

SEEKING REFUGE IN HUMAN RIGHTS? QUALIFYING FOR SUBSIDIARY PROTECTION IN THE EUROPEAN UNION

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The date 1 May 2004 is imprinted on our minds as the moment of the fifth enlargement of the European Union. However, the date was also significant for another reason. The 15 EU Member States had agreed to have in place by that time a number of key ‘building blocks’ in first step towards a Common European Asylum System.

The five key building blocks of that system were only completed in the days leading up to the 1 May deadline after much disagreement, debate and negotiation. It has been suggested that the final impulse to reach agreement came not from the need to integrate, or even from the pressure of the deadline per se, but because that deadline also signalled the entry into the EU of 10 new Member States.¹ Accordingly, the impetus stemmed from the need to finalize agreements, even if imperfect, before 10 new Member States made it even more difficult for any agreement to be reached. If 15 States could not find a ‘perfect’ solution to the asylum questions, then how could 25?

The focus of this presentation is the EU Qualification Directive,² which defines who may benefit from international protection in the EU and the rights to which such persons are entitled. I will address four issues: *a)* what is ‘complementary protection’?; *b)* what is ‘subsidiary protection’ in the EU?; *c)* analysis of Qualification Directive definition; and *d)* implications for status.

A DEFINING COMPLEMENTARY PROTECTION

A large number of States permit persons to remain in their territory who are not Convention refugees, but for whom return to the country of origin is either not possible or

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¹ J van Selm and E Tsolakis ‘The Enlargement of an “Area of Freedom, Security and Justice”: Managing Migration in a European Union of 25 Members’ Migration Policy Institute Policy Brief (May 2004) 2.

² 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 and the Content of the Protection Granted 8043/04 ASILE 23 (27 April 2004) (‘Directive’).

not advisable. Permission to stay in such cases may be granted on a variety of grounds, not all of which relate to an international protection need. An ‘international protection need’ is not defined in international law, but is commonly understood as describing persons who cannot be returned to their country of origin due to States’ *non-refoulement* obligations under international (or regional) law. It might better be expressed as ‘national protection extended in the performance of an international obligation’.³ Obligations may be express, as in article 33 of the Convention and article 3 of the CAT, or implied, as in article 7 of the ICCPR.

In other cases, protection may be extended for compassionate reasons such as age, medical reasons or family connections unrelated to an international protection need,⁴ or for practical reasons such as the inability to obtain travel documents.⁵ While such protection is humanitarian in nature, it is not based on any international protection obligation and therefore does not qualify legally as ‘complementary protection’.

In legal terms, then, ‘complementary protection’ describes protection granted on the basis of an international protection need outside the 1951 Convention framework, triggered by the State’s obligation of *non-refoulement*. It may be based on another human rights treaty, such as the CAT, or on more general principles, such as providing assistance to persons fleeing from generalized violence (through the expansion of the principle of *non-refoulement*). In this pure form, it contains no exclusion clauses but simply operates as a form of human rights or humanitarian protection triggered by States’ *non-refoulement* obligations, broadly conceived.

There are also codified instances of complementary protection, known as ‘subsidiary protection’ in the EU, ‘deferral of removal’ in the US and ‘persons in need of protection’ in Canada.⁶ These are complementary protection regimes which may exclude

³ UNHCR’s Observations on the European Commission’s 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’ 14109/01 ASILE 54 (16 November 2001) [10]. UNHCR prefers to call this ‘asylum’.

⁴ Sometimes health or family reasons may also be tied to an international protection need, such as articles 3 or 8 of the ECHR. There remains scope to test to what extent some compassionate reasons may in fact have a legal basis. However, generally they describe reasons for stay not linked to any legal ground.

⁵ EXCOM Standing Committee 18th Meeting ‘Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime’ UN Doc EC/50/SC/CRP.18 (9 June 2000) [4]–[5].

⁶ Immigration and Refugee Protection Act 2001 s 97(1).

particular persons from protection for reasons similar to the exclusion clauses in the Refugee Convention, but which may specify the rights and status to which beneficiaries of such protection are entitled.

Complementary protection has a long history, both internationally and in the European context. Although the term itself was not coined until the 1990s, the concept of complementary protection can be traced at least as far back as the 1933 League of Nations Convention. Since the 1950s, most of the 15 EU Member States had some form of complementary protection, known by names such as ‘de facto refugee status’, ‘B status’ and ‘humanitarian protection’. As the variety of names might suggest, there was no single idea of what complementary protection entailed. In some States, like Austria, Luxembourg and Spain, it was simply an obligation not to remove a person. In others, such as Greece, Italy and Sweden, it required the grant of a residence permit of some kind.⁷

If complementary protection describes ‘the role of human rights law in broadening the categories of persons to whom international protection is owed beyond article 1A(2) of the Refugee Convention’,⁸ then the EU concept of ‘subsidiary protection’ must be viewed as a regionally-specific example that is a political manifestation of the broader legal concept.⁹

B CREATION OF THE QUALIFICATION DIRECTIVE

Despite repeated calls for a common European approach to complementary protection, it was not until 1997, at the urging of Denmark and the Netherlands, that the EU began to seriously examine the importance of alternative legal sources of refugee protection, in

⁷ D Bouteillet-Paquet ‘General Presentation of the Odysseus Comparative Study: What Lessons Should be Drawn from the EU Member States’ Experience?’, paper presented at the conference ‘Subsidiary Protection: Improving or Degrading the Right of Asylum in Europe?’ Brussels (16–17 November 2001); see also D Bouteillet-Paquet ‘Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union’ in D Bouteillet-Paquet *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002) 228–29.

⁸ J McAdam Submission No 35, 2, as cited in Senate Select Committee on Ministerial Discretion in Migration Matters *Report* (Commonwealth of Australia Canberra 2004) 139.

⁹ During discussions in the EU, Commission Services described subsidiary protection as an asylum issue that was ‘more of a political nature’: Council of the European Union Note from Commission Services ‘Horizontal Issues in the Asylum Proposals’ 13636/01 ASILE 53 (9 November 2001) 2.

particular article 3 of the ECHR.¹⁰ In September 2001, the first formal proposal for the Qualification Directive emerged, setting out a harmonized subsidiary protection policy for the EU Member States. After countless amendments and much political negotiation, the final version of the Directive was agreed by the EU Member States on 31 March 2004 and formally adopted on 29 April 2004.

The Directive forms part of the European Commission's 'building blocks' in the first step towards a Common European Asylum System. Article 1 states its purpose as 'lay[ing] 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.' Its framework is 'based on existing international and EC obligations and current Member State practice'.¹¹ It aims to reduce disparities between Member States' legislation and practice to ensure a consistent minimum level of protection throughout the EU, thereby reducing secondary movements based solely on differing rights and benefits.¹²

Ultimately, 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,¹³ but distils State practice by drawing on the 'best' elements of the 15 Member States' national systems.¹⁴ It is therefore not intended as a radical overhaul of protection but as a codification of existing State practice. The Directive will help to clarify the various State practices and stabilize the pace of reform, which may be viewed as together constituting positive steps towards greater legal

¹⁰ Note from the Danish Delegation to Migration and Asylum Working Parties 'Subsidiary Protection' 6764/97 ASIM 52 (17 March 1997); Note from the Presidency to Asylum/Migration Working Group 'Implications of Article 3 of the European Convention on Human Rights for the Expulsion of Illegally Resident Third Country Nationals' 7779/97 ASIM 89 (28 April 1997).

¹¹ Note from Presidency to Permanent Representatives Committee/Council 'Report on Proceedings in the Council's Other Configurations' 8509/04 POLGEN 19 (20 April 2004) 3.

¹² Opinion of the Economic and Social Committee on the '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' (COM(2001) 510 final— 2001/0207 (CNS)) (2002/C 221/11) OJ C221/43 (17 September 2002) (Brussels 29 May 2002) [1.9].

¹³ Council of the European Union Outcome of Proceedings of CIREA Meeting with Representatives of the Courts and Other Review Bodies Dealing with Asylum on 28 November 2001 'Summary of Discussions' Doc 5585/02 CIREA 7 (Brussels 22 March 2002) 4.

¹⁴ Explanatory Memorandum in Commission 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 COM (2001) 510 final (12 September 2001) 5.

certainty. While this approach evidences 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 is not a result of a comprehensive and systematic analysis of all protection possibilities within international law. Furthermore, it is probable that the Proposal will not lead to more people being granted protection in the EU¹⁵ because it is based on a restrictive interpretation of existing practices rather than a new regime.

C POLITICAL CONSIDERATIONS

In analysing the Directive, we must not lose sight of its political context. When it was first introduced, one impetus behind harmonizing complementary protection was stated as preventing refugee flows based solely on differing levels of protection in Member States' legal frameworks.¹⁶ While it establishes a harmonized *legal* basis for complementary protection in the EU, it does so in a political environment that is suspicious of asylum seekers, that seeks a restrictive entrance policy and that is wary of large numbers of refugees. Accordingly, these factors have heavily influenced the scope of the Directive—who is eligible for protection—and the rights to which they are entitled—what that protection actually is.

The ad hoc national approach enabled States to define the eligibility criteria and content of complementary protection largely on the basis of executive discretion,¹⁷ posing problems for international burden sharing. It also exposed States to criticism for failing to fully comply with international human rights and humanitarian standards, particularly when some States provided more extensive protection than others, both in terms of eligibility thresholds and substantive rights. Discrepancies between the national systems increased difficulties in assessing other States' capacity to fully protect persons in need of international protection and their ability to engage in burden sharing.¹⁸

¹⁵ T Spijkerboer 'Subsidiarity in Asylum Law: The Personal Scope of International Protection' in D Bouteillet-Paquet *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002) 39.

¹⁶ Explanatory Memorandum (n 14) 3.

¹⁷ 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) 3.

¹⁸ *ibid* 13–14.

D THE DIRECTIVE'S REFUGEE REGIME

The Directive's definition of a 'refugee'¹⁹ is substantively identical to article 1A(2) of the Convention with one exception: it applies only to third country nationals. This has drawn sharp criticism from UNHCR and other commentators,²⁰ 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. Even if in practice the limitation may 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. As the House of Lords Select Committee on the EU noted, 'for a major regional grouping of countries such as the Union to adopt a regime apparently limiting the scope of the Geneva Convention among themselves would set a most undesirable precedent in the wider international/global context.'²¹ Furthermore, even though EU law is supposed to apply equally across all Member States, 'as the case of the Roma illustrates 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

¹⁹ Directive art 2(c).

²⁰ UNHCR's Observations (n 3) [11]; Amnesty International EU Office 'Amnesty International's Comments on the Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country National [sic] and Stateless Persons as Refugees or as Persons Who Are Otherwise in Need of International Protection, COM (2001) 510 final' (2 October 2002) <<http://www.amnesty-eu.org>> (21 October 2002) 2; European Parliament 'Report on the 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' 'Explanatory Statement' PE 319.971 (8 October 2002) 53; House of Lords Select Committee on the European Union *Defining Refugee Status and Those in Need of International Protection* (The Stationery Office London 2002) [54]. Although not formally a party to the negotiations, UNHCR maintained a close interest in the development of the Directive since it goes to the heart of its own mandate.

²¹ House of Lords (n 20) [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.

what the courts here [UK], and indeed the authorities in other countries, have found in over 7,000 cases'.²²

The definition is subject to exclusion clauses that are almost identical to those in article 1F of the Convention. The main difference lies in article 12(2)(b), which seeks to restrict the types of acts which will constitute political crimes (and hence not exclude a person from refugee status), by stating that

... particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes.²³

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.²⁴ Article 9(1) of the Directive requires such acts to either:

- (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 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).

Under paragraph (a), the seriousness of the act can be measured by either a qualitative assessment (nature of the act(s)) or a quantitative assessment (repetition of the act(s)).²⁵ The express link drawn between persecution and violations of 'basic human rights' is particularly important, because it not only underlines 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

²² House of Lords (n 20) [50] (Mr Hardwick, Refugee Council).

²³ Directive art 12(2)(b), introduced as art 14(2)(b) by 12199/02 ASILE 45 (25 September 2002).

²⁴ The Rome Statute of the International Criminal Court contains a definition of 'persecution' in the context of crimes against humanity: art 7(2)(g).

²⁵ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees UN Doc HCR/IP/4/Eng/REV.1 (Geneva January 1992) [51]–[53].

the term ‘persecution’ in the context of refugee determinations. Further, the inclusion of the words ‘in particular’ establishes that ‘basic human rights’ are not confined to rights that are non-derogable under international and regional law. Accordingly, if an act is deemed to be sufficiently serious by its nature or repetition, then a violation of a non-derogable right may be sufficient to amount to persecution. This has even greater implications for subsidiary protection. If violations of non-derogable human rights may sometimes amount to persecution, then they may certainly amount to subsidiary protection, since the latter is premised on the harm either not being sufficiently severe to constitute persecution, or as constituting persecution but without the requisite link to a Convention ground. This opens up the way for finding new forms of persecution and ‘serious harm’, and does not restrict thinking to violations of non-derogable rights only.²⁶

Paragraph (b) is based on the concept of ‘cumulative grounds’ of persecution. This is outlined in the UNHCR Handbook as measures which alone would not amount to persecution, but which when taken together, or combined with other adverse factors (such as general insecurity in the country of origin), could reasonably justify a claim to a well-founded fear of persecution.²⁷

The Directive also introduces common ‘harmonized’ concepts for a range of refugee law concepts, including ‘actors of persecution or serious harm’, ‘actors of protection’ and ‘internal protection’. 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.²⁸

E THE DIRECTIVE’S SUBSIDIARY PROTECTION REGIME

The Directive’s definition of ‘person eligible for subsidiary protection’ is:

²⁶ cf R Piotrowicz and C van Eck ‘Subsidiary Protection and Primary Rights’ (2004) 53 Intl and Comparative LQ 107, 125–31. See *R v Special Adjudicator ex p Ullah* [2004] UKHL 26.

²⁷ UNHCR Handbook (n 25) [53].

²⁸ See H Storey ‘The New EU Directive—An Evaluation’ (paper presented at International Association of Refugee Law Judges European Chapter Conference, Dublin May 2002) 7.

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.²⁹

This definition raises four points of interest. The first concerns its application to ‘third country nationals or stateless persons’ only, discussed above in the refugee context. Since 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 Convention. The restriction can be justified solely on the grounds of internal consistency—such a limitation should not form part of a broader international definition since it would place an unwarranted restriction on subsidiary protection which does not exist for Convention-based protection. It should therefore be viewed as a regional aberration.

Secondly, subsidiary protection is only applicable to a person ‘who does not qualify as a refugee’. This emphasizes that subsidiary protection is only to be granted if a person does not qualify for refugee status, and stems from the rationale that the Convention is to be given a full and inclusive interpretation. This is of particular importance in a regime that differentiates between protection needs based on the type of harm feared, since the result of wrongly classifying a claim has serious consequences for status. It also has academic/theoretical significance, since characterizing an individual as a subsidiary protection beneficiary without fully considering the application of the Convention may have the effect of stultifying that instrument’s development.

Thirdly, the standard of proof for subsidiary protection is ‘substantial grounds ... for believing’. This is an objective test, by contrast to the test in article 1A(2) of the Convention which has both objective and subjective elements, requiring an applicant to demonstrate a ‘well-founded fear’. The ‘belief’ in the present definition does not relate

²⁹ 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).

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 CAT, and was deliberately selected in order to avoid divergence between international and Member States' practice.³⁰ The Torture Committee has consistently held that 'substantial grounds' involve a 'foreseeable, real and personal risk' of torture.³¹ They are to be assessed on grounds that go 'beyond mere theory or suspicion' or 'a mere possibility of torture',³² but the threat of torture does not have to be 'highly probable'³³ or 'highly likely to occur'.³⁴

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 (but not an individual risk).

³⁰ 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.

³¹ See eg *EA v Switzerland* (Comm No 28/1995) UN Doc CAT/C/19/D/28/1995 (10 November 1997) [11.5]; *X, Y and Z v Sweden* (Comm No 61/1996) UN Doc CAT/C/20/D/61/1996 (6 May 1998) [11.5]; *IAO v Sweden* (Comm No 65/1997) UN Doc CAT/C/20/D/65/1997 (6 May 1998) [14.5]; *KN v Switzerland* (Comm No 94/1997) UN Doc CAT/C/20/D/94/1997 (19 May 1998) [10.5]; *ALN v Switzerland* (Comm No 90/1997) UN Doc CAT/C/20/D/90/1997 (19 May 1998) [8.7]; *JUA v Switzerland* (Comm No 100/1997) UN Doc CAT/C/21/D/100/1997 (10 November 1998) [6.6]; *SMR and MMR v Sweden* (Comm No 103/1998) UN Doc CAT/C/22/D/103/1998 (5 May 1999) [9.7]; *MBB v Sweden* (Comm No 104/1998) UN Doc CAT/C/22/D/104/1998 (5 May 1999) [6.8]; *KT v Switzerland* (Comm No 118/1998) UN Doc CAT/C/23/D/118/1998 (19 November 1999) [6.5]; *NM v Switzerland* (Comm No 116/1998) UN Doc CAT/C/24/D/116/1998 (9 May 2000) [6.7]; *SC v Denmark* (Comm No 143/1999) UN Doc CAT/C/24/D/143/1999 (10 May 2000) [6.6]; *HAD v Switzerland* (Comm No 126/1999) UN Doc CAT/C/24/D/126/1999 (10 May 2000) [4.10]; *US v Finland* (Comm No 197/2002) UN Doc CAT/C/30/D/197/2002 (1 May 2003) [7.8].

³² *EA v Switzerland* (n 31) [11.3].

³³ *Report of the Committee against Torture* UN GAOR 53rd Session Supp No 44 UN Doc A/53/44 (1998) Annex IX.

³⁴ *EA v Switzerland* (n 31) [11.3].

The fourth notable element of the definition relates to the nature of suffering that may result in subsidiary protection being granted, set out in article 15. As the pivotal element of the Directive, setting out the constitutive elements of subsidiary protection status, article 15 was the subject of intense debate and subject to much redrafting. The result is a political compromise, based on international and regional human rights standards, but nonetheless conservative in its scope. It cannot be regarded as an innovative blueprint applying human rights law to the protection context, since it extracts the least contestable human rights-based protections which already form part of most Member States' protection policies. The 'new' element of subsidiary protection in the 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.

It must be recalled that article 15 only falls to be considered when an examination of a Convention claim has led to the conclusion that the application does not qualify for refugee status under the Convention, or if the applicant has specifically applied only for subsidiary protection. The types of threats contained in article 15 indicate a strong presumption for Convention status.³⁵ Accordingly, article 15 should only apply where the standard of harm does not reach the level of persecution and/or there is no link to a Convention ground.

The final version of article 15 sets out the content of subsidiary protection by defining 'serious harm' as:

- (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.

The notion of 'serious harm' is not part of international law and was devised for the purposes of the Directive.

³⁵ UNHCR's Observations (n 3) [42].

Paragraph (a) was not part of the original proposal. Its legal basis is article 1 of the 6th Protocol to the ECHR, which abolishes the death penalty, and article 19(2) of the Charter of Fundamental Rights of the European Union which provides: ‘No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’

Paragraph (a) is also consistent with the jurisprudence of the European Court of Human Rights. In *Soering v United Kingdom*, the court found that although the death penalty per se did not raise an issue under articles 2 or 3 of the ECHR, circumstances relating to the death sentence, known as the ‘death row phenomenon’, could give rise to an issue under article 3.³⁶

Paragraph (b) provides that ‘serious harm’ may be constituted by ‘torture or inhuman or degrading treatment or punishment of an applicant in the country of origin’. The original proposal referred simply to ‘torture or inhuman or degrading treatment or punishment’, whereas the amended version explicitly 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 of the ECHR would prevent removal. Significantly, however, protection under article 3 would not guarantee a legal status but simply classify the person as non-removable.

Paragraph (b) was the least contentious element of article 15, since all Member States are party to the ECHR³⁷ and are bound by article 3 of the ECHR which prevents States from returning a person to a place where he or she would be placed at risk of torture or inhuman or degrading treatment or punishment, including by sending the person to another State which may subsequently return him or her to a risk of such treatment.

³⁶ *Soering v United Kingdom* (1989) 11 EHRR 439 [88].

³⁷ Even though the ECHR is not directly applicable EC law, all EU Member States are also members of the Council of Europe and bound by the ECHR in that connection. Article 6(2) of the Treaty on the EU requires Member States to use its principles as a basis in drawing up common legal acts.

There is a strong presumption for Convention refugee status where torture is involved.³⁸ Article 15(b) is therefore of limited application, particularly since persons excluded from Convention status and protected by article 3 CAT or ECHR are also excluded from subsidiary protection under the Directive.³⁹ Thus, the article would apply to persons who are unable to demonstrate a link to a Convention ground, which may amount to cases where perpetrators resort to torture based on purely criminal motivation.⁴⁰

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.⁴¹ It partially reflects Member States' obligations under the Temporary Protection Directive.

The Explanatory Memorandum to the original article 11(2)(c) suggested that persons fleeing from civil war or armed conflict could not qualify as Convention refugees. As UNHCR has noted, 'experience shows that most civil wars or internal armed conflicts are rooted in ethnic, religious or political differences which specifically victimise those fleeing. War and violence are themselves often used as instruments of persecution.'⁴² The determining factor for refugee status is whether the applicant has a well-founded fear of persecution based on one of the article 1A(2) grounds. Generalized violence does not preclude individual persecution.⁴³ Accordingly, UNHCR has again stressed that the provision will only apply where there refugee status cannot be satisfied.

Under the current provision, the threat faced must be both serious and individual. The term 'serious threat' is not defined. Presumably it ought to mean something less serious than persecution, that negatively impacts on a person's human rights. The

³⁸ UNHCR's Observations (n 3) [42].

³⁹ See exclusion clauses in Directive art 17.

⁴⁰ UNHCR 'Some Additional Observations and Recommendations on the European Commission "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" COM (2001) 510 final, 2001/0207 (CNS) of 12 September 2001' (Geneva July 2002) 7.

⁴¹ See ECRE 'European Asylum Systems: Legal and Social Conditions for Asylum Seekers and Refugees in Western Europe' (2003) <<http://www.ecre.org/conditions/index.shtml>> (13 June 2004); ELENA 'Complementary/Subsidiary Forms of Protection in the EU States—An Overview' (April 1999).

⁴² UNHCR's Observations (n 3) [35].

⁴³ ECRE 'Note from ECRE on the Harmonisation of the Interpretation of Article 1 of the 1951 Geneva Convention' (June 1995) [15].

definition of ‘serious harm’ does not assist, since it is defined as, inter alia, a serious and individual threat. It is likely that the word will not be given a definitive meaning in case law on this provision, but rather will depend on all the circumstances of the case.

The vast majority of Member States supported the ‘individual’ requirement on the grounds that this would avoid ‘an undesired opening of the scope of this subparagraph.’⁴⁴ When read in conjunction with recital 26 of the Directive, it appears to require that a person must be singled out within a situation of indiscriminate violence, even though this is contrary to the notion of violence that is indiscriminate.

The recital reads:

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 severely restricts the ambit of paragraph (c). The precise extent to which an individual threat will need to be demonstrated is unclear, particularly as the word ‘normally’ implies that in some cases the individual test may be less rigidly applied. The language of the present provision and recital would 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.⁴⁵ 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. For the current provision to have any meaningful effect, it would seem that States will have to be relatively generous in determining the ‘individual’ aspect of the risk.

The definition in the Temporary Protection Directive is wider and protects persons:

⁴⁴ Presidency Note to Coreper/Council 12382/02 ASILE 47 (20 September 2002) [4].

⁴⁵ eg UK Secretary of State’s refusal of asylum on the basis of such violence, as recorded in the case of *Vilvarajah v United Kingdom* (30 October 1991) [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.⁴⁶ [used to be in the Directive]

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 normal way,⁴⁷ *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.

F BROADER HUMAN RIGHTS APPLICATION?

There used to be another category of ‘serious harm’. The original paragraph (b) of the Directive provided that serious (and at that time, unjustified) harm could consist of a ‘violation of a human right, sufficiently severe to engage the Member State’s international obligations’.

In determining whether a violation of a human right was ‘sufficiently severe to engage the Member State’s international obligations’, the key question would have been whether the human right in question was so fundamental as to entail a *non-refoulement* obligation. Amendments to the provision supported this interpretation.

⁴⁶ Council Directive 2001/55/EC of 20 July 2001 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 [2001] OJ L212/12 art 2(c).

⁴⁷ see *ibid* art 2(a).

The deletion of this broader human rights provision has dramatically reduced the scope of the Directive. It was the provision which allowed for the greatest development of the human rights–refugee law nexus, providing flexibility for addressing new situations arising in international law and relevant developments in the jurisprudence of the European Court of Human Rights. As article 15 stands now, there is little room for interpretation and it may be that ‘inhuman or degrading treatment or punishment’ becomes the focal point for seeking to broaden the Directive’s scope, functioning in a similar fashion as the Convention’s ‘membership of a particular social group’ category.

It seems absurd to exclude known protection categories from the ambit of the Directive: persons either not encompassed by the Directive’s definitions or excluded by its narrow scope. Doing so does not delete such categories but simply recasts the class of non-removables with an ill-defined legal status. At the domestic level, it might be possible to argue that such persons ought to receive subsidiary protection status since they are in an analogous situation to 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, 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.

The Directive has not resolved the issue of human rights-based protection but has created a stop-gap for *certain* persons in need of international protection falling outside the Convention. It may therefore be that national developments, in accordance with article 3 of the Directive, are first required to develop additional subsidiary protection categories. In a domestic court, it may be possible to argue that persons in a similar situation to defined categories of subsidiary protection ought to receive the same status. If not, we will see a greater splintering of the concept of international protection as further differentiated statuses and unprotected categories develop.