



IS THERE A NEED FOR AN EXTENSION OF SUBSIDIARY PROTECTION IN THE EUROPEAN UNION QUALIFICATION DIRECTIVE?

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Abstract. *The establishment of the Common European Asylum System (CEAS) by 2012 remains a key policy objective for the European Union (EU). According to the Council of the European Union, the development of a Common Asylum Policy should be based on a full and inclusive application of the 1951 Geneva Convention Relating to the Status of Refugees (“the 1951 Refugee Convention”)¹ and other relevant international treaties.² In the European Pact on Immigration and Asylum³ attention is brought to the persistence of wide disparities amongst Member States (MSs, MS) in the granting of protection and the form of protection granted. This is seen as one of the main problems to be addressed in building the CEAS. It is fairly obvious that existing divergences in policy have a substantial impact upon the aims of the CEAS. It can be assumed that the difference in governmental practices involving recognizing asylum seekers on refugee grounds or subsidiary protection grounds may be a substantial factor in the decision-making process on where to apply for international*

1 UN General Assembly, 1951 Convention relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series No. 2545, Vol. 189.

2 Council of the European Union, The Stockholm Programme “An open and secure Europe serving and protecting the citizens”, 2 December 2009, p. 69.

3 European Pact on Immigration and Asylum, 24 September 2008, p. 11.

protection.⁴ The European Commission stressed the importance, during the second phase of the CEAS, of paying particular attention to subsidiary and other forms of protection.⁵

This Article analyses the need to expand subsidiary protection to additional groups of individuals at the EU level in order to fully align the provisions of the EU Qualification Directive⁶ with international human rights law. This would contribute to the asylum law harmonisation objectives of the Directive, as well as lay a foundation for the establishment of the CEAS.

The Article may be of interest to national and European asylum and refugee law policy makers, as well as decision makers, non-governmental organisations and scholars interested in the gaps of EU asylum instruments and possible solutions to remedy it.

Keywords: *refugees, beneficiaries of subsidiary protection, legal status of foreigners, asylum, subsidiary protection, temporary protection, international protection, EU Qualification Directive, international human rights law.*

Introduction

On 29 April 2004 the Council of the European Union adopted the Qualification Directive. It provided for a legal obligation for MSs to grant subsidiary protection to persons who do not qualify for refugee status, but who are nevertheless in need of protection on the basis of other international obligations of MSs in addition to the 1951 Refugee Convention. In doing so, the Qualification Directive is the first supranational instrument to apply a distinct status to extra-Convention refugees.⁷

Though no specific EU body of law on the issue of subsidiary protection existed previously, the European Convention on Human Rights (ECHR) and the case law of the European Court of Human Rights (ECtHR) provided for a legally binding framework, which aided the European Commission's legislative work on this issue. Partly in response to the case law of the ECtHR and the general principles of international human rights law, MSs have developed their own schemes for subsidiary or complementary

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- 4 Briefing Note "Minimum Standards Relating to the Eligibility for Refugee Status or International Protection and Content of this Status". Assessment (Summary) of the Implementation of the 2004 Directive and Proposals for a Common European Regime of Asylum, p. 4.
 - 5 Commission of the European Communities, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions "Policy Plan on Asylum. An Integrated Approach to Protection across the EU", SEC(2008) 2029, 17.6.2008, p. 3 (Policy Plan on Asylum).
 - 6 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, 30/09/2004 P. 0012 - 0023 (the Qualification Directive).
 - 7 McAdam, J. The Qualification Directive: An Overview. In *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*. Zwaan, K. (ed.). Wolf Legal Publishers, 2007.

protection. The Directive has drawn from the disparate MS systems and has attempted to adopt and adapt the best ones.⁸

Subsidiary protection can be defined as protection complementary to the 1951 Refugee Convention protection, provided when a person is facing a risk of serious harm in his country of origin and is unable to enjoy the protection of that home country. While there is no definition of subsidiary protection in the Directive as such, Art. 2(e) defined a 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 [...], would face a real risk of suffering serious harm as defined in Article 15, [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”. Art. 15 further enumerates the types of serious harm that are considered grounds for subsidiary protection. The grounds for granting subsidiary protection employed in the Directive are based largely on international human rights instruments—on the basis of which subsidiary protection developed. The most pertinent of these instruments being Article 3 of ECHR; Article 3 of the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment (CAT); and Article 7 of the International Covenant on Civil and Political Rights (ICCPR).⁹

Since the transposition of the Qualification Directive in the domestic laws of MSs, a number of studies and legal experts have claimed that the current concept of subsidiary protection in the Directive does not cover all persons who are in need of protection despite the objectives of this instrument—to ensure that Member States *apply common criteria for the identification of persons genuinely in need of international protection* and to ensure that a minimum level of benefits is available for these persons in all MSs.¹⁰ They also claim that current provisions do not secure full compatibility with the evolving case law on human rights of the ECtHR, the Court of Justice of the European Union (“EU Court”), nor refugee law standards. These allegations are drawn from substantial disparities that still exist in varying MS practices of granting protection, as well as evidence that a number of persons in need of protection do not receive it because of the current wording of Art. 15 in the Directive. As acknowledged by European institutions themselves, the differences in decisions to recognise or reject asylum requests of applicants from the same countries of origin point to a critical flaw in the current Common European Asylum System. Even after some legislative harmonisation at the EU level has taken place, a lack of common practice mixed with different traditions and diverse country of origin information sources are, among other reasons, producing divergent results. This is creating secondary movements of asylum seekers and goes against the principle of providing equal access to protection across the EU.¹¹ Among the objectives

8 The European Union clarifies what it means by refugee and subsidiary protection [interactive]. [accessed 20-04-2010]. <http://ec.europa.eu/justice_home/fsj/asylum/subsidiary/fsj_asylum_subsidary_en.htm>.

9 *Ibid.*

10 Preamble of the Qualification Directive, recital 6.

11 *Supra* note 5, p. 3.

for the second phase of CEAS, the European Commission proposed better and more harmonised standards of protection through further alignment of MS asylum laws.

In this context, the Commission presented—on 21 October 2009—its Recast Proposal for Qualification Directive.¹² While, back in 2008, the Commission planned amending the criteria for qualifying for international protection under this Directive by further clarifying the eligibility conditions for subsidiary protection,¹³ it has not done so. The Recast Proposal does not touch upon Article 15 of the Directive, thereby not addressing concerns raised about the restrictive scope of subsidiary protection nor addressing the fact recognised by the Commission itself—that the wording of the current relevant provisions allows for substantial divergences in the interpretation and the application of the concept across MSs.

The analysis presented in this Article is based on two premises:

1. The personal scope (*ratione personae*) of subsidiary protection in the Qualification Directive should derive from international obligations of MSs and corresponding practices developed by various MSs to guarantee the observance of these obligations.

2. Subsidiary protection in the Directive should be granted only to persons who are in need of international protection. However, this should not include protection granted on purely compassionate grounds, which is, and should remain, a part of the national discretion of MSs, outside the scope of legal obligations under international human rights law.

1. *Ratione Personae* (Personal Scope) of Subsidiary Protection

Rather than imposing new *ratione personae* protection obligations on Member States, the *Qualification Directive clarifies and codifies existing international and community obligations and practice*.¹⁴ Under the Directive, third country nationals and stateless persons are eligible for subsidiary protection if they face a risk of suffering serious harm as a result of their forced removal from EU territory. Serious harm is defined as:

- 1) The death penalty or execution (Art. 15(a));
- 2) Torture or inhuman or degrading treatment or punishment of the applicant in the country of origin (Art. 15(b));
- 3) Serious threat to a civilian's life by reason of indiscriminate violence in situations of international or internal armed conflict (Art. 15(c)).

The situations that are currently covered by the concept of subsidiary protection in the EU could be characterised as follows:

1. With regard to Art. 15(a) of the Directive, there is no instrument of international law that explicitly prohibits expulsion in the likelihood of imminent death penalty or

12 Commission Recast Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of subsidiary protection and the content of the protection granted, 21 October 2009.

13 *Supra* note 5, p. 5.

14 *Supra* note 8.

execution. However, it may be implicit in Art. 1 of the 6th Protocol to ECHR. In addition, Art. 9(1) of the Charter on Fundamental Rights of the European Union prohibits expulsion of a person to a state where he “would be subjected to the death penalty[...].”

2. As concerns Art. 15(b) of the Directive, it seems that it covers harm mentioned in Art. 3 ECHR¹⁵ and Art. 7 of ICCPR¹⁶ and, to a certain extent, Art. 3 of CAT¹⁷. In this case, the ill-treatment is the foreseeable consequence of expulsion and therefore prohibited, but expulsion itself does not constitute or attribute to the ill-treatment. The provision diverges from CAT in that the CAT standard is “danger” and “not real risk”.¹⁸ Also, if compared to Art. 15(a), this provision seems to be limited to serious harm in the country of origin.

3. Art. 15(c) of the Directive is relevant for the protection of civilians when humanitarian law fails to protect in time of international or internal armed conflict. This situation, because of the way it is formulated, has caused much uncertainty in its practical application and, not accidentally, the first inquiry to the EU Court was on this topic.

It is worthwhile to note that only those persons who face serious harm, as defined by one or several of the previously mentioned definitions, and who do not enjoy the protection of their country of origin can be covered by subsidiary protection in the current wording of the Qualification Directive. Subsidiary protection based on compassionate or humanitarian reasons—human rights violations other than the right to life or to physical integrity (such as the right to a fair trial or the right to respect for family and private life)—is not included within the scope of the Directive. Therefore, (at the time of adopting the Directive) it was left to the discretion of MSs to grant subsidiary protection in these cases and to do so with the same level of protection that the Directive recognises for the selected categories.¹⁹

2. Problem Description

The Qualification Directive has the aim of defining criteria on the basis of which applicants for international protection are to be recognized as eligible for subsidiary

15 Article 3. Prohibition of Torture. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

16 Article 7. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

17 Article 3.

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

18 Noll, G. International Protection Obligations and the Definition of Subsidiary Protection in the EU Qualification Directive. In *The Emergence of a European Asylum Policy*. de Sousa, M. C. D. U.; de Bruycker, P.; Brandl, U. (eds.). Brussels: Bruylant, 2004, p. 188.

19 ECRE Study on the Transposition of the Qualification Directive “The Impact of the EU Qualification Directive on International Protection” [interactive]. October 2008 [accessed 20-04-2010]. <www.ecre.org>.

protection. *Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.*²⁰ However, the current scope of subsidiary protection is limited as it does not cover all persons in need of international protection.

Firstly, it does not cover all persons who are not deportable under human rights laws, on the basis of which subsidiary protection has developed (CAT, ECHR, and ICCPR).²¹ UNHCR asserts that this is because of procedural flaws and of a narrow interpretation of the directive itself.²²

Secondly, subsidiary protection does not cover all cases where MSs grant protection. Most MSs do grant some form of protection to victims of generalised violence, while subsidiary protection (under the Directive) clearly does not require it.²³ It also does not give protection to broader categories of persons when compared to those defined in Art. 15, which shows a lack of harmonisation among MSs.²⁴ Furthermore, there is a tendency to narrow the scope of Art. 15(c) in relation to other non-refoulement provisions because of widely divergent practices in its application.²⁵

This situation undermines the EU harmonisation objective and goes against the objective of the Directive, which is to ensure a minimum level of protection to all those in need. It goes in the opposite direction of ensuring that the development of a Common Asylum Policy for the EU is based on a full and inclusive application of 1951 Geneva Convention and international human rights laws. In addition, it does not seem to be in line with standards set by Art. 78(1) of the Treaty on the Functioning of the European Union (TFEU), which refers to “offering an appropriate status to any third country national requiring international protection”. The wording of the current provisions allows for substantial divergences in the interpretation and the application of the concept, encouraging onward (secondary) movements within the Union. Indeed, statistics provide clear indications of the impact of asylum policy rules on secondary movements: countries which have introduced restrictive measures have seen a decrease in the number of applications soon after the changes were implemented (e.g. Germany after 1993, Spain in 1995, and Denmark in 2001). The gaps and ambiguities inherent in the Directive’s provisions allowed Sweden to restrict its policies concerning Iraqi asylum seekers in 2007. As a result, Sweden witnessed a decrease by 2/3 in the number of applications from that country in 2008. Its restrictive policy had an impact on its neighbouring coun-

20 Preamble of the Qualification Directive, recital 25.

21 Battjes, H. *European Asylum Law and International Law*. Martinus Nijhoff Publishers, 2006, p. 221.

22 UNHCR Study on the Implementation of the Qualification Directive “Asylum in the European Union” [interactive]. November 2007, p. 11 [accessed 20-04-2010]. <www.unhcr.org>.

23 Battjes, H., *op. cit.*, p. 241.

24 Directive 2004/83 Qualification Directive Synthesis Report, completed under the Study on the “Conformity checking of the transposition by Member States of 10 EC Directives in the sector of asylum and immigration” done for DG JLS of the European Commission in 2007, p. 20, 75; European Parliament Briefing Note on Implementation of the Qualification Directive “Minimum standards relating to eligibility for refugee status or international protection and content of this status - assessment (summary) of the implementation of the 2004 directive and proposals for a common European regime on asylum”, September 2008.

25 *Supra* note 19, p. 6.

tries—the number of applications from Iraqis to Germany and the Netherlands more than doubled in 2008 compared to 2007, Finland received 4 times as many and Norway received 3 times as many.²⁶

Member States maintain a variety of residence permits for persons not covered by the Directive but who are considered as non-expellable. Solutions used by the MSs vary from mere suspension of deportation or tolerated status to a variety of residence permits in the form of subsidiary protection or humanitarian residence on the basis of national law—a few of which result in a broad scope of rights granted to its holders.

The problem of the differing scope of subsidiary protection is recognised at the EU level. For example, the Commission acknowledges in its Impact Assessment that the Directive does not guarantee the full compatibility of national implementation measures with these instruments (international law) and allows for wide divergences amongst national decision-making practices.²⁷ Despite that and notwithstanding the specific policy objective (to ensure full respect of the ECHR and of the EU Charter of Fundamental Rights), the Recast Proposal for Qualification Directive does not touch upon Art. 15 of the Directive and does not address the problem of the limited scope of subsidiary protection. It also does not follow the objective of the directive—to address disparities between MS legislation and practice.

3. Persons not Included under Subsidiary Protection but in Need of Protection under International Law and MS Practice

Who are these persons and why must they be covered by subsidiary protection at the EU level? All examples presented below are based either on international human rights law or existing MS practice because the preamble of the Directive states that criteria—on the basis of which the applicants for international protection are to be recognised as eligible for subsidiary protection—should be drawn from international obligations under human rights instruments and from practices existing in Member States.

A starting point is defining international protection since only those persons who are in need of protection and are not given it by their home country should be covered by the Directive. International protection in a narrow sense could be defined as protection of persons, who are not able to enjoy the national protection of their country of origin, provided by a state other than the home country. International protection seeks to guarantee that refugees are treated in accordance with international standards²⁸. In a broad sense—the protection of a person by any state from any violations of human rights. With

26 Commission Staff Working Document accompanying the Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of subsidiary protection and the content of the protection granted, Summary of the Impact Assessment, COM (2009)551, 21 October 2009, p. 14–15.

27 *Ibid.*, p. 2.

28 Vysockienė, L. Pabėgėlių teisė [Refugee Law]. Mykolo Romerio universitetas, 2005, p. 36.

regard to obligations under non-refoulement, *Noll* claims that nothing in the wording or in the structure of the ECHR suggests that its Art. 3 has a monopoly on inherent non-refoulement obligations. As demonstrated elsewhere, there is no hierarchy among the rights in Section I of the ECHR and the Protocols. In principle, according to him, all ECHR rights are capable of possessing non-refoulement capabilities.²⁹

3.1. The Absolute Prohibition of Refoulement and Family and Children's Rights Considerations

Subsidiary protection in the Directive flows from the absolute obligation of MSs in certain circumstances not to expel individuals without any exceptions under international human rights instruments, namely Art. 2 and 3 ECHR, Art. 3 CAT and Art 7 ICCPR. This may include persons who were denied status under the Qualification Directive³⁰ but cannot be returned. Absolute prohibition of refoulement has been continuously repeated by the ECtHR in cases such as *Soering vs. the United Kingdom* (UK), *Ahmed vs. Austria*, *Chahal vs. the United Kingdom* and others. The Committee against Torture has also considered non-refoulement in the cases of *Balabou Mutombo vs. Switzerland*, *Khan vs. Canada*, *Ismail Alan vs. Switzerland*, *Tala vs. Sweden*, *Pauline Muzonzo Paku Kisoki vs. Sweden*, *Korban vs. Sweden*, *Halil Haydin vs. Sweden*, *Elmi vs. Australia* and others. In the case of *V.L. vs. Switzerland*,³¹ the Committee against Torture established that there was a violation committed by Switzerland by deporting a person to Belarus. The Committee established widespread violations in Belarus and, based on individual circumstances, declared a breach. The absolute nature of non-refoulement was specifically considered in *Aemei vs. Switzerland* and *Tapia Paez vs. Sweden*. The Human Rights Committee referred to non-refoulement as well (e.g. judgements in the cases *De Lopez vs. Uruguay*, *Winata and Li vs. Australia and others*). In view of existing international obligations under human rights laws as concerns non-refoulement, it is of concern that Art. 17 and 21 of the Directive does not explicitly confirm the absolute prohibition of deportations that would breach international human rights law.³²

In practice, MSs continue to issue a variety of other forms of residence permits as they cannot expel these individuals due to the absolute prohibition of refoulement. The standard of treatment that these persons receive should also respect fundamental human rights. It is therefore necessary to address the situation of those persons who are excluded from protection but who cannot be returned. Among the MSs there are at least two states (Finland and UK) that have provisions for the protection of people denied status due to the application of exclusion clauses.³³

29 Noll, G. *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*. Martinus Nijhoff Publishers, 2000, p. 453–474.

30 These are persons who are excluded from refugee status under Art. 1(F) of the Refugee Convention and Art. 12(2) of the Qualification Directive, as well as excluded from subsidiary protection under Art. 17 of the Directive.

31 CAT/C/37/D/262/2005, UN Committee against Torture, 20 November 2006.

32 *Supra* note 19, p. 29.

33 ECRE report “Complementary Protection in Europe” [interactive]. July 2009, p. 8 [accessed 20-04-2010]. <www.ecre.org>.

There are also other situations that warrant non-refoulement under international and regional human rights instruments. For instance, persons who should be exceptionally protected as there is no adequate treatment in their home country. In this respect, all MSs are bound by the results of cases such as *D. vs. UK* based on Art. 3 of ECHR.³⁴ However, since the ECtHR judgement in this case, none of the subsequent applicants have satisfied the test of exceptional circumstances required—thus no violation of Art. 3 was found³⁵—the obligation to refrain from expelling a seriously ill alien in very exceptional circumstances has not been repealed by the Court. Furthermore, there are other situations beyond Art. 3 of ECHR like Art. 8 of the ECHR, which states that in exceptional circumstances, expulsion of family members may be prevented in order to ensure the protection of family life. Noll claims that cases where the implementation of deportation would separate a family fall outside the concept of “international protection” alluded to in Art. 63(2)(a) of the Treaty establishing the European Communities. Such cases, according to him, could then be dealt with in other areas of community law—in an instrument dealing with family reunification.³⁶ However, the persons who are mentioned here as in need of international protection would include only those whose family life cannot be guaranteed in the home country (e.g. in cases of family members of subsidiary protection beneficiaries, as they do not enjoy special protection under the Family Reunification Directive³⁷). The interpretation of Art. 8 of ECHR has recently been considerably expanded by the ECtHR through the concept of the protection of private life (regardless of family connections) for persons who have established close links with the country of actual residence and whose return may constitute a violation of this article.³⁸ For instance, in the case of *Maslov vs. Austria*,³⁹ the Grand Chamber of the ECtHR held that the deportation of a youth who had spent the majority of his childhood in Austria constituted a violation of his right to his family and private life. However, these cases may not be necessarily based on protection needs because these persons may still enjoy the protection of their country of origin. In addition, obligations of non-refoulement extend to situations when the interests of children cannot be guaranteed in their home country. In these cases the observance of the best interest of the child principle under Art. 3(1) and 37(a) of the Convention on the Rights of the Child,⁴⁰ is a basis for international protection of these children.

34 In this case the ECtHR set an obligation to refrain from expulsion of a seriously ill alien with advanced stage of HIV/AIDS in very exceptional circumstances due to lack of medical treatment in the country of origin.

35 Refer to, e.g. *N. vs. UK*, Judgment of the Grand Chamber of 27 May 2008.

36 Noll, G. Fixed Definitions or Framework Legislation? The Delimitation of Subsidiary Protection *ratione personae*. *New Issues in Refugee Research, Working Paper No. 55*. February 2002, p. 8.

37 Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification//OJ L 251/12, 3.10.2003.

38 Hailbronner, K. *The Status of Persons who Have Been Denied Refugee Status*. Note for the European Parliament. 2010, p. 6.

39 *Maslov vs. Austria*, [2008] ECHR [GC] 1638/03 (23 June 2008).

40 According to the recommendations of the Committee on the Rights of the Child, no return or removal decisions should be issued without completion of an assessment on the “best interests of the child”: General Comment No. 6(2005); Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2006/6, Chapter VII(c), Return to the country of origin.

The Directive does not harmonize MS practices in these situations. How do MSs construct their domestic legislation in the previously mentioned situations? A substantial number of MSs maintain humanitarian residence permits for these individuals. For example, Austria introduced the 2005 Asylum Act which gave complementary protection based on Art. 8(1) of the ECHR, which protects private and family life.⁴¹ Also, some MSs domestically treat cases like *D vs. UK* as fitting within Art. 15(b) of the Directive.⁴² It would be therefore logical and useful to harmonise the granting of protection in these cases as they are beyond the discretion of states and are based on the objective mandatory criteria of international law. More specifically, the situations that these persons face must be clearly distinguished from the situations of people applying for asylum on purely compassionate grounds (e.g. old age, integration into host country society, etc.). This should continue to be a part of the discretionary decisions of MSs because of the absence of internationally or regionally defined standards on how to deal with these individuals. A good example of such a distinction is a new Immigration Act that entered into force on 1 January 2010 in Norway. The law differentiates between valid protection grounds and the more humanitarian reasons for granting residence.

3.2. Systematic or Generalised Violence and Human Rights Violations

The second group of asylum seekers are the victims of systematic or generalised violence and human rights violations. At the EU level, protection for these persons is provided under the Temporary Protection Directive⁴³ because the MSs have acknowledged the need for protection in relation to generalised violence. This Directive envisages among its beneficiaries “persons at serious risk of, or who have been the *victims of, systematic or generalized violations of their human rights*”.⁴⁴

The need for protection is recognised only when these persons arrive in a mass influx situation, not individually. Should the person apply to the MS outside of the temporary protection regime with the very same reasons of flight, no protection would be provided under European regulation. This causes horizontal inconsistency between asylum instruments and disparities in MS practice as concerns the issuance of residence permits. Most MSs grant protection to these persons under their own national law, but such national schemes have often been under pressure because other neighbouring Member States may respond very differently. It is important to note that there is, as yet, no basis in international treaty law for a protection obligation towards persons fleeing indiscriminate violence in situations of armed conflicts.⁴⁵ However, these situations

41 *Supra* note 33, p. 5.

42 Directive 2004/83 Qualification Directive Synthesis Report, completed under the Study on the “Conformity checking of the transposition by Member States of 10 EC Directives in the sector of asylum and immigration” done for DG JLS of the European Commission in 2007, p. 73.

43 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// *OJL* 212, 7.8.2001.

44 Art. 2(c)(ii).

45 Noll, G., *supra* note 18, p. 185.

were recognised as within the protection needs at the EU level under the Temporary Protection Directive. It would be worthwhile harmonising them in order to cover situations where dictatorial regimes or factions randomly commit large scale gross violations of human rights on their populations.⁴⁶

3.3. Persons Left out of Subsidiary Protection as a Result of Narrow Interpretation of Art. 15(c) of the Directive

Last, but not least, there are persons not afforded asylum because MSs interpret various circumstances differently. As a result, some MSs do and some do not grant protection to individuals coming from the same countries of origin (like Iraq, Chechnya and others). The European Commission acknowledged in the Policy Plan on Asylum that there are substantive divergences in the interpretation and application of the Directive across MSs.⁴⁷ Divergences resulting from the application of subsidiary protection against a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict” have been widely documented. Research has shown a tendency to narrow the scope of certain portions of this provision—most prominently, that of “individual threat”⁴⁸ in the highly restrictive interpretation of the term in line with recital 26 of the Directive.⁴⁹ This has resulted in the authorities of some MSs only accepting applicants who have been personally targeted or—in line with the restrictive approach enshrined in recital 26—applicants who face greater risk of harm than the rest of the population, or sections of it, in their country of origin. According to UNHCR, this renders protection offered by the Directive illusory for many persons and is inherently contradictory to Art. 15(c) which provides for protection from serious harm caused by “indiscriminate violence”.⁵⁰ This provision was interpreted by the EU Court for the first time in February 2009. The Court in *Elgafaji vs. Netherlands*⁵¹ reasoned that, in contrast to Art. 15(a) and (b) (which refer to types of harm that specifically target the applicant), Art. 15(c) “covers a more general risk of harm”, using the term “indiscriminate” to reinforce that. The term “individual” in Art. 15(c)—in the opinion of the Court—is to be understood as covering harm to all civilians, where violence reaches such a high level as to show “substantial grounds” to believe that a civilian, if returned, would face a real risk solely on the basis of being present. The more the applicant can show an individual risk due to factors particular to

46 Note of the Meijers Committee (Standing Committee of experts on international immigration, refugees and criminal law) on the proposals for recasting the Qualification Directive (COM(2009) 551) and the Procedures Directive (COM(2009) 554), 4 February 2010.

47 *Supra* note 5, p. 5.

48 ECRE Comments on the European Commission Proposal to recast the Qualification Directive, March 2010, p. 15, [interactive]. [accessed 20-04-2010]. <www.ecre.org>; see also: Garlic, M. UNHCR and the Implementation of the EC Qualification Directive. In *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States*. Zwaan, K. (ed.). Wolf Legal Publishers, 2007, p. 62.

49 “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”.

50 *Supra* note 22, p. 11, 15.

51 *Elgafaji vs. Staatssecretaris van Justitie*, C-465/07, European Court of Justice, 17 February 2009.

their personal circumstances, the lower the level of indiscriminate violence that must be shown. While the decision has clarified some aspects of applying this provision, maintaining recital 26 in the Directive continues to leave room for divergent interpretations by MSs.

Interpretations also vary with regard to restricting the scope of the definition of “internal armed conflict” and the definition of “armed conflict”. The term “internal armed conflict” is understood unevenly, since there is no agreed definition of it in international law. Decisions in France, Germany and Sweden highlight divergences in interpretation and application. As a result, the situation in parts of Iraq was considered as “internal armed conflict” in France, but not in Sweden where it was described as a “severe conflict”. Whilst the Swedish authorities considered the conflict in Chechnya as an “internal armed conflict”, the Slovak authorities did not. The application of this term in the Directive in at least some MSs appears to deny subsidiary protection to persons facing a real risk of serious harm in their country of origin.⁵² Furthermore, it is not clear what added value this term brings to a legal provision on subsidiary protection, as persons who face a real risk of serious harm due to indiscriminate violence and widespread human rights violations are in need of international protection regardless of whether the context is classified as an internal armed conflict or not.⁵³ Therefore, protection should also cover situations of generalised violence and systematic violations of human rights violations which do not amount to armed conflicts under international humanitarian law. This would remove any remaining ambiguities and allow for the realisation of Article 15(c)’s key added value which lies in the potential “to provide protection from serious risks which are situational, rather than individually targeted”.⁵⁴

3.4. Other Situations: Environmental, Health and Integration Considerations

What about other groups of persons who are currently not covered by the concept of subsidiary protection at the EU level but protected in practice by the MSs? Should environmental “refugees”, persons who cannot be expelled because of purely compassionate reasons or because of technical obstacles of return be included under the scope of subsidiary protection? It is claimed here that no, because there is no sufficient basis in international law and developed MS practice as a basis for harmonisation. With regard to environmentally displaced persons—at the current state of legislative developments they can be included in several existing categories of protected persons under international law. However there may be a normative protection gap for many of those who cross an international border.⁵⁵ Some of these persons fall under the existing protection regime as refugees or beneficiaries of subsidiary protection. There may be situations where victims of natural disasters flee from their homeland because their government

52 *Supra* note 22, p. 11–12.

53 *Ibid.*

54 *Supra* note 48, p. 16.

55 Kolmannskog, V.; Myrstad, F. Environmental Displacement in European Asylum Law. *European Journal of Migration and Law*. 2009, 11: 313.

has consciously withheld or obstructed assistance in order to punish or marginalize them on one of the five grounds set out in the refugee definition. In such a scenario, the persons concerned could legitimately be refugees in the traditional sense of the term.⁵⁶

As concerns purely humanitarian or compassionate grounds for the granting of asylum by MSs, there is also not a set of developed international law obligations. Issuance of residence is based on humanitarian traditions of the different MSs. There are thus groups neither covered by international or community law. As *Noll* suggests, differences in the protection offered by MSs are only problematic if and where these differences contradict protection obligations grounded in international law.⁵⁷

4. What Are Additional Arguments for Extending Subsidiary Protection in the Qualification Directive?

Having clarified who is not within the protective scope of the Directive and why these persons should be included through the extension of subsidiary protection, it is necessary to examine the additional value of extending such protection under EU instruments. The legal arguments presented above—to fully reflect international obligations of MSs by ensuring a minimum level of protection for all those in real need (as required for the establishment of the CEAS)—are clearly the most important in this respect. This would ensure full compliance with ECHR (Art. 3 and 8), CAT, ICCPR and with the best interests of the child principle. As we are entering the second phase of harmonization, it is important to consider that the whole CEAS is based on the full and inclusive application of the Geneva Convention; the obligations that flow from human rights instruments such as the ECHR; and on full respect for the rights enshrined in the Charter of Fundamental Rights.⁵⁸ Furthermore, once the EU accedes to the ECHR as a party, it will be bound to implement Art. 3 without any limitations on national security or other grounds. The Commission recognises that the human rights and refugee law standards, on which the EU asylum policy is based, set only the lower threshold, not the upper limits of harmonisation. Thus harmonisation, according to the Commission, may always go beyond this threshold, in line with the objectives set in the EU context.⁵⁹ However, as evidenced in the preceding chapter of this article, the current provisions of the Qualification Directive do not even touch upon human rights law standards, as a number of individuals in need of protection under international human rights law are left out of the scope of subsidiary protection.

Expansion of the notion of subsidiary protection under the Directive would have the additional benefit of moving towards the fulfilment of the objective of the Qualification Directive and ensuring consistency with other asylum instruments (e.g. Temporary

56 UNHCR Policy Paper “Climate Change, Natural Disasters and Human Displacement: a UNHCR Perspective”, 19 August 2009, p. 7.

57 Noll, G., *supra* note 36, p. 1.

58 *Supra* note 26, p. 6.

59 *Ibid.*, p. 10.

Protection Directive). Secondly, explicit coverage of certain individuals will limit the disparities that exist in MS legislation and practice. Given that the disparity of national asylum legislation was recognised from the very beginning as one of the main factors affecting asylum flows across the EU, harmonisation of this practice would likely have the impact of reducing asylum seekers onward movements within the Union. Evidence suggests that the harmonisation achieved by the Directive, so far, has not had any effect on secondary movements. Multiple applications remained high—at 17% in 2006 and 16% in 2007.⁶⁰ The European Council even states in the Stockholm Programme that “common rules, as well as better and more coherent application of them, should prevent or reduce secondary movements within the EU, and increase mutual trust between Member States”.⁶¹ However, in its Impact Assessment, the Commission only mentioned the need to address the different levels of rights in the different MSs granted to persons once recognised.⁶² Though, in the same document, the Commission states “it is imperative to tackle those factors which are linked to the divergences of national legislations and practices [...] and this can be achieved solely by enhanced harmonisation at the EU level.”⁶³ If further harmonisation is to be sought, the most probable objective criteria for it would be a mandatory international law. In fact, at least 3 MSs refer to international obligations as a basis for extending subsidiary protection under domestic law. National clauses that mention international obligations exist in Finland (“fulfil international obligations”) and Germany (“international law considerations”), while mentioning ECHR exists in the UK (“flagrant denial of any right guaranteed by the ECHR”).⁶⁴ Lastly, from a practical and financial point of view, the expansion of subsidiary protection would not have significant negative implications as a number of MSs already protect those persons under national law and many grant them certain rights—access to education, health care, employment and social welfare.⁶⁵

Conclusions

1. The current scope of subsidiary protection in the Qualification Directive is limited. The consequence of this is that significant disparities remain among MSs legal decisions, thereby undermining the objective of creating a harmonisation basis for CEAS, as well as failing to reduce incentives for the secondary movements of asylum seekers within the Union.

2. The concept of subsidiary protection in the Directive excludes a wide range of individuals who are considered in need of international protection based on the international obligations of MSs or existing MS practice. They include, but are not limited to:

60 *Supra* note 26, p. 14.

61 *Supra* note 2, p. 69.

62 *Supra* note 26, p. 8.

63 *Ibid.*, p. 19.

64 *Supra* note 33, p. 6.

65 *Ibid.*, p. 12.

- (a) persons undeserving protection but not deportable under international human rights law;
- (b) persons whose family life cannot be protected in the home country or children who cannot enjoy the protection of their country of origin;
- (c) persons fleeing systematic or generalised violence and human rights violations outside of the mass influx of refugees situations;
- (d) persons facing serious harm in disputable international or internal conflict situations.

3. It should be stressed, however, that the rationale for the expansion of subsidiary protection to cover the abovementioned persons lies in their need for international protection, as opposed to being based on compassionate grounds—some MSs may be granting suspension of deportation or providing other solutions in their territories for these reasons.

4. Extension of subsidiary protection on the basis of international human rights law and existing MS practice would contribute to fulfilling the objective of the Directive and to building the CEAS based on international obligations of MSs. It is likely to effectively reduce secondary movements within the Union.

5. Given these circumstances, it is unjustifiable that the European Commission has not made an effort to address this issue in its Recast Proposal for Qualification Directive while the task remains to be nevertheless relevant for further stages of harmonisation.

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AR REIKIA PLĖSTI PAPILDOMOS APSAUGOS APIMTĮ PAGAL EUROPOS SAJUNGOS KVALIFIKAVIMO DIREKTYVĄ?

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Santrauka. Bendrosios Europos prieglobsčio sistemos (toliau – BEPS) sukūrimas iki 2012 m. išlieka vienu iš pagrindinių Europos Sąjungos (toliau – ES) politikos prioritetų. ES tarybos nuomone, bendroji prieglobsčio politika turi būti grindžiama visišku ir visapusišku 1951 m. konvencijos dėl pabėgėlių statuso įgyvendinimu ir kitais susijusiais tarptautiniais dokumentais. Kaip pripažįstama Europos imigracijos ir prieglobsčio pakte, ES valstybių narių labai skirtingos apsaugos suteikimo procedūros ir formos. Ši situacija įvardijama kaip viena iš pagrindinių problemų, kurią būtina spręsti, kai kuriama BEPS. Pakankamai akivaizdu, kad šie minėti procesų valstybėse narėse skirtumai tiesiogiai turi įtakos kuriant BEPS, kadangi prieglobsčio prašytojai, ieškodami apsaugos ES, renkasi valstybes nares taip pat atsižvelgdami, ar jose jiems bus suteikta vienokia arba kitokia apsauga, todėl neišvengiami taip vadinamieji antriniai migraciniai srautai. Atsižvelgdama į šias priežastis Europos komisija nusprendė antrame BEPS kūrimo etape ypač daug dėmesio skirti papildomos apsaugos ir kitoms apsaugos formoms.

2004 m. balandžio 29 d. priimta ES kvalifikavimo direktyva pirmą kartą įtvirtino valstybių narių teisinę pareigą suteikti papildomą apsaugą asmenims, kuriems nesuteikiamas pabėgėlio statusas, tačiau jiems reikia apsaugos dėl kitų priežasčių, nei įvardytos 1951 m. Pabėgėlių konvencijoje. Pasibaigus direktyvos perkėlimo į nacionalinę valstybių narių teisę terminui, vis daugiau praktikų ir mokslininkų pripažįsta, kad šiuo metu direktyvoje įtvirtinta papildomos apsaugos apimtis *ratione personae* netaikoma visiems asmenims, kuriems reikia apsaugos, remiantis tarptautine teise arba ES valstybių narių praktika, nors direktyva kelia tikslą suteikti apsaugą visiems, kuriems jos reikia.

Šiame straipsnyje autorė kelia du pagrindinius klausimus: pirma, ar reikia plėsti papildomą apsaugą pagal ES kvalifikavimo direktyvą, siekiant, kad jos nuostatos būtų suderintos su tarptautinės žmogaus teisių teisės standartais bei užtikrintų tinkamą valstybių narių teisės ir praktikos harmonizavimą, būtiną BEPS sukurti; antra, kokiems asmenims taip būtų stiprinama apsauga? Taigi straipsnio tikslas – nustatyti situacijas, kai asmenims, kuriems Kvalifikavimo direktyvoje šiuo metu nenumatyta papildoma apsauga, vis dėlto reikia tarptautinės apsaugos, bei įvertinti, kokiais teisiniais argumentais remiantis jiems ši apsauga turėtų būti išplėsta. Be teisinių argumentų, straipsnyje taip pat pateikiamas galimų praktinių, finansinių ir kitų apsaugos išplėtimo papildomiems asmenims pasekmių vertinimas.

Autorė konstatuoja, kad papildoma apsauga pagal direktyvą turėtų būti sustiprinta ir tiems asmenims, kurie negali būti išsiunčiami remiantis absoliučiomis valstybių pareigomis pagal tarptautiniuose žmogaus teisių dokumentuose įtvirtintą asmens negražinimo principą; tais atvejais, kai išsiunčiant būtų pažeista teisė į pagarbą šeimos gyvenimui arba nepilnamečio interesai, kai tai neįmanoma užtikrinti asmens kilmės valstybėje; išimtiniais atvejais, kai asmeniui nesuteikiama sveikatos apsauga ir tai gali sukelti mirtinas pasekmes;

kai asmenys priversti individualiai (ne masinio srauto atveju) išvykti iš kilmės valstybės dėl plačiai paplitusio smurto ar rimtų žmogaus teisių pažeidimų. Tačiau, autorės nuomone, ši apsauga turi būti stiprinama atsižvelgiant į tarptautinės apsaugos poreikį, o ne dėl humanitarinių paskatų. Pastarosios, jos nuomone, ir toliau turėtų likti ES valstybių narių diskrecija. Atsižvelgiant į poreikį plėsti apsaugą nepateisinama, kad Europos komisija, 2009 m. spalio 21 d. pateiktuose pasiūlymuose pakeisti Kvalifikavimo direktyvą, net neužsimena apie Direktyvos 15 straipsnio (papildomos apsaugos pagrindai) pakeitimus. Tačiau tokių pakeitimų poreikis išlieka, jei norima ir toliau siekti bendros valstybių narių prieglobsčio politikos ir praktikos.

Straipsnis gali būti naudingas nacionaliniams ir Europos prieglobsčio politikos rengėjams, sprendimų priėmėjams, nevyriausybiniams organizacijoms bei mokslininkams, kurie domisi ES prieglobsčio teisės aktų trūkumais ir dėl šių trūkumų kylančių problemų galimais sprendimo būdais.

Reikšminiai žodžiai: *pabėgėliai, asmenys, kuriems suteikta papildoma apsauga, užsieniečių teisinė padėtis, prieglobstis, papildoma apsauga, laikina apsauga, tarptautinė apsauga, ES kvalifikavimo direktyva, tarptautinė žmogaus teisių teisė.*

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