

# **NEW ISSUES IN REFUGEE RESEARCH**

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## **The European Union proposal on subsidiary protection: an analysis and assessment**

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## Introduction

The European Commission's proposal on subsidiary protection ('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') completes the Commission's proposed set of 'building blocks' in the first step towards a Common European Asylum System ('CEAS').<sup>1</sup> According to the Tampere Conclusions of October 1999, the CEAS is to be based on 'the full and inclusive application of the Geneva Convention'<sup>2</sup> in order to maintain the principle of *non-refoulement*.<sup>3</sup>

The main aim of the Proposal is to ensure that the laws and practices of the European Union (EU) member states are harmonized to provide a minimum level of protection to persons determined to be Convention refugees or beneficiaries of subsidiary protection, so as to prevent refugee flows based solely on differing levels of protection in member states' legal frameworks.<sup>4</sup> The Proposal sets out the applicable rules for determining refugee and subsidiary protection statuses, but does not cover persons permitted to stay on purely compassionate grounds, on the basis that this does not relate to an international protection need.<sup>5</sup>

## The significance of the Proposal

The development of the Proposal appears to be a practical and positive response to the limitations of the Convention definition, and an essential step towards creating more coherent practices in the provision of international protection in Europe.<sup>6</sup> In theory, it

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<sup>1</sup> 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 (Brussels 12 September 2001) (henceforth 'Proposal'). All page references are to the pdf version of this document at: [http://www.ecre.org/eu\\_developments/qual.shtml](http://www.ecre.org/eu_developments/qual.shtml).

<sup>2</sup> Convention Relating to the Status of Refugees, adopted 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (henceforth 'Convention'). Unless otherwise stated, references to the 'Convention' also include the Protocol Relating to the Status of Refugees, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

<sup>3</sup> Presidency Conclusions Tampere European Council 15–16 October 1999, SN 200/99 [13]. See also UNHCR, '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' (Geneva November 2001), [http://www.ecre.org/eu\\_developments/unqual.doc](http://www.ecre.org/eu_developments/unqual.doc) [1] (henceforth 'UNHCR Observations').

<sup>4</sup> 'Explanatory Memorandum' in Proposal (n 1) 4 (henceforth 'Explanatory Memorandum').

<sup>5</sup> UNHCR Executive Committee of the High Commissioner's Programme Standing Committee 18<sup>th</sup> 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] (henceforth 'UNHCR Complementary Protection').

<sup>6</sup> GS Goodwin-Gill and A Hurwitz 'Draft 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' (submission to the House of Lords April 2002) [1].

allows for movement away from the textual constraints of the refugee definition contained in Article 1A(2) of the Convention, to a more inclusive and flexible framework providing protection for a greater number of people based largely on general human rights standards. However, the Proposal does not seek to create a new system of protection, but rather attempts to distil states practice by drawing on the ‘best’<sup>7</sup> elements of the 15 member states’ national systems to create a harmonised approach to complementary protection in the EU. It is therefore not intended as a radical overhaul of protection but as a codification of existing state practice.

While this approach evidences a pragmatic response to the political realities of the EU and the need to create a document of compromise, it means that the Proposal does not result from a comprehensive and systematic analysis of all protection possibilities within international human rights law. Further, it is probable that the Proposal will not lead to more people being granted protection in the EU because it is based on existing practices rather than a new regime.<sup>8</sup>

The Proposal divides protection into two categories - refugee protection, based on the ‘full and inclusive application’ of the Convention, and subsidiary protection, based on international human rights instruments. The term ‘subsidiary protection’ reveals the nature of the Proposal regime, which emphasizes the primacy of the Convention and places complementary protection in a secondary role.<sup>9</sup>

Subsidiary protection is to be granted only if an applicant does not meet the criteria for refugee status, or if the application for protection explicitly excludes the Convention as a source of protection.<sup>10</sup> It takes effect where an applicant can demonstrate a well-founded fear of being subjected to torture, inhuman or degrading treatment (reflecting Article 3 of the European Convention on Human Rights<sup>11</sup>); a violation of other human rights, sufficiently severe to engage international protection obligations; or a threat to life, safety or freedom as a result of indiscriminate violence in armed conflict or generalised violence.<sup>12</sup>

In an attempt to achieve EU-wide consistency in the interpretation of the Convention, the Proposal also clarifies who qualifies for refugee status by defining ‘persecution’ and explaining the categories of people who fall within the five Convention grounds. Although the Proposal does not create any new classes of Convention protection, it gives a definitive status to common grey areas where interpretations across the EU states have varied (such as in relation to victims of generalized violence, persecution by non-state agents and gender-based persecution).

The Proposal also details the substantive rights which states owe to beneficiaries of international protection. Broadly speaking, all beneficiaries are granted the same

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<sup>7</sup> Explanatory Memorandum (n 4) 6.

<sup>8</sup> T Spijkerboer ‘Subsidiarity in Asylum Law: The Personal Scope of International Protection’ in D Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002) 39.

<sup>9</sup> ‘Subsidiary protection’ is used here to refer to complementary protection in the Proposal, while ‘complementary protection’ refers to alternative forms of protection more generally.

<sup>10</sup> Proposal, Art 5.

<sup>11</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (Rome, 4 November 1950; ETS No 5 (1953)) (henceforth ‘ECHR’).

<sup>12</sup> Proposal, Art 15.

rights. However, the differences that do exist are significant and afford lesser rights to persons granted subsidiary protection. Although the Explanatory Memorandum premises this on ‘the need for [subsidiary] protection [being] temporary in nature’, in the same sentence it acknowledges that ‘in reality the need for subsidiary protection often turns out to be more lasting.’<sup>13</sup>

Given the lack of empirical evidence to support subsidiary protection as a temporary status, Goodwin-Gill and Hurwitz argue that it is ‘a poor reason for a lesser standard of treatment.’<sup>14</sup> Both Convention refugees and beneficiaries of subsidiary protection have been identified as having a protection need, and it makes no sense to discriminate between them on the basis of protection granted. Further, this differentiation may lead to states favouring subsidiary protection by ‘defining out’ categories of persons who technically fall within Article 1A(2), so as to avoid granting the full gamut of rights owed to Convention refugees.

There is evidence of EU states having adopted this practice over the past decade, and although the Proposal seeks to clarify some of the grey areas where this has occurred, it cannot cover all potential situations. Thus, there may be future cases where states adopt restrictive interpretations of the definition so as to contain the number of persons to whom they are obliged to grant full protection rights in accordance with the Convention. This practice threatens the ‘full and inclusive application’ of the Convention and may undermine states’ obligations under international law.

Article 3 of the Proposal for a Council Directive on Minimum Standards on Procedures in member states for Granting and Withdrawing Refugee Status<sup>15</sup> requires member states to implement the Proposal’s provisions on refugee protection, however the application of subsidiary protection provisions is optional.<sup>16</sup> As Goodwin-Gill and Hurwitz have pointed out, ‘expressions of confidence in the ability of EU member states to fulfil their international obligations are no substitute for concrete measures of implementation.’<sup>17</sup>

The fact that member states may retain national policies on complementary protection if they choose could lead to a gap in the harmonisation process.<sup>18</sup> On the other hand, applying the Proposal may allow some states to downgrade the protection they presently offer. This is expressly contemplated by Article 4, which provides that member states ‘may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person in need of subsidiary protection, and in determining the content of international protection’. While the option for states to introduce or retain more favourable standards of treatment is to be encouraged, there is a risk that some states may instead choose to lower their standards to the minimum level required by the Proposal.

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<sup>13</sup> Explanatory Memorandum (n 4) 4.

<sup>14</sup> GS Goodwin-Gill and A Hurwitz (n 6) [19].

<sup>15</sup> COM (2000) 578 final (20 September 2000) (henceforth ‘Procedures Proposal’).

<sup>16</sup> Procedures Proposal, Art 3(3).

<sup>17</sup> GS Goodwin-Gill and A Hurwitz (n 6) [1].

<sup>18</sup> GS Goodwin-Gill and A Hurwitz (n 6) [20].

## The international legal framework

Under international law, the Convention is the key instrument regulating refugee protection, with Articles 1A(2) and 33 forming the cornerstones. Despite the ratification of a number of human rights treaties since the Convention's adoption in 1951, states have been reluctant to formally acknowledge their protection obligations under these instruments. Although the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>19</sup> is the only other universal treaty to explicitly refer to *non-refoulement*, Article 7 of the International Covenant on Civil and Political Rights<sup>20</sup> has been held to implicitly prohibit *non-refoulement*,<sup>21</sup> while Article 3 of the regional ECHR extends CAT Article 3 beyond cases of torture to include inhuman or degrading treatment or punishment as grounds for *non-refoulement*.

In addition to these restraints on returning an asylum seeker to territories in which his or her life or freedom would be threatened, treaties such as the ICCPR and International Covenant on Economic, Social and Cultural Rights<sup>22</sup> contain substantive rights which states parties owe to all persons within their territories. Article 3 of the Convention on the Rights of the Child,<sup>23</sup> which states that in all decisions affecting children 'the best interests of the child' shall be a primary consideration, may temper the application of the refugee definition in cases concerning children, as the two principles may not always be compatible. Further, the rights which all children are owed under the CRC may extend international protection beyond the regime contemplated by the Convention.<sup>24</sup>

Although most states have retained the Article 1A(2) definition as the test for refugee status, states practice has revealed a general broadening of the concept of *non-refoulement*, which has led to a greater use of complementary protection measures. This has paralleled the expansion of UNHCR's mandate beyond the protection of Convention refugees to include OAU and Cartagena refugees, internally displaced persons, stateless persons, refugees fleeing man-made disasters, and rejected cases.<sup>25</sup>

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<sup>19</sup> Adopted on 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) (henceforth 'CAT').

<sup>20</sup> Adopted 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (henceforth 'ICCPR').

<sup>21</sup> See *Soering v United Kingdom* Series A No 161, (1989) 11 EHRR 439, 467; UN Human Rights Committee, *General Comment 20 (1992)*, UN doc HRI/HEN/1/Rev1 (28 July 1994) [9].

<sup>22</sup> Adopted 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

<sup>23</sup> Adopted 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (henceforth 'CRC').

<sup>24</sup> In Sweden, the CRC is being used in the determination of refugee claims where children are involved. In one case, a Togolese family sought asylum on the grounds of the father's political activities, but his reasons were deemed insufficient to warrant protection. However, the whole family was granted protection in Sweden on the grounds of risk of persecution on account of sex (which has been specifically incorporated as a ground of persecution in the Swedish Aliens Act) because there was a high risk that the man's two daughters would be forced to undergo female genital mutilation if the family was returned to Togo. Here, it was the children's fear of persecution that resulted in the whole family obtaining protection: see J Schiratzki 'Best interests of the Child in the Swedish Aliens Act' (2000) 14 *International Journal of Law, Policy and the Family* 206, 212.

<sup>25</sup> See GS Goodwin-Gill *The Refugee in International Law* (2<sup>nd</sup> edn Oxford University Press Oxford 1996) 28, referring to Report of the Working Group on Solutions and Protection, UN doc EC/SCP/64 (12 August 1991) [8]–[53].

However, despite the support of UNHCR's Executive Committee, the General Assembly and states generally in widening UNHCR's area of activities, states have expressed concerns about any corresponding broadening of the Convention definition. While acknowledging that persons fleeing armed conflict or internal disturbances need international protection, some states have argued that this does not derive from any obligation, but is purely a matter of states discretion. In 1982, the USA and UK stressed that UNHCR's mandate was 'sufficiently flexible and adaptable to changing requirements'<sup>26</sup> so that no expansion of it or the Convention definition was necessary. In the mid-1980s, Switzerland argued that protecting persons outside Article 1A(2) was based not on any Convention obligation but on considerations of humanitarian law or international solidarity - 'on a free decision by the states concerned'.<sup>27</sup> The Netherlands maintained that such protection was based on national asylum policies rather than international obligations.<sup>28</sup> Similarly, Germany argued that there was no right of asylum for persons outside the Convention, and that what counted was the 'prerogative of sovereign states to regulate the entry of aliens'.<sup>29</sup> In country reports compiled for the European Commission in 2001, the only international instrument listed as a source of protection obligations was the Convention, with a few states also acknowledging the ECHR as a regional source of protection.<sup>30</sup>

The significance of the Proposal is that for the first time, complementary protection is explicitly recognised as having a basis in international obligations under human rights instruments<sup>31</sup> and the fundamental rights and principles recognised in the Charter of Fundamental Rights of the European Union.<sup>32</sup> The Proposal is the first supranational instrument to outline a comprehensive complementary protection regime, moving 'complementary protection' beyond the realm of ad hoc and discretionary national practices to formalise it as part of EU asylum law.

## **Recent protection trends in the EU**

The decade since 1992 has seen an overall decline in the number of people granted Convention refugee status in Europe. One reason for this is 'a growing mismatch between the nature of demand and the criteria of the Geneva Convention'<sup>33</sup> - namely, that flows resulting from armed conflicts are difficult to fit within Convention notions of persecution. However, a greater use of complementary and temporary protection mechanisms corresponds to increasingly restrictive interpretations in all EU states as to who meets the criteria of the Article 1A(2) definition, so that now only a small

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<sup>26</sup> Report of the 33<sup>rd</sup> Session, UN doc A/AC.96/614 (1982) [43(f)]; UN doc A/AC.96/SR.344 [11] (USA) and SR.352 [60]–[62] (UK), as cited in GS Goodwin-Gill (n 25) 26.

<sup>27</sup> UN doc A/AC.96/SR.430 (1988) [42], as cited in GS Goodwin-Gill (n 25) 27.

<sup>28</sup> Summary Records 36<sup>th</sup> Session, UN doc A/AC.96/SR.391 (1985) [72], as cited in GS Goodwin-Gill (n 25) 26.

<sup>29</sup> UN doc A/AC.96/SR.418 (1987) [71], as cited in GS Goodwin-Gill (n 25) 27.

<sup>30</sup> See individual country reports of the EU member states at:

[http://europa.eu.int/comm/justice\\_home/unit/immigration\\_en.htm](http://europa.eu.int/comm/justice_home/unit/immigration_en.htm)

<sup>31</sup> Preamble of Proposal, [18].

<sup>32</sup> Preamble of Proposal, [7].

<sup>33</sup> Commission of the European Communities, Communication from the Commission to the Council and the European Parliament: Towards a Common Asylum Procedure and a Uniform Status, Valid Throughout the Union, for Persons Granted Asylum, COM (2000) 755 final (Brussels 22 November 2000) 5 (henceforth 'Commission Communication').

proportion of people seeking asylum in Europe are recognised as Convention refugees.<sup>34</sup>

Empirical research shows that some EU states grant complementary protection far more often than Convention status, while others rely more heavily on the Convention for determining the protection needs of asylum seekers.<sup>35</sup> The significant divergence in recognition rates of Convention refugees does not indicate that some states simply receive more refugees than others, but rather illustrates the different interpretations states place on the Article 1A(2) meaning of ‘refugee’.

From 1997 to 1999, Denmark, Finland, Germany, Greece, The Netherlands, Portugal, Spain and Sweden granted more complementary forms of protection than Convention refugee statuses, with the proportion of subsidiary forms of protection in relation to the total number of statuses granted reaching over 70 per cent in Denmark, Finland, Greece, Portugal and Sweden.<sup>36</sup> In 1998 and 1999, the proportion of people granted complementary protection as opposed to Convention status at least doubled in The Netherlands, Greece, Finland, Sweden, Denmark and Portugal.<sup>37</sup> These trends are illustrated in Table 1 (see next page).

These figures signal a shift in the application and function of complementary protection. Although complementary protection has always been contemplated in relation to the Convention, it was traditionally applied only to persons who were in a refugee-like situation but could not come within Article 1A(2). The Conference of Plenipotentiaries responsible for adopting the final draft of the Convention recognised that Article 1A(2) could never cover all situations where persons might require international protection, and thus in its Final Act recommended that states apply the definition beyond its strict scope.<sup>38</sup>

Many states followed this direction by extending protection to persons persecuted after 1 January 1951, until this temporal restriction was removed by the 1967 Protocol. There was no suggestion that such extended protection ought to be applied differently from protection under the Convention - it was not intended as a secondary (or subsidiary) mechanism. UNHCR has continued to acknowledge that however properly the Convention definition might be applied, there are persons requiring protection who do not strictly come within its scope. Consequently, it has promoted the adoption of complementary protection regimes to address their needs.<sup>39</sup>

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<sup>34</sup> See, for eg European Commission Directorate General for Justice and Home Affairs, *Study on the Legal Framework and Administrative Practices in the Member States of the European Communities Regarding Reception Conditions for Persons Seeking International Protection: Final Report* (November 2000) 38, at:

[http://europa.eu.int/comm/justice\\_home/unit/doc\\_asile\\_immigrat/final\\_rapport\\_en.pdf](http://europa.eu.int/comm/justice_home/unit/doc_asile_immigrat/final_rapport_en.pdf) (henceforth ‘EC Study’); United Nations General Assembly, Executive Committee of the High Commissioner’s Programme, ‘Note on International Protection’, A/AC.96/930 (7 July 2000) [35]; ECRE, ‘Position on the Harmonisation of the Interpretation of Article 1 of the 1951 Refugee Convention’ (June 1995) <http://www.ecre.org/positions/art1.shtml>; ECRE, ‘Position on Complementary Protection’ (September 2000) <http://www.ecre.org/positions/cp.shtml> [2], [7].

<sup>35</sup> See EC Study (n 34) 9.

<sup>36</sup> EC Study (n 34) 23.

<sup>37</sup> Commission Communication (n 33) 6 fn 1.

<sup>38</sup> GS Goodwin-Gill (n 25) 19.

<sup>39</sup> UNHCR Observations (n 3) [4].



**Table 1: The ratio of subsidiary forms of protection and Convention status granted in relation to the total number of statuses given (per cent)<sup>40</sup>**

	1997		1998		1999	
	Sub	Conv	Sub	Conv	Sub	Conv
Austria	-	-	27.64	72.36	20.71	79.29
Denmark	78.16	21.84	73.05	26.95	70.68	29.32
Finland	98.59	1.41	98.15	1.85	94.15	5.85
Germany	59.78	40.22	57.54	42.46	66.72	33.28
Greece	83.07	16.93	74	26	74.16	25.84
Ireland	36.04	63.96	13.85	86.15	6.41	93.59
Netherlands	45.61	54.39	60.38	39.62	69.73	30.27
Portugal	75.	25	87.50	12.50	75.76	24.24
Spain	55.56	44.44	75.26	24.74	62.19	37.81
Sweden <sup>41</sup>	-	-	84.05	15.95	-	-
UK	43.87	56.13	42.25	57.75	22.96	77.04
Average	48.44	51.56	52.79	47.21	43.33	56.67

Although complementary protection performs this function to an extent, it is now also used as a means of siphoning genuine refugees into a category which places less onerous protection obligations on states. Some of the key grey areas which states have sought to ‘define out’ of the Convention definition are examined below.

### **Sources of protection in the EU**

To understand the Proposal’s significance, it is necessary to briefly examine member states’ current national protection regimes. Given the diversity of asylum laws in these countries, the survey below highlights general principles, and draws attention to areas where there is notable divergence in states practice.

#### *Article 1A(2)*

Throughout the EU, the Article 1A(2) definition of a ‘refugee’ is either applied directly or incorporated into domestic legislation and is the starting point for any individual refugee claim. However, interpretational inconsistencies mean that each states has its own standards and methods of determining who falls within Article 1A(2), and accordingly protection depends on the states’ specific approach. This is particularly pertinent in relation to persecution by non-state agents, discussed below. In all member states, Convention refugees obtain the most comprehensive range of rights accorded to beneficiaries of international protection.

<sup>40</sup> No figures are available on the breakdown of ‘subsidiary status’ into complementary protection and protection granted on purely compassionate or humanitarian grounds: Bela Hovy, Head of Statistics UNHCR (11 April 2002). My understanding is that the table is based on all applications made for protection, which implies applications made under the Convention and then accorded either Convention refugee status, an alternative status or no status.

<sup>41</sup> Sweden has not provided any information on either the number of subsidiary forms of protection or Convention statuses granted in 1997 and 1999. Belgium, France, Luxembourg and Italy have only provided information on the number of Convention statuses and therefore these countries are not included in the table. Austria has only provided both numbers for 1998 and 1999.

The situation is slightly different in Germany, where persons persecuted on ‘political’ grounds enjoy the constitutional ‘right of asylum’ under Article 16a(1) of the Grundgesetz (‘Basic Law’), while section 51(1) of the Ausländergesetz (‘Aliens Act’) of July 1990 states that an alien may not be removed to a states in which ‘his life or freedom would be threatened due to his race, religion, nationality, membership of a particular social group, or political opinion’.<sup>42</sup> The German Federal Constitutional Court has held that political asylum under the Constitution encompasses persons who have suffered, or are at imminent risk of, states persecution on grounds relevant for asylum purposes, above all race, religion, nationality, membership of a particular social group and political conviction. Both a request for recognition as a victim of persecution under the Constitution, and a request for protection against deportation under section 51 of the Aliens Act, are considered when an asylum application is processed.<sup>43</sup> While both categories are considered to be Convention refugees, recipients of Constitutional asylum receive greater advantages in terms of residence (unlimited residence permits instead of temporary), work permits and access to other states benefits.<sup>44</sup>

### *ECHR and CAT*

Protection under these instruments clearly forms a part of states practice, although again to differing degrees. Article 3 of the ECHR states that: ‘No one shall be subjected to torture or to inhuman or degrading treatment or punishment’, while the prohibition on *refoulement* in Article 3 of the CAT is slightly more restrictive in applying to cases of torture only.

In reports on states practice submitted to the Council of the European Union, a number of states expressly acknowledged violations of Article 3 of the ECHR as a ground of protection,<sup>45</sup> while others referred in more general terms to elements such as ‘a threat of capital punishment, torture or other inhuman or degrading treatment’<sup>46</sup> as warranting protection. Whereas most countries grant a residence permit where deportation would violate Article 3, in Ireland protection is discretionary, and in Germany deportation is only a violation of Article 3 if the risk concerns maltreatment by states agents.<sup>47</sup>

In almost all states where this type of protection exists, the substantive rights granted are less than those of Convention refugees. On the basis of country reports, the exceptions are Denmark, Finland, The Netherlands and Sweden, where protection appears to be the same for all beneficiaries of international protection (excluding

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<sup>42</sup> A new Immigration Act, the Zuwanderungsgesetz, is due to come into force in Germany on 1 January 2003. Section 60 of that Act replaces section 51 of the Aliens Act, and extends the prohibition on deportation to victims of gender-specific and non-state persecution.

<sup>43</sup> K Hailbronner ‘Comparative Legal Study on Subsidiary Protection - Germany’ in Bouteillet-Paquet (n 8) 491–92.

<sup>44</sup> Council of the European Union, ‘Compilation of Replies Received to the Questionnaire on Alternative Forms of Protection to Refugee Status under the Geneva Convention’, 12261/00 CIREA 64 (Brussels 12 October 2000) 17 (Germany) (henceforth ‘EU Questionnaire’). No information is available in this report on Ireland or The Netherlands.

<sup>45</sup> Denmark, Germany, Spain, France, UK.

<sup>46</sup> EU Questionnaire (n 44) 50 (Finland).

<sup>47</sup> T Spijkerboer (n 8) 30; cf *TI v United Kingdom* [2000] INLR 211 (ECtHR).

under specific temporary protection regimes), and Portugal, where the only difference in treatment seems to be the length for which a residence permit is granted.<sup>48</sup>

### *Complementary protection*

A number of member states offer protection on other grounds. This can broadly be described as ‘complementary protection’, but is not necessarily identified by states in those terms. The meaning of ‘complementary protection’ is thus diverse, making comparisons between EU domestic regimes and the Proposal’s harmonization of their laws inherently difficult. In some states, for example, subsidiary protection is simply an obligation not to remove a person (such as in Austria, Luxembourg and Spain), while in others it requires the grant of a residence permit of some kind (such as in Sweden, the UK and Italy).<sup>49</sup>

In Spain, complementary protection may be extended to ‘persons who, as a result of serious conflicts or disturbances of a political, ethnic or religious nature, have been obliged to leave their country and who do not fulfil the requirements laid down in the definition of refugee.’<sup>50</sup> In Portugal, ‘subsidiary protection’ is available to those ‘who are prevented or do not feel they can return to the country of their nationality or of their habitual residence for reasons of serious insecurity owing to armed conflicts or systematic violation of human rights which are occurring there.’<sup>51</sup>

In Finland, a residence permit may be granted where a person ‘cannot return because of an armed conflict or environmental disaster.’<sup>52</sup> Sweden allows for alternative protection on the grounds of external or internal armed conflict, an environmental disaster, or a well-founded fear of persecution based on a person’s sex or homosexuality.<sup>53</sup> In the UK, Exceptional Leave to Remain may be granted where the circumstances are so exceptional and compassionate that they warrant leave to remain in the country.

The incentive for member states to harmonize subsidiary protection laws as far as possible in the Proposal is to limit secondary movements of asylum seekers within the EU and prevent ‘forum shopping’ on the basis of procedures and levels of protection available.<sup>54</sup> However, as noted above, states are not obliged to implement the Proposal’s provisions on complementary protection, which seriously jeopardises its practical effect.

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<sup>48</sup> See country reports of EC Study (n 34) for eg, [http://europa.eu.int/comm/justice\\_home/unit/doc\\_asile\\_immigrat/netherlands\\_final\\_en.pdf](http://europa.eu.int/comm/justice_home/unit/doc_asile_immigrat/netherlands_final_en.pdf); EC Questionnaire (n 44).

<sup>49</sup> 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).

<sup>50</sup> EU Questionnaire (n 44) 23 (Spain).

<sup>51</sup> Portuguese Asylum Act 1998, Art 8.

<sup>52</sup> EU Questionnaire (n 44) 50 (Finland).

<sup>53</sup> EU Questionnaire (n 44) 53 (Sweden).

<sup>54</sup> F Roscam-Abbing ‘Subsidiary Protection: Improving or Degrading the Right of Asylum in Europe?’ in Bouteillet-Paquet (n 8) 50.

### *Temporary protection*

Temporary protection in the EU is now regulated by the Council Directive 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,<sup>55</sup> which was adopted on 20 July 2001 and entered into force on 7 August 2001. All member states (except Ireland and Denmark) are bound and in accordance with Article 32(1) must ensure that the necessary domestic implementing legislation is in place by 31 December 2002.

Temporary protection is described as a ‘procedure of exceptional character’ which provides immediate and temporary protection to persons ‘in the event of a mass influx or imminent mass influx of displaced persons’, especially where there is ‘a risk that the asylum system will be unable to process this influx without adverse effects for its efficient operation, in the interests of the persons concerned and other persons requesting protection’.<sup>56</sup>

### **Some questions concerning the Proposal**

#### *Who is a refugee?*

Articles 11 and 12 of the Proposal outline the nature and reasons for persecution which qualify a person for protection as a refugee in accordance with Article 1A(2). ‘Persecution’ is defined in Article 11(1)(a) of the Proposal as:

the infliction of serious and unjustified harm or discrimination on the grounds of race, religion, nationality, political opinion or membership of a particular social group, sufficiently serious by its nature or repetition as to constitute a significant risk to the applicant’s life, freedom or security or to preclude the applicant from living in his or her country of origin.

For an act to constitute ‘persecution’, it must be ‘intentional, sustained or systematic’ and ‘sufficiently serious’ to make return to the country of origin untenable.<sup>57</sup> According to the Commentary, the concept of ‘persecution’ is not fixed in time and should be sufficiently flexible to reflect ever-changing forms of persecution which could constitute a basis for refugee status.<sup>58</sup>

Although the Proposal’s definition is based on Article 1A(2), it does not use the same language. UNHCR argues that ‘it is strongly advisable to adhere to accepted language and terminology in order to avoid confusion of concepts’<sup>59</sup> and that a failure to do so could lead to a misstatement of the legal position. Another problem is that it defines ‘persecution’ by describing the grounds on which persecution may occur. As the European Council on Refugees and Exiles (ECRE) has noted, this could confuse

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<sup>55</sup> COM (2000) 303 final (Brussels 24 May 2000) (henceforth ‘Temporary Protection Directive’).

<sup>56</sup> Temporary Protection Directive, Art 2(a).

<sup>57</sup> ‘Commentary on Articles’ in Proposal ( n 1) 19 (henceforth ‘Commentary’).

<sup>58</sup> Commentary ( n 57) 19.

<sup>59</sup> UNHCR Observations ( n 3) [7] fn 14.

interpretational issues relating to the nature of persecution with the reasons for it. As such, ECRE recommends deleting ‘on the grounds of race, religion, nationality, political opinion or membership of a particular social group’.<sup>60</sup>

Persecution under Article 11 also extends to discriminatory legal, administrative, police and/or judicial measures; prosecution or punishment for a criminal offence where the applicant is either denied means of judicial redress or suffers a disproportionate or discriminatory punishment, or the criminal offence for which the applicant is at risk of being prosecuted or punished purports to criminalise the exercise of a fundamental right; and prosecution or punishment for refusal to meet a general obligation to perform military service if the applicant is denied means of judicial redress or suffers a disproportionate or discriminatory punishment, or in situations of war or conflict, where the person can show that performance of military service will require participation in military activities which are irreconcilable with valid reasons of conscience. In all these cases, the basis for discrimination must be one of the five Convention grounds.

#### *Who is eligible for subsidiary protection?*

The rules for qualifying as a ‘person eligible for subsidiary protection’ are set out in Chapters II and IV of the Proposal . Article 5(2) of Chapter II states that:

Without prejudice to existing constitutional obligations, subsidiary protection shall be granted to any third country national or stateless person who does not qualify as a refugee, according to the criteria set out in Chapter III of this Directive, or whose application for international protection was explicitly made on grounds that did not include the Geneva Convention, and who, owing to a well-founded fear of suffering serious and unjustified harm as described in Article 15, has been forced to flee or to remain outside his or her country of origin and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country.

As the opening line of this provision indicates, member states’ duties under the Proposal may be modified by any constitutional obligations which run counter to them. This is contrary to the position in international law, where a states party to a treaty ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty.’<sup>61</sup>

The second point of note is the test for subsidiary protection status. It is modeled on Article 1A(2) of the Convention, with ‘persecution’ replaced by ‘suffering other serious and unjustified harm’. According to the Commentary, ‘persecution’ is a type

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<sup>60</sup> ECRE, Comments 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 (London March 2002), <http://www.ecre.org/statements/statuscomms.shtml> ‘Article 11 (The Nature of Persecution)’ (henceforth ‘ECRE Comments’).

<sup>61</sup> Vienna Convention on the Law of Treaties, adopted 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980), Art 27.

of ‘serious unjustified harm’ (hence the addition of the word ‘other’) which is causally linked to one or more of the five grounds in Article 1A(2).<sup>62</sup> The word ‘unjustified’ is added to contemplate situations where a state may be justified in causing harm, such as in a public emergency or for national security (where derogation from some human rights standards may be allowed). However, Goodwin-Gill and Hurwitz have noted that the concept of ‘unjustified harm’ appears to have no place in states practice and is in any case incompatible with fundamental norms of public international law.<sup>63</sup>

The test for subsidiary protection is contained in Article 15:

In accordance with Article 5(2), member states shall grant subsidiary protection *status* to an applicant for international protection who is outside his or her country of origin, and cannot return there owing to a well-founded fear of being subjected to the following serious and unjustified harm:

- (a) torture or inhuman or degrading treatment or punishment; or
- (b) violation of a human right, sufficiently severe to engage the Member states’ international obligations or; [sic]
- (c) a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of their human rights.

The Commentary acknowledges that these three grounds may overlap. With regard to the first, it maintains that member states should not apply a higher threshold of severity than is required by the ECHR, on which the subparagraph is based, but an application must be ‘well-founded’. Subparagraph (b), which *prima facie* seems quite broad, requires member states to ‘have regard to their obligations under human rights instruments, such as the ECHR’, but its applicability is limited ‘only to cases where the need for international protection is required.’<sup>64</sup>

According to the text of the Proposal, the human rights violation must be ‘sufficiently severe’ to require international protection. What this means is not clear, and is likely to become a source of much jurisprudential (and political) debate. However, it is likely that the key question will be whether the human right in question is so fundamental as to entail a *non-refoulement* obligation.

Further, Vedsted-Hansen has speculated that the lack of reference to specific human rights treaties in the Proposal may result in differing practices in member states,<sup>65</sup> although a benefit of the provision’s generality is that it can more easily be adapted to new situations. ECRE has proposed that subparagraph (b) be clarified as ‘[v]iolations of other fundamental human rights that engage the responsibility of member states in accordance with the existing and evolving body of international human rights law and jurisprudence’, as well as including a fourth category warranting complementary

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<sup>62</sup> Commentary (n 57) 13.

<sup>63</sup> GS Goodwin-Gill and A Hurwitz (n 6) [8].

<sup>64</sup> Commentary (n 57) 26.

<sup>65</sup> J Vedsted-Hansen ‘Assessment of the Proposal for an EC Directive on the Notion of Refugee and Subsidiary Protection from the Perspective of International Law’ in Bouteillet-Paquet (n 8) 74.

protection, namely those persons with a well-founded fear of being subjected to the ‘death penalty’.<sup>66</sup>

The final subparagraph is based on Article 2(c) of the Temporary Protection Directive. It is distinguished from that provision on the basis that Article 5(c) of the Proposal requires an applicant to demonstrate an individualised well-founded fear, even if the reasons for that fear are not specific to the individual. The effect of the provision is to extend protection to individuals arriving on their own or in small groups, who would qualify for protection if they arrived in a mass influx situation.

Both UNHCR and ECRE are concerned that persecution for a Convention reason can and does occur in the situations Article 15 contemplates.<sup>67</sup> ECRE argues that any applicant who falls within Article 15(a) or (b) should only be granted subsidiary protection if it is not possible to demonstrate that his or her well-founded fear is for a Convention reason.<sup>68</sup> UNHCR notes that the grounds in Article 15 may reveal a strong presumption for Convention status being granted, ‘except perhaps for those fleeing the indiscriminate effects of violence and the accompanying disorder in a conflict situation, with no element of persecution or link to a specific Convention ground.’<sup>69</sup>

Extending protection in such circumstances is in line with a number of Recommendations of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe, in particular Recommendation (2001) 18 of the Committee of Ministers to member states on Subsidiary Protection, adopted on 27 November 2001. Further, the law of armed conflict and international criminal law offer an important legal rationale for extending the scope of international protection. It would be incongruent if persons at risk of becoming victims of violations of norms sanctioned by individual criminal liability and possible prosecution could not claim protection from being returned to situations where such violations might occur. It is for these groups of people that subsidiary protection is important.

### *How is fear of persecution to be assessed?*

Article 7 sets out five matters which member states are to take into account, as a minimum, in assessing an applicant’s fear of being persecuted or exposed to other serious and unjustified harm. The first criterion requires states to consider relevant facts relating to the applicant’s country of origin or habitual residence at the time of

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<sup>66</sup> ECRE’s Recommendations to the Asylum Working Party on the Commission’s Proposal for a 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: Article 15—Complementary Forms of Protection’ (13 September 2002). Interestingly, ECRE refers to ‘complementary protection’ in its latest recommendation, instead of to ‘subsidiary protection’. See also Caritas Europa and others ‘Joint Comments on the 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’ (June 2002) [www.icmc.net/files/brussels08.en.pdf](http://www.icmc.net/files/brussels08.en.pdf), 6.

<sup>67</sup> UNHCR Observations (n 3) [42]; ECRE Comments (n 60) ‘Article 15 (The Grounds for Subsidiary Protection)’.

<sup>68</sup> ECRE Comments (n 60) ‘Article 15 (The Grounds for Subsidiary Protection)’.

<sup>69</sup> UNHCR Observations (n 3) [42].

making a decision, reflecting the principle that applications for international protection should be examined on a case-by-case basis in relation to objective country conditions.<sup>70</sup> The duty to ascertain and evaluate the relevant facts is shared by the applicant and the member state.

Article 7(b) requires member states to consider whether the applicant's fear can be objectively established—that is, whether a reasonable possibility exists that the applicant will be persecuted or otherwise subjected to serious harm if returned to the country he or she has fled. According to the Commentary, if there is a reasonable likelihood of fear being realised after an applicant is returned, then the fear is well-founded.<sup>71</sup> ECRE considers this a strength of the Proposal because it eliminates the risk of denying refugee status to a person who is deemed not to be sufficiently subjectively fearful.<sup>72</sup>

As both Hathaway and Grahl-Madsen have explained, it makes no sense to link international legal obligations to subjective notions of fear, because in the same situation some individuals may respond with stoicism while others may be easily scared, apathetic or even unconscious of the danger.<sup>73</sup> While this is a sensible analysis, sufficient attention should also be paid to an applicant suffering an extreme subjective fear, in the same way that this issue has been dealt with by the European Commission of Human Rights in relation to Article 3 of the ECHR. For example, in *Brückman's* case, the Commission admitted an application from a detained 17 year old girl on the basis that she might commit suicide if extradited to East Germany.<sup>74</sup>

Article 7(c) considers whether the applicant has already been subjected to persecution or other serious and unjustified harm or direct threats thereof, because this is a 'serious indication of the risk of being persecuted unless a radical and relevant change of conditions has taken place since then'.<sup>75</sup> Most states now regard prior persecution as relevant to future chances of persecution because 'it is unquestionably an excellent indicator of the fate that may await an applicant upon return to her home.'<sup>76</sup>

Article 7(d) requires states to consider the 'individual position and personal circumstances of the applicant, including factors such as background, gender, age, health and disabilities' in assessing the seriousness of persecution or harm. Importantly, it specifically acknowledges that persecution can be gender-specific (discussed later) or child-specific.

The Commentary describes the 'best interests of the child' principle from Article 3 of the CRC as a 'mandatory principle...referred to explicitly in the [Proposal's] recitals so that it can be used as a tool for the interpretation of all the provisions of this

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<sup>70</sup> Commentary (n 57) 14.

<sup>71</sup> Commentary (n 57) 15.

<sup>72</sup> ECRE Comments (n 60) 'Summary of Views'.

<sup>73</sup> JC Hathaway *The Law of Refugee Status* (Butterworths Canada 1991) 69, citing A Grahl-Madsen *The Status of Refugees in International Law* (A W Sijthoff Leyden 1966) 174.

<sup>74</sup> Application 6242/73 in *Stocktaking on the ECHR: The First Thirty Years, 1954–1984* (1984) 152–4. See Terje Einarsen 'The European Convention on Human Rights and the Notion of an Implied Right to *De Facto* Asylum' (1990) 2 *International Journal of Refugee Law* 361, 374.

<sup>75</sup> Commentary (n 57) 15.

<sup>76</sup> JC Hathaway (n 73) 88.



Proposal for a Directive that concern minors.<sup>77</sup> It asserts that in assessing a protection application involving a child, member states should consider that the child's age, maturity and stage of development form part of the factual context of the application; that a child may manifest his or her fears differently from an adult; that a child is likely to have limited knowledge of conditions in the country of origin; and that child-specific forms of persecution exist, such as the recruitment of children into armies, trafficking for sex work, and forced labour.<sup>78</sup>

Further, the Commentary states that the five Convention grounds for persecution can potentially include children and that children should not automatically be granted subsidiary protection status instead.<sup>79</sup> Ideally, these comments should be incorporated into the Proposal to ensure that it is interpreted accordingly. The acknowledgement of the special needs of asylum-seeking children in a legal document is a healthy sign of the interaction between human rights and refugee law.

Article 7(e) requires member states to assess whether there is credible evidence that laws are in force and applied in the county of origin which condone the persecution of, or infliction of other serious and unjustified harm on, the applicant. However, the provision appears only to cover the situation where laws are discriminatory or unjust, rather than where laws that make an act illegal are simply not enforced by states authorities, thereby resulting in persecution or the infliction of harm. UNHCR's concern with Article 7(e) is that in some cases, existing laws (themselves in line with international law) may have the effect of condoning persecution if applied in a discriminatory or arbitrary manner.

Further, UNHCR notes that the provision should not be interpreted as an evidentiary requirement, but rather as part of the fact-finding process outlined in Article 7(a). UNHCR concludes that to avoid potential misinterpretation, the provision should be deleted.<sup>80</sup>

### **Grey areas of international protection**

UNHCR identifies three categories of persons it considers to be Convention refugees but whom states commonly 'define out' of the Convention definition in an attempt to minimise their protection obligations under international law. First, persons who flee persecution in areas of on-going conflict are treated in many states as 'victims of indiscriminate violence' and given complementary protection rather than refugee status, even when they flee conflict grounded in ethnic, religious or political differences.

Secondly, those who fear persecution by non-state agents are not granted refugee status in countries such as Germany (although this should change once the new Immigration Act enters into force on 1 January 2003). Finally, persons who suffer gender-based persecution do not always receive refugee protection.<sup>81</sup> In each of these

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<sup>77</sup> Commentary (n 57) 15.

<sup>78</sup> Commentary (n 57) 15.

<sup>79</sup> Commentary (n 57) 15.

<sup>80</sup> UNHCR Observations (n 3) [24].

<sup>81</sup> UNHCR Complementary Protection (n 5) [8].

cases, UNHCR believes that to achieve overall consistency and a ‘full and inclusive’ interpretation of the Convention, refugee status should be granted. Further, the fact that states provide some form of protection at all demonstrates that ‘there is a recognized need for international protection in such cases’.<sup>82</sup>

UNHCR stresses that beneficiaries of international protection should be identified ‘according to their international protection needs, and treated in conformity with those needs and their human rights.’<sup>83</sup> Asylum seekers who fulfil the Article 1A(2) definition should be granted protection as Convention refugees, not as beneficiaries of complementary protection. Accordingly, any complementary regime should be implemented in such a way as to strengthen, not undermine, the existing system of international protection.<sup>84</sup> Even though a form of protection is clearly preferable to none at all, persons who meet the Article 1A(2) definition should be protected as Convention refugees so that states meet the international obligations to which they have agreed.

### *Victims of generalized violence*

Most EU states grant some sort of protection to persons fleeing indiscriminate violence (generally from war or civil war). France does not, and in Denmark in exceptional cases a humanitarian residence permit may be granted to families with young children from areas in a state of war. The remaining EU states grant a form of protection, although it is generally temporary and does not fall within the Convention.<sup>85</sup> Spijkerboer has identified two distinctive procedures which states employ to determine who is entitled to protection from generalised violence. Finland, Greece, Italy, Portugal, Spain and Sweden have legislative procedures in place which applicants can invoke and which can be scrutinised by the courts. By contrast, in Austria, Belgium, Germany, Ireland, The Netherlands and the UK, a discretionary act of government is required for protection to be extended. This type of protection was granted to groups from the former Yugoslavia and Kosovo.

Under Article 15(c), subsidiary protection shall be granted to a person with a well-founded fear of being subjected to ‘a threat to his or her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systemic or generalised violations of their human rights.’ As noted above, it is based on Article 2(c) of the Temporary Protection Directive, designed to regulate mass influxes of people ‘who have fled areas of armed conflict or endemic violence’ and ‘persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights’.<sup>86</sup>

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<sup>82</sup> UNHCR Complementary Protection (n 5) [9].

<sup>83</sup> UNHCR Complementary Protection (n 5) [11].

<sup>84</sup> UNHCR Complementary Protection (n 5) [11].

<sup>85</sup> See, eg JC Hathaway (n 73) 90–97; MR von Sternberg *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Law Compared* (Martinus Nijhoff Publishers The Hague 2002) 82–123.

<sup>86</sup> Temporary Protection Directive, Art 2.

Article 15(c) does not preclude applicants who can demonstrate a well-founded fear of persecution within the meaning of Article 1A(2) from being granted Convention refugee status. This is reflected in Article 3 of the Temporary Protection Directive, which states that temporary protection ‘must not prejudice recognition of refugee status under the Geneva Convention’, and in Article 11(2)(c) of the Proposal, which notes that in assessing whether a well-founded fear of persecution should result in recognition of an applicant as a Convention refugee, it is immaterial whether the applicant is from a country where many or all persons face the risk of generalised oppression.

The Commentary notes that the reason for including generalised violence as a ground of subsidiary protection is that states are bound to protect persons falling within this category in a mass influx situation, and it is therefore ‘consistent and appropriate’ to protect them when they arrive individually but do not qualify for Convention status. Thus, the Proposal’s position is that if an individual seeks asylum on the basis of generalised violence, but does not fall within the Article 1A(2) definition of a refugee, then if he or she can demonstrate an individualised well-founded fear of serious and unjustified harm, he or she is entitled to subsidiary protection.<sup>87</sup>

#### *Victims of non-state agents*

In eight of the member states, persecution by non-state agents is recognized as falling within the terms of Article 1A(2) (Belgium, Denmark, Finland, Greece, Luxembourg, The Netherlands, Sweden and the UK). In the other seven states (Austria, France, Germany, Ireland, Italy, Portugal and Spain), persecution within the meaning of Article 1A(2) requires states involvement.<sup>88</sup> However, these states provide protection under Article 3 of the ECHR (although in Denmark and Finland only a de facto refugee status is granted). Only Germany refuses to recognise non-state persecution under the Convention and rejects the European Court of Human Rights’ interpretation of Article 3.<sup>89</sup> Section 53(6) of the German Aliens Act provides that an alien’s deportation may be suspended if in the country of origin, he or she faces a substantial danger to life, personal integrity or liberty, whether resulting from states or private action.

The threshold for establishing a claim under this provision is high, and whereas Article 3 of the ECHR mandates a suspension of deportation, section 53(6) only provides for a discretionary power to do so. Germany’s country reports suggest that to make a successful claim, an applicant would have to show an extreme danger of death or a violation of physical integrity; an almost certain death or severe violation of personal integrity; a quasi immediate danger upon return; or a serious individual risk.<sup>90</sup>

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<sup>87</sup> See also Temporary Protection Directive, Art 19(2).

<sup>88</sup> 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 Bouteillet-Paquet (n 8) 233–34.

<sup>89</sup> Article 53(4) of the Aliens Act, which states that deportation is barred if it would be contrary to Article 3 of the ECHR, only applies to maltreatment by a state agent. While Article 53(6) applies to non-state persecution, its threshold is high (see text above). However, see the new Immigration Act (n 42).

<sup>90</sup> T Spijkerboer (n 8) 32.

In France, persecution which does not derive from public authorities or officials cannot trigger a Convention refugee claim.<sup>91</sup> ‘Public authorities’ include the government, administration and the military, but not political parties, participants in civil conflict, criminals or extremists. Exceptions to this are when the authorities effectively allow systematic mistreatment against a minority group through ‘passive compliance’, or when the states encourages or willingly tolerates persecution, however these are very difficult to establish.<sup>92</sup>

Article 9 provides that fear of persecution or harm is well-founded where the threat emanates from the states, parties or organisations controlling the states, or non-state actors where the states is unable or unwilling to provide effective protection. Article 11(2)(a) states that it is ‘immaterial’ whether the persecution is performed by the states or by non-state actors against which the states is unable or unwilling to provide effective protection, an approach that is consistent with the vast majority of states and paragraph 65 of the UNHCR Handbook.<sup>93</sup>

In determining the effectiveness of states protection, member states are to consider whether the states takes reasonable steps to prevent the persecution or infliction of harm and whether the applicant could reasonably access such protection. For state protection to be effective, there must exist a system of domestic protection which can detect, prosecute and punish persecutory or harmful actions. The rationale behind this is that the source of the persecution or serious harm is irrelevant—the relevant question is whether the applicant can obtain effective protection from the harm in the country of origin.<sup>94</sup>

Article 9(3) provides that ‘states’ protection may be provided by ‘international organisations and stable quasi-states authorities’ who can protect individuals from harm in a manner similar to an internationally recognised states. This provision has been heavily criticised because it has no basis in international law.<sup>95</sup> These organizations and quasi-states authorities are not parties to international human rights treaties and therefore cannot give meaningful human rights guarantees or be held accountable for non-compliance with international refugee and human rights obligations.

### *Victims of gender-based persecution*

State practice in this area can be divided into two categories. In the first group of states, gender-based persecution can lead to Convention status being granted, while in the second it can only result in complementary protection. Ireland is the only EU country with legislation stipulating that ‘membership of a particular social group’ includes membership of a group of persons whose defining characteristics are their sex or sexual orientation.

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<sup>91</sup> See GS Goodwin-Gill (n 25) 72.

<sup>92</sup> See GS Goodwin-Gill (n 25) 73 citing F Tiberghien *La protection des réfugiés en France* (2<sup>nd</sup> edn Economica Presses Universitaires d’Aix Marseille 1988).

<sup>93</sup> UNHCR Observations (n 3) [6].

<sup>94</sup> Commentary (n 57) 17.

<sup>95</sup> GS Goodwin-Gill and A Hurwitz (n 6) [12]; ECRE Comments (n 60) ‘Article 9 (Sources of Harm and Protection)’.

In the Netherlands, policy rules advocate a gender-inclusive approach to refugee determinations; note that the transgression of social mores can evidence the expression of a political opinion; and recognise that opposition to female genital mutilation may lead to refugee status.<sup>96</sup> Sexual orientation has been considered a relevant persecution ground in the Netherlands since 1981.<sup>97</sup> In the UK, the 1999 House of Lords' decision in *R v Immigration Appeal Tribunal and Anor; Ex Parte Shah*<sup>98</sup> has broadened the meaning of particular social group in which gender is clearly recognised as a ground of persecution. In Germany and Belgium also, persecution on account of gender or sexual orientation forms part of the refugee concept.

In Denmark, refugee status has sometimes been granted by recognising sexual orientation and gender as a particular social group, but complementary protection is more common. Although section 3 paragraph 3.3 of the Swedish Aliens Act has explicitly recognised gender-based persecution since 1997, it is not regarded as falling within the Convention meaning of persecution and hence only complementary protection is available. Finland's approach is the same. In the remaining EU states, country reports reveal that general provisions on complementary protection may apply where the applicant faces persecution on account of gender or sexual orientation.

Sexual orientation and gender are recognised in Article 12(d) of the Proposal as characteristics capable of defining a 'particular social group'. The importance of this provision is that it clearly locates gender-based persecution within the meaning of Article 1A(2) persecution, rather than as a form of complementary protection. It seeks to bring the practice of all EU states into line with international jurisprudence on gender-related persecution, which has developed over the last decade in decisions such as *Canada (Attorney General) v Ward*<sup>99</sup> and *Shah*.<sup>100</sup> The Commentary also notes that while the form of persecution may be gender-specific, for example rape, the persecutory act may occur for a Convention reason, such as religion.<sup>101</sup>

Article 7 lists minimum matters which member states are to take into account in assessing an applicant's fear of being persecuted or exposed to other serious and unjustified harm. Article 7(d) specifically includes gender, which according to the Commentary reflects the need to make a holistic assessment of the factual context surrounding an application.<sup>102</sup> Importantly, it emphasizes that 'persecution, within the meaning of the Geneva Convention, may be effected through sexual violence or other gender-specific means'.

It is unclear whether the provision's specific reference to the 'Convention' means that gender-specific harm is always to give rise to Convention status, particularly as the Commentary on Article 7(d) refers only to the Convention in relation to gender-specific harm, but to the Convention and subsidiary protection in relation to child-specific harm. If all gender-specific harm is to be classed as falling within the Convention, then this should be expressly stated. The ambiguity in this provision

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<sup>96</sup> Aliens Circular 2000, C1/3/32, C1/3/2.8, C1/3/2.11 respectively, as cited in T Spijkerboer (n 8) 33.

<sup>97</sup> Aliens Circular 2000, C1/3/2.12, as cited in T Spijkerboer (n 8) 34.

<sup>98</sup> [1999] 2 AC 629 (HL).

<sup>99</sup> [1993] 2 SCR 689, (1993) 103 DLR (4th).

<sup>100</sup> *Shah* (n 98).

<sup>101</sup> Commentary (n 57) 16.

<sup>102</sup> Commentary (n 57) 15.

needs to be addressed as it is an important and relatively progressive element of the Proposal.

### **Substantive rights under the Proposal**

For the most part, beneficiaries of subsidiary protection are granted the same rights under the Proposal as Convention refugees. However, the differences that exist are significant because of the potentially serious consequences they may have on the integration, well-being, financial position and quality of life of beneficiaries of subsidiary protection. UNHCR has stated that rights and benefits should be based on need rather than the grounds on which a person has been granted protection.<sup>103</sup> Similarly, ECRE and the Immigration Law Practitioners' Association argue for an equal level of rights for refugees and beneficiaries of subsidiary protection on the basis that there are no legal or logical reasons to grant the latter group lesser rights.<sup>104</sup> A key concern is that differential treatment may result in states preferring subsidiary protection due to the lower level of obligations it places on them.<sup>105</sup>

#### *Residence permits: Article 21*

Whereas Convention refugees are entitled to a residence permit valid for at least five years and renewable automatically, beneficiaries of subsidiary protection are given a residence permit valid for at least one year. It is to be automatically renewed at intervals of not less than one year until the authorities determine that protection is no longer required. While this reflects the practice of most EU states (except Sweden and Finland where 'persons in need of protection' effectively receive the same residence permit as Convention refugees<sup>106</sup>), it has no empirical justification. Given the Explanatory Memorandum's acknowledgment that beneficiaries of subsidiary protection often require longer lasting protection than Convention refugees, it is inappropriate to grant a residence permit of less duration. If it appears that subsidiary protection is no longer necessary prior to the expiry of the residence permit, then the cessation provisions in Article 16 will apply.<sup>107</sup>

Granting one year permits has the additional negative effect of requiring beneficiaries to maintain their fear. Psychologically, this may hinder their ability to move on and start a 'new life', acutely aware that their residency is guaranteed only on a year-by-year basis. This has been demonstrated in Australia, where persons who apply for refugee status onshore are only entitled to a Temporary Protection Visa. After three years, they have to reapply on the basis that they can still be considered a refugee. This requires applicants to maintain a well-founded fear of persecution and thereby

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<sup>103</sup> J Vedsted-Hansen 'Complementary or Subsidiary Protection? Offering an Appropriate Status without Undermining Refugee Protection' UNHCR, *New Issues in Refugee Research*, Working Paper No 52 (February 2002) 6.

<sup>104</sup> Vedsted-Hansen (n 103) 6.

<sup>105</sup> Vedsted-Hansen (n 103) 7.

<sup>106</sup> N Sitaropoulos 'Duration and Social Rights Status related to Subsidiary Refugeehood in the 15 EU State Members—An Overview based on the Odysseus National Reports' (17 November 2001) 3 (copy with the author).

<sup>107</sup> UNHCR Observations (n 3) [45].

hinders integration into Australian society.<sup>108</sup> As ECRE has observed, ‘successful integration into the asylum country requires a status that enables persons to develop a sense of long-term perspective for the future’, not one which creates high levels of insecurity due to its limited duration.<sup>109</sup>

Finally, Article 22 of the Proposal recognises that the ‘needs and circumstances’ of beneficiaries of subsidiary protection are substantially similar to refugees. This provision notes that despite Article 3(2)(b) of the Proposal for a Council Directive Concerning the Status of Third Country Nationals Who Are Long-Term Residents,<sup>110</sup> beneficiaries of subsidiary protection should be able to obtain long-term residence in the same way as refugees ‘because their needs and circumstances are much the same and having spent the qualifying period of five years in a member state they will have demonstrated that their need for international protection is no longer temporary’.<sup>111</sup>

#### *Travel documents: Article 23*

Refugees may apply for travel documents as set out in the Schedule to the Convention, unless compelling reasons of national security or public order require otherwise. By contrast, beneficiaries of subsidiary protection are only entitled to travel documents where they are unable to obtain a national passport. The premise of this provision is that only when the consular authorities of the subsidiary protection beneficiary’s own country are no longer functioning should he or she have access to travel documents from the protecting states.<sup>112</sup>

One problem with this is that if a beneficiary of subsidiary protection leaves the protecting states, there may be difficulties for his or her return. Further, if when he or she is outside the protecting country the situation worsens in the country of origin, there may be difficulties in travelling on a passport of that country. It would therefore be preferable for beneficiaries of subsidiary protection to have access to similar travel documents as Convention refugees, issued by the protecting states .

#### *Work rights: Article 24*

Under Article 24(1), member states are to authorize Convention refugees to engage in employed or self-employed activities immediately after refugee status has been granted, whereas member states do not have to allow beneficiaries of subsidiary protection to work until six months after they receive that status.<sup>113</sup> While refugees may access employment-related opportunities for adults, vocational training and practical workplace experience under the same conditions as nationals,<sup>114</sup> such access

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<sup>108</sup> M Smith ‘The Health of Temporary Protection Visa Holders’ (2001) 9 Transitions Magazine at: <http://www.swsahs.nsw.gov.au/areaser/startts/index.asp>

<sup>109</sup> ECRE Comments (n 60) ‘Article 21 (Residence permits)’.

<sup>110</sup> COM (2001) 127 final (Brussels 13 March 2001).

<sup>111</sup> Commentary (n 57) 29–30.

<sup>112</sup> Commentary (n 57) 30.

<sup>113</sup> Proposal, Art 24(3).

<sup>114</sup> Proposal, Art 24(2).

does not have to be afforded to beneficiaries of subsidiary protection until one year after their status is granted.<sup>115</sup>

Further, it is only once access to the labour market is granted in accordance with Article 24(1) or (3) that the beneficiary is entitled to equal treatment with nationals in terms of remuneration, access to social security systems relating to employed or self-employed activities, and other conditions of employment.<sup>116</sup> Clearly this disadvantages beneficiaries of subsidiary protection. It effectively allows the nature of the harm feared, rather than the need for protection, to determine the rights which a recipient of international protection is given.

The Commentary states that access to employment for refugees and beneficiaries of subsidiary protection ‘encourages independence and enables those concerned to provide for themselves and no longer require assistance.’<sup>117</sup> Further, it notes that employment ‘could also prove useful in reintegrating beneficiaries enjoying subsidiary protection status on their possible return to their country of origin.’<sup>118</sup> As ECRE has pointed out, denying work to beneficiaries of subsidiary protection at an early stage can ‘seriously hinder refugee integration in the long term as [it] risk[s] pushing people into illegal work or encouraging dependency on public assistance.’ Restricting access to vocational training has ‘the negative effect of delaying considerably the process of acquisition of the skills and knowledge by persons in need of international protection that are necessary to access the labour market and live independently.’<sup>119</sup>

### *Integration facilities: Article 31*

Article 31 relates to access to integration facilities to assist beneficiaries of international protection in fitting into their new society. While refugees are to be provided with ‘specific support programmes tailored to their needs in the fields of, inter alia, employment, education, healthcare and social welfare’, beneficiaries of subsidiary protection do not require access to equivalent programmes until a year after their status has been granted.

A problem with the cumulative effect of these restrictions is that whereas refugees have the opportunity to meet people through immediate access to the workforce and integration facilities, beneficiaries of subsidiary protection do not have similar access to a social group and therefore may remain isolated. Further, immediate access to integration services promotes independence and facilitates refugee participation in all aspects of the economic, social, cultural, civil and political life of the protecting country.<sup>120</sup>

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<sup>115</sup> Proposal, Art 24(4).

<sup>116</sup> Proposal, Art 24(5).

<sup>117</sup> Commentary (n 57) 30.

<sup>118</sup> Commentary (n 57) 30.

<sup>119</sup> ECRE Comments (n 60) ‘Article 24 (Access to employment)’.

<sup>120</sup> ECRE Comments (n 60) ‘Article 31 (Access to integration facilities)’.



## Conclusion

As Gregor Noll has correctly observed, complementary protection ‘should take into account international protection obligations other than those provided for in the Refugee Convention’ and should ‘explicate obligations of international law, universal or regional, which are binding for all present member states.’<sup>121</sup> The Proposal is an important step towards achieving this aim. However, as has been demonstrated in this paper, a number of issues require further attention to ensure that beneficiaries of subsidiary protection receive appropriate rights and benefits in accordance with principles of international protection.

While the Proposal seeks to bridge the gaps left by the Convention definition, at the same time it may in fact undermine elements of international protection by creating incentives for states to favour subsidiary protection. Further, because there is no formal requirement for states to implement the Proposal’s subsidiary protection provisions, states may try to subsume asylum applications in national complementary protection mechanisms, thereby weakening international protection as a whole. While any policies to this effect could presumably be corrected by the International Court of Justice,<sup>122</sup> it would be preferable to address these issues prior to the Proposal becoming EU law.

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<sup>121</sup> G Noll ‘Fixed Definitions or Framework Legislation? The Delimitation of Subsidiary Protection *Ratione Personae*’ UNHCR, *New Issues in Refugee Research*, Working Paper No 55 (February 2002) 1–2.

<sup>122</sup> GS Goodwin-Gill and A Hurwitz (n 6) [23].