm on removal is ‘more likely than not’.

The fourth notable element of the definition relates to the nature of suffering (‘serious harm’) that may result in subsidiary protection being granted, set out in article 15. ‘Serious harm’ is defined there as:

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

These types of harm reveal a strong presumption for Convention status. Article 15 should therefore only apply where the standard of harm does not reach the level of persecution and/or there is no link to a Convention ground.

Paragraph (a) was based on Protocol 6 to the ECHR, prohibiting the imposition of the death penalty in peace time, which has since been strengthened by Protocol 13,

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52 EA v Switzerland (n. 51) [11.3].
54 EA v Switzerland (n. 51) [11.3].
55 Adjei v Canada (Minister of Employment and Immigration) [1989] 2 FC 680, 57 DLR (4th) 153 (CA).
56 Li v Canada (Minister for Citizenship & Immigration) [2005] 3 FCR 239 (FCA) [27]–[29]. This was not envisaged by the Immigration and Refugee Board of Canada: “The preferred position of IRB Legal Services is that all three grounds for protection should be decided using the same standard of proof, namely the Adjei test, “reasonable chance or serious possibility”. The test is premised on the prospective nature of the risk and that same prospective element is present in all three protection grounds: Immigration and Refugee Board (Legal Services), Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection: Risk to Life or Risk of Cruel and Unusual Treatment or Punishment (15 May 2002) Part 7.
57 UNHCR’s Observations (n. 18) [42].
prohibiting the death penalty in all circumstances. Furthermore, all Member States except France are parties to the Second Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR) which contains a similar requirement. It is also consistent with the jurisprudence of the European Court of Human Rights and the Human Rights Committee.

Paragraph (b) derives from Member States’ obligations under article 3 ECHR, but with a limitation: it expressly requires that such treatment relate to an applicant ‘in the country of origin’. This may be intended to obviate a claim by an asylum seeker that he or she would face torture in a third country to which return may be contemplated, but in such circumstances article 3 ECHR would still prevent removal. Significantly, however, protection under article 3 ECHR alone would not guarantee a legal status, but would simply classify the person as non-removable. Drafting records reveal that the main impetus for the ‘country of origin’ caveat, however, was to permit the removal of ill persons to countries in which they could not obtain adequate medical treatment:

However, if sub-paragraph (b) was to fully include the jurisprudence of ECtHR relating to Article 3 of ECHR, cases based purely on compassionate grounds as was the case in D v UK (1997), also known as the St. Kitt’s case, would have to be included.

In the St. Kitts case, although the lack of access to a developed health system as well as lack of a social network in itself was not considered as torture or inhuman or degrading treatment, the expulsion to this situation, which would have been lifethreatening to the concerned person, was described as such.

Consequently, to avoid the inclusion of such compassionate grounds cases under a subsidiary protection regime, which was never the intention of this Directive, the Presidency is suggesting to limit the scope of sub-paragraph (b) by stating that the real risk of torture or inhuman or degrading treatment or punishment must prevail in his or her country of origin.

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59 Soering v United Kingdom (1989) 11 EHRR 439 [88].
61 In Bonger v The Netherlands, App No 10154/04 (15 September 2005) 14, the European Court of Human Rights stated that ‘neither Article 3 nor any other provision of the Convention and its Protocols guarantees, as such, a right to a residence permit’. In the case of Fornah v Sec’ty of State for the Home Dept v K; Fornah v Sec’ty of State for the Home Dept [2006] UKHL 46, the House of Lords also noted that leave to enter on the basis of article 3 ECHR gives rise to a limited and uncertain status: [35] (Lord Hope); [121] (Lord Brown).
62 12148/02 ASILE 43 (20 September 2002) 6 (citation omitted).
The Directive therefore regulates only ‘classic’ *refoulement* cases – where an individual fears the *positive* infliction of ill-treatment in the country of origin – but not ‘humanitarian’ cases, such as illness, where ill-treatment stems from the country of origin’s failure to provide adequate resources or care combined with termination of care in the host EU State. The assumption is that ill-treatment ‘in the country of origin’ must be constituted by a positive act of harm in that country, rather than deriving from deprivation of health care in the host State plus generally inadequate care in the country of origin. Whether or not decision-makers will interpret the ‘country of origin’ requirement so as to exclude combination cases remains to be seen, but given recent jurisprudence on ‘humanitarian’ claims and the very high threshold imposed on applicants, grants of subsidiary protection on this basis seem unlikely. Since an article 3 ECHR claim cannot be brought directly to the ECJ, seeking a ruling on this point may not be possible. Conversely, the European Court of Human Rights cannot make a ruling on how the Directive should be interpreted or implemented.

Since there is a strong presumption for Convention refugee status where torture is involved, article 15(b) would only apply to persons at risk of torture who were unable to demonstrate a link to a Convention ground (such as cases where perpetrators resort to torture based on purely criminal motivations). The provision’s scope therefore seems to rest primarily in decision-makers’ interpretation of ‘inhuman or degrading treatment or punishment’. While the jurisprudence of the European Court of Human Rights is expected to be particularly influential in this regard, national interpretations may extend the concept in different directions. Early French case law on this provision has focused on protecting individuals from non-State actors whose

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64 *N v Sec'y of State for the Home Dept* [2005] UKHL 31.
65 In the field of asylum, only Member States, not individuals, may appeal to the ECJ: TEC (n. 12) arts 68, 234.
66 In this context, note also the fact that in the international arena, there is no hierarchy of judicial institutions with a final body to resolve conflicts: International Law Commission, ‘Report of the Study Group on Fragmentation of International Law’ UN Doc A/CN.4/L.628 (1 August 2002) [15]. For discussion of the relationship between the ECJ and the European Court of Human Rights, see H. Battjes, *Human Rights Protection in the EU’s Legal Framework: The Relationship between the European Court of Justice and the European Court of Human Rights* (IARI/ILPA Seminar on the Refugee Qualification Directive, London 26 June 2006). In areas where EC law leaves Member States some discretion (which is the case with all the asylum Directives stipulating ‘minimum standards’), Member States retain full responsibility under the ECHR: *Bosphorus v Ireland* App No 45036/98 (30 June 2005) [157]. Accordingly, individual appeal rights to the European Court of Human Rights remain unaffected.
67 UNHCR’s Observations (n 18) [42].
69 It should be noted that ill-treatment due to underlying social or political chaos, or a lack of resources, will only satisfy the requisite level of severity in exceptional circumstances: e.g. *HLR v France* (1997) 26 EHRR 29 [42]; *D v UK* (1997) 24 EHRR 423; *Henan v The Netherlands* App No 13669/03 (24 June 2003); *BB v France* App No 30930/96 (9 March 1998).
conduct the authorities cannot (or will not) proscribe, granting subsidiary protection in cases including domestic violence, threats by an employer, and risks arising from testifying against persons involved in criminal activities.

Paragraph (c) reflects the existence of consistent, albeit varied, State practice of granting some form of complementary protection to persons fleeing the indiscriminate effects of armed conflict or generalized violence without a specific link to Convention grounds. However, its scope is significantly restricted by a requirement that the claimant face an individual threat. The vast majority of Member States supported the 'individual' requirement to avoid 'an undesired opening of the scope of this subparagraph'. It is strengthened by recital 26:

Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.

The combined effect of article 15(c) and recital 26 suggest that a person in an area of indiscriminate violence will need to at least show that he or she is personally at risk, rather than simply being able to claim subsidiary protection status by virtue of geographical location. This is problematic, since indiscriminate violence by definition is random and haphazard. If interpreted even more strictly, it might require individuals to be singled out, which would establish a higher threshold than is required for either Convention-based protection or temporary protection. Indeed, the Temporary Protection Directive protects persons

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70 Commission des Recours des Réfugiés (7 October 2005) App No 535458 (Mme D).
73 12382/02 ASILE 47 (30 September 2002) [4].
75 E.g. UK Secretary of State’s refusal of asylum on the basis of such violence, as recorded in the case of Vilvarajah v UK (1991) 14 EHRR 248 [13]: ‘But it is noted that the incidents you have related were random and part of the army’s general activities directed at discovering and dealing with Tamil extremists and that they do not constitute evidence of persecution’; see also [25], [40], [52], [62].
who have had to leave their country or region of origin, or have been evacuated … and are
unable to return in safe and durable conditions because of the situation prevailing in that
country, who may fall within the scope of Article 1A of the Geneva Convention or other
international or national instruments giving international protection, in particular:
(i) persons who have fled areas of armed conflict or endemic violence;
(ii) persons at serious risk of, or who have been the victims of, systematic or generalised
violations of their human rights. \(^77\)

States seem fearful of according the same protection when individual status determi-
nation procedures are involved, and accordingly demand a higher threshold of individ-
ual harm, even though those individuals would be automatically entitled to protec-
tion if they were part of a mass influx from the same area. There seems to be a deep-
seated fear that whole populations will flee on the basis of generalized violence if
subsidiary protection status does not require individual harm to be demonstrated. \(^78\)
This is counterintuitive both to State practice and the EU’s temporary protection
regime, and some States have in fact refused to transpose the individual element of
article 15(c) into their national law. \(^79\) For the current provision to have any meaning-
ful effect, it would seem that decision-makers will have to be relatively generous in
determining the ‘individual’ aspect of the risk. \(^80\)

For legal and logical consistency, subsidiary protection ought to protect persons
fleeing individually or in small groups from situations which, in a mass influx, would
result in protection. The rationale behind the Temporary Protection Directive is that
the size of the influx makes it inefficient or impossible to process claims in the nor-
mal way, \(^81\) not that the nature of the threat is unique to mass influxes. Therefore to
limit subsidiary protection in this way seems both illogical and inconsistent, premised
on political fear of numbers rather than any legal basis.

When the Directive was first proposed in 2001, the definition of ‘serious harm’
contained an additional paragraph, which provided that it could consist of a ‘violation
of a human right, sufficiently severe to engage the Member State’s international obli-
gations’. The potentially wide-ranging scope of this provision was in fact its downfall,
since the considerable flexibility it would have provided for assessing protection

\(^77\) Temporary Protection Directive (n. 2) art. 2(c).
\(^78\) 12199/02 ASILE 45 (25 September 2002).
\(^79\) E.g. Belgium’s Loi modifiant la loi du 15 décembre 1980 sur l’accès au territoire, le séjour, l’établissement et
l’éloignement des étrangers (15 September 2006) art 26, which inserted a new art 48/4(2)(c) into the
Aliens Act 1980: ‘les menaces graves contre la vie ou la personne d’un civil en raison d’une vio-
lence aveugle en cas de de conflit armé interne ou international’; Lithuania’s Law on the Legal
\(^80\) See e.g. French jurisprudence on this provision: Commission des Recours des Réfugiés SR (17
February 2006) App No 419162 (Mlle K) (applicant received subsidiary protection on the basis
of article 15(c) due to a situation of generalized violence and internal armed conflict in Iraq, and
the fact she was a single Assyro-Chaldean Christian woman with supposed financial means);
Commission des Recours des Réfugiés SR (17 February 2006) App No 497089 (M-A) (applicant
received subsidiary protection on the basis of article 15(c) due to a situation of generalized vio-
lence and internal armed conflict in Iraq, and the fact that he had been an official in the former
regime and was a member of a particular political party).
\(^81\) See Temporary Protection Directive (n. 2) art. 2(a).
needs was considered as too open and uncertain. The present wording of article 15 offers relatively little room for expansive interpretation, and for this reason it is likely that the phrase ‘inhuman or degrading treatment or punishment’ will become the focal point for seeking to broaden the Directive’s scope, functioning in a similar fashion to the Convention’s ‘membership of a particular social group’ category.

It seems absurd to exclude known protection categories from the ambit of the Directive. Doing so does not obliterate the existence of such categories, but simply recasts the class of non-removable people with an ill-defined legal status. As Vedsted-Hansen has noted, ‘they are likely to end up in a kind of tolerated situation in the actual Member State that may be prohibited from deporting them.’82 At the domestic level, it might be possible to argue that such persons ought to receive subsidiary protection status because their situation is analogous to that of currently delineated beneficiaries, (paralleling the extension of protection offered to ‘de facto refugees’ in the past). However, given the lack of latitude in the Directive to protect additional groups,83 the outcome may be a hardening of the law on the defined subsidiary protection categories, and a reluctance to grant similar protection to persons outside those categories who, ironically, may have had a better claim to protection prior to the introduction of the Directive. While this is not a reason to abandon the harmonization attempt, it highlights the problems with narrowing down the scope of subsidiary protection too far.

3.2 Exclusion Clauses

The subsidiary protection exclusion clauses are broader than the refugee ones (both under the Qualification Directive and the Convention). In addition to the refugee exclusion grounds, a person is excluded from subsidiary protection if he or she ‘constitutes a danger to the community or to the security of the country in which he or she is’ (art. 17(1)(d)). This effectively constitutes the merger of article 33(2) and article 1F of the Refugee Convention which was considered untenable, as a matter of international law, for refugees under the Directive.84 However, the lack of an international instrument on subsidiary protection meant that no analogous legal argument could be satisfied with respect to its beneficiaries, although of course States may be precluded from removing them from their territories due to their non-refoulement obligation under human rights law.

Additionally, article 17(3) of the Qualification Directive allows Member States to exclude an individual from subsidiary protection status

83 On this point, see M-T. Gil-Bazo, Refugee Status and Subsidiary Protection under EC Law: The EC Qualifications Directive and the Right to Be Granted Asylum, revised paper from ‘How Much Freedom, Security and Justice?’ ILPA, Justice and the British Institute for Comparative and International Law Conference, London May 2005, p. 4–6, 18–21, querying whether a decision by a Member State to grant subsidiary protection to additional categories of persons in accordance with international law could be interpreted as a breach of EC law.
84 See section 2.2 above.
if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes.

This provision has no parallel in the Refugee Convention.

Finally, as discussed above in the context of exclusion from refugee status, persons who instigate or otherwise finance, plan or incite terrorist acts are excluded from protection.\textsuperscript{85}

4. Status

The Qualification Directive entrenches a hierarchy of rights at a number of levels. First, and of primary relevance to the discussion below, is the superiority of refugee status over subsidiary protection status. The political compromises needed to secure all Member States’ agreement on the final text of the Directive resulted in a more greatly differentiated and diluted set of substantive rights for beneficiaries of subsidiary protection than had been originally proposed – a proposal that had itself been criticized for failing to provide a single, equal status.\textsuperscript{86} Secondly, the entitlements of refugees’ family members are more extensive than those accorded to family members of beneficiaries of subsidiary protection.\textsuperscript{87} Finally, in some cases, subsidiary protection status may provide more extensive rights than those received by refugees’ family members.\textsuperscript{88}

In May 2003, Germany still had 12 reservations in place on social rights and integration provisions. It wanted to establish subsidiary protection at the level of the former \textit{Duldung} (tolerance), described as ‘a non-status on the level of immigration rights’.\textsuperscript{89} By September 2003, all the other Member States had agreed on the text of

\textsuperscript{85} Qualification Directive, recital 22.

\textsuperscript{86} As Lambert notes, this is exacerbated by the fact that neither the Reception Conditions Directive nor the Family Reunification Directive apply to beneficiaries of subsidiary protection: Lambert (n. 5) 176. Klug suggests that the original proposal for the Directive created a single rights regime for refugees and beneficiaries of complementary protection: Klug (n. 23) 618. This is incorrect. Although the Explanatory Memorandum (n. 8) stated that ‘the rules laid down [with respect to status] apply to both categories of persons’, it added that this was so ‘\textit{unless otherwise indicated}’: 28 (emphasis added). A number of distinctions were already present in the original proposal.

\textsuperscript{87} Article 23(2) of the Qualification Directive provides that although family members of refugees and beneficiaries of subsidiary protection ‘are entitled to claim the benefits referred to in Articles 24 to 34’, that paragraph goes on to state: ‘In so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits.’ Only family members of refugees are entitled to a residence permit under article 24.

\textsuperscript{88} Art. 23(4) provides that: ‘Notwithstanding paragraphs 1 and 2 [relating to the conferral of benefits on family members], Member States may refuse, reduce or withdraw the benefits referred therein for reasons of national security or public order.’

\textsuperscript{89} Pro Asyl, ‘Council for Justice and Home Affairs in Brussels: Common EU Asylum System in Danger of Falling through because of Germany: Appeal to Chancellor Schroeder and Foreign
the Directive, but Germany refused to agree and postponed further negotiations.\textsuperscript{90} It was feared – rightly so – that Member States might submit to German demands simply to have the text agreed by the deadline of April 2004.\textsuperscript{91} Three meetings in March 2004 ultimately secured agreement on a text which accepted many of the German demands, finalized on 31 March 2004.

The areas of difference between refugee status and subsidiary protection status are summarized in the table below.\textsuperscript{92} Legally, there is no reason why the source of protection should lead to differentiation in the rights and status accorded to a beneficiary. UNHCR has stated that rights and benefits should be based on need rather than the grounds on which a person has been granted protection, and that there is accordingly no valid reason to treat beneficiaries of subsidiary protection differently from Convention refugees.\textsuperscript{93} Numerous other advocates have stressed the importance of treating refugees and beneficiaries of subsidiary protection equally.\textsuperscript{94}


\textsuperscript{91} Refugee Council (UK), International Protection Project Update (September 2003), p. 2.

\textsuperscript{92} For an extensive discussion on the points of difference, see McAdam (n. 1), p. 497–514.

\textsuperscript{93} UNHCR’s Observations (n. 18) [46]; UNHCR, Note on Key Issues of Concern to UNHCR on the Draft Qualification Directive (March 2004), p. 2; UNHCR, ‘Towards a Common European Asylum System’, in C.D.U. de Sousa and P. de Bruycker (eds), The Emergence of a European Asylum Policy (Brussels: Bruylant 2004) 249–50. The rights granted under the Directive to refugees are not identical to those contained in the Refugee Convention, although art. 20(1) states that the former are ‘without prejudice’ to the latter. Accordingly, nothing in the Directive should be understood as displacing additional or more expansive Convention rights. For discussion of the relationship between the two instruments on this point, see Klug (n. 23) 619–20. Further, UNHCR has commented that ‘[I]t is unthinkable that the Member States of the European Union would deny refugees the exercise of these Convention rights simply by reason of their express non-incorporation into Community rule. Still, there is a drafting problem that needs to be remedied’: UNHCR, Towards a Common European Asylum System (n. 94), p. 246.

<table>
<thead>
<tr>
<th>Family unity and rights of family members (art. 23)</th>
<th>Refugee status</th>
<th>Subsidiary protection status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family members(^95) entitled to same substantive rights</td>
<td>Same entitlements, but States can define applicable conditions to such benefits, provided they guarantee ‘an adequate standard of living’.</td>
<td></td>
</tr>
</tbody>
</table>

| Residence permits (art. 24) | • As soon as possible • At least 3 years and renewable • Family members: less than 3 years and renewable | • As soon as possible • At least 1 year and renewable |

| Travel document (art. 25) | • Convention travel document | • Travel does at least for serious humanitarian reasons • Only to those who cannot obtain a national passport |

| Access to employment (art. 26) | May engage in employed or self-employed activities immediately after status granted | May engage in employed or self-employed activities immediately after status granted, but ‘the situation of the labour market in the Member States may be taken into account, including for possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law.’ |

| Social welfare (art. 28) | Entitled to necessary social assistance on same terms as nationals | Entitled to necessary social assistance on same terms as nationals, but Member States may limit social assistance granted to beneficiaries of SP to core benefits. |

| Health care (art. 29) | Access to health care under the same conditions as nationals | Access to health care under the same conditions as nationals, but Member States may limit health care granted to beneficiaries of SP to core benefits |

| Access to integration facilities (art. 33) | Provision for integration programmes considered to be appropriate to help integration into society | Where Member States consider it appropriate, access shall also be granted to integration programmes |

\(^95\) ‘Family members’ are defined in art. 2(h)) as:
- spouse or unmarried partner in stable relationship (where the national aliens law/practice treats them in the same way);
- minor unmarried and dependent children.
Art. 23(5) permits Member States to grant rights to ‘other close relatives’ who:
- lived with the family in the country of origin; and
- were wholly or mainly dependent on the beneficiary of refugee/SP status.
Indeed, during the drafting process the UK government had initially seemed to recognize this, stating that ‘[a]n individual’s needs are the same regardless of the status granted; it would help limit the number of appeals by those refused refugee status but granted subsidiary protection’.96 (It later shifted its position, however.97) The House of Lords Select Committee noted further that:

We urge the Government to push for the extension of the same rights to everybody entitled to international protection. Not only would this remove an apparently unjustified discrimination between Geneva Convention refugees and beneficiaries of subsidiary protection, it would also, as the Government itself recognises, have practical advantages. It would help limit the number of appeals by those refused refugee status but granted subsidiary protection.98

The European Parliament, in its Explanatory Statement to its amendments to the Commission proposal, noted that differences between the rights accorded to refugees vis-à-vis beneficiaries of subsidiary protection were arbitrary, particularly as the statuses were supposed to be ‘complementary rather than hierarchical.99

Equivalent treatment would not only reduce fragmentation of the international protection regime but might also minimize the number of appeals against refusal of Convention status by persons seeking to obtain the full set of rights which that encompasses.100 Indeed, the extra litigation that may result from this issue itself provides an incentive for the State to grant identical rights. Article 3, strengthened by recital 8, does provide that:

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

However, it does not prevent Member States currently providing a higher level of protection to beneficiaries of subsidiary protection from lowering their standards.101

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96 ‘Explanatory Memorandum Submitted by the Home Office on Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection (2001/0207 (CNS))’ in Minutes of Evidence Taken before the EU Committee (Sub-Committee E) [22], in House of Lords (n. 18) Oral Evidence 63.
97 Refugee Council (n. 90), p. 12.
98 House of Lords (n. 18), p. 27 [111].
99 European Parliament (n. 18), p. 54.
This is a deliberate interpretative choice by Member States, since it does not follow from the terms of article 63(1)(c) TEC that minimum standards necessitate the lowering of pre-existing higher standards. Indeed, the European Parliament suggested an amendment to prevent States from using the provision to reduce their present standards, however this was not adopted by the Member States. Nevertheless, the UK has indicated that it will maintain higher standards in certain areas, such as broadening the scope of serious harm to include unlawful killing, and applying the Directive to all asylum applicants, including from within the EU.

Lambert, however, considers the wording of article 3 to be problematic because standards that are ‘compatible’ with the Directive could be interpreted to mean ‘consistent with the provisions contained in the Directive’. Accordingly, Member States with less restrictive provisions in force would have to adopt more restrictive ones to bring them into line with the Directive.

5. Conclusion

The Qualification Directive ought help to clarify the Member States’ previously diverse practices relating to refugees and other people in need of international protection, and in this way stabilize the pace of reform. Together, these may be viewed as positive outcomes. However, the decision to restrict the Directive to simply harmonizing existing concepts and methods of subsidiary protection in the EU means that it does not create a new system of protection per se, but distils State practice by (supposedly) drawing on the ‘best’ elements of the former 15 Member States’ national systems. Indeed, Geoff Gilbert has described the process as one of ‘equalizing down’ at the refugee’s expense, arguing that harmonization has been driven by an immigration control mentality, rather than one focused on the protection needs of individuals, and the international protection obligations of States. Although the 1999 Tampere Conclusions called upon Member States to respect the ‘the full and inclu-


European Parliament (n. 18) Amendment 18.


Home Office (n. 73) [4.2].

Lambert (n. 5) 164. Although note the jurisprudence of the ECJ, which suggests that Member States may deviate from Directives to the benefit of those concerned: eg Case C-84/94 UK v Council of the European Union [1996] ECR I-5755 [17]; Case C-2/97 Società italiana petroli SpA (IP) v Borsana Srl [1998] ECR I-8597 [35].


Explanatory Memorandum (n. 8) 5.

sive application of the Geneva Convention’ and the right to seek asylum (further supported in the 2001 Declaration of States Parties to the 1951 Convention), the rhetorical flourishes that kickstarted the process of harmonization have not necessarily been translated into the provisions of the various Directives.

The result is a political compromise that, while based on international and regional human rights standards, remains conservative in its scope. It is not an innovative blueprint applying human rights law to the protection context, since it extracts the least contestable human rights-based protections which already formed part of most Member States’ protection policies. The ‘new’ element of subsidiary protection in the Qualification Directive is the provision of a definitive status for its beneficiaries, although the status ultimately agreed upon reflects the hierarchical structure of the Directive which equates the ‘full and inclusive’ application of the Convention with a superior status for refugees.

The Role of the European Court of Justice

Jean-Yves Carlier*

Introduction

Before the Treaty of Amsterdam, one of the main criticisms concerning the intergovernmental immigration policy within the third pillar of Justice and Home Affairs was that no competence was delivered to the ECJ. This was the case, for instance, for the Joint Position on the harmonized application of the definition of the term refugee in the Geneva Convention (1996, OJ, L. 63). Thus, it is interesting today to specify the role and the competence of the ECJ with regard to the Qualification Directive.

It is known that, generally speaking, there are two kinds of appeals to the Court of Justice in EC law. First, a direct appeal, mainly through the review of legality of acts. Second, an indirect appeal through the preliminary question by a domestic court. These two complementary remedies, the common one and the domestic one, are usually presented as, and I quote the Court: “a complete system of legal remedies and procedures to permit the Court of Justice to review the legality of measures adopted by the [European] institutions” (UPA, § 40). This is not totally correct. As in cases Union de Pequeños Agricultores, C-50/00 (2002) and Jego-Quéré, C-263/02 (2004), the Court did reaffirm, contrary to the views of the Court of First Instance (Jego-Quéré, 2002) and to the Opinion of General Attorney Jacobs, that for a natural person to institute proceedings against an act is not “of direct and individual concern” if he is not singled out, even when there is no possibility of individual appeal to the domestic courts. This is not really important in the context of the Qualification Directive, as it is clear that a natural person could not be considered as having a “direct and individual concern” following Article 230 EC. The only means of common EC protection will, of course, be the preliminary question. However, before we turn to this, let me just make two more short remarks on the direct appeal by review of legality.

The first remark is on the possibility for a European Institution, such as the Parliament or the Commission, to institute proceedings against a directive. This was not done against the Qualification directive, but was done, for instance, by the Parliament against the Family reunification directive. The arrest in the Family reunification case (2006) is usually presented as negative because the Court refused the request for annulment of some articles on the basis of the protection of family life. My comment would not be so severe. Even if the Court did relinquish a large margin of appreciation to the Council, it was after an examination of the proportionality of the measure and with reference, for the first time in an arrest, to the Charter of fundamental rights. This is important, in my view, since in Article 18 the Charter states that “The

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right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951”.

The second remark would be for the future, if the Constitution should enter into force. Instituting proceedings against an act would be a bit more open for persons, but only for regulatory acts that do not entail implementing measures, which would still not be the case for a directive or framework law (Const. Art. III-365, § 4).

Let us turn now to the preliminary question with regard to a directive in general, and to the Qualification Directive in particular.

There are two questions.

First, the question of when. When is there a possibility or an obligation of preliminary question (I)? It is a question of procedure.

Second, the question of what. What shall be the question? It is also the question of the direct effect of a directive (II). It is a question of content.

I. The Possibility of Preliminary Question (When?)

When can domestic courts refer a question to the ECJ? The general rule of Article 234 EC is well known: “any” court or tribunal “may” refer questions to the Court “if it considers that a decision on the question is necessary to enable it to give judgment” and “courts against whose decisions there is no judicial remedy under national law” must refer such questions.

It is also known that there is a specific rule in Title IV of the Treaty (which concerns not only visa, asylum and immigration, but also other policies linked to free movement of persons, such as in International private law: Regulation Brussels I and IIbis). This specific rule of Article 68 EC introduces two limitations to preliminary questions. One is formal: only courts whose decisions are not subject to review have competence to refer a question in this matter (Art. 68, § 1 EC). One is substantial, and probably less important for the Qualification Directive. It is the exclusion of questions about “maintenance of law and order and the safeguarding of national security” linked to internal borders control (Art. 68, § 2, EC).

Let us turn to the general rule of article 234 EC (A) before taking a look at the specific rule of Article 68 EC (B).

A. General Rule (234 EC)

A first instance court “may” refer a question to the ECJ and a “court whose decisions are not subject to review”, which usually means a supreme court (House of Lords, Constitutional Court, Cour de Cassation, Conseil d’Etat, Raad van State, …), must refer a question. But both “first” and “last” instance courts refer the question “if it considers that a decision on the question is necessary to enable it to give judgment”. Thus, even courts whose decisions are not subject to review have a kind of margin of appreciation. They enjoy a power of appraisal to ascertain whether a question is necessary (Gilfit, 1982). It is clear that when Article 234, § 3, uses the word “such” a question, it refers to a “necessary” question, as in § 2. However, this power of “appraisal” does not simply lead to a possibility to refer the question. In fact, the responsibility of the State may be involved if a court, and especially a Supreme Court due to
its duty to refer the question, did not refer a proposed question and made a “manifest infringements of [Community] law” (Köbler, 2003, §§ 53-55). After having said that in the Köbler case, the Court confirmed it and condemned the Italian legislation that excluded in general the responsibility of a Supreme Court when not correctly applying community law (Traghetti del Mediterraneo SpA, 2006).

The problem, for a natural person, and particularly for a refugee refused admittance, would be of course to introduce a new procedure in responsibility against the State afterwards. This means that, in practice, in most of the cases, courts whose decisions are not subject to review would benefit from a large power of appraisal.

B. Special Rule (68 EC)

If we consider now the special rule of Article 68 EC, we know that only courts whose decisions are not subject to review shall refer a preliminary question. Three points are of interest: (1) What is a court whose decisions are not subject to review?, (2) What is the role of first instance courts?, (3) Is there, for courts whose decisions are not subject to review, an obligation to refer questions?

1) What is a court whose decisions are not subject to review?
A court against whose decisions there is no judicial remedy under national law is, in principle, a Supreme Court. However, a more concrete view may argue that it is, in concreto, in the case pending that the decision will not be subject to review. This could be important in an asylum procedures as, in practice, the last instance could be different in different procedures, for instance for a manifestly unfounded application. Case law seems to go in this direction (Costa, 1964; Georgescu, 2004 about the visa regulation for Rumanians, 539/2000, where the Court says that “the decision in principal will be subject to review”, § 32). There was a similar limitation for the preliminary question on the Brussels Convention (1968, protocol of 1971, OJ 1990, L 189/2 for a consolidated version, before the Regulation Brussels I) that was limited to appeal courts (which is, paradoxically, less limited than in Regulation Brussels I now included in Title IV EC; the Roma Convention on Conflict of Laws in contract matters was also limited to supreme courts and with just a “faculty”, OJ 1989, L 48/1, art. 2). In the case Torline (2004) the Court did accept a question of a first instance tribunal that was not subject to review.

2) What is the role of first instance courts?
We should bear in mind that even if a first instance court is not able to refer a preliminary question to the Court, it has to apply and interpret Community law. What if this tribunal has some doubt on the conformity of domestic law with Community law or of Community law with International law? It is a question of content and of conflict of laws, depending also on the “effet direct” of the directive (infra, II), but let us just say here that the domestic tribunal has to apply domestic law in conformity with Community law, but may not, in principle, judge the conformity of Community law with International law. The question here is just what could the tribunal do? In his book on European Asylum Law and International Law (Martinus Nijhoff, 2006), requested reading in this matter, Hemme Battjes suggests several solutions (pp. 573-975). The most realistic is to declare the Qualification Directive incompatible with the
Geneva Convention, to refuse to apply the directive on the basis of Article 307 EC. This will force the State authority to introduce an appeal with, probably, at the end, a preliminary question.

3) Is there an obligation to refer questions?
We are speaking here only of Courts whose decisions are not subject to review. Article 68 EC is, on this point, not exactly the same as Article 234 EC. It says that this Court “shall … request the Court of Justice to give a ruling thereon” and not that it “must” refer a question. This difference does not lead to a different interpretation. As we have seen, through the “necessity” of the question, there is always a possibility of appraisal.

II. The Content of the Preliminary Question, Linked to the Direct Effect

One could imagine two kinds of questions. First, the conformity of national law with the Qualification Directive (A). Second, the conformity of the Qualification Directive with International law (B).

A. Conformity of Domestic Law with the Qualification Directive

As the Qualification Directive provides for minimum standards with, as often in a directive, the possibility for Member States to “introduce or retain more favourable standards”, there is no need for a preliminary question if the domestic law is more favourable than the directive. For instance on the definition of subsidiary protection, in his transposition of the Qualification Directive, the Belgian law did decide to suppress the terms “and individual” in Article 15, c, which means that serious harm consists of “serious […] threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”. It is a broader definition.

On the contrary, it could happen that domestic law is less protective than the directive, for instance if there is no subsidiary protection provided. As we are after the date of transposition, I will not address the question of the effect of a directive before the date of transposition and the obligation for States to refrain from taking any measures liable to seriously compromise the result prescribed by the directive (Internenvironment Wallonie, 1997). I would just draw your attention to the Mangold (2005) case, that could be of interest before but also after the date of transposition for a directive linked to fundamental rights. The fundamental right in question in this case was the right to equal treatment regarding age. As the date for the transposition of the non-discrimination directive (Dir. 2000/78) was not yet past, and as Article 13 EC on non-discrimination is not of direct effect, Germany said that its domestic law, allowing fixed-term employment contracts for older workers was not contrary to Community law. The Court said that it was in contradiction with Community law because “the source of the actual principle underlying the prohibition of those forms of discrimination is found […] in various international instruments and in the constitutional traditions common to the Member States” (§ 74) so that “The principle of
THE ROLE OF THE EUROPEAN COURT OF JUSTICE

non-discrimination on grounds of age must thus be regarded as a general principle of Community law” (§ 75). This could be of importance, for two reasons, also in asylum law and for the interpretation of the Qualification Directive, even after the date of transposition. First, it is difficult to know today how far the Court could go on the principle of non-discrimination for the different criteria (race, ethnicity, religion, conviction, sexual orientation, …) as a general principle of Community law. Second, it is interesting to note that when a directive confirms a principle of International law, this could reach the level of general principle of Community law.

The central question now is, what is the effect of the directive after the date of transposition if a Member State did not implement the directive or did it incorrectly. Of course, the directive has a sort of indirect effect in a way that domestic courts must read domestic law in accordance with Community law. This is the theory of the conciliatory interpretation of domestic and Community law. But what happens if it is impossible and if there are doubts so that a Supreme Court should ask a preliminary question? Then, of course, the central question is that of the direct effect of a directive, and particularly the vertical direct effect between a person and the State (I will not address here the horizontal direct effect, as the Qualification Directive does not impose obligations between individuals, but this debate, which in my view is not closed, could be of importance for the “reception” directive).

If the Treaty provided that a regulation is “directly applicable” (Art. 249 EC), it did not for a directive. However, case law came to the conclusion that it is not because a directive is not directly applicable that some provision of the directive could not have direct effect. The best proof that a directive has, at least, some effect, even without transposition, is in the possibility for the Commission to “bring the matter before the Court of justice” after the date of transposition. A provision of Community law, including a directive, has direct effect when it is clear, precise and unconditional. The wording of each provision is the most important test.

If one tries the exercise to look at the wording of all articles in the Qualification Directive, the result will not be easy, and I will not do it here. I will just call your attention to two elements. First, some articles do use the wording “may be” (Art. 5, 8). In this case, direct effect seems unlikely, but most of those articles concern the possibility for Member States to do more than the minimum standard. The second point is, in my view, the most important: the obligation to grant (I would prefer to recognize) refugee status (Art. 13) or subsidiary protection (Art. 18) if the applicant for international protection fulfils the criteria of the definition. And the wording of the important elements of interpretation of the definition is clear and precise: “Actors of persecution or serious harm include” (Art. 6). This provision is quite important for the definition of non-State actors that “are unable or unwilling to provide protection against persecution”. This definition is broader than the one found in the Joint Position in 1996, and applied by domestic case law in some Member States like France; “acts of persecution within the meaning of Article 1A of the Geneva Convention must” (Art. 9); “serious harm consists of” (Art. 15). All those provisions are clearly of direct effect. If, for instance, a domestic law doesn’t have any status of subsidiary protection, this would be in contradiction with the statement of Article 18 “Member States shall grant subsidiary protection status…”, even if, according to the procedure directive, Member States may have separate procedures for subsidiary protection (Art. 3, §§ 3 and 4, Procedure directive).
In conclusion, one may say that most of the provisions of the Qualification Directive are of direct effect.

B. Conformity of the Qualification Directive with International Law

One could see two possibilities. First, the national legislator decides that on one point or another the Qualification Directive is not in conformity with international law. If domestic law then adapts the transposition of the directive to international law, there is no problem. It does not matter that the criticism against the directive be correct or not. If we assume that the result would be a more favourable standard of protection, this would be in conformity with the directive (Art. 3) and would not require a preliminary rule.

The second possibility is that a domestic court thinks that one point or another of the directive is in contradiction with International and domestic law does not correct this. Even if there is no law of transposition, or if domestic law does not cover this point, it would be difficult to sustain that there is no obligation to apply the directive because this specific provision would not be of direct effect. The indirect effect would impose the conciliatory interpretation: domestic law, and even the silence of domestic law, must be interpreted in conformity with the directive. However, at least for the Qualification Directive, all rules appear to set minimum standards and it is not Community law as such that would be in contradiction with International law, but the domestic law that can protect more, according to the directive, and must do it, according to International law. Then, in conformity with its Constitutional law, the domestic court could refuse to apply the domestic law in contradiction to International law. If there is a doubt on the interpretation of the conformity between Community law, as transposed by national law, and International law, at the end of the domestic procedure, it would be the responsibility of the Court whose decision will not be subject to review, to refer a preliminary question to the ECJ.

In conclusion, it could be said that, in theory, a solution could be found for every difficulty of interpretation of the Qualification Directive, if necessary by a preliminary rule in Luxembourg. I’m afraid that it will not be so easy in practice. Let me conclude by an example.

There is an asylum seeker coming from Afghanistan. His application for refugee status is refused on exclusion rule because he committed “particularly cruel actions that even committed with an allegedly political objective is classified as serious non-political crime”, to use the wording of Article 12, § 2, b Qualification Directive. His lawyer believes that this is contrary to the Geneva Convention. Shall he obtain from a first instance domestic court a decision that refuses to apply domestic law, arguing that if it is in conformity with Community law, it is not in conformity with International law? If yes, after appeal, shall he obtain from the Supreme Court a preliminary question to the Court, proving that this is necessary to give judgment? If yes, and if the State did take the precaution of adding that this decision and the order to leave the country was a decision relating to “the safeguarding of internal security”, the State would say then that, according to Article 68, § 2 EC, “The Court of Justice shall not have jurisdiction to rule on any measure or decision … relating to the maintenance of law and order and the safeguarding of internal security”. The lawyer could say that this does not apply to the Qualification Directive because Article 68, § 2 EC concerns
a “decision taken pursuant to Article 62 (1), which is the absence of control at internal borders”. The State could contest that this was an error and should call on Article 62 (2) concerning external borders and that, anyway, internal security remains relevant for internal borders with other Member States. The lawyer could argue that, in any case, it is up to the Luxembourg court to decide if this is a question of internal security or not, like in the visa case (Com. v. Council, C-170/56, 1988, see also CFI, Segi, T-2004). Will the Court follow the lawyer and give a preliminary rule? If not, could he take the train to Strasbourg and contest the effectivity of the Community protection system for fundamental rights? He will then have to face the Bosphorus case (E Court HR, Bosphorus, 2005) considering that the Community legal order provides for protection that is “equivalent” to that provided under the Human Rights Convention.

I leave this open for the practice.
Part Two:
Problem Issues

Ján Šikuta*

At the Tampere European Council in October 1999, the Member States undertook to establish a Common European Asylum System (CEAS) based on the full and inclusive application of the 1951 Geneva Convention relating to the Status of Refugees, as supplemented by the 1967 New York Protocol, seeking to affirm the principle of non-refoulement and to ensure that no one in need of international protection is sent back to persecution. The creation of such a system entails, in the short term, closer alignment of the rules on the recognition and content of refugee status.

The main objective of the Qualification Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to guarantee that a minimum level of benefits is available for such persons in all Member States. The Directive will apply to all applications made at the border or in the territory of a Member State. In addition, Member States are free to introduce or retain more favourable standards.

The Directive’s Preamble refers to other documents, in particular to the 1951 Refugee Convention as the cornerstone of the international legal regime for the protection of refugees (preambular paragraph 3).

Paragraphs 10 and 11 of the Preamble read:

“This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.

With respect to the treatment of persons falling within the scope of this Directive, Members States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.”

This makes clear that the Directive seeks to incorporate Member States’ obligations both under the 1951 Refugee Convention as well as the 1950 European Human Rights Convention (ECHR).

As an aside, it is worth recalling that all EU Member States are parties to the ECHR, given that they are all members of the Council of Europe, whereas not all

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Council of Europe Member States are members of the EU, and consequently are not bound by the Directive or other binding EC legislation.

A. The 1951 Refugee Convention as a Tool for Specifying Acts of Persecution

The relationship between the Refugee Convention and the ECHR is also highlighted by Article 9(1) of the Directive, which deals with an individual’s qualification as a refugee:

"Acts of persecution within the meaning of Article 1 A of the Geneva Convention must:
(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
(b) be accumulation of various measures, including violations of human rights which is sufficiently severe as to the affect an individual in a similar manner as mentioned in (a)."

Therefore, while the definition of “refugee” is formulated in Article 2(c) of the Directive as meaning a third country national or a stateless person, who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality or former habitual residence, and is unable, or, owing to such fear, is unwilling to return and to avail himself or herself of the protection of that country”, substantially reflecting Article 1A(2) of the Refugee Convention, Article 9 of the Directive uses the ECHR to help enumerate and identify acts that may constitute persecution, for the purposes of the Directive’s definition.

Article 15(2) of the ECHR provides that: “no derogation from Article 2 [right to life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [prohibition of torture and inhuman or degrading treatment or punishment], 4 (paragraph 1) [prohibition of slavery and servitude] and 7 [no punishment without law] shall be made under this provision.”

It can be therefore concluded that according to Article 9(1) of the Directive, violations of certain ECHR rights and freedoms may be considered as acts of persecution for the purposes of Directive’s refugee definition, and thereby qualify asylum applicants for recognition as refugees (provided that the other elements of the refugee definition are met).

B. Directive, National Law and the ECHR

The Directive came into force on 20 October 2004 and Member States had to transpose it into domestic law by 10 October 2006. It is thus clear that the Directive impacts on national law, which in turn has an effect on the European Court of Human Rights in Strasbourg and its jurisprudence.
Content of International Protection

B.1 Protection from Refoulement

As has already been noted, cases of refoulement, expulsion or deportation of a third country national or stateless person may violate Article 3 of the ECHR where such expulsion may be considered as (or result in) torture, inhuman or degrading treatment or punishment.

The Qualification Directive deals with protection from refoulement in Article 21, which provides that:

“1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.
2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when
   (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or
   (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.”

A similar provision is contained in the 1951 Refugee Convention. Articles 32 and 33 deal with expulsion and prohibition of expulsion or return, according to which “no Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”. The benefit of that provision may not, however, “be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”

It is thus clear that the exception to the non-refoulement principle applies only to persons whom there are reasonable grounds for considering a danger to national security, or who have been convicted by a final judgement of a particularly serious crime and are a danger to the security of the country or community of the country.

By contrast, Article 3 of the ECHR contains an absolute protection from removal to torture, inhuman or degrading treatment or punishment, regardless of whether the individual concerned constitutes a danger to the security or community of the country. In the Court’s opinion, “Article 3 of the Convention enshrines one of the fun-
damental values of the democratic societies making up the Council of Europe”. ¹ This absolute protection was demonstrated also in several Court judgements, such as Sorensen v. United Kingdom, and Ireland v. United Kingdom, where it was said: “it follows that the prohibition under Article 3 of the Convention is an absolute one and that there can never be under the Convention, or under international law, a justification for acts in breach of that provision.”

B.2 Maintaining Family Unity

Expulsion of a third country national or stateless person can also be viewed also from the perspective of maintaining the family unity. Article 23 of the Directive requires Member States to ensure that family unity can be maintained.

While the 1951 Refugee Convention does not refer to the principle of family unity as such, Article 8 of the ECHR provides that “[e]veryone has the right to respect for his private and family life, his home and his correspondence”. Section 2 of that provision reads: “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

That means that a State may only interfere with family life if: (a) the interference is in accordance with law; (b) is for a specified reason (national security, public safety, etc) and (c) is necessary in a democratic society. The first of these is particularly important in light of ECHR jurisprudence, since the Qualification Directive (like any other EU binding legislation) establishes certain conditions, criteria and standards which Member States are obliged to respect, and which must be implemented in national law. It is according to such law that any interference must be assessed.

As regards the Strasbourg Court’s case law, for cases of expulsion of family members the Court has developed the so-called Boultif criteria, which a should be taken into consideration when assessing whether expulsion amounts to a violation of Article 8 of the ECHR:

- the nature and seriousness of the offence committed by the applicant (if any);
- the length of the applicant’s stay in the country from which s/he is to be expelled;
- the time elapsed since any offence was committed and the applicant’s conduct during that period;
- the nationalities of the various persons concerned;²
- the applicant’s family situation, such as the length of marriage, and other factors expressing the effectiveness of a couple’s family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age;
- the best interests and well-being of the children;

¹ Ahmed v Austria, Application No. 25964/94.
² Boultif v Switzerland, Application No. 54273/00.
- the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled;
- the strength, solidity of social, cultural and family ties with the host country and with the country of destination;
- the seriousness of difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

These criteria were recently reaffirmed and further developed by the Grand Chamber in Uner v. The Netherlands.3

B.3 Freedom of Movement within the Member State

Issues relating to the expulsion of a third country national are very closely connected to those concerning the admission of foreigners to EU territory, and the regulation of their right to liberty and freedom of movement. It is understandable that, prior to the expulsion of a third country national, an assessment must be made of whether his/her deportation would constitute a breach of the basic human right contained in Article 3 of the ECHR – the prohibition on torture and inhuman or degrading treatment or punishment.

According to Article 32 of the Directive, Member States must accord freedom of movement within their territory to beneficiaries of refugee or subsidiary protection status, under the same conditions and restrictions as those provided for other third country nationals legally resident in their territories.

Similarly, according to Article 26 of the 1951 Refugee Convention, each Contracting State must accord to refugees lawfully in its territory the right to choose their place of residence and to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.

Article 5(1) of the ECHR also provides that: “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law”. Paragraph (f) includes as such a case: “the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition”.

While there is no dispute that Member States must allow a third country national or stateless person to submit a request for international or subsidiary protection (see, for example, Articles 2(g), which defines “application for international protection”) and Article 4(5)(d), which provides that “the applicant [must have] applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so”), there are different opinions regarding the lawfulness of States’ restrictions on (or deprivation of) the freedom of movement of those seeking international protection, namely asylum-seekers. Whether such persons may be detained, and if so, for how long and on what grounds, are questions which States have not formally resolved.

3 Application No. 46410/99.
Article 5 of the ECHR does not prohibit detention as such, but it contains an exhaustive list of situations in which detention may be resorted to, as well as procedural guarantees. Article 5 does not differentiate between nationals, third country nationals or stateless persons, instead using the term “everyone”. Article 5(1)(f) of the ECHR, from its context, can be interpreted as relating only to non-nationals, foreigners and aliens, given that only those categories of individuals can be deported or extradited, or can be prevented from entering an EU Member State. However, this provision does not make any distinction between ordinary migrants, foreigners, and aliens, on the one hand, and, on the other, asylum-seekers, refugees or other third country nationals seeking international protection or subsidiary protection, as covered by the Qualification Directive.

In other words, while Article 5(1)(f) of the ECHR does not distinguish between different categories of non-nationals, the Qualification Directive does.

UNHCR argues that the detention of asylum-seekers is inherently undesirable under normal circumstances. The Strasbourg Court’s position has typically been that States “have the undeniable sovereign right to control aliens’ entry into and residence in their territory”.

However, this is constrained by Article 5(1)(f) of the ECHR, which only permits an alien’s detention under the following circumstances:
- in accordance with a procedure prescribed by law;
- to prevent his/her effecting an entry into the country;
- an entry into the country must be unauthorised; or,
- with a view to deportation or extradition.

A few months ago, the Court dealt with a case in which, inter alia, provision of Article 5(1)(f) of the ECHR was revoked, detention of an asylum-seeker in view of prevention his effecting unauthorised entry into the country.

In the instant case, the applicant had arrived at London Heathrow Airport on 30 December 2000 and applied for asylum upon his arrival at the immigration desk, in line with the national law. He followed all the instructions given to him by the immigration authorities and reported to them on a regular basis. He did not misuse the asylum procedure and did not hide. On the contrary, he co-operated with the immigration officers. He was granted legally recognized admission. The grant of temporary admission was subsequently extended twice, on two consecutive days. When he reported himself to the immigration authorities for the fourth time, following their instructions, he was detained.

It was open to the United Kingdom authorities, when the applicant arrived in the UK, to deprive him of his liberty (that is, to detain him) under Article 5(1)(f) to prevent his effecting an unauthorised entry into the country. On the basis of the facts in this case, the purpose of the applicant’s detention was not, however, to prevent the

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4 See UNHCR Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers, 3 February 1999.
6 Saadi v United Kingdom, Application No. 13229/03, recently pending before the Grand Chamber of ECtHR.
applicant’s entry at all. If the competent authorities had been of the opinion that there existed grounds for detaining him in order to prevent him from effecting an unauthorised entry into the territory, they could have exercised that “right to control entry” at that moment for the purpose set out in Article 5(1)(f). However, the immigration authorities, on the contrary, granted him “temporary admission” and he was permitted to stay at a hotel of his choice inside the country. The grant of temporary admission was subsequently extended twice, on two consecutive days. Therefore, it seems apparent that the pre-condition for the applicant’s detention, namely that it be for the purpose of preventing him from affecting an unauthorised entry into the country, was not met, for the simple reason that the immigration authorities had already admitted him.

From a legal point of view, from the moment of lodging the asylum application, the asylum procedure started. The asylum procedure is legally recognized and prescribed by national law. It is a procedure which can last for anything from a few days to several years. The possibility of detaining an asylum seeker at any time during the asylum procedure on the ground that it was to “prevent his affecting an unauthorised entry into the country” would represent great legal uncertainty for the person concerned. States which are parties to international instruments dealing with the legal status of asylum seekers and refugees (such as the 1951 Refugee Convention) are obliged to grant an asylum seeker admission to the territory (but not a residence permit) until the final decision in the asylum procedure is taken. This also happened in the instant case, where the respondent Government admitted the applicant to the territory. The applicant, ironically, was detained for seven days, and was then released from detention after his asylum claim had been refused.

Under international law, a State has the right, by virtue of its sovereignty, to control the entry and stay of foreigners on its territory. It is, however, equally well established that a State party to the ECHR must be deemed to agree to restrict the free exercise of its rights under general international law to the extent and within the limits of the obligations which it has accepted under that instrument.

Several important questions can be asked in order to determine whether the asylum-seeker was detained in accordance with Article 5(1)(f) of the ECHR:

1. **in accordance with a procedure prescribed by law** – Was the detention procedure for an alien or economic migrant the same as the procedure for detention of an asylum-seeker? If so, was it in line with international standards or EU binding legislation? Should there be any difference in such detention procedures for asylum-seekers? Could the asylum-seeker be detained after he complied with all relevant legal requirements when asking for international protection?

2. **to prevent his/her effecting an entry into the country** – Was the purpose for detention met, when, in the instant case, the applicant was detained only after he was admitted to the territory of the UK? Can an asylum-seeker be prevented from entering the country when seeking international protection or subsidiary protection, according to EU legislation?

3. **an entry into the country must be unauthorised** – Is the entry into the country considered as unauthorised in cases where an asylum-seeker applies for asylum or other protection and complies with all relevant international standards and legislation in force? What is the legal character of stay of an asylum-seeker pending his asylum procedure? Is such stay unauthorised? Is this in line with EU legislation?
4. *with a view to deportation or extradition* – What was the real purpose and aim of applicant’s detention? Would it more fit to the instant case, if the asylum-seeker was detained with a view to deportation?

This example suggests the extent to which EU law, through its national transposition, may influence the Strasbourg Court’s interpretation of the ECHR. Since the Qualification Directive distinguishes between different categories of non-nationals and accords certain categories (e.g. asylum-seekers and refugees) higher standards than other foreigners, this will consequently have an impact on the application of the Article 5(1)(f) of the ECHR for those categories.

The influence of EU instruments, such as the Qualification Directive, on Strasbourg jurisprudence is most likely to be felt in areas where the ECHR requires acts to be in “accordance with national law”, due to the transposition requirements of the asylum Directives. In this context, therefore, new binding EU legislation may help the Court to further develop its jurisprudence.
Subsidiary Protection and Reduced Rights

Hemme Battjes*

1. European Asylum

The entry into force of the Qualification Directive is, I think, a truly constitutional moment in the history of asylum law. For it is the first international – or for the orthodox European lawyers amongst us: supranational – instrument that states a right to asylum. It gives a right to asylum in the sense of a legally enforceable claim to a residence permit adorned with several residential rights. This is really something new. Even the Refugee Convention does not confer an enforceable claim to residence permit. For persons who cannot be expelled under Article 3 ECHR, the change is even more tremendous: from mere prohibition on expulsion, subsidiary protection is changed into asylum.1

Having said that, we should proceed and look inside this asylum in order to sort out which it bestows on its beneficiaries (or as the heading of Chapter VII of the Qualification Directive calls it, the “content of international protection”). It turns out that for Convention refugees, the Directive reproduces or reinforces the rights they have under the Refugee Convention.2 Subsidiary protection beneficiaries do partly have the same rights as refugees (for example, as regards access to accommodation and freedom of movement).3 But other rights are reduced as compared to those for refugees. For example, refugees are entitled to a residence permit valid for three years, subsidiary protection beneficiaries to a permit valid only one year.4 Member states may impose obstacles to their entry on the labour market, which they cannot impose on refugees.5 And if we take the broader picture into account, a most striking difference concerns claims for family reunification in the Family Reunification Directive. This instrument does apply to claims by refugees, even establishes a regime for them that is more favourable than the one applying to other third country nationals.

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1 More precisely, the right to asylum in that sense follows from a reading of Articles 13 and 18 of the Qualification Directive in conjunction with Articles 23(1) and 29(1) of the Asylum Procedures Directive (Directive 2001/55) and Article 3(1) of the Dublin Regulation (Regulation 343/2003; cf. H. Battjes, European Asylum Law and International Law, Leiden/Boston: Martinus Nijhoff Publishers 2006, p. 364.

2 Battjes o.c., p. 474ff.

3 Articles 31 and 32; the same holds true for Articles 21(1), 22, 27, 30 and 34 QD.

4 Article 24 QD.

5 Article 26 QD.
whereas subsidiary protection beneficiaries are explicitly excluded from the benefits of this Directive.  

So the European asylum for subsidiary protection beneficiaries is in important respects reduced as compared to the European asylum for refugees. At first sight, there is nothing wrong with that from a legal perspective. In the *Bonger* case, the Strasbourg Court clearly stated that Article 3 ECHR does not imply a claim for a residence permit. I think it would be even harder to successfully claim full access to the labour market or integration facilities under Article 3 or another Convention provision. To put it bluntly, subsidiary protection beneficiaries have no claim to asylum – to residential rights - under international law, and should therefore be glad with what anything they got under the Directive.

Nevertheless, the difference in treatment with refugees is nagging. In my contribution, I will first discuss whether this difference is justified from a legal perspective. Subsequently, I will say a few words about the questions whether it is wise to differentiate (the political perspective). Finally, I will briefly address the secondary rights of family members of refugee or subsidiary protection status holders.

2. **Differential Treatment**

2.1 **The Right to Asylum**

The Qualification Directive respects, according to its Preamble (10th recital), the rights laid down in the Charter of Fundamental Rights of the European Union. Since the judgement by the European Court of Justice on the Family Reunification Directive, we now that such a reference to the Charter render its provisions indeed legally relevant for assessing the content of the instrument. In particular, so the Preamble states, the Directive “seeks to ensure full respect for human dignity and the right to asylum of applicants and their accompanying family members”, i.e. for Articles 1 and 18 Charter. So I would argue that the rules in the Qualification Directive on residential rights for both refugees as well as subsidiary protection beneficiaries serve to comply with Article 18 Charter.

What do these claims to respect for one’s human dignity and “right to asylum” entail? The text of the Charter does not state in clear terms which obligations these provisions imply – respect for human dignity and asylum are rather broad and relatively undefined concepts. But as another Charter provision, Article 19, addresses refoulement separately, I would say that the right to asylum laid down in Article 18 encompasses more than just protection from refoulement. The provision furthermore indicates where we have to look for defining the content of asylum – it refers to the Refugee Convention. So does the Preamble recital (16) to the Qualification Directive that addresses secondary rights of refugees. Furthermore, the provisions on the

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6 Directive 2003/86; cf. Preamble recital (8) and Articles 9 –12 on refugees, and Article 3(2)(c) on subsidiary protection beneficiaries.

7 ECtHR 15 September 2005 (dec.), *Bonger v The Netherlands*, appl. no. 10154/04.


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content of international protection are framed in much the same way as those in the Refugee Convention. Where subsidiary protection beneficiaries are entitled to lesser rights, their claim is presented as a deviation from the main rule. See for example Article 29 of the Qualification Directive, on health care:

“1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to health care under the same eligibility conditions as nationals of the Member State that has granted such statuses.  
2. By exception to the general rule laid down in paragraph 1, Member States may limit health care granted to beneficiaries of subsidiary protection to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals.”

2.2 Balancing Refugee Rights

Thus, the Refugee Convention benefits served as the basis for defining the content of asylum in the Directive, and differential treatment of subsidiary protection beneficiaries is presented as deviation from the main rules. Before addressing possible justifications for these deviations, I want to address the content of the Refugee Convention first. Why are refugees entitled to the claims the Convention grants them?

The Refugee Convention benefits are the result of a balance of interests. At the one hand, the interests of the refugee. The Preamble to the Convention points at the Universal Declaration of Human Rights as the basis for refugee rights. This instruments lists political as well as social, economic and cultural rights. The primary source of protection as regards these rights is one' state of nationality. People who have well-founded fear of being persecuted by the authorities of that state therefore must turn to some other state to have their human rights protected. As de facto stateless people, refugees should get protection from their host states; the preamble speaks of the “widest possible exercise of these fundamental rights and freedoms”. For the refugee, the best outcome would be treatment by the host state as nationals in all respects – access to housing, labour market, welfare and so on. But the Refugee Convention does not grant hem that, as it takes into account also the interests of the host state. As the Preamble puts it, “the grant of asylum may place an unduly heavy burden on certain states”. The resulting system of refugee benefits is carefully balanced. Some benefits may be claimed by all refugees immediately – such as access to education for minors. Other benefits apply only to refugees who have been legally resident for a number of years. Furthermore, in some respects, refugees must be treated as nationals – for example, as regards access to education. But in other issues, host states may grant them less beneficial treatment. Refugees have the same claims to wage-earning employment as most favoured aliens (hence not as nationals) for example.

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9 See Battjes a.c, p. 475-477.
11 Cf. Articles 23, 24, 28 RC.
12 Articles 22 and 17 RC.
So in sum, Refugee Convention benefits are the result of a balancing of, at one hand, the interests of the refugee as a person who is de facto stateless person as a result of his being persecuted, and at the other hand, the legitimate interest of the host state to limit the burden of asylum.

2.3 Balancing Subsidiary Protection Beneficiary Rights

All member states accepted the result of this balancing act performed in the Refugee Convention, when they became party to Refugee Convention. The Community legislator accepted it as well, for it reproduced most of the Refugee Convention benefits for refugees in the Directive. I think that when defining the content of asylum for subsidiary protection beneficiaries, the same interests are at stake. Like the refugee, the subsidiary protection beneficiary is a de facto stateless person, in need of protection from the host states – securing “the widest possible exercise of their rights and freedoms”. Why, then, does the balancing act yield other results as regards subsidiary protection beneficiaries? I can think of two explanations (or differentiations).

First, the numbers of subsidiary protection beneficiaries are expected to be so huge that the burden for host states would become too heavy. This would be an acceptable ground for reducing their rights, if we take the Refugee Convention system. Indeed, I think it is perfectly acceptable that Temporary Protection, which is designed to apply to great numbers (“mass influxes”), entails lesser residential rights than refugee status. But there is very little in the Qualification Directive that warrants the expectation that subsidiary protection will apply to numbers which come anywhere near “mass influxes”. It is modelled to the case-law of the European Court of Human Rights on Article 3 ECHR, and this case-law has hitherto not been over-inclusive, due to the quite strict real risk criterion. I would say that subsidiary protection would encompass great numbers only if it would apply to general threats, like temporary protection does. In the Qualification Directive, there is only one provision that might be taken to suggest so: Article 15(c) QD. According to this provision, one qualifies for subsidiary protection in case of an “individual threat” due to “indiscriminate violence” in a situation of war or civil war. The provision is open to various readings, and I will not go into all that. But we should note that it is possible to read it in such a way, that subsidiary protection is due in case people fled situations of indiscriminate violence. If member states read Article 15(c) of the Directive that way, and hence apply subsidiary protection to great numbers of people, they may pose that as justification for the lesser rights of subsidiary protection beneficiaries. But if they rather adhere to a restrictive reading of eligibility for subsidiary protection, differential treatment of subsidiary protection beneficiary cannot be justified by the “over-burdening” argument.

The second explanation or justification for differential treatment would be the inherently shorter duration of subsidiary protection. We saw that the Refugee Convention itself conveys far more benefits on refugees who stay for a longer period. The Qualification Directive bestows those long term claims to all refugees immediately, it seems, because refugees are expected to be in need for protection for a longer period. The three years duration of the refugees residence permit bears witness to this expectation. By contrast, subsidiary protection beneficiaries get a permit for only one year. And interestingly, states need not give them access to integration facilities. So I would say that the Qualification Directive suggests that the need for subsidiary protection may duly be expected to last shorter than the need for refugee protection. Is there any ground to expect so? In itself, there is no reason whatsoever to assume that a well founded fear of being persecuted will last longer than real risk of serious harm. Again, the only provision of the Qualification Directive that could possibly justify the assumption that the need for subsidiary protection will be less durable, might be Article 15(c).

That leads me to the following conclusion. A balance of interests of the refugee and the host state resulted in the set of refugee status benefits in the Refugee Convention and (with slight alterations) in the Qualification Directive. Exactly the same interests are at stake when defining the benefits for subsidiary protection beneficiaries. The reduced rights of subsidiary protection beneficiary are justified if there is reason to assume that subsidiary protection will apply to huge numbers, or when there is reason to assume that the need for subsidiary protection will be far shorter than the need for refugee protection. Only Article 15(c) QD, if read and applied in a liberal way, could indeed justify these assumptions.

2.4 Doubts

It appears that it is hard to justify the differential of treatment of subsidiary protection beneficiaries as compared to the entitlements of refugees on the basis of the principles that underlie the delimitation of benefits for refugees in the Refugee Convention. But I am not sure whether a law suit against differential treatment of subsidiary protection beneficiaries would be successful. One might argue that the Refugee Convention applies only to refugees, and there is no ground in international law for imposing those norms on other groups of people. I suggested the right to asylum in Article 18 Charter as a link between refugee protection and international protection for subsidiary protection beneficiary, but one might argue that this link is too weak. This provision does not confer a clearly determined right, but states that “[t]he right of asylum shall be guaranteed with due respect for [the Refugee Convention]”. To whom this right applies, and what it entails is a matter of interpretation. And in general, aliens law in Europe provides for a lot of different statuses, hence a lot of differential treatments. It seems that in issues like social benefits states (as opposed to non-refoulement issues) states enjoy a rather wide margin of appreciation.

16 Article 33 QD.
17 Battjes *c.*, p. 111-114.
3. One Status System

But even if international or European law does not impose an enforceable claim to equal treatment, it is the question whether it would be wise to do so. If a person is granted subsidiary protection, he is under the current European asylum system tempted to challenge that decision and go for the main prize: refugee status. Such challenges may seriously burden asylum systems in an unnecessary way. The Netherlands has therefore introduced in 2001 the single status for all persons who are allowed to remain on asylum related grounds - amongst others, both refugees and people to whom Article 3 ECHR applies. If I am correctly informed, Sweden and Norway have a similar system. It has been suggested that such a system may “diminish the special role of the Geneva Convention and the concept of particular rights of Convention refugees”. But I must say that I do not see the problem if the beneficiaries receive the same benefits in all respects.

4. Family Members

A connected issue are the reduced rights for family members of international protection beneficiaries. The Qualification Directive requires that family members of refugees enjoy the same benefits as refugees do (see Article 22-1). The Preamble (recital 27) explains why:

“Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status”.

I would say that the same reasoning applies to subsidiary protection beneficiaries. But oddly, the Preamble states that benefits provided to family members of subsidiary protection beneficiaries do not have “necessarily” to be the same as those for the qualifying member. Accordingly, member states may “define the conditions applicable” to benefits of such family members. I would say that just like family members of refugees should be treated as refugees, family members of subsidiary protection beneficiaries should so too.

But maybe there is no reason to address this issue, as it has been taken care of by the Strasbourg Court. In Bader, it ruled that expulsion of mr. Bader to Syria would be contrary to Article 3 ECHR, as he feared execution of the death penalty. Furthermore, his family members would all face “intolerable uncertainty” about when where and how the execution would be carried out, and on that ground, their expulsion would also be contrary to Article 3 ECHR. It confirmed this ruling in D contre la

19 Ibid., p. 22.
20 ECtHR 8 November 2005, Bader v. Sweden, appl. no. 13284/04, pars. 47 and 48.
It seems that Article 3 ECHR prohibits expulsion of family members of a person who runs a real risk of treatment contrary to Article 3 ECHR, at least when inhuman or degrading punishment is concerned (as in both cases mentioned). In such cases, I would say, that the category of “family members of a person qualifying for subsidiary protection” ceases to exist, on the authority of the European Court of Human Rights. For those family members can now invoke Article 3 ECHR themselves and would qualify for subsidiary protection on their own account.

5. Final Remarks

The analysis of differential treatment of subsidiary protection beneficiaries and their family members above allow for two conclusions on the Qualification Directive. First, reduced rights for subsidiary protection beneficiaries may be justified if subsidiary protection applies to mass influxes, or if it may duly be expected to last for a short period of time. Only Article 15(c) of the Directive gives reasons to supposes that either of both characteristics applies to subsidiary protection. Thus, the delimitation of secondary rights for subsidiary protection beneficiaries unexpectedly emphasises the central importance of this provision. Second, even if the content of the subsidiary protection status may be open to criticism, the importance of the grant of asylum to this category remains very great. The recent case-law of the Strasbourg Court according to which real risk of harm after expulsion of a person prohibits also expulsion of his family members illustrates why. This case-law extends or, if the family members would be protected from expulsion by Article 8 ECHR, strengthens protection from refoulement. The Directive translates the protection for these family members to a claim to asylum for subsidiary protection beneficiaries.

21 ECtHR 22 June 2006, appl. no. 24245/03, par. 56.
Part Three:
The Implementation of the Directive in Selected Member States

Madeline Garlick*

1. The Qualification Directive and the Common European Asylum System

After nearly three years of negotiations, the European Council in April 2004 agreed on a Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted1 (the ‘Qualification Directive’), one of the key legal measures on asylum required under Article 63 of the Amsterdam Treaty. The Directive’s adoption represented a critical point in a process initiated five years earlier, when the European Council summit in Tampere had called for measures to establish a ‘common European asylum system, based on the full and inclusive application of the [1951] Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement.’2

According to the Council in Tampere, one of the fundamental elements in that system would be a legal instrument for ‘the approximation of rules on the recognition and content of refugee status... completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection’.3 The Qualification Directive defined the minimum standards for criteria to be applied across the European Union in determining eligibility for refugee status or other forms of protection, and appeared to represent a major step forward towards harmonization of Member States’ laws and practice in granting protection to those seeking asylum within the EU.

The Office of the High Commissioner for Refugees (UNHCR or the Office) followed closely the process of preparation and negotiation of the Qualification Directive. UNHCR saw this as a key instrument that would influence the ways in which

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3 Ibid., para. 14.
Member States would interpret the 1951 Convention criteria for refugee status, and other international and regional standards for the grant of other forms of protection (referred to in the Directive as ‘subsidiary protection’). Member States and EU institutions consulted periodically with UNHCR during the negotiations, in accordance with Declaration 17 to the Amsterdam Treaty, which requires consultations with the Office on matters relating to asylum policy. UNHCR submitted formal comments and recommendations to Member States and institutions throughout the course of the negotiations, and provided input directly to successive Council Presidencies and Member States, including on questions of international refugee law as relevant to the draft Directive’s text. The Office sought through its interventions to ensure that the Directive would conform to the standards of the 1951 Convention and other relevant international instruments, in line with the Council’s obligations under Amsterdam and the Tampere objectives.

Upon its adoption, UNHCR welcomed a number of features of the Directive which were seen as welcome steps in the direction of aligning Community law with international refugee protection standards. In its definition of a ‘refugee’, the Directive incorporated the 1951 Convention definition as a binding standard under Community law. It also established an explicit obligation for all Member States to provide subsidiary protection to people at risk of serious harm, defined as including, amongst other things, torture or inhuman or degrading treatment or punishment. The Directive also referred to gender- and child-specific forms of persecution, along with persecution or serious harm at the hands of non-state agents, both of which have attained widespread acceptance as ground for protection in the practice of numerous States. However, several unclear areas and other weaknesses were also identified, which could create the potential for protection gaps and risks that some people in need of international protection may not be recognized under the EC’s minimum criteria.

UNHCR’s reservations about the Directive, as expressed at the time of the Directive’s adoption, include some which remain current, based on limited observation of Member States’ subsequent national legislation and practice. This article aims to summarize several of these key concerns regarding the Qualification Directive, both at the level of the EC minimum standards, and in national laws and practice. It has not been possible to review the state of transposition or implementation in a com-

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plete or conclusive manner,7 but some provisional assessments can be made based on reports on law and practice from UNHCR, NGOs, lawyers and Member States’ representatives in public fora. It is hoped that these concerns, along with others voiced by UNHCR in its official commentary on the Directive,8 will be scrutinized closely in the process of evaluation of first-phase asylum instruments that the European Commission is obliged to conduct by the end of 2007 under the Hague Programme.9 This evaluation process should in turn provide a basis for ‘second phase instruments and measures’ which the Commission is required to submit to the Council and Parliament ‘with a view to their adoption by the end of 2010’.10

2. Harmonisation of EU Laws and Practice

Some observers have queried whether effective harmonization has been achieved through the Qualification Directive and the other key instruments adopted under the Amsterdam Treaty programme. It has been argued that the minimum standards adopted in a number of important provisions11 provide wide-ranging exceptions, and leave extensive room for Member States’ discretion, so that harmonization is unlikely to result in practice.

While harmonization was not a key objective in itself for UNHCR, the Office supported the process as a means to seek to establish and entrench high standards of protection, and set EU norms at the level of those States offering good practice and more flexible approaches to recognition and entitlements for refugees. The process was seen as a means to work towards reducing or eliminating some of the discrepancies in the ways in which protection criteria have been interpreted and applied to similar asylum seeker groups in different EU Member States. Striking variations emerge from UNHCR’s public statistics, which indicate that in 2005, asylum seekers from the Russian Federation, for example, were recognized in approximately 10% of cases in one Member State; close to 70% in another Member State; but faced a 0% recognition rate in a third, neighbouring State.12 While harmonization at the level of

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7. The limited period of time elapsed since the Directive’s transposition deadline means that it would be difficult to assess progress on transposition or implementation in a conclusive way, especially given that several key States have yet to adopt or amend the necessary provisions. Decision-making authorities and courts have also not had the opportunity to build up practice or jurisprudence.


10. Ibid.

11. Criticism has focused particularly on the Asylum Procedures Directive, adopted in 2005, which provides significant scope for Member States’ discretion and preservation of divergent national practices.

12. See figures for positive decisions (claims ‘recognised’) for applicants from the Russian Federation in the Netherlands, Austria and Slovakia respectively. UNHCR, ‘2005 Global Refugee Trends: a Statistical Overview of Populations of Refugees, Asylum-Seekers, Internally Dis-
the lowest rate or standard of protection would be undesirable, a more consistent and legally sound application of protection criteria across the EU should ideally emerge from a fair and accurate application of EC common standards.

In addition to the legislative negotiations, UNHCR has been involved in the process of transposition of the EC Directives into Member States’ national law. This input has been provided under its mandate under Article 35 of the 1951 Geneva Convention, which defines UNHCR’s supervisory responsibility for the 1951 Convention, and has provided the basis for a long-established practice of providing recommendations and advice to guide the development of national legislation on asylum in general.

Bearing in mind that the Directive enshrines only minimum standards, permitting Member States freely ‘to introduce or retain more favourable standards for determining who qualifies as a refugee or … person eligible for subsidiary protection’, UNHCR has sought to promote transposition standards going beyond the minima in the Directive. This need has arisen particularly for those areas where there is scope for divergence between the Directive and the 1951 Convention or other related international provisions.

3. Key Areas of Interest in the Qualification Directive

3.1 Subsidiary Protection

In its definitions, the Qualification Directive defines ‘person eligible for subsidiary protection’ as ‘a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15…’ Article 15 in turn defines ‘serious harm’ as ‘(a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations or international or internal armed conflict’.

UNHCR welcomed the inclusion in the Directive of an obligation for Member States to grant subsidiary protection, particularly given that the concept had not previously featured explicitly in the law of some Member States. Divergent views are apparent on the application of Article 15(c) in particular, and on how to interpret threats resulting from ‘indiscriminate violence’. At the insistence of some States in the negotiations, paragraph 26 was inserted in the Preamble to the Directive, providing

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15 Those without explicit concepts for subsidiary protection status in national law prior to the Directive included Germany and Belgium.
that ‘risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm’. This Preambular explanation, while not strictly binding, clearly indicated the view of some States that the notion of ‘indiscriminate violence’ should be applied narrowly.

UNHCR by contrast has encouraged Member States to apply Article 15(c) in a broad manner, without excessive reliance on limitations relating to individual threat. The Office has argued that Article 15(c) should be interpreted as requiring a serious and immediate, rather than remote, risk for the applicant, which derives from the situation of generalized violence. It does not, however, imply that applicants are obliged to show that they are personally being targeted by the perpetrators of the generalized violence. It would appear that differences in interpretation persist among Member State authorities, based on what is seen by some as the ambiguous, if not internally contradictory, wording of the Directive.

A further, potentially challenging aspect of Article 15(c) relates to the definition of an ‘international or internal armed conflict’. Different views could be taken on what the threshold test for such a conflict might be, and what body is qualified to determine when it is crossed and entitlements arise to subsidiary protection in EU States. Member State authorities will presumably be confronted with this question, and obliged to consider concepts from international law in reaching their determinations.¹⁶

Questions also arise about the precise intended scope of Article 15(b), which reflects the wording of Article 3 of the European Convention on Human Rights, providing for protection from the threat of ‘torture, inhuman or degrading treatment or punishment’ in the applicant’s country of origin. Views may differ, for example, on whether this criterion in the EC context extends to cover protection from return to a country where medical treatment would not be available to treat a particularly serious illness from which an applicant suffers.

UNHCR has signaled its concern¹⁷ that the codification of subsidiary protection in EC law in the Directive could potentially lead to undermining of grants of refugee status under the 1951 Convention. This reservation focuses on the possibility that State authorities might not feel obliged to test an applicant’s claim against the criteria for 1951 Convention status, if they can find that the requirements for subsidiary pro-

¹⁶ A question has been raised as to whether the International Committee of the Red Cross, with its authoritative role under international humanitarian law, might be appropriately asked to express a view on when a situation reaches the level of an ‘international or internal armed conflict’ for the Directive’s purposes. However, limits on the ICRC’s role and mandate, and the absence of a direct association with Community law, could make this course impractical. Informal accounts suggested that by early 2007, some EU Member States were taking a restrictive view of the cases amounting to indiscriminate violence in international or internal armed conflict.

¹⁷ UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004), 28 January 2005: Comment on Article 15. Some observers have also cited an impression in some States that refugee status grants are declining, while subsidiary protection is awarded in cases that would previously have been recognized under the 1951 Convention.
tection are satisfied more easily. In order to preserve the underlying analysis and special legal character of the 1951 Convention concept, UNHCR has maintained that ‘subsidiary protection should apply only if there is no link between the risk or threat of harm and any of the five Convention grounds’ (i.e. threats linked to the claimant’s race, religion, nationality, membership of a social group or political opinion). In this way, subsidiary protection could strengthen, rather than weaken, the established precepts of international refugee law, and scope is left to enable the refugee definition to evolve and meet the changing needs and circumstances of applicants for protection.

States must also address some practical questions around the introduction of subsidiary protection to ensure respect for the rights of people newly entitled to this status. Training will be important to raise awareness and understanding of subsidiary protection concepts in those States which are introducing the notion, potentially extending at least to advocates, decision makers and judges. Transitional provisions are notably absent from the Directive. This has left several States and applicants uncertain about whether and how subsidiary protection grounds might be considered, for example, for people whose claims for refugee status had been rejected at first instance before the Directive was adopted; but who are still awaiting outcomes on appeals when new national laws have come into force.

3.2 Non-state Agents

Another new concept in the law of some Member States is the requirement under the Directive to accord protection to victims of persecution or serious harm by non-State agents.18

Article 6 provides that ‘actors of persecution or serious harm include: (a) the State; (b) parties or organisations controlling the State or a substantial part of the territory of the State; (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7’. Under Article 7, ‘protection can be provided by: (a) the State; or (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State’.

For UNHCR, acts committed by non-State agents qualify as persecution and constitute grounds for the grant of refugee status, in cases where the State is unwilling or unable to offer effective protection against the perpetrator (and where the persecution is linked to race, religion, membership of a social group or political opinion). Threats arising in situations of ‘failed States’ come into this category, where there is no State actor which can be held accountable for failing to protect its citizens, as could be the case, for example, in situations of (civil) war. Another example could include people threatened by domestic violence, where State authorities are unwilling or unable to protect the victim, and where the other 1951 Convention requirements are satisfied. In order to achieve a harmonized approach to this complex and sensitive notion, further evolution will be needed in the approaches of Member States to such cases.

The question of whether an applicant can claim State protection is always an element in the assessment of eligibility for refugee status, according to the wording of Article 1A of the 1951 Convention. The EC Directive purports to take the test one step further, by providing in Article 7 for the possibility of ‘non-State actors of protection’. It remains to be seen how widely this notion might be applied in EU asylum decision-making. UNHCR’s concern with the provision centres on the suggestion that international organizations could be seen to have legal and practical powers comparable to those of a State, in situations where they are seen to be ‘controlling the State or a substantial part of the territory of the State’.

UNHCR has noted that ‘under international law, international organisations do not have the attributes of a State and ‘their ability to enforce the rule of law generally is limited. Furthermore, they are not party to human rights treaties.’ Concern has been expressed about the political context behind this provision, which suggests that EU Member States wished to use it to reject claims from asylum seekers from Kosovo, overseen for several years by a UN administration (‘UNMIK’) and peacekeeping force. It was noteworthy that around the time when the Directive was finally agreed, violence broke out in Kosovo on a significant scale, which demonstrated unequivocally that the UN administration and international force was not in a position to protect all of the population. UNHCR’s concern is that while international organizations continue to provide the best level of support and protection that they can, limited resources and legal authority may systematically handicap their efforts. This renders unrealistic the suggestion that international organizations can ‘control’ territory and ‘protect’ people in the same way that a State can.

3.3 Internal Relocation Alternative

Under Article 8(1) of the Directive, ‘Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.’ Article 8(2) provides that ‘Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.’

The juxtaposition of these two paragraphs creates problems of legal interpretation and practice. Firstly, for interpretation, it appears difficult to argue that it is ‘reasonable’ to expect a person to stay in a particular part of a country, where ‘technical obstacles’ effectively preclude his or her return to that country. However, some Member States have used Article 8 as a grounds for rejecting claims even where return cannot take place, apparently considering that the two provisions are compatible. The implication is that it can be seen as ‘reasonable’, on a theoretical plane, to expect a person to stay in a place to which she or he cannot go in reality.

A second concrete problem is that of the situation of those people who are refused status on the basis Article 8, but who cannot be removed due to ‘technical obstacles’ such as lack of travel documentation; absence of civilian transport into the country in question; personal circumstances such as illness, or otherwise. These kinds of technical barriers may in some cases persist for years, and the applicant meanwhile has no entitlement to predefined basic rights or status under Community law. The resultant limbo situation seems problematic for applicants and host States alike.
In early 2007, however, an interesting case touching on this issue has been decided by the European Court of Human Rights (the Court) in Strasbourg. This case, *Salah Sheekh v Netherlands*, addressed, among other things, the question of the internal flight alternative. There, the Court concluded that States may rely on the existence of an internal flight alternative in assessing a risk of serious harm. However, it noted that a State, in proposing to return a person to a country where she or he purportedly has an internal relocation alternative, is obliged to ensure that the person is not, as a result of its acts, exposed to inhuman or degrading treatment or punishment contrary to Article 3 of the European Convention on Human Rights (ECHR). This judgment may influence future interpretation of the internal flight alternative under the law of EU States, particularly in cases where a risk of violation of Article 3 of the ECHR arises.

### 3.4 Exclusion

The Directive provides for applicants to be excluded both from refugee status and subsidiary protection, on grounds which are defined in Articles 12 and 17 respectively. UNHCR has criticized Article 12 in particular because of its inconsistency with the exclusion principles enshrined in Article 1F of the 1951 Convention.

The exclusion grounds in Article 1F are exhaustive, and while they may be subject to different interpretations, UNHCR maintains that it is not open to a signatory or group of signatory States to expand them unilaterally.

In case of a person who has committed ‘serious non-political crimes outside the country of refuge prior to his/her admission as a refugee’, Article 12(2)(b) of the Directive purports to define ‘prior to his/her admission’ as the ‘time of issuing a residence permit’. This means that the timeframe during which an applicant could potentially commit a ‘excludable’ crime is significantly lengthened. In some States, it could be years before a decision is made and residence permit issued. Moreover, the concept of ‘serious non-political crimes’ is also broadened to include ‘particularly cruel acts, even if committed with an alleged political motive’. These references to the undefined and unclear notions of ‘particularly cruel acts’ and ‘alleged’ motives appear to create great scope for subjective and arbitrary application of the exclusion concept.

In addition, the Directive moves beyond the 1951 Convention again in Article 12(3), which permits exclusion of persons who ‘instigate or otherwise participate’ in committing crimes as defined in Article 12(2). Apart from objections in principle to such a widening of the exclusion clauses, this provision also raises significant questions about the potential difficulties of establishing criminal proof of responsibility on the part of a third person.

The application of the Directive’s exclusion clauses in practice will warrant close monitoring by UNHCR and other interested observers. Although the numbers of people excluded from protection in EU Member States appears to be relatively small, the concept is politically very sensitive, notably given its potential link to ‘terrorism’ and other perceived threats to Member States’ security. Moreover, discussions in EU

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Member States’ fora suggest that the issue is of great interest to many States, whose representatives are interested in exchanging information and practice on how to apply it.

4. Practical Challenges

Apart from the legal and interpretative questions arising above, there are issues around the practical application of the Qualification Directive which also give grounds for concern. Among these is the question of the Directive’s interrelation with other EC instruments on asylum; and the scope for authoritative court decisions clarifying its provisions in the future.

A first example of potentially problematic assumptions and outcomes relates to the Dublin II Regulation.20 This Regulation is founded on the theory or objective that an asylum applicant should have the same prospect of securing protection in all States of the EU. Dublin II provides a mechanism for identifying the State which is responsible for determining a claim, based on criteria unconnected to the merits or nature of the application, but which consider rather the person’s family situation, his or her prior transit through or entry to another State, and others. Member States routinely transfer asylum applicants under the Dublin II system to other States which ‘take back’ or ‘take charge’ of the person for the purpose of determining their claims.

However, the limited experience of applying the Qualification Directive, and longer evidence emerging from past application of related concepts, suggest that there remain significant differences in the ways in which States interpret and apply protection criteria. This means that a person who might be recognized in State A, but who is sent back to State B under Dublin II, is not necessarily assured of protection if State B adopts a more restrictive approach to the internal flight alternative, indiscriminate violence, or other notions described above.

Given the varying prospects of recognition between EU Member States, the imperative for such people to undertake secondary movements in the first place is apparent, along with the consequences of their return under Dublin II. This speaks in favour of greater consistency and quality in decision-making, based on the Qualification Directive, in the interests of the effective functioning of the common European asylum system as a whole.

Some ambiguities and discrepancies described here also highlight the need for judicial interpretation to clarify and ensure the correct application of the Directive. Yet practical factors in many cases may place daunting obstacles in the way of applicants with potentially strong cases to argue in court.

One problem relates to the low level of State support to pay for legal assistance. Although free legal assistance is obligatory at least at second instance under the Asy-

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20 Council Regulation (EC) 343/2003 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, OJ L 50/1, 25.2.2003 (the ‘Dublin II Regulation’).

Note: the Asylum Procedures Directive provides that applicants should be entitled to an ‘effective remedy’, but does not define further what that entails; and explicitly permits EU States to use non-suspensive effect.

When the deadline for transposition of the Directive into national law arrived in October 2006, six Member States had notified the Commission of measures to bring their national legislation into conformity with its provisions: European Commission Press Release, 10 October 2006, ‘Entry into force of key asylum law creating a “level playing field” in asylum policies throughout Europe hampered by failure of timely transposition by most Member States’, IP/06/1345. By February 2007, fourteen Member States had formally notified the Commission of their transposition measures; but among those, it remained unclear whether all had transposed the EC legislation correctly or completely.

5. Conclusion

The Qualification Directive provoked concerns on the part of UNHCR and other observers at the time of its adoption, relating particularly to provisions seen as potentially incompatible with international norms. It remains difficult to assess the full impact of the Directive, and its success or otherwise in delivering protection to entitled applicants, with relatively few States having transposed it and little comprehensive data regarding its application. However, concerns in some key areas persist, and
clarifications have not been achieved to date through Member States discussions, guidance from the Commission, through jurisprudence or otherwise. An instrument of the complexity and scale of the Qualification Directive warrants thorough and careful analysis across the EU, as part of the evaluation of first-phase legal instruments foreseen by the Hague Programme, to help decisively identify and develop solutions to the problems.
The Qualification Directive: A Milestone in Belgian Asylum Law

Dirk Vanheule*

1. Introduction

The implementation of the Qualification Directive 2004/831 is a milestone in Belgian asylum law.2 It has resulted in the introduction of new grounds to obtain asylum status in Belgium. Up till then only recognition of refugee status under the Refugee Convention and Protocol entitled asylum claimants to obtain residence in Belgium.3 Unlike other countries, Belgian immigration legislation did not know an alternative B- or C-status for persons not meeting the refugee definition but who could not be returned, for compelling humanitarian reasons or reasons related to the situation in their country of origin. Although the Belgian legislator was aware that under international law certain asylum claimants could not be removed, even though they could not qualify as refugees under the Convention, an alternative status was not included in the legislation.4

This incompatibility of the legislative framework with contemporary reality of immigration authorities being confronted with persons who could not be removed, has lead in the past to some creative solutions, but none giving these asylum claimants equal rights or status like recognized refugees. The solutions were either a form of toleration of presence on the Belgian territory (often in the form of a prolongation of the period given to leave Belgium in an expulsion order), ad hoc schemes of temporary protection (e.g. during the crises in former Yugoslavia and Rwanda) or individual regularisations through a leave of stay granted by the minister of the interior, possibly on an injunction ordered by the courts.

At the same time the asylum authorities in Belgium have been struggling with a serious backlog created by the increase of asylum applications up till 2001.

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4 For instance, when an asylum application is declared inadmissible for being manifestly unfounded or on formal-procedural grounds, the Commissioner general for refugees and stateless persons must give an advice whether the applicant can be returned to the country where he claims to fear for his life or freedom, thus taking into consideration international obligations of non-refoulement.
Table 1. Number of asylum applications in Belgium

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<tbody>
<tr>
<td>1981</td>
<td>2,449</td>
<td>5,387</td>
<td>15,444</td>
<td>17,657</td>
<td>26,421</td>
<td>14,568</td>
<td>11,655</td>
<td>12,401</td>
<td>11,602</td>
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<td>1985</td>
<td>21,967</td>
<td>35,778</td>
<td>42,720</td>
<td>24,549</td>
<td>18,805</td>
<td>16,940</td>
<td>15,357</td>
<td>15,957</td>
<td>11,587</td>
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This increase had, at the turn of the millennium, already led to discussions about a possible reform of the rather complex Belgian refugee recognition procedure. This procedure is characterised by a two-tier track of examinations. The first step, after the determination of Belgium’s responsibility under the Dublin criteria, is an examination of the admissibility (on formal and substantial grounds, notably when a claim is manifestly unfounded) in an administrative process by the Immigration Service and the Commissioner-general for Refugee and Stateless Persons\(^5\) and with a possibility of judicial review by the Council of State, the supreme administrative court. Admissible claims are then heard on their merits by the Commissioner-general, with a right of appeal to the Permanent Refugee Appeals Commission\(^6\) and the Council of State.

The implementation of the Qualification Directive has created the necessary momentum to amend the Belgian asylum legislation both on the substance as with regard to the procedure. On the substance, the subsidiary protection status was introduced. The procedural reform consists of a simplification of the recognition procedure.

2. The Implementation Process as regards Refugee Status and Subsidiary Protection Status

The Qualification Directive was transposed into Belgian law by two laws of 15 September 2006, amending the existing Aliens Act\(^7\) and becoming effective as of 10 October 2006. The Belgian government succeeded in meeting the transposition deadline, for this directive at least. With the same act, also the Family Reunification Directive 2003/86/EC and Directive 2004/81/EC on victims of trafficking in human beings were implemented.

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\(^5\) The Commissioner-general heads an independent agency for the determination of refugee status.

\(^6\) The commission is an independent administrative tribunal.

As a result, the Belgian Aliens Act still, as before, states in its Article 48 that a person “fulfilling the requirements set thereto by international agreements binding Belgium” can be recognized as refugee. This principle affirms that international law, and more in particular the 1951 Refugee Convention, is still binding.

The new Articles 48/2, 48/3 and 48/4 contain the definitional criteria to be met in order to obtain refugee status (Article 48/3) and subsidiary protection status (Article 48/4). No distinction is made here between EU citizens and third country nationals. Indeed, in its declaration to the Amsterdam Protocol on asylum for nationals of Member States of the European Union, Belgium stated that it would still carry out an individual examination of any asylum request made by a national of another Member State, be it on the basis of the presumption that such a request is manifestly unfounded.8

Most of the provisions of the Directive dealing with the definitions were copied literally into the Belgian legislation.9

Since the Belgian interpretation of the refugee definition has already been very broad, the introduction of the definitional provisions of the Directive, will probably not change existing practices very much.10 Some of the more restrictive provisions in the directive have, in fact, been left out. This has been the case with article 8, paragraph 3 QD that allows for the application of the internal protection alternative to refuse recognition notwithstanding technical obstacles to return to the country of origin. Also the possible limitation of gender related fear for persecution that could be read in article 10, paragraph 1, (d) in fine QD11 has been left out of the Belgian Aliens Act.

On the other hand it is quite startling to see that some of the most basic and in Belgian asylum practice undisputed rules on the assessment of facts and circumstances in Article 4 QD have not been entered into the Aliens Act: the assessment at the time of taking a decision, the effect of past persecution, the benefit of the doubt. The same goes for the possibility of the need for international protection arising sur place in Article 5 QD, even though the notion of réfugié sur place has been used in Belgian asylum practice along the lines of Article 5.

As for the introduction of subsidiary protection status, the Belgian implementation is characterised by two facts.

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8 Declaration by Belgium on the Protocol on asylum for nationals of Member States of the European Union, Of C. 340, 10 November 1997. Under the new asylum procedure these applications will not be taken into consideration when the declaration does not offer sufficient elements for a well-founded fear of persecution or serious reasons for a real risk of harm. Only a limited right of judicial review remains open to the claimant then. See Article 57/6, par. 1, 2° new Aliens Act.

9 This has been the case for the Articles 6 to 10 and 15 to 17 QD.

10 Although it remains to be seen if the possibility of granting subsidiary protection status, will not shift some of the persons in situations currently recognized as leading up to refugee status into that new subsidiary protection status.

11 ‘Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article.’
First, not all possible violations of article 3 ECHR will lead to the granting of subsidiary protection status in the asylum procedure. In the event of threat to a person’s life due to (the absence or insufficiency of) medical conditions in the country of origin, a person is eligible to obtain a stay on medical grounds, but not the subsidiary protection status (see further).

Second, the discussion on Article 15, (c) QD, namely whether the notion of “individual threat” can be compatible with the notion of harm as result of “indiscriminate violence” in situations of armed conflict, has been solved by omitting the term “individual”. A serious threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict is serious harm, leading up to subsidiary protection status.12

Finally, some discrepancies should be noted here between the Dutch and the French version of the Aliens Act and the corresponding versions of the Directive. Both versions have official status in Belgium. In the Dutch version of the Aliens Act, the concept of religion comprises “inter alia” the holding of theistic, non theistic and atheistic beliefs (Article 48/3, § 4, b) whereas the Directive indicates that the concept shall include “in particular” (“met name”) these beliefs (Article 10, 1, (b) QD). As for the social group notion, the Dutch version of the text sticks to the Dutch version of the directive, stating that it refers to members sharing “a common background that cannot be changed” (“gemeenschappelijke achtergrond”, “histoire commune” in Article 10, 1, (d) QD). The French version of the Belgian act uses the terms “racines communes” which seem to require stronger common roots, rather than a shared background or history (Article 48/3, § 4, d Aliens Act).

A similar remark can be made with regard to the grounds for exclusion of subsidiary protection status. A person is excluded where there are serious reasons for considering that he has committed a serious crime (article 17, 1, (c) QD). Unlike the exclusion ground for refugees in article 1, F, b of the Refugee Convention and Article 12, 2, b QD, where explicit reference is made to serious non-political crimes, exclusion of subsidiary protection is also possible in the event of political crimes. At least, according to the Dutch and English versions of the directive, using the term “crime” or “misdrijf”. The French version of the directive, however, refers to a non-political crime: “un crime grave de droit commun”. Nevertheless, the French version of the Belgian Act, like the Dutch version of the act and the QD allows for exclusion for any serious crime (“crime grave”).

3. The New Asylum Procedure

With the implementation of the Directive and the introduction of subsidiary protection status, the Belgian legislator has also changed the asylum procedure.

This procedure is to be a (quasi-) “one stop shop”-procedure: all applications for asylum will be examined in a single procedure on, first, the conditions for refugee status and, second, the conditions for subsidiary protection status. This examination

12 Along with the harm consisting of death penalty or execution, torture or degrading treatment or punishment in the country of origin.
will be done by the Commissioner-general for Refugees and Stateless Persons. The jurisdiction of the Immigration Service, that could decide on the admissibility of asylum claims in the existing procedure on both substantial and formal grounds, will be limited to the application of the Dublin criteria, the filtering of double applications and the removal of failed asylum claimants. Against the decision of the Commissioner-General an appeal is open to the Council for Aliens Litigation (Raad voor Vreemdelingenbetwistingen, Conseil du Contentieux des Etrangers), a newly to establish administrative tribunal. Appeals for cassation against the Council's decision will be open to the Council of State (Raad van State, Conseil d'Etat). The new procedure is expected to become effective as of 1 April 2007.

Although this reform of the procedure is not to be seen as the formal implementation of the Procedures Directive 2005/85/EC, the Belgian government seems confident that the new procedure will meet all the requirements therein.

One important exception to the single procedure remains. Persons fearing a return to their country of origin for medical reasons can obtain a residence status only through an administrative procedure before the Immigration Service. The new Article 9 ter of the Aliens Act states that a person in Belgium holding an identity document and suffering from a disease in such a manner that this disease constitutes a serious risk for his life or physical integrity or a serious risk for an inhuman or degrading treatment when no adequate treatment exists in his country of origin, can apply for a leave of stay to the Immigration Service. Upon a medical examination by a state appointed doctor, a determination on the delivery of a residence title for medical reasons will be made.

This specific procedure was introduced because the asylum authorities were believed to have insufficient knowledge in medical matters to decide on this type of residence claims.

4. The Status

The legislative amendments of 15 September 2006 only relate to the residence issues of refugee and subsidiary protection status.

Persons whose refugee status has been recognized are allowed in Belgium for an unlimited stay. During the first 10 years of their stay, their status can be revoked, possibly on demand of the Immigration Service, by the Commissioner-general on the basis of fraud committed in the refugee status determination procedure (omission of facts, false declarations, false or forged documents) or when the personal behaviour indicates that the person does not fear persecution. In that case the person can be ordered to leave Belgium.

In the event of the granting of subsidiary protection status, the asylum applicant is allowed to stay in Belgium for a limited period. The person is given a renewable residence title of 1 year. After 5 years he is allowed to a stay for an unlimited period.

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13 Art. 49, § 1 Aliens Act.
14 Art. 57/6, 7° Aliens Act.
15 Art. 49/2 Aliens Act.
During the stay for a limited period, the status can, on demand of the Immigration Service, be revoked by the Commissioner general in the event of cessation due to a substantial change of the circumstances that have led to the subsidiary protection status or in the event of exclusion for suspicion of crimes against peace, war crimes or crimes against humanity, serious crimes and acts contrary to the purposes and principles of the UN. Moreover, during a period of 10 years the status can be revoked for reason of fraud committed in the determination procedure. In each of these cases the person can be ordered to leave Belgium.

One may say that subsidiary protection status is still seen as a type of temporary protection rather than full protection.

The transposition of other provisions in the Qualification Directive granting rights to refugees and persons in need of subsidiary protection may need additional legislative amendments of federal and, within the Belgian federal context, regional legislation (travel documents, access to employment and education, social welfare, health care, accommodation, integration, …).

5. Transition

As the subsidiary protection status is a new status in Belgium, a number of transitory measures has been taken to ensure the benefit of the rights that asylum claimants may have under the Qualification Directive.

All asylum applications still pending on the date of entry of the new asylum act (10 October 2006) and all new applications introduced as of that day will be determined under the provisions of both the refugee and the subsidiary protection status.

For asylum applications already determined prior to the enactment of the new provisions, the possibility of yet obtaining subsidiary protection status was envisaged. A first case is that of asylum claimants who have been refused Convention refugee status but who got issued a so-called “non-refoulement clause”, i.e. an advice by the Commissioner-general to the Immigration Service that the person cannot be returned to the country of origin for reason of a danger for his life, physical integrity or freedom (under Article 3 ECHR). Provided that they can prove their identity, these persons can obtain a residence title as person in need of subsidiary protection, on the triple condition that they have stayed in Belgium, that the danger still exists and that they constitutes no danger to public order or national security.¹⁶

Other asylum claimants who also filed for refugee status unsuccessfully but who were not given a “non-refoulement clause”, may introduce a new asylum application, even on the same facts that will be examined under the subsidiary protection rules.¹⁷

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¹⁶ This permit is given by a request sent to the mayor of the place of residence. Art. 77, § 3 Act of 15 September 2006 amending the Aliens Act of 15 December 2006.

¹⁷ Article 77, § 2 Act of 15 September 2006 amending the Aliens Act of 15 December 2006. Normally, a consecutive asylum claim based on elements that have already been invoked in a prior application, are not taken into consideration. Article 52/4 Aliens Act, renumbered 52bis.
6. Conclusions

The transposition of the Qualification Directive is a milestone in Belgian asylum law. Finally the existing protection under refugee status is reinforced by the introduction of subsidiary protection. The existing practice of non-refoulement of persons in fear of the type of harm as meant by Article 15 Qualification Directive, either through ad hoc executive orders or court measures, with a less certain residence status, is replaced by a full status. Whether this will have an impact on the existing recognition rate of refugee status – somewhere around 10 % of the applications – is to be seen. The Belgian legislator has, in any case, confirmed the broad and open interpretation of the refugee definition and of the harm to be feared under the subsidiary protection status. Surprisingly though, some of the basics in status determination as mentioned in Article 4 of the Directive have been omitted from the Belgian legislation. Surprisingly as well, the Belgian legislator has considered subsidiary protection to be the ‘lesser’ form of protection: the status only becomes final after five years. The Belgian legislator confuses subsidiary protection, which calls for full protection as long as the facts and circumstances responsible for the risk of serious harm persist, with temporary protection, which is basically an instrument to lighten the burden of massive influxes of asylum claimants on the asylum procedure.

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18 Like with situations leading to refugee status this protection can be needed for a longer or for a shorter period.
The Qualification Directive and its Transposition into Swedish Law

Gregor Noll*

1. Introduction

What is the impact of the Qualification Directive\(^1\) on the Swedish legal system? At the time of writing, a conclusive answer cannot be provided, while the contours of legislative changes have become apparent.

A governmental inquiry (hereinafter “the Inquiry”) had been assigned to draw up a comprehensive report on legislative changes necessary to transpose the Directive, and delivered a 494-page report on 19 January 2006, including detailed legislative proposals.\(^2\) According to standard procedure, this report will eventually result in a governmental proposal to parliament, on the basis of which the Swedish parliament will adopt the necessary changes. By summer 2006, ministerial civil servants had advanced quite far in their work on the government proposal. Further progress was hampered by the upcoming general election on 17 September 2006. A new government was elected, and a new migration minister took office.

When the transposition period elapsed on 9 October 2006, Sweden had failed to notify the European Commission of its transposition measures on, thereby joining the majority of Member States.\(^3\) The incoming government decided to handle the transposition of the Qualification Directive and the Draft Directive on Asylum Procedures\(^4\) in one and the same process, which provided for further delay. There are

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3  Only six Member States had done so when the deadline of 9 October 2006 had elapsed. European Commission, Entry into force of key asylum law creating a “level playing field” in asylum policies throughout Europe hampered by failure of timely transposition by most Member States, Press Release of 10 October 2006.

reasons to assume that a governmental proposal will be finalised in spring 2007 and
new legislation might enter into force later that year.5

Against this backdrop, the report of 19 January 2006 delivered by the government-
ial Inquiry must be seen as the only document available offering indications on what
course the Swedish transposition process might take. It should be emphasised from
the outset that the present author was a member of the Inquiry. Therefore, all that
can be done in the framework of the current text is to present the main proposals in
the Inquiry Report without purporting to offer a detached critique.6

Unsurprisingly, the Inquiry’s work was largely inspired by a minimalist approach
towards transposition. It had to relate to a major revision of the Swedish Aliens Act,
which was bound to enter into force on 31 March 2006, and featured inter alia a shift
from an authority-based appeal system to a court-based appeal system.7 The content
of the Qualification Directive had been well known at the preparatory stage of the
2006 Aliens Act, which might limit the need for comprehensive transposition meas-
ures in the future.

2. Defining Refugees

The Directive offers an opportunity to rectify known problems with the refugee
definition of the Swedish Aliens Act. The most important correction related to the
question of gender and persecution, and it engaged the Inquiry as well as a parallelly
ongoing legislative reform process. In 1997, a special provision for aliens having a
well-founded fear of persecution on account of gender or sexual orientation had been
introduced in the Aliens Act.8 This lex specialis had relegated its beneficiaries to sub-
sidiary protection and therewith effectively precluded such persons to be recognised
as refugees. This, in turn, denied them the benefits associated with refugee status (as a
tavel document, more favourable family reunification rules under the Dublin Con-
vention and Regulation, and earlier access to naturalization). In its bill “Refugee
status and persecution on grounds of sex or sexual orientation” (Government’s Bill
2005/06:6), the Government has proposed that persons who feel a well-founded fear
of persecution on grounds of gender or sexual orientation should instead receive
protection as refugees. The Inquiry saw strong reasons for supporting this alteration
in articles 9.2.f and 10.1.d QD.9

5 Telephone interview with Mr. Niklas Kebbon, Swedish Ministry of Justice, 9 January 2007.
6 Nonetheless, the positions expressed in this text are that of the author. Please note that all
translations from Swedish to English are by this author and have no official standing whatso-
ever.
8 See K. Folkelius and G. Noll: “Affirmative Exclusion? Sex, Gender, Persecution and the Re-
9 See in particular p. 111-112 of the Inquiry Report, pointing out that the understanding of a
particular social group according to the refugee definition in existing Swedish law normally does
not encompass groups constituted by gender or sexual orientation.
As of 31 March 2006, a new provision in line with the Government’s Bill and the position of the Inquiry has been adopted. In a literal translation, Chapter 4 Section 1 of the Aliens Act now defines a refugee as

“an alien being outside the country in which that alien is a citizen, because he or she feels a well-founded fear of persecution for reasons of race, nationality, religious or political opinion or for reasons of gender, sexual orientation or other membership of a particular social group.”

Another proposal put forward in the Inquiry Report concerns the forward-looking character of the refugee definition. Article 4.4 QD implies that refugee status determination ultimately assesses future risks. Presently, a key phrase on persecution by non-state agents in Chapter 4 Section 1 of the Swedish Aliens Act relates to a refugee as an alien having been exposed to persecution. The Inquiry proposes this wording to be altered to define a refugee as an alien risking to be exposed to persecution.

Otherwise, the Inquiry Report states that Swedish law is well in line with the prescriptions of the Qualification Directive in a number of areas (actors of persecution, actors of protection, cessation). On the issue on protection needs created by the applicant sur place in Article 5.3 QD, the Inquiry Report highlights a lack of clarity in article 5.3 QD, which states that an applicant “shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin.” The Inquiry emphasised the need to assess all sur place cases under the 1951 Convention. It suggested that this particular provision “shall not entail any legislative changes”.

The Inquiry believes that Swedish procedures for cessation of refugee status comply with the requirements of the Qualification Directive. The Inquiry Report puts forward the proposal to as domestic norms reflecting Article 1D, E and F of the 1951 Convention are merely limiting the right to obtain a residence permit under current law, the Inquiry report suggests that they should also bar an applicant from access to refugee status. The Inquiry proposes that a provision be introduced in the Aliens Act that a residence permit for a refugee must be permanent or be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require.

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10 “[E]n utlänning som befinner sig utanför det land som utlänningen är medborgare i, därför att han eller hon känner välgrundad fruktan för förföljelse på grund av ras, nationalitet, religiös eller politisk uppfattning eller på grund av kön, sexuell läggning eller annan tillhörighet till en viss samhällsgrupp”.
13 Inquiry Report, p. 127-139.
14 Inquiry Report, p. 132-133.
3. Subsidiary Protection

Subsidiary forms of protection were introduced in Swedish law and practice already in the 1970s. By comparison to Southern neighbours as Germany, the Swedish variety was relatively advantageous, and entailed permanent residence permits with a stable set-up of rights. During the past decade, the definition was successively adapted to international human rights law and thus became less discretionary. Articles 2.e and 15 QD would reinforce this trend further\(^\text{15}\), if the Inquiry proposal for reform is followed.

In order to transpose the Directive, it is suggested that Chapter 4, Section 2 of the Aliens Act be supplemented by a provision covering serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict. In defining beneficiaries of subsidiary protection in its article 2.e, the Qualification Directive employs objective formulations of risk (“substantial grounds for believing” and “real risk of suffering serious harm”). These criteria may be considered more favourable for the individual than the criterion “well-founded fear” presently used when defining subsidiary protection beneficiaries in the Aliens Act. The Inquiry Report suggests, therefore, that the language of “well-founded fear” is swapped for language reflecting objective risks (the alien being “in danger” or “running the risk” of certain specified forms of harm).\(^\text{16}\)

The proposed definition has grown into an extraordinarily complex provision. Its central elements merit quoting in full:

A person in need of alternative protection according to this law is an alien who, in other cases than those covered by Section 1 [i.e. the refugee definition, GN], is outside the country in which the alien is a citizen, but where there are reasonable grounds to assume that the alien upon return
1. would be in danger of being exposed to the death penalty or to corporal punishment, torture or other inhuman or degrading treatment or punishment,
2. would as a civilian run a serious and individual risk to life or person by reason of indiscriminate violence in situations of international or internal armed conflict,
3. would otherwise be in need of protection due to international or internal armed conflict, or would risk to be exposed to serious violations due to other grave conflicts in the alien’s home country, or
4. would be in danger of being persecuted on account of his or her gender or homosexuality

and that alien is unable or, owing to such risk, unwilling to accord himself or herself of the protection of that country.


\(^\text{16}\) See the wording of proposed amendments to Chapter 4 Section 2 of the Aliens Act on p. 44-45 of the Inquiry Report.
It is immaterial to application whether the authorities of the home country are responsible for exposing the alien to the risk mentioned in the first paragraph, subparagraphs 1-4, or whether the authorities are unable to protect the alien from such actions by individuals. Notably, the Inquiry committee believed that article 15.1.c QD might be so narrow in scope that the pre-existing Swedish protection clause for persons fleeing armed conflict should not be swapped for it. Therefore, article 15.1.c QD is replicated in subparagraph 2 above, while the pre-existing clause is to be found in subparagraph 3 to provide a catch-all for those cases not falling under subparagraph 2.

The Inquiry further suggested that the Aliens Act be complemented with a provision prescribing that a beneficiary of subsidiary protection be declared as having the status of subsidiary protection. A residence permit for a person with subsidiary protection status should be permanent, or valid for a period of at least one year, and renewable unless compelling reasons of national security or public order otherwise require. The Inquiry also proposed the introduction of a provision on the ending and revocation of subsidiary protection status.

4. Assessment of Facts and Circumstances

In its article 4, the Qualification Directive offers a messy combination of mandatory and optional rules on how to assess applications for international protection. The current Swedish system for assessing applications for international protection is a one-stop shop, where applications for asylum are dealt with in the same manner as applications for subsidiary protection. It rests on the principle of free evaluation of evidence. The Inquiry believed that it currently meets the requirements raised by the Directive, obviating active transposition.

5. Information Duties on the Content of the Status Granted

In Swedish practice, refugees and beneficiaries of subsidiary protection status are informed of their rights and obligations. However, there is no written norm underpinning that practice. With a view to article 22 QD, the Inquiry proposes that a new provision on information concerning the rights and obligations relating to refugee or subsidiary protection status be introduced in the Aliens Ordinance (1989:547).

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17 Please note that subparagraph 4 has already been deleted in Chapter 4 Section 2 of the Aliens Act as currently in force for reasons explained above (see text accompanying note 9).
18 Inquiry Report, p. 188-189.
21 Inquiry Report, p. 218.
states explicitly that, “[t]o the extent possible, such information shall be delivered in a language which the alien can understand”.23

6. Maintaining Family Unity

In Swedish law, the principle of family unity applies to families of refugees. To a large extent, the unity of families of individuals with subsidiary protection status is also maintained. In general, family members will be granted the same status as the person they wish to join in Sweden.

In the light of articles 23 and 24, the Inquiry proposes that a provision be introduced in the Aliens Act stating that a spouse, partner or unmarried child of a refugee or person with subsidiary protection status is entitled to a residence permit. The residence permit is to be permanent, or valid for a period of at least one year, and renewable unless reasons of national security or public order otherwise require.24 Otherwise, existing provisions in the Aliens Act on the revocation of residence permits of family members are deemed compatible with the Directive.

Providing family members of beneficiaries of refugee or subsidiary protection status with permanent residence permits or temporary residence permits valid for at least one year opens their access to residence-based benefits in Chapter VII of the Directive. With regard to the level of benefits to be provided to family members of beneficiaries of refugee or subsidiary protection status, existing Swedish law matches the requirements of the Directive.

7. Travel Documents

Existing Swedish law provides that refugees are entitled to a travel document in accordance with the 1951 Convention. Hence, there is no need of active transposition of article 25.1 QD. The Inquiry proposes that the Swedish Migration Board should be obliged by a provision in the Aliens Ordinance to issue an aliens passport to a beneficiary of subsidiary protection status where this is necessary for serious humanitarian reasons.25 At present, there is merely a competence for the Migration Board to do so, but no obligation.

8. Unaccompanied Minors

In its analysis of existing Swedish law, the Inquiry noted that article 30.5 QD would need to be transposed. It is suggested that the Swedish Migration Board be given the

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task of tracing an unaccompanied child’s family members after a child has been granted a residence permit.26

9. **Other Issues**

With regard to
Access to the labour market;
- Education;
- Access to accommodation;
- Right to free movement within the Member State;
- Access to integration facilities;
- Repatriation;
- Administrative cooperation within the EU, and
- Staff,

the Inquiry deems Swedish law to be fully in line with the obligations of the Qualification Directive. No legislative amendments are proposed in these areas.

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The Implementation of the Qualification Directive in France: One Step Forward and Two Steps Backwards

Vincent Chetail∗

The position of France regarding the implementation of the European Qualification Directive of 29 April 20041 can best be described as unusual. France incorporated the Directive five months before its very adoption! A Statute on asylum was specifically adopted in December 2003 in order to incorporate in domestic law the main components of the proposal of the European Commission, which eventually became – after several modifications – the Qualification Directive five months later.2

At first glance, this sudden enthusiasm coming from a Member State traditionally reticent in implementing European Directives may strike as surprising. As the author has elaborated on elsewhere,3 this premature incorporation was clearly designed to influence the negotiations within the European Union and thereby to reshape the content of the future Directive. From a traditional French viewpoint, it made it possible to argue that the EU Directive implements French law rather than the contrary.

In spite of its highly political context, the Statute of December 2003 introduced three important changes in existing French domestic law and practice: it officially recognised subsidiary protection, persecution from non-state actors, and internal

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protection. Although not explicitly required by European law, the new Statute also instituted a single procedure on asylum, including both claims for refugee status and subsidiary protection.

Since the adoption of the Statute, there has been no other substantial legislative or administrative measure to implement the Qualification Directive. A new Code on aliens’ admission and the right to asylum (Code de l’entrée et du séjour des étrangers et du droit d’asile) entered into force in March 2005. However, the adoption of this Code was a purely formal modification of the law, the purpose of which was to gather all the existing rules governing migration and asylum into a single document. Similarly, the new Statute on immigration and integration (Loi Sarkozy II), enacted in July 2006, contains some provisions on technical aspects of the asylum procedure, but these provisions do not affect the Qualification Directive. The deadline of 10 October 2006 for implementing the Directive in national legislation therefore lapsed without any further change.

The legislative reform adopted in December 2003 undoubtedly endorsed important changes initiated by the European Union. Nonetheless, this premature incorporation of the Qualification Directive remains selective and partial, thus reducing the impact of the harmonization process. More significantly, French law focuses only on certain limited aspects of the two major components of the Directive concerning respectively, the common criteria for defining who is a refugee or is otherwise entitled to subsidiary protection (Part. I) and the minimum level of rights and benefits attached to the protection granted (Part. II).

1. The Definition of Refugees and of other Persons in Need of International Protection

The main interest of the French legislation lies in the definition of refugees and persons entitled to subsidiary protection and more particularly in the case law that relates to it. France is indeed in a very peculiar situation, as it is the only Member State that it has the opportunity to implement the EU Directive during more than two years before the official deadline for its transposition. However, even if the French case law is instructive on several aspects of the Qualification Directive, the overall result of the implementation process initiated in January 2004 is rather disappointing. French Courts did not succeed in providing a systemic and coherent framework for the interpretation of the definition of persons in need of protection, particularly concerning the very concept of persecution.


6 French case law mentioned in the present study is updated until 30 September 2006. It may be found in the 2004 and 2005 annual reports and the three first quarterly reports 2006, edited by the Commission des recours des réfugiés (Contentieux des réfugiés. Jurisprudence du Conseil d’État et de la Commission des recours des réfugiés, Centre d’information juridique).
1.1 Nature and Grounds of Persecution and Serious Harm

Persecution is defined in Article 9 of the Qualification Directive as “a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms” or “an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner”. This general definition of persecution has not been incorporated into French domestic law (neither in the legislation of December 2003 nor in any other regulations or case law). The absence of any clear-cut definition of the term “persecution” contrasts with the more systemic and rather sophisticated approach developed by common law countries. Defining persecution by reference to human rights violations not only ensures that the 1951 Geneva Convention has a continuing relevance in accordance with the subsequent evolution of international law, but it also allows for a common and coherent framework for interpretation that plainly corresponds to the objectives of the harmonization process initiated by the European Union.

The attitude of the French authorities towards the crucial concept of persecution is symptomatic of a selective and partial incorporation of the Qualification Directive. As a matter of fact, it therefore depends on the circumstances of each case whether a particular action or threat would amount to persecution. Such an empirical and ad-hoc assessment weakens the very idea of a predictable and binding meaning of persecution. This typical trend of the French Parliament and the Courts may be explained on the following grounds: it illustrates their implicit will to preserve a broad margin of appreciation for decision-makers and more decisively, their traditional reluctance to define persecution by reference to human rights. In accordance with a sovereign and classical conception of asylum, refugee law is commonly considered in France to be within the boundaries of domestic administrative law rather than international or human rights law.

This conception did not change even after the incorporation in domestic law of the grounds of subsidiary protection deriving from human rights instruments. The
The recognition of this alternative ground for protection is one of the major changes inspired by the EU Directive. The legislation adopted in December 2003 restates the basic criteria for subsidiary protection recognised in article 15 of the Qualification Directive. Both French law and European law refer to a “serious harm” which consists of: (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.11

The absence of any legal definition of persecution, in conjunction with the more specific criteria of subsidiary protection, makes it difficult to distinguish between the two forms of protection. After more than two years of application, the case law of the French Refugee Appeals Board (Commission des recours des réfugiés) is simply not coherent. One could reasonably wonder whether it aims to distinguish them. The Commission tends to use one common criterion for both forms of protection in order to differentiate who is outside and who is within the ambit of international protection. This vague and factual criterion depends on the gravity of persecution and serious harm. Asylum applications are frequently refused on the ground that the prejudicial actions are not sufficiently severe to be eligible for refugee status or for subsidiary protection.12 The threshold of the gravity test can be relatively high. For example, a dismissal motivated by ethnic origin in Georgia does not justify international protection.13 The French Commission held in the same vein that a withdrawal of nationality as a result of the refusal to perform military service in Turkey is neither a persecution nor a serious harm.14

The main distinctive element between subsidiary protection and refugee definition is built on the grounds of persecution and serious harm. Subsidiary protection does

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11 We could notice two differences of language between the two texts. The French Act does not explicitly mention “execution”, which is supposed to be covered by the generic expression of “death penalty” (peine de mort). Moreover, the EU Directive requires that “torture or inhuman or degrading treatment” relates to an applicant “in the country of origin”, whereas this curious condition is fortunately not mentioned in the French legislation.

12 See for example: CRR, 9 January 2006, 489406, D. (short term detention of 24 hours for identity control of a transsexual in Ivory Coast); CRR, 1 June 2005, 487178, Vélotantis (expulsion from housing of a Muslim in Bosnia according to a non-discriminatory legislation); CRR, 6 December 2004, 496263, Wang (pressure from private individuals to reimburse a loan and financial penalty for leaving the Chinese territory without official permission).

13 CRR, 6 January 2005, 479780, Sharesbean épouse Khatoyan.

14 CRR, 2 May 2005, 502323, Gunduz.
not require a particular ground or motivation, whereas persecution – under the refugee definition – has to be based on one of the grounds enumerated in the Geneva Convention (race, religion, nationality, political opinion and particular social groups). Article 9(3) of the EU Directive recalls that “there must be a connection between the reasons […] and the acts of persecution”. These five reasons of persecution are defined in Article 10 of the Directive. The European definitions of these grounds of persecution have not been explicitly incorporated in domestic law. However, they correspond in substance to the general understanding of French case law. For example, the Conseil d’État held in a judgement Beltaifa delivered in 1998 that political opinion may be attributed to the applicant by the actor of persecution, irrespective of the reality of such political beliefs.15 Since the consecration of this interpretation by Article 10 § 2 of the Directive, the Commission refers more systematically to the perception of political opinions by persecutors.16

The ground of persecution based on the “membership to a particular social group” provides a more striking example of the parallel between French case law and the EU Directive. The controversial notion of a particular social group is defined in the Directive as the “members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society”. This definition is considered to encompass the two main conceptions of a particular social group, namely the “protected characteristic approach” and the “social perception approach”.17 Article 10 is however criticized by the UNHCR because, although the two approaches frequently converge, this is not always the case and it may therefore create protection gaps.18 The UN agency therefore recommends that Member States reconcile the two approaches to permit alternative, rather than cumulative, application of the two conceptions. This will certainly not be the case for France, as the definition of a “particular social group” expressed in Article 10 § 1 d) of the EU Directive is similar to that retained by the Conseil d’État in a judgement delivered in 1997. According to the French Administrative Supreme Court, a particular social group has to be defined on the basis of two cumulative conditions: the members of that group have to share a

common characteristic and, because of this characteristic, the group has to be perceived as distinct in the surrounding society.\textsuperscript{19} The Commission confirmed in 2004 and 2005 a well-established case law,\textsuperscript{20} recognizing that women who refuse genital mutilation constitute a particular social group in Chad,\textsuperscript{21} Senegal\textsuperscript{22} and Mali.\textsuperscript{23} The Commission also held in an important judgment delivered in July 2005 that women refusing forced marriage and considered by the society as transgressing social mores constitute a particular social group in Cameroon.\textsuperscript{24} The Commission explained that if one of the two conditions identified by the \textit{Conseil d'État} for the definition of a particular social group is not satisfied, notably because their refusal is not considered as a transgression of the social order, such women are still eligible for subsidiary protection. This case is one of the rare decisions explicitly referring to the differences between subsidiary protection and refugee definition.

In doing so, the Commission highlights the main purpose of subsidiary protection, namely providing for an alternative protection when persecution is not based on one of the five grounds enumerated in the Geneva Convention. This case also exemplifies the implicit reasoning of the French Court: the decision-maker has first to examine whether the applicant fulfils the conditions of the refugee definition and then, if this is not the case, notably because of the absence of a ground of persecution, the decision-maker has to examine whether the applicant satisfies the conditions for subsidiary protection. Following this method, refugee definition under the Geneva Convention remains the rule and subsidiary protection under the European Directive the exception. Article L 712-1 of the French Statute (\textit{Code des étrangers}) explicitly recalls for the same purpose that subsidiary protection is granted to any person who does not qualify as a refugee.

Since January 2004, subsidiary protection has been recognised in three main fields: family or private issues; threat of serious harm from mafia and other criminal organizations; and situations of armed conflict. The first set of circumstances is the most frequent ground for subsidiary protection. It generally includes: family violence in the context of forced marriage refusal;\textsuperscript{25} domestic violence from husband;\textsuperscript{26} family har-

\textsuperscript{19} The French Supreme Court defined a particular social group as a “groupe dont les membres seraient, en raison des caractéristiques communes qui les définissent aux yeux des autorités et de la société, susceptibles d’être exposés à des persécutions”: CE, SSR, 23 June 1997, O., Loh. p. 261 ; D., 1997, IR p. 175 ; JCP, n°28-29, 9 juillet 1997.


\textsuperscript{21} CRR, 30 March 2004, 454281, Ndiguimadji.

\textsuperscript{22} CRR, 22 February 2005, 456133, \textit{Diakhate épouse Ndioneu}.

\textsuperscript{23} CRR, 16 June 2005, 492440, \textit{Sylla}.


\textsuperscript{25} CRR, 21 December 2004, 483691, \textit{Diagana} Mauritania; CRR, 7 October 2005, 535458, \textit{Dolgor} Mongolia.
The Implementation of the Qualification Directive in France

Asessment based on perceived sexual orientation; forced prostitution by a family member; and adultery cases. The second set of circumstances justifying subsidiary protection is related to threat of serious harm by mafia or other criminal organizations because the applicants denounced their criminal activities or refused bribes and rackete. The third main ground for subsidiary protection derives from a situation of armed conflict, as expressly mentioned in Article 15 (c) of the EU Directive. During more than two years of application, the Commission recognized subsidiary protection in the context of armed conflict only four times. It concerned applicants coming from Sudan, Iraq and Colombia. In the first decision delivered in November 2005, the French Court described the situation in Darfur as an internal armed conflict under the criteria mentioned in Article 3 of the Geneva Convention on the protection of civilian population. The reference to Article 3 was rather unfortunate. Contrary to the assumption of the Commission, this provision identifies the minimum standard applicable in times of internal armed conflict, but it does not define what an internal armed conflict is.

Two other decisions have been delivered in February 2006 in the context of Iraq, where the situation has been characterized by the Commission as “a conflict between Iraqi security forces, coalition forces and armed groups carrying out on certain parts of the territory sustained and concerted military

28 CRR, 9 March 2006, 548670, Barre: Congo.
32 Article 3 may however be relevant for identifying the “threat to a civilian’s life or person” mentioned in Article 15 (c) of the EU Directive. According to Article 3: “In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for (…)”.  

93
operations”. This definition, implicitly inspired from the wording of Article 1 of the 1977 Protocol II relating to the Protection of Victims of Non-International Armed Conflicts, is far more relevant than Article 3 common to 1949 Geneva Conventions.

These few cases demonstrate that the threshold of this last ground of subsidiary protection is relatively high. It excludes situations where the intensity of violence falls below the threshold required by an “armed conflict”. One could argue that a situation of generalized violations of human rights is a degrading treatment under Article 15 (b) of the Qualification Directive. The French Commission is however traditionally reluctant towards situations of indiscriminate violence. Contrary to other States Parties to the Geneva Convention, it never recognized the concept of collective persecution under the refugee definition. In fact, subsidiary protection as well as refugee status are frequently denied on the ground that the general situation in the country of origin cannot justify protection in the absence of a clearly individualized risk of persecution or serious harm upon return. French case law gives the impression that the benefit of subsidiary protection and refugee status is inversely proportionate to the number of persons invoking it.

Case law rulings can be inconsistent in their application of the Directive. The Commission held in a decision of June 2006 regarding an applicant from Iran that judicial condemnation to 100 lashes for adultery is not a persecution, on the ground that it is the result of a non-discriminatory measure of implementation of the criminal legislation. It concludes nevertheless that this is an inhuman and degrading treatment under Article 15 (b) of the EU Directive. The Commission implicitly admits therefore that such a penalty is susceptible to be applied against any other persons in the same situation. Such decisions are nevertheless sparse. The recent cases related to a situation of armed conflict confirm the premise based on – what Jane McAdam called – a “political fear of numbers rather than any legal basis”.

The four decisions delivered under the meaning of Article 15 (c) of the Directive have been formulated in very cautious terms. The Commission insists on the “individual” and “direct” nature of the threat to life or person, holding, for example, that such a threat is closely linked either to the financial situation of the Sudanese national or to the former position of the Iraqi applicant in the administration of Sad-

36 CRR, 9 June 2006, 550721, Mehrzadeh. The legality of such conclusion is questionable, as Article 9 (2) (c) of the EU Qualification explicitly states that “prosecution or punishment, which is disproportionate” is an act of persecution under the refugee definition.
dam Hussein.\textsuperscript{39} It begs the question whether the situation of armed conflict is still relevant in such circumstances. Indeed, the refugee status has been recognized in similar circumstances to other applicants from Sudan\textsuperscript{40} and Iraq\textsuperscript{41} without mentioning the situation of armed conflict.

Overemphasis on a personalized threat neutralized the very concept of indiscriminate violence under Article 15 (c) of the EU Directive and removed, as a consequence, a substantial part of the raison d’être of subsidiary protection. Such reasoning is based on a confusion between the effect and the cause, namely the risk itself (fear/threat) and the source of this risk (persecution/serious harm). While the risk is by definition personal to the applicant, such a risk may be caused by a collective treatment to a whole group of persons. The issue is not whether the claimant is more at risk than anyone else in his/her country, but rather whether he/she is personally at risk because of his/her membership to a particular group.

1.2 Actors of Persecution and Actors of Protection

One of the major changes introduced by the legislative reform initiated in December 2003 relates to non-state actors. According to a well-known case law, France was traditionally in favour of the so-called “accountability approach” requiring a direct link between persecution and the State.\textsuperscript{42} On the contrary, the vast majority of States parties to the Refugee Convention apply the “protection approach”, focusing on the failure to provide protection.\textsuperscript{43} This last approach was finally endorsed by Article 6 of the EU Directive and France preferred to anticipate this change by incorporating it in its domestic law before the adoption of the Directive (Article L. 713-2 of the Code des étrangers).

This change imposed by the Parliament created a sort of cultural revolution for French judges. Persecution from non-state actors no longer depends on State complicity, as was previously required for Algerian applicants. The Commission acknowledged in a decision of June 2004 that the Algerian authorities were unable to provide protection against terrorists between 1995 and 2000 and considered that they are still unable to today in the particular region of Chlef.\textsuperscript{44} It also recognized refugee status to nationals from Columbia who have a well-founded fear of being extorted and kidnapped by the FARC guerrilla group.\textsuperscript{45} Contrary to its previous case law, the Com-

\textsuperscript{39} CRR, SR, 17 February 2006, 497089, Alawazi.
\textsuperscript{40} CRR, 15 May 2006, 560434, Lpen.
\textsuperscript{41} CRR, 15 mars 2006, 502401, Nouri.
\textsuperscript{44} CRR, SR, 25 June 2004, 446177, Boubriama. See also: CRR, 16 June 2004, 462367, Bougessa.
mission finally recognised in September 2004 that persecution may also come from Somali clans.\textsuperscript{46} This is another important change, because it traditionally considered Somalia as a situation of anarchy without any legal or \textit{de facto} authorities. The Commission also explained in subsequent decisions on Somalia that the current transitional government does not exercise effective control over the Somali territory and thus cannot provide protection against persecution from clans.\textsuperscript{47}

Despite these remarkable changes, the Commission still seems reluctant to address persecution from non-state actors. Such claims are frequently refused on the general ground that the risk is not clearly established. Moreover, certain decisions relating to Algerian applicants surprisingly continue to apply the former case law.\textsuperscript{48} Decisions of this kind are isolated but nevertheless illustrate persisting disagreement within the Commission itself on the issue of non-state actors. Another disturbing aspect of French case law derives from the fact that the vast majority of subsidiary protection cases have been recognized in the context of private and non-state persecution. This curious coincidence could be inferred from an implicit interpretation that persecution under the Refugee Convention is supposed to be linked to a legal or \textit{de facto} authority. Such a distinction is clearly in contradiction with the EU Directive as the rules governing actors of persecution and protection are expressly applicable under the same conditions for the refugee definition and the subsidiary protection.

With regard to the actors of protection identified in Article 7(1) of the EU Directive, it is worth mentioning that the legislation adopted in December 2003 only refers to “States” and “international or regional organisations”. The other actors of protection mentioned in the Directive (“parties or organisations […] controlling the State or a substantial part of the territory of the State”) have been voluntarily excluded by the French Parliament. Such a peculiarity is compatible with the EU Directive, as Article 3 explicitly permits Member States to “introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection”.

On the other hand, French legislation fails to incorporate an important clarification specified in Article 7(2) of the Directive\textsuperscript{49} regarding the level of protection provided by States and international organizations. In the silence of the legislation, case law insists on the effectiveness of the protection actually provided by States or international organisations to prevent persecution.\textsuperscript{50} The Commission recalled in numerous cases on Congo,\textsuperscript{51} Kosovo\textsuperscript{52} and Haiti\textsuperscript{53} that the mere presence of UN peace-


\textsuperscript{48} CRR, 13 March 2006, 561830, Hamouwouda.

\textsuperscript{49} According to Article 7(2) of the Directive, “Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, \textit{inter alia}, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection”.

\textsuperscript{50} See in particular: CRR, SR, 29 July 2005, 487336, Ali Ahmed.

\textsuperscript{51} CRR, 25 May 2004, 442209, Kibalatatatu Moboto.

\textsuperscript{52} CRR, 23 September 2004, 469809, Qirimì.
keeping forces is not sufficient to prevent persecution, when such forces as well as State authorities fail to provide effective protection. The Commission’s assessment being focused on the circumstances of each case, it is difficult to be more specific than the effective nature of the protection in the country of origin.

1.3 Internal Protection

According to Article 8(1) of the Qualification Directive, Member States “may” refuse protection to an applicant “if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country” \(^{54}\). Although optional, the French Parliament explicitly incorporated the concept of internal protection in its domestic legislation (article L. 713-3 of the Code des étrangers). The Commission des recours des réfugiés confirmed in June 2004 that the two conditions above-mentioned are cumulative: the decision-maker has firstly to examine whether there is a risk of persecution or serious harm in a part of the country of origin and secondly, it has to examine whether the applicant can reasonably be expected to stay in that part of the country.\(^{55}\)

Contrary to the European text, the French Code explicitly mentions the author of persecution amongst the different factors to take into account in the assessment of the availability of internal protection. When the author of persecution is the State, it is clearly exceptional that an applicant may find protection in one part of the national territory, as State authorities are generally able to act throughout the whole territory. In practice, internal protection has been raised only four times as a ground of refusal of refugee status and subsidiary protection.\(^{56}\) In each case, applicants invoked non-state actors’ persecutions in one particular area of the national territory. This is an important point for the potential impact of internal protection. As a matter of principle, internal protection is not bound to be applied to all asylum cases. Geographically circumscribed risk of persecution is a prerequisite to apply internal protection.

Once such a geographically circumscribed risk is established, the Commission generally takes into account the living conditions in the relevant part of the country in order to assess whether it is reasonable to stay there. It held, for instance, that an Algerian applicant could not reasonably be expected to stay in Alger because of the impossibility of finding a job as well as being submitted to pressure by the police to go back to his region of origin.\(^{57}\) However, the geographical size of a given part of


\(^{57}\) CRR, SR, 25 June 2004, 446177, Bouhrima.
the country is surprisingly not a relevant factor. The Commission admitted that the capital of Moldavia\textsuperscript{58} or even the village of origin in Kosovo\textsuperscript{59} could be a reasonable place to stay. Such a restrictive interpretation is manifestly open to legitimate criticism.

2. The Content of International Protection for Refugees and Beneficiaries of Subsidiary Protection

One of the two major objectives of the Directive is to ensure that a minimum level of protection is available in all Member States for refugees and beneficiaries of subsidiary protection (recitals 6). It is intended to reduce disparities between Member States’ legislation and, as a consequence, the so called “secondary movements” based on differing rights and benefits from a State to another. Differences between Member States have been, however, substituted by differences between persons. The final text of the Qualification Directive has resulted in differentiation between the rights afforded to those with refugee status and those with subsidiary protection by allowing Member States to withhold rights, or grant significantly lower levels of rights, to beneficiaries of subsidiary protection.

For instance, refugees shall be issued with a residence permit valid for at least three years, whereas persons entitled to subsidiary protection shall be issued with a residence permit valid for at least one year (Article 24). In the same vein, refugees shall be granted a travel document in accordance with the Geneva Convention, whereas beneficiaries of subsidiary protection shall only be provided with a travel document when they “are unable to obtain a national passport” and “serious humanitarian reasons [...] require their presence in another State” (Article 25). More significantly, access to employment (Article 26), social welfare (Article 28), health care (Article 29) and integration facilities (Article 33) is more restricted for persons entitled to subsidiary protection. According to Article 28(2), Member States have the option to limit the social benefits for persons entitled to subsidiary protection to core benefits only (minimum income support, assistance in case of illness, pregnancy and parental assistance). On the other hand, refugees and persons entitled to subsidiary protection have equal access to education (Article 27) and accommodation (Article 31). Member States shall also allow freedom of movement within their territory under the same conditions for both refugees and beneficiaries of subsidiary protection (Article 32).

The difference of treatment between refugees and persons entitled to subsidiary protection is frequently criticized.\textsuperscript{60} Legally, there is no basis as to why the source of protection should require differentiation in the benefits and entitlements accorded to the beneficiary. UNHCR has stated that rights should be based on need rather than

\begin{itemize}
\item \textsuperscript{58} CRR, 30 March 2006, 542469, \textit{Nacu}.
\item \textsuperscript{59} CRR, 26 October 2004, 475193, \textit{Hyrije Bejtullahu}.
\end{itemize}
the grounds on which a person has been granted protection and that there is accordingly no valid reason to treat beneficiaries of subsidiary protection differently from Convention refugees. The position of French law on this important question is again relatively original. The selective and anticipated incorporation of the Qualification Directive was mainly focused on the issue of residence permits of refugees and beneficiaries of subsidiary protection. On the contrary, other aspects of their legal status, such as access to employment and welfare benefits, have been relatively ignored so that the previous legislation has been maintained without significant changes.

2.1 Residence Permit and Family Unity

The major difference between refugee status and subsidiary protection lies in the duration of the residence permit. This differentiation is even more accentuated in French law than in the minimum standard provided by the European Directive. According to the Code on aliens' admission and the right to asylum (Article L 314-11 8), a residence permit of ten years is delivered to refugees, whereas the residence permit for beneficiaries of subsidiary protection is valid for only one year (Article L. 712-3). Such a distinction is based on the false premise that refugee status is taken to be permanent, while subsidiary protection is considered temporary in nature. However, the risk faced in the country of origin is relatively comparable under both forms of protection. There is no reason to expect the need for subsidiary protection to be of shorter duration than the need for protection under the refugee status.

Notwithstanding this basic reality, French law incorporates in substance the rules governing cessation and revocation of subsidiary protection enshrined in Articles 16 and 19 of the Directive. The result is that the latter protection is particularly precarious. According to Article L. 712-3 of the French Code, subsidiary protection may be withdrawn at any time if the beneficiary has committed a serious non-political crime or if its activities in France represent a threat to public order or national security. Moreover, renewal of the one year permit may be refused if the circumstances which justified the initial grant for subsidiary protection no longer exist. The situation of refugees is more stable than those of persons entitled to subsidiary protection. Indeed, the cessation clauses of the refugee status have no effect on the ten years residence permits. Residence permits remain valid despite the withdrawal of refugee status and they are automatically renewed, with the traditional exceptions of the threat to public order and national security.

With regard to family members, the ten years resident permit is delivered to the spouse and minor children of the refugee (Article L 314-11 ali 8). Similarly, the one year permit is delivered under the same conditions to the family of the beneficiary of subsidiary protection (Article L. 313-13). The Commission des recours des réfugiés confirmed in a judgement delivered in May 2005 that the principle of family unity has to

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be applied under the same conditions for refugees and beneficiaries of subsidiary protection. This case is an interesting one, as the Commission explained that the right to family unity derives not only from French domestic legislation but more broadly from the general principles of refugee law. It held that: “The object of the directive no 2004/83/CE of the European Union Council adopted 29 April 2004, as well as the Code on the aliens’ admission and the right to asylum, is to institute an asylum regime which, while conferring different rights in function of the legal nature of the protection conferred to an alien, has to ensure for all persons in need of a real protection, whether under the refugee status or the subsidiary protection, the effective guarantees deriving from the general principles of law applicable to refugees”.

Family unity, being such a general principle of law, has to be extended by analogy to beneficiaries of subsidiary protection. As a result, family members have to be granted subsidiary protection and benefit from all the rights attached to this protection on an equal footing with any other beneficiary of the subsidiary protection.

The clarification given by the French Court is extremely important because the Directive is particularly vague on this albeit crucial issue. On the insistence of Germany, there is no explicit reference in the EU Directive to residence permits for family members of beneficiaries of subsidiary protection. Moreover, while Article 23(2) entitles family members of the beneficiary of subsidiary protection to claim the benefits recognized in the Directive, the reminder provision enables Member States to restrict its application. It states that Member States “may define the conditions applicable to such benefits” without any other precision on the scope and the content of these possible conditions.

2.2 Employment and Welfare Benefits

French law is rather indifferent to the EU Directive with regard to employment and welfare benefits. The reform on asylum simply left unchanged the content of the previous legislation. The practical result is that domestic law goes sometimes beyond the minimum standard identified by the Directive.

Access to employment is recognized by French law under the same conditions for refugees (Article L. 314-4 of the Code) and beneficiaries of subsidiary protection (Article L. 313-13). There is, however, a difference between them with regard to trade and commercial activities. Contrary to persons entitled to subsidiary protection, refugees are exempted from the possession of the special permit ordinarily required of all

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64 Translation from the author (“tant la directive no2004/83/CE du Conseil de l’Union européenne, en date du 29 avril 2004, que le livre VII du code de l’entrée et du séjour des étrangers et du droit d’asile ont pour objet l’institution d’un régime d’asile qui, s’il peut comporter des garanties et conférer des droits différents selon la nature juridique de la protection accordée à l’étranger, assure en tout état de cause à l’ensemble des personnes qui ont un réel besoin de protection, qu’elles soient détentrices du statut de réfugié ou de la protection subsidiaire définie par l’article L.712-1 du code précité, les garanties effectives qui découlent des principes généraux du droit applicables aux réfugiés”).
65 Only the family members of refugees are mentioned in the final version of Article 24 of the Directive.
foreigners since 1938 (called “carte de commerçant étranger”). Moreover, it is worth recalling that access to a considerable number of liberal professions is prohibited to aliens in general (including both refugees and beneficiaries of subsidiary protection), because the exercise of these professions is subordinated to the possession of the French nationality or the nationality of another EU Member State.

With regard to other economic and social rights, access to social welfare, health care, education and accommodation is generally accorded to all aliens legally resident in France under the same conditions as those provided for French nationals. The primary legislation does not contain any specific provision on travel document for refugees and beneficiaries of subsidiary protection. Nevertheless, a Decree of 14 August 2004 provides that the Director of OFPRA, the administrative office in charge of the protection of refugees in France, is competent for identifying the beneficiaries of subsidiary protection for whom a travel document has to be issued (Article 9 4°). Although there is curiously no explicit mention for refugees, they are entitled to the relevant documents required by Article 28 of the Geneva Convention.

Conclusion

The incorporation of the Qualification Directive in France was both hasty and incomplete. This transposition “à la carte” considerably mitigates its impact on French law. It highlights more generally the persistence of national peculiarities over the objectives of European harmonization. French Parliament explicitly integrates only 7 of the 34 Articles of the Directive. Probably the most acute problem in France is about the definition of refugees and beneficiaries of subsidiary protection. The necessary recognition of non-state persecution cannot divert attention from the fact that the majority of the other changes initiated by the Parliament are much more restrictive and other important aspects of the Directive were simply ignored. During the last two years, French Courts have unfortunately failed to rectify the situation by promoting a more integrated and balanced interpretation of the refugee definition. The road for a European Asylum Regime is still long.

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The Implementation of the EU Qualification Directive in the Member States: Slovakia

Olga Sidorenko*

Introduction

When the negotiations for the accession to the European Union began, the differences between the EU acquis and the Slovak legislation were apparent. One of the most evident discrepancies was in the area of justice and home affairs, including asylum law. It was a difficult task to harmonise the national legislation with the EU acquis not just because of the vast number of legal acts to be adopted, amended or translated, but in particular due to the fact that the sensitive concepts of asylum and human rights needed to be brought in line with the views of the EU.1 The alignment with the EU acquis was certainly a challenging task for all candidate countries. The harmonisation of legislation did not simply mean taking over the texts prepared and adopted by the Institutions in Brussels. One has to realise that this process required substantial changes in the policy, legislation and both to be reflected in the implementation process in practice. Essential reforms were also required in the institutional framework.

Evolution of the Slovak Asylum Legislation

The first legislative act dealing with asylum on the territory of the former Czech and Slovak Federal Republic (Czechoslovakia), following the political changes at the end of the 1980s, was the Refugee Law No. 498 Coll. of 16 November 1990.2 Its adoption was of vital importance, as it was necessary to establish this essential institute of the international and humanitarian law. After the splitting of Czechoslovakia on the 1st January 1993 into two independent states - the Czech Republic and the Slovak Republic, also known as Slovakia, the abovementioned Law was revoked in Slovakia and replaced by the Refugee Law No. 283 Coll. of 14 November 1995.3

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1 Based on interviews at the Institute for the Approximation of the Law of the Slovak Government on the 31st August 2004 and at the UNHCR BO, Bratislava, on the 2nd September 2004.
2 It was adopted by the Parliament of the Czech and Slovak Federal Republic on the 16th November 1990 and entered into force on the 1st January 1991. Rights and duties of aliens in general were at that time still regulated by the Law on the Stay of Aliens on the Territory of the Czech and Slovak Socialistic Republic (No. 68 Coll. of 1965), Art. 1(3).
Part II of the Slovak Constitution\(^4\) lays down the fundamental rights and freedoms provided for Slovak nationals, and for persons residing in the territory of the Slovak Republic. Article 53 of the Constitution stipulates that

> “the Slovak Republic shall grant asylum to aliens persecuted for the exercise of political rights and freedoms. Such asylum may be denied to those who have acted to violate the fundamental human rights and freedoms. Details shall be provided by law”.

New provisions to the Slovak Refugee Law were introduced by an amendment to the 283/1995 Law, *No. 309 Coll. of 19 September 2000*, which entered into force on the 1\(^{st}\) November 2000 and the substantial changes introduced by this amendment were:

- the abolition of the “24-hour-rule” for lodging an asylum claim;\(^5\)
- the extension of the grounds for granting refugee status by inserting a new paragraph on family reunification; and
- the addition to the list of grounds for starting an accelerated procedure of cases where the applicant came from a third safe country or a safe country of origin.

The complete harmonisation of the Slovak asylum law with the Community law had to progress in three stages, starting with the adoption of the amending 309/2000 Law. The next proposed stages have been the adoption of an entirely new Asylum Law; and finally the complete implementation of the EU law in the field of asylum achieved upon Slovakia’s accession to the European Union.\(^6\)

A proposal for a new Asylum Law was submitted to the Slovak Parliament according to a negotiation position reflected in the Negotiation Chapter 24 (Co-operation in the field of justice and home affairs). In June 2002 the Slovak Parliament adopted a new Asylum Law, which entered into force on the 1\(^{st}\) January 2003. The main purpose of the *Asylum Law No. 480 Coll. of 20 June 2002* has been to attain standards comparable to the standards of the EU Member States.\(^7\) The 480/2002 Asylum Law introduced new terminology, including its title. Instead of ‘Refugee Law’, it is now named ‘Asylum Law’, in order to harmonise the corresponding terminology used in the national legislation with the Community legislation.

At the time of joining the EU on the 1\(^{st}\) May 2004, Slovakia had adopted the EU legislation on asylum in force at that time. It can be therefore said that Slovakia acceded to the Union on the same footing as the ‘old’ Member States. Since the EU asylum system itself has been further developing according to the goals set in the first pillar, especially Article 63 TEC, it has been inevitable to respond to these new devel-

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\(^5\) Following the abolition of the often criticised “24-hour-rule” – a time-limit for lodging an asylum claim, asylum seekers can lodge an application either at the border at the time of entry the territory of Slovakia or after crossing the border, at any time at a police department at the place of their stay.

\(^6\) Explanatory memorandum of the Slovak Government to the 309/2000 Law.

\(^7\) Explanatory memorandum of the Slovak Government to the 480/2002 Law.
opments in the way of further amending the national legislation. For example, a new Law was adopted in December 2004. The amendment to the 480/2002 Asylum Law, No. 1 Coll. of 2 December 2004 entered into force on the 1st February 2005. The main purpose of this amendment has been to transpose into the national legislation the Reception Directive and the Temporary Protection Directive, and thus to make a further step to bring the Slovak legislation on asylum in line with the primary (especially Articles 61 and 63 TEC) and the secondary (the above-mentioned Council Directives) Community law.

Transposition of the Qualification Directive into the Slovak Legislation

The implementation of European Union law consists of several stages. Some of them (e.g. transposition) are also called ‘abstract implementation’, since they refer to the implementation of European legislation (primary or secondary) into the national legislation of the Member States. Other stages (application, enforcement) represent ‘concrete implementation’, i.e. application of the already harmonised national legislation in practice and its enforcement by administrative or judicial authorities.

A proposal for a further amendment to the Slovak Asylum Law (further referred to as the amendment-proposal) has been introduced in order to comply with the obligation to transpose the Council Directive 2004/83/EC of 29 April 2004 in the national legislation. Once the new amendment enters into force, the asylum-determination procedure carried out by the Migration Office of the Ministry of Interior of the Slovak Republic will include not only assessment of asylum claims, but also a determination whether a third-country national qualifies for a subsidiary form of protection. Currently, a subsidiary form of protection for the third-country nationals is partially covered by the concept of tolerated stay laid down in the Law on the Stay of Aliens No. 48/2002 Coll. The tolerated stay does not, however, offer the same scope of rights as does the subsidiary protection according to the Qualification Directive.

The amendment-proposal introduced a number of substantial changes, for example, it:
- defines the terms: international protection, subsidiary protection, serious harm, actors of persecution, country of origin;
- redefines the term persecution, and specifies the reasons for persecution;
- broadens the grounds for rejection of an asylum application as inadmissible;
- includes new circumstances under which the asylum is not granted or is revoked;

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8 So far the 480/2002 Asylum Law has been further amended by the following laws: 606/2003 Coll., 207/2004 Coll. and 1/2005 Coll.
11 A single-procedure-approach has been introduced in Article 12(1) (a).
OLGA SIDORENKO

- introduces the grounds for granting, for refusal to grant, for ending and revocation of subsidiary protection;
- enables to grant subsidiary protection for the purpose of family reunification;
- introduces the rights and duties of the third country nationals, who have been granted a subsidiary form of protection, including the right to be informed about these rights and duties;
- determines the time period for which the asylum status for the purpose of family reunification is initially granted.

I will not go into details regarding all provisions in the amendment-proposal. Instead, based on a discussion with the representative of the UNHCR in Slovakia, I would like to draw your attention to one Article, the new Article 20, paragraphs (2) and (3).

The proposal under Article 20(2) states that asylum shall be granted for an indefinite period of time, while asylum for the purpose of family reunification shall be granted initially for a period of 3 years. Subsequently it may be extended, upon the request of the applicant for an indefinite period of time, provided that the requirements under Article 10 (i.e. granting asylum for the purpose of family reunification) are met. This proposed provision puts the family members of the person granted asylum in a disadvantageous position on account of their derivative refugee status. This proposed distinction is incompatible with the legal requirement of non-discrimination contained under various international human rights treaties. It is also important to bear in mind that in its Final Act, the UN Conference of Plenipotentiaries, which adopted the 1951 Geneva Convention, unanimously approved Recommendation B on the subject of family unity in the case of refugees emphasizing that the

“unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unit is constantly threatened, and noting with satisfaction that according to the official commentary of the ad hoc Committee on Statelessness and Related Problems (E/1616, p. 40) the rights granted to a refugee are extended to the members of his family.”

Further, the fundamental importance of the family and the need to protect it have consistently received recognition in international human rights law both at the universal and regional level and it is clear that these protective provisions apply to refugees and beneficiaries of subsidiary protection. The following international legal instruments form the foundation in support of family reunification:
- the Universal Declaration of Human Rights (Article 16);
- the International Covenant on Civil and Political Rights (Articles 17, 23);
- the International Covenant on Economic, Social and Cultural Rights (Article 10);
- the Convention on the Rights of the Child (Articles 7, 8, 9, 10, 18, 22);

The proposed administrative requirement that this status shall be first granted for three years, with the possibility to apply for an indefinite status, appears to be incompatible with the body of law and practice outlined above. The Slovak authorities justi-
fied this provision by referring to Article 24(1) of the Qualification Directive on residence permits. Moreover, the approach taken in the amendment-proposal suggests a refugee status that can be terminated purely on the basis of expiration of time, a cessation provision infringing the 1951 Refugee Convention and the Qualification Directive, as well.

As regards Article 20(3) of the amendment-proposal, the beneficiaries of subsidiary protection, as well as their family members would need to renew their status annually. Having a status that has to be renewed every year would cause major challenges for the beneficiaries of subsidiary protection. Furthermore, the Qualification Directive does not recommend that time limitations should be attached to subsidiary protection status. On the contrary, according to the Qualification Directive, subsidiary protection status is a durable status that can only be terminated on the grounds laid down in Article 19. Therefore, the time limitation proposed in the amendment seems to be below the minimum standards established by the Directive. The Slovak authorities justify the one-year time limitation of the subsidiary protection status by the minimum duration of residence permits issued to the beneficiaries of subsidiary protection according to Article 24(2) of the Qualification Directive. However, from a legal point of view there is a qualitative difference between a time limit on the status itself and a time limit on a residence permit for the status holder. It is stated in the Qualification Directive that as long as the person holds the status, he/she is automatically entitled to the residence permit. Thus, in order to refuse the granting of or renewal of the residence permit, the status which provides the entitlement would need to be terminated first. In order to avoid confusion, this distinction must be clearly reflected in the amendment to the Slovak Asylum Law; otherwise one can speak about an incorrect interpretation and consequently an incorrect transposition of the EU Qualification Directive.

Conclusion

The transposition of the Qualification Directive in the Slovak legislation requires amending other legal instruments besides the Asylum Law, for example, the Law on the Stay of Aliens, the Criminal Code and the Code of Criminal Procedure, the Social Assistance Law and the Administrative Fees Law. As far as the transposition process of the Qualification Directive into the Slovak national legislation is concerned, by 15 November 2006 the situation was as follows:

1. On the 5th September 2006, the Legislative Council of the Slovak Government discussed the amendment-proposal in order to ensure the transposition of the Qualification Directive.
2. On the 20th September 2006, the Slovak Government approved the proposal.
3. In order to become a law, the proposal needs to be adopted by the Slovak Parliament. The adoption of the proposal by the Slovak Parliament is still pending, currently being in the second reading in the Parliament. The expected entering into force of the amendment to the Asylum Law is the 1st January 2007, as stated in the final provisions to the amendment-proposal.
Slovakia thus did not meet the transposition deadline of the 10th October 2006 as laid down in Article 38(1) of the Qualification Directive to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive; nevertheless, its transposition is in process. By transposing the Qualification Directive in the national law, the process of harmonisation of the Slovak asylum legislation with the EU *aequius* will not yet be completed. Before 1 December 2007 the Asylum Law would need to be amended again in order to transpose the Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.
Transposition of the Qualification Directive in Germany

Roland Bank*

1. Introduction

In the course of negotiations on the Qualification Directive, Germany had managed to introduce some of its national concepts into the Directive. For instance, the provision on subsequent applications and protection needs arising sur place in Article 5 (3) Qualification Directive was modelled along the German provision on post-flight reasons concerning the rejection of constitutional asylum existing at the time.1 With regard to some other aspects, the concepts adopted in the Qualification Directive were taken up in the course of legislative reform of German immigration law in 2004. This applies in particular to the provision on non-state agents of persecution: Before the reform, it was standing practice in Germany to deny refugee protection in cases in which persecution emanated from non-state agents. With the Immigration Act 2004, a provision explicitly recognising non-state agents as relevant actors of persecution was introduced into German law which is worded exactly along the lines of Article 6 lit. c Qualification Directive. Consequently, a number of aspects do not or no longer require any legislative transposition activities. However, the great majority of provisions of the Qualification Directive on the criteria for refugee status and particularly subsidiary protection still require transposition legislation.

Germany is currently seeking to transpose into German law the Qualification Directive together with all other instruments adopted under Title IV of the EC Treaty. A respective legislative proposal had been drafted already in autumn 2004 but remains under discussion at the end of 2006.2 The new act will not enter into force

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1 The German legal situation concerning asylum applications based on post-flight reasons created by the own decision of the asylum seeker was – before the legislative reform in 2004 – the following: According to Section 28 Asylum Procedures Act constitutional asylum was rejected but Convention refugee status was possible. With the Immigration Act 2004, a new Subsection 2 was introduced blocking, as a rule, the granting of Convention refugee status if the respective reasons are brought forward in a subsequent asylum application.

2 Due to a number of additional reform issues added to the mere transposition provisions, significant political discussions surrounded the adoption process. Since transposition provision in contrast were often rather technical in nature, it has proven difficult to raise any significant political interest for the respective proposals even if they partly will fall short of the requirements of the Qualification Directive. Moreover, in the second half of 2006, the adoption process has been politically intertwined with negotiations on a long-stayer regulation applying to persons without legal residence permit but remaining in Germany based on a toleration permit. This aspect has attracted most interest in the public debate surrounding the negotiations.
before summer 2007. Since the expiry of the transposition deadline on 10 October 2006, the Qualification Directive is applicable in Germany with immediate effect under the usual conditions. It is this requirement of direct application of the Qualification Directive which may prompt a more thorough review of the current German practice in the light of the Directive in particular by the courts: judges will have to systematically examine the provisions of the Directive taking into account the entire Directive as it stands and not only by applying German transposition provisions.

The application of the Directive before and after its transposition will provide an important impulse towards bringing German practice of refugee law better in line with the 1951 Convention. More particularly, the following provisions of the Qualification Directive will require changes in the practice of German refugee law: the cumulative effect of certain acts may constitute an act of persecution (Art. 9 (1) lit. b Qualification Directive); persecution for reasons of religion will no longer be limited to the exercise of religious freedom in private but also cover persecution on grounds of the exercise of religious freedom in public (Art. 10 (1) b Qualification Directive); the German concept of an internal protection alternative will no longer apply and be replaced by the criteria of safety from persecution and reasonableness of the protection alternative in line with the Directive (Article 8 Qualification Directive); the concept of subsidiary protection according to Article 15 Qualification Directive will add significant aspects to the concepts applying so far in Germany. Moreover, other provisions of the Directive shall inspire a review of certain criteria as interpreted in Germany, without, however, already prescribing definitely different results. For instance, the concept of what constitutes an act of persecution if the rights to life, liberty or freedom are not violated may have to be reconsidered in the light of Art. 9 Qualification Directive. Or, the question of rejecting subsequent applications may have to be revisited against the background of Article 5 (3) Qualification Directive in the light of its explicit reference to and the lack of compatibility with the 1951 Convention.

2. Problems in the Draft Transposition Act

Two fields of discussion in the process of transposition legislation shall be addressed here. Firstly, the technique of transposition: whereas some provisions are transposed by amending existing provisions in German law others are transposed by referring in a German provision to several specific articles of the Qualification Directive. The latter approach will be analysed in some detail below since it concerns the most important provisions of the Directive. Secondly, the phenomenon of selective or restrictive transposition provides for examples in which the immediate effect of the Directive will remain of crucial importance.3

3 The Transposition Act is still being negotiated among the coalition partners of the present Government, and there is no final draft available for the time being. The analysis is based therefore on the draft of 13 March 2006 by the Federal Ministry of Interior ("Entwurf eines Gesetzes zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union"); subsequently to be referred to as “Draft Transposition Act”) and on the “Application Guidelines” of 13 October 2006 regarding the direct application of the Qualification Directive, also issued
2.1 Technique of Referral

According to the Draft Transposition Act, the core provisions of the Qualification Directive setting out the criteria for refugee status are not woven into existing German provisions. Instead of this, a reference to these provisions will be introduced into German law. The respective draft provision on criteria for refugee status reads:

“In application of the Convention of 28 July 1951 relating to the Status of Refugees (Federal Law Gazette 1953 II, p. 559), a foreigner may not be deported to a state in which his or her life or liberty is under threat on account of his or her race, religion, nationality, membership of a certain social group or political convictions; when determining whether persecution according to sentence 1 exists, Article 4 paragraph 4 and Articles 7 to 10 of Directive 2004/83/EC shall be applied complementarily.”

A similar reference is foreseen in the draft provisions on subsidiary protection.

It may seem surprising to see that only some of the core provisions of the Qualification Directive are referred to in the German transposition provision quoted above while others remain unmentioned. The possible intention of the legislator is probably to take up in this provision everything which is not regulated elsewhere in German asylum law. Moreover, as indicated in the introduction, another core provision had already been taken up previously in the Residence Act – an equivalent to Article 6 lit. c Qualification Directive on agents of persecution had already been inserted into the Residence Act by the Immigration Act 2004. Other provisions of the Directive have their origin in other parts of the German system: in particular, Section 28 Asylum Procedures Act has been the model for Article 5 Qualification Directive on international protection needs arising sur place.

For other provisions, in particular, other parts of Article 4 Qualification Directive, it is difficult to find parallels in the German Residence Act or the Asylum Procedures Act. As a consequence, the selective reference to Articles of the Qualification Directive will lead to new challenges for interpretation and application with immediate effect. Moreover, the reference to a bulk of articles is likely to decrease the chances of arriving at an application which fully reflects the systematic approach adopted by the Qualification Directive and the Geneva Convention for reviewing refugee status. In this regard it would have been preferable to introduce a number of new provisions


Extract from draft consolidated version of Section 60 (1) Residence Act according to the Application Guidelines, p. 4.

See draft consolidated version of Section 60 (7) 3 Residence Act according to the Application Guidelines, p.16. Reference is made to Articles 4 (4), 5 (1) and (2), 6 to 8 Qualification Directive.
systematically transposing the norms of the Qualification Directive one by one. This would have required some fundamental changes in the German system in particular by putting an end to the systematic anchoring of refugee status in the provisions on protection against deportation and dispersing other rights to various corners of aliens legislation rather than establishing a right to refugee status and the ensuing rights including the right not to be deported to the country of persecution in a coherent manner. This, however, politically was not feasible only about two years after Germany had seen its entire system of aliens and refugee law reformed after years of heated debates.

Another shortcoming of the transposition provision inserted in Section 60 (1) Residence Act as quoted above pertains to the “complementary” application of the provisions of the Directive to which the Act refers. From the viewpoint of European Law this approach is simply not correct. The wording of the transposition provision was chosen in order to allow for a continued application of the German provisions and concepts in relation to refugee protection. This is not limited to the attempt to maintain the restrictive parts of these concepts as far as possible but serves as well for preserving other specific concepts e.g. the provision on gender based persecution which is supposedly wider than the provision in Article 10 (1) d Qualification Directive. However, the wording may provoke confusion in the application of the provisions in the individual case. Such confusion could have been avoided by using a wording which takes up Article 3 Qualification Directive. This provision unequivocally allows retaining more favourable standards. A wording inspired by this Article would have been fully in line with the alleged legislative intention to state that any German provision going beyond the scope of protection required by the Qualification Directive remains untouched by the provisions of the Directive. The situation under European Law is sufficiently clear: If the provisions of the Directive referred to in German law leads to an interpretation more favourable for the asylum seeker than the respective German provisions or case law the European provision will prevail. It is open to doubt whether the confusing wording chosen for the transposition legislation will always lead to the correct results.

2.2 Selective Transposition

Looking at the draft transposition provisions in detail one may encounter various examples of selective transposition of the Directive. One has been mentioned above regarding Article 4 Qualification Directive of which only its paragraph 4 is explicitly referred to. Other examples are the omission of certain parts of the provisions on protection by other UN agencies (Article 12 (1) lit. a Qualification Directive) or on subsidiary protection (Article 15 lit. c Qualification Directive).

The most striking example for a selective transposition concerns Article 12 (1) lit. a Qualification Directive which takes up Article 1 D of the 1951 Convention. Whereas the first sentence of Article 12 (1) lit. a Qualification Directive is proposed

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6 The respective German provision (Section 60 (1) 3 Residence Act) states that persecution for reasons of gender is sufficient to constitute persecution for being a member of a particular social group.
for transposition in its entirety thereby excluding those persons benefiting from the protection of a UN agency other than UNHCR, the second sentence was omitted entirely in a first draft of the Transposition Act and in its central legal meaning in the latest draft. According to the second sentence of Article 12 (1) lit. a Qualification Directive, those persons having lost the protection mentioned in the first sentence are included in the protection by the Directive ipso facto. According to the latest draft, refugee status of the persons no longer under the protection of another UN agency is made dependant on a positive review of the refugee criteria according to Article 1 A (2) of the 1951 Convention. Consequently, the ipso facto approach of the Directive is turned into an ordinary review of refugee criteria. In other words, the inclusion provision of Article 12 (1) lit. a Qualification Directive is not foreseen to be fully transposed into German law.

The lack of conformity of the draft German provisions on subsidiary protection with the Qualification Directive will be discussed in some detail below. However, the phenomenon of selective transposition may be observed here: The term “indiscriminate violence” of Article 15 lit. c Qualification Directive is omitted in the draft of the German transposition provision. Even though the term concerned may seem rather vague such differences in wording between the Directive and a provision transposing a certain aspect of the Directive into national law will give rise to interpretative problems and uncertainty among those applying the law – a fortiori if such a central legal term of a provision of the Directive is omitted in the transposition norm. In particular, the omission of the term “indiscriminate violence” bears the danger that German practitioners will keep applying the test of whether the risk is related to an intentional act directed at a specific person; this approach cannot be reconciled with the term “indiscriminate violence”.

However, taking into account the function of the Qualification Directive as an instrument establishing minimum standards there seems to be only one interpretation of this omission which would be in line with European Law. By omitting a certain term the transposing Member State excludes any restrictions on the application of the respective clause potentially going along with term omitted: a national provision which is at variance with the text of the Qualification Directive can only be identical or more generous in its protection scope than the Directive. If a specific term of the text is omitted identity with the scope of the Directive cannot be intended. Consequently, only a more favourable scope is perceivable. Regarding more specifically the conditions for subsidiary protection under Article 15 lit. c Qualification Directive, the omission of the term “indiscriminate violence” therefore has to be interpreted in the way that an individual threat of serious harm may emanate from any kind of violence.

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7 Section 3 (3) Asylum Procedures Act according to the Draft Transposition Act of 3 January 2006.

8 Cf. draft consolidated version of Section 60 (8) Residence Act according to the Application Guidelines, p. 11 et seq.

9 The new German provision transposing on Article 12 (1) lit. a Qualification Directive refers to the criteria of Section 60 (1) Residence Act. Even though this provision deals with the protection against refoulement and is worded along the lines of Article 33 (1) of the 1951 Convention it is established practice of German courts that this provision is to be applied in a manner taking into account the refugee criteria of Article 1 A (2) of the 1951 Convention.
in the context of an armed conflict; any qualification of the violence in question must not form a criterion for providing protection in the German system if the transposition will take the form of the draft. Even if the German legislator may have another interpretation in mind, this is the only possible interpretation in line with European Law.

3. Impact of the Qualification Directive on the German System of Criteria for Granting Refugee Status or Subsidiary Protection

3.1 Closing Protection Gaps

3.1.1 Act of Persecution: Cumulative Effect
According to German case law, acts relevant for refugee protection always had to relate to an interference with the same human right. An overall analysis of a number of smaller infringements would not lead to the granting of refugee status.10 This approach will have to change according to Article 9 (1) lit. b Qualification Directive which determines that the cumulative effect of “various measures, including violations of human rights” may amount to an act of persecution.

3.1.2 Religious Persecution
So far, the German concept of persecution for reasons of religion had been significantly limited. According to the standing case law of both the Federal Constitutional Court11 and the Federal Administrative Court,12 only certain aspects of religious freedom deserved protection. In those cases in which future persecution could be avoided by restricting the exercise of religion to the so called “forum internum”, i.e. to exercise in private including private meetings with other believers, refugee protection was refused. In so doing, German courts often did not clearly differentiate between the act of persecution and the reasons for persecution.13 In particular, German courts frequently failed to examine possible sanctions as acts of persecution if they were related to the exercise of religious freedom in public.14

According to the Qualification Directive, refugee claims based on religious persecution are not exclusively related to the exercise of religious freedom in private but also cover persecution on grounds of the exercise of religious freedom in public (Article 10 (1) b Qualification Directive). Of course, protection will only be granted if there is an act of persecution which fulfils the requirements of Article 9 Qualification Directive, in particular regarding the severity of the violation of human rights. In

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10 See most recently, Higher Administrative Court of Schleswig-Holstein, judgement of 24 March 2005 – 1 LB 45/03.
11 Federal Constitutional Court, BVerfGE (official collection of the Federal Constitutional Court) 76, 143 (at 158 et seq.).
12 Federal Administrative Court, BVerwGE (official collection of the Federal Administrative Court) 74, 31 (at 38, 40).
13 For a detailed analysis see R. Bank and N. Schneider, Durchbruch für das Völkerrecht, Supplement to Asylmagazin 6/2006, p. 10 et seq.
14 See for instance, Federal Administrative Court, judgment of 20 January 2004, – 1 C 9/03.
most cases, a look at the sanctions prompted by a particular exercise of religious freedom will suffice to show a possible act of persecution in this sense: in practice, certain acts such as public demonstrations of one’s religious beliefs or proselytising will be punished with most severe sanctions from incarceration to corporal punishment or even death. What needs careful review in such cases is whether the incriminated act indeed forms part of the personal beliefs of the applicant in the sense that he or she feels religiously obliged to exercise such acts. If this is the case, he or she cannot be expected to suppress these religious convictions in the country of origin in order to escape persecution;15 rather, the person concerned has to be recognised as a refugee.

Only in those cases, in which the respective sanctions as such do not amount to an act of persecution, a violation of the right to religious freedom will have to be reviewed as to whether it is sufficiently severe to constitute an act of persecution as such. For instance, if the sanction for being a member of a Christian church or for a specific religious behaviour is a moderate fine or leads to an exclusion from certain tax benefits the sanction is not as severe as to constitute an act of persecution in the sense of the Qualification Directive. It may, possibly, constitute an act of discrimination which – if forming part of a broader policy – may amount to an act of persecution in the sense of the Qualification Directive together with other measures adopted against the applicant. Regarding the violation of the right to religious freedom as such going along with the prohibition of a certain religious behaviour, this may only constitute an act of persecution if it is considered to be sufficiently severe to pass the threshold of Article 9 Qualification Directive. This may in particular be the case if religious freedom is violated in a way forcing the applicant to deny his religious faith altogether.16 Transferring the German approach to this question would mean that only if the existential minimum of religious freedom (equated with the “forum internum”) – defined according to a human dignity core pertaining to each and every human right – was interfered with the violation would be sufficiently severe as to require international protection.

3.1.3 Internal Protection Alternative

Even though posing numerous questions of interpretation of the details, Article 8 Qualification Directive clearly imposes as criteria for the application of the internal protection alternative safety from persecution as well as reasonableness of the stay in the safe part of the country. According to the German approach, the second criterion was only considered relevant if the situation of living conditions in the region of the

15 The assumption made by German courts that, if future persecution depends on future behaviour of the applicant, the applicant may be required to abstain from the incriminated behaviour, meets with some distinct opposition in the international jurisprudence: United Kingdom Court of Appeal, Buxton J, Z v Secretary of State [2005], IAR 75; High Court of Australia, NABD of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 29 (26 May 2005), Judge Kirby, paragraphs 58, 106, 113, 113 et seq. (The majority of judges in this case rejected the appeal but on reasons of fact without principally rejecting Kirby’s arguments.)

16 See, for instance, Federal Administrative Court, judgment of 22 February 2005, – 1 C 17/03. The case concerned a marriage concluded under yezidi faith which could only be officially recognised in Syria if the faith was denied.
protection alternative was worse than in the region of origin. This practice was based on the assumption that a causal link between the persecution and the bad living conditions in the area of the protection alternative had to be established. Consequently, the German concept was based on the comparison between the situation in the region of origin and the region of the protection alternative within the country of origin.

Particularly striking were the results of this approach in cases concerning asylum seekers from Chechnya who frequently were denied protection because of a presumed protection alternative elsewhere in the Russian Federation. Of course, in spite of an important degree of discrimination and often very difficult practical living conditions of refugees from Chechnya elsewhere in the Russian Federation, the living conditions in the Chechen Republic have been regularly assessed to be worse than the conditions in other parts of the Federation. In the respective judgments the fact that the situation in Chechnya and the resulting living conditions were strongly intertwined with the overall situation of widespread persecution was usually not taken into account.

The concept of the Directive does not support a concept comparing the situation in the region of alternative protection with any other region – be it the region of origin or the situation in the country of asylum as it is promulgated by the case law of some countries. The wording of the Directive is clearly limited to taking into account the living conditions in the region of the protection alternative: the wording of Article 8 (1) and (2) speaks of reasonableness only with a view to “that part of the country” which is under consideration as an alternative protection area.

3.1.4 Subsidiary Protection

The concept of subsidiary protection will add significant new protection aspects to the concepts applying so far in Germany.

Currently, German law provides for subsidiary protection in cases involving one of the following risks:
- execution of a death penalty (Section 60 (3) Residence Act);
- torture (Section 60 (2) Residence Act);
- deportation in violation of the European Convention of Human Rights (Section 60 (5) Residence Act);
- individual threat to life or liberty; access to this individual protection is barred, however, in situations involving dangers to which the population or the segment of the population to which the foreigner belongs are generally exposed (Section 60 (7) Residence Act); according to German jurisprudence, only in cases of extreme danger involving a very high probability of imminent death or severest in-

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17 Federal Constitutional Court, decision of 10 July 1989, BVerfGE (official collection of judgements and decisions of the Federal Constitutional Court) 80, p. 315 et seq.
18 Cf. for instance Higher Administrative Court of North-Rhine Westphalia, judgment of 12 July 2005, – 11 A 2307/03.A, B II.4
jury upon return, an exception to this rule applies and an individual may find protection also in situations of general risks.

The draft Transposition Act contains amendments with a view to include the imposition of the death penalty as well as inhuman or degrading treatment or punishment in the respective provisions. Moreover, a sentence on Article 15 lit. c Qualification Directive will be inserted in the Residence Act.

Significant changes in the scope of protection may be expected with a view to protection against deportation in cases involving a risk of torture, inhuman or degrading treatment or punishment according to Article 15 lit. b Qualification Directive since both the scope of protection and the standards of probability under the Directive are broader than the German concept applying so far.

Protection in cases involving indiscriminate violence in situations of armed conflict under Article 15 lit. c Qualification Directive is insufficiently reflected both under current German law and in the draft Transposition Act. The current as well as the future legal situation under German law in principle provide for individual protection only in cases in which there is no general danger for the entire population or segments of it. Exceptions to this principle are only foreseen in cases of extreme danger, i.e. if returning a person to his country of origin would expose him or her almost certainly to death or most severe injury. The Directive goes far beyond this approach and consequently requires a different scope of protection to be granted by German authorities and courts.

3.1.4.1 Risk of torture, inhuman or degrading treatment or punishment

In order to fully understand the German transposition of subsidiary protection regarding protection against torture, inhuman or degrading treatment the legal requirements under the Directive and international law have to be taken into account. Three layers of protection have to be differentiated in the EU Member States which may apply in case of a risk of torture, inhuman or degrading treatment: firstly, refugee status in line with the Qualification Directive and the 1951 Convention going along with specific rights set out in the Directive and the 1951 Convention is granted if the well-founded fear of torture, inhuman or degrading treatment is combined with a reason for persecution in the sense of Article 1 A (2) of the 1951 Convention and Article 10 Qualification Directive and no exclusion grounds apply; secondly, subsidiary protection status under the Qualification Directive going along with certain rights specified in the Directive is granted if the real risk of the incriminated treatment is not related to a reason of persecution and no exclusion grounds under Article 17 Qualification Directive apply; and, thirdly, protection against deportation under human rights law, in particular, Article 3 ECHR, without providing any status rights is granted in every other case of a real risk of such treatment. Consequently, protection against deportation under the European Convention of Human Rights (ECHR) is outside the ambit of the Qualification Directive. It remains applicable also in situations where subsidiary protection is excluded under the Directive, for instance for war criminals. However, since Article 15 lit. b Qualification Directive and Article 3 ECHR are worded in identical terms, the interpretation of these criteria for subsidiary protection under the Qualification Directive will have to reflect the jurisprudence of the European Court of Human Rights on Article 3 ECHR.
The draft German transposition act correctly transposes this concept by establishing a provision prohibiting deportation in cases involving a real risk of torture, inhuman or degrading treatment; the general rules of Chapter II of the Directive are explicitly made applicable to the said provision.\(^{20}\) At the same time the provision on protection against deportation under the ECHR remains excluded from the application of these general provisions.\(^{21}\)

Since the German provision on protection in cases of a risk of torture, inhuman or degrading treatment or punishment as well as Article 15 lit. b Qualification Directive are worded equivalently to Article 3 ECHR, the jurisprudence of the European Court of Human Rights will have to be taken into account more accurately by the German authorities and courts when reviewing cases for protection under this angle. If they failed to do so they may be corrected by rulings of the ECJ. So far, German courts have declined to follow the jurisprudence of the European Court of Human Rights in some aspects thereby developing a distinctly German interpretation of protection against deportation under Article 3 of the European Convention of Human Rights. In particular, dangers emanating from non-state sources were not regarded as giving rise to protection under that provision.\(^{22}\) The new legal situation means that in cases of a threat of torture, inhuman or degrading treatment or punishment emanating from non-state actors international protection must be granted as subsidiary protection under the Qualification Directive (see Article 6).

Moreover, concepts of inhuman or degrading treatment which are broader than the German interpretation of Article 3 ECHR will apply in the framework of subsidiary protection under the Qualification Directive. In particular, this would include protection in cases in which the danger in question does not go back to an intentional attack on human rights but refers to the circumstances of a particular situation.\(^{23}\) Arguments to exclude any acts which are not intentionally directed towards the person affected are grounded on the wording of Article 15 lit. b Qualification Directive ("torture, inhuman or degrading treatment or punishment of the applicant in the country of origin", emphasis added) and the fact that Article 6 Qualification Directive refers to actors of serious harm. As will be demonstrated below, both arguments are not convincing.

By reference to the country of origin in Article 15 lit. b Qualification Directive, it seems, the drafters have sought to avoid that the act of deportation may be the point of reference for the violation of the prohibition of torture, inhuman or degrading treatment. In the context of the obligations under Article 3 ECHR it is the act of deportation which gives rise to the responsibility of the member state for a violation of the Convention. Sometimes the argument is made that because of referring to the treatment in the country of origin Article 15 lit. b Qualification Directive is not intended to cover circumstances or situations. This argument is based on the supposi-

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\(^{20}\) Cf. consolidated Section 60 (2) Residence Act according to the Application Guidelines, p. 15.

\(^{21}\) The Draft Transposition Act does not contain an amendment of Section 60 (5) Residence Act on protection against deportation if that was contrary to the ECHR.

\(^{22}\) See especially Federal Administrative Court, judgment of 17 October 1995, 9 C 15.95 and judgment of 15 April 1997, 9 C 38.96,

tion that the reasons for granting protection from deportation under the ECHR also in cases involving dangers of being exposed to circumstances or situations as in contrast to suffering intentional acts directed against the applicant was that deportation constituted the intentional act.

This supposition is wrong for two reasons. Firstly, under either approach, what constitutes an incriminated treatment has to be established independently of whether the applicant is exposed to the treatment in an EU member state or in a third country. Since “inhuman or degrading treatment” need not be intentional according to the jurisprudence of the European Court of Human Rights 24 there is no reason arising from a systematic comparison with the Convention to assume that non-intentional treatment violating the said provision was outside the ambit of Article 15 lit. b Qualification Directive. Moreover, it is recognised that also a violation of positive obligations may lead to a violation of Article 3 ECHR. 25 Of course, such positive obligations do not apply to the countries of origin which are not member states of the ECHR. However, the absence of positive measures may lead to a situation violating the prohibition of torture, inhuman or degrading treatment all the same. For instance, if a country of origin does not provide care for orphans, an unaccompanied minor applicant may be in danger of neglect and suffering if returned which is inhuman or degrading. This state of neglect and suffering would be contrary to Article 3 ECHR and should therefore prompt access to protection under Article 15 lit. b of the Qualification Directive.

Secondly, the concept of subsidiary protection of the Directive goes far beyond protection against deportation by providing for a number of positive rights in its Chapter VII. It is therefore logical if the criteria for granting protection are not focused on the act of deportation as it is the case in the context of the ECHR. In that context, the act of deportation is the necessary link to establish the responsibility of the member state of the Convention. Under the Qualification Directive, non-deportation is one of several legal consequences following from subsidiary protection status. However, this difference in the approaches does not imply a different scope of protection.

There is much more merit to the argument that the requirement of intentional treatment aiming at a specific person as in contrast to “circumstances” or “situations” follows from Article 6 and 7 Qualification Directive. Article 6 provides an enumeration of actors of serious harm. Moreover, Article 7 establishes a framework for counter-measures to be taken by the home-state against non-state persecution or serious harm, in particular through prosecution and punishment of those responsible.

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24 In particular, detention conditions are frequently reviewed by the European Court of Human Rights for their compatibility with Article 3 ECHR, cf. Valasinas v Lithuania, No. 44558/98, paragraph 102. Whereas the deprivation of liberty is intentional, insufficient detention conditions need not be intended. Moreover, circumstances or situations may give rise to positive obligations of the Member States.

25 There is ample case law by the European Court of Human Rights on this question. Cf. for instance as one of the leading cases European Court of Human Rights, Z v United Kingdom, Reports 2001-V, p. 1, paragraph 74. A profound general analysis of the positive obligations under the Convention is provided by C. Droege, Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention (2003).
At a first glance, also such counter-measures seem to be directed against an intentional behaviour or at least acts as in contrast to circumstances or situations: the wording of the provision refers to “acts constituting … serious harm”. However, these counter-measures are only examples for the protection to be provided by the member state which do not limit the scope of serious harm to acts.

The condition of “intentionally aiming at a specific person” (i.e. specifically at the applicant) currently applied as a requirement for subsidiary protection under German law is definitely too narrow to conform to the Article 15 lit. c Qualification Directive: It is part of the character of indiscriminate actions that they do not necessarily aim at a specific person. And, while protection against threats emanating from certain actors may be the rule, this does not exclude exceptional cases in which the protection need is based on circumstances or situations. If the requirement of an intentional act directed against the applicant cannot be maintained with a view to Article 15 lit. c, neither can it apply to Article 15 lit. b Qualification Directive.

The core argument, however, is that the terms used in Article 15 lit. b Qualification Directive and Article 3 ECHR are identical. To interpret one of the core values of European and universal human rights law – the absolute protection against torture, inhuman or degrading treatment – differently in order to arrive at different statuses would be less than convincing. The central difference between the protection under the Directive and that under the corresponding provision of the ECHR is that protection under the Directive may be excluded (Article 17 Qualification Directive) and therefore the subsidiary protection status in line with Articles 20 et seq. Qualification Directive can be denied on exclusion grounds. In contrast to that, protection under Article 3 ECHR is absolute and guarantees non-deportation also in cases in which the person concerned fulfils the requirements of an exclusion ground. This result does not warrant any differences in interpreting the terms “torture, inhuman or degrading treatment or punishment”.

Consequently, as in contrast to the German practice under Section 60 (5) Residence Act which provides protection against deportations involving a violation of the ECHR, situations and circumstances which may be in violation of the prohibition of torture, inhuman or degrading treatment or punishment must prompt protection under Article 15 lit. b Qualification Directive.

3.1.4.2 Individual risk of harm because of indiscriminate violence in armed conflicts

The German legal situation concerning protection against individual dangers for life, limb or liberty will undergo substantial changes because of the application of Article 15 lit. c Qualification Directive. Currently, access to individual protection is barred if dangers arise to which the population or the segment of the population to which the foreigner belongs are generally exposed (Section 60 (7) Residence Act). In such cases, protection against deportation is possible only on the basis of a general deportation ban adopted by a German State; such a decision does not lead to a legal residence permit but persons affected remain in Germany on a toleration permit (Section 60 a (1), (3) Residence Act) which excludes access to integration. Such general deportation bans are adopted in practice only very rarely.

Exceptions to this rule applying in cases of general dangers are only applied if the dangers are so extreme as to expose the individual concerned almost certainly to death
or most serious injuries upon return. Thereby, a very high threshold is applied regarding the standard of probability required to obtain individual protection. This approach is maintained in the current proposals for the respective part of the Transposition Act.  

The result of barring individual protection cannot be maintained in situations within the scope of Article 15 lit. c of the Qualification Directive. It is emphasised in the Directive (Recital no. 26) that “risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.” However, it remains clear by the wording of the recital that in such situations the access to individual protection is not generally barred altogether (“normally … in themselves”). On the contrary, Article 15 lit. c of the Directive is related to protection in situations of indiscriminate violence in armed conflicts and consequently as such is designated for situations involving general dangers.

The German Ministry of Interior seems to suppose that the existing legal provisions – no access to individual protection unless there is an extreme danger of death or most serious injuries – are in line with the Qualification Directive. However, the standard of probability applied in the German “extreme danger” approach cannot be applied under the Directive at least in cases in which the person concerned had suffered serious harm or had been threatened directly by such harm. Such cases are addressed in Article 4 (4) Qualification Directive. This provision requires that previous risk of serious harm is taken as a serious indication for a real risk of suffering serious harm upon return, unless there are good reasons to consider that such harm will not be repeated. Even though the standard of probability in cases of real risks of serious harm is not explicitly set out in the Directive, it is clear that the standard applied in Germany so far is much too high in cases covered by Article 15 lit. c Qualification Directive: Firstly, the term “threat” clearly shows that a danger is sufficient; otherwise the term would be superfluous and the wording could have been restricted to referring to the (certain) fact of death or injury upon return. Secondly, dangers arising sur place cannot be evaluated in such extreme difference to the standard applying after the experience of pre-flight threats in accordance with Article 4 (4) Qualification Directive. It would be absurd to require applicants potentially exposed to post-flight dangers not amounting to a highly probable or even certain violation of the rights to life or physical integrity to first experience the immediate threat of serious harm before being able to find protection.

In addition to this change of standards in situations in which the German system applies a bar to individual protection in situations of general dangers, the standard of probability applied under the German system for individual protection in situations of individual dangers will need to be changed. Whereas the German authorities and

26 See Federal Ministry of Interior, Application Guidelines, p. 16.
27 The Federal Ministry of Interior underlines that in order to find protection under the Directive, the violation of life or person must be “equivalent to being unavoidable” (“gleichsam un- ausweichlich”), Application Guidelines, p. 16. This section of the Application Guidelines is not limited to exceptions to the barring effect of general dangers in the German system but is directly applied to Article 15 lit. c Qualification Directive as a requirement for an individual threat.
courts used to apply the standard of a considerable probability (“beachtliche Wahr-
scheinlichkeit”) of suffering the harm from which protection is sought, this standard
cannot be applied anymore in situations covered by Article 4 (4) Qualification Direc-
tive.

3.2 Revisiting Concepts

Other provisions of the Directive will inspire a review of German concepts applying
so far without, however, already prescribing definitely different results.

3.2.1 Act of Persecution: Severe Violation of Basic Human Rights

According to the German concept of what constitutes an act of persecution – or as it
is put in German terminology, an interference relevant for asylum (“asylrelevanter
Eingriff”) – authorities and courts used to differentiate between the interferences
with the rights to life, liberty or physical integrity on the one hand and interferences
with other rights on the other hand. Whereas interferences with the first group of
rights used to be qualified as relevant for asylum without any additional criteria, inter-
ferences with other rights used to fulfill the conditions for protection according to the
German system only if the dimension of human dignity forming the core of protection
in the respective fundamental right was interfered with. Under the German concept
of fundamental rights, Article 1 of the Constitution provides that human dignity must
not be violated. This provision is perceived as bearing on all other provisions on
fundamental rights in the Constitution which all have a core part protecting human
dignity and a wider part protecting those aspects of a right which are not relevant for
human dignity. Only interferences with the wider parts of a fundamental human right
may be justified; interferences with the core part of a fundamental right may not be
justified since this would constitute an interference with human dignity which is not
permitted under any circumstances.

In Article 9 (1) lit. a Qualification Directive neither of the elements of the Ger-
man approach is explicitly used. Instead of that, the Directive refers to a “severe
violation of basic human rights”.

Regarding the criterion of a basic human right, the Directive provides examples
by pointing at the non-derogable provisions of the ECHR.28 In addition to these
examples the Qualification Directive remains open for other rights to be qualified as
basic human rights. This openness is further underlined in Article 9 (2) lit. b Qualifi-
cation Directive stating that also protection against discrimination may constitute a
basic human right.

At first glance, the German concept of rights relevant for persecution would seem
broader than that under the Directive. According to German practice, an interference

28 Thereby the prohibition of killing in contravention of Article 2 (unless in the context of legal
warfare), the prohibition of torture, inhuman and degrading treatment or punishment, the pro-
hibition of slavery as well as the principle of nulla poena sine lege are clearly designated as basic
human rights. To these rights explicitly mentioned one might first add also the rights designated
as non-derogable in the International Covenant of Civil and Political Rights (Article 4 (2)), in-
cluding the right to freedom of thought, conscience and religion, to the list of basic human
rights.
with any human right can be relevant for persecution. However, by applying the human dignity criterion to all such infringements, the German approach boils down to only including infringements of human dignity in the concept of an act of persecution. Therefore, the German approach of an act of persecution is limited to interferences with the rights to life, physical integrity, liberty and human dignity. There can be little doubt that all of these rights would qualify as a basic human right in the sense of Article 9 (1) of the Directive. The Qualification Directive goes beyond these rights in its openness for qualifying other human rights as basic human rights.

If a violation of a basic human right in the sense of the Directive has been established, the next question is whether the violation is sufficiently severe. Under the severity test it would have to be examined whether the type of act constituting a violation of a basic human right is carried out in a manner which is sufficiently severe to pass the threshold of Article 9 (1) lit. a Qualification Directive. However, violations of certain basic human rights may always pass the severity test. Some of the rights explicitly referred to in the Directive as examples for basic human rights are protected in absolute terms allowing for little differentiation as to the severity implied. For instance, it cannot be argued that treatment to be characterised as inhuman would be sufficiently severe while treatment “only” characterised as degrading would not. In addition to the absolute nature of the protection under Article 3 ECHR, also the case law on “degrading treatment” which includes very severe violations speaks against such a differentiation. Moreover, having in mind that a danger of any treatment in the country of origin constituting torture, inhuman or degrading treatment prompts subsidiary protection under the Qualification Directive (Article 15 lit. b) it would be surprising to regard the same treatment as not qualifying as sufficiently severe for granting refugee protection.

Having in mind that therefore the criterion of severity of the violation would always be fulfilled in the case of some basic human rights there can be little doubt that any violation of the rights usually referred to in the German system would fulfil the criteria of Article 9 Qualification Directive: Unjustified infringements of the physical integrity or the right to liberty have been acknowledged to constitute violations of Article 3 ECHR in the practice of the European Court of Human Rights; violations of the human dignity would constitute a “degrading treatment” under Article 3 ECHR.

29 Regarding human dignity, this follows from the systematic position as the first right set out in the European Charter of Fundamental Rights as well as from the protection of human dignity as protection against degrading treatment under Article 3 ECHR. This provision counts among the rights explicitly referred to as basic human rights by Article 9 (1) lit. a Qualification Directive.

30 See for instance, European Court of Human Rights, No. 47095/99, paragraphs 97 et seq. – Kalashnikov v Russian Federation (2002). The Court qualified the detention conditions involving extreme overcrowding, lack of hygiene, including the accommodation together with inmates suffering from transmittable diseases for almost 5 years as “degrading treatment”.

31 Whereas similar considerations apply to the protection of the right to life and freedom from slavery, the situation is less clear regarding the nulla poena provision. For instance, there may be violations of the nulla poena sine lege principle leading to a modest fine only which may have to be qualified as not sufficiently severe.
An unjustified killing would contravene Article 2 ECHR and always constitute a severe violation of a basic human right.

The question is, however, whether the concept of severe violation of a basic human right allows for taking into consideration acts which do not constitute an infringement of human dignity. The fundamental difference between the two concepts is that the aspect of human dignity entails a qualitative assessment (is the measure in question denying the quality of the applicant as a subject?) of the violation of a human right whereas the “severe violation” approach seems to rely exclusively on a quantitative approach (is the violation in question carried out in a manner above or below the threshold of severity?). Unless the requirements for the severity of the violation are interpreted very restrictively, there will be cases in which the violation is sufficiently severe in the sense of the Qualification Directive without interfering with the human dignity core of the fundamental right affected. As a consequence, there are likely to be cases which are covered only by the Directive.

3.2.2 Post Flight Reasons and Denial of Refugee Status

Another aspect which may have to be revisited is the question of rejecting – as a rule – refugee status in the case of subsequent applications based on reasons created by the applicant. There is a German provision prescribing such results (Section 28 (2) Asylum Procedures Act) which obviously formed the background for Article 5 (3) Qualification Directive. It provides that any reason for refugee status created only after a previous final decision in an asylum procedure “shall normally” not lead to granting refugee status. This wording leaves room for providing for refugee status in exceptional cases without, however, giving an idea what these exceptional circumstances may be. Given the fact that the provision aims at fighting abuse, refugee status would have to be granted under the German provisions at least in cases not involving any such abuse.

Some German courts have ruled that the German provision was in conflict with the 1951 Convention if it was applied without modification. The argument was that the granting of refugee status was related to a well-founded fear of persecution for a Convention reason and did not contain any conditions as to how and when the situation leading to a well-founded fear had arisen. To follow the rule of the said provision was regarded as being contrary to the purpose of the Immigration Act 2004 which sought to put the 1951 Convention into the focus of analysis when reviewing the criteria of refugee status.

These arguments may find additional support in Article 5 (3) Qualification Directive and its explicit reference to the 1951 Convention. Since the Convention does not

33 Federal Constitutional Court, BVerfGE (official collection) 30, 1 (at 25 et seq.).
34 Cf. also UNHCR-Handbook, paragraphs 94 et seq.
35 Cf., for instance, Administrative Court Stuttgart, judgment of 18 April 2005, A 11 K 12040/03 A.
allow for exceptions to the rule that a well-founded fear of persecution for a Convention reason qualifies the asylum seeker for refugee status irrespective of an eventual bad faith of the applicant in provoking the danger, the application of Article 5 (3) of the Directive poses serious problems. These problems, of course, are inherent in the Directive and should lead to a review of the compatibility of Article 5 (3) Qualification Directive with the 1951 Convention with which it has to conform due to the standards imposed by Article 63 (1) EC Treaty. The fact that the Member States were quite uncertain whether the rule established in Article 5 (3) Qualification Directive was in accordance with the 1951 Convention is not only demonstrated by the text of Article 5 (3) ("without prejudice to the Geneva Convention") but also by Article 20 (6) Qualification Directive. This latter provision explicitly presupposes that a person is a refugee also in cases in which post-flight activities were undertaken only with a view to creating the necessary conditions for the recognition as a refugee. In such cases, Article 20 (6) Qualification Directive allows for a modification of the rights granted to refugees under Chapter VII of the Directive without, however, going below the standard guaranteed in the 1951 Convention.

How these provisions will be reconciled with each other and with the requirements of the 1951 Convention in practice remains to be seen. Whereas it seems unlikely that German practice is going to change immediately with the direct application of the Qualification Directive the final outcome of the interpretation on the European level will have its bearing on the German concept as well.

4. Conclusion

The application of the Qualification Directive in German Law with direct effect since 10 October 2006 as well as the future transposition legislation will lead to some significant changes in the German system of asylum and refugee law. In particular, cumulative acts ("an accumulation of various measures, including violations of human rights") will have to be taken into account when analysing the question of whether an act of persecution is at stake; moreover, protection in cases involving persecution on the grounds of religion is widened; the scope of the concept of an internal protection alternative is more limited and consequently will lead to a rejection of less applicants than under the current German approach; and, subsidiary protection in all three variants under Article 15 of the Qualification Directive significantly adds protection aspects to the German provisions applying so far.

Finally, some aspects of German law may have to be given a second thought in view of new provisions in the Qualification Directive: the question of what constitutes an act of persecution will have to be reviewed taking into account that the concept of severe violation of a basic human right not always requires a violation of human dignity. Moreover, the recognition of refugees sur place will need to be analysed

36 Cf. UNHCR Annotated Comments on the EC Council Directive 2004/83 of 29 April 2004, Article 5 (3). While recognising the aim of fighting abuse UNHCR draws the attention to the fact that in many cases, the questions can be addressed by a thorough review of the credibility of the claim.
in further detail to ensure that the decision practice is in accordance with the requirements of the 1951 Convention. Without having discussed this in this article, also the German decision practice on cessation of refugee status – carried out in thousands of cases in which it cannot yet be expected from the persons concerned to avail themselves of the protection of their home state – as well as that on exclusion from refugee status will have to be revisited in the light of the practice of other Member States under the Qualification Directive and finally any interpretations given by the ECJ.

It will be the task of the authorities – in particular, the Federal Office for Migration and Refugees which is responsible for deciding on the applications for international protection as a first instance – and the administrative courts to apply and further interpret the respective provisions. It is foreseeable that important questions of interpretation will remain under discussion for significant periods in future, and it is to be hoped that national last instance courts will readily refer questions to the ECJ in the framework of the preliminary ruling procedure modified with regard to legal provisions adopted under Title IV of the EC Treaty. However, since this still may take a longer time, it may be hoped that the referral of questions of interpretation by the Commission, the Council or a Member State under Article 68 (3) EC Treaty will become relevant in practice with a view to speeding up harmonisation by authoritative rulings on the part of the ECJ.

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37 Proposals to adapt the preliminary ruling procedure under Article 68 EC Treaty which modifies criteria for jurisdiction on issues and instruments related to Title IV EC Treaty to the general requirements applying under Article 234 are under discussion, see in particular Commission Communication COM (2006) 346 final.
Implementation of the EU Qualification Directive in the Republic of Lithuania

Lyra Jakuleviciene

1. Introduction

Differently from the European Union (EU) old Member States, Lithuania has started incorporating into its national law the provisions of then draft EU legislation on asylum even before its formal adoption by the Council. At the time when the EU Qualification Directive (Directive)\(^1\) was pending adoption, the aliens legislation in Lithuania was undergoing reform. This allowed to already take into account some of the norms of the Directive in the new version of the Law on Legal Status of Aliens of the Republic of Lithuania (Aliens Law), adopted on the same day as the Directive.\(^2\)

As a result, some provisions in the Aliens Law reflect provisions of the Commission Proposal for Council Directive\(^3\) and not of the final text of the Directive (e.g. concerning the grounds for subsidiary protection, the Aliens Law recognises violations of human rights as a ground for subsidiary protection,\(^4\) while such a ground has disappeared from the final text of the Directive). Provisions of the Directive can be found in the Aliens’ Law, even if the law has no reference to the Directive, as well as implementing legal acts (e.g. the Order on the Examination of the Asylum Claims, approved by the Minister of Interior on 15 November 2004).\(^5\)


\(^4\) Article 87. Granting Subsidiary Protection

1. Subsidiary protection may be granted to an asylum applicant who is outside his country of origin and is unable to return to it owing to a well-founded fear that:

1) he will be tortured, subjected to cruel, inhuman or degrading treatment or punishment;

2) there is a threat that his human rights and fundamental freedoms will be violated;

3) his life, health, safety or freedom is under threat as a result of endemic violence which spread in an armed conflict or which has placed him at serious risk of systematic violation of his human rights.

2. Legal and Institutional Framework for Qualification of Persons as Refugees and Beneficiaries of Subsidiary Protection in Lithuania

Before Lithuania’s entry into the EU, only one form of protection, namely refugee status, was established by the legislation as a result of ratification of the 1951 United Nations Convention Relating to the Status of Refugees (1951 Convention) and its New York Protocol in 1997. Refugee definition corresponded to that of the 1951 Convention. No other alternative forms of protection existed in the laws, but a number of persons falling out of the refugee definition could not be deported due to refugee related reasons and were accumulating in a legal limbo situation. This situation could not continue for a very long time and the Government decided in 2000 to start issuing them with temporary residence permits on humanitarian grounds under Article 19(3) of then still in force the Law on Legal Status of Aliens. But as this was an artificial temporary solution, those persons practically faced legal problems in accessing social and economic rights, because other laws were not adapted to reflect their specific situation. These reasons, combined with the legislative process in the EU leading to the adoption of the Qualification Directive (which introduced for the first time the legal grounds for subsidiary protection) has lead to reforms in the aliens legislation of that time. One of the results of these reforms was a new version of the Aliens Law, adopted on 29 April 2004.

Currently, there are three forms of protection (asylum) recognised by the Lithuanian legislation: refugee status, subsidiary protection and temporary protection. Article 86(1) of the Aliens Law provides that refugee status shall be granted to “the asylum applicant who, owing to a 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, unless there are conditions specified in Article 88 of this Article” [exclusion clauses]. Furthermore, Article 87(1) stipulates the grounds for qualification for subsidiary protection. Pursuant to the Law,

“subsidiary protection may be granted to an asylum applicant who is outside his country of origin and is unable to return to it owing to a well-founded fear that:
1) he will be tortured, subjected to cruel, inhuman or degrading treatment or punishment;
2) there is a threat that his human rights and fundamental freedoms will be violated;
3) his life, health, safety or freedom is under threat as a result of endemic violence which spread in an armed conflict or which has placed him at serious risk of systematic violation of his human rights”.

7 Article 2(23) of the Aliens’ Law.
Temporary protection is regulated by a separate section in the Law and will not be analyzed here, as it falls outside the scope of the Qualification Directive and thus this publication.

There is no explicit requirement in the Aliens Law that criteria for refugee status be examined first. But in practice, asylum officials start analyzing the need for refugee status and only then continue examining whether the person would need protection on other grounds. Notwithstanding, the practice would still benefit from an explicit provision in the Law that subsidiary protection can be granted to a person, not fulfilling the criteria for refugee status, but in need of protection on other grounds, in order to ensure that subsidiary protection is indeed complementary and not replacing the refugee protection enshrined in the 1951 Convention.8

Decisions on refugee status or subsidiary protection are taken by the Migration Department to the Ministry of Interior of the Republic of Lithuania (Migration Department) and can be appealed to Vilnius District Administrative Court with a possibility of further appeal to the Higher Administrative Court of Lithuania.

During 2005, 410 persons applied for asylum in Lithuania. 15 of them were granted refugee status and 328 received subsidiary protection (this number also includes the renewals of subsidiary protection status, not only first arrivals). Absolute majority of persons granted refugee status came from the Russian Federation (Chechnya), while those granted subsidiary protection originated also mostly from the Russian Federation (Chechnya) and Afghanistan.

<table>
<thead>
<tr>
<th>Year</th>
<th>Refugee status</th>
<th>Subsidiary protection*</th>
<th>Rejected applications for asylum</th>
<th>Terminated examination of applications</th>
</tr>
</thead>
<tbody>
<tr>
<td>1997</td>
<td>6</td>
<td>-</td>
<td>53</td>
<td>-</td>
</tr>
<tr>
<td>1998</td>
<td>28</td>
<td>-</td>
<td>116</td>
<td>108</td>
</tr>
<tr>
<td>1999</td>
<td>11</td>
<td>-</td>
<td>171</td>
<td>104</td>
</tr>
<tr>
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<td>15</td>
<td>80</td>
<td>113</td>
<td>200</td>
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<td>2001</td>
<td>3</td>
<td>266</td>
<td>58</td>
<td>97</td>
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<tr>
<td>2002</td>
<td>1</td>
<td>287</td>
<td>37</td>
<td>55</td>
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<tr>
<td>2003</td>
<td>3</td>
<td>485</td>
<td>56</td>
<td>230</td>
</tr>
<tr>
<td>2004</td>
<td>12</td>
<td>407</td>
<td>50</td>
<td>91</td>
</tr>
<tr>
<td>2005</td>
<td>15</td>
<td>328</td>
<td>30</td>
<td>7</td>
</tr>
<tr>
<td>Total</td>
<td>94</td>
<td>1,853</td>
<td>684</td>
<td>892</td>
</tr>
</tbody>
</table>

* Before 30 April 2004, foreigners were issued temporary residence permit to reside in Lithuania on humanitarian grounds. This number includes also renewals of subsidiary protection, not only first arrivals.

8 Paragraph 24 of the Preambule and Article 2(e) of the Qualification Directive.
The table above illustrates the distribution of persons in need of protection according to the type of status granted since 1997 when the asylum procedure in Lithuania started operating until the end of 2005.\(^9\)

Tendencies for the first half of 2006 look very similar:\(^10\)

<table>
<thead>
<tr>
<th>Citizenship</th>
<th>Decision</th>
<th>Status granted</th>
<th>Rejected</th>
<th>Terminated examination of application</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Refugee status</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Subsidiary protection*</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Afghanistan</td>
<td></td>
<td>19</td>
<td></td>
<td></td>
<td>20</td>
</tr>
<tr>
<td>Pakistan</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Belarus</td>
<td></td>
<td>2</td>
<td>1</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Nigeria</td>
<td></td>
<td>1</td>
<td>9</td>
<td></td>
<td>10</td>
</tr>
<tr>
<td>Ukraine</td>
<td></td>
<td>1</td>
<td>1</td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Russia</td>
<td></td>
<td>8</td>
<td>185</td>
<td></td>
<td>198</td>
</tr>
<tr>
<td>Iraq</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Philippines</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Ghana</td>
<td></td>
<td>5</td>
<td></td>
<td></td>
<td>5</td>
</tr>
<tr>
<td>Liberia</td>
<td></td>
<td>2</td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Somalia</td>
<td></td>
<td>3</td>
<td></td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Sri Lanka</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Stateless</td>
<td></td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>10</strong></td>
<td><strong>211</strong></td>
<td><strong>24</strong></td>
<td><strong>248</strong></td>
</tr>
</tbody>
</table>

* This number includes also renewals of subsidiary protection, not only first arrivals.

3. **Main Concerns in National Law and Practice in Relation to the Qualification Directive**

A few points of a general concern could be mentioned in the beginning. Firstly, the Aliens Law is limited to the enumeration of grounds when refugee status or subsidiary protection can or cannot be granted, but beyond that, it does not include such important provisions introduced by the Qualification Directive, as e.g. acts of persecution within the meaning of Article 1A of the 1951 Convention\(^11\), definition of the actors of persecution\(^12\), refugee *sur place* definition\(^13\) and others. Some of these provisions are mentioned only in the implementing legislation of the Law, namely the Order on the Examination of Asylum Claims.\(^14\) In particular, the definition in the

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\(^9\) Information of the Migration Department, “Migracijos metaštis 2005”, available in Lithuanian only at: http://www.migracija.lt/MD/metraštis2005.htm#_Toc136333066


\(^11\) Article 9 of the Directive.

\(^12\) Article 6 of the Directive.

\(^13\) Article 5 of the Directive.

\(^14\) Paragraphs 66.1 and 66.4 of the Order.
Law of possible acts of persecution contained in Article 9 of the Qualification Directive, would assist the harmonisation of interpretation within administrative institutions and courts. Furthermore, the notion of internal flight alternative in Lithuania needs harmonisation with definition of this notion contained in the Qualification Directive. The definition is embodied in the Order on the Examination of Asylum Claims, where internal flight alternative is defined as a “[…] real possibility for asylum seeker to relocate to another living place within the territory of the country of origin, where he can obtain state protection from persecution”. Meanwhile, the Directive establishes stricter requirements for application of the notion, i.e. that there would be no well-founded fear of being persecuted or no real risk of suffering serious harm and that the applicant could reasonably be expected to stay in that part of the country. Also, in applying this notion, regard should be taken to both the general circumstances prevailing in that part of the country, as well as to the personal circumstances of the applicant.

Among the more serious concerns with regard to transposition and implementation of the Qualification Directive, three particular issues could be mentioned:

1. Interpretation of refugee definition: assessment of claims of people coming from the civil war situations and in respect of gender-based persecution.
2. Standards of treatment of persons granted with subsidiary protection status.
3. Wide interpretation of exclusion and cessation clauses.

3.1 Interpretation of Refugee Definition: Assessment of Claims of People Coming from the Civil War Situations and in respect of Gender-based Persecution

Though the Aliens Law to a large extent reflects the provisions of the Directive concerning the grounds for refugee status and subsidiary protection, practical implementation and interpretation remains of concern. For instance, one of the main groups of asylum seekers in Lithuania, those coming from Chechnya, continue receiving only subsidiary protection and not refugee status, though the situation in Chechnya in itself may be characterised as that leading to refugee related problems and thus in most cases warranting refugee status. In 2005, out of 342 Chechens who applied for asylum, only 15 received refugee status and 288 were granted subsidiary protection in Lithuania (this number includes also renewals of subsidiary protection). Similar tendencies can be observed also during the previous years. As no official policy exists to explain the situation, it can only be inferred by the author of this publication that among possible reasons there might be a prevailing presupposition that the conflict in Chechnya carries a non-individual nature, which means that anyone can be targeted for non-refugee related reasons and everyone faces just the general consequences of the war and instability. At the same time, there might be explanations related to the

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15 Paragraph 2 of the Order.
16 Article 8(1-2) of the Directive.
proximity of Lithuania to Russia and the sensitivity that may surround the official recognition of persons as refugees who might be viewed as enemies of the official regime in their own country and thus not allegedly deserving support of another country through the protection of refugees. Though this sensitivity for granting refugee status as such in Lithuania seems to have already diminished during the recent years, because the asylum procedure has been operating for almost ten years, asylum and other officials have acquired experience and the numbers of asylum seekers have not proved to be enormous as initially foreseen.

Another tendency in relation to claims of persons coming from the civil war situations is that the refugee definition is interpreted in a restrictive manner by the administrative institution in that it is more likely for the person to get asylum if he has already experienced persecution, in comparison with those who fled in fear of persecution. This practice may run counter the requirements of international refugee law and at the same time of the Directive, according to which the fact that the applicant has already been subject to persecution is a serious indication of the applicant’s well-founded fear of persecution, but not an absolute condition to require to establish that.

Secondly, while for the past few years a number of women and girls have been granted Convention status on the family unity ground, there has been only few cases of recognition of a refugee woman as a principal applicant, even though a number of female asylum seekers is rather large among all applicants. In the period of 1998-2000 there were 6 cases, when female asylum seekers were granted refugee status on the basis of gender based claim. Other few cases were only in 2005-2006. There might be several reasons explaining the current situation in view of the author of this publication, though no one may be taken as a definite and unquestionable, because gender based persecution may be invisible not only within the country of origin of the applicant, but also during examination of the claim in the asylum procedure in the country of asylum, thus difficult to record. Among possible reasons, lack of appropriate identification mechanisms and skills of responsible persons dealing with asylum seekers and foreigners in general can be mentioned, as well as little knowledge and understanding of certain cultural aspects that may be involved and make the identification of gender based claims more difficult. It may be questioned, whether the procedures, established by the legislation can ensure equal opportunities for both male and female applicants to properly present the claim. The interview technique applied in Lithuania, which is of interrogative nature, as well as strict and formalised format of questions to be asked during the interview may limit the possibilities of identifying the gender based claims. Not even talking about the need to mainstream gender and culture sensitivity issues not only among the asylum officials and asylum judges, but in particular border guard, police, detention and reception centres’ staff whom the asylum seekers are most frequently firstly faced with.

18 Article 4(3b) and 4(4) of the Directive.
19 Among those who received refugee status during the recent years were a few Chechen women and one separated girl, who were granted refugee status in 2005, as well as one woman from Belarus, who received refugee status in 2006.
In this respect, adoption of the guidelines on how to deal with gender claims, including identification, processing and interpretation, which would be available for all officials dealing with foreigners and refugees, might result in emergence of an increased number of gender based claims. Such guidelines are adopted by some of the EU Member States (e.g. Sweden, the United Kingdom) and their experience may be of value in Lithuania as well. Also, it would be worthwhile introducing specific provisions concerning gender based persecution and child specific persecution as a basis for refugee status in the legislation or at least to interpret the refugee definition in practice in the spirit of the Directive.

3.2 Standards of Treatment of Persons granted with Subsidiary Protection Status

Standards of treatment of persons granted refugee status in Lithuania correspond to a large extent to the requirements of the Qualification Directive. On the contrary, standards of treatment of persons granted alternative form of protection to refugee status has been a concern in Lithuania for a number of years already, as most of Lithuania’s legal acts regulating provision of social welfare, health care and housing support condition access to such services with the status of a permanent resident in Lithuania. In effect, even though the Qualification Directive provides for access to social assistance to persons granted with subsidiary protection on the same grounds as nationals of the asylum country, persons with subsidiary protection, who hold the status of temporary residents in Lithuania, are not guaranteed with adequate social support after the end of their integration period supported by special measures of the state.

Social integration of persons granted asylum in Lithuania (including refugees and beneficiaries of subsidiary protection) is regulated by the Order of the Minister of Social Security and Labour on Integration of Foreigners Granted Asylum in the Republic of Lithuania of 11 January 2006 (Order on State Support for Integration). This Order provides that integration is financed from the state budget and includes measures in the field of language studies, employment, accommodation, social security, social welfare support, health care and others. This is not the first legal act on integration of persons granted asylum. The first one was adopted by the Government back in 1998 and was applied only to persons granted refugee status, second one was approved also by the Government on 17 May 2001, while the third one was

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20 Art. 28 (1) of the Directive.
22 Paragraph 4 of the Order on State Support for Integration.
approved by the ministerial order in 2004. According to the current Order, the
duration of state supported integration varies depending on the existence of special
needs. For example, those foreigners granted asylum who do not have special needs,
may enjoy state support for integration in the reception centre up to 6 months after
the granting of a residence permit (with a possibility of extension to 12 months) and
for additional 12 months after being transferred from the reception centre to the
municipality. Persons with special needs (e.g. with disability) may enjoy state support
for integration even up to 30 months after the date of their settlement in the munici-
pality. Foreigners, who are unaccompanied minors, may be allowed to receive sup-
port in the reception centre until they turn 18 years. State support may be provided
only for one time for the same person according to the integration rules. The legis-

taxative concern in Lithuania is that a separate social integration system is created for
foreigners granted asylum instead of attempting to integrate them into the existing
state social support and health care systems. As a result, when state supported inte-
gration comes to an end, the beneficiaries of subsidiary protection do not smoothly
pass to the general state support system as would be in case of permanent residents
and refugees.

Recently, a few attempts were undertaken to ensure access of persons with sub-
сидary protection to particular social services and health care. For instance, amend-
ments made to the Law on Health Care System on 28 April 2005, provided that
state guaranteed (free of charge) health care services also for foreigners granted sub-
sidary or temporary protection in Lithuania are paid from compulsory health insur-
ance fund, state or municipal budget or funds of special programmes of municipali-
ties designated to support the health care of society. Another important amendment
was adopted to the Law on Health Insurance and the Law on Health Care System in
2005. Amendments to Article 6 of the Law on Health Insurance, adopted on 28 April
2005, envisaged that compulsory health insurance would apply also to:
1) foreigners who are unaccompanied minors;
2) those foreigners, who are granted subsidiary or temporary protection in Lithuania
and who are below 18 years of age, or who have been diagnosed with an illness or
state of health included in the list approved by the Ministry of Health Care, or
who are single parents with minor children, women during pregnancy period of
70 days (who turn to 28 and more weeks of pregnancy) before delivery and 56
days after delivery, persons who reached a pension age in accordance with the
laws of the Republic of Lithuania.

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25 Order of the Minister of Social Security and Labour No. A1-238 of 21 October 2004 on Ap-
proval of the Order on State Support to Integration of Foreigners Granted Asylum in
26 This provision was introduced by the supplement to the Order on State Support for Integration
on 10 July 2006.
27 Paragraph 11 of the Order on State Support for Integration.
28 The Law of the Republic of Lithuania on Amendment of Article 47 of the Law on Health Care
29 Law of the Republic of Lithuania on the Amendment of Article 6 of the Law on Health Insur-
By virtue of this amendment, vulnerable individuals were integrated into the general system of health care of the state and this solution seems to work also in practice. For all others, according to the amendment to the Law, costs of health care services shall be covered from the state budget in case of subsidiary and temporary protection in accordance with the order determined by the Government or an institution authorised by it. However, such an order has never been adopted, which means that the potential for persons to face problems in practice remains acute. Therefore, these amendments ensure access to the services for beneficiaries of subsidiary protection with special needs only, but not to any person granted protection.

Furthermore, as a consequence of adoption of the Law on Social Services in January 2006, foreigners temporary staying in Lithuania were given access to social services (social supervision and social guardianship). Notwithstanding these important amendments, the implementation of other social-economic rights at the moment is not fully guaranteed in Lithuania.

Another issue of concern is a narrow interpretation of core benefits in case of limiting social assistance granted to beneficiaries of subsidiary protection status, which does not correspond to the notion of core benefits in the Qualification Directive, which cover at least minimum income support, assistance in case of illness, pregnancy and parental assistance.31

Last, but not least, problems of implementation of the Directive in Lithuania may occur in relation to the establishment of a permanent guardianship for unaccompanied minors, who are granted asylum in Lithuania. At the moment of writing this publication, they are guaranteed temporary guardianship only for the purpose of the asylum procedure, but not permanent one, which is required by the Directive after granting of refugee status or subsidiary protection to a minor.32

3.3 Wide Interpretation of Exclusion and Cessation Clauses

Some of the provisions of the Qualification Directive (in particular Article 14 (paragraphs 4-5) dealing with a possibility of exceptions from residence rights on national security grounds) can be viewed in the Lithuanian context as having encouraged legislative developments that raise serious concern not only in respect of proper implementation of the Directive, but even the provisions of the 1951 Geneva Convention. Draft amendments to the Aliens Law, currently being discussed in the Parliament of Lithuania (at the moment of preparing this publication in November 2006), suggest introducing an additional exclusion clause in the Law. The suggested amendment provides that an asylum seeker shall not be granted refugee status or subsidiary protection “if his presence in the Republic of Lithuania may cause danger to the national security or public order or he has been convicted by a final judgement for a particu-

31 Paragraph 34 of the Preamble of the Directive.
32 Article 30(1) of the Directive.
larly serious crime”. Consequently, refugee status could be withdrawn on these grounds as well. Identical provision is proposed to be added to the cessation clauses. These proposals may be viewed as not fully in line with Articles 11 (1) and 12 (2) of the Directive, which embody an exhaustive list of exclusion and cessation clauses. Even though the proposals for legislative amendments in Lithuania may remind of paragraphs 4-5 in Article 14 of the Directive, the proposals seem to confuse the concept of exclusion, residence permit withdrawal and expulsion, which UNHCR strongly opposed in the negotiations on the Directive with their position had been taken into account in the final wording of those provisions. According to UNHCR, paragraph 4 and 5 of Article 14 refer to a status granted to a refugee, while other provisions of the Directive use the term refugee status. The reason for using different terminology is to distinguish refugee status in the context of the 1951 Convention from national status being granted to recognised Convention refugee according to the procedure established by national laws of the Member States. In other words, while the Directive does not allow Member States to exclude third country nationals from refugee status (Article 12 of the Directive) on the ground of alleged threat to national security or public order, it does allow states to invoke these considerations as a ground not to grant a legal (residence) status to the refugee concerned.

4. Conclusion

In assessing the impact of the Qualification Directive on legislation and practice in Lithuania so far, it can be observed that a number of provisions have already been taken into account even before the adoption of the Directive. But as no formal transposition has yet taken place, a number of provisions remain to be introduced into Lithuanian legislation. Therefore, it can be concluded that Lithuania did not meet the transposition deadline of 10 October 2006 mentioned in the Directive.

Secondly, the Directive had undoubtedly an impact on legislation both in a positive sense, but also in view of restrictions. Among the positive effects of transposition was the introduction for the first time of subsidiary protection status with rather clearly defined list of grounds, more precise definition of some concepts of interpreting the refugee definition, emergence of a number of positive legislative developments in the field of standards of treatment of persons with various protection statuses and others. At the same time, a number of issues remain of concern. Some of the important provisions (e.g. definition of acts of persecution, sur place refugee concept, actors of persecution, etc.) should find their place in the legislation and not in the ministerial legal acts, as it is currently the case. More substantial concerns could

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33 Article 28(2) of the Draft Law on Amendments to the Aliens Law, text of the Draft is available in Lithuanian only at: www.lrs.lt.
34 Article 29 of the Draft Law on Amendments to the Aliens Law, text of the Draft is available in Lithuanian only at: www.lrs.lt.
36 Article 38(1) of the Directive.
be grouped under the three areas regarding: interpretation (including narrow interpre-
tation of refugee definition in civil war situations and in respect of gender based
claims, as well as evidentiary requirements to prove individual persecution which
would be already experienced), implementation (access to social and economic rights
and other standards of treatment of persons with subsidiary protection status), and
general worrisome tendencies related to interpretation of exclusion and cessation
clauses of refugee status and subsidiary protection. The Draft Law on Amendments
seems to unlikely address all the concerns in the Aliens Law mentioned, while a
number of provisions of the Qualification Directive will still have to go a long way to
become a reality of practice in Lithuania.
Annexes
COUNCIL DIRECTIVE 2004/83/EC
of 29 April 2004

on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular points 1(c), 2(a) and 3(a) of Article 63 thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the European Economic and Social Committee (3),

Having regard to the opinion of the Committee of the Regions (4),

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.

(2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951 (Geneva Convention), as supplemented by the New York Protocol of 31 January 1967 (Protocol), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.

(3) The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees.

(4) The Tampere conclusions provide that a Common European Asylum System should include, in the short term, the approximation of rules on the recognition of refugees and the content of refugee status.

(5) The Tampere conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection.

(6) The main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.

(7) The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks.

(8) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person who otherwise needs international protection.

(9) Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.

(10) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.

(11) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

(4) OJ C 278, 14.11.2002, p. 44.
(12) The ‘best interests of the child’ should be a primary consideration of Member States when implementing this Directive.

(13) This Directive is without prejudice to the Protocol on asylum for nationals of Member States of the European Union as annexed to the Treaty Establishing the European Community.

(14) The recognition of refugee status is a declaratory act.

(15) Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.

(16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

(17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.

(18) In particular, it is necessary to introduce common concepts of protection needs arising sur place; sources of harm and protection; internal protection; and persecution, including the reasons for persecution.

(19) Protection can be provided not only by the State but also by parties or organisations, including international organisations, meeting the conditions of this Directive, which control a region or a larger area within the territory of the State.

(20) It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution.

(21) It is equally necessary to introduce a common concept of the persecution ground ‘membership of a particular social group’.

(22) Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that ‘acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations’ and that ‘knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations’.

(23) As referred to in Article 14, ‘status’ can also include refugee status.

(24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.

(25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

(26) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.

(27) Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status.

(28) The notion of national security and public order also covers cases in which a third country national belongs to an association which supports international terrorism or supports such an association.

(29) While the benefits provided to family members of beneficiaries of subsidiary protection status do not necessarily have to be the same as those provided to the qualifying beneficiary, they need to be fair in comparison to those enjoyed by beneficiaries of subsidiary protection status.

(30) Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, health care and access to integration facilities requires the prior issue of a residence permit.

(31) This Directive does not apply to financial benefits from the Member States which are granted to promote education and training.

(32) The practical difficulties encountered by beneficiaries of refugee or subsidiary protection status concerning the authentication of their foreign diplomas, certificates or other evidence of formal qualification should be taken into account.

(33) Especially to avoid social hardship, it is appropriate, for beneficiaries of refugee or subsidiary protection status, to provide without discrimination in the context of social assistance the adequate social welfare and means of subsistence.
With regard to social assistance and health care, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting the benefits for beneficiaries of subsidiary protection status to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy and parental assistance, in so far as they are granted to nationals according to the legislation of the Member State concerned.

Access to health care, including both physical and mental health care, should be ensured to beneficiaries of refugee or subsidiary protection status.

The implementation of this Directive should be evaluated at regular intervals, taking into consideration in particular the evolution of the international obligations of Member States regarding non-refoulement, the evolution of the labour markets in the Member States as well as the development of common basic principles for integration.

Since the objectives of the proposed Directive, namely to establish minimum standards for the granting of international protection to third country nationals and stateless persons by Member States and the content of the protection granted, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the Directive, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom has notified, by letter of 28 January 2002, its wish to take part in the adoption and application of this Directive.

In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified, by letter of 13 February 2002, its wish to take part in the adoption and application of this Directive.

In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Directive and is not bound by it or subject to its application.

HAS ADOPTED THIS DIRECTIVE,

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter and scope

The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Article 2

Definitions

For the purposes of this Directive:

(a) ‘international protection’ means the refugee and subsidiary protection status as defined in (d) and (f);


(c) ‘refugee’ means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply;

(d) ‘refugee status’ means the recognition by a Member State of a third country national or a stateless person as a refugee;

(e) ‘person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;
(f) ‘subsidiary protection status’ means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection;

(g) ‘application for international protection’ means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;

(h) ‘family members’ means, insofar as the family already existed in the country of origin, the following members of the family of the beneficiary of refugee or subsidiary protection status who are present in the same Member State in relation to the application for international protection:

— the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens,

— the minor children of the couple referred to in the first indent or of the beneficiary of refugee or subsidiary protection status, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;

(i) ‘unaccompanied minors’ means third-country nationals or stateless persons below the age of 18, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States;

(j) ‘residence permit’ means any permit or authorisation issued by the authorities of a Member State, in the form provided for under that State’s legislation, allowing a third country national or stateless person to reside on its territory;

(k) ‘country of origin’ means the country or countries of nationality or, for stateless persons, of former habitual residence.

Article 3

More favourable standards

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.
5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant’s statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:

(a) the applicant has made a genuine effort to substantiate his application;
(b) all relevant elements, at the applicant’s disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
(c) the applicant’s statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant’s case;
(d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
(e) the general credibility of the applicant has been established.

Article 5

International protection needs arising sur place

1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.

2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.

3. Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin.

Article 6

Actors of persecution or serious harm

Actors of persecution or serious harm include:

(a) the State;
(b) parties or organisations controlling the State or a substantial part of the territory of the State;
(c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.
(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

2. Acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

(a) acts of physical or mental violence, including acts of sexual violence;

(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

(c) prosecution or punishment, which is disproportionate or discriminatory;

(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

(e) acts of gender-specific or child-specific nature.

3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.

**Article 10**

**Reasons for persecution**

1. Member States shall take the following elements into account when assessing the reasons for persecution:

(a) the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group;

(b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

(c) the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d) a group shall be considered to form a particular social group where in particular:

— that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

— the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

**Article 11**

**Cessation**

1. A third country national or a stateless person shall cease to be a refugee, if he or she:

(a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or

(b) having lost his or her nationality, has voluntarily re-acquired it; or

(c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or

(d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or

(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality;

(f) being a stateless person with no nationality, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence.

2. In considering points (e) and (f) of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee’s fear of persecution can no longer be regarded as well-founded.
Article 12

Exclusion

1. A third country national or a stateless person is excluded from being a refugee, if:

(a) he or she falls within the scope of Article 1 D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive;

(b) he or she is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or rights and obligations equivalent to those.

2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

CHAPTER IV

REFUGEE STATUS

Article 13

Granting of refugee status

Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.

Article 14

Revocation of, ending of or refusal to renew refugee status

1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be a refugee in accordance with Article 11.

2. Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted refugee status, shall on an individual basis demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article.

3. Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the Member State concerned that:

(a) he or she should have been or is excluded from being a refugee in accordance with Article 12;

(b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of refugee status.

4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.

6. Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31 and 32 and 33 of the Geneva Convention in so far as they are present in the Member State.
CHAPTER V

QUALIFICATION FOR SUBSIDIARY PROTECTION

Article 15

Serious harm

Serious harm consists of:

(a) death penalty or execution; or

(b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or

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

Article 16

Cessation

1. A third country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.

2. In applying paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm.

Article 17

Exclusion

1. A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious crime;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;

(d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

2. Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

3. Member States may exclude a third country national or a stateless person from being eligible for subsidiary protection, if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes.

CHAPTER VI

SUBSIDIARY PROTECTION STATUS

Article 18

Granting of subsidiary protection status

Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V.

Article 19

Revocation of, ending of or refusal to renew subsidiary protection status

1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be eligible for subsidiary protection in accordance with Article 16.

2. Member States may revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if after having been granted subsidiary protection status, he or she should have been excluded from being eligible for subsidiary protection in accordance with Article 17(3).

3. Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person, if:

(a) he or she, after having been granted subsidiary protection status, should have been or is excluded from being eligible for subsidiary protection in accordance with Article 17(1) and (2);

(b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of subsidiary protection status.
4. Without prejudice to the duty of the third country national or stateless person in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted the subsidiary protection status, shall on an individual basis demonstrate that the person concerned has ceased to be or is not eligible for subsidiary protection in accordance with paragraphs 1, 2 and 3 of this Article.

CHAPTER VII

CONTENT OF INTERNATIONAL PROTECTION

Article 20

General rules

1. This Chapter shall be without prejudice to the rights laid down in the Geneva Convention.

2. This Chapter shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated.

3. When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

4. Paragraph 3 shall apply only to persons found to have special needs after an individual evaluation of their situation.

5. The best interest of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.

6. Within the limits set out by the Geneva Convention, Member States may reduce the benefits of this Chapter, granted to a refugee whose refugee status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee.

7. Within the limits set out by international obligations of Member States, Member States may reduce the benefits of this Chapter, granted to a person eligible for subsidiary protection, whose subsidiary protection status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a person eligible for subsidiary protection.

Article 21

Protection from refoulement

1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

(a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies.

Article 22

Information

Member States shall provide persons recognised as being in need of international protection, as soon as possible after the respective protection status has been granted, with access to information, in a language likely to be understood by them, on the rights and obligations relating to that status.

Article 23

Maintaining family unity

1. Member States shall ensure that family unity can be maintained.

2. Member States shall ensure that family members of the beneficiary of refugee or subsidiary protection status, who do not individually qualify for such status, are entitled to claim the benefits referred to in Articles 24 to 34, in accordance with national procedures and as far as it is compatible with the personal legal status of the family member.

In so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits.

In these cases, Member States shall ensure that any benefits provided guarantee an adequate standard of living.

3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from refugee or subsidiary protection status pursuant to Chapters III and V.

4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred therein for reasons of national security or public order.
5. Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of refugee or subsidiary protection status at that time.

Article 24

Residence permits

1. As soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).

Without prejudice to Article 23(1), the residence permit to be issued to the family members of the beneficiaries of refugee status may be valid for less than three years and renewable.

2. As soon as possible after the status has been granted, Member States shall issue to beneficiaries of subsidiary protection status a residence permit which must be valid for at least one year and renewable, unless compelling reasons of national security or public order otherwise require.

Article 25

Travel document

1. Member States shall issue to beneficiaries of refugee status travel documents in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.

2. Member States shall issue to beneficiaries of subsidiary protection status travel documents which enable them to travel, at least when serious humanitarian reasons arise that require their presence in another State, unless compelling reasons of national security or public order otherwise require.

Article 26

Access to employment

1. Member States shall authorise beneficiaries of refugee status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after the refugee status has been granted.

2. Member States shall ensure that activities such as employment-related education opportunities for adults, vocational training and practical workplace experience are offered to beneficiaries of refugee status, under equivalent conditions as nationals.

3. Member States shall authorise beneficiaries of subsidiary protection status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service immediately after the subsidiary protection status has been granted. The situation of the labour market in the Member States may be taken into account, including for possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law. Member States shall ensure that the beneficiary of subsidiary protection status has access to a post for which the beneficiary has received an offer in accordance with national rules on prioritisation in the labour market.

4. Member States shall ensure that beneficiaries of subsidiary protection status have access to activities such as employment-related education opportunities for adults, vocational training and practical workplace experience, under conditions to be decided by the Member States.

5. The law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply.

Article 27

Access to education

1. Member States shall grant full access to the education system to all minors granted refugee or subsidiary protection status, under the same conditions as nationals.

2. Member States shall allow adults granted refugee or subsidiary protection status access to the general education system, further training or retraining, under the same conditions as third country nationals legally resident.

3. Member States shall ensure equal treatment between beneficiaries of refugee or subsidiary protection status and nationals in the context of the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications.

Article 28

Social welfare

1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status receive, in the Member State that has granted such statuses, the necessary social assistance, as provided to nationals of that Member State.
2. By exception to the general rule laid down in paragraph 1, Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals.

Article 29

Health care

1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to health care under the same eligibility conditions as nationals of the Member State that has granted such statuses.

2. By exception to the general rule laid down in paragraph 1, Member States may limit health care granted to beneficiaries of subsidiary protection to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals.

3. Member States shall provide, under the same eligibility conditions as nationals of the Member State that has granted the status, adequate health care to beneficiaries of refugee or subsidiary protection status who have special needs, such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict.

Article 30

Unaccompanied minors

1. As soon as possible after the granting of refugee or subsidiary protection status Member States shall take the necessary measures, to ensure the representation of unaccompanied minors by legal guardianship or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or Court order.

2. Member States shall ensure that the minor’s needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.

3. Member States shall ensure that unaccompanied minors are placed either:
   (a) with adult relatives; or
   (b) with a foster family; or
   (c) in centres specialised in accommodation for minors; or
   (d) in other accommodation suitable for minors.

In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.

4. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

5. Member States, protecting the unaccompanied minor’s best interests, shall endeavour to trace the members of the minor’s family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

6. Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs.

Article 31

Access to accommodation

The Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to accommodation under equivalent conditions as other third country nationals legally resident in their territories.

Article 32

Freedom of movement within the Member State

Member States shall allow freedom of movement within their territory to beneficiaries of refugee or subsidiary protection status, under the same conditions and restrictions as those provided for other third country nationals legally resident in their territories.

Article 33

Access to integration facilities

1. In order to facilitate the integration of refugees into society, Member States shall make provision for integration programmes which they consider to be appropriate or create pre-conditions which guarantee access to such programmes.

2. Where it is considered appropriate by Member States, beneficiaries of subsidiary protection status shall be granted access to integration programmes.

Article 34

Repatriation

Member States may provide assistance to beneficiaries of refugee or subsidiary protection status who wish to repatriate.
CHAPTER VIII

ADMINISTRATIVE COOPERATION

Article 35
Cooperation
Member States shall each appoint a national contact point, whose address they shall communicate to the Commission, which shall communicate it to the other Member States. Member States shall, in liaison with the Commission, take all appropriate measures to establish direct cooperation and an exchange of information between the competent authorities.

Article 36
Staff
Member States shall ensure that authorities and other organisations implementing this Directive have received the necessary training and shall be bound by the confidentiality principle, as defined in the national law, in relation to any information they obtain in the course of their work.

CHAPTER IX

FINAL PROVISIONS

Article 37
Reports
1. By 10 April 2008, the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary. These proposals for amendments shall be made by way of priority in relation to Articles 15, 26 and 33. Member States shall send the Commission all the information that is appropriate for drawing up that report by 10 October 2007.
2. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive at least every five years.

Article 38
Transposition
1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 10 October 2006. They shall forthwith inform the Commission thereof.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 39
Entry into force
This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Article 40
Addressees
This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Luxembourg, 29 April 2004.

For the Council
The President
M. McDOWELL
Proposal for a

COUNCIL DIRECTIVE

on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection

(presented by the Commission)
EXPLANATORY MEMORANDUM

1. MINIMUM STANDARDS FOR THE QUALIFICATION AND STATUS OF THIRD COUNTRY NATIONALS AND STATELESS PERSONS AS REFUGEES OR AS PERSONS WHO OTHERWISE NEED INTERNATIONAL PROTECTION

50 YEARS AFTER THE GENEVA CONVENTION: CREATING THE HEART OF THE COMMON EUROPEAN ASYLUM SYSTEM

According to the Conclusions of the Presidency at the Tampere European Council in October 1999, a Common European Asylum System is to include, in the short term, a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure, common minimum conditions of reception for asylum seekers and the approximation of rules on the recognition and content of refugee status. This is to be supplemented with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection. In addition, the Conclusions make clear that, in the longer term, Community rules should lead to a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union. Finally, the European Council, in Tampere, urged the Council to step up its efforts to reach agreement on the issue of temporary protection for displaced persons on the basis of solidarity between Member States.

- On 28 September 2000, the Council adopted a Decision (2000/596/EC) establishing a European Refugee Fund as a solidarity measure to promote a balance in the efforts made by Member States in receiving and bearing the consequences of receiving refugees and displaced persons.
- On 11 December 2000, the Council adopted a Regulation (2725/2000/EC) concerning the establishment of ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention on the State responsible for examining applications for asylum lodged in one of the European Union Member States.
- On 20 July 2001, the Council adopted a Directive (2001/55/EC) on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

In addition to the Proposals for the above mentioned acts approved by the Council, the Commission has adopted:

- On 22 November 2000, a Communication on a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union.
On 26 July 2001 a Proposal for a Council Regulation 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.

As indicated in the scoreboard to review progress on the creation of an area for freedom, security and justice in the European Union, approved by the Council on 27 March 2000, the Commission is now, in the second half of 2001, proposing a Council Directive on minimum standards on the qualification and status of third country nationals and stateless persons as refugees and as persons otherwise in need of international protection. This will complete the Commission’s work on a proposed set of “building blocks”, which jointly constitute the first step of the “Common European Asylum System” called for by the Tampere European Council.

This Proposal has been drafted on the basis of a number of preparatory activities and background materials.

In the preparatory phases of the legislative process leading to the current Proposal, the Commission organised a series of bilateral consultations with Member States. These consultations were held on the basis of a discussion paper, drafted with a view to facilitating discussions with Member States on how best to legislate in EC legal instruments, rules on the recognition and content of refugee and subsidiary protection status.

In its November 2000 Communication, entitled “Towards a common asylum procedure and a uniform status, valid throughout the Union for persons granted asylum” (the Asylum Communication), the Commission wrote that “representatives of civil society, associations, non-governmental organisations and local authorities and communities must also be partners in the new system as actors and vectors of asylum values in Europe”. Within this context the Commission consulted in addition to Member States, UNHCR, expert non-governmental organisations in the field such as the European Council on Refugees and Exiles (ECRE) and Amnesty International, specialised non-governmental organisations such as the European Women’s Lobby and Save the Children, academic experts such as the ODYSSEUS academic network for legal studies on immigration and asylum in Europe, and representatives of the judiciary such as the International Association of Refugee Law Judges, on the basis of the aforementioned discussion paper.

On 23 and 24 April 2001 a Seminar, held in Norrköping, and entitled “International protection within one single asylum procedure” was organised by the Swedish Presidency of the European Union. This seminar dealt with the following three issues: the interpretation of the refugee definition, subsidiary forms of protection and a single asylum procedure. The discussion held there and the main findings of the seminar, as well as the different background papers prepared for this Seminar were important sources of inspiration in drafting the current Proposal.

Where it relates to the issue of the refugee definition, the present Proposal also draws on a recent academic study undertaken by the Refugee Studies Centre, University of Oxford for the European Commission. This Proposal incorporates the findings of an expert meeting that was organised to discuss this study as well as various relevant national, European and international texts and jurisprudence. It also reflects various recent comparative Council and CIREA overviews of Member States practices regarding the issue of subsidiary protection.
2. SCOPE OF THE PROPOSAL

With regard to the Common European Asylum System, it was agreed at the Tampere European Council that it “should include the approximation of rules on the recognition and content of the refugee status and should be complemented by measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection”. The main aim being to ensure that a minimum level of protection is available in all Member States for those genuinely in need and to reduce disparities between Member States’ legislation and practice in these areas. Any differences not solely connected with family, cultural or historical factors, likely to influence in one way or another the flows of asylum applicants, should as far as possible disappear between the Member States, where such movement is purely caused by differences in legal frameworks.

This Proposal relates to an instrument for part of the “first-step” of a Common European Asylum System, which is to be “based on the full and inclusive application of the Geneva Convention, thus ensuring that nobody is sent back to persecution, i.e. maintaining the principle of non-refoulement”. The Proposal therefore lays down rules for determining which applicants for international protection qualify for refugee status and which qualify for subsidiary protection status. It does not extend to cover those third country national or stateless persons present in the territory of Member States who Member States currently allow to remain in their territory for reasons not related to a need for international protection, such as compassionate or humanitarian ones.

In the interests of greater harmonisation and limiting unwarranted secondary movement of asylum seekers, this Directive includes provisions on the minimum rights and benefits to be enjoyed by the beneficiaries of refugee and subsidiary protection status. In the main, the rights and benefits attached to both international protection statuses are the same, to reflect the fact that the needs of all persons in need of international protection are broadly similar. However, some differentiation has been made, in recognition of the primacy of the Geneva Convention and the fact that the regime of subsidiary protection starts from the premise that the need for such protection is temporary in nature, notwithstanding the fact that in reality the need for subsidiary protection often turns out to be more lasting. In order to reflect this underlying premise and reality entitlement to some important rights and benefits has been made incremental, requiring that a brief qualification period be served before a beneficiary of subsidiary protection status becomes eligible to claim them.

This Proposal does not address the procedural aspects of granting and withdrawing refugee status or subsidiary protection status. The procedures for asylum applicants are laid out in the Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status. Article 3 of that Directive makes the applicability of the Directive to applications for international protection, not made specifically in relation to the Geneva Convention, optional. This leaves a potential gap in the European protection regime and allows for differences in Member State practice in this area to continue with a possible negative affect on the goal of limiting unwarranted secondary movement of asylum seekers within the European Union. Member States are therefore encouraged to apply the optional Article 3 of the Proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status to all applications for international protection in a similar manner in the interests of harmonisation.
In the Asylum Communication the Commission states that at the end of this first step of the harmonisation process of EU asylum policy, and whatever the result, it will be necessary to consider whether mechanisms can be developed to correct certain differences that might remain or to prevent the phenomenon of divergent interpretation of Community rules. Specific questions related to the issues covered in this Proposal were also already identified in the Communication as being in need of further clarification, such as: should the EU aim for transposing the Geneva Convention status into Community law, should the EU envisage one or more uniform personal statuses and what kind of documents, rights, freedom of movement and right of residence in another Member State should refugees and others in need of international protection have. These questions are not covered by this Proposal because it is envisaged that they will be tackled in the second step of the harmonisation process.

3. GUIDING PRINCIPLES

The Charter of fundamental rights of the European Union reiterated the right to asylum in its Article 18. Flowing from this the Proposal reflects that the cornerstone of the system should be the full and inclusive application of the Geneva Convention, complemented by measures offering subsidiary protection to those persons not covered by the Convention but who are nonetheless in need of international protection. It is argued that the wording of the definition of who is a refugee, as contained in Article 1(A)(2) of the 1951 Geneva Convention, as well as the Convention itself, remains relevant today and is sufficiently flexible, full and inclusive to offer a guarantee of international protection to a significant proportion of those persons in need of it. This approach is in accordance with the principles of interpretation as codified in Article 31(1) of the 1969 Vienna Convention on the Law of Treaties, requiring that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

The Directive takes as a starting point the “Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonised application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugee”, (hereinafter the Joint Position). Other sources of reference were the “Handbook on procedures and criteria for determining refugee status” of the office of the United Nations High Commissioner for Refugees (hereinafter the Handbook), drafted with a view to assisting States party to the Convention in interpreting the Convention’s refugee definition, and the EXCOM Conclusions. However, the primary point of reference is the Geneva Convention itself.

The subsidiary protection measures proposed are considered complementary to the protection regime enshrined in the Geneva Convention and its 1967 Protocol and are to be implemented in such a manner that they do not undermine but instead complement the existing refugee protection regime. The definition of subsidiary protection employed in this Proposal is based largely on international human rights instruments relevant to subsidiary protection. The most pertinent of them being (Article 3 of) the European Convention on Human Rights and Fundamental Freedoms (hereinafter the ECHR), (Article 3 of) the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment, and (Article 7 of) the International Covenant on Civil and Political Rights.

Though no specific EU acquis on the issue of subsidiary protection exists, the ECHR and the case law of the European Court on Human Rights provide for a legally binding framework, informing the Commission’s legislative work on this issue. Partly in response to the case law of the European Court of Human Rights and general principles of international humanitarian
law, Member States have developed schemes of “subsidiary” or “complementary” protection. This Proposal has drawn from the disparate Member State systems and has attempted to adopt and adapt the best ones. Rather than creating new ratione personae protection obligations incumbent on Member States, the Proposal is clarifying and codifying existing international and Community obligations and practice.

4. THE OBJECTIVES OF THE PROPOSAL

With this Proposal for a Directive, the Commission is pursuing the following aims:

1. Implementing point (1)(c), 2(a), and 3(a) of the first paragraph of Article 63 of the Treaty, paragraph 38(b)(i and ii) of the Vienna Action Plan, Conclusion 14 of the Tampere European Council and relevant references in the Scoreboard presented to the Council and the Parliament in March 2000;

2. Setting out minimum standards on the qualification and status of applicants for international protection as refugees or beneficiaries of subsidiary protection status;

3. Ensuring that a minimum level of protection is available in all Member States for those genuinely in need of international protection and to reduce disparities between Member States’ legislation and practice in these areas as the first step towards full harmonisation.

4. Limiting secondary movements of applicants for international protection influenced solely by the diversity of the applicable rules on recognising refugee status and granting subsidiary protection status;

5. To guarantee a high level of protection for those who genuinely need it, whilst at the same time preventing abuses of asylum applications which undermine the credibility of the system, often to the detriment of applicants in genuine need of protection.

5. AN OVERVIEW OF THE STANDARDS IN THE PROPOSAL

This Proposal is composed of seven Chapters:

(a) The first group of provisions concerns the most general aspects of the Proposal, including its objective and scope as well as the definitions of the concepts that are relevant for a clear understanding of the Proposal.

(b) The second set of rules focuses on the general nature of international protection, identifying the many common characteristics of its two constitutive elements, refugee status and subsidiary protection status. It outlines general rules on establishing how to determine whether a claim for international protection is well founded or not. Its guiding principle is that international protection of any sort is a type of surrogate protection to be provided in lieu of national protection only when the realistic possibility of obtaining protection from an applicant’s country of origin is absent.

(c) A third group of rules is specific to the qualification as a refugee. It focuses in particular on the definition of “persecution” and offers an interpretation of this central notion, including the five grounds on which it can be predicated, based on Article 1 (A) of the Geneva Convention. It also contains rules laying down the circumstances in which
Member States may withdraw refugee status when such status is found no longer to be required as well as rules for excluding applicants from such status.

(d) The fourth group of rules provides a framework for identifying three categories of applicants for international protection who do not qualify as refugees but are eligible for the supplementary status of subsidiary protection. The three categories are based on Member States existing obligations under human rights instruments, as well as existing Member State practice in this area, and are designed to complement the refugee protection regime. It also contains rules laying down the circumstances in which Member States may withdraw subsidiary protection status when such status is found no longer to be required as well as rules for excluding applicants from such status.

(e) A fifth set of rules lays down the minimum obligations that Member States shall have towards those to whom they grant international protection. These obligations include the duration and content of the status flowing from recognition as a refugee or as a beneficiary of subsidiary protection status. The benefits accruing to both categories of international protection status shall be very similar with a few important exceptions with regard to the duration of the status, and certain rights which depend on a qualification period in the case of beneficiaries of subsidiary protection to reflect the potentially more temporary nature of this category.

(f) Finally, the Proposal outlines in its two final Chapters several rules to ensure the Directive’s complete implementation. If the final aims of the future directive are to be met, the instruments that are put in place to reach these aims have to be checked, revised and adjusted to be sure they are going to produce the expected results. It is important that a national contact point is designated and that appropriate measures are enacted to establish direct Cooperation and an exchange of information between the competent authorities. At Community level, it is important to assess whether the purposes of this Directive are met or if there is room for improvement.

The Commission, for its part, envisages the introduction of one Contact Committee. This Contact Committee will facilitate the transposition and the subsequent implementation of this and other Directives in the field of asylum through regular consultations on all practical problems arising from its application. It will help avoid duplication of work where common standards are set and to adopt complementary strategies in combating abuse of the protection regime. In addition, the Committee will facilitate consultation between the Member States on reaching similar interpretations of the rules laid down on international protection that they may lay down at national level. This would greatly help the construction of a Common European Asylum System as envisaged by the Conclusions of the Presidency at the Tampere European Council in October 1999. Lastly, the Committee will advise the Commission, if necessary, on any supplements or amendments to be made to this Directive or on any adjustments deemed necessary.

6. THE CHOICE OF LEGAL BASIS

The choice of legal basis is consistent with the amendments made to the Treaty establishing the European Community by the Amsterdam Treaty, which entered into force on 1 May 1999. Points (1)(c) and 2(a) of the first paragraph of Article 63 of the EC Treaty provides that the Council shall adopt measures on asylum in accordance with the Geneva Convention of 28 July 1951, the Protocol of 31 January 1967 and other relevant human rights instruments, relating to minimum standards on the qualification and status of refugees and persons who
otherwise need international protection. Point (3)(a) of the first paragraph of Article 63 of the EC Treaty provides that the Council is to adopt measures relating to “conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits, including those for the purpose of family reunion”. As this Article applies equally to refugees as to other categories of third country nationals, it constitutes the legal basis for the inclusion in this Proposal of the conditions of residence of refugees, including their rights such as employment and education.

Article 63 is accordingly the proper legal basis for a Proposal to establish minimum standards for the qualification and status of refugees and persons who otherwise need international protection in Member States.

Title IV of the EC Treaty is not applicable to the United Kingdom and to Ireland, unless those Member States decide otherwise in accordance with the procedure laid down in the Protocol on the position of the United Kingdom and Ireland annexed to the Treaties. Title IV is likewise not applicable to Denmark, by virtue of the Protocol on the position of Denmark annexed to the Treaties.

7. SUBSIDIARITY AND PROPORTIONALITY: JUSTIFICATION AND VALUE ADDED

Subsidiarity

The insertion of the new Title IV (Visas, asylum, immigration and other policies related to free movement of persons) in the Treaty establishing the European Community demonstrates the will of the High Contracting Parties to confer powers in these matters on the European Community. But the European Community does not have exclusive powers here.

Consequently, even with the political will to implement a common policy on asylum and immigration, it must act in accordance with Article 5 of the EC Treaty, i.e. the Community may take action only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. The proposed Directive satisfies these criteria.

The establishment of an area of freedom, security and justice entails the adoption of measures relating to asylum. The specific objective of this initiative is to lay down minimum standards on the qualification and status of refugees and persons who otherwise need international protection in Member States. The standards laid down in this Proposal must be capable of being applied through minimum conditions in all the Member States. Minimum Community standards have to be laid down by the kind of action proposed here. They will help to limit secondary movements of asylum applicants that result from disparities in Member States practices and legislation. Henceforth, applicants for asylum will be less inclined than before to decide on their country of destination on the basis of different protection regimes. They will also be less inclined than before to choose their country of destination on the different level of rights and benefits that Member States attach to recognition of a form of international protection. The continued absence of approximated rules on the qualification and status of refugees and persons who otherwise need international protection would have a negative effect on the effectiveness of other instruments relating to asylum.
Conversely, once minimum standards on the qualification and status of refugees and persons who otherwise need international protection are in place, the operation of, *inter alia*, an effective system for determining which Member State is responsible for considering an asylum application is fully justified. Applicants for international protection who cannot choose in complete freedom where to lodge their application should expect their claims for international protection to be assessed in a similar way in any Member State of the European Union and for successful recognition of such a claim to result in a comparable set of rights and benefits. The idea of a single Member State responsible for examining an application for international protection becomes fairer to applicants if the same minimum standards exist across all Member States. At the same time, minimum standards on the qualification and content of the two protection regimes should limit the importance of factors that determine secondary movements within the Union and, in this way, would help to establish the effectiveness of the mechanisms according to which the responsible Member State is chosen.

Establishing common minimum standards on the qualification and status of refugees and persons who otherwise need international protection is a fundamental tool in making national asylum systems more effective and a Common European Asylum System more credible.

**Proportionality**

The form taken by Community action must be the simplest form allowing the Proposal to attain its objectives and to be implemented as efficiently as possible. In this spirit, the legal instrument chosen is a Directive, which allows minimum standards to be laid down, while leaving national authorities the choice of the most appropriate form and methods for implementing it in their national system. The Proposal concentrates on a set of minimum standards that are strictly necessary for the coherence of the planned action without laying down standards relating to other aspects of asylum. The Proposal refers to the Proposal for a directive on minimum standards on common asylum procedures (COM(2000) 578), to the Proposal for a Directive laying down minimum standards on the reception of applicants for asylum in Member States (COM(2001)181), the Proposal for a Council Regulation 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 (COM(2001) 447), the Council Directive (2001/55/EC) on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, the amended Proposal for a Council Directive on the right to family reunification (COM(2000) 624) and to the Proposal for a Council Directive concerning the status of third country nationals who are long term residents (COM(2001) 127) to ensure consistency within the Common European Asylum System and with other Proposals for Community instruments in the field of immigration. Finally, several rules require Member States only to comply with certain aims (e.g. they are asked to integrate considerations specific to the applications for international protection from persons having special needs) but leave Member States completely free to choose the means used to achieve this aim. The Proposal, therefore, does not go beyond what is necessary to achieve the objective of the Directive.
COMMENTARY ON ARTICLES

CHAPTER I

Subject matter, definitions and scope

Article 1

This Article defines the purpose of the Directive, which is to provide a framework for an international protection regime, based on existing international and Community obligations and current Member States practice, and separated into the two complementary categories of refugee and subsidiary protection in order to maintain the primacy of the Geneva Convention in such a regime. It lays down minimum standards for the qualification and subsequent status of third country nationals and stateless persons who fall into these categories but does not legislate for persons whom Member States chose to grant a status on strictly humanitarian or compassionate grounds.

Article 2

Definitions

This Article contains definitions of the various concepts and terms used in the provisions of the Proposal.

(a) Throughout the Proposal, the term “international protection” refers to the protection applied for by third country nationals or stateless persons, or given to them by Member States, instead of protection previously provided by an individual’s country of origin or habitual residence. The whole concept of “international protection” is comprised of the two separate but complementary elements of refugee status and subsidiary protection status.

(b) Throughout the Proposal, the term “Geneva Convention” refers to the Convention relating to the status of refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967. All Member States are parties to both without any temporal or geographical limitations.

(c) A “refugee” is a person who fulfils the requirements of Article 1(A) of the Geneva Convention.

(d) “Refugee status” means the status granted by a Member State to a third country national or stateless person who is a refugee and is admitted as such to the territory of this Member State;

(e) Throughout the Proposal “person eligible for subsidiary protection” means a person who does not qualify as a refugee but otherwise satisfies the rules regarding international protection set out in Chapters II and IV of this Directive. The term refers to someone who has established a well founded fear of being subjected to other serious harm in their country of origin for one or more of the reasons set out in Chapter IV but does not qualify as a refugee.

(f) “Subsidiary protection status” is a form of international protection status, separate but complementary to refugee status, granted by a Member State to a third country national
or stateless person who is not a refugee but is otherwise in need of international protection and is admitted as such to the territory of this Member State;

(g) An “application for international protection” or an “application” is a request by a third country national or a stateless person for protection from a Member State, which can be understood to be on the grounds that he or she is a refugee or a person in need of subsidiary protection. Any application for international protection shall fall to be considered under the provisions of the Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status, and is presumed to be an application for asylum unless a third country national or a stateless person explicitly requests another kind of protection that can be applied for separately;

(h) “Application for asylum” is defined with reference to the definition of a refugee in the Geneva Convention, set out in Chapters II and III of this Directive

(i) “Application for subsidiary protection” is defined with reference to the interpretation of three categories of person considered to be in need of international protection according to Member States obligations under certain human rights instruments or drawn from previously existing and widespread Member State practice, which cannot be understood to be on the grounds that he or she is a refugee.


(i) This subparagraph concerns spouses or unmarried partners (who may be of the same sex) but the provision relating to unmarried partners is only applicable in Member States where such relationships are treated in the same way as married couples for legal purposes. This provision generates no actual harmonisation of national rules on the recognition of unmarried couples; it merely allows the principle of equal treatment to operate. To prevent possible abuse, unmarried partners must be in a stable relationship, backed up by evidence of cohabitation or by reliable testimony.

(ii) This subparagraph concerns the children of a married or unmarried couple, who are themselves unmarried and dependent, whether or not they are minors. No distinction is made in the treatment of children born outside marriage, of a previous marriage or who are adopted. Unmarried children who are not minors are therefore covered if they are dependent, either because they are objectively unable to meet their own needs or because of their state of health

(iii) This subparagraph concerns family members not already covered if they were dependent on the applicant at the time of departure from the country of origin. They must therefore be objectively unable to meet their own needs or may have serious health problems or have undergone particularly traumatic experiences. They can be grandchildren, grandparents, great-grandparents or other adults dependent on the applicant.

(k) The notion of accompanying family members is defined in relation to the definition of family members set out in paragraph (k) and to the fact that they are present in the host country in relation to the application for asylum. This is to exclude from family
unification, under this Directive, family Members that are in the host country for different reasons (e.g. work) or that are in another Member State or in a third country.

(l) The concept of “unaccompanied minor” is drawn from the definition in the Council Resolution of 26 July 1997 on unaccompanied minors who are nationals of third countries.

(m) A "residence permit" refers to any formal documentary authorisation to reside for a limited or indefinite period in the territory of a Member State.

(n) The notion of “Country of origin” refers to the country of nationality or former habitual residence of the applicant.

Article 3

Scope

This Article concerns the scope of the Directive.

The use of the term “third country nationals and stateless persons” relates to the language used in Article 63(1)(c) of the EC Treaty.

Article 4

More favourable provisions

This Proposal for a Directive focuses only on minimum standards on qualification and status of third country national and stateless persons as refugees or persons who are otherwise in need of international protection. The relevant provisions of the Amsterdam Treaty should not be understood as precluding the Member States from granting more than the agreed minimum standards in this field, particularly in terms of the rights and benefits accorded to those recognised as being in need of international protection. This Article accordingly allows Member States to grant applicants for international protection more favourable conditions insofar as they are compatible with the minimum standards laid down in this Directive.

CHAPTER II

Qualification for international protection

Section 1

International protection

This Chapter sets out the shared underlying necessary requirements for an applicant to qualify for either forms of international protection outlined in this Directive. It draws on and elaborates the principles that underlie qualification for refugee status and subsidiary protection status. It takes as its guiding principle the idea that an individual only has a well-founded fear of being persecuted or otherwise suffering serious harm, and is therefore entitled to protection from a Member State, if protection from a domestic source, most usually the applicant’s home state, is not reasonably available.
Article 5

The elements of international protection

This Article sets out the two separate but complementary types of beneficiary of international protection, namely “refugee” and “beneficiary of subsidiary protection”.

(1) This paragraph outlines a definition of a refugee that is consistent with the Geneva Convention and further elaborated in Chapter III of this Directive. It affirms the concept of a refugee as someone who has a well-founded fear of being persecuted only for one or more of five broadly defined reasons: race, religion, nationality, membership of a particular social group and political opinion. The fear must be such that it makes the applicant unwilling or unable to avail him or herself of the protection of the country of nationality.

(2) This paragraph outlines the definition of who should be eligible for subsidiary protection and directs that the category should be interpreted further by reference to Chapter IV of this Directive. Although the Geneva Convention is thought to be sufficiently broad and inclusive to provide protection for a significant number of those in need of it, international human rights instruments and Member State practice in this area have extended the scope of international protection still further. The Directive’s aim is to provide that a minimum standard of subsidiary protection is available to complement the Geneva Convention in all Member States to reflect what has been existing practice at Member State level and as a step towards harmonisation.

The phrase “serious unjustified harm” is used here as part of the integrated approach taken to the whole concept of “international protection” and its two separate but closely linked components of refugee status and subsidiary protection. Persecution is defined as being a type of serious unjustified harm, which is causally linked to one or more of the five grounds mentioned in the Geneva Convention. Where there is a well-founded fear of serious unjustified harm for a reason not covered by the Geneva Convention then, subject to the criteria in Chapter IV of the Directive, an applicant will be found to be otherwise in need of international protection and granted subsidiary protection status. Whereas the phrase “well-founded fear of being persecuted” is used as a shorthand term of reference in relation to refugees, the complimentary phrase “well founded fear of (suffering) other serious (unjustified) harm” is used in a similar manner throughout the text in relation to beneficiaries of subsidiary protection.

The term “unjustified” is added to the definition of “serious harm” in order to reflect that there are circumstances in which a state may be justified in taking measures that cause harm to individuals, such as in the event of a public emergency or national security. Such instances of “justified” harm are likely to be rare but it would be contrary to human rights instruments, such as the European Convention on Human Rights and Fundamental Freedoms, to exclude the possibility that some proportionate derogation from human rights standards may, in limited and particular circumstances, be justified, most commonly in the interests of the wider common good.

Beneficiaries of subsidiary protection are not necessarily any less ‘deserving’ of protection than refugees but in order to respect the call for a “full and inclusive application of the Geneva Convention” and in recognition that the Geneva Convention is sufficiently broad and inclusive to cover a significant number of those genuinely in need of international protection, consideration of whether an applicant qualifies for
subsidiary protection shall only normally take place after it has been established that he or she does not qualify as a refugee.

The exception to this rule is when an applicant for international protection lodges an application on grounds that specifically exclude the Geneva Convention. In such a case, qualification should be considered under Chapters II and IV of this Directive, without reference to Chapter III. The provisions of this paragraph are also without prejudice to Member States constitutional obligations (such as Constitutional asylum)

(3) This paragraph links the elements of international protection as set out in Section 1 with the assessment of the applicant’s fear of being persecuted or exposed to serious and unjustified harm in the country of origin, pursuant to Section 2.

Article 6

Extension of international protection to the accompanying family members

This Article provides for the extension of international protection to all accompanying family members defined in Article 2 of this Directive.

(1) This Paragraph makes clear that dependant family members are entitled to a status equal to that of the main applicant for asylum and that such entitlement is derived simply from the fact that they are family members.

(2) This Paragraph provides for an exception to the principle set out in paragraph 1. It allows for a family member who would otherwise qualify for a protection status to be excluded from the orbit of this Directive if rules laid out in Chapter III and IV of the Directive, relating to the Exclusion Clauses detailed in the Geneva Convention, apply to them.

Section 2

Assessment of the applicant’s fear of being persecuted or exposed to other serious and unjustified harm

Article 7

Assessment of applications for international protection

This Article addresses the application for international protection and the assessment of whether the application is objectively well founded. It sets out rules to help in establishing whether an application for international protection is well founded or not. In deciding which rules were relevant close attention was paid to the Geneva Convention, the Joint Position, and the Handbook.

(a) This point reflects the principle that applications for international protection should be examined on a case by case basis in relation to the objective conditions known to exist in the country of origin or habitual residence. Although the burden of proof in principle rests with the applicant, the duty to ascertain and evaluate all relevant facts is shared between the applicant and the Member State responsible for considering the application.
(b) This paragraph states the principle that the need for international protection is forward-looking and that the applicant’s fear of being persecuted or exposed to serious and unjustified harm in the country of origin may be well founded if it is objectively established. If there is a reasonable likelihood of the fear being realised after an applicant is returned to the country of origin then the fear is well founded. The relevant enquiry is whether there is a reasonable likelihood of the fear of persecution or otherwise suffering serious harm being realised. A fear of being persecuted or otherwise subjected to serious harm may be well-founded even if there is not a clear probability that the individual will be persecuted or suffer such harm but the mere chance or remote possibility of it is an insufficient basis for the recognition of the need for international protection.

(c) This paragraph relates to the fact that if an applicant for international protection has already been subject to persecution or serious and unjustified harm, or to direct threats of persecution or serious and unjustified harm this shall be taken as a serious indication of the risk of being persecuted unless a radical and relevant change of conditions has taken place since then in the applicant’s country of origin, or in his or her relations with the country of origin.

(d) This paragraph reflects the principle that in assessing applications for international protection, a holistic assessment must be made of the factual context surrounding the application. For example, where the applicant is a child or adolescent, the assessment of whether a given risk is sufficiently serious to amount to persecution or other serious harm shall take account of child-specific forms of human rights violation.

With the reference to age this paragraph draws particular attention to the potential vulnerability and unique circumstances of a minor’s application for international protection. According to Article 3 of the United Nations Convention on the Right of the Child of 1989, “In all actions concerning children … the best interests of the child shall be a primary consideration”. This mandatory principle, implicit in this paragraph, is referred to explicitly in the recitals so that it can be used as a tool for the interpretation of all the provisions of this Proposal for a Directive that concern minors. More specifically, in assessing an application for international protection Member States should take into consideration:

(a) the fact that the age and maturity of the child and his or her stage of development form part of the factual context of the application

(b) the fact that children may manifest their fears differently from adults

(c) the fact that children are likely to have limited knowledge of conditions in their country of origin

(d) the existence of child specific forms of persecution, such as recruitment of children into armies, trafficking for sex work, and forced labour.

Within this context, the refugee definition, in particular the five grounds for persecution, is thought to be sufficiently broadly defined as to potentially include refugee children. They should not automatically be granted subsidiary protection simply because they are children.
In particular, where the applicant for international protection is a woman, account shall be taken of the fact that persecution, within the meaning of the Geneva Convention, may be effected through sexual violence or other gender-specific means. Where the form of persecution is gender-specific this should not obscure the reason why the persecutory act occurred. For example, sexual violence can be inflicted on refugee women because, for instance, of their religion, political opinion or nationality. In these cases sexual violence is purely a form of persecution and any of the Convention grounds elaborated in Article 12 may be applicable. However, sexual violence to refugee women, such as Female Genital Mutilation can also be inflicted for the one and only reason of their gender. In such situations, the persecution ground “membership of a particular social group” could apply.

The Commission acknowledges the importance and usefulness of specific “Guidelines” for assessing claims of minors, as well as from women applicants for international protection. However it does not deem the first stage of the Common European Asylum System, or the instrument of a Directive as being appropriate for introducing such guidelines at EU level now. It therefore encourages Member States to develop such guidelines at national level in consultation with UNHCR.

(e) An application for international protection may also be based on credible evidence that laws or regulations in force in the country of origin authorise or condone the persecution or other serious harm of the applicant as an individual, or of a relevant group of which the applicant is shown to be a member and there is a reasonable possibility that such laws or regulations will be applied. There shall be no well founded fear if the law is obsolete and not applied in practice.

Article 8

International protection needs arising sur place

This Article concerns the issue of an application for international protection which is made sur place, in cases where the need for such protection arises only after an applicant is already in the territory of Member State, most frequently as a result of a change of circumstances in the country of origin.

(1) This paragraph explains that a fear of persecution or otherwise suffering serious harm need not have existed when an individual left his or her country of origin but a sur place claim based on relevant changes in the individual’s country of origin since departure shall be recognised only insofar as those changes are shown to give rise to a well-founded fear of being persecuted or suffering other serious harm on the part of the individual.

(2) This paragraph addresses the issue of sur place claims based on the individual’s activities since leaving his or her country of origin. A claim shall be most readily established where the activities relied upon constitute the expression and continuation of convictions previously held in the country of origin, and which are related to the need for international protection. Continuity of this kind is not however an absolute requirement but may give an indication as to the credibility of the application.

This paragraph also addresses the issue of abuse in sur place cases. The fact that a fear of persecution or otherwise suffering serious harm was manufactured, does not in itself necessarily mean that such a fear cannot be well founded and therefore sufficient to
warrant the grant of an international protection status. However, where it can be established to a reasonable degree of certainty that the activities since leaving the country of origin were engaged in for the purpose of manufacturing the necessary conditions for being granted an international protection status, Member States are entitled to start from the premise that these activities do not in principle furnish grounds for such a grant and shall have serious grounds for questioning the credibility of the applicant. Member States should ensure though that the competent authorities recognise applicants as persons in need of international protection if the activities of the kind referred to in this paragraph may reasonably be expected to come to the notice of the authorities of the individual’s country of origin, be treated by them as demonstrative of an adverse political or other protected opinion or characteristic, and give rise to a well-founded fear of being persecuted or suffering serious and unjustified harm.

Article 9

Sources of harm and protection

This Article is about the concept of State protection and follows the argument that the main rationale behind the Geneva Convention and regimes of subsidiary protection is that everyone is entitled to be free from persecution or other serious harm, and in the face of such harm should be able to access effective State protection.

(1) This paragraph follows the practice of the vast majority of Member States and other global actors by affirming that the fear of being persecuted or suffering serious unjustified harm may also be well founded where the risk of it emanates not only from the State but also from parties or organisations controlling the State or from non-state actors where the State is unable or unwilling to provide effective protection. The source of the persecution or serious unjustified harm is deemed irrelevant. The relevant enquiry is whether or not an applicant may obtain effective protection against the harm, or threat of harm, in the country of origin. If persecution or other serious unjustified harm stems from the State then such fear is well founded because de facto there is no viable avenue of protection available in the country of origin. If it stems from non-state agents then any such fear is only well founded if the State is unwilling or effectively unable to provide protection against such risk of harm.

(2) This paragraph is about the evaluation of the effectiveness, including the availability, of State protection. There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actions which constitute persecution or other serious harm. The issue at stake is whether such a system as a whole offers a sufficient and accessible level of protection to all members of the population. For the system to offer effective protection, the State must be able and willing to operate it, such that there is no significant risk of persecution of other serious harm being realised.

In the first part of this evaluation, relating to the determination of whether or not the State has taken, or could be reasonably expected to take, adequate steps to control or combat the infliction of harm, Member States should consider the following factors:

(a) General conditions in the country of origin

(b) The State’s complicity with respect to the infliction of harm at stake
(c) The nature of State’s policies with respect to the harm at stake, including whether
there in force a criminal law which makes violent attacks by persecutors
punishable by sentences commensurate with the gravity of their crimes

(d) The influence the alleged persecutors have with State officials

(e) Whether any official action taken is meaningful or merely perfunctory, including
an evaluation of the willingness of law enforcement agencies to detect, prosecute
and punish offenders

(f) Whether there is a pattern of State unresponsiveness

(g) A denial of State’s services

(h) Whether any steps have been taken by the State to prevent infliction of harm

In the second part of this evaluation, relating to the determination whether the applicant
has reasonable access to State protection, Member States should consider the following
factors:

(i) Evidence by the applicant that the alleged persecutors are not subject to the
State’s control

(j) The qualitative nature of the access the applicant has to whatever protection is
available, bearing in mind that applicants as a class must not be exempt from
protection by the law

(k) Steps, if any, by the applicant to obtain protection from State officials and the
State response to these attempts

(3) This paragraph continues from the logic employed in the previous one. Having accepted
that it is possible to have a well founded fear of being persecuted or otherwise suffering
serious harm at the hands of non-state agents, this Article sets out the limited conditions
where non-state bodies can be considered as potential protectors in a similar manner to
recognised states. This requires that an international organisation such as the UN or
NATO or a stable State-like authority controls the territory of proposed return and is
willing and able to give effect to rights and protect an individual from harm in a manner
similar to an internationally recognised state for as long as is necessary.

Article 10

Internal protection

This Article is about the potential for flight or protection from persecution or other serious
harm within the territory of the country of origin. On the principle that international
protection from harm is only required as a secondary alternative to domestic protection, this
provision allows Member States to reject applications for international protection if it can be
established that effective protection is available in at least part of the country of origin to
which the applicant can reasonably be returned.

(1) This paragraph makes it a condition of the internal protection alternative that the facts
of an applicant’s claim for international protection must be considered by
Member States before they examine whether an applicant might reasonably be returned.
Only if the application for international protection would otherwise be granted may Member States consider the internal protection option. In other words, only if the applicant establishes a well founded fear of being persecuted or otherwise suffering serious harm in a part of the country of origin shall an examination be made as to whether in another part of the country such fear would be unfounded. In this examination the possibility that effective protection from persecution or other serious harm may be reasonably available in the country of origin must be assessed. Because a national government is presumed to be entitled to act throughout the whole of the national territory, there is a strong presumption against finding internal protection to be available if the agent of persecution is, or is sponsored by, the national government. Internal protection is most likely to prove viable when the harm is threatened by a non-state agent.

(2) This paragraph is about the considerations to be taken into account in deciding whether the fear of return to a part of the country of origin is well founded. As part of that process it lays down some minimum conditions for establishing if an applicant for international protection may reasonably be refused status and returned to a part of the territory of the country of origin or habitual residence as referred to in paragraph (1). In establishing the reasonableness of return to the proposed site, consideration should be given to the security, political and social circumstances prevailing in that part of the country and to any particular vulnerabilities of the applicant.

CHAPTER III
Qualification for refugee status

The previous Chapter laid down the general pre-conditions necessary for either refugee status or subsidiary protection status to be granted and elaborated the notions of well-foundedness and sources of harm and protection. This Chapter focuses on those factors that are unique to qualification as a refugee, particularly the concept of persecution and its grounds, and is guided very much by the Joint Position and the Geneva Convention, although persecution is not actually defined by the Geneva Convention.

Article 11

The nature of persecution

This Article is about the nature of persecution and lays down some principles for its interpretation.

(1) As the concept of persecution is not grounded in time, the interpretation of persecution outlined in this Article is intended to be flexible, adaptable and sufficiently open, in order to reflect ever-changing forms of persecution, which may constitute a basis for refugee status.

(a) This paragraph lays down the condition that, in order to constitute persecution, acts must be intentional, sustained or systematic and must be sufficiently serious to make return to the country of origin untenable. They must also be based on one of the grounds mentioned in Article 1A of the Geneva Convention as further elaborated in paragraphs 1-5 of Article 12. The repetition of discriminatory measures which, taken separately, may not be serious enough to constitute
persecution, may give rise to a valid claim for refugee status on cumulative grounds.

(b) This paragraph is about persecution as legal, administrative, police and/or judicial measures, which are either persecutory in themselves or have the appearance of legality and are misused for the purposes of persecution, or are carried out in breach of the law and are sufficiently serious to make return to the country of origin untenable. General measures to safeguard public order, State security, or public health will not usually amount to persecution, so long as they meet the requirements for valid limitation of or derogation from human rights obligations established by international law.

(c) Points (i) and (ii) of this paragraph are about legitimate law enforcement. Criminal prosecution or punishment for breach of an ordinary law of general application will not usually amount to persecution. It may be otherwise, however, if the State of origin engages in discriminatory prosecution or adjudication; if it imposes discriminatory or inhuman punishment; or if its law purports to criminalise the exercise of a fundamental international human right or to require an individual to commit acts which are in violation of basic norms of international law.

(d) This paragraph is about military service. It states that prosecution or punishment for refusal to meet a general obligation to perform military service, whether for conscientious objection, absence without leave, evasion, or desertion, will not usually amount to persecution. It may be otherwise, however, if the State of origin denies the applicant due process of law, or engages in discriminatory conscription, assigns duties or conditions of service on a discriminatory basis, or imposes sanctions for failure to meet military service obligations on a discriminatory basis, hence exposing the applicant to disproportionate or excessive punishment or fails to provide a reasonable and non-discriminatory alternative to military service for persons with genuine political, religious, or moral convictions to military service.

In situations of war or conflict, prosecution or punishment for refusal to perform military duties may, by itself, also amount to persecution if the person can establish that performance of military service will require his or her participation in military actions abhorrent to his or her genuine and deep moral, religious or political convictions or to other valid reasons of conscience. Establishing a valid conscientious objection may be facilitated if the military action in which the person would be required to participate is contrary to basic rules of human conduct and/or has been condemned by the international community. This is not, however, indispensable and, even if the military action is generally conducted within the limits prescribed by the laws of war, the person may have valid reasons of conscience for not participating in it. This will be the case, for instance, if the person is a member of an ethnic minority who may be required to participate in military action against that minority.

(2) This Paragraph further explores the nature of (the reasons of) persecution by laying down some guiding principles for Member States to follow. Qualification as a refugee must in all cases link the well founded fear of persecution with at least one of the five grounds enumerated in the Geneva Convention and set out in Article 13 of this Directive.
(a) This subparagraph is about the sources of persecution. Persecution is most clearly evident when it emanates from the state itself or from parties or organisations controlling it. In such circumstances the availability of protection from the harm feared or suffered is, almost by definition, unavailable or ineffective. However, it also stated that persecution can originate from non-state agents in the circumstances where a state is unable or unwilling to provide effective protection against such persecution. In such cases also, subject to the other qualifying criteria set out in this Directive being met, refugee status should be granted.

(b) This subparagraph is about the attribution of a Convention reason to an applicant. The fact that the grounds, on which a fear of being persecuted is based, are genuine or simply attributed to the applicant by the State or non-governmental agent of persecution is immaterial. For example, it may be sufficient that a persecutor believes that an individual holds a certain political view, regardless of the truth of the matter, for a persecutory act to be taken against that individual for the single reason of imputed political opinion.

(c) This subparagraph addresses the subject of generalised oppression or violence. There may be a tendency to exclude from refugee status applicants who have fled, sometimes in large numbers, from situations of large scale oppression and violence because there are so many of them or their circumstances are similar to many others. They are nonetheless entitled to be recognised as refugees if their race, religion, nationality, membership of a particular social group, or political opinion accounts for their well-founded fear of being persecuted. Only when one of these five reasons is not significantly implicated in relation to the fear of persecution are Member States justified in granting subsidiary protection status instead. While persons in flight from civil war or internal or generalised armed conflict are not necessarily Convention refugees, Member States should ensure that neither are they automatically excluded from refugee status

Article 12

The reasons for persecution

This Article outlines principles relating to the reasons of persecution. The Article owes much to the Geneva Convention and the Joint Position and does not seek to create any new reasons not explicitly or implicitly recognised by these instruments.

(a) This paragraph sets out rules for the interpretation of the concept of “race”. It should be interpreted in the broadest of terms to include all kinds of ethnic groups and the full range of sociological understandings of the term. Persecution is most often well-founded on racial grounds in cases where the persecutor regards the victim of persecution as belonging to a different racial group other than his own, by reason of real or supposed difference, and this forms the grounds for his action or the fear of persecution.

(b) This paragraph sets out rules for the interpretation of the concept of “religion” and instructs Member States to interpret it so as to include the holding of theistic, non-theistic and atheistic beliefs. Persecution on religious grounds may occur where such interference targets a person who does not wish to profess any religion, refuses to take up a particular religion or does not wish to comply with all or part of the rites and customs relating to a religion.
(c) This paragraph sets out rules for the interpretation of the concept of “nationality”. The term nationality is not to be understood only as citizenship, but also refers to membership of an ethnic, cultural or linguistic group, and may overlap with the term ‘race.’

(d) This paragraph sets out rules for the interpretation of the concept of “Membership of a particular social group”, a term that was deliberately drafted in an open way and needs to be interpreted in a broad and inclusive manner. A group may be defined by a fundamental characteristic, such as gender, sexual orientation, age, family relationship, or history, or by an attribute which is so fundamental to identity or conscience that members of the group should not be required to renounce it, such as trade union membership or the advocacy of human rights.

The concept is not confined to narrowly defined, small groups of persons, and no voluntary associational relationship or de facto cohesion of members is required. The reference to gender and sexual orientation does not imply that this persecution ground necessarily covers all women and homosexuals. Its applicability will depend on particular circumstances and contexts in the country of origin and the characteristics of the persecution and the persecuted.

The interpretation should also allow for the inclusion of groups of individuals who are treated as "inferior" or as "second class" in the eyes of the law, which thereby condones persecution at the hands of private individuals or other non-state actors, or where the State uses the law in a discriminatory manner and refuses to invoke the law to protect that group. This may be the case in situations where women are the victims of domestic violence, including sexual violence and mutilations, in those States where they are unable to obtain effective protection against such abuse because of their gender or social status as married women, daughters, widows or sisters, in that particular society.

(e) This paragraph sets out rules for the interpretation of the concept of “political opinion”. Holding political opinions different from those of the government is not in itself a sufficient ground for securing refugee status. The applicant must show that the authorities know, or are likely to come to know, about his or her political opinions or attribute them to him or her, that those opinions are not tolerated by the authorities, and that, given the situation in the country of origin, they would be likely to be persecuted for holding such opinions. The political nature of an opinion is not compromised by the objective unimportance of the applicant’s opinions or relevant actions, or by his or her own failure or unwillingness to characterise the opinion as political. An action may also be, or be deemed to be by a persecutor, an expression of a political opinion.

Article 13

Cessation of refugee status

(1) This Article relates to situations where it is acknowledged that refugee status is maintained until and unless a refugee comes within the terms of one of the cessation clauses in Article 1(C) of the Geneva Convention.

(a) Voluntary re-availment of national protection

This paragraph regulates the situation in which a refugee voluntarily seeks and obtains from the authorities of his or her country of origin a form of diplomatic protection...
available only to nationals of that country, such as the issuance or renewal of a national passport, may thereby cease to be in need of such status. Where the contact between a refugee and the diplomatic mission of his or her country of origin is incidental, it is unlikely to evince the requisite intention to secure that State’s protection.

(b) Voluntary re-acquisition of nationality

This paragraph regulates the situation in which a refugee who has lost the nationality of his or her country of origin, voluntarily seeks and receives again the nationality of that State. Such a person thereby ceases to be a refugee. The re-acquisition of nationality de jure alone is insufficient to justify application of this cessation clause; the Handbook provides that the granting of nationality by operation of law or by decree does not amount to voluntary re-acquisition of nationality, unless the nationality has been expressly or implicitly accepted by the refugee.

(c) Acquisition of a new nationality

This paragraph provides that refugee status may be withdrawn when the refugee has acquired a new nationality and enjoys the protection of the country of new nationality. The acquisition of nationality de jure alone is insufficient to justify application of the cessation clause, protection from the country of new nationality must also be ensured. The Handbook provides that where international protection status has come to an end by virtue of the acquisition of a new nationality, and the new nationality is subsequently lost, the status may be revived, depending on the circumstances.

(d) Voluntary re-establishment in country of origin

This paragraph regulates the situation in which a refugee returns to his or her country of origin. If return trips can be considered to be taking place on an ongoing basis, then the person in question would cease to be a refugee. Whether or not this is objectively established should be assessed on a case by case basis. Generally speaking, a consistent pattern of regular return visits to the country of origin over a certain period of time would amount to re-establishment in that country. This is particularly so if the refugee avails himself or herself of the benefits and facilities in the country normally enjoyed by citizens.

(e) Change of circumstances in country of origin

This paragraph regulates situations in which refugee status comes to an end due to a change of circumstances in the country of origin. It requires, in conformity with the Handbook and state practice, that such a change is of such a profound and durable nature that it eliminates the refugee’s well-founded fear of being persecuted. A profound change of circumstances is not the same as an improvement in conditions in the country of origin. The relevant inquiry is whether there has been a fundamental change of substantial political or social significance that has produced a stable power structure different from that under which the original well-founded fear of being persecuted was produced. A complete political change is the most obvious example of a profound change of circumstances, although the holding of democratic elections, the declaration of an amnesty, repeal of oppressive laws, or dismantling of former services may also be evidence of such a transition.
A situation which has changed, but which also continues to show signs of volatility, is by definition not durable. There must be objective and verifiable evidence that human rights are generally respected in that country, and in particular that the factors which gave rise to the refugee’s well-founded fear of being persecuted are durably suppressed or eliminated. Practical developments such as organised repatriation and the experience of returnees, as well as the reports of independent observers should be given considerable weight.

The Member State invoking this cessation clause should ensure that an appropriate status, preserving previously acquired rights, is granted to persons who are unwilling to leave the country for compelling reasons arising out of previous persecution or experiences of serious and unjustified harm, as well as to persons who cannot be expected to leave the Member State due to a long stay resulting in strong family, social and economic links in that country.

(f) Changes of circumstances in country of habitual residence

This paragraph is identical to 1(e) except that it relates to situations where a refugee had no nationality at the time refugee status was granted and the fear of persecution was linked to return to the country of habitual residence rather than nationality.

(2) International refugee law and practice requires that a decision to withdraw refugee status is based on objective and verifiable evidence and that each case is investigated on an individual basis. Moreover, the person in question should have the opportunity to contest the decision. Such standards are already laid down in various provisions in the Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status. This provision, however, is limited to laying down a minimum standard applicable to the process of assessing the case for cessation, namely that the state wishing to withdraw protection bears the burden of proof in establishing that it is justified to do so.

Article 14

Exclusion from refugee status

(1) This Article reiterates the principle that a person who comes within the terms of one of the exclusion clauses in Article 1(D) (E) (F) of the Geneva Convention is excluded from refugee status. Exclusion can also occur where the facts requiring exclusion become known after the recognition of international protection.

This Directive does not apply to an applicant who comes within the following situations:

(a) Assistance or protection of the United Nations

This paragraph refers to Exclusion clause Article 1(D) of the Geneva Convention, which applies to any person who is in receipt of protection or assistance from organs or agencies of the United Nations, other than the United Nations High Commissioner for Refugees. The exclusion clause was drawn up within the particular context of Palestine refugees receiving protection from the United Nations Reliefs and Works Agency for Palestine Refugees in the Near East (UNRWA). For purposes of this exclusion clause, the protection or assistance available from the United Nations agency must have the
effect of eliminating or durably suppressing the individual’s well-founded fear of being persecuted.

An individual is excluded from refugee status on grounds of United Nations protection or assistance only if he or she has received such protection or assistance before seeking asylum, and has not at any time ceased to receive such protection or assistance. Exclusion under this clause shall not occur if an individual is prevented by circumstances beyond his or her control from returning to the place in which he or she is in principle entitled to benefit from United Nations protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive.

(b) Rights in country of residence

This paragraph relates to situations covered by Article 1 (E) of the Geneva Convention. It prescribes the situation in which refugee status may be denied when an applicant for asylum is recognised by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country. Mere transient or purely temporary presence in such a state is not a basis for exclusion. An applicant shall be excluded only if there is guaranteed full protection against deportation or expulsion.

(c) Applicants not deserving international protection

This paragraph obliges the Member States, in order to maintain the integrity and credibility of the Geneva Convention, not to grant refugee status to an applicant in the situations covered by Article 1 (F) of the Geneva Convention.

(i) The crimes referred to in this subparagraph shall be interpreted as those defined in international instruments to which the Member States have acceded, and in resolutions adopted by the United Nations or other international or regional organisations to the extent that they have been accepted by the Member States.

(ii) In applying this particular subparagraph, the severity of the expected persecution should be weighted against the nature of the criminal offence of which the person concerned is suspected. Particularly cruel actions, even if committed with an allegedly political objective, may be classified by Member States as serious non-political crimes.

(iii) This subparagraph reflects the fact that the fundamental principles laid down in the Charter of the United Nations should govern the relations of its members with each other and in relation to the international community as a whole. When such principles have been violated by an applicant for asylum he or she may be excluded from refugee status.

(2) The grounds for exclusion should be based solely on the personal and knowing conduct of the person concerned.

(3) The person concerned is entitled to lodge a legal challenge in the Member State concerned. The relevant procedural standards can be found in the Proposal for a
Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status

(4) This paragraph states that the obligation not to grant refugee status to those undeserving of it, is without prejudice to Member States’ obligations under international law, in particular under the European Convention on Human Rights.

CHAPTER IV

Qualification for subsidiary protection status

This Chapter further defines the international protection category of “subsidiary protection”, which has been developed to complement the category of “refugee” interpreted in Chapter III. No specific EU acquis directly related to subsidiary or complementary protection exists but the ECHR and the case law of the European Court on Human Rights provides for a legally binding framework, which informed the choice of categories of beneficiary in this Proposal. The categories and definitions of persons listed in this Chapter do not create completely new classes of persons that Member States are obliged to protect but represent a clarification and codification of existing practice. The three categories listed below in paragraph 2 of this Article are drawn very much from the disparate Member State practices and are believed to encompass the best ones.

Article 15

The grounds of subsidiary protection

After establishing, according to the rules set out in Article 5(2) that an applicant potentially falls within the scope of this Chapter, Member States have three separate but potentially overlapping grounds to consider when establishing whether an applicant falls to be granted subsidiary protection status.

(a) This subparagraph relates to torture, inhuman or degrading treatment or punishment, reflecting the content of Article 3 of the ECHR. In establishing whether an applicant qualifies according to this criteria Member States should not apply a greater threshold of severity than is required by the ECHR but in all cases an application must be well-founded, as outlined in Chapter II.

(b) This subparagraph relates to the well-founded fear of a violation of other human rights. When considering granting subsidiary protection status on the basis of this ground Member States shall have full regard to their obligations under human rights instruments, such as the ECHR, but shall limit its applicability only to cases where the need for international protection is required. In particular they should consider whether the return of an applicant to his or her country of origin or habitual origin would result in serious unjustified harm on the basis of a violation of a human right and whether they have an extraterritorial obligation to protect in this context.

(c) This subparagraph relates to situations where an individual is displaced from his or her country of origin and is unable to return there. The definition of this subparagraph is without prejudice to Article 11(2) (c) and is drawn from Article 2(c) of the Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons. In the case of subsidiary protection though, an applicant must still establish a well-founded fear for his or her life on an individual basis. Although the reasons for the fear may not be specific to an individual he or she must
still establish that the fear is well founded in their particular case. Member States are bound to cover persons falling into this category where they arrive in a Council agreed ‘mass influx’ so it is consistent and appropriate to include them also when they arrive individually, and do not qualify as a refugee.

**Article 16**

**Cessation of subsidiary protection status**

(1) This paragraph is about the principle that subsidiary protection status is maintained until such time as it is established by the competent authorities that such protection is no longer required because the reason for granting such status has ceased to exist.

(2) This paragraph reiterates the principle that subsidiary protection may be withdrawn if the change of circumstances in the country of origin or of habitual residence is of such a profound and durable nature that it eliminates the need for subsidiary protection. A profound change of circumstances is not the same as an improvement in conditions in the country of origin. The relevant inquiry is whether there has been a fundamental change of substantial political or social significance that has produced a stable power structure different from that under which the original well-founded fear of being persecuted was produced. A complete political change is the most obvious example of a profound change of circumstances, although the holding of democratic elections, the declaration of an amnesty, repeal of oppressive laws, or dismantling of former services may also be evidence of such a transition.

A situation which has changed, but which also continues to show signs of volatility, is by definition not durable. There must be objective and verifiable evidence that human rights are generally respected in that country, and in particular that the factors which gave rise to the subsidiary protection beneficiary’s well-founded fear of suffering unjustified harm are durably suppressed or eliminated. Practical developments such as organised repatriation and the experience of returnees, as well as the reports of independent observers should be given considerable weight.

**Article 17**

**Exclusion from subsidiary protection status**

(1) This Article obliges Member States not to grant subsidiary protection to an applicant in the specific situations described in this. Exclusion can also occur where the facts requiring exclusion become known after the recognition of international protection.

This Directive does not apply to an applicant who comes within the following situations:

(a) The crimes referred to in this subparagraph shall be interpreted as those defined in international instruments to which the Member States have acceded, and in resolutions adopted by the United Nations or other international or regional organisations to the extent that they have been accepted by the Member States.

(b) In applying this particular subparagraph, the severity of the expected persecution should be weighted against the nature of the criminal offence of which the person concerned is suspected. Particularly cruel actions, even if committed with an
allegedly political objective, may be classified by Member States as serious non-political crimes.

(c) This subparagraph reflects the fact that the fundamental principles laid down in the Charter of the United Nations should govern the relations of its members with each other and in relation to the international community as a whole. When such principles have been violated by an applicant for international protection he or she may be excluded from subsidiary protection status.

(2) The grounds for exclusion should be based solely on the personal and knowing conduct of the person concerned.

(3) The person concerned is entitled to lodge a legal challenge in the Member State concerned. The relevant procedural standards can be found in the Proposal for a Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status.

(4) This paragraph states that the obligation not to grant subsidiary protection to those undeserving of it, is without prejudice to Member States’ obligations under international law, in particular under the European Convention on Human Rights.

CHAPTER V

Refugee status and subsidiary protection status

Article 18

Content of international protection

(1) This paragraph is aimed to clarify that the content of refugee status as laid down in this Proposal for a Directive cannot be interpreted as limiting in any sense the rights set out in Articles 3-34 of the Geneva Convention.

(2) This paragraph introduces three rules: the first one is aimed to make clear that the rules laid down in this Chapter apply to both categories of persons in need of international protection defined in Article 2, unless otherwise indicated; the second one is meant to ensure that the transition from being an applicant for international protection to being a refugee or beneficiary of subsidiary protection shall in principle never result in a decrease in the level of protection; finally, the third rule laid down in this paragraph, requires that the level of rights granted to refugees and to the beneficiaries of subsidiary protection is enjoyed equally by their accompanying family members.

(3) This paragraph introduces a general clause, concerning the interpretation of the rules of Chapter V that have to be specifically adapted when they are applicable to persons with special needs. Without being exhaustive (any other category of persons with special needs should be taken into account) this paragraph lists the groups that in the practices of Member States and in the relevant studies have been regarded as having special needs in relation to psychological and health care. It was felt necessary to specify for single women that they usually have “special needs” only if they come from countries where they are subject to substantial gender-related discrimination. Other gender specific health and hygiene needs, such as shaving things and condoms for men, or sanitary towels and contraceptives for women, are no special needs.
Article 19

Protection from refoulement and expulsion

In accordance with Articles 32 and 33 of the Geneva Convention, this Article confirms the Member States’ obligation not to expel refugees and to respect, in relation to them, the principle of non-refoulement. It confirms, in accordance with The European Convention on Human rights, the same obligation in relation to the victims of torture or inhuman or degrading treatment or punishment. Finally, it requires Member States to not expel the beneficiaries of the other forms of subsidiary protection and to respect, in relation to them, the principle of non-refoulement within the same limits laid down in Articles 32 and 33 of the Geneva Convention.

Article 20

Information

This Article provides for persons enjoying international protection to receive the necessary information on the rules governing such protection. This is also in line with the relevant provisions in the other asylum-related (Proposal for) Directives.

Article 21

Residence permits

1. The five-year period proposed in this paragraph reflects a balance between the different practices of Member States. The permit is subject to the criteria set out in the cessation and exclusion clauses of this Directive.

2. This paragraph addresses the issue of the duration of residence permits that are granted to the beneficiaries of subsidiary protection status. This status is considered, in the majority of Member States, as a temporary one. Accordingly, the beneficiaries of subsidiary protection should be provided with a residence permit valid for an initial period of one year. This permit should be automatically renewed at intervals of not less than one year, unless the granting authorities establish that the subsidiary protection is no longer required.

Article 22

Long-term residence status

This Article obliges Member States to apply, notwithstanding its Article 3(2)(b), the Directive concerning third country nationals who are long-term residents and make that Directive applicable to the beneficiaries of subsidiary protection status under the focus of this Proposal for a Directive. According to the Commentary to Article 3(2)(b) of the Proposal for a Directive concerning third country nationals who are long-term residents “Persons covered by a form of subsidiary or additional protection are excluded. The fact that the concept of subsidiary protection is not harmonised at Community level precludes coverage of this category of persons in this Proposal. But the Commission believes that such persons, who are legal residents, must have access to long-term resident status if they meet the criteria. The Conclusions of the Tampere European Council of 15 and 16 October 1999 state that “[refugee status] should also be completed with measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection”. The Commission is
planning in 2001 to present a Proposal concerning subsidiary protection that could extend to access to long-term status for this category of third-country nationals”. Accordingly, as the concept of subsidiary protection is to a great extent harmonised by this Proposal for a Directive it is reasonable and coherent to make it a requirement for Member States to extend the application of the Directive concerning third country nationals who are long-term residents to the beneficiaries of subsidiary protection status falling under the scope of this Proposal for a Directive. Beneficiaries of subsidiary protection are to be treated in the same way as refugees for the purposes of long-term residency because their needs and circumstances are much the same and having spent the qualifying period of five years in a Member State they will have demonstrated that their need for international protection is no longer temporary.

Article 23

Travel document

(1) This paragraph confirms the obligation laid down in Article 28 of the Geneva Convention requiring Member States to issue to persons that they recognise as refugees, “travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require”, in the form of the Schedule to the Geneva Convention.

(2) Beneficiaries of subsidiary protection may be in a position to apply for and to receive a travel document from the consular authorities of their country of origin or ordinary residence (e.g. when these authorities are able to continue their work even if in the country they represent there is a situation of widespread generalised and indiscriminate violence arising from armed conflict). This paragraph is meant to ensure that travel documents are issued to beneficiaries of subsidiary protection status, only when they are unable to obtain a national passport from their consular authorities (e.g. there are no longer functioning consular authorities).

Article 24

Access to employment

(1) The Member States shall authorise refugees to engage in employed or self-employed activities under the same conditions as nationals. This principle of equal treatment also applies to remuneration, social security related to employed or self-employed activities, and other conditions of employment. Access to employment encourages independence and enables those concerned to provide for themselves and no longer require assistance.

(2) This paragraph codifies a practice in the majority of Member States to offer activities such as employment-related education opportunities for adults, vocational training and practical workplace experiences to refugees with a view to facilitating their integration.

(3) As a minimum standard the Commission proposes that Member States be required to put in place rules that do not exclude the access of beneficiaries of subsidiary protection status and their accompanying family members to employed or self-employed activities six months after they have been granted the subsidiary protection status. Access to employment encourages independence and enables those concerned to provide for themselves and no longer require assistance. It could also prove useful in reintegrating
beneficiaries enjoying subsidiary protection status on their possible return to their country of origin.

(4) As a minimum standard the Commission proposes that Member States be required to put in place rules that do not exclude the access of beneficiaries of subsidiary protection status and their accompanying family members to employment-related education opportunities for adults, vocational training and practical workplace experiences one year after they have been granted the subsidiary protection status.

(5) This paragraph obliges Member States to ensure that, after access to the labour market is granted in accordance with paragraphs 1, 2, 3 and 4, ordinary law in the Member State applicable to remuneration, to the access to social security systems relating to employed or self employment activities, and other conditions of employment shall apply in the same way as they do to nationals.

\textit{Article 25}

\textbf{Access to education}

(1) This paragraph concerns the schooling and education of minors enjoying international protection. Reference is made to the concept of “minors” without specific reference to “school age”, as this age varies from one Member State to another, and the United Nations Convention on the Rights of the Child does not make the schooling of minors conditional on their age. As the principle of equal treatment applies minors enjoying international protection should be given free access to the public education system. This provision lays down one of the rules that illustrate the special attention to minors that characterise the Proposal as whole.

(2) This paragraph obliges Member States to allow adults enjoying international protection access to the general education system, as well as to vocational training, further training or retraining, under the same conditions as EU nationals. Adults enjoying international protection may have been forced to abandon their studies or vocational training when they fled their country of origin. They should therefore be allowed access to the general education system and to vocational training, further training, or retraining during the period of temporary protection. In addition, the knowledge they acquire in this way could be useful in reintegrating them on their possible return to their country of origin.

(3) Persons enjoying international protection must have the same right to recognition of their qualifications as nationals. This encompasses also the obligation of the Member State to take into consideration all the diplomas, certificates and other evidence of formal qualifications – i.e. including those acquired outside the EU – of the person concerned and his relevant experience, by comparing the specialised knowledge and abilities certified by those diplomas and that experience with the knowledge and qualifications required by the national rules (Case C-238/98 \textit{Hocsman}).

\textit{Article 26}

\textbf{Social Welfare}

As with anyone covered by a form of protection and lacking the necessary resources, Member States should make available to those enjoying international protection the social welfare support and means of subsistence necessary for a normal and dignified life for the duration of this protection. The Member States may choose the form this assistance and
means of subsistence will take, to ensure that they are consistent with the social welfare arrangements of the individual Member States.

Article 27

Health and psychological care

(1) In this paragraph Member States are required to provide beneficiaries of international protection access to health and psychological care under the same conditions as nationals of the Member State that has granted the status.

(2) This Article is about victims of torture and organised violence, and is in line with the relevant provisions of the Directive laying down minimum standards on the reception of applicants for asylum in Member States. This paragraph provides for special medical help to be given by Member States to those who have been the victims of torture, rape or other serious acts of violence. This should include victims of organised violence and of gender related violence, to ensure that people traumatised by exposure to ethnic cleansing are covered by the provision.

(3) Minors are often the victims of many specific forms of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or suffer from armed conflicts. Member States are required to provide minors that have been victimised with rehabilitation services, appropriate mental health care and qualified psycho-social counselling, when it is necessary.

Article 28

Unaccompanied minors

This Article concerns the specific needs of unaccompanied minors.

(1) Member States are required to provide as soon as possible for the necessary representation of the unaccompanied minor applying for international protection to ensure that the minor’s needs are duly met in the enforcement of the provisions of this Directive.

(2) In view of the minor's vulnerability and potential for abuse, the principle of regular assessments by the appropriate welfare authorities of the actual situation of the minor is provided for in this paragraph.

(3) This paragraph contains rules to be understood as an explicit enforcement of the principle of safeguarding the best interests of the child in relation to reception conditions. Member States are required to provide unaccompanied minors who lodge an application for international protection with one of the listed forms of housing from the moment they are admitted to the territory to the moment they have to leave the country in which the application was lodged or in which the application is being examined.

(4) This paragraph provides for siblings to be kept together (this rule may be disregarded only in exceptional circumstances such as the sudden mass influx of applicants for international protection, for a brief period of time) and changes of their residence should be kept to a minimum.
(5) This paragraph concerns efforts to trace relatives, and the principle of confidentiality applicable to such efforts, as far as they are in the best interest of the child.

(6) To properly meet the needs of unaccompanied minors during asylum procedures, Member States must ensure that staff working with unaccompanied minors receive appropriate training on their needs.

Article 29

Access to appropriate accommodation

This Article is concerned with the issue of accommodation. The minimum standards laid down in this paragraph enable the Member States to provide accommodation or housing for persons enjoying international protection as part of their national reception scheme. These provisions may in some cases allow for temporary accommodation centres. They may also take the form of collective structures or separate flats. Suitable accommodation means that for single refugees gender segregated accommodation and sanitary installations should be provided. Alternatively Member States may provide persons enjoying international protection the means to obtain housing if they do not have sufficient resources.

Article 30

Freedom of movement within the Member State

This Article forbids the Member State that has granted international protection status to limit the freedom of movement to persons who have been granted such a protection status within its territory.

Article 31

Access to integration facilities

(1) This paragraph codifies a practice existing in most of the Member States. The Commission welcomes the attention already given by Member States to the many related situations (education, social welfare, health care, housing and other integration facilities) which play a vital role in supporting successful integration of refugees into the society and in particular into the labour market. Indeed the Commission believes that it is necessary to provide specific support for disadvantaged groups, including many refugees, rather than only allowing them equal access into mainstream employment and education opportunities. In this respect, the Commission recalls Guideline 7 of the Employment Guidelines for 2001 (Council Decision 2001/63/EC of 19 January 2001 on Guidelines for Member States' employment policies for the year 2001), and which reads as follows:

"7. Each Member State will:

- identify and combat all forms of discrimination in access to the labour market and to education and training;

- develop pathways consisting of effective preventive and active policy measures to promote the integration into the labour market of groups and individuals at risk or with a disadvantage, in order to avoid marginalisation, the emergence of ‘working poor’ and a drift into exclusion;"
implement appropriate measures to meet the needs of the disabled, ethnic minorities and migrant workers as regards their integration into the labour market and set national targets where appropriate for this purpose."

Programmes designed to facilitate the integration of refugees into the society of the Member State could for instance include:

(a) a “tailor made plan of action” regarding employment and education;
(b) language courses;
(c) basic and advanced training courses;
(d) measures aimed at promoting self-maintenance;
(e) events organised to provide an introduction to the history and culture of the Member State;
(f) events arranged jointly with citizens of the Member State to promote mutual understanding.

The above programmes are potentially eligible for financing under the European Refugee Fund.

(2) This paragraph provides for beneficiaries of subsidiary protection status access to programmes referred and elaborated upon in paragraph (1), not later than one year after their status is granted.

Article 32

Voluntary return

This Article grants persons recognised as being in need of international protection access to voluntary return programmes for those who wish to return on a voluntary basis to their country of origin. Member States are encouraged to facilitate such returns. Candidates for voluntary return must be fully informed of the conditions in which they will return. The Member States may use exploratory visits as a way of helping candidates. Exploratory visits enable some candidates to visit their country of origin for a short time to see for themselves the security situation and the circumstances of reintegration, before voluntary return is fully completed. The above programmes are potentially eligible for financing under the European Refugee Fund.

CHAPTER VI

Administrative cooperation

Article 33

Cooperation

This Article concerns Cooperation among Member States, and between them and the Commission.
Member States are required to appoint a national contact point and take the appropriate measures to establish direct cooperation, including the exchange of visits, and an exchange of information between the competent authorities.

Article 34

Staff and resources

This Article is about staff and material resources.

(1) This paragraph is based on the consideration that applicants for asylum are a group of people with a specific background and needs. It must be ensured that authorities and other organisations implementing this Directive have received the necessary basic training with respect to their needs.

(2) This paragraph requires Member States to allocate the necessary resources in connection with the national provisions enacted to implement this Directive to ensure that these provisions can be enforced.

CHAPTER VII

Final provisions

Article 35

Non-discrimination

Within the target group specified in the Directive introducing international protection, there may be persons of different race, ethnic origin, nationality, religion and beliefs. This paragraph emphasises that the granting of international protection must be free of all discrimination based on these factors and other factors such as sex, age, sexual orientation or handicap and that the Member States must ensure that this principle is respected.

The wording is based on Article 3 of the Geneva Convention, Article 13 of the EC Treaty and Article 21 of the Charter of Fundamental Rights of the European Union. This provision is without prejudice of obligations descending from international instruments such as the European Convention on Human Rights and Fundamental Freedoms (Article 14).

Article 36

Reports

This Article is about reports. The Commission is instructed to draw up a report on the Member States’ application of the Directive, in accordance with its role of enforcing provisions adopted by the institutions under the Treaty. It is also given the task of proposing possible amendments to the Directive.

A first report must be submitted no later than two years after the deadline for transposition of the Directive in the Member States. The Member States should send the Commission all the information that is appropriate for drawing up this report.

After presenting the report the Commission must draw up a report on the application of the Directive at least every five years.
Article 37

Transposition

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 April 2004 at the latest. They shall forthwith inform the Commission thereof.

When the Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such a reference is to be made.

2. Member States shall communicate to the Commission the text of the provisions of national law relating to the enforcement of this Directive.

Article 38

This Article lays down the date when the Directive enters into force. This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.
Proposal for a

COUNCIL DIRECTIVE

on minimum standards for the qualification and status of third country nationals and
stateless persons as refugees or as persons who otherwise need international protection

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular
point 1(c), 2(a) and 3(a) of the first paragraph of Article 63 thereof,

Having regard to the Proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Having regard to the opinion of the Economic and Social Committee³,

Having regard to the opinion of the Committee of the Regions⁴,

Whereas:

(1) A common policy on asylum, including a Common European Asylum System, is a
constituent part of the European Union’s objective of progressively establishing an
area of freedom, security and justice open to those who, forced by circumstances,
legitimately seek protection in the Community.

(2) The European Council at its special meeting in Tampere on 15 and 16 October 1999
agreed to work towards establishing a Common European Asylum System, based on
the full and inclusive application of the Geneva Convention relating to the Status
of Refugees of 28 July 1951, as supplemented by the New York Protocol of
31 January 1967, thus maintaining the principle of non-refoulement and ensuring that
nobody is sent back to persecution.

(3) The Geneva Convention and Protocol provide the cornerstone of the international
legal regime for the protection of refugees.

(4) The Tampere Conclusions provide that a Common European Asylum System should
include in the short term the approximation of rules on the recognition and content of
refugee status.

¹ OJ C
² OJ C
³ OJ C
⁴ OJ C
The Tampere Conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection.

The main aim of this Directive is to ensure that a minimum level of protection is available in all Member States for those genuinely in need of it because they cannot reasonably rely on their country of origin or habitual residence for protection.

This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity, the right to asylum of applicants for asylum and their accompanying family members, and the protection in the event of removal, expulsion or extradition, promoting the application of Articles 1, 18 and 19 of the Charter.

This Directive should be implemented without prejudice to Member States’ existing international obligations under human rights instruments.

This Directive is without prejudice to the Protocol on asylum for nationals of Member States of the European Union as annexed to the Treaty Establishing the European Community.

The recognition of refugee status is a declaratory act.


Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.

It is necessary to introduce common concepts of the criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.

In particular, it is necessary to introduce common concepts of: protection needs arising sur place; sources of harm and protection; internal protection; and persecution, including the reasons for persecution.

In particular, it is necessary when assessing applications from minors for international protection that Member States should have regard to child-specific forms of persecution, such as the recruitment of children into armies, trafficking for sex work, and forced labour.
(17) Minimum standards for the definition and content of subsidiary protection status should also be laid down. The subsidiary protection regime should be complementary and additional to the refugee protection regime enshrined in the Geneva Convention.

(18) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection status. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.

(19) The approximation of rules on the recognition and content of refugee status and subsidiary protection should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks.

(20) The Directive should not affect the conditions under which Member States may, in accordance with their own domestic law, permit persons to enter or remain in their territory where the return of those persons to their own country would endanger their safety owing to circumstances not covered by this Directive.

(21) It is in the very nature of minimum standards that Member States have the power to introduce or maintain more favourable provisions for third country nationals and stateless persons who ask for international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person who otherwise needs international protection.

(22) In accordance with Article 2 and Article 3(2) of the Treaty, this Directive, as regards its objectives and content, aims to eliminate inequalities, and to promote equality, between men and women.

(23) The “best interests of the child” should be a primary consideration of Member States when implementing this Directive

(24) The implementation of this Directive should be evaluated at regular intervals.

(25) Since the objectives of the proposed action, namely to establish minimum standards for the granting of international protection to third country nationals and stateless persons by Member States cannot be sufficiently attained by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives,
CHAPTER I

General provisions

Article 1

Subject matter

The purpose of this Directive is to lay down minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection.

Article 2

Definitions

For the purposes of this Directive:

(a) “International protection” means refugee status and subsidiary protection status.

(b) “Geneva Convention” means the Convention relating to the status of refugees done at Geneva on 28th July 1951, as supplemented by the New York Protocol of 31 January 1967;

(c) “Refugee” means a third country national or a stateless person who fulfils the requirements laid down by Article 1(A) of the Geneva Convention and set out in Chapters II-III of this Directive;

(d) “Refugee status” means the status granted by a Member State to a person who is a refugee and is admitted as such to the territory of that Member State and/or permitted to remain and reside there;

(e) "Person eligible for subsidiary protection” is a person who does not qualify for refugee status but otherwise satisfies the rules regarding international protection set out in Chapters II and IV of this Directive.

(f) “Subsidiary protection status” means the status granted by a Member State to a third country national or a stateless person who is a person eligible for subsidiary protection and is admitted as such to the territory of that Member State and/or permitted to remain and reside there;

(g) “Application for international protection” means a request by a third country national or a stateless person for protection from a Member State, which can be understood to be on the grounds that the applicant is either a refugee or a person eligible for subsidiary protection. Any application for international protection is presumed to be an application for asylum save where the applicant explicitly requests another kind of protection that can be applied for separately;

(h) “Application for asylum” means a request by a third country national or a stateless person for international protection from a Member State, which can be understood to be on the grounds that the applicant is a refugee within the meaning of Article 1(A) of the Geneva Convention.
“Application for subsidiary protection” means a request by a third country national or a stateless person for international protection from a Member State which cannot be understood to be on the grounds that the applicant is a refugee within the meaning of Article 1(A) of the Geneva Convention, or follows rejection of such a request, but can be understood to be on the grounds that the applicant is a person eligible for subsidiary protection;

“Family members” means:

(i) the spouse of the applicant or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples;

(ii) the children of the couple referred to in point (i) or of the applicant alone, on condition that they are unmarried and dependent and without distinction as to whether they were born in or out of wedlock or adopted;

(iii) other close relatives who lived together as part of the family unit at the time of leaving the country of origin, and who were wholly or mainly dependent on the applicant at that time

“Accompanying family members” means the family members of the applicant who are present in the same Member State in relation to the application for asylum;

"Unaccompanied minors" means third-country nationals and stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States;

"Residence permit" means any permit or authorisation issued by the authorities of a Member State, in the form provided for under that State's legislation, allowing a third country national or stateless person to reside on its territory;

“Country of origin” means the country of nationality or former habitual residence.

Article 3
Scope

This Directive shall apply to all third country nationals and stateless persons who make an application for international protection at the border or on the territory of a Member State and to their accompanying family members and to all those who receive such protection.

Article 4
More favourable provisions

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person in need of subsidiary protection, and in determining the content of international protection, in so far as those standards are compatible with this Directive.
CHAPTER II

Qualification for international protection

Section I

International protection

Article 5

The elements of international protection

1. Refugee status shall be granted to any third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, and to any stateless person, who, being outside the country of former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

2. Without prejudice to existing constitutional obligations, subsidiary protection shall be granted to any third country national or stateless person who does not qualify as a refugee, according to the criteria set out in Chapter III of this Directive, or whose application for international protection was explicitly made on grounds that did not include the Geneva Convention, and who, owing to a well-founded fear of suffering serious and unjustified harm as described in Article 15, has been forced to flee or to remain outside his or her country of origin and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

3. The applicant’s fear of being persecuted or exposed to other serious and unjustified harm in the country of origin shall be assessed in accordance with Section 2.

Article 6

Extension of international protection to the accompanying family members

1. Member States shall ensure that accompanying family members are entitled to the same status as the applicant for international protection.

2. The rule laid down in paragraph 1 is not applicable where the accompanying family Member is excluded from refugee and subsidiary protection status pursuant to Chapters III and IV.
Section 2

Assessment of the applicant’s fear of being persecuted or exposed to other serious and unjustified harm

Article 7

Assessment of applications for international protection

In assessing an applicant’s fear of being persecuted or exposed to other serious and unjustified harm, Member States shall take into account, as a minimum, the following matters:

(a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application;

(b) whether the applicant’s fear of being persecuted or exposed to other serious and unjustified harm in the country of origin is objectively established, in that there is a reasonable possibility that the applicant will be persecuted or otherwise subjected to serious harm if returned to the country of origin;

(c) whether the applicant has already been subject to persecution or other serious and unjustified harm or to direct threats of persecution or other serious and unjustified harm, in that this would strongly indicate a reasonable possibility that the applicant might suffer further persecution or harm in the future;

(d) the individual position and personal circumstances of the applicant, including factors such as background, gender, age, health and disabilities so as to assess the seriousness of persecution or harm. Where the form of persecution is gender-specific or child-specific, account shall be taken of the fact that persecution, within the meaning of the Geneva Convention, may be effected through sexual violence or other gender-specific means;

(e) whether there is credible evidence that laws or regulations are in force and applied in practice in the country of origin which authorise or condone the persecution of the applicant or the infliction upon the applicant of other serious and unjustified harm.

Article 8

International protection needs arising sur place

1. A well-founded fear of being persecuted or otherwise suffering serious unjustified harm may be based on events which have taken place since the applicant left his country of origin.

2. A well-founded fear of being persecuted or otherwise suffering serious unjustified harm may be based on activities which have been engaged in by the applicant since he left his country of origin, save where it is established that such activities were engaged in for the sole purpose of creating the necessary conditions for making an application for international protection. That is not the case where the activities relied upon constitute the expression and continuation of convictions held in the country of origin, and they are related to the grounds for recognition of the need for international protection.
Article 9

Sources of harm and protection

1. Member States shall consider that the fear of being persecuted or of otherwise suffering unjustified harm is well-founded whether the threat of persecution or other serious unjustified harm emanates from:

   (a) the State;
   
   (b) parties or organisations controlling the State;
   
   (c) non-State actors where the State is unable or unwilling to provide effective protection.

2. In evaluating the effectiveness of State protection where the threat of persecution or other serious unjustified harm emanates from non-State actors, Member States shall consider whether the State takes reasonable steps to prevent the persecution or infliction of harm, and whether the applicant has reasonable access to such protection. There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actions which constitute persecution or other serious and unjustified harm. Where effective State protection is available, fear of being persecuted or otherwise suffering serious unjustified harm shall not be considered to be well founded, in which case Member States shall not recognise the need for protection.

3. For the purpose of this Directive, “State” protection may also be provided by international organisations and stable quasi-State authorities who control a clearly defined territory of significant size and stability, and who are able and willing to give effect to rights and to protect an individual from harm in a manner similar to an internationally recognised State.

Article 10

Internal protection

1. Once they have established that the fear of being persecuted or of otherwise suffering serious and unjustified harm is well-founded, Member States may examine whether this fear is clearly confined to a specific part of the territory of the country of origin and, if so, whether the applicant could reasonably be returned to another part of the country where there would be no well-founded fear of being persecuted or otherwise suffering serious and unjustified harm.

   In carrying out this examination there shall be a strong presumption against finding internal protection to be a viable alternative to international protection if the agent of persecution is, or is associated with the national government.

2. In examining whether an applicant can be reasonably returned to another part of the country in accordance with paragraph 1, Member States shall have regard to the security, political and social circumstances prevailing in that part of the country, including respect for human rights, and to the personal circumstances of the applicant, including age, sex, health, family situation and ethnic, cultural and social links.
CHAPTER III

Qualification for refugee status

Article 11

The nature of persecution

1. In the determination of whether a well-founded fear of being persecuted has been objectively established, the term persecution shall be considered to cover as a minimum any of the following situations:

(a) the infliction of serious and unjustified harm or discrimination on the grounds of race, religion, nationality, political opinion or membership of a particular social group, sufficiently serious by its nature or repetition as to constitute a significant risk to the applicant’s life, freedom or security or to preclude the applicant from living in his or her country of origin;

(b) legal, administrative, police and/or judicial measures when they are designed or implemented in a discriminatory manner on the grounds of race, religion, nationality, political opinion or membership of a particular social group and if they constitute a significant risk to the applicant’s life, freedom or security or preclude the applicant from living in his or her country of origin;

(c) prosecution or punishment for a criminal offence if, on the grounds of race, religion, nationality, political opinion or membership of a particular social group:
   (i) the applicant is either denied means of judicial redress or suffers a disproportionate or discriminatory punishment
   (ii) the criminal offence for which the applicant is at risk of being prosecuted or punished, purports to criminalise the exercise of a fundamental right

(d) prosecution or punishment for refusal to meet a general obligation to perform military service on the grounds of race, religion, nationality, political opinion or membership of a particular social group:
   (i) if the conditions stated in paragraph (c) (i) apply.
   (ii) in situations of war or conflict, if the person can establish that performance of military service will require his or her participation in military activities which are irreconcilable with the applicant’s deeply held moral, religious or political convictions, or other valid reasons of conscience.

2. The following principles shall, as a minimum, govern the determination of whether a well-founded fear of being persecuted should result in the recognition of an applicant as a refugee

(a) it is immaterial whether the persecution stems from the State, parties or organisations controlling the State, or non-State actors where the State is unable or unwilling to provide effective protection.
(b) it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecutory action, provided that such a characteristic is attributed to him or her by the agent of persecution;

(c) it is immaterial whether the applicant comes from a country in which many or all persons face the risk of generalised oppression.

Article 12

The reasons for persecution

In determining whether a well founded fear of persecution is based on reasons of race, religion, nationality, political opinion or membership of a particular social group, the following elements shall, as a minimum, be taken in account:

(a) the concept of race shall include considerations of colour, descent, or membership of a particular ethnic group;

(b) the concept of religion shall include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

(c) the concept of nationality shall not be confined to citizenship but shall include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

(d) the concept of social group shall include a group which may be defined in terms of certain fundamental characteristics, such as sexual orientation, age or gender, as well as groups comprised of persons who share a common background or characteristic that is so fundamental to identity or conscience that those persons should not be forced to renounce their membership. The concept shall also include groups of individuals who are treated as “inferior” in the eyes of the law;

(e) the concept of political opinion shall include the holding of, or the being conceived of as holding, an opinion on a matter related to the State or its government or its policy, whether or not that opinion has been acted upon by the applicant.

Article 13

Cessation of refugee status

1. Member States shall maintain refugee status until and unless the refugee:

(a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or

(b) having lost his or her nationality, has voluntarily re-acquired it; or
(c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or

(d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or

(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality;

(f) Being a person with no nationality, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence.

In the cases referred to in points (a) to (f), the residence permit may be revoked.

In considering point (e), Member States shall have regard to whether the change of circumstances is of such a profound and durable nature that the refugee’s fear of persecution can no longer be regarded as well-founded.

2. The Member State which has granted refugee status shall bear the burden of proof in establishing that a person has ceased to be in need of international protection for one of the reasons stipulated in paragraph 1.

Article 14

Exclusion from refugee status

1. Member States shall exclude from refugee status any applicant:

(a) who is at present receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees;

(b) who is recognised by the competent authorities of the country in which he or she has taken up residence as having the rights and obligations attached to the possession of the nationality of that country;

(c) where there are serious reasons for considering that:

   (i) the applicant has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

   (ii) the applicant has committed a serious non-political crime prior to his or her admission as a refugee;

   (iii) the applicant has been guilty of acts contrary to the purposes and principles of the United Nations.

2. The grounds for exclusion shall be based solely on the personal and knowing conduct of the person concerned.
3. Member States shall ensure that persons so excluded have the right to bring proceedings before a court against a decision to exclude them from international protection.

4. The application of the exclusion shall not in any manner affect obligations that Member States have under international law.

CHAPTER IV

Qualification for subsidiary protection status

Article 15

The grounds of subsidiary protection

In accordance with Article 5(2), Member States shall grant subsidiary protection status to an applicant for international protection who is outside his or her country of origin, and cannot return there owing to a well-founded fear of being subjected to the following serious and unjustified harm:

(a) torture or inhuman or degrading treatment or punishment; or

(b) violation of a human right, sufficiently severe to engage the Member State’s international obligations or;

(c) a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights.

Article 16

Cessation of subsidiary protection status

1. Member States shall ensure that subsidiary protection status is maintained until such time as it is established by the competent authorities that such protection is no longer required, in which case the residence permit may be revoked.

2. Subsidiary protection may be withdrawn if the circumstances in the country of origin which led to the granting of such status under Article 15, cease to exist, or if a change in circumstances is of such a profound and durable nature that it eliminates the need for subsidiary protection.

Article 17

Exclusion from subsidiary protection status

1. Member States shall exclude from subsidiary protection status any applicant where there are serious reasons for considering that:

(a) the applicant has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) the applicant has committed a serious non-political crime prior to his or her admission as a refugee;

(c) the applicant has been guilty of acts contrary to the purposes and principles of the United Nations.

2. The grounds for exclusion shall be based solely on the personal and knowing conduct of the person concerned.

3. Member States shall ensure that persons so excluded have the right to bring proceedings before a court against a decision to exclude them from international protection.

4. The application of the exclusion shall not in any manner affect obligations that Member States have under international law.

CHAPTER V

Refugee status and subsidiary protection status

Article 18

Content of international protection

1. The rules laid down in this Chapter shall be without prejudice to the rights laid down in the Geneva Convention.

2. The rules laid down in this Chapter shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated. The level of rights attached to a protection status shall not be lower than that enjoyed by applicants during the determination process and shall be enjoyed equally by the accompanying family members of the qualified beneficiary.

3. When implementing the provisions of this Chapter, Member States shall take into account the specific situation of persons who have special needs such as: minors in general, unaccompanied minors, disabled people, elderly people, single parents with minor children, victims of torture or sexual abuse or exploitation, pregnant women and persons suffering from infirmity, whether mental or physical. Member States shall also take into account the specific situation of single women who, are subject to substantial gender-related discrimination in their country of origin.

Article 19

Protection from refoulement and expulsion

Member States shall respect the principle of non-refoulement and shall not expel persons enjoying international protection, otherwise than in accordance with their international obligations.
Article 20

Information

Member States shall provide persons recognised as being in need of international protection, immediately after status has been granted, with information, in a language likely to be understood by them, in which provisions relating to the respective protection regimes are clearly set out.

Article 21

Residence permits

1. As soon as their status has been granted Member States shall issue to refugees and their accompanying family members a residence permit which must be valid for at least five years and renewable automatically.

2. As soon as the status has been granted Member States shall issue to persons enjoying subsidiary protection status and their accompanying family members a residence permit which must be valid for at least one year. This residence permit shall be automatically renewed at intervals of not less than one year, until such time as the granting authorities establish that such protection is no longer required.

Article 22

Long-term residence status

Notwithstanding Article 3(2)(b) of Council Directive…/…EC. [concerning the status of third country nationals who are long term residents] Member States shall grant persons enjoying subsidiary protection status long term-residence status on the same terms as those applicable to refugees under that Directive.

Article 23

Travel document

1. Member States shall issue to persons to whom they have granted refugee status travel documents in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.

2. Member States shall issue travel documents to persons enjoying subsidiary protection status who are unable to obtain a national passport.

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Article 24

Access to employment

1. Member States shall authorise refugees to engage in employed or self-employed activities under the same conditions as nationals, immediately after the refugee status has been granted.

2. Member States shall ensure that activities such as employment-related education opportunities for adults, vocational training and practical workplace experience are offered to refugees, under the same conditions as nationals.

3. Member States shall authorise persons enjoying subsidiary protection status to engage in employed or self-employed activities under the same conditions as nationals no later than six months after such status is granted.

4. Member States shall ensure that persons enjoying subsidiary protection status have access to activities such as employment-related education opportunities for adults, vocational training and practical workplace experience, under the same conditions as nationals no later than one year after such status is granted.

5. After access to the labour market is granted in accordance with paragraphs 1 and 3, refugees and persons enjoying subsidiary protection status are entitled to equal treatment with nationals in terms of remuneration, access to social security systems relating to employed or self-employed activities, and other conditions of employment.

Article 25

Access to education

1. Member States shall grant full access to the education system to all those minors enjoying international protection under the same conditions as nationals.

2. Member States shall allow adults enjoying international protection access to the general education system, further training or retraining, under the same conditions as nationals.

3. Member States shall ensure equal treatment as between persons enjoying international protection and nationals with regard to the recognition of diplomas, certificates and other qualifications issued by a competent authority.

Article 26

Social Welfare

Member States shall ensure that persons enjoying international protection receive, under the same conditions as nationals of the Member State that has granted the protection, the necessary assistance in terms of social welfare and means of subsistence.
Article 27

Health and psychological care

1. Member States shall ensure that persons enjoying international protection have access to health and psychological care under the same conditions as nationals of the Member State that has granted the status.

2. Member States shall provide appropriate medical and psychological care to persons enjoying international protection who have special needs, such as accompanied or unaccompanied minors, or persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence.

3. Member States shall ensure access to rehabilitation services to minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict. To facilitate recovery and reintegration, appropriate mental health care shall be developed and qualified psycho-social counselling shall be provided when it is needed.

Article 28

Unaccompanied minors

1. Member States shall take the necessary measures as soon as possible, to ensure the representation of unaccompanied minors enjoying international protection by legal guardianship, or representation by an organisation which is responsible for the care and well-being of minors, or by any other appropriate representation.

2. Member States shall ensure that the minor’s needs are duly met in the implementation of the provisions of this Directive by the appointed guardian. The appropriate authorities shall make regular assessments.

3. Member States shall ensure that unaccompanied minors are placed:
   (a) with adult family members; or
   (b) with a foster family; or
   (c) in centres specialised in accommodation for minors; or
   (d) in other accommodation suitable for minors.

4. Member States shall ensure that siblings are kept together. Changes of unaccompanied minors’ residence shall be limited to a minimum.

5. If it is in the best interests of the child, Member States shall endeavour to trace the members of the family of unaccompanied minors as soon as possible.

6. Member States shall ensure that those working with unaccompanied minors receive appropriate training on their needs.
Article 29

Access to appropriate accommodation

The Member States shall ensure that persons enjoying international protection have access to suitable accommodation or, if necessary, receive the means to obtain housing.

Article 30

Freedom of movement within the Member State

Member States shall not limit the freedom of movement within their territory of persons enjoying international protection.

Article 31

Access to integration facilities

1. In order to facilitate the integration of refugees into society, Member States shall make provision for specific support programmes tailored to their needs in the fields of, inter alia, employment, education, healthcare and social welfare;

2. Member States shall grant persons enjoying subsidiary protection access to equivalent programmes, not later than one year after their status is granted.

Article 32

Voluntary return

Member States shall grant persons enjoying international protection access to voluntary return programmes for those who wish to return on a voluntary basis to their country of origin.

CHAPTER VI

Administrative cooperation

Article 33

Cooperation

Member States shall each appoint a national contact point, whose address they shall communicate to the Commission, which shall communicate it to the other Member States.

Member States shall, in liaison with the Commission, take all appropriate measures to establish direct Cooperation and an exchange of information between the competent authorities.

Article 34

Staff and resources

1. Member States shall ensure that authorities and other organisations implementing this Directive have received the necessary basic training with respect to the needs of both male and female applicants and their accompanying family members, as well as the specific needs of minors, in particular unaccompanied minors.
2. Member States shall allocate the necessary resources in connection with the national provisions enacted to implement this Directive.

CHAPTER VII

Final provisions

Article 35

Non-discrimination

Member States shall implement the provisions of this Directive without discrimination on the basis of sex, race, nationality, membership of a particular social group, health, colour, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership of a national minority, fortune, birth, disabilities, age or sexual orientation.

Article 36

Reports

By 30 April 2006 at the latest, the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States and shall propose any amendments that are necessary. Member States shall send the Commission all the information that is appropriate for drawing up that report. After presenting the report the Commission shall report to the European Parliament and the Council on the application of this Directive in the Member States at least every five years.

Article 37

Transposition

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 April 2004 at the latest. They shall forthwith inform the Commission thereof.

When the Member States adopt those provisions, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such a reference is to be made.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 38

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Communities.
Article 39

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the Council
The President
LEGISLATIVE FINANCIAL STATEMENT

Policy area(s): JUSTICE AND HOME AFFAIRS
Activity(ies): Asylum and Immigration

**TITLE OF ACTION:** PROPOSAL FOR A COUNCIL DIRECTIVE ON MINIMUM STANDARDS FOR THE QUALIFICATION AND STATUS OF THIRD COUNTRY NATIONALS AND STATELESS PERSONS AS REFUGEES OR AS PERSONS WHO OTHERWISE NEED INTERNATIONAL PROTECTION

1. **BUDGET LINE(S) + HEADING(S)**
   
   A0 7030 (meetings)

2. **OVERALL FIGURES**

2.1. Total allocation for action (Part B): EUR million for commitment

2.2. Period of application:
   
   2001(September-2006)

2.3. Overall multi-annual estimate on expenditure:

   (a) Schedule of commitment appropriations/payment appropriations (financial intervention) *(see point 6.1.1)*

<table>
<thead>
<tr>
<th>EUR million (to 3rd decimal place)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Year n</td>
</tr>
<tr>
<td>--------</td>
</tr>
<tr>
<td>Commitments</td>
</tr>
<tr>
<td>Payments</td>
</tr>
</tbody>
</table>

   (b) Technical and administrative assistance and support expenditure *(see point 6.1.2)*

   | Commitments |       |       |       |       |                       |       |
   | Payments    |       |       |       |       |                       |       |

   Subtotal (a)+(b)

   | Commitments |       |       |       |       |                       |       |
   | Payments    |       |       |       |       |                       |       |
(c) Overall financial impact of human resources and other administrative expenditure (see points 7.2 and 7.3)

<table>
<thead>
<tr>
<th>Commitments/ payments</th>
<th>0.029</th>
<th>0.029</th>
<th>0.029</th>
<th>0.029</th>
<th>0.029</th>
<th>0.029</th>
<th>0.175</th>
</tr>
</thead>
</table>

TOTAL (a)+(b)+(c)

| Commitments | 0.029 | 0.029 | 0.029 | 0.029 | 0.029 | 0.029 | 0.175 |
| Payments     | 0.029 | 0.029 | 0.029 | 0.029 | 0.029 | 0.029 | 0.175 |

2.4. Compatibility with the financial programming and the financial perspective

X Proposal compatible with the existing financial programming

2.5. Financial impact on revenue:

X No financial implications (involves technical aspects regarding implementation of a measure)

Note: All details and observations pertaining to the method of calculating the effect on revenue should be included in a separate annex.

EUR million (to 1 decimal place)

<table>
<thead>
<tr>
<th>Budget line</th>
<th>Revenue</th>
<th>Prior to action (Year n-1)</th>
<th>Situation following action</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Year n</td>
</tr>
<tr>
<td>(a) Revenue in absolute terms</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(b) Change in Revenue</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(Please state each budget line involved, adding the appropriate number of rows to the table if there is an effect on more than one budget line)

1 For further information see a separate guidance paper.
3. BUDGET CHARACTERISTICS

<table>
<thead>
<tr>
<th>Type of expenditure</th>
<th>New</th>
<th>EFTA participation</th>
<th>Participation applicant countries</th>
<th>Heading Financial Perspective</th>
</tr>
</thead>
<tbody>
<tr>
<td>Comp/ Non-comp</td>
<td>Diff/ Non-diff</td>
<td>YES/ NO</td>
<td>YES/NO</td>
<td>YES/NO</td>
</tr>
</tbody>
</table>

4. LEGAL BASIS

Article 63 of the EC Treaty, point 1(c) of first paragraph, and point 2(a)

5. DESCRIPTION AND GROUNDS

5.1. Need for Community intervention

5.1.1. Objectives pursued

The aim of the Directive is to establish minimum standards on the qualification and status of applicants for international protection as refugees or beneficiaries of subsidiary protection status;

The proposal is one of the Community initiatives on asylum related issues for the purpose of achieving a Common European Asylum System. The November 2000 Communication of the Commission on asylum, states that at the end of the first stage, in which the current Proposal has been presented, and whatever the result, it will be necessary to consider whether mechanisms can be developed to correct certain differences that might remain or to prevent the phenomenon of divergent interpretation of Community rules.

5.1.2. Measures taken in connection with ex ante evaluation

Not applicable

5.1.3. Measures taken following ex post evaluation

Not applicable

5.2. Actions envisaged and arrangements for budget intervention

With respect to this Directive, the Commission intends to establish a Contact Committee.

The reasons to establish this Committee are the following. Firstly, the Committee is to help the Member States implement the minimum standards in a forward-looking and Coordinating spirit. Secondly, it is to be the forum for Member States that wish to go jointly beyond the minimum standards at this stage of the harmonisation process. Thirdly, it is to set aside the impediments and create the necessary conditions for achieving the objective set by the European Council in Tampere.

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2 For further information see a separate guidance paper.
Thus, the Committee could promote further approximation of asylum policy in the future and it could pave the way forward from minimum standards on the recognition and content of refugee and subsidiary protection status to towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum.

In the period before 30 April 2004 the Contact Committee will meet three times a year to prepare transposal of the Directive and henceforth two or three times a year to facilitate consultation between Member States on additional standards, etc.

5.3. Methods of implementation

*Not applicable*

6. FINANCIAL IMPACT

6.1. Total financial impact on Part B - (over the entire programming period)

*(The method of calculating the total amounts set out in the table below must be explained by the breakdown in Table 6.2.)*

6.1.1. Financial intervention

<table>
<thead>
<tr>
<th>Breakdown</th>
<th>Year N</th>
<th>N + 1</th>
<th>N + 2</th>
<th>N + 3</th>
<th>N + 4</th>
<th>N + 5 and subs. Years</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Action 1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Action 2</td>
<td></td>
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<tr>
<td>Etc.</td>
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<tr>
<td><strong>TOTAL</strong></td>
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<td></td>
</tr>
</tbody>
</table>
### 6.1.2. Technical and administrative assistance, support expenditure and IT expenditure (Commitment appropriations)

<table>
<thead>
<tr>
<th></th>
<th>Year N</th>
<th>N + 1</th>
<th>N + 2</th>
<th>N + 3</th>
<th>N + 4</th>
<th>N + 5 and subs. Years</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>1. Technical and</strong></td>
<td></td>
<td></td>
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<tr>
<td><strong>administrative</strong></td>
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<tr>
<td><strong>assistance</strong></td>
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<tr>
<td><em>(a) Technical assistance</em></td>
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<tr>
<td><em>(b) Other technical and</em>*</td>
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<td><strong>administrative</strong></td>
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<tr>
<td><strong>assistance:</strong></td>
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<td>- intra muros:</td>
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<td>- extra muros:</td>
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<tr>
<td><em>of which for construction</em></td>
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<td><em>and maintenance of</em></td>
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<tr>
<td><em>computerised management systems</em></td>
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<tr>
<td><strong>Subtotal 1</strong></td>
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<td><strong>2. Support expenditure</strong></td>
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<tr>
<td><em>(a) Studies</em></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>(b) Meetings of experts</em></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>(c) Information and</em>*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>publications</strong></td>
<td></td>
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<td></td>
</tr>
<tr>
<td><strong>Subtotal 2</strong></td>
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<tr>
<td><strong>TOTAL</strong></td>
<td></td>
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<td></td>
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<td></td>
</tr>
</tbody>
</table>
6.2. Calculation of costs by measure envisaged in Part B (over the entire programming period)\(^3\)

(Where there is more than one action, give sufficient detail of the specific measures to be taken for each one to allow the volume and costs of the outputs to be estimated).

Commitments in EUR million (to the 3rd decimal place)

<table>
<thead>
<tr>
<th>Breakdown</th>
<th>Type of outputs (projects, files)</th>
<th>Number of outputs (total for years 1…n)</th>
<th>Average unit cost</th>
<th>Total cost (total for years 1…n)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Action 1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Measure 1</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>- Measure 2</td>
<td></td>
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</tr>
<tr>
<td>Action 2</td>
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<td></td>
</tr>
<tr>
<td>- Measure 1</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>- Measure 2</td>
<td></td>
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</tr>
<tr>
<td>- Measure 3</td>
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</tr>
<tr>
<td>Etc.</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>TOTAL COST</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If necessary explain the method of calculation

\(^3\) For further information see a separate guidance paper.
7. IMPACT ON STAFF AND ADMINISTRATIVE EXPENDITURE

7.1. Impact on human resources

<table>
<thead>
<tr>
<th>Types of post</th>
<th>Staff to be assigned to management of the action using existing and/or additional resources</th>
<th>Total</th>
<th>Description of tasks deriving from the action</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of permanent posts</td>
<td>Number of temporary posts</td>
<td>If necessary, a fuller description of the tasks may be annexed.</td>
</tr>
<tr>
<td>Permanent officials or Temporary staff</td>
<td>A</td>
<td>B</td>
<td>C</td>
</tr>
<tr>
<td>Other human resources</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

7.2. Overall financial impact of human resources

<table>
<thead>
<tr>
<th>Type of human resources</th>
<th>Amount EUR</th>
<th>Method of calculation *</th>
</tr>
</thead>
<tbody>
<tr>
<td>Officials</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Temporary staff</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other human resources</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(give budget line)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The amounts are total expenditure for twelve months.
7.3. **Other administrative expenditure deriving from the action**

<table>
<thead>
<tr>
<th>Budget line (number and heading)</th>
<th>Amount EUR</th>
<th>Method of calculation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Overall allocation (Title A7)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A07030 – Meetings</td>
<td>29 250</td>
<td>3 meetings/year at average cost of EUR 9 750 (15 x EUR 650) per meeting</td>
</tr>
<tr>
<td><strong>Information systems (A-5001/A-4300)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Other expenditure - Part A (state which)</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>29 250</td>
<td></td>
</tr>
</tbody>
</table>

The amounts are total expenditure for twelve months.

| I.   | Annual total (7.2 + 7.3) | EUR 29 250 |
| II.  | Duration of action       | 6 Years    |
| III. | Total cost of action (I x II) | EUR 175 500 |
8. FOLLOW-UP AND EVALUATION

8.1. Follow-up arrangements

Not applicable

8.2. Arrangements and schedule for the planned evaluation

Not applicable

9. ANTI-FRAUD MEASURES

Not applicable