



**UNHCR**

United Nations High Commissioner for Refugees  
Haut Commissariat des Nations Unies pour les réfugiés

## **UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence**

### **Introduction**

The Netherlands Council of State has requested a preliminary ruling from the European Court of Justice concerning the interpretation of Articles 2(e) and 15(c) of 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<sup>1</sup> (“Qualification Directive”). These provisions concern the granting of “subsidiary protection” to civilians facing a “serious and individual threat ... by reason of indiscriminate violence in situations of international or internal armed conflict”.

The questions posed by the Council of State are as follows:<sup>2</sup>

1. Is Article 15(c) of Council Directive 2004/83/EC (1) 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 to be interpreted as offering protection only in a situation on which Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted in the case-law of the European Court of Human Rights, also has a bearing, or does Article 15(c), in comparison with Article 3 of the Convention, offer supplementary or other protection?
2. If Article 15(c) of the Directive, in comparison with Article 3 of the Convention, offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15(c) of the Directive, read in conjunction with Article 2(e) thereof?

The Office of the United Nations High Commissioner for Refugees (“UNHCR”) welcomes the opportunity for the Court to clarify these questions, with a view to ensuring subsidiary protection for all who need it, and a more harmonized application of the Qualification Directive’s minimum standards.<sup>3</sup>

UNHCR has a direct interest in this matter, as the agency entrusted by the United Nations General Assembly with responsibility for providing international protection to

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<sup>1</sup> OJ L 304/12 of 30.9.2004.

<sup>2</sup> OJ C 8/5 of 12.1.2008. See also Decision 200702174/1 of the Netherlands Council of State of 12 October 2007.

<sup>3</sup> UNHCR has documented differences in Member States’ approaches to Article 15(c) and other parts of the Qualification Directive. See: UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007, <http://www.unhcr.org/protect/PROTECTION/47302b6c2.pdf>, particularly pp. 82-90.

refugees, and for seeking permanent solutions for the problem of refugees.<sup>4</sup> According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”<sup>5</sup> UNHCR’s supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention relating to the Status of Refugees (“1951 Convention”) and Article II of the 1967 Protocol relating to the Status of Refugees.<sup>6</sup> It has also been reflected in EC law.<sup>7</sup>

Since its creation in 1951, UNHCR has been working with States to identify and respond to international protection needs, including those arising in situations of international or internal armed conflict. The organization’s original mandate was based on an abstract definition of a refugee as a person with a well-founded fear of persecution on grounds of race, religion, nationality, membership of a social group or political opinion<sup>8</sup>, reproduced (with some adjustments) in Article 1A of the 1951 Convention. Nothing in that definition excludes its application to persons fleeing persecution in conflict situations.

In the years following adoption of UNHCR’s Statute, the UN General Assembly and Economic and Social Committee extended UNHCR’s competence *ratione personae*.<sup>9</sup> This was done not by amending the statutory refugee definition, but by empowering UNHCR to protect and assist particular groups of people whose circumstances did not necessarily meet the definition in the Statute.<sup>10</sup> In practical terms, this has extended UNHCR’s mandate to a variety of situations of forced displacement resulting from conflict, indiscriminate violence or public disorder. In light of this evolution, UNHCR considers that serious (including indiscriminate) threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order are valid reasons for international protection under its mandate.<sup>11</sup>

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<sup>4</sup> See *Statute of the Office of the United Nations High Commissioner for Refugees*, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628>, G.A. Res. 428(V), Annex, UN Doc. A/1775, paragraph 1 (1950).

<sup>5</sup> *Ibid.*, paragraph 8(a).

<sup>6</sup> UNTS No. 2545, Vol. 189, p. 137 and UNTS No. 8791, Vol. 606, p. 267.

<sup>7</sup> Declaration 17 to the Treaty of Amsterdam (OJ L 304/12 of 30.9.2004) provides that “Consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy”. Article 21 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326/13 of 13.12.2005) especially Article 21(c) obliges Member States to allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.”

<sup>8</sup> Paragraph 6 of the Statute.

<sup>9</sup> See UNHCR, *Note on International Protection*, submitted to the 45<sup>th</sup> session of the Executive Committee of the High Commissioner’s Programme, UN Doc. A/AC.96/830, 7 September 1994, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f0a935f2>, paragraphs 31-32 and note 8.

<sup>10</sup> In such cases, the institutional competence of UNHCR is based on paragraph 9 of its Statute: “The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.”

<sup>11</sup> UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, Executive Committee of the High Commissioner’s Programme, Standing Committee, UN Doc. EC/55/SC/CRP.16, 2 June 2005, paragraph 26, <http://www.unhcr.org/excom/EXCOM/42a005972.pdf>

In this note, UNHCR presents its views on the minimum standards for subsidiary protection under the Qualification Directive for persons threatened by indiscriminate (or generalized) violence. UNHCR defines these terms as follows: The term “subsidiary” or “complementary” forms of protection<sup>12</sup> refers to legal mechanisms for protecting and according a status to a person in need of international protection who does not fulfil the refugee definition of the 1951 Convention, as interpreted by States. UNHCR considers such mechanisms to be a positive and pragmatic response to certain international protection needs not covered by the 1951 Convention. UNHCR wishes to ensure that subsidiary protection complements and does not undermine refugee status under the 1951 Convention. UNHCR thus has an interest in seeing that EC law on subsidiary protection adequately reflects international standards, and helps to avoid protection gaps.

UNHCR understands the term “indiscriminate” or “generalized” violence to mean the exercise of force not targeted at a specific object or individual. It understands the term “persons threatened by indiscriminate violence” to refer to people outside their countries of origin (or in the case of stateless persons, outside their countries of habitual residence), who cannot return because there is a real risk that they would face threats to life, to physical integrity or freedom resulting from such violence. Protection needs arising from situations of indiscriminate violence are often the cause of forced displacement, but such protection needs may also arise *sur place*.

Part One of this paper sets out UNHCR’s recommendations for the interpretation of Article 15(c) of the Qualification Directive. Part Two provides background information on relevant principles of international and regional refugee and human rights law, the object and purpose of Article 15(c) seen from the perspective of its drafting history, and Member States’ practice.

## **1. Interpreting Article 15(c) of the Qualification Directive: UNHCR’s Recommendations**

In order to contribute to the harmonization of State practice, UNHCR has issued three position papers containing its views on complementary protection.<sup>13</sup> These documents examine the position of complementary protection within the broader international protection regime; its beneficiaries and appropriate standards of treatment; and procedural questions.

UNHCR’s views have been taken up by the Committee of Ministers of the Council of Europe. In 2001, the Committee recommended that subsidiary protection be granted *inter alia* to a person “... forced to flee or remain outside his/her country of origin as a

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<sup>12</sup> UNHCR prefers the term “complementary protection” to “subsidiary protection”. However, as the latter is used in EC law, it is used in this note when referring to EC law and Member State practice.

<sup>13</sup> See UNHCR, *Complementary Forms of Protection: Their Nature and Relationship to the International Protection Regime*, UN Doc. EC/50/SC/CRP.18, 9 June 2000 <http://www.unhcr.org/excom/EXCOM/3ae68d140.pdf>; UNHCR, *Providing International Protection Including Through Complementary Forms of Protection*, *op.cit.* footnote 11; and UNHCR, *Complementary Forms of Protection*, Global Consultations on International Protection, EC/GC/01/18, 4 September 2001, <http://www.unhcr.org/protect/PROTECTION/3b95d7174.pdf>.

result of a threat to his/her life, security or liberty, for reasons of indiscriminate violence, arising from situations such as armed conflict”.<sup>14</sup>

In 2005, UNHCR’s Executive Committee (ExCom), currently made up of 72 States, adopted a “Conclusion on the Provision of International Protection including through Complementary Forms of Protection”.<sup>15</sup> This Conclusion affirms that complementary forms of protection should only be resorted to after full use has been made of the 1951 Convention. It also distinguishes complementary protection clearly from temporary protection, which is a specific, provisional response to situations of mass influx. Finally, the Conclusion underlines the importance of developing the international protection system in a way which avoids protection gaps, and enables all those in need of international protection to find and enjoy it.

UNHCR long advocated the creation of a specific basis in European Community law for the protection of persons falling under UNHCR’s mandate, but outside the scope of the 1951 Convention refugee definition. For this reason, UNHCR supported the European Union’s initiative to develop instruments setting minimum standards for temporary and subsidiary protection. UNHCR welcomed the adoption in 2001 of the 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 (“Temporary Protection Directive”), but stressed that temporary protection cannot be the only protection tool for persons at risk in situations of generalized violence, whether 1951 Convention refugees or others.<sup>16</sup> UNHCR therefore also welcomed the Commission’s proposal for Article 15(c) of the Qualification Directive, which encompassed people fleeing indiscriminate violence in situations of armed conflict or systematic or generalized violations of their human rights.<sup>17</sup>

However, during the negotiations on the Qualification Directive, the scope of Article 15(c) was narrowed. The reference to situations of systematic and generalized violations of human rights was deleted, and terminology was adopted which is not entirely clear. When the final text was approved, UNHCR noted that Recital 26<sup>18</sup> and the term

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<sup>14</sup> Council of Europe, *Recommendation (2001)18 of the Committee of Ministers to Member States on subsidiary protection*, 27 November 2001, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3dde4c184>.

<sup>15</sup> UNHCR’s Executive Committee of the High Commissioner’s Programme, *Conclusion on the Provision on International Protection Including Through Complementary Forms of Protection*, No. 103 (LVI) 2005, 7 October 2005, <http://www.unhcr.org/excom/EXCOM/43576e292.html>.

<sup>16</sup> See: *UNHCR welcomes EU agreement on temporary protection*, UNHCR Briefing Note, 1 June 2001, <http://www.unhcr.org/news/NEWS/3b17a0b24.html>. The “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”, dated 7 August 2001, was published in OJ L.212/12, 7.8.2001.

<sup>17</sup> See: UNHCR, *Some additional observations on the European Commission ‘Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, COM(2001)510 final of 12.9.2001’*, July 2002, <http://www.unhcr.org/protect/PROTECTION/436623912.pdf>.

<sup>18</sup> Recital 26 reads: “Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individualized threat which would qualify as serious harm”.

“individual” in Article 15(c) might prove difficult to interpret, in light of the objective of addressing protection needs arising in the context of “indiscriminate” violence. UNHCR called on Member States not to adopt a minimalist interpretation of the Directive’s provisions on subsidiary protection.<sup>19</sup>

UNHCR’s recent Study on the Implementation of the Qualification Directive<sup>20</sup> shows that some Member States do interpret Article 15(c) broadly, in line with its objective and spirit, but that the harmonization potential of the Directive with regard to subsidiary protection has not yet been fully achieved. UNHCR continues to urge EU Member States to give a broad meaning to Article 15(c), reflecting its aim to harmonize Member State practice in line with international obligations and best national practice, and to serve as a legal basis for international protection needs not met by the 1951 Convention.<sup>21</sup>

In UNHCR’s view, the subsidiary protection regime created by the Qualification Directive should be informed - but not limited - by international and regional human rights law. The jurisprudence of the European Court of Human Rights (ECtHR) on Article 3 of the European Convention on Human Rights (ECHR),<sup>22</sup> the interpretation by treaty supervisory bodies of obligations under international law, and Member States’ practice, should all serve to define the scope of the Directive’s provisions. Such an approach is in line with the stated intent of the EU at the time of drafting the instrument, namely, to harmonize Member States’ practices.

International and internal armed conflict is frequently rooted in ethnic, religious or political differences. War and violence are often used as instruments of persecution. Article 15(c) must therefore be understood as covering risks different from those addressed by the 1951 Convention.<sup>23</sup> Subsidiary protection should not be resorted to, where the threat is targeted at an individual and he or she would qualify for refugee status.<sup>24</sup>

However, UNHCR’s Study on the Qualification Directive demonstrates that some Member States have granted subsidiary protection to applicants from situations of generalized violence who also have a well-founded fear of persecution on 1951 Convention grounds.<sup>25</sup> Such an approach undermines the 1951 Convention and must be avoided. This aim can be achieved through an interpretation of Article 15(c) which does not focus on individuals who are singled out by perpetrators of human rights violations, but which encompasses risks faced more generally by people in situations of

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<sup>19</sup> See: UNHCR, *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 28 January 2005, comment on Recital 26 and Article 15(c), at <http://www.unhcr.org/protect/PROTECTION/43661eee2.pdf>.

<sup>20</sup> *Op.cit.* footnote 3.

<sup>21</sup> *Ibid.*, pages 15, 17, 66-89.

<sup>22</sup> The Court’s recent decision in *Salah Sheekh v. The Netherlands*, no. 1948/04, 11 January 2007, is one example of the evolving jurisprudence in the area of *non-refoulement*.

<sup>23</sup> This is consistent with UNHCR’s view that subsidiary protection should strengthen refugee status under the 1951 Convention. See: UNHCR’s Executive Committee, *Conclusion No. 103 (LVI) of 2005*, paragraph (k), *op.cit.* footnote 15. See also Recital 24, Qualification Directive.

<sup>24</sup> This view was shared by the Member States in drafting the Directive, as indicated by Recital 24.

<sup>25</sup> See UNHCR, *Qualification Directive Study*, *op.cit.* footnote 3, pages 84 and 86.

indiscriminate violence. In the same vein, Article 15(c) should not be used to address risks covered by Article 15(a) or (b). This was not the intention of the drafters, nor would such an approach ensure the *effet utile* of Article 15(c).

On this basis, UNHCR considers that the added value of Article 15(c) is its ability to provide protection from serious risks which are situational, rather than individually targeted. Even though applications for protection are assessed in an individual asylum procedure, eligibility for subsidiary protection under Article 15(c) should extend to risks which (potentially) threaten groups of people.

The notion of “individual” threat should, in UNHCR’s view, serve to remove from the scope of the provision persons for whom the alleged risk is merely a remote possibility, for example because the violence is limited to a specific region, or because the risk they face is below the relevant “real risk” threshold. It should not lead to a higher threshold and heavier burden of proof, as situations of generalized violence are characterized precisely by the indiscriminate and unpredictable nature of the risks they present.

Article 15(c) was formulated explicitly to address threats stemming from indiscriminate violence, which by definition may affect everyone in a given situation. An interpretation which would not extend protection to persons in danger simply because they form part of a larger segment of the population affected by the same risks, would conflict with the wording as well and the spirit of the provision. Such an interpretation would result in an unacceptable protection gap, and be at variance with international refugee and human rights law.<sup>26</sup>

International protection needs arising from indiscriminate violence are not limited to situations of declared war or internationally recognized conflicts. It is therefore important that the requirements for an “internal armed conflict” are not set too high. While there is no legal definition or generally agreed meaning of this term, its interpretation will be informed by international humanitarian law, notably Article 1(1) of Protocol II of the 1949 Convention.<sup>27</sup> Based on this provision, clear command structures among parties to the conflict, along with control over territory such that they can be expected to implement Protocol II, should be considered sufficient. No formal determination by a State or an organization regarding the existence of an “international or internal armed conflict” should be required.

The evolution of the law of armed conflict and the related evolution of international criminal law, most notably the Statute of the International Criminal Court, are important in this context. It would be incongruent if persons facing risk of violation of norms sanctioned by international criminal liability would be unable to claim protection from return to situations where such risks occur. UNHCR notes also the decision of the

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<sup>26</sup> *Ibid.* See also: UK Asylum and Immigration Tribunal, *Lukman Hameed Mohamed v. The Secretary of State for the Home Department*, AA/14710/2006, 13 September 2007 (unreported case), judgment of Judge JFW Phillips who held: “It would be ridiculous to suggest that if there were a real risk of serious harm to members of the civilian population in general by reason of indiscriminate violence that an individual Appellant would have to show a risk to himself over and above that general risk.” See also James Hathaway, *The Law of Refugee Status*, 1991, p. 97.

<sup>27</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b37f40>.

International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of *Prosecutor v. Tadic*.<sup>28</sup> The ICTY found that an armed conflict exists whenever there is resort to armed force between States, or protracted armed violence between governmental authorities and organized armed groups, or between such groups within a State.<sup>29</sup>

In this connection, the term “civilian” in Article 15(c) should not serve to exclude former combatants who can demonstrate that they have renounced military activities. The fact that an individual was a combatant in the past does not necessarily exclude him or her from international protection if he or she has genuinely and permanently renounced military activities.<sup>30</sup> The criteria for determining whether a person satisfies this test have been defined by the UNHCR Executive Committee.<sup>31</sup>

As regards the “real risk” threshold, UNHCR recommends a pragmatic approach. Several factors should be taken into account in assessing whether the applicant would face a real risk of serious and indiscriminate threat to his or her life or person. These could include: the general situation in the country, the number of casualties, the question of whether the conflict is countrywide or limited to a specific region, and the applicant’s personal background. The fact that several EU Member States refrain from deportation to a given situation may be an important indication that a real risk of indiscriminate violence exists.

Article 15(c) should be construed as a basis for the grant of subsidiary protection to persons, including former combatants, at risk from indiscriminate violence in broadly-defined situations of armed conflict. The requirement for an “individual” threat should not be interpreted in an excessively narrow manner, but rather as requiring that the risk faced by the individual claimant is real, and not remote, in his or her individual circumstances. As set out in Part Two below, this conclusion is supported by the provision’s drafting history and the sources on which it is based, as well as the practice of Member States.

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<sup>28</sup> International Criminal Tribunal for the former Yugoslavia (ICTY), Appeals Chamber, *Prosecutor v. Tadic*, *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, IT-94-1-AR72, <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

<sup>29</sup> *Ibid.*, paragraph 70.

<sup>30</sup> See Conclusion No. 94 (LIII) of the UNHCR Executive Committee of 8 October 2002, paragraph (c)(vii), at <http://www.unhcr.org/excom/EXCOM/3dafdd7c4.html>.

<sup>31</sup> *Ibid.*

## 2. Protection of People Threatened by Indiscriminate Violence: Sources, Object and Purpose of Article 15(c) of the Qualification Directive, and State Practice

### 2.1 International and Regional Law

#### *International and Regional Refugee Law*

The State is primarily responsible for protecting its citizens. A need for international protection arises where State protection is absent, *de facto* or *de jure*, with the result that basic human rights are seriously at risk. This may occur as a result of persecution or other threats to life, liberty or personal security. Frequently, these elements are interlinked, and forced displacement is more often than not the manifestation of a State's failure to provide protection. Situations of conflict and disorder regularly give rise to such risks. Such cases must be clearly distinguished from those where individuals leave or stay outside their countries of origin for compassionate or other reasons.<sup>32</sup>

With the 1951 Convention and its 1967 Protocol, States adopted a framework which, if properly applied, can address most international protection needs, including those arising in the context of conflict and serious public disorder. In such situations, entire groups of people may be at risk of persecution based, for example, on their ethnicity or political affiliation. People with a well-founded fear of such persecution who seek asylum fall squarely within the 1951 Convention definition.

Furthermore, the dynamic nature of the 1951 Convention, informed by its objective and purpose as well as by developments in related areas of law (human rights law, humanitarian law and international criminal law), offers the possibility for States to extend its application to persons who are in need of international protection beyond the scope of the "classical" refugee definition.

In Africa, States have formally broadened the refugee definition to encompass people threatened by indiscriminate violence. The Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa explicitly covers not only persons fleeing persecution for the reasons set out in the 1951 Convention, but also:

"...every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".<sup>33</sup>

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<sup>32</sup> See UNHCR, *Complementary Forms of Protection: Their Nature and Relationship to the International Protection Regime*, *op.cit.* footnote 13.

<sup>33</sup> Organization of African Unity, 1969 *Convention governing the Specific Aspects of Refugee Problems in Africa*, Article 1(2), UNTS 14691, <http://www.unhcr.org/cgi-bin/txis/vtx/refworld/rwmain?docid=3ae6b36018>.



Similarly, in Latin America, the 1984 Cartagena Declaration on Refugees<sup>34</sup> recommended inclusion of:

“persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order”.<sup>35</sup>

Although not binding, this definition serves as the basis for recognition of refugee status in a number of Latin American States.<sup>36</sup>

The principle of *non-refoulement* as the cornerstone of international refugee law reflects, in UNHCR’s view, a rule of customary international law.<sup>37</sup> In application of this principle, countries which are not party either to the 1951 Convention or to regional refugee instruments or which maintain a geographical limitation to the 1951 Convention continue to host large numbers of refugees fleeing from persecution as well as indiscriminate violence. UNHCR, by virtue of its mandate, has often been involved in assisting these host countries and in seeking durable solutions for the refugees concerned.

Several attempts have been made in the Council of Europe to adopt a broad approach to the refugee definition of the 1951 Convention and to extend its application to “de facto refugees”, i.e. persons who do not formally fulfil the refugee definition of the 1951 Convention.<sup>38</sup> However, these recommendations have not been taken up by the Council of Europe’s Member States. Unlike the regions mentioned earlier, European States do not collectively apply an extended refugee definition which includes people fleeing from indiscriminate violence. In 2001, the Committee of Ministers therefore recommended that subsidiary protection be granted to such persons.<sup>39</sup>

### *International Human Rights Law*

Certain human rights obligations, especially protection of the right to life and the absolute prohibition on torture or cruel, inhuman and degrading treatment or

<sup>34</sup> *Cartagena Declaration on Refugees*, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, III(3), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b36ec>.

<sup>35</sup> *Ibid.*, Chapter III(3), last sentence.

<sup>36</sup> Similarly, the revised text of the 1966 Bangkok Principles on the Status and treatment of Refugees adopted by the Asian-African legal Consultative Organization (formerly Committee) in 2001 incorporates a refugee definition similar to that in the OAU Refugee Convention. The principles are available at <http://www.aalco.int/Final Text of Bangkok Principles.htm>.

<sup>37</sup> See analysis and sources referred to in: UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, Geneva 2007, paragraphs 14-16 and footnote 30 with further references, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=45f17a1a4>.

<sup>38</sup> See: Council of Europe Parliamentary Assembly, *Recommendation 773 (1976) on the situation of de facto refugees*, 26 January 1976, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4720706b2>; *Recommendation 1236 (1994) on the right of asylum*, 12 April 1994, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b38010>; and Council of Europe Rec(2001)18, *op.cit.* footnote 14. See also Jane McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, *International Journal of Refugee Law*, Vol. 17, Issue 3 (2005), p. 462, footnote 2.

<sup>39</sup> Council of Europe Rec (2001)18, *op.cit.* footnote 14.

punishment, have been interpreted by the supervisory organs of human rights instruments as prohibiting *refoulement* to places where there is a risk of such treatment. *Non-refoulement* is also considered a fundamental component of the customary international law prohibition against torture, a prohibition which has attained the rank of *jus cogens*.<sup>40</sup> These provisions thus complement the protection mechanisms available under international refugee law.

Jurisprudence suggests that a situation of indiscriminate violence may trigger the application of the *non-refoulement* provisions of human rights instruments if the applicant can show a personal risk. However, the standard of proof is quite high. For example, in the context of Article 7 of the 1966 International Covenant on Civil and Political Rights<sup>41</sup>, the UN Human Rights Committee has highlighted the need to ensure that removal does not result in a “real risk of irreparable harm”.<sup>42</sup>

Article 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitly refers to the obligation not to remove someone to a country where he or she would be in danger of being subjected to torture. The UN Committee against Torture has consistently held that “for the purposes of Article 3 [...], a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned”.<sup>43</sup> According to the Committee, such a risk “must be assessed on grounds that go beyond mere theory or suspicion”<sup>44</sup>, but “does not have to meet the test of being highly probable”.<sup>45</sup>

### *European Human Rights Law*

Article 3 of the ECHR provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”. Article 3 is not subject to any derogation<sup>46</sup> and the European Court of Human Rights has consistently held that returning an individual to a country where there are substantial grounds for believing

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<sup>40</sup> *Ibid.*, paragraphs 21-22 and footnote 48 with further references.

<sup>41</sup> 999 UNTS 171, 6 (ILM) 1967. Article 7 provides that “[n]o one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment”.

<sup>42</sup> See: UN Human Rights Committee, *General Comment No. 31[80]: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add 13, 26 May 2004, paragraph 12, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=478b26ae2>.

<sup>43</sup> See, for instance, UN Committee Against Torture, *E.A. v. Switzerland (28/1995)*, Decision of 10 November 1997, CAT/C/19/D/28/1995, paragraph 11.5. Similarly: *S.C. v. Denmark (143/1999)*, Decision of 10 May 2000, CAT/C/24/D/143/1999, paragraph 6.6, and *Zare v. Sweden (256/2004)*, Decision of 17 May 2006, CAT/C/36/D/256/2004, paragraph 9.3.

<sup>44</sup> See: UN Committee Against Torture, *General Comment No. 1: Implementation of article 3 of the Convention in the context of article 22*, adopted on 21 November 1997, UN Doc. A/53/44, annex IX, 1997, paragraph 6 and 7, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=453882365>.

<sup>45</sup> *Ibid.*

<sup>46</sup> Article 15(2) of ECHR. See ECtHR, *Ireland v. UK*, 18 January, 1978, Series A 25, paragraph 163. Similarly: *Soering v. The United Kingdom*, 7 July 1989, no. 25803/94, paragraph 88 and *Kalashnikov v. Russia*, 15 July 2002, no. 47095/99, paragraph 95. In subsequent decisions, the Court has further specified that “even in the most difficult of circumstances, such as the fight against organized terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.” See, for example, ECtHR, *Aksoy v. Turkey*, 18 December 1996, no. 25964/94, paragraph 62. In *Chahal v. The United Kingdom* (15 November 1996, no. 22414/93, paragraph 80), the Court explicitly stated: “The prohibition provided by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees [...]”

that he or she is “at real risk of being subjected to torture or inhuman or degrading treatment or punishment” is a violation of Article 3.<sup>47</sup> The ill-treatment must attain “a minimum level of severity”<sup>48</sup> and the standard of proof for such treatment is “substantial grounds for believing”.<sup>49</sup> It is irrelevant whether the proposed return would take place directly or indirectly.<sup>50</sup>

Many of the expulsion cases handled by the ECtHR have involved treatment in the country of origin of the kind envisaged by the 1951 Convention, and the ECtHR has generally deemed it necessary to assess the real risk of ill-treatment arising out of the individual situation of the applicants. While the ECtHR has not excluded the applicability of Article 3 in situations of conflict and indiscriminate violence, it has in several decisions set high standards for the granting of Article 3 protection, including where the applicant faced threats in the context of such situations.

*Vilvarajah and Others v. The United Kingdom* concerned Tamil asylum-seekers who, after their return from the United Kingdom (UK) to Sri Lanka, had been tortured. In this case, the ECtHR found that as “their personal situation was [not] any worse than the generality of other members of the Tamil community or other young male Tamils who were returning to their country [...] A mere possibility of ill-treatment ... is not sufficient [...] there existed no special distinguishing features in their cases that could or ought to have enabled the Secretary of State to foresee that they would be treated in this way.”<sup>51</sup>

Similarly, in *H.L.R. v. France*, in which the applicant claimed that he faced attacks by drug traffickers in Colombo, the ECtHR held that it “can but note the general situation of violence existing in the country of destination. It considers, however, that this circumstance would not in itself entail, in the event of deportation, a violation of Article 3.”<sup>52</sup>

*Venkadajalasarma v. The Netherlands* concerned a Tamil applicant from Sri Lanka. After assessing the general situation in Sri Lanka, the ECtHR found that “no substantial grounds have been established for believing that the applicant, if expelled, would be exposed to a real risk”<sup>53</sup> of ill-treatment, as the peace process looked promising and the country’s human rights situation appeared to be stabilizing.<sup>54</sup> The case is another example of the fact that the ECtHR does not exclude risks arising in the context of situations of conflict and generalized violence from the scope of Article 3, although in this specific case the Court found that the situation in Sri Lanka did not give rise to a real risk for the applicant.

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<sup>47</sup> As an early landmark case with respect to extradition, see ECtHR, *Soering v. The United Kingdom*, paragraph 88 and 91. See also ECtHR, *Cruz Varas and Others v. Sweden* (15 November 1996, no. 22414/93, paragraph 80), in which the Court confirmed that Article 3 is applicable in extradition as well as in expulsion cases.

<sup>48</sup> See above, *Cruz Varas*, paragraph 83.

<sup>49</sup> *Soering v. The United Kingdom, op.cit.*, paragraph 88.

<sup>50</sup> ECtHR, *T.I. v. United Kingdom*, Decision 7 March 2000, no. 43844/98, International Journal of Refugee Law, Vol. 12, No. 2, p. 256.

<sup>51</sup> ECtHR, *Vilvarajah and Others v. The United Kingdom*, 30 October 1991, nos. 13163/87, 13164/84, 13165/87, 13447/87 and 13448/87, paragraph 111f.

<sup>52</sup> ECtHR, *H.L.R. v. France*, 29 April 2004, no. 24573/94, paragraph 41.

<sup>53</sup> ECtHR, *Venkadajalasarma v. The Netherlands*, 17 February 2004, no. 58510/00, paragraph 68.

<sup>54</sup> *Ibid.*, paragraph 69.

The ECtHR's jurisprudence in this area is still evolving. In *Salah Sheekh v. The Netherlands*,<sup>55</sup> a January 2007 judgment concerning a Somali national from Mogadishu and member of the minority Ashraf clan, the ECtHR reconsidered the rather restrictive application of the "real risk" criterion it used in *Vilvarajah*. It contrasted the situation of Salah Sheekh to that of Vilvarajah, finding that "on the basis of the applicant's account and the information about the situation in the 'relatively unsafe' areas of Somalia for members of the Ashraf minority, it is foreseeable that upon his return the applicant will be exposed to treatment in breach of Article 3."<sup>56</sup> The Court explicitly lowered the "real risk" threshold by stating that "[i]t might render the protection offered by that provision illusory if, in addition to the fact that he belongs to the Ashraf [...], the applicant be required to show the existence of further special distinguishing features."<sup>57</sup>

The ECtHR is currently applying interim measures according to Rule 39<sup>58</sup> to all cases brought by Sri Lankan nationals of Tamil origin seeking to prevent their removal, pending a leading decision. Furthermore, in a letter of 23 October 2007, the Court asked the United Kingdom and France to refrain for the time being from issuing removal orders to Tamils who claim that their return to Sri Lanka would expose them to the risk of treatment in violation of the ECHR. This indicates that the ECtHR is willing to apply Articles 2 and 3 ECHR to people fleeing threats arising in the context of conflict and violence, and to develop further its jurisprudence in this respect.

### Conclusion

The 1951 Convention and its 1967 Protocol provide the basic framework to address international protection needs, and can extend to people threatened by indiscriminate violence, although this approach has not been taken in Europe. The prohibition of *refoulement* as developed under international and European human rights law offer protection complementary to that of the 1951 Convention. The risks associated with return to a situation of indiscriminate violence may give rise to protection under these instruments, although the jurisprudence in this area is still evolving, and the standard applied for the risk assessment is high. In a recent decision concerning a member of a minority clan in Somalia, the ECtHR has clarified that protection must not be illusory, and that distinguishing features beyond belonging to a group at risk are not required.

UNHCR welcomes the recognition by the ECtHR and supervisory bodies of key human rights instruments that threats arising from indiscriminate violence may give rise to *non-refoulement* protection, and looks forward to further development of this reasoning. UNHCR considers that a situation of indiscriminate violence is a strong indicator of an individualized risk to affected persons, and that the *non-refoulement* provision applies, regardless of the number of persons at risk.

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<sup>55</sup> ECtHR, *Salah Sheekh v. The Netherlands*, *op.cit.* footnote 22.

<sup>56</sup> *Ibid.*, paragraph 148.

<sup>57</sup> *Ibid.*

<sup>58</sup> According to Rule 39 of the Rules of the ECtHR, the Court can request interim measures.

## 2.2 Origins, Object and Purpose of Article 15(c)

The need to harmonize EU rules on “*de facto* refugees” was already acknowledged in the European Commission’s 1991 Communication on the Right to Asylum.<sup>59</sup> The term “*de facto* refugees” was defined broadly, covering all international protection needs arising because the physical integrity of a person not qualifying for 1951 Convention status would be endangered, if returned to his or her country of origin.<sup>60</sup> People threatened by indiscriminate violence and conflict were included in this definition.

Soon after the Communication was issued, the mass influx from the former Yugoslavia focused the attention of Member States on the problem of people fleeing violence and conflict<sup>61</sup> and ultimately led in 2001 to the adoption of the Directive on Temporary Protection.<sup>62</sup> This Directive recognizes the international protection needs of “displaced persons” who are unable to return to their countries “in safe and durable conditions because of the situation prevailing in that country” and who “may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection”. The Directive cites in particular two categories of persons: (i) persons who have fled areas of armed conflict or endemic violence; and (ii) persons at serious risk of, or who have been the victims of, systematic or generalized violations of their human rights.

For the first time, the Temporary Protection Directive set binding minimum standards at EU level for the legal status and rights of persons fleeing indiscriminate violence. The Directive’s rationale is to enable Member States to provide time-limited protection to large numbers of people, in emergency situations, without having to conduct an individual examination of their claims. Article 2(a) provides: “Temporary protection means a procedure of exceptional character to provide, in the event of a mass influx or imminent mass influx of displaced persons from third countries who are unable to return, immediate and temporary protection”. The existence of a mass influx must be established by a Council Decision, and UNHCR must be consulted. The duration of temporary protection is strictly limited to a maximum of three years.<sup>63</sup> The Directive obliges Member States to permit beneficiaries to lodge an asylum application at any time, although the processing of such applications may be suspended while the temporary protection regime remains in force. The Directive has been transposed in all Member States, but has so far never been applied.

While negotiations on the Temporary Protection Directive were still underway, the European Council made it clear that temporary protection alone would not suffice to meet the needs of persons threatened by indiscriminate violence. The 1999 Tampere

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<sup>59</sup> *Communication from the Commission to the Council and the European Parliament on the right to asylum of 11 October 1991*, SEC (91) 1857 fin, [http://aei.pitt.edu/1275/01/asylum\\_rights\\_SEC\\_91\\_1857.pdf](http://aei.pitt.edu/1275/01/asylum_rights_SEC_91_1857.pdf).

<sup>60</sup> *Ibid.*

<sup>61</sup> European Council in Edinburgh, 11-12 December 1992, *Conclusions of the Presidency*, [http://www.europarl.europa.eu/summits/edinburgh/a0\\_en.pdf](http://www.europarl.europa.eu/summits/edinburgh/a0_en.pdf); *Resolution on certain common guidelines as regards the admission of particularly vulnerable groups of persons from the Former Yugoslavia*, OJ 1995 C 262, 2 June 1993. In 1997, the Commission submitted a proposal for a joint action concerning temporary protection of displaced persons.

<sup>62</sup> Council Directive 2001/55/EC, *op.cit.* footnote 16.

<sup>63</sup> One year with possibility of extension for another year. In exceptional cases, it may be extended for a third year.

Conclusions stated that the Common European Asylum System should also include “measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection”.<sup>64</sup> “Temporary” and “subsidiary” protection thus emerged as distinct protection tools, and minimum standards for subsidiary protection were incorporated into the draft Qualification Directive.

The Qualification Directive takes a holistic approach to international protection needs, and contains minimum standards both for the recognition of refugee status and for subsidiary protection. Subsidiary protection is intended to be complementary to refugee protection.<sup>65</sup> The definition of subsidiary protection in Article 2(e) is thus restricted to persons who do not qualify for refugee status. The Directive draws from two sources: “international obligations under human rights instruments” and “practices existing in Member States” or “best elements of the Member States’ national systems”.<sup>66</sup>

The Commission had envisaged an approach to subsidiary protection which would encompass all international protection obligations not covered by the 1951 Convention. During the drafting of the Directive, reference was made to the Final Act of the 1951 Convention, the evolution of UNHCR’s mandate and regional developments such as the OAU Convention, as arguments for including people threatened by indiscriminate violence and massive human rights violations in the subsidiary protection regime.<sup>67</sup>

Some States, however, wished to have a more precise definition, leaving no doubt as to the scope of subsidiary protection.<sup>68</sup> This resulted in a more narrowly circumscribed provision. Under Article 15(c), the individual must be fleeing a situation of international or internal armed conflict, and the threat must be both “serious” and “individual”. The Directive does not define “international or internal armed conflict”<sup>69</sup>, nor the notion of “serious threat”. As far as the “individual” nature of the threat is concerned, Recital 26 states that risks to which the population of a country or a section of the population is generally exposed do not normally create in themselves an individual threat which

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<sup>64</sup> *Presidency Conclusions*, Tampere European Council, 15-16 October 1999, paragraph 14, [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/ec/00200-r1.en9.htm](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm)

<sup>65</sup> Recital 24 states: “Minimum Standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention”.

<sup>66</sup> *Explanatory Memorandum to 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, 12 September 2001, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0510:FIN:EN:PDF>. Discussions on minimum standards for subsidiary protection had started in 1997, with a Danish proposal, taken up by the Dutch Presidency, which focused on Article 3 ECHR as a legal basis for protection of persons falling outside the 1951 Convention refugee definition. A 1998 study commissioned by the General Secretariat provided an overview of subsidiary forms of protection in Member States, which were not limited to Article 3 of the ECHR. See: *Study on the International Instruments Relevant to Subsidiary Protection*, 10175/98 ASIM 178, 13 July 1998. For an updated overview of Member States’ practices, see the Note from General Secretariat of the Council to Asylum Working Party, *Compilation of Replies to Questionnaire on Complementary Forms of Protection*, 8378/01 ASILE 27, 3 May 2001.

<sup>67</sup> *Informal EC Discussion Paper on the legislative work by the European Commission regarding the definition of the concept of ‘refugee’ and the subsidiary protection*, 14 May 2001.

<sup>68</sup> *Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum*, Doc 12148/02 ASILE 43, 20 September 2002 (hereinafter ‘Presidency Paper’), page 2.

<sup>69</sup> Indeed, during the drafting process a reference to the 1949 *Geneva Convention relative to the Protection of Civilian Persons in Time of War* was proposed but not inserted.

would qualify as serious harm. Some Member States apparently did not intend to create any new legal obligations in Articles 2(e) and 15 of the Qualification, but rather to reflect Member States' existing *non-refoulement* obligations.<sup>70</sup>

Article 3 ECHR and the related jurisprudence of the ECtHR played an important role in the drafting of Articles 2(e) and 15. The objective risk assessment of the term "substantial grounds for believing" in Article 2(e) was taken from the case-law of the ECtHR (and the UN Committee against Torture), as were the criteria for serious harm set out in Article 15(a) and (b). However, the subsidiary protection regime of the Qualification Directive is not a mere copy of Article 3 ECHR or the ECtHR's interpretation of that provision. The wording of "serious harm" in Article 2(e) does not derive from the ECtHR's jurisprudence, nor in the decisions of the supervisory bodies of the international human rights treaties.

Furthermore, the ECtHR had set a high threshold for the assessment of risk in situations of conflict and indiscriminate violence, although it never excluded *per se* that situations of generalized violence could give rise to Article 3 protection. A similar approach had been taken by the Committee against Torture. It is only recently (subsequent to adoption of the Qualification Directive), that the ECtHR has relaxed the test for demonstrating a "real risk" in such situations.<sup>71</sup>

Despite the lack of authoritative pronouncements from the ECtHR and the human rights treaty bodies on the protection of people at risk in situations of indiscriminate violence, this group was included in the Commission's initial proposal for subsidiary protection. This approach appears to have been taken in view of the practice of Member States<sup>72</sup>, and as a logical consequence of the recognition of the protection needs of such people in the Temporary Protection Directive, to which the Explanatory Memorandum of the Commission on Article 15(c) makes explicit reference. The Memorandum also explains that although the applicant must establish a real risk on an individual basis, "the reasons for the fear may not be specific to an individual".

During the negotiations in the Council, there was general agreement that the subsidiary protection regime must encompass people threatened by indiscriminate violence, and that Article 15(c) was to include the obligation to apply the principle of *non-refoulement* in a situation where a Member State would seek to expel an individual to a country where a high level of violence prevailed. A Presidency paper submitted during the negotiations specifically referred to the fact that the ECtHR did not exclude the application of the *non-refoulement* principle to such situations.<sup>73</sup> Furthermore, there was agreement that a specific provision for the protection of people at risk in situations of indiscriminate violence was necessary, since it was considered that the reference to torture and ill treatment in Article 15(b) would not necessarily cover threats arising in situations of indiscriminate violence.<sup>74</sup>

In conclusion, the drafting history of the Directive shows that Member States agreed that subsidiary protection under the Qualification Directive should include people

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<sup>70</sup> This is shown by the title, structure and Recital 25 of the Directive.

<sup>71</sup> *Ibid.*, page 14 and footnote 55.

<sup>72</sup> See below, section 2.3.

<sup>73</sup> *Op.cit.* footnote 68, page 7.

<sup>74</sup> *Ibid.*, page 6.

threatened by indiscriminate violence, provided they meet the relevant requirements. These requirements have been drawn not only from the jurisprudence of the ECtHR, but also from broader standards of protection under international law and Member States' national laws, as described in the following section.

### 2.3 National Mechanisms Complementary to the 1951 Convention

Most States, whether or not they are party to the 1951 Convention, have acknowledged the international protection needs of persons fleeing indiscriminate violence. Some use the framework of the 1951 Convention to address these needs. Others have put in place mechanisms based on the country's obligations under international or regional human rights law, and/or on national (constitutional) obligations. These national measures vary widely, from discretionary non-removal practices (i.e. mere factual protection against *refoulement*), to the granting of a status akin to refugee status. However, in UNHCR's view, States should address these protection needs on the basis of a legal provision which offers a formal status.

The compilation below includes some examples of practice within the EU.<sup>75</sup> Similar practices exist outside the EU.<sup>76</sup> This compilation includes practice before and after adoption of the Qualification Directive, and draws on UNHCR's November 2007 Study of the Implementation of the Qualification Directive in selected Member States.<sup>77</sup> It demonstrates that the Qualification Directive has neither restricted the way in which eligibility for complementary forms of protection is assessed, nor led to a fully harmonized approach to subsidiary protection. As regards Article 15(c), practice shows that several Member States have found the provision too narrow, and in their national transposition of this provision, have chosen to omit the word "individual", or to extend the scope beyond "civilians" or beyond situations of "armed conflict". Some States have

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<sup>75</sup> All translations from national legislation or jurisprudence below are unofficial translations. For a more comprehensive overview, see: Jane MacAdam, *Seeking refuge in human rights*, paper presented at 5-6 June 2004 Conference on Asylum and Migration: Policy and Practice in the EU Accession Countries, <http://www.forcedmigration.org/events/prague2004/mcadam-paper.pdf>; ECRE, *Complementary/Subsidiary Forms of Protection in the EU Member States: An Overview*, December 2003 update, at: <http://www.ecre.org/research/survcompro.pdf>; Ruma Mandal, *Protection Mechanisms outside of the 1951 Convention ('Complementary Protection')*, PPLA/2005/02, June 2005 (survey commissioned by UNHCR), <http://www.unhcr.org/protect/PROTECTION/435df0aa2.pdf>; and Daphne Bouteillet-Paquet (ed.), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention*, Brussels, 2002.

<sup>76</sup> For example, Canada's Immigration and Refugee Protection Act (2001) establishes "protected person" status, which extends to 1951 Convention refugees and other persons facing a "risk to their life or a risk or cruel or inhuman treatment or punishment" in their country of origin. The risk must be one not faced generally by other individuals in or from that country; the Immigration and Refugee Board guidance states "there is a requirement of some targeting although the targeted group may be large". See: Immigration and Refugee Board of Canada, *Consolidated Grounds in the Immigration and Refugee Protection Act*, 2002, [http://www.irb-cisr.gc.ca/en/references/legal/rpd/cgrounds/life/cglife\\_e.pdf](http://www.irb-cisr.gc.ca/en/references/legal/rpd/cgrounds/life/cglife_e.pdf), paragraph 3.1.7. In addition, Canadian law allows the Minister to impose a stay on removal orders to a country or a place if the circumstances there pose a generalized risk to the entire civilian population as a result of armed conflict. See: *Immigration and Refugee Protection Regulations*, Canada Gazette, Vol. 135, No. 50, 15 December 2001, Section XXII, *Stay of Removal Order*, Part 13 Division 3 and Part 15, <http://laws.justice.gc.ca/en/1-2.5/SOR-2002-227/index.html>. A moratorium on removals is currently or has recently been in effect for Afghanistan, Burundi, the Democratic Republic of Congo, Haiti, Iraq, Liberia, Rwanda and Zimbabwe.

<sup>77</sup> *Op.cit.* footnote 3.



maintained broader forms of subsidiary protection, in addition to those of Articles 2(e) and 15 of the Qualification Directive.

### Austria

In Austria, prior to transposition of the Qualification Directive, asylum-seekers whose removal or expulsion was prohibited and who had no lawful right to stay, were granted a limited residence permit on the basis of Articles 8 and 15 of the 1997 Asylum Law. In all cases outside the asylum procedure, the authorities had to assess whether obstacles to *refoulement* existed (Article 57 Aliens Law) prior to a person's removal.<sup>78</sup> An alien could seek a deportation deferment order (Article 56, paragraph (2) of the Aliens Law), declaring deportation impossible on legal grounds (Article 57 Aliens Law) or for practical reasons. Such an order could also be issued *ex officio* and was renewable. While no additional rights were conveyed to the holder, the order provides evidence of the deferral of the deportation to a later date. The Austrian Administrative Court, on this legal basis, has stated that the removal to a situation of extreme danger would be contrary to Austrian law. This would apply particularly if, due to the armed conflict, the situation of danger would be so widespread that practically everyone deported to the country in question would face threats to life and person, so as to preclude deportation under Article 3 of the ECHR.<sup>79</sup>

According to Article 8 of the 2005 Asylum Law, subsidiary protection is now granted if return to the country of origin would constitute a real risk of violation of Articles 2 or 3 ECHR or its Protocols No. 6 or 13, or would represent for the applicant as a civilian a serious threat to his life or person by reason of indiscriminate violence in situations of international or internal conflict. Beneficiaries of subsidiary protection receive a limited right of residence.<sup>80</sup>

### Finland

According to Section 9(4) of the Finnish Constitution, “[a] foreigner shall not be deported, extradited or returned to another country, if in consequence he or she is in danger of capital punishment, torture or other treatment violating human dignity.” This *non-refoulement* provision is mirrored in Section 147 of the 2004 Aliens Act (301/2004, amendments up to 619/2007). Finland is still in the process of transposing the Qualification Directive. The proposed new law would permit the grant of residence permits to those fleeing armed conflict or indiscriminate violence.

The 2004 Aliens Act is broader than Article 15 of the Qualification Directive. Under Section 88, aliens may receive a residence permit on the basis of a “need for protection”

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<sup>78</sup> Decisions on whether the removal of an asylum-seeker contravenes the *non-refoulement* principle of Article 57 Aliens Law are taken by the asylum authorities in the framework of the single procedure (Article 8 Asylum Law).

<sup>79</sup> Translation by UNHCR. See VwGH, 99/21/0286, 8 November 2001. Similarly, see *inter alia* VwGH, 99/20/0599, 4 April 2000 and VwGH, 99/20/0460, 21 June 2001.

<sup>80</sup> According to jurisprudence of the Higher Administrative Court (*Verwaltungsgerichtshof*), subsidiary protection on the basis of Article 3 ECHR is also granted if a person does not have sufficient means of subsistence in the country of origin or whose particular medical needs cannot be met. See, for example, VwGH, 2005/01/0057, 26 January 2006; VwGH, 2005/21/0058, 17 November 2005; and VwGH, 2001/01/0164, 9 July 2002, <http://www.ris2.bka.gv.at/Vwgh/>.

if “they are under the threat of capital punishment, torture or other inhuman treatment or treatment violating human dignity in their home country or country of permanent residence,” or if they cannot return to their country “because of an armed conflict or environmental disaster”. An individual threat is not required.<sup>81</sup> Finnish authorities have granted protection under Section 88 to asylum-seekers from Iraq, Afghanistan and Somalia, citing the general “security situation” in those countries.<sup>82</sup>

### France

In France, until 2004 the concept of “territorial asylum”<sup>83</sup> served as a legal basis, separate from refugee status, for addressing certain international protection needs, including those of people threatened by indiscriminate violence, if the person could show that he was individually targeted.<sup>84</sup> When amending the 1952 Asylum Law by Law 2003-1176 in December 2003, France introduced the concept of subsidiary protection. Article 2(II)(2)(c) of the 2003 Asylum Law provides for subsidiary protection of a civilian against “[...] serious, direct and individualized threat to his life or person because of indiscriminate violence resulting from internal or international armed conflict”. In a number of decisions, the *Commission des Recours des Réfugiés* (CRR) has granted subsidiary protection on that basis to people threatened by indiscriminate violence.<sup>85</sup>

### Lithuania

In Lithuania, subsidiary protection may be granted on the basis of Article 87(1) of the 2004 Law on the Legal Status of Aliens (as amended by 28 November 2006) to a person who is unable to return to his or her country of origin owing *inter alia* to a well-founded fear that his or her life, health, safety or freedom is under threat as a result of endemic violence occurring in a situation of armed conflict or which has placed him or her at serious risk of systematic human rights violation.

Article 87(1)(3) of the Aliens Law does not require an “individual threat” to the applicant’s life or person if the application is based on indiscriminate violence. Instead, the required analysis is whether such violence poses a threat to the applicant’s life, health, safety, or freedom, or presents a serious risk of systematic violation of human rights. On this basis, in cases of armed conflict causing indiscriminate violence, people

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<sup>81</sup> Note also that aliens who are found to be not entitled to international protection because of the exclusion grounds, may still be issued with a temporary residence permit for a maximum of one year at a time if they cannot be removed “because they are under the threat of death penalty, torture, persecution or other treatment violating human dignity” (Section 89).

<sup>82</sup> In recent years, Finnish authorities have also granted asylum-seekers from Iraq, Somalia and Afghanistan temporary residence permits (so-called B-status) under Section 51 of the Aliens Act, which applies to aliens who cannot be returned to their countries due to “technical barriers,” such as the unavailability of flights (due for instance to civil war).

<sup>83</sup> For an explanation of territorial asylum under French law, see Delouvain, Patrick, *The Evolution of Asylum in France*, Journal of Refugee Studies, vol. 13, no. 1, March 2000, pages 66-69.

<sup>84</sup> See Ruma Mandal, *op.cit.* footnote 75, page 75.

<sup>85</sup> See, for example, CRR Case GKY, 03-01-01735, 17/10/2006; CRR Case JECB, 490601, 4/12/2006; CRR Case TT, 580896, 1/02/2007. See also Chapters IV.4.4.2 and IV.5 of the UNHCR’s *Qualification Directive study, op.cit.* footnote 3.

have been granted subsidiary protection without demonstrating individual threats (for instance, persons from Somalia, and of Chechen origin from the Russian Federation).<sup>86</sup>

### Germany

In Germany, the Interior Minister of each Federal State may order a temporary suspension of deportation on humanitarian grounds based on Section 60a of the 2004 Residence Act (former Section 54 Aliens Act) with regard to specific countries or groups of persons, for a maximum period of six months. Persons whose deportation is suspended on this basis receive a toleration permit with limited rights only. In the past, this provision has sometimes been used to provide protection to groups fleeing situations of conflict and indiscriminate violence.<sup>87</sup>

However, given the fact that suspension of deportation by the Ministers is a political decision, it has been infrequently used. The German Federal Administrative Court therefore decided that in cases of extreme danger, in the absence of a temporary suspension by a Federal State, protection must be granted by the asylum authorities to individuals on the basis of Section 60(7) of the 2004 Residence Act (former Section 53(6) Aliens Act).<sup>88</sup> The threshold for the risk assessment is, however, very high. The individual must face “certain death or most severe injuries”.<sup>89</sup>

### Netherlands

In the Netherlands, people threatened by indiscriminate violence not qualifying for refugee status may receive an asylum permit on the basis of the following two subparagraphs of Article 29(1) of the Aliens Act of 23 November 2000, which apply to persons:

- (c) For whom the Minister [of Justice] has concluded, on the ground of convincing reasons of a humanitarian nature which are connected to the reasons for departure from the country of origin, that he cannot reasonably be returned to the country of origin; [and]
- (d) For whom return to the country of origin would, according to the assessment of the Minister [of Justice], be particularly harsh in connection with the general situation there.

Subparagraph (c) contains what is called the “trauma policy”. This pertains to persons whose experiences have been so traumatic that they cannot be expected to return to the

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<sup>86</sup> See, for example, the case of a Chechen national who had been denied refugee status under the 1951 Convention, but who was subsequently granted subsidiary protection. The Supreme Administrative Court (SAC) of Lithuania found that although no individual threat was proven in this case, subsidiary protection had to be granted because of the general situation in Chechnya (*I.B. v. Migration Department*, 26 November 2007, A8-1076/2007).

<sup>87</sup> As examples, see the orders of the Interior Minister of Schleswig-Holstein to suspend deportation to Kosovo and to extend the suspension of deportation to Sri Lanka, of 21 August 2007.

<sup>88</sup> Section 60 (7) Residence Act 2004 states: “A foreigner should not be deported to another State in which there is a substantial concrete danger to his or her life and limb or liberty. Dangers to which the population or the segment of the population to which the foreigner belongs are generally exposed shall receive due consideration in decisions pursuant to Section 60a (1), sentence 1 [Temporary suspension of deportation].” Prior to 1994, toleration permits were issued to groups of persons fleeing civil war situations.

<sup>89</sup> See decisions of the German Federal Administrative Court of 17 October 1995, 9 C 9.95, 27 April 1998, 9 C 13.97 and 8 December 1998, 9 C 4.98.

country of origin. The relevant experiences are enumerated in an Aliens Circular.<sup>90</sup> In order to qualify for a status based on trauma, the asylum-seeker must have left his or her country within six months of the traumatic events. The Minister of Justice may also declare whole groups eligible for protection under Article 29 (c).

Subparagraph (d) establishes group (or category)-based protection, and is the instrument used to protect people threatened by indiscriminate violence. This is a discretionary tool. The Minister of Justice has the power to determine whether group-based protection will be implemented for persons coming from a particular country or region, or for a particular group of persons.<sup>91</sup> Indicators to be taken into consideration in the decision are the following:

- (a) The nature of violence in the country of origin, and specifically the extent of violations of human rights and humanitarian law, the degree of arbitrariness and the degree to which violence occurs, as well as its geographical spread;
- (b) Activities undertaken by international organizations with regard to the country of origin if and insofar as these form a benchmark for the position of the international community with respect to the situation there; and
- (c) The policy of other EU Member States.<sup>92</sup>

The beneficiaries of group-based protection receive a residence permit which carries the same rights as those extended to persons recognized as refugees.

### Portugal

With the Asylum Act of 1998, Portugal established a subsidiary protection regime, which includes not only threats arising from armed conflict but also from repeated human rights violations. According to Article 8, a residence permit “[s]hall be granted [...] for humanitarian reasons to aliens or stateless people to whom the provisions of Article 1 [refugee status] do not apply, and who are prevented from returning or feel unable to return to the country of their nationality or habitual residence, for reasons of serious insecurity emerging from armed conflicts or from the repeated violation of human rights that occurs therein.”

The Portuguese Supreme Administrative Court has emphasized that the obligation to grant protection for “humanitarian reasons” is not discretionary.<sup>93</sup> In practice, the Portuguese Aliens and Border Service require applicants to prove their nationality, and to show beyond any doubt that the general situation of insecurity in their country of origin causes personal consequences, which are directly related to their flight.<sup>94</sup>

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<sup>90</sup> The following (exhaustive) list of experiences is considered traumatic: the violent death of close family members or housemates, and of other relatives or friends if the applicant can plausibly show that there was a close bond between him/herself and the deceased; substantial non-criminal detention; torture, severe mistreatment or rape of applicant or witness of the same suffered by a close family member or housemate or of other relative or friend if applicant can show that there was a close bond between him/herself and the person concerned (Aliens Circular C/4.2.3).

<sup>91</sup> At the end of 2007, a group-based protection policy was in force for: persons originating from central and southern Iraq; Tutsis from the Democratic Republic of Congo; non-Arabs from Darfur, Sudan; persons originating from southern Somalia; and persons originating from Côte d’Ivoire.

<sup>92</sup> Article 3.106 Aliens Decree of 23 November 2000.

<sup>93</sup> Decision 045979, 24 January 2001, paragraphs I, II.

<sup>94</sup> See the assessment of the Portuguese Supreme Administrative Court that “[t]he granting of a residence permit for humanitarian reasons [...] depends on the prevalence in the country of the

## Slovakia

In Slovakia, prior to January 2007, persons in need of international protection who were not recognized as refugees received a tolerated stay status. However, this form of protection was limited to persons qualifying for protection under Article 3 ECHR. A subsidiary protection regime was established by the 2006 Act on Asylum which transposes the Qualification Directive. The provision transposing Article 15 b) is not limited to the country of origin and the provision for Article 15(c) is not limited to “civilians”.

## Spain

According to Article 17(2) of the Spanish Asylum Law (9/1994) in connection with Article 31.3 of the Asylum Regulation (as amended in the implementing Decree 2393/04 to the 2003 Aliens Law), humanitarian status may be granted to people fearing risks from indiscriminate violence who do not qualify for refugee status under the 1951 Convention, if there are well-founded and serious reasons to conclude that such persons would face real risk to life or physical integrity if returned. Both 1951 Convention status and humanitarian status under Articles 17(2), in connection with 31.3, entail the same rights for the recipient (including protection from *refoulement* and grant of a residence and work permit), with the exception of family reunification, where different conditions apply.

## Sweden

In Sweden, subsidiary protection was already included in the 1989 Swedish Aliens Act, long before the adoption of the Qualification Directive. A residence permit was granted to persons having a well-founded fear of the death penalty, corporal punishment, torture, or other inhuman or degrading treatment or punishment (Section 3(1)), as well as those in need of protection because of external or internal armed conflict (Section 3(2)). In addition, Chapter 2 Section 4(5) provided for the grant of a residence permit on humanitarian grounds.

Chapter 4 Section 2 of the 2005 Aliens Act transposes Article 15 of the Qualification Directive. It is potentially wider in scope than the Directive. It describes “a person otherwise in need of protection” who is entitled to a residence permit as one who:

1. has a well-founded fear of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment;
2. needs protection because of external or internal armed conflict or, because of other severe conflicts in the country of origin, has a well-founded fear of being subjected to serious abuses; or
3. is unable to return to the country of origin because of an environmental disaster.

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appellant of a situation of ‘serious insecurity emerging from armed conflict’”. According to the Court, “systematic violations of human rights only exist when the human rights violation is related to the citizen’s security, in the sense that these violations occur so frequently that they give rise to a feeling of serious insecurity amongst the generality of the citizens of the country” (Portuguese Supreme Administrative Court, Proc. 01297/04, 9 February 2005). See also: Portuguese Supreme Administrative Court Proc. 045142, 15 February 2000, Portuguese Administrative and Fiscal Court Proc. 316/05.OBELRS, 13 February 2006 and Administrative and Fiscal Court, Proc. 1008/06.8BELSB, 21 September 2007.

Unlike Article 15(c), Section 2(2) is not limited to civilians, and nor does it require an “individual” threat, or one which is directed against life or person. Moreover, Section 2(2) extends protection to those having a well-founded fear of “serious abuses” due to “other severe conflicts in the country of origin”.<sup>95</sup> In several cases, applicants from Iraq have been granted subsidiary protection on the basis that they had a well-founded fear of being subjected to severe abuse in a situation of “other severe conflicts”.<sup>96</sup>

Swedish law is thus broader in scope than the Qualification Directive and Sweden grants subsidiary protection in a large proportion of cases, although Swedish courts tend to adopt a rather restrictive interpretation of the law.<sup>97</sup>

### United Kingdom

Until March 2003, subsidiary protection in the United Kingdom could only be granted by the government on the discretionary basis of Exceptional Leave to Remain. The subsequently introduced concepts of Humanitarian Protection<sup>98</sup> and Discretionary Leave<sup>99</sup> were similarly based on general Asylum Policy Instructions. However, since 2006, complementary protection status is included in the UK’s Immigration Rules and the wording of Article 15(c) of the Qualification Directive has been included in paragraph 339C of those Rules. A recent decision of the UK Asylum and Immigration Tribunal suggests that the threshold for meeting the criteria of “individual threat” and “indiscriminate violence” should not be set too high for persons fleeing from situations of generalized violence;<sup>100</sup> humanitarian protection was granted under paragraph 339C to the applicant based on the general situation in Iraq. The judge rejected the argument

<sup>95</sup> The preparatory works to the Swedish legislation indicates that the interpretation of ‘other severe conflicts’ is potentially broad and includes political instability in the home country where the power relations are such that the legal system does not impartially safeguard basic human rights. See Prop. 2004/05:170, page 178. The Swedish version is available at: [http://www.riksdagen.se/webbnav/index.aspx?nid=37&dok\\_id=GS03170&rm=2004/05&bet=170](http://www.riksdagen.se/webbnav/index.aspx?nid=37&dok_id=GS03170&rm=2004/05&bet=170). Likewise, the preparatory works suggest that the scope of ‘serious abuses’ can include disproportionate punishment, arbitrary incarceration, physical abuse and assaults, sexual abuse, social rejection, and other severe harassment.

<sup>96</sup> See, *inter alia*, MIBSOM21, MIBIQ2, MIBIQ10 and MIBIQ18 as quoted in the UNHCR’s Qualification Directive study, *op.cit.* footnote 3, pp. 70, 72 and 85.

<sup>97</sup> Judicial practice has formulated a requirement of individual and concrete threat such that an applicant claiming to fear “serious abuse” as a result of “other severe conflicts” must demonstrate he or she is “personally at risk” through some “particular circumstance”. In practice this has denied international protection to many Somali applicants. The situations in Iraq and Somalia are not considered to constitute an “internal armed conflict”, and what may be deemed “internal armed conflicts” by other EU Member States are instead assigned as “other severe conflicts” by Swedish authorities, even though protection is granted nevertheless. For more details, see UNHCR’s Qualification Directive study, *op.cit.* footnote 3, page 71ff.

<sup>98</sup> According to the UK Home Office’s Border and Immigration Agency (BIA), “humanitarian protection” is defined as “protection given to someone under the terms of the European Convention on Human Rights. It is not the same as asylum, which may be given only to those who are fleeing persecution, under the terms of the 1951 United Nations Convention Relating to the Status of Refugees. We may give humanitarian protection to someone whom we believe does not qualify for asylum if we think there are humanitarian reasons for allowing that person to stay in the United Kingdom.”; see: BIA, *Glossary*, <http://www.bia.homeoffice.gov.uk/glossary?letter=H>.

<sup>99</sup> The UK Home Office’s Border and Immigration Agency states that “discretionary leave to remain” is a form of “permission to stay in the United Kingdom for reasons that are exceptional. This is sometimes given to someone who does not qualify for asylum but whom we believe should be allowed to stay for other reasons”; see: BIA, *Glossary*, <http://www.bia.homeoffice.gov.uk/glossary?letter=D>.

<sup>100</sup> See *Lukman Hameed Mohammed v. Secretary of State for the Home Department*, footnote 26.

that the applicant would have to prove an individual risk over and above the existing general risk to the civilian population: “[W]hereas the threat may be individual it is, to borrow terminology from a separate jurisdiction, joint and several. Indiscriminate violence does not by its simple and logical definition, target individuals; it targets no one, but affects anyone and potentially everyone.”<sup>101</sup>

## 2.4 Conclusion

Many Member States extend subsidiary protection under Article 15 to people threatened by indiscriminate violence, although the requirements for such protection vary. Finland, Lithuania, Sweden, Portugal and Spain continue to grant subsidiary protection to people threatened by indiscriminate violence in widely-interpreted situations of armed conflict, based on concepts which existed in their legal systems before the Qualification Directive was adopted. The scope of these provisions was in some cases broader than Article 3 of the ECHR, as currently interpreted by the ECtHR, and broader than a narrow reading of Article 15(c) of the Qualification Directive. In Germany and Austria, removal to “situations of extreme danger” is prohibited, and subsidiary protection is provided if the indiscriminate violence prevailing in such situations creates risks for all who would be removed. In these Member States, the transposition of the Qualification Directive has resulted in broad interpretation of Article 15(c).

In certain other countries (including the UK and Slovakia), an explicit legal obligation to provide protection to people threatened by indiscriminate violence was introduced with the transposition of Article 15(c) of the Qualification Directive. In Slovakia, the concept extends beyond the Directive’s minimum standards. A recent UK Court decision<sup>102</sup> held that protection on the basis of Article 15(c) could be provided based on a general assessment of the situation of indiscriminate violence in the country, without the need for the applicant to demonstrate that he or she was individually targeted. Practice in several Member States thus shows that the criteria for granting subsidiary protection to people fleeing indiscriminate violence should not be interpreted too narrowly. In UNHCR’s view, these good practices should guide interpretation of the scope of the provision.

UNHCR  
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<sup>101</sup> *Ibid.*, paragraph 19.

<sup>102</sup> *Ibid.*