

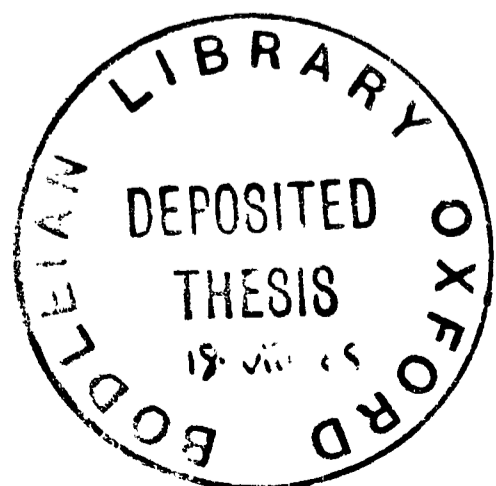
# SEEKING REFUGE IN HUMAN RIGHTS

## Complementary Protection in International Refugee Law

Thesis submitted for the Degree of Doctor of Philosophy  
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## ABSTRACT

This thesis examines complementary protection—the protection afforded by States to persons who fall outside the legal definition of a refugee in article 1A(2) of the 1951 Refugee Convention, but who nonetheless have a need for international protection. Human rights law has extended States' international protection obligations beyond the Refugee Convention, preventing States from removing individuals who would be at risk of serious harm if returned to their countries of origin. While a number of States have traditionally respected these additional human rights obligations, they have been reluctant to grant beneficiaries a formal legal status analogous to that enjoyed by Convention refugees. By examining the human rights foundations of the Convention, the architecture of the Convention, regional examples of complementary protection, and principles of non-discrimination, the thesis argues that the Convention is a *lex specialis* for all persons in need of international protection—a specialized blueprint of legal status, irrespective of the legal source of the protection obligation.

Chapter 1 identifies pre-1951 examples of complementary protection, demonstrating how the content of the status afforded to extended categories of refugees was historically the same as that granted to 'legal' refugees. It traces unsuccessful attempts at the international and European levels to codify a system of complementary protection, prior to the EU's adoption of the Qualification Directive in 2004. The Qualification Directive, examined in Chapter 2, represents the first supranational codification of complementary protection, but is hampered by a hierarchical conceptualization of protection that grants a lesser status to beneficiaries of 'subsidiary protection' vis-à-vis Convention refugees. Chapters 3 to 5 examine the CAT, ECHR, ICCPR and CRC to identify provisions which may give rise to a claim for international protection, beyond article 3 CAT, article 3 ECHR and article 7 ICCPR. Finally, Chapter 6 illustrates why all persons protected by the principle of *non-refoulement* are entitled to the same legal status, demonstrating the function of the Convention as a *lex specialis* for all persons in need of international protection.

# CONTENTS

<i>Table of Treaties and Statutes</i>	i
<i>Table of Cases</i>	vi
<i>Abbreviations</i>	xi
<i>Acknowledgements</i>	xiv
<b>Introduction</b>	<b>1</b>
<b>1 The Evolution of Complementary Protection</b>	<b>10</b>
A INTRODUCTION	10
B DEFINING COMPLEMENTARY PROTECTION	11
C THE 1951 REFUGEE CONVENTION	20
D COMPLEMENTARY PROTECTION AND INTERNATIONAL LAW	33
E CONCLUSION	51
<b>2 The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime</b>	<b>52</b>
A CREATION OF THE QUALIFICATION DIRECTIVE	52
B THE DIRECTIVE'S SUBSIDIARY PROTECTION REGIME	61
C SUBSIDIARY PROTECTION EXCLUSION CLAUSES	97
D THE CONTENT OF INTERNATIONAL PROTECTION: SUBSTANTIVE RIGHTS	104
E 'MINIMUM STANDARDS'—A HARMONIZED APPROACH?	129
F CONCLUSION	132
<b>3 An Alternative Asylum Mechanism: The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</b>	<b>134</b>
A INTRODUCTION	134
B THE STRUCTURE OF THE CAT	138
C TORTURE PROHIBITION IN DOMESTIC COMPLEMENTARY PROTECTION	156
D CONCLUSION	165
<b>4 The Scope of Ill-Treatment under the ECHR and ICCPR</b>	<b>167</b>
A INTRODUCTION	167
B THE ECHR AND ASYLUM	168

C	UNQUALIFIED RIGHTS	180
D	QUALIFIED RIGHTS	191
E	PROTECTION FOR SOCIO-ECONOMIC REASONS	204
F	THE INTERNATIONAL REACH OF THE ECHR	208
G	CONCLUSION	211
<b>5</b>	<b>Protection and ‘The Best Interests of the Child’: The Convention on the Rights of the Child</b>	<b>213</b>
A	INTRODUCTION	213
B	SPECIAL PROTECTION OF CHILDREN UNDER INTERNATIONAL LAW	214
C	THE CONVENTION ON THE RIGHTS OF THE CHILD	216
D	‘THE BEST INTERESTS OF THE CHILD’—ARTICLE 3	218
E	THE WEIGHT TO BE GIVEN TO THE CHILD’S BEST INTERESTS	223
F	JURISPRUDENCE ON ‘THE BEST INTERESTS OF THE CHILD’	227
G	CONCLUSION	244
<b>6</b>	<b>The Legal Status of Persons to Whom the Refugee Convention Does Not Apply</b>	<b>246</b>
A	INTRODUCTION	246
B	THE IMPORTANCE OF STATUS	247
C	THE CONVENTION AS A <i>LEX SPECIALIS</i> AND ITS SIGNIFICANCE FOR STATUS	261
D	THE ARCHITECTURE OF THE REFUGEE CONVENTION	268
E	CATEGORIES OF RIGHTS	275
F	MINIMUM STANDARDS OF TREATMENT FOR NON-REMOVABLE PERSONS	301
G	CONCLUSION	312
	<b>Conclusion</b>	<b>315</b>
	<i>Bibliography</i>	319

## TABLE OF TREATIES AND STATUTES

### International Instruments

Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291 .....	186
Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees of 5 July 1922, 13 LNTS 237.....	15
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85..... 6, 8, 12, 25, 45, 55, 59, 66, 67, 75, 133, 134–65, 169, 172, 178, 206, 234, 262, 263, 277, 284, 286, 289, 316	
Convention against Transnational Organized Crime UNGA Res 55/25 of 15 November 2000 (entered into force 29 September 2003) .....	185
Convention concerning the Status of Refugees coming from Germany of 10 February 1938, 192 LNTS 59 19, 288	
Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 .....	219
Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 .....	7, 8, 133, 172, 192, 196, 208, 213–44, 245, 277, 278, 316
Convention relating to the International Status of Refugees of 28 October 1933, 159 LNTS 199 .....	17, 214, 288
Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 .... 2, 3, 4, 6, 9, 13, 14, 17, 19, 20, 22, 26, 29, 30, 33, 34, 39, 41, 42, 46, 48, 49, 50, 51, 54, 56, 57, 62, 65, 82, 88, 90, 103, 112, 114, 118, 134, 135, 136, 139, 142, 145, 146, 148, 150, 157, 158, 162, 164, 165, 169, 182, 183, 186, 189, 204, 212, 214, 217, 227, 245, 249, 252, 256, 265, 266, 267, 268, 271, 276, 277, 282, 283, 294, 297, 308, 315, 316	
Declaration of the Rights of the Child UNGA Res 1386 (XIV) of 20 November 1959 .....	217
Declaration on the Protection of All Persons from Enforced Disappearances UNGA Res 47/133 of 18 December 1992 .....	172
Declaration on the Protection of Women and Children in Emergency and Armed Conflict UNGA Res 3318 (XXIX) of 14 December 1974 .....	217
Declaration on Territorial Asylum UNGA Res 2312 (XXII) of 14 December 1967 .....	281
Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 Oct 1950) 75 UNTS 31 .....	172
Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 Oct 1950) 75 UNTS 85.....	172
Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 Oct 1950) 75 UNTS 135 .....	172

Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 Oct 1950) 75 UNTS 287 .....	172, 192, 290
Geneva Declaration of the Rights of the Child (adopted 26 September 1924) [1924] LN OJ Spec Supp 21, 43.....	214
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families UNGA Res 45/158 of 18 December 1990 (entered into force 1 July 2003).....	192
International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171 ..... 6, 8, 12, 21, 22, 25, 59, 68, 72, 83, 117, 133, 134, 135, 137, 138, 139, 142, 152, 153, 154, 157, 163, 164, 165, 167, 169, 170, 171, 172, 174, 175, 177, 178, 180, 181, 184, 188, 193, 209, 211, 217, 255, 263, 275, 277, 278, 297, 299, 301, 302, 303, 305, 311, 313, 316	
International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.....	21, 22, 204, 217, 251, 256, 275, 278, 301, 303, 304, 305, 313
International Refugee Organization Constitution UNGA Res 77 of 15 December 1946 (entered into force 20 August 1948) 18 UNTS 3.....	214
London Agreement relating to the Issue of Travel Documents to Refugees Who Are the Concern of the Intergovernmental Committee on Refugees (15 October 1946) 11 UNTS 73 .....	32
Optional Protocol to the ICCPR UNGA Res 2200A (XXI) of 16 December 1966 (entered into force 23 March 1976) 999 UNTS 302.....	153
Plan for the Issue of a Certificate of Identity to Armenian Refugees of 31 May 1924, LN Doc C.L.72(a).1924 .....	15
Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 .....	192, 206
Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 .....	192
Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 . 20, 21, 23, 24, 26, 28, 29, 34, 39, 44, 48, 49, 52, 57, 62, 65, 72, 117, 135, 139, 152, 153, 154, 157, 170, 180, 181, 185, 186, 190, 204, 208, 217, 261, 264, 265, 266, 281, 283, 291, 306, 308	
Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 .....	85, 88, 89, 90, 91, 92, 172, 185, 187, 285, 298
Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted by UNGA Res 44/128 of 15 December 1989).....	72
Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, 60 LNTS 253.....	184
Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules') UNGA Res 40/33 of 29 November 1985.....	217
Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 8 May 1993) UNSC Res 827 (1993).....	172

Statute of the International Tribunal for Rwanda (adopted November 1994) UNSC Res 955 (1994).....	172
Statute of the Office of the United Nations High Commissioner for Refugees UNGA Res 428 (V) of 14 December 1950 .....	11, 24, 147, 275
Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III)....	21, 22, 134, 171, 172, 184, 217, 218, 275, 281, 301, 305, 308, 313
Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 .....	68, 135

### **European Instruments**

Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 8771/04 ASILE 33 (30 April 2004).....	108
Charter of Fundamental Rights of the European Union [2000] OJ C364/1 .....	72, 75
Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950) ....	6, 8, 12, 13, 25, 45, 46, 53, 54, 55, 59, 66, 69, 72, 73, 74, 75, 83, 92, 93, 94, 97, 99, 117, 133, 135, 137, 138, 139, 141, 142, 152, 153, 154, 155, 165, 167–211, 225, 257, 258, 259, 260, 263, 277, 278, 279, 280, 281, 286, 291, 295, 296, 298, 299, 300, 302, 306, 314, 316
Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof [2001] OJ L212/12 .....	24, 77, 80, 81, 84, 86, 87, 192, 274, 306, 307
Council Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers [2003] OJ L31/18 .....	121, 125, 126, 306, 307, 310, 313
Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [2003] OJ L251/12 .....	111, 192, 193, 195
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 [2004] OJ L304/12 ....	2, 3, 5, 25, 34, 43, 47, 51, 52, 54, 79, 87, 97, 160, 165, 167, 178, 179, 180, 181, 193, 195, 203, 246, 272, 273, 279, 281, 294, 309, 316, 317
Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States [2002] OJ L190/1 .....	290
European Convention on Extradition (adopted 13 December 1957, entered into force 18 April 1960) ETS No 24.....	284
Treaty establishing the European Community [2002] OJ C325/33 .....	52, 130
Treaty on European Union [2002] OJ C325/5 .....	52

## Other Regional Instruments

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123 .....	43, 135, 138, 172, 180, 278, 302
Arab Convention on the Suppression of Terrorism (adopted 22 April 1998, entered into force 7 May 1999) .....	284
Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the Inter-American Commission on Human Rights OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190–93 (1984–85)..	1, 4, 35, 41, 42, 43, 77, 156, 267
Convention of the Organization of the Islamic Conference on Combating International Terrorism (adopted 1 July 1999).....	284
Guiding Principles on Internal Displacement UN Doc CN.4/1998/53/Add.2 (11 February 1998).....	303
Limburg Principles on the Implementation of the ICESCR (1986) 37 ICJ Rev 43 .....	303
Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45 ....	1, 4, 19, 35, 41, 42, 43, 50, 77, 156, 267, 275, 281, 282, 284
Organization of African Unity Convention on the Prevention and Combating of Terrorism (Algiers Convention) (14 July 1999).....	284

## Council of Europe

CM Recommendation R 81 (16) on the Harmonisation of National Procedures relating to Asylum .....	39
CM Recommendation R (2001) 18 on Subsidiary Protection.....	52
PA Recommendation 773 (1976) on the Situation of <i>De Facto</i> Refugees.....	38, 39, 52, 277
PA Recommendation 817 (1977) on Certain Aspects of the Right to Asylum.....	52
PA Recommendation 1016 (1985) on Living and Working Conditions of Refugees and Asylum Seekers	39, 52
PA Recommendation 1088 (1988) on the Right to Territorial Asylum .....	39, 52
PA Recommendation 1236 (1994) on the Right of Asylum .....	39, 52
PA Recommendation 1237 (1994) on the Situation of Asylum-Seekers Whose Asylum Applications Have Been Rejected .....	36, 52
PA Recommendation 1309 (1996) on the Training of Officials Receiving Asylum-Seekers at Border Points .....	46
PA Recommendation 1327 (1997) on the Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe .....	36, 52, 194
PA Recommendation 1440 (2000) on Restrictions on Asylum in the Member States of the Council of Europe and the EU .....	52

## EXCOM Conclusions

EXCOM Conclusion No 22 (XXXII) ‘Protection of Asylum-Seekers in Situations of Large-Scale Influx’ (1981).....	43, 306–09
EXCOM Conclusion No 56 (XL) ‘Durable Solutions and Refugee Protection’ (1989).....	40
EXCOM Conclusion No 82 (XLVIII) ‘Safeguarding Asylum’ (1997) .....	310

**Australian Legislation**

Crimes (Administration of Sentences) Amendment (Category AA Inmates) Regulation 2004..... 299  
Migration Act 1958 (Cth) ..... 162

**Canadian Legislation**

Canadian Charter of Rights and Freedoms ..... 220  
Immigration and Refugee Protection Act 2001..... 13, 24, 159

**United Kingdom Legislation**

Anti-Terrorism, Crime and Security Act 2001 c 24..... 288, 298–300  
Children Act 1989 c 41 ..... 219  
Human Rights Act 1998 c 42..... 20, 209–10  
Human Rights Act (Designated Derogation) Order 2001, SI 3644/2001..... 298  
Nationality, Immigration and Asylum Act 2002 c 41 ..... 260, 312

**United States Legislation**

Immigration and Nationality Act ..... 157, 158, 183

## TABLE OF CASES

### Committee against Torture

<i>AD v The Netherlands</i> Comm No 96/1997 (24 January 2000) CAT/C/23/D/96/1997 .....	206
<i>Aemei v Switzerland</i> Comm No 34/1995 (9 May 1997) UN Doc CAT/C/18/D/34/1995 .....	67, 145
<i>Alan v Switzerland</i> Comm No 21/1995 (8 May 1996) UN Doc CAT/C/16/D/21/1995 .....	149
<i>ALN v Switzerland</i> Comm No 90/1997 (19 May 1998) UN Doc CAT/C/20/D/90/1997 .....	149
<i>ARJ v Australia</i> Comm No 692/1996 CCPR/C/60/D/692/1996 (11 August 1997).....	175
<i>BS v Canada</i> Comm No 166/2000 (14 November 2001) UN Doc CAT/C/27/D/166/2000.....	134
<i>Chipana v Venezuela</i> Comm No 110/1998 (10 November 1998) CAT/C/21/D/110/1998.....	151, 154, 289
<i>EA v Switzerland</i> Comm No 28/1995 (10 November 1997) UN Doc CAT/C/19/D/28/1995.....	66, 149
<i>Elmi v Australia</i> Comm No 120/1998 (14 May 1999) UN Doc CAT/C/22/D/120/1998s .....	140, 154
<i>GRB v Sweden</i> Comm No 83/1997 (15 May 1998) UN Doc CAT/C/20/D/83/997 .....	140
<i>HAD v Switzerland</i> Comm No 126/1999 (10 May 2000) UN Doc CAT/C/24/D/126/1999 .....	149
<i>IAO v Sweden</i> Comm No 65/1997 (6 May 1998) UN Doc CAT/C/20/D/65/1997 .....	149
<i>JUA v Switzerland</i> Comm No 100/1997 (10 November 1998) UN Doc CAT/C/21/D/100/1997.....	149
<i>Khan v Canada</i> Comm No 15/1994 (15 November 1994) UN Doc CAT/C/13/D/15/1994 .....	148
<i>Kindler v Canada</i> Comm No 470/1991 (30 July 1993) UN Doc CCPR/C/48/D/470/1991 .....	175, 286
<i>Kisoki v Sweden</i> Comm No 41/1996 (8 May 1996) UN Doc CAT/C/16/D/41/1996.....	150
<i>KN v Switzerland</i> Comm No 94/1997 (19 May 1998) UN Doc CAT/C/20/D/94/1997 .....	149
<i>Korban v Sweden</i> Comm No 88/1997 (16 November 1998) UN Doc CAT/C/21/D/88/1997 .....	147, 148
<i>KT v Switzerland</i> Comm No 118/1998 (19 November 1999) UN Doc CAT/C/23/D/118/1998.....	149
<i>MA v Canada</i> Comm No 22/1995 (9 May 1995) UN Doc CAT/C/14/D/22/1995.....	153
<i>MBB v Sweden</i> Comm No 104/1998 (5 May 1999) UN Doc CAT/C/22/D/104/1998.....	149
<i>Mutombo v Switzerland</i> Comm No 13/1993 (17 April 1994) UN Doc CAT/C/12/D/13/1993... ..	148, 150, 151
<i>NM v Switzerland</i> Comm No 116/1998 (9 May 2000) UN Doc CAT/C/24/D/116/1998 .....	149
<i>PQL v Canada</i> Comm No 57/1996 (17 Nov 1997) UN Doc CAT/C/19/D/57/1996 .....	143
<i>SC v Denmark</i> Comm No 143/1999 (10 May 2000) UN Doc CAT/C/24/D/143/1999.....	149
<i>SMR and MMR v Sweden</i> Comm No 103/1998 (5 May 1999) UN Doc CAT/C/22/D/103/1998 .....	149
<i>Tala v Sweden</i> Comm No 43/1996 (15 November 1996) UN Doc CAT/C/17/D/43/1996 .....	150
<i>Tapia Paez v Sweden</i> Comm No 39/1996 (28 April 1997) UN Doc CAT/C/18/D/39/1996.....	145
<i>US v Finland</i> Comm No 197/2002 (1 May 2003) UN Doc CAT/C/30/D/197/2002.....	149
<i>X v Switzerland</i> Comm No 17/1994 (17 November 1994) UN Doc CAT/C/13/D/17/1994 .....	151
<i>X v Switzerland</i> Comm No 18/1994 (23 November 1994) UN Doc CAT/C/13/D/18.1994 .....	151
<i>X, Y and Z v Sweden</i> Comm No 61/1996 (6 May 1998) UN Doc CAT/C/20/D/61/1996 .....	149

### Human Rights Committee

<i>C v Australia</i> Comm No 900/1999 (28 October 2002) UN Doc CCPR/C/76/D/900/1999 .....	171
<i>Cox v Canada</i> Comm No 539/1993 (31 October 1994) UN Doc CCPR/C/52/D/539/1993 .....	171
<i>García v Ecuador</i> Comm No 319/1988 (5 November 1991) UN Doc CCPR/C/40/D/319/1988 .....	171
<i>GT v Australia</i> Comm No 706/1996 (4 November 1997) UN Doc CCPR/C/61/D/706/1996 .....	171
<i>Karakurt v Austria</i> Comm No 964/2000 (4 April 2002) UN Doc CCPR/C/74/D/965/2000 .....	280
<i>Ng v Canada</i> Comm No 469/1991 (5 November 1993) UN Doc CCPR/C/49/D/469/1991 .....	171, 288
<i>Vuolanne v Finland</i> Comm No 265/1987 (7 April 1989) UN Doc CCPR/C/35/D/265/1987 .....	174

## European Court of Human Rights

<i>A v Switzerland</i> App No 11933/86 (14 April 1986).....	174
<i>Abdulaziz v UK</i> (1985) 7 EHRR 471 .....	168, 177, 191, 193, 194, 195, 198, 278, 279, 280
<i>Ahmed v Austria</i> (1997) 24 EHRR 278.....	139, 169, 204, 206, 249, 250, 258
<i>Ahmut v The Netherlands</i> (1996) 24 EHRR 62.....	195
<i>Altun v Federal Republic of Germany</i> (1984) 36 DR 209 .....	139, 174
<i>Amrollahi v Denmark</i> App No 56811/00 (11 July 2002).....	192, 198, 199
<i>Amuur v France</i> (1996) 22 EHRR 533 .....	188, 189
<i>Bankovic v Belgium</i> (2001) 11 BHRC 435 .....	188, 189
<i>Barthold v Germany</i> (1985) 7 EHRR 383.....	197
<i>BB v France</i> App No 30930/96 (9 March 1998).....	205, 207, 249, 250, 258
<i>Belgian Linguistics case</i> (1968) 1 EHRR 252 .....	190, 191, 280
<i>Belilos v Switzerland</i> (1988) 10 EHRR 466.....	278
<i>Beljoudi v France</i> (1992) 14 EHRR 801.....	94, 197, 198, 199
<i>Bensaid v UK</i> (2001) 33 EHRR 205 .....	177, 199, 200, 205, 206
<i>Berrehab v The Netherlands</i> (1988) 11 EHRR 322 .....	193, 197, 198, 199
<i>Boughanemi v France</i> (1996) 22 EHRR 228 .....	198, 199
<i>Boultif v Switzerland</i> (2001) 33 EHRR 50.....	177, 197
<i>Boyle v UK</i> (1995) 19 EHRR 179.....	194
<i>Campbell v UK</i> (1982) EHRR 293 .....	203
<i>Chahal v UK</i> (1996) 23 EHRR 413 .....	168, 169, 177, 178, 200, 295, 296, 298
<i>Chassagnou v France</i> (2000) 29 EHRR 615 .....	278
<i>Chorfi v Belgium sub nom C v Belgium</i> App No 21794/93 (7 August 1996) .....	198, 201
<i>Costello-Roberts v UK</i> (1995) 19 EHRR 112 .....	200
<i>Coster v UK</i> (2001) 33 EHRR 479 .....	208
<i>Cruz Varas v Sweden</i> (1991) 14 EHRR 1 .....	154, 175, 176, 178, 198
<i>Cyprus v Turkey</i> (1976) 4 EHRR 482.....	205
<i>Cyprus v Turkey</i> (2002) 35 EHRR 30 .....	191
<i>D v UK</i> (1997) 24 EHRR 423 .....	139, 177, 178, 181, 182, 200, 205, 206, 207, 276, 293
<i>De Wilde, Ooms and Versyp v Belgium</i> (1979–80) 1 EHRR 373 .....	184
<i>Dehwari v The Netherlands</i> (2000) 29 EHRR CD 74.....	178, 182, 212
<i>Deumeland v Germany</i> (1986) 8 EHRR 448 .....	306
<i>Drozdz and Janousek v France and Spain</i> (1992) 14 EHRR 745 .....	176, 187, 188, 206, 207, 212
<i>Dudgeon v UK</i> (1981) 4 EHRR 149 .....	194
<i>Einhorn v France</i> App No 71555/01 (16 October 2001) .....	189, 190, 211, 212
<i>El Boujaidi v France</i> (2000) 30 EHRR 223.....	198
<i>Feldbrugge v The Netherlands</i> (1986) 8 EHRR 425.....	306
<i>Fredin v Sweden</i> (1991) 13 EHRR 784.....	278
<i>Gillow v UK</i> (1989) 11 EHRR 335 .....	280
<i>Gonzalez v Spain</i> App No 43544/98 (29 June 1999) .....	178
<i>Grandrath v Federal Republic of Germany</i> (1967) 10 Yearbook 626.....	203
<i>Greek case</i> (1969) 12 Yearbook 1 .....	172, 173, 174
<i>Gül v Switzerland</i> (1996) 22 EHRR 93.....	195, 197
<i>Guzzardi v Italy</i> (1981) 3 EHRR 333.....	188
<i>Henao v The Netherlands</i> App No 13669/03 (24 June 2003) .....	206, 207
<i>Hilal v UK</i> (2001) 33 EHRR 2.....	178, 205
<i>HLR v France</i> (1997) 26 EHRR 29.....	139, 141, 178, 206, 259, 260
<i>Hussain v UK</i> (1996) 22 EHRR 1 .....	291
<i>Ireland v UK</i> (1979–80) 2 EHRR 25 .....	172
<i>Iversen v Norway</i> (1963) 6 Yearbook 278 .....	186
<i>Kalashnikov v Russia</i> (2002) 36 EHRR 587 .....	206
<i>Keenan v UK</i> (2001) 33 EHRR 38.....	205, 293
<i>Kokkinakis v Greece</i> (1994) 17 EHRR 397 .....	203
<i>Kotälla v The Netherlands</i> (1978) 14 DR 238 .....	174

<i>Larkos v Cyprus</i> (2000) 30 EHRR 597 .....	280
<i>Lee v UK</i> (2001) 33 EHRR 677 .....	208
<i>Lithgow v UK</i> (1986) 8 EHRR 329 .....	277
<i>Loizidou v Turkey</i> (1995) 20 EHRR 90.....	93, 209
<i>Lynas v Switzerland</i> (1976) 6 DR 141 .....	298
<i>Maaouia v France</i> (2001) 33 EHRR 42.....	280
<i>Mamatkulov v Turkey</i> App Nos 46827/99.....	181
<i>Mar v UK</i> (1996) 23 EHRR CD 120.....	188
<i>Marckx v Belgium</i> (1979) 2 EHRR 330 .....	194
<i>McCann v UK</i> (1995) 21 EHRR 97 .....	181
<i>Mehemi v France</i> (2000) 30 EHRR 739 .....	198
<i>Moustaquim v Belgium</i> (1991) 13 EHRR 802 .....	197, 198, 199, 305
<i>National Union of Belgian Police v Belgium</i> (1975) 1 EHRR 578.....	197
<i>Niemetz v Germany</i> (1993) 16 EHRR 97 .....	201
<i>Norris v Ireland</i> (1988) 13 EHRR 186 .....	194
<i>Nsona v The Netherlands</i> App No 23366/94 (29 November 1996) .....	194
<i>Ould Barar v Sweden</i> (1999) 28 EHRR CD 213 .....	185
<i>Pancenko v Latvia</i> App No 40772/98 (28 October 1999).....	207, 258, 306
<i>Peers v Greece</i> (2001) 33 EHRR 51 .....	173
<i>Poirrez v France</i> App No 40892/98 (30 September 2003).....	190, 191, 280, 281, 306
<i>Pretty v UK</i> (2002) 35 EHRR 1 .....	173
<i>Price v UK</i> (2001) <i>The Times</i> (13 August 2001).....	293
<i>Raidl v Austria</i> App No 25342/94 (4 September 1995) .....	286
<i>Rasmussen v Denmark</i> (1985) 7 EHRR 371 .....	197
<i>Razaghi v Sweden</i> (App No 64599/01 (11 March 2003).....	189, 202
<i>Salesi v Italy</i> (1993) 26 EHRR 187.....	306
<i>Selmouni v France</i> (1999) 29 EHRR 403 .....	145
<i>Sen v The Netherlands</i> App No 31465/96 (21 December 2001).....	195
<i>Silver v UK</i> (1983) 5 EHRR 347.....	198
<i>Smith (Jane) v UK</i> (2001) 33 EHRR 712.....	208
<i>Soering v UK</i> (1989) 11 EHRR 439.....	73, 74, 94, 135, 168, 169, 173, 174, 175, 176, 189, 211, 212, 289
<i>Stubbings v UK</i> (1997) 23 EHRR 213 .....	199
<i>Sunday Times v UK</i> (1979–80) 2 EHRR 245.....	197
<i>Tanko v Finland</i> App No 23634/94 (19 May 1994).....	205
<i>Tatete v Switzerland</i> App No 41874/98 (6 July 2000) .....	181
<i>TI v UK</i> [2000] INLR 211.....	148, 175, 257
<i>Tomic v UK</i> App No 17837/03 (14 October 2003) .....	189
<i>Tsirlis v Greece</i> (1998) 25 EHRR 198.....	204
<i>Tyrer v UK</i> (1979–80) 2 EHRR 1 .....	173, 174, 175
<i>Van der Musselle v Belgium</i> (1984) 6 EHRR 163.....	278
<i>Van Droogenbroeck</i> (9 July 1980) Series B No 44.....	184
<i>Vijayanathan v France</i> (1993) 15 EHRR 62.....	253, 257
<i>Vilvarajah v UK</i> (1991) 14 EHRR 248 .....	79, 175, 176, 177, 178, 204, 206, 278
<i>Von Volsem v Belgium</i> App No 14641/89 (9 May 1990).....	205
<i>W, X, Y and Z v UK</i> (1968) 11 Yearbook 562.....	185
<i>X and Y v Switzerland</i> (1977) 9 DR 57 .....	209
<i>X and Y v UK</i> (1972) 39 CD 104 .....	193
<i>X and Y v UK</i> App No 9369/81 (3 May 1983).....	194
<i>X v Belgium</i> App No 984/61 (29 May 1961) 6 CD 39–40.....	168
<i>X v Federal Republic of Germany</i> (1963) 6 Yearbook 462 .....	168
<i>X v Federal Republic of Germany</i> (1965) 8 Yearbook 158 .....	209
<i>X v Federal Republic of Germany</i> (1968) 11 Yearbook 494 .....	194
<i>X v Federal Republic of Germany</i> (1974) 17 Yearbook 148 .....	186
<i>X v Federal Republic of Germany</i> (1980) 18 DR 216.....	187
<i>X v The Netherlands</i> (1983) 32 DR 180.....	187
<i>X v UK</i> (1980) 19 DR 244.....	182

*X v UK* (1982) 29 DR 176..... 168

## Australia

*Applicant A v Minister of Immigration and Ethnic Affairs* (1997) 190 CLR 225 ..... 183  
*Re Minister for Immigration and Multicultural Affairs* ..... 239  
*Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55 ..... 277  
*Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 141 ALR 322 ..... 162  
*Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC 70 ..... 259  
*Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 ... 217, 220, 237, 239, 241  
*Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 137 ALR 103 ..... 162  
*QAAE of 2002 v Minister for Immigration and Multicultural & Indigenous Affairs* [2002] FCA 1213..... 162  
*Re Minister for Immigration and Multicultural and Indigenous Affairs, ex p Applicants S134/2002* [2003] HCA 1 ..... 162  
*Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568 ..... 224

## Canada

*Arica v Canada* (1995) 182 NR 392 (FCA)..... 160  
*Baker v Canada* [1997] 2 FC 127 (CA)..... 221  
*Baker v Canada* [1999] 2 SCR 817 ..... 217, 220, 221, 233, 234, 240, 241  
*Bian v Canada* FCTD IMM-1640-00 (11 December 2000)..... 225  
*Canada v Ward* [1993] 2 SCR 689 ..... 225, 291  
*Chan v MEI* [1995] 3 SCR 593 ..... 183  
*Cheung v Canada* [1993] 2 FC 314 (FCA)..... 183  
*Frigole v Canada* FCTD T-13-93 (9 January 1996) ..... 234  
*Iruthayathas v Canada* (1994) 82 FTR 154 (FCTD) ..... 234  
*Malchikov v Canada* IMM-1673-95 (18 January 1996) ..... 234  
*Nadesalingam v Canada* FCTD IMM-5711-93 (13 December 1994) ..... 234  
*Pushpanathan v Canada* [1998] 1 SCR 982 ..... 288  
*Sahota v Canada* [2002] 3 FC D28 (FCTD)..... 234  
*Sellakkandu v Canada* [1993] 68 FTR 291 (TD)..... 221  
*Shu Ping Li v Canada* FCTD IMM-932-00 (11 December 2000) ..... 225  
*Suresh v Canada* 2002 SCC 1, [2002] 1 SCR 3..... 145, 160, 161, 294  
*Wu v Canada* 2001 FCT 1274..... 223  
*Yusuf v MEI* [1992] 1 FC 629 ..... 233

## United Kingdom

*A v Sect'y of State for the Home Dept* [2004] UKHL 56 ..... 298, 300  
*Devaseelan v Sect'y of State for the Home Dept* [2003] Imm AR 1 ..... 179, 206  
*Gurung v Sect'y of State for the Home Dept* [2002] UKIAT 04870 (14 October 2002)..... 257, 288  
*Holub v Sect'y of State for the Home Dept* [2001] 1 WLR 1359 (CA)..... 208  
*Horvath v Sect'y of State for the Home Dept* [2001] 1 AC 489 (HL) ..... 24  
*Kacaj v Sect'y of State for the Home Dept* [2002] EWCA Civ 314..... 175, 176, 186  
*Mthokozisi v Sect'y of State for the Home Dept* [2004] EWHC 2964 (Admin) ..... 199  
*Q v Sect'y of State for the Home Dept* [2003] EWHC 2507 (Admin)..... 8, 207, 260  
*Q v Sect'y of State for the Home Dept* [2003] EWCA Civ 364, [2003] 3 WLR 365 ..... 8, 207, 260  
*R (on the Application of 'B') v Sect'y of State for the Foreign and Cth Office* [2004] EWCA Civ 1344... 209  
*R (on the Application of Shahid) v Sect'y of State for the Home Dept* QBD (Admin) (13 October 2004, Gibbs J) ..... 257  
*R v Hammersmith and Fulham LBC, ex p M* (1998) 30 HLR 10 ..... 260  
*R v Home Sect'y, ex p Brind* [1991] 1 AC 696 (HL)..... 239

<i>R v Immigration Officer at Prague Airport, ex p European Roma Rights Centre</i> [2004] UKHL 55.....	170
<i>R v Sect’y of State for the Home Dept, ex p Adan</i> [2001] 2 AC 477 (HL).....	148
<i>R v Sect’y of State, ex p Andries</i> (10 December 1999).....	257
<i>R v Sect’y of State, ex p Quaquah (No 1)</i> [2000] INLR 196.....	257
<i>Saadi v Sect’y of State for the Home Dept</i> [2002] UKHL 41, [2002] 1 WLR 3131 .....	177
<i>Sect’y of State for the Home Dept v Kacaj</i> [2002] Imm AR 213 .....	182
<i>Sect’y of State for the Home Dept v Limbuela</i> [2004] EWCA Civ 540 .....	207, 260
<i>Sepev v Sect’y of State for the Home Dept</i> [2002] 1 WLR 856 (HL) .....	24
<i>Sivakumaran v Secty’ of State for the Home Dept</i> [1988] AC 958 (HL) .....	262
<i>T v Sect’y of State for the Home Dept</i> [1996] AC 742 (HL).....	288
<i>Ullah v Sect’y of State for the Home Dept</i> [2002] EWCA Civ 1856, [2003] 1 WLR 770.....	176
<i>Ullah v Sect’y of State for the Home Dept</i> [2004] UKHL 26.....	25, 176, 180, 182, 186, 188, 190, 201–03, 206, 209, 212
<i>Z v Sect’y of State for the Home Dept</i> [2002] Imm AR 560 .....	200

## United States

<i>Beharry v Ashcroft</i> 329 F 3d 51 (2d Cir 2003) .....	243
<i>Beharry v Reno</i> 183 F Supp 2d 584 (EDNY 2002).....	217, 242
<i>INS v Aguirre-Aguirre</i> 526 US 415 (1999) .....	288
<i>Kahssai v INS</i> 16 F 3d 323, 329 (9 <sup>th</sup> Cir 1994) .....	234
<i>Matter of Chang</i> 20 I & N Decisions 38 (BIA) 1989.....	183
<i>Sale v Haitian Centers Council, Inc</i> 113 S Ct 2549 (1993) .....	212
<i>Suresh v Canada</i> 2002 SCC 1, [2002] 1 SCR 3.....	145, 160, 161, 294

## ABBREVIATIONS

1933 Convention	Convention relating to the International Status of Refugees of 28 October 1933, 159 LNTS 199
1951 Convention	Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137
1967 Protocol	Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267
ACHR	American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123
AHC	Ad Hoc Committee on Statelessness and Related Problems
AJIL	American Journal of International Law
API	Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3
APII	Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of the Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609
Cartagena Declaration	Cartagena Declaration on Refugees (22 November 1984) in Annual Report of the Inter-American Commission on Human Rights OAS Doc OEA/Ser.L/V/II.66/doc.10, rev.1, 190-93 (1984-85)
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13
CERD	Committee on the Elimination of Racial Discrimination
CM	Committee of Ministers (Council of Europe)
COE	Council of Europe
Comm No	Communication Number
Convention	Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137
Court	European Court of Human Rights
CP	Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons
CPSS	Conference of Plenipotentiaries on the Status of Stateless Persons
CRC	Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3
CUP	Cambridge University Press
Declaration on Territorial Asylum	Declaration on Territorial Asylum UNGA Res 2312 (XXII) of 14 December 1967
DIP	Department of International Protection, UNHCR
EC	European Community
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950)
ECOSOC	UN Economic and Social Council
EJML	European Journal of Migration and Law
ESCOR	Economic and Social Council Official Records
EU	European Union
European Court	European Court of Human Rights
GAOR	Official Records of the United Nations General Assembly
GCI	Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 Oct 1950) 75 UNTS 31

GC2	Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 Oct 1950) 75 UNTS 85
GC3	Geneva Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 Oct 1950) 75 UNTS 135
GC4	Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 Oct 1950) 75 UNTS 287
HC	High Commissioner
HR	Human Rights
HRC	UN Human Rights Committee
HRQ	Human Rights Quarterly
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights (adopted 16 Dec 1966, entered into force 23 March 1976) 999 UNTS 171
ICESCR	International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3
ICLQ	International and Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the International Tribunal for Rwanda (adopted November 1994) UNSC Res 955 (1994)
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTY Statute	Statute of the International Criminal Tribunal for the Former Yugoslavia (adopted 8 May 1993) UNSC Res 827 (1993)
IIHL	International Institute of Humanitarian Law
IJRL	International Journal of Refugee Law
ILC	International Law Commission
ILM	International Legal Materials
Intl Conf on German Refugees	International Conference for the Adoption of a Convention Concerning the Status of Refugees Coming from Germany
IRO	International Refugee Organization
IRRC	International Review of the Red Cross
JHA	Justice and Home Affairs
JIL	Journal of International Law
JRS	Journal of Refugee Studies
LN	League of Nations
LNTS	League of Nations Treaty Series
Migrant Workers Convention	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families UNGA Res 45/158 of 18 December 1990 (entered into force 1 July 2003)
NASS	National Asylum Support Service (UK)
OAU Convention	Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45
OHCHR	Office of the United Nations High Commissioner for Human Rights
OJ	Official Journal
OR	Official Records
OUP	Oxford University Press
PA	Parliamentary Assembly (Council of Europe)
Protocol	Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267
Qualification Directive	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 [2004] OJ L304/12
Reception Conditions Directive	Council Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers [2003] OJ L31/18

Refugee Convention	Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137
Rome Statute	Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3
RSC Archive	Archive of the Refugee Studies Centre, University of Oxford
TEC	Treaty establishing the European Community [2002] OJ C325/33
Temporary Protection Directive	Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof [2001] OJ L212/12
TEU	Treaty on European Union [2002] OJ C325/5
TPS	Temporary Protected Status (US)
UDHR	Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217A (III)
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNHCR Handbook	UNHCR <i>Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees</i> UN Doc HCR/IP/4/Eng/Rev.1 (2 <sup>nd</sup> edn Geneva 1992)
UNHCR Statute	Statute of the Office of the United Nations High Commissioner for Refugees UNGA Res 428 (V) of 14 December 1950
UNTS	United Nations Treaty Series
UP	University Press

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## INTRODUCTION

We turn to human rights doctrine for assistance in filling out the grey areas. In doing so, we may wonder why it is permissible to distinguish *in favour* of Convention refugees, when other violations of rights seem no less serious. Why do some types of harm carry more “value” than others?<sup>1</sup>

The concept of complementary protection is plagued by imprecision. As a purely descriptive term, it may connote any act which seeks to widen the application of refugee protection, encompassing a range of distinct concepts such as temporary protection, territorial asylum, the institutional ‘good offices’ refugees, protection of the internally displaced, the regional OAU Convention and Cartagena Declaration mandates, ‘externally displaced persons’,<sup>2</sup> and all forms of municipal protection that exceed the scope of the Convention, such as ‘de facto refugee status’,<sup>3</sup> ‘B status’,<sup>4</sup> ‘war refugees’<sup>5</sup> and ‘humanitarian asylum’.<sup>6</sup>

Yet, such a wide and rudimentary interpretation fails to serve any useful function. To properly examine all of these protection elements is tantamount to surveying the whole refugee protection regime. Accordingly, this thesis has a more specific task: to examine protection afforded by States to persons falling outside the prevailing legal refugee definition, who, following individual status determination, are found to be legally

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<sup>1</sup> GS Goodwin-Gill ‘Editorial: Asylum 2001—A Convention and a Purpose’ (2001) 13 IJRL 1, 8.

<sup>2</sup> UNHCR (DIP) ‘Categories of Persons to Whom the High Commissioner is Competent to Extend International Protection’ (IOM/FOM (no number) 5 August 1981) [9].

<sup>3</sup> First employed by Nordic States and subsequently incorporated into international discourse: D Bouteillet-Paquet ‘Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union’ in D Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002) 227.

<sup>4</sup> eg Denmark.

<sup>5</sup> eg Spain, Italy, Finland, Germany and Austria.

<sup>6</sup> This term was typically employed in the Mediterranean States as well as Germany, Austria and Luxembourg.

non-removable. Its particular focus is on the way human rights law has extended States' international protection obligations beyond the 1951 Refugee Convention by widening the scope of *non-refoulement* (the principle of non-return). While threshold eligibility has thus been broadened by human rights law, operating as a complementary source of protection, it is argued that the Convention functions as a *lex specialis* for all persons in need of international protection, providing an appropriate legal status irrespective of the source of the protection obligation.

Most persons who face serious harm will be encompassed by the refugee definition contained in article 1A(2) of the 1951 Convention. However, sometimes a person may be at risk of ill-treatment that is very serious but does not amount to 'persecution', or treatment is persecutory but is not connected to one of the five Convention grounds. These persons will have a need for complementary protection.<sup>7</sup>

To date, there has been no comprehensive study of the role and capacity of complementary protection in international law. Bouteillet-Paquet and others surveyed domestic complementary protection regimes in the EU prior to the adoption of the Qualification Directive;<sup>8</sup> Jackson examined the development of extended institutional protection through 'good offices' and mandate refugees;<sup>9</sup> while Perluss and Hartman in the 1980s examined the emergence of a customary norm of 'temporary refuge', prohibiting States from forcibly repatriating persons who had fled generalized violence

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<sup>7</sup> Clark usefully employs the term 'rights based refuge' to describe 'the wider protection of 1951 Convention Article 33 refugee combined with related protection of the human rights found in other treaties'. He asserts that it 'has the potential to meet the need for additional protection, whether "temporary protection" or "complementary protection"': T Clark 'Rights Based Refuge, the Potential of the 1951 Convention and the Need for Authoritative Interpretation' (2004) 16 IJRL 584.

<sup>8</sup> Bouteillet-Paquet (ed) (n3).

<sup>9</sup> IC Jackson *The Refugee Concept in Group Situations* (Martinus Nijhoff Publishers The Hague 1999).

and other threats caused by internal armed conflict within their own State.<sup>10</sup> This thesis charts the evolution of complementary protection at the international level, focusing on the capacity of human rights law, in particular, as a source of States' extended protection obligations.

The impetus for this inquiry stemmed from the EU's deliberations on formalizing a subsidiary protection regime as one of the key 'building blocks' in the Common European Asylum System. In 2001, a proposal was introduced to codify the criteria by which EU Member States afford protection to extra-Convention refugees, as well as to determine a resultant legal status for those beneficiaries. Adopted in April 2004, the 'Qualification Directive' represents the first supranational codification of a specialist complementary protection regime. Yet, while it partly closes a protection 'gap' by regulating the eligibility and status of persons in need of protection, instead of leaving these matters to State discretion, it unjustifiably entrenches a protection hierarchy, and creates further protection gaps by omitting to provide for known categories of extra-Convention refugees.

The Directive is based on existing EU Member State practice and accordingly reflects its differentiation in rights between 'Convention' and 'other' refugees. During discussions, and even in UNHCR's commentaries, there was a sense in which such a distinction was considered inherent in the very nature of complementary protection—as though 'complementary protection' implies a complementary status. Yet, as this thesis argues, the term refers to the protection capacity of other legal sources *complementary to* the 1951 Convention. Consideration of the operation of other regional instruments, such

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<sup>10</sup> D Perluss and JF Hartman 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 Virginia JIL 551.

as the OAU Convention and Cartagena Declaration, and of European practice at least to the 1970s, reflects a quite different conception of complementary protection.

Although complementary protection is typically considered an invention of the past decade, the concept has in fact paralleled the existence of formal legal protection ever since the 1920s, when international law first sought to regulate refugee protection. **Chapter 1** identifies early examples of complementary protection, from the League of Nations period up until the 1990s. It argues that complementary protection developed in two main ways: through ad hoc national measures, *domestically* extending international protection through legislation applied to groups not absorbed by formal international definitions; and through States offering protection to new refugee groups, pre-empting the formal conclusion of new *international* legal agreements and thus representing an embryonic form of subsequently formalized protection. The importance of these examples is to show that the content of the status afforded to extended categories of refugees was the same as the dominant legal instrument afforded to refugees. Examining how such protection has historically operated shows why there is no fundamental legal reason for creating a separate, subsidiary status for beneficiaries of complementary protection.

The chapter next analyses the protection concept embodied in the 1951 Convention, underscoring its foundation as a specialist human rights treaty and role as a *lex specialis* for all persons protected by the principle of *non-refoulement*. It illustrates why human rights law necessarily extends the protection concept, both in terms of influencing the meaning of ‘persecution’ in article 1A(2) as well as *independently* creating grounds for non-removal. In particular, this section seeks to establish a legal

model for the operation of complementary protection—human rights law extends threshold eligibility, while the Convention provides the resultant legal status.

Chapter 1 then looks at the protection gap that has arisen between institutional and State practice, despite attempts at the European and international levels to codify complementary protection. Finally, it critically examines the conceptual differences between complementary protection and subsidiary protection in preparation for Chapter 2.

**Chapter 2** provides a comprehensive analysis of the Qualification Directive, referred to above. It examines the final text of the Directive in light of the drafting process, noting the political compromises that shaped the scope and content of the instrument. Though it has shifted complementary protection beyond the realm of ad hoc and discretionary national practices to a codified regime, it does not reflect best practice. In several respects, protection has been diluted to ‘bare minimum’ standards, and there is nothing in the Directive to prevent States with higher standards from reducing them to that level. The chapter criticizes the narrowing-down of originally-proposed categories of persons eligible for subsidiary protection, arguing that defining out known groups does not eliminate them but simply creates new categories of unprotected persons. Secondly, the chapter highlights the absence of an international legal basis on which to base distinctions between the rights granted to Convention refugees vis-à-vis beneficiaries of subsidiary protection. It concludes that the Directive represents a regional, political manifestation of the broader legal concept of complementary protection, and as such does not provide a model for emulation at the international level.

**Chapters 3 to 5** examine specific human rights treaties to illustrate the expanded scope of *non-refoulement* and threshold eligibility. **Chapter 3** reviews the scope and content of protection afforded by article 3 CAT, which prohibits *refoulement* absolutely to a State ‘where there are substantial grounds for believing that [a person] would be in danger of being subjected to torture’. It analyses the provision’s application at two levels: internationally, with respect to claims taken to the Committee against Torture, and domestically, in relation to national laws that allow protection to be claimed on the basis of article 3 CAT, or that acknowledge article 3 CAT as a defence to removal. By contrast to the Refugee Convention, the CAT does not contain any exclusion clauses. Thus, persons expressly excluded from the Convention may nonetheless claim CAT-based protection. The chapter also explores the legal and practical limitations of decisions by international committees, such as the lack of enforceability of decisions, procedural requirements imposed on applications, and the uncertainty of the legal status and concomitant rights typically afforded to beneficiaries of such protection.

**Chapter 4** turns to the ECHR and ICCPR’s capacity as complementary protection instruments. In addition to article 3 ECHR and article 7 ICCPR, which are acknowledged sources of the principle of *non-refoulement*, the chapter explores the ability of other provisions to provide a basis on which international protection may be claimed. Although in theory there is no reason why any ECHR or ICCPR provision should not be able to independently form the basis of a protection claim, a restrictive approach by the European Court of Human Rights and the Human Rights Committee means that ill-treatment under any right other than article 3 ECHR or article 7 ICCPR must effectively reach the level of inhuman or degrading treatment or punishment in order to constitute an

unjustifiable breach. The term ‘unjustifiable’ is used, since certain rights under these instruments are qualified. This means that States may interfere with qualified rights where they can demonstrate a legitimate aim for doing so. Thus, for example, although article 8 protects the right to respect for family life, separation of families does not alone give rise to a right for family members to enter and reunite in a State. Although immigration control is not a legitimate aim per se, it is recognized as a medium through which other legitimate aims are promoted, such as measures to protect national security, public safety, public health or morals, rights and freedoms of others, the country’s economic well-being, and to prevent disorder or crime. Accordingly, the qualification of certain rights limits, although does not obliterate, their capacity to found protection claims.

**Chapter 5** considers how the ‘best interests of the child’ principle of the CRC may influence the determination of protection claims involving children. Since article 3 CRC requires the best interests of the child to be a primary consideration in all actions concerning children, it is argued that in assessing a need for international protection, the best interests principle must necessarily impact on claims involving or directly affecting children. The best interests standard exceeds traditional concepts of protection, to the extent that Goodwin-Gill and Hurwitz argue that where children are concerned, a duty to protect may arise even in the absence of well-founded fear of persecution or other serious harm.<sup>11</sup> In relation to admission, the chapter explores the principle’s implementation in Swedish, Danish, Finnish and Canadian practice, as well as internationally under the

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<sup>11</sup> GS Goodwin-Gill and A Hurwitz ‘Memorandum’ in Minutes of Evidence Taken before the EU Committee (Sub-Committee E) (10 April 2002) [10], in House of Lords Select Committee on the EU *Defining Refugee Status and Those in Need of International Protection* (The Stationery Office London 2002) Oral Evidence 2.

Comprehensive Plan of Action in the late 1980s–early 1990s. In relation to non-removal, the chapter examines Australian, Canadian and US jurisprudence, highlighting the importance of the principle despite the (then) absence of its domestic implementation in those jurisdictions.

While the CAT, ECHR, ICCPR and CRC provide an important curb on States' power to expel aliens, they are presently incomplete forms of protection. A State may have an obligation not to deport, but the question remains as to what extent it is then responsible to take measures allowing the individual to exist and subsist. Whereas a State's recognition of a person as a Convention refugee leads to the conferral of Convention status, no similar grant of rights currently stems from protection under human rights law. Crucially, the extent of protection provided by these treaties is safety from *refoulement*.

**Chapter 6** therefore examines the question of status for persons in need of international protection. States that permit extra-Convention refugees to remain in their territories, without conferring a formal status, subject them to legal limbo. Although general human rights law will apply, at least at minimum levels, the content and practical effect of these rights will depend on the combination of regional and international treaties which the host State has ratified, plus the domestic implementation of those rights and the possibility of enforcing them. Lack of access to such rights can create enormous difficulties in many aspects of daily life, including obtaining rental accommodation, employment, medical care and opening a bank account.<sup>12</sup> In many cases, healthcare,

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<sup>12</sup> O Andrysek 'Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures' (1997) 9 IJRL 392, 411. See also UK cases relating to whether the destitution of asylum-seekers qualifies as inhuman or degrading treatment or punishment under article 3 ECHR: *Q v Sect'y of State for the Home Dept* [2003] EWHC 2507 (Admin); *Q v Sect'y of State for the Home Dept*

employment, social security, education and other rights which Convention refugees receive are denied. Accordingly, the extent of protection may be little more than *non-refoulement* through time.<sup>13</sup>

By analysing the architecture of the Convention, the structure of human rights-based protection, non-European regional examples of complementary protection, the rights of stateless persons vis-à-vis the rights of refugees, non-discrimination principles, and the lack of any legal justification for differentiating the rights of beneficiaries of complementary protection, this chapter shows why the Convention operates as a *lex specialis* for all persons in need of international protection—a specialized blueprint of legal status, rights and obligations. There is no legal justification for granting a lesser status to persons whose need for international protection stems from a source other than the Refugee Convention. However, since the Convention expressly denies refugee status to certain excluded persons under article 1F, the final part of the chapter determines the content of a minimum status under human rights law.

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[2003] EWCA Civ 364, [2003] 3 WLR 365; *S v Sect'y of State for the Home Dept* [2003] EWHC 1941; *Shamsi v Sect'y of State for the Home Dept* [2003] EWHC 2215.

<sup>13</sup> GS Goodwin-Gill *The Refugee in International Law* (2<sup>nd</sup> edn OUP Oxford 1996) 196–202.

# CHAPTER 1

## THE EVOLUTION OF COMPLEMENTARY PROTECTION

### A INTRODUCTION

Complementary protection has a long history, both internationally and in the European context. Ever since the international community has sought to regulate the movement of refugees through international law, States have recognized that not all persons seeking protection fit neatly within legal definitions. Accordingly, some countries have allowed persons who are not technically ‘refugees’, but who nonetheless have a valid need for protection, to remain in their territories. However, there are discrepancies between different States’ understandings of *who* should benefit from such extended protection, and, crucially, the status to which they should be entitled.

This chapter seeks to show that protection is not a fixed concept in international law, and that its meaning at any given time is inextricably linked to the dominant legal definition of who is a refugee. It establishes the relationship between the Convention, as a specialist human rights instrument, and the protection function of human rights law more generally. By examining the human rights foundations of the Convention, it introduces the argument, developed in the final chapter, that the Convention is a *lex specialis* for all persons protected by the principle of *non-refoulement*, irrespective of that obligation’s source.

## B DEFINING COMPLEMENTARY PROTECTION

### 1 'Protection'

There is no singular concept of 'protection' in international law. Although 'protection' forms the essence of States' obligations vis-à-vis refugees, the term itself is not defined in any international or regional refugee or human rights instrument. It is a term of art.<sup>1</sup>

The need for international protection is predicated on the breakdown of national protection—a lack of the basic guarantees which States normally extend to their citizens. It is this factor that distinguishes refugees from people simply in need of humanitarian assistance. UNHCR says that '[t]he protection that States extend to refugees is not, properly speaking, "international protection," but national protection extended in the performance of an international obligation',<sup>2</sup> and is better described simply as 'asylum'. In fact, when the term 'international protection' was first coined by the French delegation during the 1950s drafting of the UNHCR Statute, its purpose was to distinguish between international protection extended by UNHCR and national protection extended by States.<sup>3</sup> Accordingly, international protection provides a substitute for national protection, which lasts until the refugee is able to benefit again from national protection, either in the country of origin or by assuming a new nationality.

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<sup>1</sup> GS Goodwin-Gill 'The Language of Protection' (1989) 1 IJRL 6, 6. See also P Tuitt *False Images: Law's Construction of the Refugee* (Pluto Press London 1996) on de facto refugees.

<sup>2</sup> UNHCR's Observations on the European Commission's Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection' 14109/01 ASILE 54 (16 November 2001) [10].

<sup>3</sup> ECOSOC OR 9<sup>th</sup> Session (1949) 'Summary Record of the 326<sup>th</sup> Meeting' 628–29; UNGA OR 4<sup>th</sup> Session Third Committee 'Summary Record of the 256<sup>th</sup> Meeting', cited in UNHCR's Observations (n2) [10] fn 16.

Protection comprises two elements: the threshold qualification (refugee) and the rights that attach (status). How these two elements are defined in international law at any given time crystallizes a particular conceptualization of refugee protection. Since every definition reflects the particular features of forced migration sought to be regulated at the time of drafting—‘formaliz[ing] the political consensus ... about the groups that should be given refugee status’<sup>4</sup>—the notion of protection must necessarily evolve over time.<sup>5</sup> When determining whether an individual has an international protection need, the assessment focuses on the scope of the threshold qualification (underscored by the principle of *non-refoulement*), rather than the rights that ensue.

## 2 What is ‘Complementary Protection’?

A large number of States permit persons to remain in their territory who are not Convention refugees, but for whom return to the country of origin is either not possible or not advisable. The obligation not to return an individual to serious harm may be express, as in article 33 of the Convention and article 3 CAT, or implied, as in article 7 ICCPR.

In other cases, permission to remain may be granted for compassionate reasons such as age, health or family connections unrelated to an international protection need;<sup>6</sup>

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<sup>4</sup> CM Skran *Refugees in Inter-War Europe: The Emergence of a Regime* (Clarendon Press Oxford 1995) 111; O Jaszi ‘Political Refugees’ *Annals* 203 (May 1939) 83.

<sup>5</sup> This was already recognized in a 1930s Swedish report: G Melander ‘The Personal Scope of an Asylum Convention’ IHL Round Table on Some Current Problems of Refugee Law (San Remo 8–11 May 1978) 18; P Hartling ‘Concept and Definition of “Refugee”—Legal and Humanitarian Aspects’ (1979) *Nordisk Tidsskrift for Intl Ret* 125, 125–26.

<sup>6</sup> Sometimes health or family reasons may also be tied to an international protection need, such as under arts 3 or 8 ECHR, and there remains some scope to test the extent to which compassionate reasons may in fact have a legal basis. However, generally they describe reasons for stay not linked to any legal ground.

or for practical reasons, such as the inability to obtain travel documents.<sup>7</sup> While such protection is humanitarian in nature, it is not based on an international protection obligation and therefore does not come within the legal conception of ‘complementary protection’.<sup>8</sup>

In legal terms, ‘complementary protection’ describes protection granted by States on the basis of an international protection need outside the 1951 Convention framework. It may be based on a human rights treaty or on more general humanitarian principles, such as providing assistance to persons fleeing from generalized violence.<sup>9</sup> In this pure form, it is not constrained by exclusion clauses but simply operates as a form of human rights or humanitarian protection triggered by States’ expanded *non-refoulement* obligations. Codified forms of complementary protection, such as ‘subsidiary protection’ in the EU; TPS, ‘withholding of removal’ and ‘deferral of removal’ in the US; and ‘persons in need of protection’ in Canada,<sup>10</sup> may exclude particular persons from protection for reasons similar to the exclusion clauses in the Refugee Convention, but may also specify the rights and status to which beneficiaries are entitled. Typically, such legal status is less comprehensive than that accorded to Convention refugees.

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<sup>7</sup> EXCOM 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]. During the drafting of the 1951 Convention, France had proposed that refugee status should extend to a person ‘unable to obtain from [his or her] country [of origin] permission to return’: AHC ‘France: Proposal for a Draft Convention Preamble’ UN Doc E/AC.32/L.3 (17 January 1950).

<sup>8</sup> Chapter 4 discusses exceptional cases where essentially compassionate reasons fall within the scope of art 3 ECHR. Belgium, Greece, Italy and the UK were the only European States to provide complementary protection to persons who could not be deported for compassionate reasons: D Bouteillet-Paquet ‘Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union’ in D Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002) 238.

<sup>9</sup> See D Perluss and JF Hartman ‘Temporary Refuge: Emergence of a Customary Norm’ (1986) 26 Virginia JIL 551; GS Goodwin-Gill ‘*Non-Refoulement* and the New Asylum Seekers’ (1986) 26 Virginia JIL 897; cf K Hailbronner ‘*Non-Refoulement* and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?’ (1986) 26 Virginia JIL 857.

<sup>10</sup> Immigration and Refugee Protection Act 2001 s 97(1).

### 3 The ‘Complementary’ Aspect

At the outset, it is essential to appreciate that the ‘complementary’ aspect of ‘complementary protection’ is not the form of protection or resultant status accorded to an individual, but rather the *source* of the additional protection. Its chief function is to provide an alternative basis for eligibility for protection. Understood in this way, it does not mandate a lesser duration or quality of status, but simply assesses international protection needs on a wider basis than the dominant legal instrument, presently the 1951 Convention.

By nature, the term ‘complementary protection’ is relational. The existence of *complementary* protection is predicated on the existence of a formal refugee protection regime, and contemporary understandings of ‘protection’ inform its content and function. Its meaning shifts depending on the meaning ascribed to that other protection source at a given point in time. The content of complementary protection in international law is therefore not fixed, but ‘fluid’, its ‘contours’ varying significantly.<sup>11</sup> Furthermore, in examining historical examples of complementary protection, it should be recalled that the concept is not unified, organic law, but a posterior, synthetic classification—a modern label describing an historical practice.

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<sup>11</sup> Bouteillet-Paquet (n8) 226.

#### 4 Historical Origins (Pre-1951)

Although the term ‘complementary protection’ was not coined until the 1990s,<sup>12</sup> a rudimentary concept can be traced back to the first attempts to regulate refugees under international law by the League of Nations.<sup>13</sup> These early instruments, based on a juridical concept of protection aimed at rectifying the breakdown in the international legal order caused by States’ denial of diplomatic and consular protection to their citizens,<sup>14</sup> defined refugees by national categories. Accordingly, the Arrangement concerning the Legal Status of Russian and Armenian Refugees of 12 May 1926<sup>15</sup> defined as refugees:

*Russian:* Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Soviet Socialist Republics and who has not acquired another nationality.

*Armenian:* Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired another nationality.<sup>16</sup>

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<sup>12</sup> UNHCR ‘Note on International Protection’ UN Doc A/AC.96/799 (25 July 1992) [5].

<sup>13</sup> For history: JH Simpson *The Refugee Problem: Report of a Survey* (OUP London 1939); LW Holborn ‘The Legal Status of Political Refugees, 1920–1938’ (1938) 32 AJIL 680; MR Marrus *The Unwanted: European Refugees from the First World War through the Cold War* (2<sup>nd</sup> edn Temple UP Philadelphia 2002); P Weis ‘The International Protection of Refugees’ (1954) 48 AJIL 193; JC Hathaway ‘The Evolution of Refugee Status in International Law: 1920–1950’ (1984) 33 ICLQ 348; Skran (n4).

<sup>14</sup> JC Hathaway *The Law of Refugee Status* (Butterworths Canada 1991). Generally for this section, see Hathaway (n13).

<sup>15</sup> 89 LNTS 47. This supplemented and amended the Arrangement with regard to the Issue of Certificates of Identity to Russian Refugees of 5 July 1922, 13 LNTS 237 and the Plan for the Issue of a Certificate of Identity to Armenian Refugees of 31 May 1924, LN Doc C.L.72(a).1924.

<sup>16</sup> There are more recent instances of domestic refugee definitions adopting protection concepts from the early League instruments. In the Tanzanian Refugees (Declaration) Order 1966, a refugee was described as a person of a certain origin who entered Tanzania after a particular date: G Melander ‘The Concept of the Term “Refugee”’ in AC Bramwell (ed) *Refugees in the Age of Total War* (Unwin Hyman London 1988) 11. See also Zambian Refugee (Control) Act 1970, permitting the Minister to ‘declare, by statutory order, any class of persons who are, or prior to their entry into Zambia were, ordinarily resident outside Zambia to be refugees for the purposes of this Act.’ US TPS status and EU temporary protection follow similar patterns.

Subsequent definitions applied this standard formula to other categories of refugees defined by national group,<sup>17</sup> thereby extending protection incrementally by nationality. Even when notions of social and political upheaval subsequently came to inform refugee definitions, these remained circumscribed by *particular* crises and linked to ethnic or national origin.

Yet, determining whom the League would protect was a selective, political<sup>18</sup> process. In a 1926 report, the High Commissioner identified over 150,000 people from eight national categories in analogous circumstances to the Russian and Armenian refugees. In choosing to extend legal protection to only a fraction of them,<sup>19</sup> the space for complementary protection was created. States became increasingly aware of the protection gaps created by refugee definitions that were legal abstractions divorced from events actually producing refugees.<sup>20</sup> As late as 1938, Switzerland observed that it daily received refugees who had lost their nationality on account of events during the First World War, but who remained unprotected by any international refugee instrument.<sup>21</sup>

The 1933 Convention provided the first formal mechanism envisaging complementary protection. Article 1, which incorporated the refugee definitions set out in the 1926<sup>22</sup> and 1928 instruments,<sup>23</sup> permitted States to modify or amplify these

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<sup>17</sup> Arrangement (Russian and Armenian refugees) (n15); Arrangement concerning the Extension to Other Categories of Refugees of Certain Measures Taken in Favour of Russian and Armenian Refugees of 30 June 1928, 89 LNTS 63.

<sup>18</sup> T Sjöberg *The Powers and the Persecuted: The Refugee Problem and the Intergovernmental Committee on Refugees* (Lund UP Lund 1991) 38.

<sup>19</sup> Minutes of the 43<sup>rd</sup> Session of the Council LN OJ (February 1927), cited in Skran (n4) 115.

<sup>20</sup> GS Goodwin-Gill *The Refugee in International Law* (OUP Oxford 1983) 4.

<sup>21</sup> International Conference for the Adoption of a Convention Concerning the Status of Refugees Coming from Germany 'Provisional Minutes: Third Meeting (Private)' (8 February 1938) CONF.CSRA/PV3 (8 February 1938) 4.

<sup>22</sup> Arrangement (Russian and Armenian Refugees) (n15). See Convention relating to the International Status

definitions at the moment of signature or accession to the treaty. Just as Recommendation E of the Final Act to the 1951 Convention ‘expresses the hope that the Convention ... will have value as an example exceeding its contractual scope’, this mechanism formally contemplated the possibility of complementary protection.

Although amplification of the definition was supposed to be specified at the time of signature or accession, such as Egypt’s reservation of the right to expand or limit the definition as it wished,<sup>24</sup> this did not prevent France from extending the Convention’s provisions to Spanish refugees in its territory in 1945. France had been a strong advocate of extending the 1933 Convention provisions to new groups of refugees, such as to German refugees in 1938, despite resistance from States such as Belgium and the UK.<sup>25</sup> However, as the French delegate to the Conference of Plenipotentiaries noted, France would not have been able to grant the benefit of existing conventions to those refugees had it been required to under international law. ‘She had done her best in an exceptional situation; and only later had it become possible for her to extend to those refugees the benefits of the 1933 Convention. ... It seemed more natural for governments to extend their commitments subsequently rather than to set out by assuming excessively wide commitments.’<sup>26</sup>

A French decree of 15 March 1945 provided that in light of the Arrangement of 12 May 1926, the Convention of 28 October 1933, and relevant domestic laws, ‘[I]e

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of Refugees of 28 October 1933, 159 LNTS 199.

<sup>23</sup> Arrangement (Extension to Other Categories) (n17).

<sup>24</sup> CP ‘Summary Record of the 19<sup>th</sup> Meeting’ (Geneva 13 July 1951) UN Doc A/CONF.2/SR.19 (26 November 1951) 25 (France).

<sup>25</sup> International Conference for the Adoption of a Convention Concerning the Status of Refugees Coming from Germany ‘Provisional Minutes: Second Meeting’ (7 February 1938) CONF.CSRA/PV2, 3; Intl Conf on German Refugees ‘Provisional Minutes: First Meeting (Private)’ (7 February 1938) CONF.CSRA/PV1 (7 February 1938) 5–6, 14. For additional examples: Perluss and Hartman (n9) 559.

<sup>26</sup> CP ‘Summary Record of the 22<sup>nd</sup> Meeting’ (Geneva 16 July 1951) UN Doc A/CONF.2/SR.22 (26 November 1951) 10 (France).

bénéfice de la convention relative au statut international des réfugiés est étendu aux réfugiés espagnols.’<sup>27</sup> Spanish refugees were defined in article 2 as

les personnes possédant ou ayant possédé la nationalité espagnole, ne possédant pas une autre nationalité et à l’égard desquelles il est établi, qu’en droit ou en fait, elles ne jouissent pas de la protection du gouvernement espagnol.’<sup>28</sup>

As the French representative explained at the 33<sup>rd</sup> meeting of the Ad Hoc Committee on Refugees and Stateless Persons, the protection offered was identical to the formal legal status provided by the 1933 Convention:

France in particular gave persons in the position, but not enjoying the status, of refugees the same rights and advantages as if she were bound to do so by conventions; and that the French Government had extended those rights to refugees from Spain even though she was not bound to do so under any international convention.<sup>29</sup>

Some other States also permitted persons who did not meet international refugee definitions, but who were considered to require protection, to remain in their territories and commonly afforded them refugee status outlined by international conventions.<sup>30</sup> For example, French public hospitals provided free treatment to German refugees prior to the conclusion of the 1938 Convention, though the French government stressed ‘its urgent need of a text on which to base its practice.’<sup>31</sup> The UK treated as refugees

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<sup>27</sup> Decret No 45=766 du 15 mars 1945 accordant aux réfugiés espagnols le bénéfice de diverses dispositions (Journal Officiel de la République Française 21 avril 1945) Gazette du Palais (1945) art 1.

<sup>28</sup> *ibid* art 2.

<sup>29</sup> AHC Second Session ‘Summary Record of the 33<sup>rd</sup> Meeting’ (Geneva 14 August 1950) UN Doc E/AC.32/SR.33 (20 September 1950) 9.

<sup>30</sup> AHC First Session ‘Summary Record of the 17<sup>th</sup> Meeting’ (NY 31 January 1950) UN Doc E/AC.32/SR.17 (6 February 1950) [31] (USA).

<sup>31</sup> Intl Conf on German Refugees ‘Second Meeting’ (n25) 4. See Convention concerning the Status of

many thousands of persons who still enjoyed the protection of the Reich, and had extended its asylum to them, either for the purpose of enabling them to make a new home in the United Kingdom, or of staying there temporarily till plans for their settlement in some other country had been completed.<sup>32</sup>

As the Polish representative in 1938 observed, '[i]nternal legislation frequently granted to the refugees, both from the legal and social point of view, a more favourable position than that embodied in the provisions of the draft Convention.'<sup>33</sup> Complementary protection, extending beyond States' international protection obligations, was in some senses an embryonic form of subsequently formalized protection.

The content of protection was identical; it was simply the basis on which protection was granted that was 'complementary'. The same pattern is followed by the OAU Convention, the 'regional complement' to the Refugee Convention. This differs from the EU's 'subsidiary protection', a regional adaptation of complementary protection that prescribes a legal status inferior to Convention refugee status. Though this echoes the European practice over the past two decades of diluting the protection granted to extra-Convention refugees, it has no solid legal basis. Chapter 6 examines this in detail.

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Refugees coming from Germany of 10 February 1938, 192 LNTS 59.

<sup>32</sup> Intl Conf on German Refugees 'Provisional Minutes: Fourth Meeting' (Geneva 8 February 1938) CONF.CSRA/PV4 (10 February 1938) 8. For example, the British *Kindertransport*, a quasi-protection, quasi-humanitarian assistance scheme enabled Jewish children forced to flee Germany to stay in Britain. It was reminiscent of a WWI programme that admitted several thousand Belgian children to Britain, and the admission in May 1937 of 3800 Basque children as refugees of the Spanish Civil War: AJ Sherman *Island Refuge* "Britain and Refugees from the Third Reich 1933–1939" (2<sup>nd</sup> edn Frank Cass Ilford 1994) 183–87; R Göpfert *Der jüdische Kindertransport von Deutschland nach England 1938/39: Geschichte und Erinnerung* (Campus Verlag Frankfurt 1999).

<sup>33</sup> Intl Conf on German Refugees 'First Meeting' (n25) 11.

## C THE 1951 REFUGEE CONVENTION

Since coming into force in 1954, the Refugee Convention has been the central international instrument on refugee status, supplemented by the 1967 Protocol which extended its temporal and (with respect to some States) geographical application. In the half-century since the Convention's inception, international human rights law has evolved as a sophisticated system of rights and duties between the individual and the State, which has affected traditional notions of State sovereignty and behaviour in an unprecedented manner.<sup>34</sup> Yet despite the influence of 'international human rights law' in regulating State behaviour, there has been a general reluctance by States, academics and institutions to view human rights law, refugee law and humanitarian law as branches of an interconnected, holistic regime, particularly when it comes to triggering eligibility for protection beyond the scope of article 1A(2).

### 1 The Refugee Convention as a Human Rights Treaty<sup>35</sup>

The drafting of the 1951 Convention represented a 'profound re-orientation' in refugee organizations, agreements and agendas, but it was '*evolution, not revolution*'.<sup>36</sup> In 1947, the Commission on Human Rights had adopted a resolution that 'early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection

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<sup>34</sup> eg Human Rights Act 1998 (UK) c 42.

<sup>35</sup> IC Jackson *The Refugee Concept in Group Situations* (Martinus Nijhoff Publishers The Hague 1999); UNHCR 'Note on International Protection' UN Doc A/AC.96/975 (2 July 2003) [49]–[52] emphasizes relevance of human rights law to refugee issues.

<sup>36</sup> GS Goodwin-Gill 'Editorial: The International Protection of Refugees: What Future?' (2000) 12 IJRL 1, 2.

of any Government, in particular the acquisition of nationality, as regards their legal status and social protection and their documentation.’<sup>37</sup> At the request of ECOSOC, the Ad Hoc Committee on Statelessness and Related Problems was asked to draft a binding legal instrument to implement articles 14 and 15 of the UDHR,<sup>38</sup> firmly cementing the Convention’s foundations in human rights law. Its purpose was to ‘consolidate existing agreements and conventions and, further, to determine the status of those refugees who had so far enjoyed no protection under any of the existing instruments.’<sup>39</sup> Although the Convention took as its departure point human rights principles contained in the UDHR, it revised, consolidated and substantially extended earlier agreements to create a new protection regime.<sup>40</sup> Many substantive provisions were based on principles of the UDHR<sup>41</sup> and the embryonic ICCPR and ICESCR, known then as the draft Covenant on Human Rights.<sup>42</sup>

The Convention’s Preamble states its aim as assuring ‘refugees the widest possible exercise of ... fundamental rights and freedoms’. The Convention was to establish practical but universal standards<sup>43</sup> for the rights of refugees that went beyond the

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<sup>37</sup> Commission on Human Rights Report to ECOSOC on the 2<sup>nd</sup> Session of the Commission Held at Geneva from 2 to 17 December 1947 (1948) UN Doc E/600 [46], in P Weis ‘Human Rights and Refugees’ (1971) 1 Israel Yearbook on HR 35, 37.

<sup>38</sup> AHC First Session ‘Summary Record of the 1<sup>st</sup> Meeting’ (NY 16 January 1950) UN Doc E/AC.32/SR.1 (23 January 1950) [4] (Secretariat).

<sup>39</sup> CP ‘Summary Record of the 2<sup>nd</sup> Meeting’ (Geneva 2 July 1951) UN Doc A/CONF.2/SR.2 (20 July 1951) 9 (HC).

<sup>40</sup> Convention Preamble.

<sup>41</sup> ‘Comments on the Draft Convention and Protocol: General Observations’ Annex II to AHC ‘Draft Report of the Ad Hoc Committee on Statelessness and Related Problems’ (16 January–February 1950) UN Doc E/AC.32/L.38 (15 February 1950) 36 (art 3 non-discrimination), 46 (art 26 education); AHC ‘Refugees and Stateless Persons: Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems’ (Document E/1618) UN Doc E/AC.32/L.40 (10 August 1950) 31 (France on UDHR art 29(1)).

<sup>42</sup> ‘Comments on the Draft Convention and Protocol: General Observations’ (n41) 58; see UN Doc E/1572, 12 (art 32 (then art 27) expulsion).

<sup>43</sup> CP ‘2<sup>nd</sup> Meeting’ (n39) 18 (HC); CP ‘Summary Record of the 3<sup>rd</sup> Meeting’ (3 July 1951) UN Doc A/CONF.2/SR.3 (19 November 1951) 10 (France).

lowest common denominator, 'since a convention would hardly be useful if it contained only the minimum acceptable to everyone.'<sup>44</sup> Early UNGA resolutions support its underlying human rights basis, with an emphasis on assisting the most needy,<sup>45</sup> affirming basic principles relating to solutions,<sup>46</sup> and recommending increased protection activities.<sup>47</sup>

The result is a specialist human rights treaty that reflects the tenets of the UDHR, ICCPR and ICESCR in such provisions as the acquisition of property, the right to work, housing, public education, public relief, labour legislation and social security, and freedom of movement.<sup>48</sup> Moreover, it reinforces States' protection of refugees as an international legal duty, arising from article 14 of the UDHR and embodied in binding form by the principle of *non-refoulement* in article 33 of the Convention. As one commentator remarks: 'The framers' unambiguous reference in the Preamble of the 1951 Convention to the Universal Declaration of Human Rights indicates a desire for the refugee definition to evolve in tandem with human rights principles.'<sup>49</sup> Lauterpacht and Bethlehem stress that the law on human rights that has emerged since the Convention's conclusion is 'an essential part of [its] framework ... that must, by reference to the ICJ's observations in the *Namibia* case, be taken into account for purposes of interpretation.'<sup>50</sup>

UNHCR has also emphasized that:

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<sup>44</sup> AHC First Session 'Summary Record of the 25<sup>th</sup> Meeting' (NY 10 February 1950) UN Doc E/AC.32/SR.25 (17 February 1950) [68].

<sup>45</sup> UNGA Res 639 (VI) of 20 December 1952; UNGA Res 728 (VIII) of 23 October 1953.

<sup>46</sup> UNGA Res 1166 (XII) of 26 November 1957; ECOSOC Res 686 (XXVI) B of 21 July 1958.

<sup>47</sup> UNGA Res 1284 (XIII) of 5 December 1958 [1], in Goodwin-Gill (n1) 14.

<sup>48</sup> J Patrnoic 'International Protection of Refugees in Armed Conflicts' (reprinted by UNHCR Protection Division from *Annales de Droit International Médical* (July 1981)) section 4.

<sup>49</sup> MR von Sternberg *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared* (Martinus Nijhoff The Hague 2002) 314.

<sup>50</sup> E Lauterpacht and D Bethlehem 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion'

The human rights base of the Convention roots it quite directly in the broader framework of human rights instruments of which it is an integral part, albeit with a very particular focus. The various human rights treaty monitoring bodies and the jurisprudence developed by regional bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights are an important complement in this regard, not least since they recognize that refugees and asylum-seekers benefit both from specific Convention-based protection and from the range of general human rights protections as they apply to all people, regardless of status.<sup>51</sup>

By contrast to the category-based approach of previous refugee instruments, article 1A(2) embodies a ‘universal’ refugee definition,<sup>52</sup> requiring refugees to demonstrate a well-founded fear of ‘persecution’ based on nationality, religion, race, political opinion or membership of a particular social group. Although its scope was initially constrained by temporal and geographical limitations, these were removed by the 1967 Protocol.<sup>53</sup> Perluss and Hartman describe article 1A(2) as a ‘coalescence’ of the three historical approaches: individual (subjective fear), social (objectively determined group factors), and the juridical element of a lack of de jure protection by the country of

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in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP Cambridge 2003) [75].

<sup>51</sup> UNHCR ‘Note on International Protection’ UN Doc A/AC.96/951 (13 September 2001) [4].

<sup>52</sup> For debates: AHC ‘Summary Record of the 3<sup>rd</sup> Meeting’ (NY 17 January 1950) UN Doc E/AC.32/SR.3 (26 January 1950) [25], [50] (France), [54] (USA); AHC ‘Refugees and Stateless Persons’ (n41) 26–27; AHC ‘Provisional Draft of Parts of the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees, Prepared by the Working Group on this Article’ UN Doc E/AC.32/L.6 (23 January 1950); AHC ‘Corrigendum to the Proposal for a Draft Convention Submitted by France’ UN Doc E/AC.32/L.3/Corr.1 (18 January 1950) art 1(1); AHC ‘United States of America: Addendum to E/AC.32/L.4’ UN Doc E/AC.32/L.4/Add.1 (19 January 1950) art IA(4); AHC ‘Decisions of the Committee on Statelessness and Related Problems Taken at the Meetings of 31 January 1950’ UN Doc E/AC.32/L.20 (31 January 1950) art IB; AHC ‘Draft Convention Relating to the Status of Refugees: Decisions of the Working Group Taken on 9 February 1950’ UN Doc E/AC.32/L.32 (9 February 1950) art 1B.

<sup>53</sup> The geographical limit now only applies to the following States: Congo, Madagascar, Malta, Monaco and Turkey (as at February 2002). It cannot be applied by any State ratifying the Convention or Protocol after the Protocol was adopted.

origin,<sup>54</sup> focusing on individual harm caused by an uprooting event, rather than the event itself (in line with post-1939 approaches).

The new orientation of the definition necessarily impacts upon the manner in which extension of the protection concept occurs. Where refugeehood is defined in law by selected<sup>55</sup> national categories, such as ‘Russian refugee’ and ‘Armenian refugee’, rather than by a more abstract and universal concept such as ‘persecution’, it is easier to contemplate (and regulate) incremental expansion of the refugee concept. Applying the concept to new refugee situations effectively involves adding another nationality into a relatively standard definition, such that the definition itself does not substantively alter.<sup>56</sup> Expansion on the basis of an abstract concept such as ‘persecution’ is less neat and predictable than incremental growth.<sup>57</sup> At the institutional level, the expansion of article 1A(2) of the Convention (paralleled by article 6A of the UNHCR Statute) occurred first by widening its temporal scope (to Hungarian refugees in 1956), then by broadening its geographical application (to Chinese refugees in Hong Kong).<sup>58</sup> Both these elements were ultimately adopted in the 1967 Protocol. The next phase involved expansion of the protection *concept* via a widening of the principle of *non-refoulement*.

While developments in human rights law may shape interpretations of ‘persecution’,<sup>59</sup> they may also *independently* form grounds for non-removal. Article 3

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<sup>54</sup> Perluss and Hartman (n9) 583, referring to Hathaway (n14) 2–6.

<sup>55</sup> LN ‘Russian and Armenian Refugees: Report to the Eighth Assembly’ (1927) (A.48.1927.XIII) 14, in Skran (n4) 115; see Doc XIII.Refugees.1927.XIII.3.

<sup>56</sup> This is similar to the EU Temporary Protection Directive which applies on a case-by-case basis to declared mass influxes.

<sup>57</sup> Although note concerns that ‘it was not always an easy matter to ascertain whether a given person did or did not possess the attributes of a refugee coming from Germany.’: Intl Conf on German Refugees ‘Second Meeting’ (n25) 17 (Liaison Committee).

<sup>58</sup> For a detailed account, see Jackson (n35).

<sup>59</sup> See Hathaway (n14) 112, approved in *Horvath v Sect’y of State for the Home Dept* [2001] 1 AC 489 (HL) 495 (Lord Hope of Craighead); *Sepet v Sect’y of State for the Home Dept* [2002] 1 WLR 856 (HL) [7]

CAT, article 7 ICCPR and article 3 ECHR are recognized sources of human rights *non-refoulement*—complementary protection—which prohibit removal in circumstances additional to (and sometimes overlapping with) article 1A(2). External to and independent of the Convention,<sup>60</sup> the instruments provide only a trigger for protection and do not elaborate a resultant legal status. The main problem with the EU Qualification Directive, and one which has characterized many ad hoc complementary protection schemes, is that beneficiaries do not receive the same level of rights as Convention refugees. In so far as there is no legal justification for distinguishing between the status granted to Convention or extra-Convention refugees,<sup>61</sup> it makes sense that the Convention, as a ‘Magna Carta for the persecuted’,<sup>62</sup> applies to both. It is argued that since the Convention is itself a specialist human rights instrument, the protection conceptualization it embodies is necessarily extended by developments in human rights law, rather than via the conventional means of a protocol. It therefore acts as a *lex specialis* which applies to persons encompassed by that extended concept, that is, by complementary protection.<sup>63</sup> The issue of resultant legal status issue is examined comprehensively in Chapter 6, but the following sections illustrate why the Convention has the capacity to encompass refugees beyond the scope of article 1A(2).

UNHCR’s 2001 Note on International Protection emphasized the Convention’s humanitarian and human rights character, noting that its scope had been extended through

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(Lord Bingham); *Ullah v Sect’y of State for the Home Dept* [2004] UKHL 26 [32] (Lord Steyn); International Association of Refugee Law Judges Human Rights Nexus Working Party ‘Rapporteur’s Report’ (1998 Annual Conference Ottawa 12–17 October 1998) 8. See eg gender-related persecution.

<sup>60</sup> Although some States may procedurally determine the order in which protection may be invoked.

<sup>61</sup> UNHCR’s Observations (n2) [46]; UNHCR ‘Note on Key Issues of Concern to UNHCR on the Draft Qualification Directive’ (March 2004) 2.

<sup>62</sup> CP ‘19<sup>th</sup> Meeting’ (n24) 27 (International Association of Penal Law).

<sup>63</sup> Chapter 6 considers the tension between the absolute nature of human rights *non-refoulement* and the Convention’s exclusion clauses with respect to granting Convention status.

the 1967 Protocol and ‘complemented, indeed buttressed, by the progressive development of international human rights law.’<sup>64</sup> The jurisprudence of treaty-monitoring bodies and regional human rights courts was mentioned as a further important complement, since these bodies ‘recognize that refugees and asylum-seekers benefit both from specific Convention-based protection and from the range of general human rights protections as they apply to all people, regardless of status.’<sup>65</sup>

## 2 ‘Humanitarian Refugees’: Article 1A(1)

New legal refugee definitions do not obliterate the *existence* of other types of refugees, but simply recharacterize the formal qualities or scope of refugeehood. State practice has continually provided for ‘informal’ refugee categories, even if the trade-off for extended *non-refoulement* has been rudimentary legal rights.

Analysis of the Convention’s conceptualization of ‘protection’ invariably focuses on the refugee definition in article 1A(2), since an individual must satisfy its requirements to trigger Convention status. Article 1A(1), which extends the benefits of the 1951 Convention to any person who

[h]as been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization

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<sup>64</sup> UNHCR ‘Note on International Protection’ (n51) [2].

<sup>65</sup> *ibid* [4].

is generally overlooked as an historical remnant. However, although eligibility under this provision is retrospective, the fact that the Convention recognizes all previous refugee definitions as giving rise to Convention status is significant. First, the incorporation of these definitions necessarily broadens the Convention's conceptual basis of protection, making it difficult to sustain the argument that, conceptually, the Convention does not support the grant of its international legal status to persons fleeing situations of armed conflict or communal violence. This has particular significance for persons seeking complementary protection on the basis of civil war, and challenges the EU's current approach of creating a new and separate protection status for such persons.

Secondly, even though an applicant today cannot invoke an article 1A(1) instrument as the basis of an asylum claim (just as an Armenian presenting him- or herself for the first time in 1951 could not claim under article 1A(1)<sup>66</sup>), the fact that Convention status flows from the definitions contained in those instruments, which embody what Melander has termed the 'humanitarian refugee' concept,<sup>67</sup> makes it more difficult to justify differential treatment for persons seeking complementary protection on similar grounds.

Melander's claim that the majority of refugees in the 1920s and 1930s were 'humanitarian refugees'—predominantly victims of armed conflicts or communal violence who today would fall outside the definition in article 1A(2)<sup>68</sup>—appears in a new light if we consider that not only has State practice continued to recognize both 'humanitarian' and 'human rights' refugees, but that the dominant legal refugee

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<sup>66</sup> CP '22<sup>nd</sup> Meeting' (n26) 17 (HC).

<sup>67</sup> G Melander 'Refugee Policy Options—Protection or Assistance' in G Rystad (ed) *The Uprooted: Forced Migration as an International Problem in the Post-War Era* (Lund University Press Lund 1990) 146–47.

<sup>68</sup> *ibid.*

instrument implicitly retains the humanitarian concept of protection within its definitional provision.

Thus, while the text of article 1A(1) does not support an argument that the provision itself gives rise to additional grounds for claiming protection under the Convention, its implicit incorporation of earlier legal definitions of ‘refugee’ (and the concepts of protection which those definitions embody) supports the view that the Convention tolerates a broader protection concept than article 1A(2) might suggest, and that Convention status is the appropriate status for persons in need of international protection for humanitarian reasons.

### **3 Recommendation E of the Final Act**

Recommendation E of the Final Act of the Conference on Plenipotentiaries was a UK initiative based on paragraph 7 of the Preamble to the original text of the draft Convention,<sup>69</sup> and was prompted by the deletion of former article 1F, which provided: ‘The Contracting States may agree to add to the definition of the term “refugee” contained in the present article persons in other categories, including such as may be recommended by the General Assembly.’<sup>70</sup> The UK representative explained that his delegation had felt that a general recommendation was called for to cover those classes of refugees who were altogether outside the scope of article 1A.<sup>71</sup>

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<sup>69</sup> CP ‘Summary Record of the 35<sup>th</sup> Meeting’ (Geneva 25 July 1951) UN Doc A/CONF.2/SR.35 (3 December 1951) 43; see original UK proposal: CP ‘United Kingdom: Recommendation for Inclusion in the Final Act’ UN Doc A/CONF.2/107 (25 July 1951).

<sup>70</sup> CP ‘Texts of the Draft Convention and the Draft Protocol to be Considered by the Conference’ UN Doc A/CONF.2/1 (12 March 1951) 5 (citations omitted).

<sup>71</sup> CP ‘35<sup>th</sup> Meeting’ (n69) 44.

Recommendation E of reveals that the drafters of the 1951 Convention to some extent ‘envisaged a complementary protection system’.<sup>72</sup> This statement needs further explanation to avoid any suggestion that the drafters envisaged a separate complementary protection system operating outside the Convention’s parameters, which is not sustained when one considers the phrasing of the Recommendation. Certainly the Recommendation envisages the expansion of the Convention to encompass additional categories of refugees not provided for by the terms of article 1A(2) of the Convention.<sup>73</sup> Its wording makes clear that what is imagined is not a complementary status for such categories, but rather that the terms of the Convention itself would be extended by the General Assembly<sup>74</sup>:

EXPRESSES the hope that the Convention relating to the Status of Refugees will have value as an example *exceeding its contractual scope* and that all nations will be guided by it in *granting* so far as possible to persons in their territory *as refugees* and who would not be covered by the terms of the Convention, *the treatment for which it provides*. (emphasis added)

Read in this way, the Recommendation is a most useful guiding principle in the complementary protection debate. Though aspirational rather than a firm legal duty, the Recommendation helps to counter claims that the Convention is too restrictive to absorb the additional groups of refugees covered by complementary protection sources, or that

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<sup>72</sup> H Storey and others ‘Complementary Protection: Should There Be a Common Approach to Providing Protection to Persons Who Are Not Covered by the 1951 Geneva Convention?’ (Joint ILPA/IARLJ Symposium 6 December 1999) (copy with author) 4.

<sup>73</sup> CP ‘35<sup>th</sup> Meeting’ (n69) 44. In 1966, it was observed that Recommendation E of the Final Act had encouraged States to ‘frequently accord the treatment provided for in the Convention to persons not falling within its terms’: Proposed Measures to Extend the Personal Scope of the Convention relating to the Status of Refugees of 28 July 1951 (Submitted by the High Commissioner in Accordance with Paragraph 5(b) of General Assembly Resolution 1166 (XII) of 26 November 1957) (12 October 1966) UN Doc A/AC.96/346 [2].

<sup>74</sup> ‘Comments on the Draft Convention and Protocol: General Observations’ (n41) 34.

the Convention was not intended to apply to additional groups. This interpretation is reinforced by an earlier version of the text, which was originally proposed as part of the Preamble to the Convention:

Expressing the hope finally that this Convention will be regarded as having value as an example exceeding its contractual scope, and that without prejudice to any recommendations the General Assembly may be led to make in order to invite the High Contracting Parties to extend to other categories of persons the benefits of this Convention, all nations will be guided by it in granting to persons who might come to be present in their territory in the capacity of refugees and who would not be covered by the following provisions, treatment affording the same rights and advantages.<sup>75</sup>

The Recommendation is important in two respects. First, with respect to eligibility, it encourages the extension of protection to individuals not encompassed by the Convention definition of a refugee. Secondly, with respect to substantive rights, it envisages the application of the Convention framework to persons covered by extended eligibility, tacitly recognizing that the source of the harm causing flight is irrelevant for the purposes of status. This is very significant in the EU context, where subsidiary protection status results in a lower form of rights than Convention status. The Recommendation supports the argument that there is no legal justification for creating two levels of rights simply by distinguishing between the source of harm (or the legal basis for protection).

The Hungarian refugee crisis of 1956 provided the first real challenge to the article 1A(2) definition, and reflects the first example of widespread Refugee Convention-related complementary protection. The refugees did not strictly fall within the temporal requirements of the Convention definition, however the High Commissioner

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<sup>75</sup> CP 'Texts of the Draft Convention' (n70) 2–3.

determined that since the flight of Hungarian refugees was related to recent events and political changes resulting from the end of the Second World War, they should be considered as falling within the Convention's scope.<sup>76</sup> Austria followed this interpretation when it granted asylum to 180,000 Hungarian refugees.<sup>77</sup> It issued them with normal refugee eligibility certificates as soon as technically possible, unless individual status determination showed that a person was not entitled to the Convention's benefits.

Most other States granted protection on a prima facie basis, at least initially.<sup>78</sup> Norway granted all Hungarian citizens a residence permit for one year that included permission to work, renewed automatically on request. After two years, they could request a permanent residence permit, which was mostly granted. It was only at this point that individual status determination took place, when the police had the opportunity to deny a permit 'in specially difficult cases (criminals)'.<sup>79</sup> The distinction between Hungarian refugees and Convention refugees in Norway lay in the grant of travel documents. If an individual had not left Hungary for an article 1A(2) reason, then he or she was not entitled to a Convention travel document but to an alien's passport. In reality, this did not have a substantial impact on the rights received:

This system has the advantage that if a refugee in Norway receives travel documents, he is thoroughly screened and found to be a political refugee. Of course every refugee receives the benefit of the doubt. Also those with

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<sup>76</sup> UNHCR 'The Problem of Hungarian Refugees in Austria' UN Doc A/AC.79/49 (17 January 1957) Annex IV [4].

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid* [5].

<sup>79</sup> Letter from A Fjellbu (Norwegian Refugee Council) to P Weis (1 July 1959), in UNHCR Archives Fonds 11 Sub-fonds 1, 6/1/HUN.

an alien's passport is not refused residence permit, and have all the social rights.<sup>80</sup>

The UK did not have a special eligibility procedure for Hungarian refugees but granted them the same rights as Convention refugees. As in Norway, the only distinction was with respect to travel documents. Hungarian refugees were only given a Convention travel document if they were considered to be firmly settled in the UK; in all other cases, they received the London travel document.<sup>81</sup> In Germany, Hungarian refugees were subject to a simplified eligibility procedure for recognition as Convention refugees and received Convention rights, including Convention travel documents. In Italy, two methods were employed for protecting Hungarian refugees. Some were given temporary asylum pending resettlement and were not examined by the Eligibility Commission. Other arrivals were individually examined and as at the end of March 1957, 126 of 127 cases had been found to be Convention refugees.

A 1956 Resolution on Hungarian Refugees of the Consultative Assembly of the Council of Europe requested all Member States 'to accord to all of them who are able to work the facilities available under the system established by the Statute relating to refugees and provided for under the Geneva Convention of 1951.'<sup>82</sup> A memo by Paul Weis the following year revealed that:

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<sup>80</sup> *ibid.*

<sup>81</sup> London Agreement relating to the Issue of Travel Documents to Refugees Who Are the Concern of the Intergovernmental Committee on Refugees (15 October 1946) 11 UNTS 73.

<sup>82</sup> Resolution adopted by the Committee on Population and Refugees (Vienna 15 October 1956) COE Doc 587, adopted with certain amendments by Permanent Commission (Paris 19 November 1956) acting for Consultative Assembly between sessions, in Interoffice Memorandum to Mr M Pagès, Director from P Weis 'Eligibility of Refugees from Hungary' (9 January 1957) 22/1/HUNG [3], in UNHCR Archives Fonds 11 Sub-fonds 1, 6/1/HUN.

On the whole ... no Government has, as far as we know, raised any objection to the application of the Convention to Hungarian refugees who otherwise fulfill the conditions of Article 1 of the Convention and it can, therefore, be assumed that the interpretation of the dateline of 1 January 1951 contained in Document A/AC.79/49 Annex IV is accepted by Governments parties to the Convention.<sup>83</sup>

Of course, it cannot be overlooked that the policy of declaring every Hungarian to be a refugee 'suited the ideological and racial preferences of western powers'<sup>84</sup>—Europeans fleeing Communism. Yet, in a sense, Recommendation E reflects an optimal system of complementary protection, operating more as a theoretical concept guiding the expansion of international protection within a broadened refugee law framework, than a separately defined system of protection (as has been created in the EU). Some authors suggest that, from a pragmatic perspective, some form of codified complementary protection is necessary for States to meet their international obligations,<sup>85</sup> even if the international law regime in principle already contains sufficient safeguards.

#### **D COMPLEMENTARY PROTECTION AND INTERNATIONAL LAW**

At first glance, it appears that international law has little to say about the relatively amorphous concept of complementary protection. Just as 'protection' is not defined, the term 'complementary protection' appears in no international treaty and has no singular connotation in State practice. It is envisaged that a 2005 EXCOM Conclusion will

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<sup>83</sup> Memo from P Weis to Mr J Mersch, UNHCR Branch Office in Luxembourg 'Application of 1951 Convention to Hungarian Refugees' (28 May 1957) Ref.G.XV.7/1/8, 6/1/HUN [3], in UNHCR Archives Fonds 11 Sub-fonds 1, 6/1/HUN.

<sup>84</sup> Independent Commission on International Humanitarian Issues *Refugees: The Dynamics of Displacement* (London 1986) 33, in G Melander 'The Two Refugee Definitions' Raoul Wallenberg Institute of Human Rights and Humanitarian Law *Report No 4* (Lund 1987) 14.

<sup>85</sup> This is the view expressed in H Storey and others (n72) 14.

specifically refer to ‘complementary protection’, although it remains to be seen how it will be defined.<sup>86</sup> Furthermore, despite the range of domestic incarnations of complementary protection, such as ‘de facto refugee status’, ‘B status’, ‘war refugees’, ‘humanitarian asylum’, ‘OAU/Cartagena-type refugees, externally or internationally displaced persons, persons fleeing danger, victims of violence ... and Temporary Protected Status cases’,<sup>87</sup> the term itself remains absent from national legislation.<sup>88</sup> The EU Qualification Directive, which is the first supranational instrument to outline a comprehensive complementary protection regime, adopts the term ‘subsidiary protection’ instead. In addition to codifying broadened threshold eligibility for international protection beyond article 1A(2), this regime prescribes a legal status inferior to Convention refugee status. ‘Subsidiary protection’ is thus a regionally-specific political manifestation of the broader legal concept of complementary protection, examined in Chapter 2.

## **1 Institutional vis-à-vis State Expansion: Temporary Refuge**

Whereas UNHCR’s institutional mandate<sup>89</sup> has been extended by UNGA,<sup>90</sup> the text of the Convention definition has remained static, apart from the 1967 Protocol’s removal of its

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<sup>86</sup> UNHCR email correspondence with author concerning the drafting of a Background Report on Complementary Protection in preparation for a 2005 EXCOM Conclusion (October 2004). On recommendation for an EXCOM Conclusion: UNHCR *Agenda for Protection* (2<sup>nd</sup> edn March 2000) 34; for text of preliminary draft: Global Consultations on International Protection ‘Complementary Forms of Protection’ UN Doc EC/GC/01/18 (4 September 2001) [11].

<sup>87</sup> UNHCR ‘Protection of Persons of Concern to UNHCR Who Fall Outside the 1951 Convention: A Discussion Note’ (2 April 1992) UN Doc EC/1992/SCP.CRP.5 [16].

<sup>88</sup> Bouteillet-Paquet (n8) 226. For additional egs: PA *Report on the Situation of De Facto Refugees* (5 August 1975) Doc 3642 ‘Explanatory Memorandum’ [41].

<sup>89</sup> For background: Jackson (n35); C Ruthström-Ruin *Beyond Europe: The Globalization of Refugee Aid* (Lund University Press Lund 1993); UNHCR (DIP) ‘Categories of Persons to Whom the High

temporal and geographical restrictions. The result is a ‘disjuncture between the functional responsibilities of UNHCR and the legal obligations of States’<sup>91</sup> under international law.<sup>92</sup>

In Africa and Latin America, the OAU Convention and Cartagena Declaration respectively contain extended refugee definitions which codify institutional practice.<sup>93</sup> Accordingly, in those regions, States’ protection responsibilities extend beyond article 1A(2) to encompass flight from ‘external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality’,<sup>94</sup> and ‘generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.’<sup>95</sup>

State practice in Europe and other western countries has been characterized by highly varied ad hoc national responses, premised largely on executive discretion.<sup>96</sup> Despite three decades of discussions at the European and international levels to create a harmonized, legal approach to complementary protection, it was only in 2004 that a binding legal instrument was adopted in the EU, and a non-binding EXCOM Conclusion is planned at the international level for late 2005.

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Commissioner is Competent to Extend International Protection’ (IOM/FOM (no number) 5 August 1981).

<sup>90</sup> Set out in Perluss and Hartman (n9) 584 fn 153; see also A/RES/1167(XII) of 26 November 1957; A/RES/1388(XIV) of 20 November 1959; A/RES/1499(XV) of 5 December 1960; A/RES/1671(XVI); A/RES/1673(XVI) of 18 December 1961.

<sup>91</sup> Goodwin-Gill (n1) 12.

<sup>92</sup> For the dimensions of the gap: UNHCR ‘Protection of Persons of Concern’ (n87) [1].

<sup>93</sup> UNHCR (DIP) (n89) [31]; Melander (n84) ‘The Two Refugee Definitions’ 10. For distinctions between the OAU and Cartagena definitions: UNHCR ‘Protection of Persons of Concern’ (n87).

<sup>94</sup> OAU Convention art 1(2).

<sup>95</sup> Cartagena Declaration art III(3).

<sup>96</sup> H Storey and others (n72) 3.

Yet, despite the lack of international or regional instruments in western States specifically protecting refugees falling outside article 1A(2),<sup>97</sup> State practice has consistently revealed a dominant trend of offering some form of protection to ‘persons whose life or freedom would be at risk as a result of armed conflict or generalized violence if they were returned involuntarily to their countries of origin.’<sup>98</sup> In practice, States respect a right of refuge in cases of grave and urgent necessity, and no State has formally denied that such a right exists.<sup>99</sup> UNHCR asserts that persons fleeing ‘serious danger resulting from unsettled conditions of civil strife’ are protected from removal by a customary norm that has achieved the status of *jus cogens*.<sup>100</sup> A 1994 Council of Europe Parliamentary Assembly Recommendation observed that most Member States allowed rejected asylum-seekers to remain in their territory on humanitarian grounds, ‘particularly on account of international or domestic armed conflicts, serious violations of human rights or lack of democracy.’<sup>101</sup> In fact, according to Jackson, States have historically implemented similarly generous refugee policies paralleling institutional action (such as Austria’s response to Hungarian refugees), with more restrictive national policies only taking hold in the 1980s.<sup>102</sup>

Although some States characterized such protection as a sovereign humanitarian act or a duty under national (including constitutional) law, rather than deriving from any

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<sup>97</sup> See eg UNHCR ‘Protection of Persons of Concern’ (n87) [14].

<sup>98</sup> UNHCR ‘Note on International Protection’ UN Doc A/AC.96/830 (7 September 1994) [39].

<sup>99</sup> GJL Coles *The Question of a General Approach to the Problem of Refugees from Situations of Armed Conflict and Serious Internal Disturbance* (International Institute of Humanitarian Law San Remo 1989) 21.

<sup>100</sup> Report of UNHCR to ECOSOC (1985) UN Doc E/1985/62 [22]–[23].

<sup>101</sup> PA Recommendation 1237 (1994) on the Situation of Asylum-Seekers Whose Asylum Applications Have Been Rejected [4].

<sup>102</sup> Jackson (n35); see also PA Recommendation 1327 (1997) on the Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe [2]–[3].

international obligation,<sup>103</sup> Perluss and Hartman's illuminating 1986 study demonstrated the emergence of a customary norm of 'temporary refuge' at the intersection of refugee law, humanitarian law and human rights law.<sup>104</sup> It prohibited States from forcibly repatriating foreigners who had fled generalized violence and other threats caused by internal armed conflict within their own State, until the violence ceased and the home State could assure the security and protection of its nationals.<sup>105</sup> Goodwin-Gill supports this view, arguing that 'the essentially moral obligation to assist refugees and to provide them with refuge or safe haven has, over time and in certain contexts, developed into a legal obligation (albeit at a relatively low level of commitment).'<sup>106</sup> This has been buttressed and extended by the expanded principle of *non-refoulement* in human rights law, examined in Chapters 3 to 5.

Although the norm of temporary refuge pertains specifically to large-scale influx, representing the legal foundation of subsequent formalized temporary protection regimes,<sup>107</sup> there is nothing intrinsic preventing its application to *individuals* fleeing generalized violence. Accordingly, complementary protection is its 'individual' counterpart, extending protection to single or small group arrivals on the same humanitarian basis. This was recognized by the High Commissioner in 1985, who stated that temporary refuge was encompassed within the principle of *non-refoulement*, requiring that 'no person shall be subjected to such measures as rejection at the frontier, or, if he has already entered the territory, expulsion or compulsory return to any country

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<sup>103</sup> UNHCR 'Note on International Protection' (n98) [40]; UN Doc A/AC.96/SR.430 (1988) [42], Summary Records 36<sup>th</sup> Session, UN Doc A/AC.96/SR.391 (1985) [72], UN Doc A/AC.96/SR.418 (1987) [71], in Goodwin-Gill (n20) 26, 27.

<sup>104</sup> Perluss and Hartman (n9).

<sup>105</sup> *ibid* 554. For egs: 571ff.

<sup>106</sup> Goodwin-Gill (n9) 898.

<sup>107</sup> J Fitzpatrick 'Human Rights and Forced Displacement: Converging Standards' in AF Bayefsky and J Fitzpatrick (eds) *Human Rights and Forced Displacement* (Martinus Nijhoff The Hague 2000) 8.

where he may have reason to fear persecution *or serious danger resulting from unsettled conditions or civil strife.*<sup>108</sup> This section of the chapter traces State responses to individual protection needs complementary to the Convention regime, which can be seen, in part, as a logical—and legal—extension of temporary protection developed in response to mass influx.

(a) Developments at the European level

In 1976, the Council of Europe sought to harmonize European State practice<sup>109</sup> relating to the ‘socially and legally ... precarious position’<sup>110</sup> of *de facto* refugees, through the adoption of a non-binding Recommendation 773.<sup>111</sup>

‘*De facto* refugees’ were defined in the Recommendation as ‘persons not recognised as refugees within the meaning of Article 1 of the [Refugee] Convention ... and who are unable or unwilling for political, racial, religious or other valid reasons to return to their countries of origin’.<sup>112</sup> Drawing explicitly on the language of article 1A(2) of the Convention, the definition directly extends that refugee conceptualization—complementing Convention protection. However, taken as a whole, the

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<sup>108</sup> Report of UNHCR to ECOSOC (1985) UN Doc E/1985/62 [22].

<sup>109</sup> Sweden was the first western European State to legislate on *de facto* refugees (1975 amendment to Aliens Act 1954), followed by Denmark and the Netherlands.

<sup>110</sup> PA Report (n88) ‘Explanatory Memorandum’ [9].

<sup>111</sup> The term ‘*de facto* refugee’ came from a study by Anne Paludan of Denmark on ‘The New Refugees in Europe’, undertaken for a Working Group on Refugees and Exiles in Europe. Other suggested terms were ‘refugees without official status’ and ‘non-statutory refugees’: P Weis ‘Convention Refugees and *De Facto* Refugees’ in G Melander and P Nobel (eds) *African Refugees and the Law* (Scandinavian Institute of African Studies Uppsala 1978) 17; PA Report (n88) ‘Explanatory Memorandum’ [3].

<sup>112</sup> PA Recommendation 773 (1976) on the Situation of *De Facto* Refugees [1]. This definition was one considered by the Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees, Annex to ‘International Co-operation to Avert New Flows of Refugees: Note by the Secretary-General’ UN Doc A/41/324 (13 May 1986) 24.

Recommendation considerably widened the refugee concept, with non-exhaustive grounds for non-return and no persecution nexus requirement.

The Recommendation considered that *de facto* refugees ‘need a more favourable treatment than that accorded to aliens in general’ since they lacked the option of returning home.<sup>113</sup> Although it advocated the drafting of an agreement ‘mak[ing] applicable to *de facto* refugees as many articles as possible of the Convention relating to the Status of Refugees of 28 July 1951’,<sup>114</sup> its operative paragraphs stated only that States should be encouraged not to expel *de facto* refugees or subject them to restrictions regarding their political activities.<sup>115</sup> In this connection, Weis recalled that the main disability of *de facto* refugees was their lack of Convention status.<sup>116</sup> He considered the best solution to be ‘an agreement extending the definition of the 1951 Convention so as to cover *de facto* refugees’, but, correctly, considered it politically unlikely in the near future.<sup>117</sup> Despite frequent calls for a binding European instrument on the codification of complementary protection,<sup>118</sup> none was concluded until 2004.

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<sup>113</sup> Recommendation 773 (n112) [3].

<sup>114</sup> *ibid* [5I(b)].

<sup>115</sup> *ibid* [5II].

<sup>116</sup> See national egs: Weis (n111) 20.

<sup>117</sup> *ibid* 22.

<sup>118</sup> Recommendation 773 (n112) [4]; CM Recommendation R 81 (16) on the Harmonisation of National Procedures relating to Asylum; PA Recommendation 1016 (1985) on Living and Working Conditions of Refugees and Asylum Seekers 4(ii)–4(iii); PA Recommendation 787 (1976) on Harmonisation of Eligibility Practice under the 1951 Geneva Convention on the Status of Refugees and the 1967 Protocol; PA Recommendation 1016 (1985) on Living and Working Conditions of Refugees and Asylum Seekers [6(ii)]; PA Recommendation 1088 (1988) on the Right to Territorial Asylum [10(iii)]–[10(iv)]; PA Recommendation 1236 (1994) on the Right of Asylum [8(iii)(c)]; PA Recommendation 1237 (n101) [8(iii)].

(b) International level

It was not until the late 1980s that States began to concertedly address the concept of complementary protection at the international level.<sup>119</sup> The first concentrated analysis of the appropriateness of the 1951 definition to contemporary refugee situations was undertaken at the UNHCR-convened San Remo Round Table of 1989 on the protection of refugees in non-international armed conflicts. The Round Table noted the necessity of ‘supplementing the traditional principles of law and doctrine with complementary new principles’,<sup>120</sup> in particular focusing on human rights law as a primary source for refugee protection at all stages of the refugee process.<sup>121</sup>

It criticized national extra-Convention responses such as ‘tolerance’ permits, which were typically ad hoc, unstructured, and provided only informal protection, leaving refugees in a legal ‘limbo’.<sup>122</sup> While *non-refoulement* ‘without more’ might be acceptable for a very limited period (such as an emergency situation), the Round Table experts considered it unjust ‘to deprive a human being of a community for many years, especially where the person lived under a continuing threat of expulsion.’<sup>123</sup>

A 1991 Working Group, established at EXCOM’s request,<sup>124</sup> identified seven categories of persons in need of international protection (based on relevant international

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<sup>119</sup> The Council of Europe had adopted recommendations since the mid-1970s: PA Report (n88).

<sup>120</sup> Annex to UNHCR ‘Solution to the Refugee Problem and the Protection of Refugees’ (SCIP) (23 August 1989) UN Doc EC/SCP/55, entitled ‘Report of the Round Table on Solutions to the Problem of Refugees and the Protection of Refugees’ (San Remo Italy 12–14 July 1989) [8]. The experts, governmental and non-governmental, attended in a personal capacity.

<sup>121</sup> *ibid* [33], Conclusion [13]. See also UNHCR ‘Note on International Protection’ No 62 (XLI) (1990).

<sup>122</sup> Annex to UNHCR (n120) [55].

<sup>123</sup> *ibid*. Examined further in Ch 6.

<sup>124</sup> EXCOM Conclusion No 56 (XL) ‘Durable Solutions and Refugee Protection’ (1989) [(c)].

instruments and UNHCR's mandate as extended by various UNGA resolutions).<sup>125</sup> Given concerns that States were not politically prepared to broaden the refugee definition through a new international instrument,<sup>126</sup> the Working Group recommended that the OAU Convention and Cartagena Declaration be used 'as examples on which States elsewhere might wish to draw in developing their own *national* legislation',<sup>127</sup> since they addressed 'protection and assistance needs not exclusive to these regions'.<sup>128</sup> Viewing these regional instruments as syntheses of institutional and State mandates, the Working Group argued that 'it was illogical from a legal and moral point of view to provide legal status as a refugee to a person if (s)he stayed in his/her region of the world, but not if (s)he left it'.<sup>129</sup>

Even though this outcome may not appear innovative, it was significant for two reasons. First, the Working Group placed the question of an expanded refugee definition on the international agenda. Although the question of an extended international definition was deferred, it was not rejected. Secondly, the suggested protection models—the OAU Convention and the Cartagena Declaration—revert to the 1951 Convention as the blueprint for legal status. Accordingly, reliance on these instruments discloses the view that the Convention itself provides an appropriate legal status for extra-Convention refugees,<sup>130</sup> and that complementary protection does not equate to subsidiary rights.

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<sup>125</sup> EXCOM 'Report of the Working Group on Solutions and Protection to the 42<sup>nd</sup> Session of the Executive Committee of the High Commissioner's Programme' (12 August 1991) UN Doc EC/SCP/64 [8]. See also Report of the Group of Governmental Experts (n112).

<sup>126</sup> EXCOM 'Report of the Working Group' (n125) [25].

<sup>127</sup> *ibid* Recommendation [55(b)] (emphasis added); see also UNHCR 'Note on International Protection' (n98) [35]; UNHCR 'Note on International Protection' UN Doc A/AC.96/930 (7 July 2000) [40]–[41].

<sup>128</sup> EXCOM 'Report of the Working Group' (n125) Observation [54(e)].

<sup>129</sup> *ibid* [12]. See also UNHCR 'Protection of Persons of Concern' (n87) [1].

<sup>130</sup> EXCOM 'Report of the Working Group' (n125) [11]; See Annex to UNHCR (n120) Conclusion [12].

A 1992 discussion note, revealing the most comprehensive analysis of complementary protection up to that time, identified five categories of persons of concern to UNHCR: *a)* those who fall under the Statute/1951 Convention definition and thus are entitled to benefit from the full range of UNHCR's functions; *b)* those who belong to a broader category but have been recognized by States as being entitled to both the protection and assistance of UNHCR; *c)* those to whom the High Commissioner extends his 'good offices', mainly but not exclusively to facilitate humanitarian assistance; *d)* returning refugees, for whom the High Commissioner may provide reintegration assistance and a certain protection; and *e)* non-refugee stateless persons whom UNHCR has a limited mandate to assist.<sup>131</sup> For the purposes of devising an expanded protection regime, the Note stated that those in category (b) were of most interest, and typically included persons covered by the definitions in the OAU Convention and the Cartagena Declaration.

The Note concluded that common elements of existing complementary protection approaches were a generalized threat to physical safety or security, external displacement and a temporary protection need, and that these would presumably provide the basis for determining categories of beneficiaries of any new protection framework. It was uncritical of the notion of such protection as temporary, noting that '[f]or the very large majority of persons of concern in the present context, return at some point will be the only available solution.'<sup>132</sup> Whether this is a pragmatic assessment based on large numbers or on the fact that once a civil war has finished, return may be possible, was not explained in the Note. Although it reflected western State practice, it was not a

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<sup>131</sup> UNHCR 'Protection of Persons of Concern' (n87) [11].

<sup>132</sup> *ibid* [7].

component of protection under the OAU Convention or Cartagena Declaration and appears to have been adopted without thorough inquiry into whether it was legally justifiable or necessary.<sup>133</sup> However, a concomitant right attaching to temporary protection was the right to return to the country of origin, including assistance to return once it is safe to do so. Accordingly, standards for assessing when it is safe for return needed to be determined.

For the first time, the minimum content of a complementary protection regime was outlined, contrasting markedly to earlier models that simply extended the Convention to additional classes of refugees. No explanation was given as to why different standards were contemplated, given that both the OAU Convention and the Cartagena Declaration apply the Convention in this respect.<sup>134</sup> Recommended standards were based predominantly on the those contained in the 1981 EXCOM Conclusion No 22 (XXXII) on Protection of Asylum-Seekers in Situations of Large-Scale Influx.<sup>135</sup> Yet, at the same time, the Note concluded that:

There is nothing in the Convention definition which would exclude its application to persons caught up in civil war or other situations of generalized violence. Refugees are refugees when they flee or remain outside a country for reasons pertinent to refugee status, whether these reasons arise in civil war type situations, in international armed conflict or in peace time. Possibilities for identifying these persons should, therefore, not be precluded, but rather specifically provided for.<sup>136</sup>

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<sup>133</sup> This aspect is discussed later in the context of the Qualification Directive.

<sup>134</sup> The Cartagena Declaration also refers to the standards in the ACHR and EXCOM Conclusion No 22 (XXXII) 'Protection of Asylum-Seekers in Situations of Large-Scale Influx' (1981) as additional protection safeguards: [8].

<sup>135</sup> UNHCR 'Protection of Persons of Concern' (n87) [20]–[21].

<sup>136</sup> *ibid* [21].

Despite general agreement that ad hoc national responses should be strengthened into a harmonized codified protection regime to avoid differential treatment, uncertainty and unequal burden-sharing,<sup>137</sup> there remained disagreement about the best means of fulfilling this task. Adopting an additional Protocol to the Convention was canvassed but discouraged as a solution, in particular because to do so would ‘include the danger thereby of reopening fundamental principles and precepts in the Convention itself for further consideration’.<sup>138</sup> Instead, it was suggested that national legislation should first be addressed to ensure that it conformed with international and regional standards, by reference to instruments, arrangements, and internationally endorsed guidelines such as EXCOM conclusions. A subsequent development could then be the establishment of an international universal regime, in the first instance through an UNGA resolution annexing a declaration, followed by a new international convention or additional regional instruments. It was noted, however, that ‘this would, in all likelihood, be an ambitious and controversial endeavour.’<sup>139</sup>

A 1994 Note proposed four alternatives as a means of establishing an explicit<sup>140</sup> international complementary protection regime: a new Convention, a declaration of guiding principles, regional harmonization or concerted approaches in specific situations. UNHCR was of the opinion that while a new international instrument—‘an OAU refugee Convention writ large’<sup>141</sup>—was the most attractive option, realistically there seemed to be

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<sup>137</sup> *ibid* [3]; cf EXCOM ‘Report of the Working Group’ (n125) [25].

<sup>138</sup> EXCOM ‘Report of the Working Group’ (n125) [25]; UNHCR ‘Protection of Persons of Concern’ (n87) [7].

<sup>139</sup> UNHCR ‘Protection of Persons of Concern’ (n87) [9].

<sup>140</sup> As opposed to the ‘implicit’, existing complementary protection regime comprised of various human rights treaties and customary international law, whose meaning varies depending on the content of States’ international and regional legal obligations.

<sup>141</sup> UNHCR ‘Note on International Protection’ (n98) [52].

little inclination by States to incur further legal obligations in relation to asylum.<sup>142</sup> Ironically, just as States were extending UNHCR's mandate to refugees in large-scale influxes and displaced persons in refugee-like situations,<sup>143</sup> their domestic policies began to oppose a general widening of the refugee definition.<sup>144</sup> Accordingly, it was feared that any formal renegotiation of the Convention definition could lead to a more restrictive policy with respect to States' international obligations. A set of guiding principles was therefore advocated as the most realistic means of obtaining a formalized commitment by States about providing protection to refugees from armed conflict (for which there was broad international consensus),<sup>145</sup> with harmonized regional approaches cited as 'perhaps the most promising option for strengthening protection.'<sup>146</sup> Although ad hoc responses by States to particular emergencies such as those in Indo-China in the 1980s and the former Yugoslavia in the 1990s were described as 'extremely effective in mobilizing international support on behalf of specific groups of refugees', not least due to public awareness and media attention, they were dismissed as a complementary protection model because they were not considered 'reliable ... for ensuring the protection of refugees fleeing less accessible conflicts'.<sup>147</sup>

It was not until 1994 that EXCOM expressly acknowledged the link between States' Convention obligations and their other international legal duties under instruments such as the CAT and the ECHR, stating that 'many of these countries are parties to other

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<sup>142</sup> *ibid* [53].

<sup>143</sup> eg UNGA Res 1499 (XV) of 5 December 1960, 1673 (XVI) of 18 December 1961, 1959 (XVIII) of 12 December 1963, 2294 (XXII) of 11 December 1967, 3143 (XXVIII) of 14 December 1973.

<sup>144</sup> Goodwin-Gill (n1) 12. This was also affirmed by the 1977 Conference on Territorial Asylum: Melander (n84) 'The Two Refugee Definitions' 11; A Grahl-Madsen *Territorial Asylum* (Almqvist and Wiksell International Stockholm 1980) 61ff.

<sup>145</sup> UNHCR 'Note on International Protection' (n98) [54].

<sup>146</sup> *ibid* [55].

<sup>147</sup> UNHCR 'Note on International Protection' (n98) [56].

international instruments that could be invoked in certain circumstances against the return of some non-Convention refugees to a place where their lives, freedom or other fundamental rights would [be] in jeopardy.’<sup>148</sup> Up until then, extended obligations had been discussed in very general terms. At the same time, the Council of Europe Parliamentary Assembly explicitly acknowledged that States’ international protection obligations were ‘based on the 1951 Geneva Convention *and* the Convention for the Protection of Human Rights and Fundamental Freedoms—remembering that *the latter also implies obligations vis-à-vis persons who are not necessarily refugees in the sense of the 1951 Geneva Convention*’.<sup>149</sup>

Given States’ political reluctance ‘to undertake internationally binding obligations towards refugees beyond those that they have already assumed’,<sup>150</sup> attention to existing human rights obligations becomes fundamental—they already provide a regime which extends to persons outside the scope of the Convention. Even in States where the Refugee Convention does not directly apply, refugees, asylum-seekers and displaced persons remain protected by ‘the general principles of international law, the humanitarian practices of international organizations, the principle of humanity, and guarantees of fundamental human rights.’<sup>151</sup>

Within the framework of this existing body of international law, three sets of principles have tended to develop separately, although in parallel, where they could perhaps have been linked more closely at an earlier stage. These are the law of refugee protection, human rights law generally

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<sup>148</sup> *ibid* [40].

<sup>149</sup> Recommendation 1236 (n118) [8(iii)] (emphasis added); see also PA Recommendation 1309 (1996) on the Training of Officials Receiving Asylum-Seekers at Border Points [7(ii)(a)], referring to the ‘basics of asylum law’ as including the ECHR.

<sup>150</sup> UNHCR ‘Note on International Protection’ (n98) [44].

<sup>151</sup> UNHCR ‘Note on International Protection (submitted by the High Commissioner)’ (9 September 1991) UN Doc A/AC.96/777 [56].

and humanitarian law. Together, these three domains of law—which, in reality, are closely interrelated and often overlap—should ideally permit an individual to assert a claim, not only against his or her own country or, in certain situations, another country, but on the international community as whole—a claim to its direct involvement on humanitarian grounds. In other words, where Governments fail to recognize individual claims, or where there is no effective Government to which an individual in the first instance might turn, there is a pressing need for that person to be able to assert a claim more broadly. The international community seems already to be moving in this direction as a result of recent events and there might be value in examining how the legal foundations of this development could be strengthened.<sup>152</sup>

## 2 ‘Subsidiary’ versus ‘Complementary’ Protection

While the term ‘subsidiary protection’ is largely descriptive, it may also have some weak normative significance. By entrenching a hierarchical protection structure, the Qualification Directive relegates complementary protection in the EU to an intrinsically secondary role. Although it is sometimes used interchangeably with ‘complementary protection’,<sup>153</sup> it is better characterized as a narrow form of complementary protection.

UNHCR’s Director of International Protection, Erika Feller, criticized States’ increasing use of subsidiary forms of protection as a means of restricting asylum ‘on their own terms’, arguing that subsidiary protection implied less binding obligations on States than their obligations under international law.<sup>154</sup> For example, Parliamentary Assembly Recommendation 1327 (1997) on the Protection and Reinforcement of the Human Rights

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<sup>152</sup> *ibid*; see also UNHCR (n12) [1].

<sup>153</sup> EXCOM ‘Summary Record of the 541<sup>st</sup> Meeting’ (Geneva 7 October 1999) UN Doc A/AC.96/SR.541 (6 January 2000) [9]. This is the first time ‘subsidiary protection’ was mentioned at the international level.

<sup>154</sup> EXCOM ‘Summary Record of the 540<sup>th</sup> Meeting’ (Geneva 7 October 1999) UN Doc A/AC.96/SR.540 (12 October 1999) [44]. The Nordic States’ relatively generous complementary protection is counterbalanced by very low recognition rates of Convention refugees. Domestic complementary protection effectively takes refugee protection outside international law. In Denmark, the ratio was approximately one-third Convention refugees to two-thirds *de facto* refugees: KU Kjær ‘The Abolition of the Danish *De Facto* Concept’ (2003) 15 IJRL 254, 258.

of Refugees and Asylum-Seekers in Europe explained that rising numbers of asylum-seekers in the early 1990s, resulting in processing difficulties and public hostility stemming from economic and social tensions, resulted in the majority of Council of Europe Member States introducing restrictive asylum legislation, in particular through the extension of concepts such as ‘temporary protected status’ and ‘the right to stay on humanitarian grounds’.<sup>155</sup> UNHCR is critical of approaches that shift Convention refugees into subsidiary protection categories,<sup>156</sup> especially where they could ‘very probably be [encompassed] by a liberal interpretation of the 1951 Convention.’<sup>157</sup> This not only denies refugees their entitlements under international law to Convention protection, but seeks to remove them beyond the reach of international scrutiny. There is a danger of soft law edging out hard law obligations by ‘diluting principles and fudging standards.’<sup>158</sup>

In December 2001, representatives of the Contracting States to the Convention adopted a Declaration ‘[r]ecognizing the enduring importance of the 1951 Convention, as the primary refugee protection instrument which, as amended by its 1967 Protocol, sets out rights, including human rights, and minimum standards of treatment that apply to persons falling within its scope’.<sup>159</sup> UNHCR has repeatedly called for States to respect

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<sup>155</sup> Recommendation 1327 (n102) [2]–[3].

<sup>156</sup> Within Europe, three groups were commonly the subject of interpretational disputes: persons fearing persecution by non-State agents; persons fleeing persecution in areas of on-going conflict; and persons fearing gender-related persecution. In eight EU Member States, the identity of the agent of persecution was irrelevant: Belgium, Denmark, Finland, Greece, Luxembourg, the Netherlands, the United Kingdom, and Sweden. Denmark, Sweden, Finland, Italy and Spain provided only subsidiary protection for gender-related persecution.

<sup>157</sup> UNHCR (DIP) (n89) [34]; Recommendation 787 (n118) [1],[3], [4].

<sup>158</sup> Goodwin-Gill (n9) 914.

<sup>159</sup> Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (Geneva 13 December 2001) UN Doc HCR/MMSP/2001/09 (16 January 2002) <[www.unhcr.ch/cgi-bin/texis/vtx/protect](http://www.unhcr.ch/cgi-bin/texis/vtx/protect)> (18 February 2003) Preamble [2], [4].

the primacy of the Convention.<sup>160</sup> In 1994 and 1995, the General Assembly passed two resolutions reiterating

the importance of ensuring access, for all persons seeking international protection, to fair and efficient procedures for the determination of refugee status *or, as appropriate, to other mechanisms to ensure that persons in need of international protection are identified and granted such protection*, while not diminishing the protection afforded to refugees under the terms of the 1951 Convention, the 1967 Protocol and relevant regional instruments.<sup>161</sup>

Jackson views this paragraph as cementing the primacy of the Refugee Convention and, depending on how the definition of ‘refugee’ is interpreted under these instruments, ‘as attributing a complementary and residual character to the “additional” category.’<sup>162</sup> However, an alternative reading would be that the Convention and Protocol provide the minimum level of protection that ought to be accorded to all persons with an international protection need, and thus in extending protection to additional categories of refugees, these minimum standards should not be jeopardized.

Creating a protection hierarchy reflects a very literal interpretation of respecting the Convention’s primacy. Simply entrenching it as the pinnacle of protection does not engage with the underlying protection principles it reflects, and may in fact undermine its primacy by siphoning refugees into complementary categories. Conceived of conceptually, the affirmation of the Convention’s primacy is, in effect, a commitment to respect its protection principles and refrain from diluting its scope by developing the law

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<sup>160</sup> eg EXCOM ‘Global Consultations on International Protection: Report of the Meetings within the Framework of the Standing Committee: Report of the First Meeting in the Third Track (8–9 March 2001) UN Doc A/AC.96/961 (27 June 2002) [14].

<sup>161</sup> UNGA Res 49/169 of 23 December 1994 [5]; UNGA Res 50/152 of 21 December 1995 [5] (emphasis added).

<sup>162</sup> Jackson (n35) 431.

*outside* its boundaries. It would seem that the Convention's primacy would be better observed if it were recognized as the source of international protection status for all persons protected by *non-refoulement*, consistent with Recommendation E of the Final Act and the OAU Convention model. Differentiation in treatment may lead to States favouring subsidiary protection by 'defining out' categories of persons who technically fall within article 1A(2), so as to avoid the more stringent obligations required for Refugee Convention refugees. It may also create an incentive for appeal by beneficiaries of subsidiary protection, attempting to 'upgrade' their status.<sup>163</sup>

Furthermore, the hierarchical structure places considerable emphasis on the interpretation of article 1A(2) of the Convention, since differential status makes it imperative to accurately determine whether or not an individual meets the Convention definition. A report of the International Association of Refugee Law Judges found that although decision-makers in most States implicitly incorporate a human rights approach in their analysis of 'persecution',<sup>164</sup> this diminishes relative to the number of different asylum options available in that State. In other words, where a complementary status exists, decision-makers may be less likely to test the boundaries of 'persecution'.<sup>165</sup> This is particularly problematic where complementary status does not equate to Convention status.

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<sup>163</sup> House of Lords Select Committee on the EU *Defining Refugee Status and Those in Need of International Protection* (The Stationery Office London 2002) [102], [111]. The Minister (Angela Eagle MP Parliamentary Under Secretary of State at the Home Office) acknowledged that this already happens.

<sup>164</sup> International Association of Refugee Law Judges (n59) 8.

<sup>165</sup> *ibid* 3.

## E CONCLUSION

This chapter explored the development of complementary protection from the earliest international agreements through to the 1951 Convention. By examining the human rights context in which the Convention was drafted, and its scope for expansion, it showed the capacity of human rights law to extend the Convention's application to beneficiaries beyond article 1A(2). This is analysed further in Chapters 3 to 5.

The next chapter turns to the development of the EU Qualification Directive. The drafting process reveals the political compromises that have turned the legal concept of 'complementary protection' into the political concept of 'subsidiary protection', fleshing out some of the problems identified above. The impetus behind the Directive was to ensure that the laws and practices of the EU Member States were harmonized to provide a minimum level of protection to extra-Convention refugees, preventing refugee flows based solely on differing levels of protection in different States.<sup>166</sup> However, harmonization has enabled a considerable narrowing of State best practice, both in terms of threshold eligibility (restricted to three tightly defined categories) and resultant legal status, and has created new gaps in the protection regime.

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<sup>166</sup> 'Explanatory Memorandum' in Commission of the European Communities Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection COM (2001) 510 final (12 September 2001) 4.

## CHAPTER 2

### THE EUROPEAN UNION QUALIFICATION DIRECTIVE: THE CREATION OF A SUBSIDIARY PROTECTION REGIME

#### A CREATION OF THE QUALIFICATION DIRECTIVE<sup>1</sup>

##### 1 Background

Despite repeated calls for a common European approach to complementary protection,<sup>2</sup> it was not until 2001 that a Directive setting out a harmonized subsidiary protection policy was formulated for the EU Member States, and not until 29 April 2004 that it was formally adopted.<sup>3</sup> Its impetus was a Danish proposal in March 1997,<sup>4</sup> and a closely

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<sup>1</sup> 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 [2004] OJ L304/12.

<sup>2</sup> PA Recommendation 773 (1976) on the Situation of *De Facto* Refugees; PA Recommendation 817 (1977) on Certain Aspects of the Right to Asylum; PA Recommendation 1016 (1985) on Living and Working Conditions of Refugees and Asylum Seekers; CM Recommendation No R (84) 1 on the Protection of Persons Satisfying the Criteria in the Geneva Convention Who Are Not Formally Recognised as Refugees; PA Recommendation 1088 (1988) on the Right to Territorial Asylum; Communication from the Commission to the Council and the European Parliament on the Right of Asylum SEC 91 1857 final (11 October 1991); PA Recommendation 1236 (1994) on the Right of Asylum; PA Recommendation 1237 (1994) on the Situation of Asylum-Seekers Whose Asylum Applications Have Been Rejected; Council Resolution of 14 October 1996 laying down the Priorities for Cooperation in the Field of Justice and Home Affairs for the period from 1 July 1996 to 30 June 1998 (96/C 319/01); PA Recommendation 1327 (1997) on the Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe; CM Recommendation R (98) 13 on the Right of Rejected Asylum Seekers to an Effective Remedy against Decisions on Expulsion in the Context of Article 3 of the European Convention on Human Rights; PA Recommendation 1440 (2000) on Restrictions on Asylum in the Member States of the Council of Europe and the EU; CM Recommendation R (2001) 18 on Subsidiary Protection; PA Recommendation 1525 (2001) on the United Nations High Commissioner for Refugees and the Fiftieth Anniversary of the Geneva Convention.

<sup>3</sup> 2579<sup>th</sup> Council Meeting JHA (Luxembourg 29 April 2004) 8694/04 (Presse 123) I. Ironically, the Directive does not apply to Denmark, in accordance with articles 1 and 2 of the Protocol on the Position of Denmark annexed to the Treaty on European Union [2002] OJ C325/5 and the Treaty establishing the European Community [2002] OJ C325/33: Directive recital 40. For Danish law: KU Kjær 'The Abolition of the Danish *De Facto* Concept' (2003) 15 IJRL 254.

<sup>4</sup> Note from the Danish Delegation to Migration and Asylum Working Parties 'Subsidiary Protection' 6764/97 ASIM 52 (17 March 1997).

related note by the Netherlands Presidency of April 1997,<sup>5</sup> which focused in particular on the importance of article 3 ECHR as an alternative legal basis of protection for persons falling outside the Convention definition of a refugee. On the basis of the Danish note, Member States were asked to respond to a questionnaire about their subsidiary protection practices, and a study of July 1998 by the General Secretariat gave an overview of the various forms of subsidiary protection and their legal bases in the Member States.<sup>6</sup>

The concept of subsidiary protection was defined by the Austrian Presidency in 1998 as ‘protection for persons from third states who do not fall within the scope of the Geneva Convention but who still have need of some other form of international protection.’<sup>7</sup> It was distinguished from temporary protection on the basis that it was granted following individual status determination, whereas temporary protection, at least in the EU context, denotes protection granted in a mass influx situation.<sup>8</sup>

A summary of EU subsidiary protection practices in February 1999 noted that all Member States had some form of subsidiary protection applied in parallel with Convention protection, but its nature varied considerably. Indeed, in a later document it was acknowledged that in some Member States ‘the concept, as such, has not been (fully) developed.’<sup>9</sup> In a survey of European legislation prior to the conclusion of the

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<sup>5</sup> Note from the Presidency to Asylum/Migration Working Group ‘Implications of Article 3 of the European Convention on Human Rights for the Expulsion of Illegally Resident Third Country Nationals’ 7779/97 ASIM 89 (28 April 1997).

<sup>6</sup> ‘Study on the International Instruments Relevant to Subsidiary Protection’ 10175/98 ASIM 178 (13 July 1998). For an updated overview of Member States’ practices: 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); ECRE ‘European Asylum Systems: Legal and Social Conditions for Asylum Seekers and Refugees in Western Europe’ (2003) (13 June 2004).

<sup>7</sup> Note from Presidency to Asylum Working Party ‘Subsidiary Protection’ 6246/99 ASILE 7 (23 February 1999) [3], referring to 10811/98 ASIM 193 ASILE 9 MIGR 13 (5 August 1998).

<sup>8</sup> The original meaning of temporary protection was protection provided by a country of first asylum while resettlement was awaited.

<sup>9</sup> Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum 5293/03 ASILE 3 (20 January 2003) 4.

Qualification Directive, neither Belgium, Ireland nor the UK had a legal definition of ‘subsidiary protection’, instead preferring to adopt ad hoc mechanisms to complement the Refugee Convention. In the other 12 EU Member States, legislation governed complementary forms of protection,<sup>10</sup> although it was typically regarded as a State prerogative granted for humanitarian reasons. An exception was Portugal, where subsidiary protection was incorporated as a positive right available to persons who ‘cannot return to the country of which they are a national or in which they have their habitual residence because of the severe insecurity engendered by armed conflict or systematic violations of human rights’.<sup>11</sup>

Despite the lack of coordinated application, subsidiary protection was growing in practical importance and many applicants were increasingly basing their claims directly on subsidiary protection instruments, such as article 3 ECHR. In some States, more persons were recognized as having subsidiary protection status than Convention status.<sup>12</sup> In fact, in only four States was Convention status granted more often than a subsidiary protection status.<sup>13</sup> These statistics require careful interpretation, since higher rates of non-Convention protection do not necessarily equate to a reduction in Convention refugees applying for protection. It is well documented that some States interpret the Convention definition extremely narrowly in order to provide subsidiary protection to the majority of applicants for international protection, since it is regulated outside the

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<sup>10</sup> For legislation details: D Bouteillet-Paquet ‘Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union’ in D Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002) 226 fn 37.

<sup>11</sup> Act No 15/98 of 16 March 1998 art 8(1).

<sup>12</sup> Note from Presidency to Asylum Working Party (n7) [4].

<sup>13</sup> Note from Swedish, Dutch and Finnish Delegations ‘Subsidiary Protection’ 12063/01 ASILE 47 (20 September 2001) 3. Comments based on ‘Study on the International Instruments Relevant to Subsidiary Protection’ (n6).

international law regime, is subject to greater domestic discretion and frequently provides a lower level of protection.

The original concept of a subsidiary protection Directive was liberally conceived. Although the key premise was that 'harmonisation would be based on the valid international human rights instruments relevant to subsidiary protection',<sup>14</sup> with specific mention of the ECHR, CAT, the Geneva Conventions and their 1977 Protocols,<sup>15</sup> consideration was also given as to whether certain environmental, compassionate or other triggers might justify subsidiary protection.<sup>16</sup>

Ultimately, the decision to restrict the Directive to simply harmonizing existing concepts and methods of subsidiary protection in the EU means that it does not create a new system of protection per se,<sup>17</sup> but rather distils State practice by drawing on the 'best' elements of the Member States' national systems.<sup>18</sup> It is therefore not intended as a radical overhaul of protection, but as a codification of existing State practice. The Directive may help to clarify the various State practices and stabilize the pace of reform, which together constitute positive steps towards greater legal certainty. While this approach evidences a pragmatic response to the political realities of the EU and the need to create an instrument of compromise, it also means that the Directive is not a result of a comprehensive and systematic analysis of all protection possibilities within international

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<sup>14</sup> Note from Presidency to Asylum Working Party 'Discussion Paper on Subsidiary Protection' 13167/99 ASILE 41 (19 November 1999) 2.

<sup>15</sup> Note from Swedish and others (n13) 5.

<sup>16</sup> Note from Presidency (n14) 3.

<sup>17</sup> Council of the EU Outcome of Proceedings of CIREA Meeting with Representatives of the Courts and Other Review Bodies Dealing with Asylum on 28 November 2001 'Summary of Discussions' Doc 5585/02 CIREA 7 (Brussels 22 March 2002) 4.

<sup>18</sup> 'Explanatory Memorandum' in Commission of the European Communities Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection COM (2001) 510 final (12 September 2001) 5. Note that it was drafted prior to 1 May 2004 enlargement of the EU and hence relied on the State practice of the 15 Member States at that time.

law. Furthermore, it is probable that the Directive will not lead to more people being granted protection in the EU<sup>19</sup> because it is based on a restrictive interpretation of existing practices rather than a new regime. While it establishes a harmonized *legal* basis for complementary protection in the EU, it does so in a political environment that is suspicious of asylum-seekers, that seeks restrictive entrance policies and that is wary of large numbers of refugees. Accordingly, these factors have heavily influenced the scope of the Directive—who is eligible for protection—and the rights to which they are entitled—what that protection actually is. If ‘complementary protection’ describes the role of human rights law in broadening the categories of persons to whom international protection is owed beyond article 1A(2) of the Refugee Convention, then ‘subsidiary protection’ is a regionally-specific political manifestation of the broader legal concept.<sup>20</sup>

The impetus for harmonization in this field is multifaceted. The ad hoc national approach enabled States to define the eligibility criteria and content of complementary protection largely on the basis of executive discretion,<sup>21</sup> posing problems for international burden sharing. It also exposed States to criticism for failing to fully comply with international human rights and humanitarian standards, particularly when some States provided more extensive protection than others, both in terms of eligibility thresholds and substantive rights. Discrepancies between the national systems increased difficulties in

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<sup>19</sup> T Spijkerboer ‘Subsidiarity in Asylum Law: The Personal Scope of International Protection’ in Bouteillet-Paquet (ed) (n10) 39.

<sup>20</sup> During discussions in the EU, Commission Services described subsidiary protection as an asylum issue that was ‘more of a political nature’: Council of the EU Note from Commission Services ‘Horizontal Issues in the Asylum Proposals’ 13636/01 ASILE 53 (9 November 2001) 2; see also K Hailbronner ‘Principles of International Law regarding the Concept of Subsidiary Protection’ in Bouteillet-Paquet (ed) (n10) 7.

<sup>21</sup> H Storey and others ‘Complementary Protection: Should There Be a Common Approach to Providing Protection to Persons Who Are Not Covered by the 1951 Geneva Convention?’ (Joint ILPA/IARLJ Symposium 6 December 1999) (copy with author) 3.

assessing other States' capacity to fully protect persons in need of international protection and their ability to engage in burden sharing.<sup>22</sup>

The EC Commission's Communication on the Right of Asylum in 1991 incorporated the need to harmonize rules on de facto refugees as one of a list of measures to be taken in the context of a single European market.<sup>23</sup> Part of the impetus in creating common standards was an attempt to stave off secondary movements based on differing levels of protection in Member States.<sup>24</sup> A 1998 report to the European Parliament advanced as key reasons for harmonization

differences between the legal systems of the Member States [that] may well cancel out the Union's current efforts to promote a better spread of responsibilities with regard to reception and residence of persons seeking protection, and may harm the spirit of solidarity between the Member States.<sup>25</sup>

## **2 Purpose of the Directive**

It has generally been acknowledged that, however properly the refugee definition contained in the 1951 Convention and 1967 Protocol may be applied, there are some categories of persons in need of protection who do not fall under the strict scope of these instruments. Such refugees of concern to UNHCR include, for example, those fleeing the indiscriminate effects of violence arising in situations of armed conflict, with no specific element of persecution. UNHCR has, accordingly, promoted the adoption

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<sup>22</sup> *ibid* 13–14.

<sup>23</sup> Communication from the Commission (n2) [25]; ECRE 'The Need for a Supplementary Refugee Definition' (April 1993) 4.

<sup>24</sup> Informal JHA Council Meeting in Copenhagen 'Discussion Paper concerning Recognition Rates on Convention Refugees and Persons in Need of Protection in Member States and (the Road towards) a Common Understanding of International Protection' (13 September 2002) <[www.eu2002.dk/ewebeditpro2/upload/OW.StaticContent/636/Common%20refugee%20def.eng.pdf](http://www.eu2002.dk/ewebeditpro2/upload/OW.StaticContent/636/Common%20refugee%20def.eng.pdf)> (21 October 2002) 2.

<sup>25</sup> Committee on Civil Liberties and Internal Affairs 'Report on the Harmonisation of Forms of Protection Complementing Refugee Status in the European Union' PE 228.552/fin (26 November 1998) 7.

of complementary or subsidiary regimes of protection to address their needs.<sup>26</sup>

Article 1 states the purpose of the Directive as ‘lay[ing] down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.’ Its framework is ‘based on existing international and EC obligations and current Member State practice’.<sup>27</sup> It aims to reduce disparities between Member States’ legislation and practice to ensure a consistent minimum level of protection throughout the EU, thereby reducing secondary movements based solely on differing rights and benefits.<sup>28</sup> ‘International protection’ here means ‘refugee and subsidiary protection status’ as defined in articles 2(d) and (f) of the Directive,<sup>29</sup> which are in turn cross-referenced to definitions of ‘refugee’ in article 2(c) and ‘person eligible for subsidiary protection’ in article 2(e), examined below. It is accordingly an instrument-specific definition that has a limited contextual scope. Despite Spain’s persistent suggestion that the term be given a ‘true’ definition, such as ‘the protection applied for by third country nationals when opportunities for national protection against persecution or serious and unjustified harm

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<sup>26</sup> UNHCR’s Observations on the European Commission’s Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection’ 14109/01 ASILE 54 (16 November 2001) [4].

<sup>27</sup> Note from Presidency to Permanent Representatives Committee/Council ‘Report on Proceedings in the Council’s Other Configurations’ 8509/04 POLGEN 19 (20 April 2004) 3.

<sup>28</sup> Opinion of the Economic and Social Committee on the ‘Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third-Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection’ (COM(2001) 510 final— 2001/0207 (CNS)) (2002/C 221/11) OJ C221/43 (17 September 2002) (Brussels 29 May 2002) [1.9].

<sup>29</sup> Directive art 2(a).

have been exhausted or are unavailable',<sup>30</sup> such a move was ultimately rejected and the ensuing definition is almost identical to the original draft.

In the context of the Directive, 'international protection' serves as a shorthand term to denote Convention refugees *plus* others in need of protection, implicitly recognizing the existence of other international legal sources of protection complementary to the Convention. However, it is notable that none of the cross-referenced definitions refers to the principle of *non-refoulement* in spite of the urgings of some delegations.<sup>31</sup> Indeed, the Directive uses internal cross-referencing as much as possible rather than referring to the international law on which provisions are based. Even article 21 on protection from *refoulement* does not cite specific legal sources for that obligation, but refers broadly to Member States' duty to 'respect the principle of non-refoulement in accordance with their international obligations'. The European Parliament suggested the inclusion of provisions expressly referring to the ECHR, the CAT and the ICCPR, as well as to 'other international agreements', on the basis that '[i]t is important for legal certainty and the protection of human rights to guarantee expressly the primacy of human rights instruments that set higher standards.'<sup>32</sup> However, this proposal was rejected by Member States.

The Directive's scope does not extend to persons permitted to remain in a Member State 'for reasons not due to a need for international protection but on a discretionary

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<sup>30</sup> 11356/02 ASILE 40 (6 September 2002), building on definition of 10596/02 ASILE 36 (9 July 2002). For identity of delegation: 12199/02 ASILE 45 (25 September 2002).

<sup>31</sup> 7882/02 ASILE 20 (24 April 2002); 9038/02 ASILE 25 (17 June 2002); 12199/02 ASILE 45 (n30). At first they wanted a specific reference to article 33 of the Convention; later they urged for internal cross-referencing.

<sup>32</sup> European Parliament 'Report on the Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection' (8 October 2002) Final A5-0333/2002, PE 319.971, Amendments 6, 19, 37.

basis on compassionate or humanitarian grounds'.<sup>33</sup> It also does not address procedural aspects of granting and withdrawing refugee or subsidiary protection status, which are set out in a separate Council Directive.<sup>34</sup> The Directive is thus restricted to defining the eligibility criteria for international protection and the rights and entitlements of its beneficiaries.

The Directive introduces common 'harmonized' concepts for a range of refugee law concepts, including 'persecution', 'particular social group' and 'internal protection'. While there is not the space here to examine each of these concepts in detail, it is important to observe that they necessarily impact upon the scope of subsidiary protection by defining the boundaries of *refugee* protection. However, they have been criticized as an attempt to replace the international refugee law regime with a regional one, rather than simply clarifying or complementing international law.<sup>35</sup>

German MEP Christian von Boetticher argued that subsidiary protection should be governed by a separate Directive, since refugee protection is not comparable to subsidiary protection. To merge the two statuses, he said, 'would make it impossible to set up an acceptable European asylum system'. He continued:

A clear distinction between these two possible types of protection must be preserved. Refugees are granted their status on the basis of the forms of discrimination laid down in the Geneva Convention; this protection is designed for the longer term. Subsidiary protection, on the other hand – as shown by the experience gained with Directive 2001/55/EC (mass influx) – is a temporary protection which does not narrow down the possibility of a swift return and where those seeking protection have significantly less

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<sup>33</sup> Directive recital 9.

<sup>34</sup> Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 8771/04 ASILE 33 (30 April 2004).

<sup>35</sup> See H Storey 'The New EU Directive—An Evaluation' (paper presented at International Association of Refugee Law Judges European Chapter Conference, Dublin May 2002) 7.

motivation to integrate than do refugees. The corresponding provisions therefore have a totally different basis.<sup>36</sup>

This suggestion was strongly opposed by Amnesty International. Amnesty argued that further differentiation of the two statuses through separate texts would strengthen diverging standards across Member States and undermine a harmonized level of minimum protection.<sup>37</sup> Furthermore, a single instrument reinforces the legal linkages between the two forms of protection and shows that they stem from similar causes.

## **B THE DIRECTIVE'S SUBSIDIARY PROTECTION REGIME**

### **1 Definition**

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

a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.<sup>38</sup>

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<sup>36</sup> European Parliament 'Amendments 52-176' PE 310.971/52-176 (14 June 2002) Amendment 52 (Christian Ulrik von Boetticher) 2.

<sup>37</sup> Amnesty International EU Office 'Amnesty International's Concerns regarding Amendments to the Draft Report on the Proposal for a Council Directive on a [sic] Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons who Otherwise Need International Protection (PE 310.971/52-176)' (12 September 2002) <[www.amnesty-eu.org](http://www.amnesty-eu.org)> (21 October 2002).

<sup>38</sup> 7944/04 ASILE 21 (31 March 2004) art 2(e). It was originally art 5, but was moved to the definitions section in art 2 by 11356/02 ASILE 40 (n30).

This definition raises four points of interest. The first concerns its application to ‘third country nationals and stateless persons’ only,<sup>39</sup> a limitation applied to the Directive’s definition of ‘refugee’ as well. This has drawn sharp criticism from UNHCR and other commentators,<sup>40</sup> who rightly argue that imposing such a restriction on the definition of a refugee contravenes article 42 of the Refugee Convention, which prohibits States from limiting the personal scope of article 1 or making reservations to article 3. Even if in practice the limitation may have little effect on refugee recognition statistics, it is undesirable that EU States set an example of limiting the application of the Convention definition in this way and undermining international law through a tailored regional agreement. As the House of Lords Select Committee on the EU noted, ‘for a major regional grouping of countries such as the Union to adopt a regime apparently limiting the scope of the Geneva Convention among themselves would set a most undesirable precedent in the wider international/global context.’<sup>41</sup> Furthermore, even though EU law is supposed to apply equally across all Member States, ‘as the case of the Roma illustrates there are occasions when even if there are supposedly safeguards in place in theory, those safeguards are not being effectively implemented and for the individuals concerned, regardless of membership of the club, they are being persecuted in their

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<sup>39</sup> Based on TEC (n3) art 63 and Protocol to the TEC on Asylum for Nationals of Member States of the EU (Protocol No 29).

<sup>40</sup> UNHCR’s Observations (n26) [11]; Amnesty International EU Office ‘Amnesty International’s Comments on the Commission’s Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country National [sic] and Stateless Persons as Refugees or as Persons Who Are Otherwise in Need of International Protection, COM (2001) 510 final’ (2 October 2002) <[www.amnesty-eu.org](http://www.amnesty-eu.org)> (21 October 2002) 2; European Parliament (n32) 53; House of Lords Select Committee on the EU *Defining Refugee Status and Those in Need of International Protection* (The Stationery Office London 2002) [54]. Although not formally a party to the negotiations, UNHCR maintained a close interest in the development of the Directive since it goes to the heart of its own mandate.

<sup>41</sup> House of Lords (n40) [54]. See also UNHCR’s comments at [52]. Although the Convention and human rights treaties would still apply to EU citizens, their resultant legal status would be uncertain. Additionally, the argument that EU citizens may in any case move freely within the EU does not justify the breach of international law in the Directive, nor does such freedom of movement necessarily guarantee an equivalent level of rights as provided for in the Directive, especially for citizens of the 10 new Member States.

country and they are not being protected and that is what the courts here [UK], and indeed the authorities in other countries, have found in over 7,000 cases'.<sup>42</sup>

Since the Directive is the first instrument to define subsidiary protection at an inter-governmental level, the restriction does not breach international law in the same way that the limitation on refugee eligibility breaches the Convention. It can be justified solely on the grounds of internal consistency. Such a limitation should not form part of any broader international definition of a beneficiary of complementary protection, since it would place an unwarranted restriction on subsidiary protection which does not exist for Convention-based protection. It should therefore be viewed as a regional aberration.

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

Thirdly, the standard of proof for subsidiary protection is 'substantial grounds ... for believing'. This was not always the standard envisaged by the Directive. Article 5 of the original proposal, which was subsequently transplanted to article 2(e) of the definitions,<sup>43</sup> provided that:

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<sup>42</sup> House of Lords (n40) [50] (Mr Hardwick, Refugee Council).

<sup>43</sup> 10596/02 ASILE 36 (n30) art 5(2) (emphasis added).

Without prejudice to existing constitutional obligations, subsidiary protection shall be granted to any third country national or stateless person ... who, owing to a well-founded fear of suffering serious and unjustified harm as described in Article 15, has been forced to flee or to remain outside his or her country of origin and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.<sup>44</sup>

The Convention article 1A(2) standard incorporated above has both objective and subjective elements, requiring an applicant to demonstrate a ‘well-founded fear of suffering serious and unjustified harm’. By contrast, the ‘substantial grounds’ test is an objective one that mandates ‘substantial grounds ... for believing’ that the applicant ‘would face a real risk of suffering serious harm’ if returned. The ‘belief’ in the present definition does not relate to the applicant’s belief (unlike the applicant’s well-founded fear), but rather to the decision-maker’s judgment that substantial grounds (based on objective circumstances) exist for believing that the applicant would face harm.

Sweden sought the reinsertion of the words ‘well-founded fear’ to replace ‘substantial grounds’, arguing that the same proof requirements should be established as for refugees and that wording from decisions of the Torture Committee should be taken into account.<sup>45</sup> Germany was concerned that the ‘substantial grounds’ wording could provoke problems of proof assessment, but that these should be solved by article 7.<sup>46</sup>

The well-founded fear test has been the subject of on-going scholarly debate and there is no need to rehearse those arguments here. However, it is important to identify the difference arising from a purely objective standard and one which also takes subjective fear into account. The former, on which article 2(e) is based, requires an

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<sup>44</sup> Original art 5(2).

<sup>45</sup> 12199/02 ASILE 45 (n30) 3 fn 3.

<sup>46</sup> *ibid.*

analysis of country conditions and human rights standards as a prerequisite for determining whether persecution or serious harm may exist in a given situation. While it is of fundamental importance that human rights law influences interpretations of these terms and forms the underlying basis of protection needs, the additional subjective element of the Convention definition captures a need for protection that is outside the realm of a pure human rights assessment and which cautions against tying the concept of persecution exclusively to human rights law. As UNHCR's Director of International Protection observed:

Persecution cannot and should not be defined solely on the basis of serious human rights violations. Severe discrimination or the cumulative effect of various measures not in themselves alone amounting to persecution, as well as their combination with other adverse factors, can give rise to a well-founded fear of persecution, or, otherwise said: make life in the country of origin so insecure from many perspectives for the individual concerned, that the only way out of this predicament is to leave the country of origin.<sup>47</sup>

The current version of article 2(e) demands a higher threshold than the well-founded fear test for persecution, since objective conditions cannot be assessed in conjunction with the applicant's own perception of the situation. Although there is merit in Hathaway's argument that linking international legal obligations to subjective notions of fear is futile because, in identical circumstances, some individuals may respond with

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<sup>47</sup> E Feller 'Statement by Ms Erika Feller, Director, Department of International Protection, UNHCR' (SCIFA Brussels 6 November 2002) 3. See also UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* UN Doc HCR/IP/4/Eng/REV.1 (2<sup>nd</sup> edn Geneva 1992) [55]. This element is underestimated in Hathaway's analysis of the well-founded fear standard: JC Hathaway *The Law of Refugee Status* (Butterworths Toronto 1991) 69. It is reminiscent of remarks made during the drafting of the 1951 Convention, when the Israeli delegate explained that applying objective criteria in certain cases would result in injustice, such as where persons' 'horrifying memories ... made it impossible for them to consider returning': AHC 'Summary Record of the 18<sup>th</sup> Meeting' (31 January 1950) E/AC.32/SR.18 (8 February 1950) [13] (Israel).

stoicism while others may be easily scared, apathetic or even unaware of the danger,<sup>48</sup> it too readily overlooks the situation where ‘life in the country of origin [has become] so insecure from many perspectives *for the individual concerned*, that the only way out of this predicament is to leave the country of origin.’<sup>49</sup> In a case concerning article 3 ECHR, the European Commission of Human Rights acknowledged the importance of recognizing extreme subjective fear. There, 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, even though the objective facts did not give credence to her fear.<sup>50</sup>

The reference to ‘substantial grounds’ stems from the case law of the European Court of Human Rights on article 3 ECHR and the Torture Committee on article 3 CAT, and was deliberately selected in order to avoid divergence between international and Member States’ practice.<sup>51</sup> The Torture Committee has consistently held that ‘substantial grounds’ involve a ‘foreseeable, real and personal risk’ of torture.<sup>52</sup> They are to be assessed on grounds that go ‘beyond mere theory or suspicion’ or ‘a mere possibility of torture’,<sup>53</sup> but the threat of torture does not have to be ‘highly probable’<sup>54</sup> or ‘highly likely to occur’.<sup>55</sup> The danger must be ‘personal and present’.<sup>56</sup> ‘Substantial grounds’ may be

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<sup>48</sup> Hathaway (n47) 69, citing A Grahl-Madsen *The Status of Refugees in International Law* (AW Sijthoff Leyden 1966) 174.

<sup>49</sup> Feller (n47) 3 (emphasis added).

<sup>50</sup> *Brückman’s case* App No 6242/73 in *Stocktaking on the European Convention on Human Rights: The First Thirty Years, 1954–1984* (1984) 152–54, cited in T Einarsen ‘The European Convention on Human Rights and the Notion of an Implied Right to *De Facto* Asylum’ (1990) 2 *IJRL* 361, 374.

<sup>51</sup> Council of the EU Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum on 25 September 2002 Doc 12148/02 ASILE 43 (20 September 2002) 5. The Netherlands supported Sweden’s argument that wording from decisions of the Torture Committee should be taken into account to avoid different rulings from different courts of bodies concerning similar situations: 12199/02 ASILE 45 (n30) 3 fn 3.

<sup>52</sup> See Ch 3 n66.

<sup>53</sup> *EA v Switzerland* Comm No 28/1995 (10 November 1997) UN Doc CAT/C/19/D/28/1995 [11.3].

<sup>54</sup> Report of the Committee against Torture UN GAOR 53<sup>rd</sup> Session Supp No 44 UN Doc A/53/44 (1998) Annex IX.

<sup>55</sup> *EA* (n53) [11.3].

based not only on acts committed in the country of origin prior to flight, but also on activities undertaken in the receiving country.<sup>57</sup> Furthermore, 'it is not necessary that all the facts invoked by the author [of the claim] should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable.'<sup>58</sup> In addition to an examination of the particular facts of the case at hand, article 3(2) requires attention to be paid to 'all relevant considerations', including the general human rights situation in the State to which return is contemplated.

As can be seen from this explanation of 'substantial grounds', the Directive effectively incorporates a circular, if not a double, threshold. Whereas the Torture Committee considers 'substantial grounds' to be met by a 'foreseeable, real and personal risk', the Directive requires that there are (a) substantial grounds for believing that (b) there is a real risk to the applicant. Accordingly, the Directive requires a foreseeable, real and personal risk of a real risk. Importantly, however, it does not require the risk to be peculiar to the applicant, despite France's desire to amend 'real risk' to 'real and individual risk' in order to limit the scope of subsidiary protection to cases where applicants face an individual menace.<sup>59</sup>

One final point to note concerns the original stipulation that the article would not prejudice existing constitutional obligations. This was contrary to the position at international law, which does not permit a State to 'invoke the provisions of its internal

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<sup>56</sup> Report of the Committee against Torture (n54) Annex IX.

<sup>57</sup> *Aemei v Switzerland* Comm No 34/1995 (9 May 1997) UN Doc CAT/C/18/D/34/1995 [9.5].

<sup>58</sup> *ibid* [9.6].

<sup>59</sup> 12199/02 ASILE 45 (n30) 3 fn 3.

law as justification for its failure to perform a treaty',<sup>60</sup> and recently reaffirmed by the Human Rights Committee:

Although article 2, paragraph 2 [of the ICCPR], allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.<sup>61</sup>

The reference was removed in September 2002.<sup>62</sup>

## **2 'Serious Harm' (Article 15)**

The fourth notable element of the definition relates to the nature of suffering that may result in subsidiary protection being granted, set out in article 15. As the pivotal element of the Directive, setting out the constitutive elements of subsidiary protection status, article 15 was the subject of intense debate and subject to much redrafting. Although, like the rest of the Directive, it is said to reflect existing practice in Member States, the nature and content of domestic subsidiary protection varied widely and hence harmonization in this area was bound to be strongly contested. The result is a political compromise, based on international and regional human rights standards, but nonetheless conservative in its scope. It cannot be regarded as an innovative blueprint applying

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<sup>60</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 27.

<sup>61</sup> HRC 'General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' CCPR/C/74/CRP.4/Rev.6 (21 April 2004) [4] [unedited version].

<sup>62</sup> 11356/02 ASILE 40 (n30).

human rights law to the protection context, since it extracts the least contestable human rights-based protections which already form part of most Member States' protection policies. The 'new' element of subsidiary protection in the Directive is the provision of a definitive status for its beneficiaries, although the status ultimately agreed upon reflects the hierarchical structure of the Directive which equates the 'full and inclusive' application of the Convention with a superior status for refugees.

It must be recalled that article 15 is only considered when an examination of a Convention claim has led to the conclusion that the application does not qualify for refugee status under the Convention, or if the applicant has specifically applied for subsidiary protection. The types of threats contained in article 15 indicate a strong presumption for Convention status.<sup>63</sup> Accordingly, article 15 should only apply where the standard of harm does not reach the level of persecution and/or there is no link to a Convention ground.

The Asylum Working Party first examined article 15 at its meeting on 4–5 June 2002.<sup>64</sup> Some Member States thought that the ECHR should form the cornerstone of any subsidiary protection definition, while others believed this would make the definition too open-ended, since the ECHR is continuously interpreted by the European Court of Human Rights and hence not fixed.<sup>65</sup>

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

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<sup>63</sup> UNHCR's Observations (n26) [42].

<sup>64</sup> 9038/02 ASILE 25 (n31) 1.

<sup>65</sup> UNHCR World News 'EU: Ministers Close to Agreement on Definition of Refugee Directive' (13 September 2002) <[www.unhcr.ch](http://www.unhcr.ch)> (6 September 2003).

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

The notion of 'serious harm' is not part of international law and was devised for the purposes of the Directive. In the original proposal, the term used was 'serious and unjustified harm'. 'Unjustified harm' was widely criticized, not least for the implication that harm may at times be justifiable. The Explanatory Memorandum explained it reflected the fact that there are 'circumstances in which a state *may be justified* in taking measures that cause harm to individuals, such as in the event of a public emergency or national security',<sup>66</sup> even though such instances are likely to be rare. It continued:

it would be contrary to human rights instruments, such as the European Convention on Human Rights and Fundamental Freedoms, to exclude the possibility that some proportionate derogation from human rights standards may, in limited and particular circumstances, be justified, most commonly in the interests of the wider common good.<sup>67</sup>

Goodwin-Gill and Hurwitz noted that the concept of 'unjustified harm' is not only incompatible with fundamental norms of public international law, but also appears to have no place in State practice.<sup>68</sup> It may be that its purpose was to qualify the term 'serious harm' in order not to include persons legitimately punished under the rule of

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<sup>66</sup> Explanatory Memorandum (n18) 13.

<sup>67</sup> *ibid.*

<sup>68</sup> GS Goodwin-Gill and A Hurwitz 'Memorandum' in Minutes of Evidence Taken before the EU Committee (Sub-Committee E) (10 April 2002) [6]–[8], in House of Lords (n40) Oral Evidence 1–2.

law,<sup>69</sup> but as the House of Commons Select Committee on European Scrutiny observed, ‘the word “harm” should only be used in legislation to denote consequences which are wrongful, and therefore incapable of justification.’<sup>70</sup> UNHCR described it introducing an unwarranted element of judgment, stipulating a test ‘incompatible with human rights guarantees and which may limit persecution to only violations of non-derogable human rights.’<sup>71</sup> Since it was referred to not only in respect of subsidiary protection but also refugee protection, UNHCR was concerned that the formulation might be interpreted restrictively so as to impose an additional requirement on refugee qualification which was not part of international law.<sup>72</sup> Germany, Greece and Sweden argued for the removal of the term ‘unjustified harm’, describing it as an ‘inappropriate expression’ that risked allowing acceptance of ‘justified harm’.<sup>73</sup> The word ‘unjustified’ was relegated to square brackets in a draft of 23 October 2002, and deleted completely in the subsequent 8 November 2002 draft.<sup>74</sup>

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<sup>69</sup> View of the Minister of State at the Home Office (Angela Eagle) in House of Lords (n40) [99].

<sup>70</sup> House of Commons Select Committee on European Scrutiny *Fourth Report of Session 2002–03* (The Stationery Office London 6 January 2003)

<[www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-iv/63.pdf](http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-iv/63.pdf)> [6.25].

<sup>71</sup> UNHCR ‘Some Additional Observations and Recommendations on the European Commission “Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection” COM (2001) 510 final, 2001/0207 (CNS) of 12 September 2001’ (Geneva July 2002) 4.

<sup>72</sup> *ibid* 4.

<sup>73</sup> 12199/02 ASILE 45 (n30) 3 fn 4.

<sup>74</sup> 12620/02 ASILE 54 (23 October 2002) arts 2(e), 15 and 13648/02 ASILE 61 (8 November 2002) respectively.

### 3 Death Penalty or Execution

Paragraph (a) was not part of the original proposal. It was added by the Chair in September 2002,<sup>75</sup> following the suggestion of a delegation<sup>76</sup> and various NGOs.<sup>77</sup> Article 2(1) ECHR does not protect the right to life absolutely, expressly stating that: ‘No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law’. The legal basis of paragraph (a) was Protocol 6 to the ECHR, prohibiting the imposition of the death penalty in peace time.<sup>78</sup> Furthermore, all Member States except France are parties to the Second Optional Protocol of the ICCPR which contains a similar requirement.<sup>79</sup>

Its inclusion in the Directive was welcomed by Amnesty,<sup>80</sup> ECRE<sup>81</sup> and others. ECRE noted Member States’ obligations under article 19(2) of the Charter of Fundamental Rights of the European Union which provides: ‘No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be

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<sup>75</sup> 11356/02 COR 1 ASILE 40 (9 September 2002) new art 15(a).

<sup>76</sup> ECRE ‘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); 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)> (7 May 2004) 6.

<sup>77</sup> 9038/02 ASILE 25 (n31) 22 fn 3.

<sup>78</sup> Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty (adopted 28 April 1983, entered into force 1 March 1985) ETS No 114. This has since been strengthened by Protocol 13, prohibiting the death penalty in all circumstances: Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances (adopted 3 May 2002, entered into force 1 July 2003) ETS No 187.

<sup>79</sup> Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty (adopted by UNGA Res 44/128 of 15 December 1989); Status of Ratifications as at 9 June 2004 <[www.unhchr.ch/pdf/report.pdf](http://www.unhchr.ch/pdf/report.pdf)> (10 June 2004).

<sup>80</sup> Amnesty International (n40) 6.

<sup>81</sup> ECRE (n76).

subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’<sup>82</sup> The European Parliament suggested that ‘sexual mutilation’ also be included as an explicit type of treatment that could result in subsidiary protection, but this was not adopted.<sup>83</sup> It should be noted that the provision is not, as Piotrowicz and van Eck suggest,<sup>84</sup> a replacement for the deleted human rights provision (discussed below), but rather an additional ground of ‘serious harm’. This is clear from the drafting process, since the two provisions co-existed for a period, and the human rights paragraph applied specifically to acts outside the scope of sub-paragraphs (a) to (c).<sup>85</sup>

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

[i]t would hardly be compatible with the underlying values of the Convention, that ‘common heritage of political traditions, ideals, freedom and the rule of law’ to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, and in the Court’s view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to

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<sup>82</sup> [2000] OJ C364/1.

<sup>83</sup> European Parliament (n32) Amendment 54.

<sup>84</sup> R Piotrowicz and C van Eck ‘Subsidiary Protection and Primary Rights’ (2004) 53 ICLQ 107, 123.

<sup>85</sup> 11356/02 ASILE 40 (n30); 12148/02 ASILE 43 (n51); removed 12382/02 ASILE 47 (30 September 2002).

inhuman or degrading treatment or punishment proscribed by that Article (art. 3).<sup>86</sup>

The court found that if substantial grounds could be shown for believing that the individual concerned, if extradited, would face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country, then the Contracting State's responsibility would be engaged. 'In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.'<sup>87</sup> Accordingly, in *Soering*, it was held that the UK's extradition of Soering to the US to face the death row phenomenon would violate article 3 ECHR.

#### **4 Torture or Inhuman or Degrading Treatment or Punishment**

The original paragraph (a) has been slightly reworded to form the current paragraph (b), which provides that 'serious harm' may be constituted by 'torture or inhuman or degrading treatment or punishment of an applicant in the country of origin'. The original proposal referred simply to 'torture or inhuman or degrading treatment or punishment', whereas the amended version explicitly requires that such treatment relate to an applicant 'in the country of origin'. This may be intended to obviate a claim by an asylum-seeker that he or she would face torture in a third country to which return may be contemplated, but in such circumstances article 3 ECHR would prevent removal. Significantly,

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<sup>86</sup> *Soering v UK* (1989) 11 EHRR 439 [88].

<sup>87</sup> *ibid* [91].

however, protection under article 3 would not guarantee a legal status but would simply classify the person as non-removable. Furthermore, the question whether subsidiary protection status should, by analogy, extend to such persons would not be for the European Court of Human Rights to decide, which has jurisdiction over the ECHR, but rather for the European Court of Justice, which supervises the Directive. Since an article 3 ECHR claim cannot be brought directly to the ECJ, seeking a ruling on this point may not be possible. Conversely, the European Court of Human Rights cannot make a ruling on how the Directive should be interpreted or implemented.<sup>88</sup>

Paragraph (b) was the least contentious element of article 15, since all Member States are party to the ECHR<sup>89</sup> and are bound by article 3 which prevents States from returning a person to a place where he or she would be placed at risk of torture or inhuman or degrading treatment or punishment, including by sending the person to another State which may subsequently return him or her to a risk of such treatment. In line with article 3 ECHR, protection extends beyond article 3 CAT to cover not only torture, but also inhuman or degrading treatment or punishment.

There is a strong presumption for Convention refugee status where torture is involved.<sup>90</sup> Article 15(b) is therefore of limited application, particularly since persons excluded from Convention status and protected by article 3 CAT or ECHR are also

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<sup>88</sup> In this context, note also the fact that in the international arena, there is no hierarchy of judicial institutions with a final body to resolve conflicts: ILC 'Report of the Study Group on Fragmentation of International Law' UN Doc A/CN.4/L.628 (1 August 2002) [15].

<sup>89</sup> Even though the ECHR is not directly applicable EC law, all EU Member States are also members of the Council of Europe and bound by the ECHR in that connection. Article 6(2) TEU (n3) further states: 'The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law requires Member States to use its principles as a basis in drawing up common legal acts.' See also Charter of Fundamental Rights of the European Union (n82).

<sup>90</sup> UNHCR's Observations (n26) [42].

excluded from subsidiary protection under the Directive.<sup>91</sup> Thus, the article would apply to persons who are unable to demonstrate a link to a Convention ground, which may amount to cases where perpetrators resort to torture based on purely criminal motivation.<sup>92</sup>

## 5 Indiscriminate Violence

Paragraph (c) has undergone more significant drafting changes. The original wording,

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

was ultimately replaced by

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

following six chief amendments during the drafting process.<sup>93</sup> The provision reflects the existence of consistent, albeit varied, State practice of granting some form of complementary protection to persons fleeing the indiscriminate effects of armed conflict or generalized violence without a specific link to Convention grounds.<sup>94</sup> The Explanatory

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<sup>91</sup> See exclusion clauses in Directive art 17.

<sup>92</sup> UNHCR 'Some Additional Observations' (n71) 7.

<sup>93</sup> 11356/02 COR 1 ASILE 40 (n75); 12148/02 ASILE 43 (n51); 12534/02 ASILE 49 (7 October 2002); 12619/02 ASILE 53 (9 October 2002); 12620/02 ASILE 54 (n74); 13646/02 ASILE 60 (31 October 2002).

<sup>94</sup> See ECRE (n5); ELENA 'Complementary/Subsidiary Forms of Protection in the EU States—An Overview' (April 1999).

Memorandum to the original article 11(2)(c) suggested that persons fleeing from civil war or armed conflict could not qualify as Convention refugees. As UNHCR noted, ‘experience shows that most civil wars or internal armed conflicts are rooted in ethnic, religious or political differences which specifically victimise those fleeing. War and violence are themselves often used as instruments of persecution.’<sup>95</sup> The determining factor for refugee status is whether the applicant has a well-founded fear of persecution based on one of the article 1A(2) grounds. Generalized violence does not preclude individual persecution.<sup>96</sup> Accordingly, UNHCR has again stressed that the provision will only apply where refugee status cannot be satisfied.

Article 15(c) reflects in part Member States’ obligations under the Temporary Protection Directive and the Council of Europe’s Recommendation (2001) 18 of the Committee of Ministers on Subsidiary Protection, adopted on 27 November 2001, as well as EU Member States’ repeated support for UNHCR’s mandate activities for victims of indiscriminate violence (linked to other regional agreements such as the OAU Convention and the Cartagena Declaration). The provision’s shifting scope will be examined below with reference to three elements: (a) the nature of the threat, (b) the focus of the threat and (c) the cause and circumstances of the threat.

(a) Nature of the threat

Under the current provision, the threat faced must be both serious and individual. In the original proposal, the ‘threat’ faced was simple and unqualified. The first set of

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<sup>95</sup> UNHCR’s Observations (n26) [4].

<sup>96</sup> ECRE ‘Note from ECRE on the Harmonisation of the Interpretation of Article 1 of the 1951 Geneva Convention’ (June 1995) [15].

amendments to article 15 introduced the notion of a ‘serious threat’ into the text,<sup>97</sup> while subsequent amendments required both a serious *and* individual threat.<sup>98</sup>

(i) *Individual*

Although it was argued that incorporation of the term ‘individual’ must not restrict the Directive’s scope so as only to cover situations where a person is individually targeted by the State or parties controlling the State,<sup>99</sup> the vast majority of Member States supported the ‘individual’ requirement on the grounds that this would avoid ‘an undesired opening of the scope of this subparagraph.’<sup>100</sup>

The individual requirement cannot logically mean that a person must be singled out within a situation of indiscriminate violence, since to require this would be contrary to the notion of violence that is indiscriminate. Yet precisely this limitation appears to have been introduced through a recital which reads:

Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.<sup>101</sup>

This severely restricts the ambit of paragraph (c). It is tantamount to saying that the individual does not exist in a group, undermining the force of an indiscriminate violence category of subsidiary protection and creating an ‘unacceptable protection

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<sup>97</sup> 11356/02 COR 1 ASILE 40 (n75).

<sup>98</sup> 12148/02 ASILE 43 (n51); 12534/02 ASILE 49 (n93); 12619/02 ASILE 53 (n93); 12620/02 ASILE 54 (n74); 13646/02 ASILE 60 (n93).

<sup>99</sup> 12382/02 ASILE 47 (n85) 4 fn 3.

<sup>100</sup> *ibid* [4].

<sup>101</sup> Directive recital 26.

gap'.<sup>102</sup> The precise extent to which an individual threat will need to be demonstrated is unclear, particularly as the word 'normally' implies that in some cases the individual test may be less rigidly applied. The Explanatory Memorandum's analysis of the original paragraph (c) may provide some guidance, especially since the provision did not incorporate 'individual threat' but was still regarded as requiring an assessment similar to the Convention's well-founded fear test: 'Although the reasons for the fear may not be specific to an individual he or she must still establish that the fear is well founded in their particular case.'<sup>103</sup> The language of the present provision and recital would suggest that a person in an area of indiscriminate violence will need to at least show that he or she is *personally* at risk, rather than simply being able to claim subsidiary protection status by virtue of geographical location. This is problematic, since indiscriminate violence by definition is random and haphazard.<sup>104</sup> If interpreted even more strictly, it might require individuals to be singled out, which would establish a higher threshold than is required for either Convention-based protection or temporary protection. For the current provision to have any meaningful effect, however, it would seem that States will have to be relatively generous in determining the 'individual' aspect of the risk.

Courts have traditionally been reluctant to grant refugee status to persons facing generalized, group-defined oppression, often requiring asylum-seekers fleeing from such circumstances to show that they have been singled out for persecution rather than subject to a general denial of human rights. But as Hathaway notes, to demand a 'singling out'

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<sup>102</sup> UNHCR 'Note on Key Issues of Concern to UNHCR on the Draft Qualification Directive' (March 2004) 1.

<sup>103</sup> Explanatory Memorandum (n18) 26–27.

<sup>104</sup> eg UK Secretary of State's refusal of asylum on the basis of such violence, as recorded in the case of *Vilvarajah v UK* (1991) 14 EHRR 248 [13]: 'But it is noted that the incidents you have related were random and part of the army's general activities directed at discovering and dealing with Tamil extremists and that they do not constitute evidence of persecution'; see also [25], [40], [52], [62].

of an applicant ‘confuses the requirement to assess risk on the basis of the claimant’s particular circumstances with some erroneous notion that refugee status must be based on a completely personalized set of facts.’<sup>105</sup> Rather, the question should be whether the applicant has a reasonable chance of persecution, or here, of a serious threat.

In relation to refugee status, which ought to be more difficult to satisfy given the required link to a Convention reason, Hathaway states:

In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm in her country, and if that risk is grounded in their civil or political status, then in the absence of effective national protection she is properly considered to be a Convention refugee.<sup>106</sup>

The absence of such thinking in the final version of the Directive is both curious and disheartening, particularly given the conclusion of the Temporary Protection Directive in 2001 which protects persons

who have had to leave their country or region of origin, or have been evacuated ... and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:

- (i) persons who have fled areas of armed conflict or endemic violence;
- (ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.<sup>107</sup>

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<sup>105</sup> Hathaway (n47) 91–92 (citations omitted).

<sup>106</sup> Hathaway (n47) 97 (citations omitted).

<sup>107</sup> 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

States seem fearful of according the same protection when individual status determination procedures are involved and accordingly demand a higher threshold of individual harm, even though such persons would be automatically entitled to protection if they were part of a mass influx from the same area. As the comment by the French delegation shows, there is a deep-seated fear that whole populations will flee on the basis of generalized violence if subsidiary protection status does not require individual harm to be demonstrated.<sup>108</sup> This is counterintuitive both to State practice and the EU's temporary protection regime. For legal and logical consistency, subsidiary protection ought to protect persons fleeing individually or in small groups from situations which, in a mass influx, would result in protection. The rationale behind the Temporary Protection Directive is that the size of the influx makes it inefficient or impossible to process claims in the normal way,<sup>109</sup> *not* that the nature of the threat is unique to mass influxes. Therefore to limit subsidiary protection in this way seems both illogical and inconsistent, premised on political fear of numbers rather than any legal basis.

(ii) *Serious*

The term 'serious threat' is not defined in the Directive or in general international law. The definition of 'serious harm' in article 15 is not particularly helpful, since it includes, somewhat circularly, a 'serious and individual' threat. The term appears in US

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between Member States in Receiving Such Persons and Bearing the Consequences thereof [2001] OJ L212/12 art 2(c).

<sup>108</sup> 12199/02 ASILE 45 (n30).

<sup>109</sup> see Temporary Protection Directive (n107) art 2(a).

legislation on Temporary Protection Status,<sup>110</sup> however is not defined and has not been the subject of judicial consideration since the decision to grant TPS is an executive one.

It is unclear whether ‘seriousness’ relates to a threat that is credible or genuine; to an imminent threat; or to the gravity of the threat. During the drafting process, Germany had suggested alternative terminology—a ‘significant real threat’<sup>111</sup>—which encompasses all three of these interpretations.

With respect to the third interpretation, seriousness as gravity, some assistance may be gained from article 9(1)(a) of the Directive. This provision requires persecutory acts to ‘be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights’. Accordingly, for the purposes of article 15, ‘serious’ may imply a threat that negatively impacts on a person’s human rights, here through indiscriminate violence, but that falls short of ‘persecution’.

In international criminal law, ‘serious crimes’ is a similarly elusive term. In that context, UNHCR suggests that ‘international rather than local standards’ should apply in determining the seriousness of an offence.<sup>112</sup> There the factors to be considered include ‘the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime.’<sup>113</sup>

It is likely that the term ‘serious’ in article 15 will remain undefined even in subsequent case law, since it is a useful descriptor that should remain flexible and adaptable to the particular circumstances of the case. It may be considered to refer to a

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<sup>110</sup> 8 USC 1254a(b)(1)(A).

<sup>111</sup> 12199/02 ASILE 45 (n30).

<sup>112</sup> UNHCR ‘Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees’ UN Doc HCR/GIP/03/05 (4 September 2003) [14].

<sup>113</sup> *ibid.*

threat that is not minor, inconsequential, or a remote possibility, whether applied to the threat's credibility, imminence or gravity. A combination of these interpretations may be taken into account, depending on the likely severity of the consequences if the person is not protected. Sometimes a 'real' threat may not be considered sufficiently severe or imminent to warrant protection.<sup>114</sup> For example, UNHCR suggests that if the conflict and generalized violence were localized in a different part of the country from the applicant, and there is no other risk feared by that person, then the threat might not be sufficiently serious to engage a Member State's protection.<sup>115</sup>

(b) Focus of the threat

In the final version of the Directive, the focus of the threat is 'a civilian's life or person'. However, the provision went through five other versions. The original proposal referred to a threat to 'life, safety or freedom', which was altered to 'life or physical integrity [or freedom from unlawful detention]', then to 'life or physical integrity of a civilian'. The third amendment reintroduced the concept of detention, but replaced 'unlawful' with 'arbitrary' since this was the terminology used in international instruments such as the ICCPR.<sup>116</sup> Hence it referred to 'a civilian's life or physical integrity or freedom from arbitrary detention'. The fourth amendment added 'freedom from arbitrary arrest or detention', while the fifth and final amendment simplified the phrase to 'a civilian's life or person'. Although it may look narrower than alternative phrases, Piotrowicz and van

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<sup>114</sup> In relation to 'real risk', 'serious risk' and 'substantial risk' in the context of the ECHR: R Alleweldt 'Protection Against Expulsion Under Article 3 of the European Convention on Human Rights' (1993) 4 EJIL 360, 367.

<sup>115</sup> UNHCR *Tool Boxes on EU Asylum Matters: Tool Box 2: The Instruments* (2003) 311.

<sup>116</sup> See 12534/02 ASILE 49 (n93) 3 fn 3.

Eck suggest that there is room to argue that ‘life or person’ may be construed more expansively than the terms ‘safety’ or ‘freedom’.<sup>117</sup>

The Chair explained that the word ‘freedom’, as initially proposed by the Commission, was deleted due to concerns that this would unduly widen the scope of the Directive,<sup>118</sup> despite objections by Germany, Finland and Cion.<sup>119</sup> France, in particular, was opposed to the inclusion of ‘freedom’, arguing that this would risk opening up subsidiary protection to entire populations of countries involved in conflict,<sup>120</sup> although the Temporary Protection Directive already does this in its application to persons who have fled areas of armed conflict or endemic violence.<sup>121</sup>

The UK encouraged the removal of references to ‘physical integrity’ and ‘freedom from arbitrary arrest’, since they might enable the article to be too broadly interpreted, and imposed a reservation on the ‘unclear’ scope of the paragraph while these terms remained.<sup>122</sup> Despite Germany and the Netherlands’ constant lobbying for the retention of ‘freedom from arbitrary detention’ and ‘freedom from arbitrary arrest’, they were omitted on the grounds that such treatment would already be covered by article 15(b), provided it occurred in the applicant’s country of origin.<sup>123</sup>

Cion opposed paragraph (c) being restricted to civilians (a Dutch suggestion), and thought it should include ex-combatants as well.<sup>124</sup> Cion’s suggestion sits more comfortably with a momentary reference in the paragraph to the 1949 Convention

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<sup>117</sup> Piotrowicz and van Eck (n84) 114.

<sup>118</sup> 12382/02 ASILE 47 (n85) 4 fn 4.

<sup>119</sup> 12199/02 ASILE 45 (n30).

<sup>120</sup> *ibid.*

<sup>121</sup> Temporary Protection Directive (n107) art 2(c)(i).

<sup>122</sup> Presidency Note to Council (JHA) 12619/01 ASILE 53 (9 October 2002) Annex.

<sup>123</sup> See Chair’s suggested reformulation of the provision in 13646/02 ASILE 60 (n93).

<sup>124</sup> 12199/02 ASILE 45 (n30).

relative to the Protection of Civilian Persons in Time of War, proposed by the Council Legal Service. A draft of 23 October 2003 tentatively included the following:

[in accordance with the 1949 Convention relative to the Protection of Civilian Persons in time of War,] serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.<sup>125</sup>

An advantage of specifically referring to the Geneva Convention is the simultaneous incorporation of common article 3 prohibited acts into 'serious harm' (provided the rest of paragraph (c) could be satisfied). However, a disadvantage of inextricably linking subsidiary protection to international humanitarian law is that 'strictly applied, it would only cover armed conflicts that were conducted in violation of international humanitarian law norms.'<sup>126</sup> Accordingly, it would not encompass situations where the intensity of violence falls below the threshold required by an 'armed conflict'<sup>127</sup>—and thus outside the scope of international humanitarian law—even though individuals remain at risk for similar reasons.

It may also be that international criminal law creates obligations for States preventing return of a person to a State where there are substantial grounds for believing that there is a real risk that the applicant will be exposed to acts which would violate the Rome Statute of the International Criminal Court. This is considered in Part 6 below.

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<sup>125</sup> 13354/02 ASILE 55 (23 October 2002) art 15(c) and 12620/02 ASILE 54 (n74) (references omitted).

<sup>126</sup> Storey and others (n21) 15.

<sup>127</sup> IIHL '14<sup>th</sup> Round Table on Current Problems of International Humanitarian Law' (San Remo 12–16 September 1989) 10 (Introduction by G Arnaout).

(c) Cause and circumstances of the threat

Conditions in the country of origin are a precondition to triggering article 15(c). In every version of the paragraph, the cause of the threat has been ‘indiscriminate violence’ arising in situations of armed conflict, specified from the second draft onwards as being either international or internal in character.<sup>128</sup> This can be contrasted to the Committee of Ministers Recommendation R (2001) 18 on Subsidiary Protection, adopted shortly after the original Directive was proposed, which listed armed conflict as just one example of indiscriminate violence posing a threat to ‘life, security or liberty’.<sup>129</sup> This reflects the practice of the vast majority of Member States, which provide a form of subsidiary protection to victims of indiscriminate violence.<sup>130</sup> The exceptions are France and Denmark, which require applicants to demonstrate a personal risk of persecution in such circumstances.<sup>131</sup> Both States have provided *ex officio* protection to particular national groups when the degree of violence in certain countries has been such that all nationals could be considered at risk.<sup>132</sup>

The original version of the paragraph also provided that the threat could result from ‘systematic or generalized violations of [an applicant’s] human rights’. This was based on article 2(c) of the Temporary Protection Directive which accords protection when persons have fled areas of armed conflict or endemic violence; or when they are at serious risk of, or have been the victims of, systematic or generalized violations of their

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<sup>128</sup> 11356/02 COR 1 ASILE 40 (n75).

<sup>129</sup> CM Recommendation R (2001) 18 (n2) [1].

<sup>130</sup> Bouteillet-Paquet (n10) 231.

<sup>131</sup> Amnesty International (n37) fn 5.

<sup>132</sup> Denmark granted *ex officio* protection to people from Sierra Leone and Somalia: Refugee Appeal Board (30 April 1991) (1990-21-1521; 1990-21-1645; 1990-21-1665; 1990-21-1666). France has granted similar protection to Haitians, Poles and Lebanese asylum-seekers.

human rights. As the Explanatory Memorandum noted, ‘Member States are bound to cover persons falling into this category where they arrive in a Council agreed “mass influx” so it is consistent and appropriate to include them also when they arrive individually, and do not qualify as a refugee.’<sup>133</sup>

The deletion of this additional ground, and the resulting gap between temporary and subsidiary protection, may in part be explained by the following. A mass influx situation coming within the scope of the Temporary Protection Directive must first be characterized as such by a qualified majority of the Council of the EU. Accordingly, this mechanism acts as a filter between States and persons seeking protection. It provides room for States to manoeuvre when it comes to classifying the nature of a particular refugee-producing situation. If the Council does not determine a particular situation to be a ‘mass influx of displaced persons’,<sup>134</sup> then no obligation arises for Member States to provide temporary protection. In addition, article 7(1) seems to deny a State the right to independently determine that a mass influx exists for the purposes of offering temporary protection within its own territory, since that provision links the extension of temporary to ‘additional categories of displaced persons’ to a pre-existing Council decision under article 5. As a result, accepting obligations under the Temporary Protection Directive has a less immediate impact for States than accepting obligations under the Qualification Directive.

The removal of ‘systematic or generalized violations of [an applicant’s] human rights’ reduces the flexibility of article 15 to adapt to new situations, particularly in relation to developing jurisprudence of the European Court of Human Rights. This is

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<sup>133</sup> Explanatory Memorandum (n18) 27.

<sup>134</sup> Temporary Protection Directive (n107) art 5(1).

despite early enthusiasm about the Directive's flexibility to adapt to future developments of Member States' international obligations,<sup>135</sup> which was considered 'important to cover in particular situations of serious violence which may not (yet) qualify as situations of armed conflict under international humanitarian law, namely situations in which the threshold of armed conflict is not reached or the qualification as armed conflict is disputed.'<sup>136</sup> Given the harmonized understanding of generalized violence in the context of temporary protection, it would be consistent if individuals fleeing outside a mass influx were accorded protection on the same basis through subsidiary protection, unless they can establish that they are Convention refugees.<sup>137</sup> As article 15(c) stands, protection based on generalized violence is only available when an armed conflict exists. Accordingly, disagreement about the character of a conflict may jeopardize the application of this paragraph.

## **6 The Role of International Criminal Law**

International criminal law provides an additional legal rationale for extending protection beyond the scope of the 1951 Convention. Jurisprudence of the international criminal tribunals of Rwanda and the former Yugoslavia, and most notably the Rome Statute, which 'bridge' international human rights and criminal law,<sup>138</sup> reinforce the norms of international humanitarian law with respect to the protection of civilians and have

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<sup>135</sup> Informal JHA Council Meeting (n24) 3.

<sup>136</sup> UNHCR 'Some Additional Observations' (n71) 7.

<sup>137</sup> *ibid* 6; Feller (n47) 4.

<sup>138</sup> UNHCR 'UNHCR and Human Rights' (Policy Paper resulting from Deliberations in the Policy Committee on the Basis of a Paper Prepared by DIP, issued under AHC's Memorandum) AHC/97/325 (6 August 1997).

clarified the content of war crimes under international law. During the Global Consultations in 2001, experts identified a need to draw on ‘developments in other areas of international law since 1951, in particular international criminal law and extradition law as well as international human rights law and international humanitarian law’ in interpreting the exclusion clauses of the Convention.<sup>139</sup> There is no reason why the same rationale should not apply to interpreting protection needs. Indeed, UNHCR has highlighted the incongruity ‘if those persons who risk falling victim to violations of norms sanctioned by individual criminal liability and possible prosecution, would not be able to claim protection against being returned to situations where such violations risk to occur.’<sup>140</sup>

International criminal law concerns the gravest forms of human rights abuse— matters which constitute ‘the most serious crimes of concern to the international community as a whole’, namely genocide, crimes against humanity, war crimes and the crime of aggression.<sup>141</sup> The Rome Statute codifies and progressively develops existing customary international law for the purposes of the jurisdiction of the International Criminal Court.

International criminal law seems to offer greater protection than reliance on the norms of international humanitarian law, since the latter depends on the existence of an armed conflict, which may sometimes be disputed.<sup>142</sup> Although certain elements of international criminal law also require the existence of an ‘armed conflict’, many others

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<sup>139</sup> UNHCR Global Consultations ‘Summary Conclusions: Exclusion from Refugee Status’ (Expert Roundtable, Lisbon 3–4 May 2001) [2], specifically in relation to art 1F.

<sup>140</sup> Feller (n47) 4; UNHCR ‘Some Additional Observations’ (n71) 6.

<sup>141</sup> Rome Statute art 5(1). The court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with arts 121 and 123: art 5(2).

<sup>142</sup> For problems related to this: D Perluss and JF Hartman ‘Temporary Refuge: Emergence of a Customary Norm’ (1986) 26 Virginia JIL 551, 573.

do not. Furthermore, the fact that the international community regards these acts as so abhorrent that they attract individual *criminal* responsibility suggests that the obligation to prosecute may involve a concomitant duty to protect persons from exposure to such acts. States have a duty to prevent violations of human rights,<sup>143</sup> and as the principle of *non-refoulement* demonstrates, this extends in certain cases to protecting people from being returned to countries where their human rights cannot be guaranteed.

It was partly on this basis that the Refugee Convention was established. It sought to provide legal respite for persons persecuted on account of their race, religion, nationality, political opinion or membership of a particular social group. It was drafted with the events of the Second World War specifically in mind, as the original dateline made clear. It encompassed the treatment of the Jewish population and minority groups by fascist governments—treatment that was to be condemned by the Nuremberg Tribunal as war crimes. In the *travaux préparatoires* of the 1951 Convention, the German delegation explained how it was appropriate to refer to provisions of the Geneva Conventions in relation to war crimes and crimes against humanity. ‘By associating the Geneva Conventions with the work of the Conference the humanitarian aims which should govern the Convention would be stressed.’<sup>144</sup> Thus, extending this protection rationale, it seems logical that as the nature of conflict has shifted and the scope of international criminal responsibility has been codified into a set of principles contained in the Rome Statute, the types of acts criminalized may themselves give rise to a protection need for their victims.

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<sup>143</sup> *Rodríguez v Honduras* (29 July 1988) Inter-American Court of Human Rights Series C No 4.

<sup>144</sup> CP ‘Summary Record of the 19<sup>th</sup> Meeting’ (13 July 1951) UN Doc A/CONF.2/SR.19 (26 November 1951) 26 (Federal Republic of Germany); see CP ‘Draft Convention relating to the Status of Refugees: Federal Republic of Germany: Amendment to Article 1’ UN Doc A/CONF.2/76 (13 July 1951).

In most cases, prosecution for crimes under the Rome Statute will not occur until the end of a conflict. By that time, asylum may not be the most appropriate remedy for persons affected by those crimes. It is therefore necessary to establish a mechanism whereby, if there is a 'real risk' that a person is being exposed to crimes which would violate the Rome Statute, asylum can be claimed on that basis. The severity of the crimes alone will generally satisfy the test of persecution in article 1A(2), but if the requisite link to a Convention ground cannot be established, then complementary protection should ensue.<sup>145</sup> It is not suggested that the same standard of proof or criminal intent apply in the protection context, but rather that, in sourcing complementary legal bases for international protection, the types of acts determined to be the most serious crimes under international law are highly relevant.

The temporary protection regime that was established in Europe in response to the conflict in Bosnia-Herzegovina effectively operated along these principles, although it was predicated on a mass influx situation rather than individual cases of flight. While a grant of asylum cannot prejudice any subsequent criminal prosecution of the perpetrators, it is preferable to take preventative action during the conflict where possible. If not, then it could be argued that the State has failed in its duty under the Rome Statute by failing to protect persons exposed to dangers of serious criminal actions. Given the seriousness of crimes covered by the Rome Statute, there would seem to be an even stronger duty on States to protect persons at risk of becoming victims to such crimes. Since 'States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence

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<sup>145</sup> Note that the Rome Statute also defines 'persecution'. The definition there, although requiring intent, may encompass a wider scope: 'the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity': art 7(2)(g). The Convention ground element is represented by the broader notion of group identity, rather than exhaustively enumerated as in art 1A(2), while the concept of 'persecution' is explained as the 'severe deprivation of fundamental rights'.

causing arbitrary loss of life',<sup>146</sup> returning aliens to States in the midst of war or generalized violence may breach this 'supreme duty'.<sup>147</sup>

Given the low rate of conviction under the Statutes of the ICTY and ICTR, it is likely that the Rome Statute will have a similarly weak enforcement rate. Thus, it may be that by protecting populations from probable breaches of the Rome Statute, as they are occurring, that the international community can best give effect to its commitments under that instrument.

## **7 Broader Human Rights Application?**

The original paragraph (b) of the Directive provided that serious (and at that time, unjustified) harm could consist of a 'violation of a human right, sufficiently severe to engage the Member State's international obligations'. The precise scope of this was unclear, since the meaning of 'sufficiently severe' is not a term of international law and was not explained in the Explanatory Memorandum beyond the following:

This subparagraph relates to the well-founded fear of a violation of other human rights. When considering granting subsidiary protection status on the basis of this ground Member States shall have full regard to their obligations under human rights instruments, such as the ECHR, but shall limit its applicability only to cases where the need for international protection is required. In particular they should consider whether the return of an applicant to his or her country of origin or habitual origin [sic] would result in serious unjustified harm on the basis of a violation of a

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<sup>146</sup> HRC 'General Comment 6: The Right to Life' (30 April 1982).

<sup>147</sup> S Taylor 'Australia's Implementation of Its Non-Refoulement Obligations under the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights' (1994) 17 UNSW LJ 432, 447.

human right and whether they have an extraterritorial obligation to protect in this context.<sup>148</sup>

On its face the original article 15(b) was very broad, requiring States to have ‘full regard’ to their human rights obligations, limited only by the condition that ‘international protection is required’. The meaning of this caveat seems to be explained by the next sentence: that in particular, although not exclusively, States must consider not only whether serious harm would result, but whether the State has an extraterritorial obligation to protect in the particular context. The European Court of Human Rights has affirmed that the concept of ‘jurisdiction’ in article 1 ECHR extends beyond the national territory of Member States when ‘acts of their authorities, whether performed within or outside national boundaries ... produce ... effects outside their own territory’.<sup>149</sup> Extraterritoriality is not limited to a specified set of provisions. It would appear that its scope could be very wide indeed, potentially applying to all the substantive articles of the ECHR as well as to other international treaty obligations. This is analysed in Chapter 4.

In determining whether a violation of a human right was ‘sufficiently severe to engage the Member State’s international obligations’, the key question would have been whether the human right in question was so fundamental as to entail a *non-refoulement* obligation. Amendments to the provision supported this interpretation. The first amendment, whereby the provision became paragraph (d), provided that

[a]cts outside the scope of litra a – c and sufficiently severe to otherwise force an applicant to leave or stay outside his or her country, or in the case

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<sup>148</sup> Explanatory Memorandum (n18) 26. See also CM Recommendation R (2001) 18 (n2) [1], which recommends subsidiary protection ‘for other reasons recognised by the legislation or practice of the member state’.

<sup>149</sup> *Loizidou v Turkey* (1995) 20 EHRR 90 [62].

of stateless persons, his or her country of former habitual residence, when such acts entitle the applicant to protection against refoulement in accordance with the international obligations of Member States,<sup>150</sup>

while the second (and last prior to deletion) referred to acts ‘and treatment’ otherwise outside the scope of article 15 that were ‘sufficiently severe to entitle the applicant to protection against refoulement in accordance with the international obligations of Member States.’<sup>151</sup> The addition of ‘treatment’ indicated that the provision was to apply only to man-made situations.<sup>152</sup>

Amnesty was ‘highly concerned’ by this version of article 15(d) because it did not allow for flexibility in conferring extraterritorial effects on international human rights norms apart from torture, which was already incorporated in the Directive. This would mean that persons who could not be removed due to other provisions of the ECHR, such as articles 6 and 8, would not fall within the scope of the Directive.<sup>153</sup> This is despite the European Court of Human Rights’ finding that expelling an individual could, in certain circumstances, constitute a breach of article 6<sup>154</sup> or 8.<sup>155</sup> A Presidency Note confirmed that cases in which the European Court of Human Rights had ruled that an expulsion separating a person from family members residing in the expelling State breached article 8 ECHR, would not be covered by paragraph (d), since the act did not occur in the country of origin.<sup>156</sup>

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<sup>150</sup> 11356/02 COR 1 ASILE 40 (n75) new art 15.

<sup>151</sup> 12199/02 ASILE 45 (n30) art 15.

<sup>152</sup> 12148/02 ASILE 43 (n51) 7.

<sup>153</sup> Amnesty International (n40) 7.

<sup>154</sup> *Soering* (n86) [113].

<sup>155</sup> eg *Beljoudi v France* (1992) 14 EHRR 801.

<sup>156</sup> 12148/02 ASILE 43 (n51) 7.

Speculation on this question is in any case academic in the context of the Directive, since the provision has now been deleted.<sup>157</sup> However, it is extremely important for assessing the potential of human rights protections for asylum-seekers and identifying which rights may in fact be invoked as alternative source of complementary protection.

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

It seems absurd to exclude known protection categories from the ambit of the Directive: persons either not encompassed by the Directive’s definitions or excluded by its narrow scope. Doing so does not delete such categories, but simply recasts the class of non-removables with an ill-defined legal status. As Vedsted-Hansen notes, ‘they are likely to end up in a kind of *tolerated* situation in the actual Member State that may be prohibited from deporting them.’<sup>158</sup> At the domestic level, it might be possible to argue that such persons ought to receive subsidiary protection status since they are in an analogous situation to currently delineated beneficiaries, (paralleling the extension of protection offered to ‘de facto refugees’ in the past). However, given the lack of latitude

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<sup>157</sup> Deleted by 12620/02 ASILE 54 (n74).

<sup>158</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 (ed) (n10) 76.

in the Directive to protect additional groups, the outcome may be a hardening of the law on the defined subsidiary protection categories, and a reluctance to grant similar protection to persons outside those categories who, ironically, may have had a better claim to protection prior to the introduction of the Directive. While this is not a reason to abandon the harmonization attempt, it highlights the problems with narrowing down the scope of subsidiary protection too far.

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

Finally, it should be noted that article 37 requires Member States to propose any amendments to the Directive by 10 April 2008, and that article 15 is listed as a priority in this respect. The insertion of such a *rendez-vous* clause was recommended by Cion in direct response to the removal of the broader human rights provision.<sup>159</sup> Member States argued that they wanted to ‘test’ the operation of harmonized subsidiary protection before formally expanding human rights grounds for protection at the EU level, thereby retaining their discretion to regulate other human rights-based protection. However,

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<sup>159</sup> 12382/02 ASILE 47 (n85).

given the difficulties in achieving agreement on the present definition, substantial amendments are unlikely.<sup>160</sup>

## C SUBSIDIARY PROTECTION EXCLUSION CLAUSES

The Directive's exclusion clauses are divided into two parts. Article 12 (formerly article 14), based on article 1F of the Convention, deals with exclusion of persons from refugee status. Article 17 creates grounds for exclusion from subsidiary protection status, which has not been the subject of previous legal regulation at an international level. This section considers the exclusion clauses for subsidiary protection, highlighting differences between them and the refugee exclusion clauses.

### 1 Absolute Protection?

Unlike the human rights provisions on which subsidiary protection grounds are based, *non-refoulement* for a subsidiary protection reason is not absolute in character. Accordingly, even though article 3 ECHR is a non-derogable provision, its equivalent in article 15(b) is subject to the exclusion clauses in article 17. Although this means that persons excluded under the Directive are not eligible for subsidiary protection, they

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<sup>160</sup> It should be noted, however, that the Commission has been mandated to present a proposal on the right to long-term residence status for beneficiaries of subsidiary protection, excluded from the Council Directive 2003/109/EC of 25 November 2003 concerning the Status of Third-Country Nationals Who Are Long-Term Residents [2004] OJ L16/44. It is considering dealing with this issue within the Qualification Directive, due to perceived advantages in the political process (co-decision between the European Parliament and the Council, rather than the Council alone, and by Qualified Majority Voting in the Council, rather than unanimity). Accordingly, should the Commission present a new proposal for a Qualification Directive, incorporating long-term residence provisions, then nothing prevents the reform of other provisions as well.

cannot be removed if regional or international law prohibits *refoulement* in the circumstances. The effect of the exclusion clauses is therefore to deny the status and content of subsidiary protection to certain persons.

Given that States cannot remove some individuals regardless of their conduct, Germany and Sweden thought that States should have the discretion to provide residence permits to excluded persons in some cases, such as if a person would risk torture if returned to his or her country of origin.<sup>161</sup> A new paragraph was proposed that read:

In the case where a third country national or a stateless person in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of formal habitual residence, would face a real risk of suffering serious harm as defined in Article 15 (a) and (b) and is unable or, owing to such risk, is unwilling to avail himself or herself of the protection of that country, a Member State may grant the person subsidiary protection status, residence permit and other rights, should it be in compliance with the Member States' international obligations.<sup>162</sup>

However, the Chair believed this issue could be solved by article 3 (then article 4), which permits States to implement more favourable provisions, and by recital 9 of the Preamble which reads:

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

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<sup>161</sup> 12199/02 ASILE 45 (n30).

<sup>162</sup> 13648/02 ASILE 61 (n74) 26 fn 1.

This recital is problematic if considered to apply to persons who cannot under any circumstances be removed, since it characterizes such persons as ‘compassionate or humanitarian’ cases subject to States’ discretion, rather than as protected absolutely by international law (such as article 3 ECHR). Although such a recital can in no way undermine the legal force of a provision such as article 3 ECHR, it leaves standards of treatment for persons protected by *non-refoulement* but outside the scope of the Directive to the whim of various States. Thus, while some aspects of human rights-based protection have been harmonized by the Directive, the creation of subsidiary protection exclusion clauses has effectively divided the concept so that the content of protection for persons with an international protection need but excluded from the Directive remains undefined—a legal limbo.

## **2 Operation of the Exclusion Clauses**

Two of the Convention’s exclusion clauses, articles 1F(a) and (c), have been adopted in the Directive and apply to both refugee and subsidiary protection statuses. They deny protection to persons who have ‘committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes’,<sup>163</sup> or who have been ‘guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations’.<sup>164</sup>

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<sup>163</sup> Directive arts 12(2)(a), 17(1)(a).

<sup>164</sup> Directive arts 12(2)(c), 17(1)(c).

Article 1F(b) of the Convention, which denies protection to any person who has ‘committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee’ is applied to refugees under the Directive.<sup>165</sup> However, an additional coda in article 12(2)(b) explains that this means ‘the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes’.

The ‘serious crime’ exclusion is even broader for subsidiary protection status. The original draft was identical to article 1F(b) of the Convention, except that neither the refugee nor subsidiary protection status exclusion clauses at that time required the crime to have been committed ‘outside the country of refuge’, reflecting article 33(2) of the Convention.<sup>166</sup> However, unlike article 1F(b) of the Convention and article 12(2)(b) of the Directive, which refer to ‘a serious non-political crime’, article 17(1)(b) now requires only that the applicant has committed a ‘serious crime’. By implication, this encompasses both non-political *and* political crimes.

The term ‘serious non-political crimes’ has its origins in extradition law, but has no universally accepted definition. This means that there can be no automatic presumption of exclusion.<sup>167</sup> Although interpretations vary considerably from State to State, two broad categories of offences regarded as ‘political’ (and hence non-excludable) have developed in State practice: absolute or purely political offences, and relative or

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<sup>165</sup> Directive art 12(2)(b).

<sup>166</sup> This element was reinserted into the refugee exclusion clause: Directive art 12(2)(b).

<sup>167</sup> G Gilbert ‘Current Issues in the Application of the Exclusion Clauses’ in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP Cambridge 2003) 439.

related political offences.<sup>168</sup> The first describes acts that directly interfere with the integrity or security of the State, but not with other individuals' rights, such as treason. Delineating the boundaries of the second category is more complicated, since it encompasses common crimes committed with some political motivation. In determining whether or not such a crime is 'political', its political nature must dominate over its common criminal character.<sup>169</sup> Matters that may be taken into account include whether the act has occurred in connection with a violent struggle for political power in the State, or in the context of a movement that seeks to alter the balance of power within the State; whether the crime has been motivated by political ideology; and whether the means employed are proportionate to the political objectives pursued.<sup>170</sup> If the acts are grossly disproportionate to the aim, or are of an atrocious or barbaric nature, then they may be excluded from the 'political crime' tag.<sup>171</sup> Additionally, the UNHCR Handbook notes that a 'serious crime' in the context of article 1F(b) of the Convention 'must be a capital crime or a very grave punishable act. Minor offences punishable by moderate sentences are not grounds for exclusion under Article 1 F (b) even if technically referred to as "crimes" in the penal law of the country concerned.'<sup>172</sup>

Even though the precise character of a political crime is indeterminate under international law, excluding a person from refugee status under the Convention and the Directive at least requires the decision-maker to consider the nature of the crime and be able to justify his or her decision as to its character. By contrast, no such deliberation is

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<sup>168</sup> N Keijzer 'The Political Offence Exception in Extradition Law' in PJ van Krieken (ed) *Refugee Law in Context: The Exclusion Clause* (TMC Asser Press The Hague 1999) 163.

<sup>169</sup> GS Goodwin-Gill *The Refugee in International Law* (2<sup>nd</sup> edn OUP Oxford 1996) 65, 105.

<sup>170</sup> See predominance test developed by the Federal Court of Switzerland in *Ktir v Ministère Public Fédéral* (1961) 34 ILR 143 and discussed in Keijzer (n168) 164–65.

<sup>171</sup> UNHCR Handbook (n47) [152]; ECRE 'Position on Exclusion' (March 2004) [22].

<sup>172</sup> UNHCR Handbook (n47) [155].

required for exclusion from subsidiary protection. Once it can be shown that a person has committed a ‘serious crime’, there is no need to determine whether or not the crime is political or non-political in nature.

Accordingly, subsidiary protection is not available to any person excluded from Convention (or Directive) refugee status. In this respect, subsidiary protection does not function as a residual status, since more people are excluded from subsidiary protection than from refugee status.

### **3 Wider Exclusion from Subsidiary Protection**

An additional exclusion clause, which is not part of the refugee exclusion clauses in the Convention or Directive,<sup>173</sup> but has its basis in the exception to *non-refoulement* in article 33(2), precludes from subsidiary protection status any person who ‘constitutes a danger to the community or to the security of the country in which he or she is’.<sup>174</sup> While a merger of article 33(2) with the refugee exclusion clauses was ultimately acknowledged as being inconsistent with the Convention,<sup>175</sup> the lack of an international instrument on subsidiary protection meant that no analogous legal argument could be satisfied with respect to subsidiary protection.

Furthermore, article 17(3) allows Member States to exclude an individual from subsidiary protection status

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<sup>173</sup> The Directive would be contrary to international law if it sought to limit the application of the Convention in this respect.

<sup>174</sup> Directive art 17(1)(d), inserted by 12620/02 ASILE 54 (n74).

<sup>175</sup> 12620/02 ASILE 54 (n74) 19 fn 2; See also the view of the UK government in House of Commons (n70) [6.22]; Feller (n47) 5; Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum on 5–6 November 2002 13623/02 ASILE 59 (30 October 2002) 3.

if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes.

This provision has no parallel in the Refugee Convention.

Finally, recital 22 of the Directive excludes persons instigating or otherwise participating<sup>176</sup> in terrorist acts from protection:

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

This is particularly problematic since ‘terrorism’ is not defined in international law. A person excluded from refugee status on this basis will necessarily be excluded from subsidiary protection status, since in addition to article 17(1)(c), article 17(1)(b) excludes any person who has committed a ‘serious crime’.

It is therefore clear that subsidiary protection is not necessarily a fallback status for unsuccessful refugee claimants. Its exclusion clauses have a far wider reach than those for refugees, which are restricted in accordance with the provisions of the Convention.

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<sup>176</sup> Directive art 12(3).

## D THE CONTENT OF INTERNATIONAL PROTECTION: SUBSTANTIVE RIGHTS

The political compromises needed to secure all Member States' agreement on the final text of the Directive have resulted in a more greatly differentiated and diluted set of substantive rights for beneficiaries of subsidiary protection than in the original proposal, which had already been criticized for failing to grant equivalent treatment to refugees. Germany's acceptance of article 6 (on subsidiary protection status and non-State actors of persecution) effectively turned on other Member States accepting its proposals to limit the entitlements of beneficiaries of subsidiary protection with respect to social assistance, health care and access to employment.

In May 2003, Germany still had 12 reservations in place on social rights and integration provisions. German commentators noted that the German government would like to have established EU subsidiary protection at the level of *Duldung* (tolerance), described as 'a non-status on the level of immigration rights'.<sup>177</sup> The Refugee Council (UK) rightly feared that Member States might submit to German demands simply to have the text agreed by the new deadline of April 2004.<sup>178</sup> As at September 2003, 14 of the 15 Member States had agreed on the text of the Directive, but Germany refused to agree and postponed further negotiations for a period of time.<sup>179</sup> Three meetings in March 2004

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<sup>177</sup> Pro Asyl 'Council for Justice and Home Affairs in Brussels: Common EU Asylum System in Danger of Falling through because of Germany: Appeal to Chancellor Schroeder and Foreign Minister Fischer to Withdraw the German Reservations' (8 May 2003) <[www.proasyl.de/presse03/mai08.htm](http://www.proasyl.de/presse03/mai08.htm)> (6 September 2003). On Germany's insistence: Third UNHCR Working Group on EU Asylum and Migration Harmonization 'Summary of the Most Important Points of the Proposal for Council Directive on Minimum Standards for the Qualification of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted' (21 May 2003) <[www.unhcr.bg/events\\_records/2003/3unhcr\\_wg.pdf](http://www.unhcr.bg/events_records/2003/3unhcr_wg.pdf)> (24 March 2004).

<sup>178</sup> Refugee Council (UK) 'International Protection Project Update' (September 2003) 2.

<sup>179</sup> Refugee Council (UK) 'Refugee Council Briefing on the Common European Asylum System' (March 2004) <[www.refugeecouncil.org.uk/downloads/briefings/intl/common\\_euro.pdf](http://www.refugeecouncil.org.uk/downloads/briefings/intl/common_euro.pdf)> (13 April 2003) 13.

ultimately secured agreement on a text which accepted many of the German demands, finalized on 31 March 2004.

Legally, there is no reason why the source of protection should require differentiation in the rights and status accorded to a beneficiary. UNHCR has stated that rights and benefits should be based on need rather than the grounds on which a person has been granted protection, and that there is accordingly no valid reason to treat beneficiaries of subsidiary protection differently from Convention refugees.<sup>180</sup> Numerous other advocates have stressed the importance of treating refugees and beneficiaries of subsidiary protection equally.<sup>181</sup>

The Home Office's memorandum to the House of Lords inquiry into the Directive clearly explains why there should be little or no difference between the two statuses: '[a]n individual's needs are the same regardless of the status granted; it would help limit the number of appeals by those refused refugee status but granted subsidiary protection',<sup>182</sup> (although the Refugee Council (UK) notes that the UK government shifted its position later in negotiations to the extent that it became 'instrumental in lowering the entitlements of people with subsidiary protection status'<sup>183</sup>).

The House of Lords Select Committee noted further that:

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<sup>180</sup> UNHCR's Observations (n26) [46]; UNHCR 'Note on Key Issues' (n102) 2.

<sup>181</sup> eg Amnesty International Irish Section 'The Case for Complementary Protection' (January 2003) <[www.amnesty.ie/act/refug/protection.shtml](http://www.amnesty.ie/act/refug/protection.shtml)> (6 September 2003); Refugee Council (UK) 'Refugee Council's Response to the Home Office Consultation on Changes to the Policy of Issuing of Certificates of Identity' (February 2003)

<[www.refugeecouncil.org.uk/downloads/policy\\_briefings/cid\\_traveldocs.pdf](http://www.refugeecouncil.org.uk/downloads/policy_briefings/cid_traveldocs.pdf)> (12 April 2004).

<sup>182</sup> 'Explanatory Memorandum Submitted by the Home Office on Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection (2001/0207 (CNS))' in Minutes of Evidence Taken before the EU Committee (Sub-Committee E) [22], in House of Lords (n40) Oral Evidence 63.

<sup>183</sup> Refugee Council (n179) 12.

We urge the Government to push for the extension of the same rights to everybody entitled to international protection. Not only would this remove an apparently unjustified discrimination between Geneva Convention refugees and beneficiaries of subsidiary protection, it would also, as the Government itself recognises, have practical advantages. It would help limit the number of appeals by those refused refugee status but granted subsidiary protection.<sup>184</sup>

Equivalent treatment would not only reduce fragmentation of the international protection regime but might also minimize the number of appeals against refusal of Convention status by persons seeking to obtain the full set of rights which that encompasses.<sup>185</sup> Furthermore, Member States should recognize that the enjoyment of these rights does not necessarily require permanent settlement, but, conversely, that shorter residence permits for persons with subsidiary protection status cannot be justified by an assertion that subsidiary protection is, by nature, more temporary than refugee protection, since this is plainly not always the case. Given the lack of empirical evidence to support subsidiary protection as a temporary status, it has been strongly criticized as ‘a poor reason for a lesser standard of treatment.’<sup>186</sup>

The European Parliament, in its Explanatory Statement to its amendments to the Commission proposal, noted that differences between the rights accorded to refugees vis-à-vis beneficiaries of subsidiary protection were arbitrary, particularly as the statuses were supposed to be ‘complementary rather than hierarchical.’<sup>187</sup> Furthermore, as noted by the European Parliament Committee on Women’s Rights and Equal Opportunities,

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<sup>184</sup> House of Lords (n40) 27 [111].

<sup>185</sup> UNHCR ‘Some Additional Observations’ (n71) 8.

<sup>186</sup> Goodwin-Gill and Hurwitz (n68) [19].

<sup>187</sup> European Parliament (n32) 54.

minimum standards should not be considered merely as a means of survival, but should give beneficiaries a right to the provision of the conditions required for full citizenship.<sup>188</sup>

## **1 Maintaining Family Unity (Article 23)<sup>189</sup>**

‘Family members’ were originally defined in article 2(j), now 2(h), of the Directive as

- (i) the spouse of the applicant or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples;
- (ii) the children of the couple referred to in point (i) or of the applicant alone, on condition that they are unmarried and dependent and without distinction as to whether they were born in or out of wedlock or adopted;
- (iii) other close relatives who lived together as part of the family unit at the time of leaving the country of origin, and who were wholly or mainly dependent on the applicant at that time.

The final definition is considerably narrower. First, in order to benefit from the Directive’s provisions, the family must have already existed in the country of origin and its members must be present in the same Member State as the primary applicant seeking protection.<sup>190</sup> This means that protection is unavailable under the family provisions to spouses or partners met, and children born, since the applicant left the country of origin. Similarly, if an applicant obtains protection before his or her family arrives in the host

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<sup>188</sup> Contained in *ibid* 58.

<sup>189</sup> Formerly art 21. For a recent, comprehensive examination of the law in this area: K Jastram and K Newland ‘Family Unity and Refugee Protection’ in Feller, Türk and Nicholson (eds) (n167) 555.

<sup>190</sup> Inserted by 10596/02 ASILE 36 (n30).

State, then those family members are ineligible for protection under the family provisions of the Directive.<sup>191</sup>

Secondly, ‘children’ in sub-paragraph (ii) must now be minors; the law applicable to ‘unmarried couples’ is the law relating to aliens, rather than general national legislation; and the category of ‘other close relatives’ has been removed. These changes were based on the definition in article 2(d) of the draft Procedures Directive<sup>192</sup> and were adopted early in the revision process, despite some resistance.<sup>193</sup> For example, one delegation suggested that an alternative to the ‘other close relatives’ category could be ‘first degree relatives in direct ascending line and the adult unmarried children when they are dependent on the qualified beneficiary of international protection’,<sup>194</sup> but this too was rejected. In the same way that the Directive’s preference for internal cross-referencing avoids explicit recognition of international legal obligations, using yet-to-be-adopted Directives as a justification for narrowing down the scope of another Directive is circular and self-serving. While consistency is important, it does not excuse reliance on provisions in embryonic regional legislation rather than international law to justify restrictive legal drafting.

The original draft extended all the Directive’s rights to accompanying family members,<sup>195</sup> granting beneficiaries the same status as the primary applicant<sup>196</sup> and the same length resident permit.<sup>197</sup> It was a derivative status that applied to a comparatively

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<sup>191</sup> They could only obtain Directive-based protection if they made successful independent claims for protection. See Amnesty’s criticism of this: Amnesty International (n40).

<sup>192</sup> Amended Proposal (n34).

<sup>193</sup> 7882/02 ASILE 20 (n31); 9038/02 ASILE 25 (n31); see reservations in 10596/02 ASILE 36 (n30).

<sup>194</sup> 10596/02 ASILE 36 (n30).

<sup>195</sup> Original arts 3, 18(2).

<sup>196</sup> Original art 6(1).

<sup>197</sup> Original art 21.

wider range of beneficiaries.<sup>198</sup> The Directive is now considerably more limited in its application to ‘family members’. As already noted, the scope of the category has been curtailed, and the extension of protection to other family members has become discretionary, relocated to article 23(5):

Member States may decide that this Article also applies to other close relatives who lived together as part of the family at the time of leaving the country of origin, and who were wholly or mainly dependent on the beneficiary of refugee or subsidiary protection status at that time.

Article 23(1) requires Member States to ‘ensure that family unity can be maintained’.<sup>199</sup> Article 23(2) entitles family members, as defined in article 2(h), to claim the benefits contained in articles 24 to 34 in accordance with national procedures and to the extent that is compatible with their personal legal status. Protection can be denied if a family member would be excluded from refugee or subsidiary protection status under the Directive, however article 23(4) also permits Member States to refuse, reduce or withdraw benefits ‘for reasons of national security or public order’. These highly discretionary notions could enable States to limit their obligations for a wide range of reasons without further justification.

While article 23(2) on its face appears relatively liberal, the remainder of the provision enables Member States to considerably restrict its application. First, Member States ‘may define the conditions applicable to such benefits’ with respect to the family members of beneficiaries of subsidiary protection. This appears to be based on

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<sup>198</sup> Contrast original art 2(j) to present art 2(h).

<sup>199</sup> Inserted by 10576/03 ASILE 40 (19 June 2003).

Germany's urging that the extension of such benefits ought to be entirely discretionary.<sup>200</sup>

Secondly, in these cases, the level of the benefits must simply 'guarantee an adequate standard of living'. An indication as to how this phrase should be interpreted is provided by recital 29, which states:

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

During the drafting it was also noted that the level of rights should not be lower than those granted pursuant to the Directive laying down Minimum Standards for the Reception of Asylum Seekers.<sup>201</sup> However, the phrase 'fair in comparison' implies that the rights will be less than those accorded to beneficiaries of subsidiary protection.

Only family members of refugees are entitled to a residence permit under article 24. The original proposal entitled all family members (which, it will be recalled, was in any case a wider class than presently) to a residence permit, the length of which was the same as the primary applicant (five years for refugee status and one year for subsidiary protection status). Germany opposed the provision of residence permits to family members of beneficiaries of subsidiary protection,<sup>202</sup> and ultimately the right was removed.<sup>203</sup> Family members of refugees retain the right to such a permit, although by contrast to the primary applicant's permit of at least three years, it may be valid for less

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<sup>200</sup> 6566/03 ADD 1 ASILE 10 (24 February 2003); 10576/03 ASILE 40 (n199).

<sup>201</sup> Council Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers [2003] OJ L31/18, as cited in 8919/03 ASILE 29 (12 May 2003).

<sup>202</sup> 6566/03 ADD 1 ASILE 10 (n200).

<sup>203</sup> 10576/03 ASILE 40 (n199).

than three years.<sup>204</sup> Some delegations consistently argued that family members should have to submit an independent application for protection, but this was rejected.<sup>205</sup>

The Directive effectively creates two new categories in its protection hierarchy.<sup>206</sup> Refugee status within the Directive framework is superior to subsidiary protection status, which is superior to the status granted to family members of refugees, which in turn is superior to the status granted to family members of beneficiaries of subsidiary protection. The status accorded to family members is thus considerably more limited than envisaged in the original draft, both in terms of eligibility as well as substantive rights. This is by contrast to the derivative status which has long been advocated by UNHCR for family members of refugees. As UNHCR noted during the drafting process:

The exceptional circumstances in which the principle of family does not automatically lead to the granting of derivative refugee status is when family members are applicants for asylum in their own right or when this would be incompatible with the personal status of the family member, e.g. because he or she possesses a different nationality.<sup>207</sup>

Finally, ECRE has expressed concern that the Directive does not expressly contain a right to family reunion, especially since beneficiaries of subsidiary protection are excluded from the application of the Family Reunion Directive.<sup>208</sup>

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<sup>204</sup> Directive art 24(1).

<sup>205</sup> 7882/02 ASILE 20 (n31), 9038/02 ASILE 25 (n31), 10596/02 ASILE 36 (n30).

<sup>206</sup> It implicitly creates yet another category—persons who are not eligible for protection under the Directive but whom States cannot remove due to their international obligations. Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [2003] OJ L251/12 expressly excludes family members of beneficiaries of subsidiary or temporary protection: art 3(2).

<sup>207</sup> UNHCR ‘Some Additional Observations’ (n71) 3.

<sup>208</sup> ECRE ‘Information Note on the Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted’ (October 2004) IN1/10/2004/ext/CN.

## 2 Residence Permits (Article 24)<sup>209</sup>

Whereas the original draft required residence permits to be issued ‘as soon as’ status had been granted, the new version is subtly different by requiring that permits be issued ‘as soon as possible’ after status has been granted. This applies to both refugees and to beneficiaries of subsidiary protection. Similarly, whereas the original provided that such permits were to be renewable *automatically*, Spain, Finland, Luxembourg and the Netherlands objected to this wording and the final version states only that they be renewable.<sup>210</sup>

The main substantive changes relate to *a*) the length of the permit and *b*) the rights of family members to residence. In the original proposal, refugees and their accompanying family were granted a residence permit of ‘at least five years’, while beneficiaries of subsidiary protection and their accompanying family members received a permit valid for ‘at least one year’. The European Parliament unsuccessfully proposed equivalent treatment to refugees with a permit ‘valid for at least *five years and automatically renewable*’, arguing that

[p]ersons with complementary protection status should be treated in terms of duration of protection in the same way as Refugee Convention refugees bearing in mind that both categories of protected persons have similar needs and circumstances and that successful integration into the asylum country requires a status that enables persons to develop a sense of long-term perspective for the future.’<sup>211</sup>

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<sup>209</sup> Formerly art 22.

<sup>210</sup> See 12199/02 ASILE 45 (n30), wording deleted 6566/03 ADD 1 ASILE 10 (n200).

<sup>211</sup> European Parliament (n32) Amendment 66.

Since Convention status is itself contemplated as temporary, there is no legal reason for distinguishing between the length of residence permit granted to Convention refugees vis-à-vis beneficiaries of subsidiary protection. The Netherlands argued for a three year rather than a five year permit, which was ultimately adopted with respect to refugees. However, despite some delegations stating that they would only accept the reduction to three years for refugees if the length of a permit for beneficiaries of subsidiary protection were raised to three years,<sup>212</sup> the one year requirement remained.

The most dramatic amendment to article 24 relates to the rights of family members. Whereas accompanying family members originally received the same entitlement as the primary applicant, under the final version only the family members of *refugees* are provided for (in article 24(1)), and they are entitled to a residence permit that ‘may be valid for less than three years’.<sup>213</sup> It is unclear from the wording whether the permit *must* also be renewable, or whether it *may* be renewable. Rights of family members of beneficiaries of subsidiary protection have been completely eroded, such that there is no longer any reference to them in the provision.<sup>214</sup>

Finally, national security (or ‘terrorism’) clauses have been inserted into both the refugee and subsidiary protection paragraphs, albeit at different points in the drafting process,<sup>215</sup> providing that residence permits will be granted ‘unless compelling reasons of national security or public order otherwise require’. This derogation clause operates distinctly from the more general exclusion clauses in articles 12 and 17 and the exception

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<sup>212</sup> 15627/02 ASILE 82 (19 December 2002).

<sup>213</sup> Inserted by 10576/03 ASILE 40 (n199). Several delegations, including Finland, opposed referring to family members in the same terms as the primary applicant: eg 9945/03 ADD 1 ASILE 32 (28 May 2003).

<sup>214</sup> Deleted by 10576/03 ASILE 40 (n199).

<sup>215</sup> Inserted into art 24(1) by 8919/03 ASILE 29 (n201); inserted into art 24(2) by 15627/02 ASILE 82 (n212).

to *non-refoulement* in article 21. It is unclear what kind of status would attach to a person denied a residence permit for reasons of national security or public order, since recital 30 in the Preamble provides:

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

The effect may be to exclude persons from the Directive through the backdoor. For individuals satisfying the Convention definition, and who cannot otherwise be excluded or returned, international law will provide certain protections (the ‘international obligations’ referred to above). However, for individuals who are only eligible for subsidiary protection, the result may be that they are left in a legal limbo. Although general human rights law provides certain rights for everyone, the content of such protection is minimal and access is in practice frequently restricted by legal status.<sup>216</sup>

Public order and national security are highly discretionary notions. During the drafting of the Refugee Convention, a UK proposal to incorporate a provision permitting derogation from the Convention ‘to such extent only as is necessary in the interests of the national security’ sparked concern, not least due to the potentially wide interpretation that could be given to the vague notion of ‘national security’.<sup>217</sup> The House of Commons Select Committee on European Scrutiny questioned the Minister about the meaning of ‘public order’ in the Directive, specifically whether it meant ‘public policy’ (*ordre*

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<sup>216</sup> For egs of human rights-based protections: Hathaway (n47) 105–17; Ch 6 below.

<sup>217</sup> For UK proposal: AHC ‘United Kingdom: Amendments to Draft Convention relating to the Status of Refugees (E/1618)’ E/AC.32/L.41 (15 August 1950). For debate: AHC ‘Summary Record of the 35<sup>th</sup> Meeting’ (Geneva 15 August 1950) E/AC.32/SR.35 (25 September 1950) 7–11; CP ‘Summary Record of the 28<sup>th</sup> Meeting’ (Geneva 19 July 1951) A/CONF.2/SR.28 (28 November 1951) 4–10.

*public*) or ‘public order in the more strict sense’.<sup>218</sup> The Minister responded that the term is understood by Member States ‘to refer to situations, similar to those of national security, where the public good might be threatened.’<sup>219</sup> This wider definition would encompass public order in the stricter sense, where there is a threat to the structure of society. The Select Committee considered this interpretation appropriate.<sup>220</sup>

Although ‘national security’ and ‘public order’ remain undefined in the Directive, recital 28 in the Preamble stipulates that:

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

It may be that a person will have already been excluded under article 17(1)(d)—‘he or she constitutes a danger to the community or to the security of the Member State in which he or she is present’—or 21(2)(a)—‘there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present’—but it might also be the case that the person cannot be returned for reasons of national security or public order which are not personal to the applicant, but rather reflect a broader state of affairs (such as treatment of foreign nationals during war). Furthermore, the Directive explicitly incorporates through recital 22 that acts of terrorism are acts contrary to the purposes and principles of the United Nations. UNHCR rightly

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<sup>218</sup> House of Commons Select Committee on European Scrutiny *Twenty-Second Report of Session 2002–03* (The Stationery Office London 13 June 2003) <[www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxii/63-xxii.pdf](http://www.publications.parliament.uk/pa/cm200203/cmselect/cmeuleg/63-xxii/63-xxii.pdf)> (25 February 2004) [14.5].

<sup>219</sup> *ibid* [14.8].

<sup>220</sup> *ibid* [14.10].

observed that a direct reference in the Directive to ‘terrorism’ is problematic, since the term is without a clear or universally agreed definition.<sup>221</sup>

There remains one final, crucial point about recital 30. By allowing Member States to use residence permits as a precondition for other substantive benefits, article 24 effectively becomes a threshold right on which other rights are contingent. Accordingly, delays in processing residence permits, which only have to be issued ‘[a]s soon as possible after ... status has been granted’, may mean that access to the substantive rights of access to employment, social welfare, health care and access to integration facilities is provisionally denied.

Although awarding a residence permit is a separate act from recognizing refugee status, in practice the two are generally linked, so that rights tend to flow from that point of residence as though it were the point of legal recognition of refugee status. Conversely, cessation of residence may not necessarily be a cessation of refugee status, which raises further legal complications.<sup>222</sup>

### **3 Travel Document (Article 25)<sup>223</sup>**

Under article 25, refugees are entitled to Convention travel documents. By contrast, beneficiaries of subsidiary protection are entitled to a travel document only if they are ‘unable to obtain a national passport’, and potentially only in limited circumstances—‘at

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<sup>221</sup> UNHCR ‘Note on Key Issues’ (n102) 2.

<sup>222</sup> On this point: J-Y Carlier and D Vanheule (eds) *Europe and Refugees: A Challenge?* (Kluwer Law International The Hague 1997) 697; Goodwin-Gill (n169) 369.

<sup>223</sup> Formerly art 23.

least when serious humanitarian reasons arise that require their presence in another State’.

The Explanatory Memorandum to the original draft explained the first limitation on the basis that consular authorities from the applicant’s country might continue to operate normally, as for example where armed conflict in the country of origin does not prevent their continued work abroad.<sup>224</sup> However, it should also be established whether the national passport in fact provides the beneficiary with the full measure of national protection, such as the right to freely return to the country of issue.<sup>225</sup> Logically, then, in situations where consular authorities no longer exist, where the ‘national passport’ does not provide full protection, or where an applicant’s presence before such authorities could endanger him or her (hence his or her subsidiary protection status), the Member State should provide a travel document.

The second caveat’s stipulation that a travel document be withheld unless ‘serious humanitarian reasons’ require the applicant to travel abroad seems unnecessarily restrictive.<sup>226</sup> Although technically it does not prevent persons from leaving the host State, its practical effect may breach article 12 ICCPR and article 2 of Protocol 4 to the ECHR, which provide that ‘[e]veryone shall be free to leave any country’ except in accordance with laws necessary to protect national security, public order, public health or morals or the rights and freedoms of others.<sup>227</sup> Since passport practices depend largely on domestic rather than international law, it is not always clear whether possession of a

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<sup>224</sup> Explanatory Memorandum (n18) 30.

<sup>225</sup> Goodwin-Gill (n169) 82–83.

<sup>226</sup> Inserted by 5224/03 ASILE 2 (14 January 2003).

<sup>227</sup> ICCPR arts 12(2) and (3); Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol thereto (adopted 16 September 1963, entered into force 2 May 1968) ETS No 46 arts 2(2) and (3).

passport is a prerequisite to travel abroad, although States generally require this of alien travellers.<sup>228</sup> 'Returnability' is an important consideration in a State's decision whether to admit an alien, since some States refuse entry to persons who cannot satisfy immigration officers that they will be admitted to another country after their stay in that country.<sup>229</sup> Indeed, during the drafting of the 1951 Convention, the UK representative observed that the purpose of a travel document is 'to enable a refugee who had no passport to return within a given period to the country that issued his travel document. Without that provision, the refugee would probably not be allowed to enter other countries, for they would hesitate to admit him for fear that they might be obliged to keep him permanently on their territory.'<sup>230</sup> Accordingly, a Member State's refusal to issue a beneficiary of subsidiary protection with a travel document effectively precludes that person from leaving the Member State, since he or she is likely to be refused entry into another State and is not guaranteed re-entry into the EU Member State (although leaving the Member State does not lead to cessation of status).<sup>231</sup> Furthermore, carrier sanctions may mean that airlines and other transport services prevent such a person from boarding their craft.

Finally, the legal position of beneficiaries vis-à-vis non-EU Member States is uncertain, since, unlike a Convention travel document, a subsidiary protection travel document is not recognized under international law. Parties to the Convention are obliged to recognize a Convention travel document, but there is no parallel duty with respect to a subsidiary protection travel document. There was even some concern that a

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<sup>228</sup> GS Goodwin-Gill *International Law and the Movement of Persons between States* (Clarendon Press Oxford 1978) 24–25.

<sup>229</sup> *ibid* 26.

<sup>230</sup> AHC 'Summary Record of the 16<sup>th</sup> Meeting' (30 January 1950) E/AC.32/SR.16 (8 February 1950) [9].

<sup>231</sup> Directive art 16.

travel document issued by one EU Member State might not be accepted by another,<sup>232</sup> although Goodwin-Gill notes that in practice, States tend to accept such documents.<sup>233</sup>

#### **4 Access to Employment (Article 26)<sup>234</sup>**

Access to employment is a sensitive political issue in the EU, as previous Council deliberations on other asylum legislation have reinforced.<sup>235</sup> Discussions in the Asylum Working Party indicated that there was no opposition to providing access to refugees, but there were differences of opinion among delegations with respect to beneficiaries of subsidiary protection, some wanting to retain discretion to regulate access to the labour market.<sup>236</sup>

During the drafting process, the standard of treatment under this article was significantly reduced, with the most notable amendments occurring with respect to employment opportunities for beneficiaries of subsidiary protection. One positive change was to grant such persons immediate access to employment after subsidiary protection status has been granted, rather than requiring them to wait up to six months, as allowed by the original proposal.<sup>237</sup> However, as is explained below, this ‘gain’ may be outweighed by the ability of Member States to take labour market policies into account.

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<sup>232</sup> Memorandum by Statewatch (8 March 2001 [sic 2002]) [9] in House of Lords (n40) Oral Evidence 46. Nicholas Blake also noted that France used to recognize the UK’s temporary protection documents, but as at May 2002, had stopped doing so: Oral Evidence of N Blake [200] in House of Lords (n40) Oral Evidence 59.

<sup>233</sup> Oral Evidence of GS Goodwin-Gill [62] in House of Lords (n40) Oral Evidence 10.

<sup>234</sup> Formerly art 24.

<sup>235</sup> Presidency Note (n8) 4.

<sup>236</sup> *ibid.*

<sup>237</sup> The European Parliament pressed for this change: European Parliament (n32) Amendment 69. It noted that: ‘Employment restrictions upon status determination seriously hinder refugee integration in the long term as they risk pushing people into illegal work or encouraging dependency on public assistance.’

Whereas the original proposal prescribed employment for refugees and beneficiaries of subsidiary protection ‘under the same conditions as nationals’,<sup>238</sup> their access to employment is now ‘subject to rules generally applicable to the profession and to the public service’.<sup>239</sup>

A further reduction in rights relates to subsidiary protection beneficiaries’ access to employment-related education opportunities, vocational training and practical workplace experience. Originally, Member States had to provide these ‘under the same conditions as nationals no later than one year after such status is granted’,<sup>240</sup> whereas the current article 26(4) states that access will be determined ‘under conditions to be decided by the Member States’.

The provision that has undergone the most dramatic change is the second half of paragraph 3, which provides that in authorizing beneficiaries of subsidiary protection to engage in employment,

[t]he situation of the labour market in the Member States may be taken into account, including for possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law. Member States shall ensure that the beneficiary of subsidiary protection status has access to a post for which the beneficiary has received an offer in accordance with national rules on prioritisation in the labour market.

This is in contrast to refugees’ access to employment, which contains no such proviso. Finland and Sweden believed that beneficiaries of subsidiary protection should enjoy

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<sup>238</sup> Original arts 24(1) and (3).

<sup>239</sup> Directive arts 26(1) and (3).

<sup>240</sup> Original art 24(4).

similar working conditions as refugees,<sup>241</sup> while another delegation argued for direct access to work for both statuses.<sup>242</sup> France believed the same conditions regarding access to employment should be established for all third country nationals legally resident.<sup>243</sup> There is no legal reason why conditions should be different for the two protection categories. Instead, the result is a political arrangement.

Both Austria and Germany wanted labour market considerations to be able to be taken into account in determining the conditions under which beneficiaries of subsidiary protection could access employment.<sup>244</sup> Austria opposed wording that labour market policies could only be taken into account for up to one year, arguing for deletion of a time limitation or an extension of it to five years.<sup>245</sup> The Netherlands sought a three year limit, which France and Sweden thought was too long,<sup>246</sup> while the German delegation sought to remove all time-bound restrictions.<sup>247</sup> The Chair suggested a solution similar to that reached under article 11(2) of the Reception Conditions Directive, namely that within one year after the subsidiary protection status has been granted, Member States shall decide the conditions for granting access to the labour market.<sup>248</sup> The political compromise—that ‘[t]he situation of the labour market in the Member States may be taken into account ... for a limited period of time’—does not cater precisely to Austrian and German tastes, but is perhaps more favourable to the Austrian position than its suggested five year stipulation, since the wording is inherently vague and open to different interpretations,

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<sup>241</sup> 6275/03 ADD 1 ASILE 9 (13 February 2003).

<sup>242</sup> 15627/02 ASILE 82 (n212).

<sup>243</sup> 6566/03 ADD 1 ASILE 10 (n200) 26 fn 4; 9945/03 ADD 1 ASILE 32 (n213) 26 fn 2; 8858/03 ADD 1, 26 fn 3.

<sup>244</sup> 6566/03 ADD 1 ASILE 10 (n200) 26 fn 2.

<sup>245</sup> *ibid* 26 fn 3.

<sup>246</sup> 7728/04 ASILE 18 (24 March 2004).

<sup>247</sup> 7469/04 ASILE 15 (17 March 2004).

<sup>248</sup> Reference to Reception Conditions Directive (n201); see Chair’s comments in 9945/03 ADD 1 ASILE 32 (n213) 26 fn 2.

and a ‘limited period’ is not necessarily a ‘short period’. The Directive itself therefore no longer stipulates a time limit during which Member States may restrict access to work for beneficiaries of subsidiary protection.

The effect of the labour market clause is to undermine attempts to harmonize substantive rights of beneficiaries of subsidiary protection, since it permits Member States to themselves determine when subsidiary protection beneficiaries will be granted the right to work. It effectively counteracts the benefit of allowing beneficiaries immediate access to employment.

In terms of prioritization, earlier drafts provided that

Member States may give priority to EU citizens and citizens of States bound by the Agreement on the European Economic Area and also to legally resident third-country nationals who receive unemployment benefit.<sup>249</sup>

The current provision is less specific, and implies that prioritization is one of a number of matters that may be taken into account when assessing the situation of the labour market. In the UK government’s view, the Directive obliges Member States to provide beneficiaries of subsidiary protection with access to employment on the day their status is granted, but takes into account the difficulties faced by some Member States by permitting prioritization. The UK regards this as a minimum standard only.<sup>250</sup> It had been proposed to include the following recital in the Preamble, to indicate that although labour market considerations could be taken into account, only in exceptional cases

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<sup>249</sup> 6566/03 ADD 1 ASILE 10 (n200); 10576/03 ASILE 40 (n199).

<sup>250</sup> House of Commons (n218) [14.7].

should they actually impact negatively on subsidiary protection beneficiaries' ability to access work:

The principle of the access of beneficiaries of subsidiary protection status to the labour market, under the conditions set out in this Directive, should be the general rule; however, Member States should be able to examine the situation of their labour markets.<sup>251</sup>

However, this was ultimately deleted.<sup>252</sup>

The new final sentence of paragraph 3 is also restrictive. It means that if the national law of a Member State enforces a waiting period before a foreigner can be given a job, then beneficiaries of subsidiary protection may be required to fulfil that waiting period in case a suitable EU national applies. Such waiting periods are meant to be specific to particular sectors or professions rather than applying universally.

Article 26 may not last long in its present form. A *rendez-vous* clause in article 37 (formerly 35) requires Member States to propose any amendments to the Directive by 10 April 2008, with priority given to articles 15, 26 and 33.

## **5 Social Welfare (Article 28)<sup>253</sup>**

Article 28 on social welfare involved considerable compromise before final agreement was reached. The original draft provided, without exception, that both refugees and beneficiaries of subsidiary protection would receive necessary assistance in terms of social welfare and means of subsistence under the same conditions as nationals.

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<sup>251</sup> 7482/04 ASILE 16 (22 March 2004).

<sup>252</sup> 7944/04 ASILE 21 (n38).

<sup>253</sup> Formerly art 26.

However, while the core of that provision remains, a second paragraph has been added which permits States to ‘limit social assistance granted to beneficiaries of subsidiary protection status to core benefits’, albeit at the same levels and eligibility conditions as nationals. This exception clause was added at Germany’s insistence, which throughout negotiations had sought to differentiate between the entitlements of refugees and beneficiaries of subsidiary protection.<sup>254</sup> A recital indicates that ‘core benefits’ refers to ‘at least minimum income support, assistance in case of illness, pregnancy and parental assistance, insofar as they are granted to nationals according to the legislation of the Member State concerned’, with the ‘modalities and detail’ of their provision to be determined by national law.

A German proposal in February 2003 separated the original concept of ‘necessary assistance in terms of social welfare and means of subsistence’ into two, granting ‘social welfare’ to refugees without sufficient resources for their subsistence, and ‘means of subsistence’ to beneficiaries of subsidiary protection without sufficient resources.<sup>255</sup> This promoted a hierarchical relationship between the two forms of international protection, since social welfare, for refugees, provided more comprehensive benefits than subsistence aid.

Resisting the German distinction, an alternative proposal was put forward three months later by another delegation, stipulating that: ‘The minimum level of assistance granted must not be lower than the assistance granted to asylum seekers in line with Council Directive 2003/9/EC laying down minimum standards for the reception of

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<sup>254</sup> Ultimately, the bulk of Germany’s amendments were adopted. See 7482/04 ASILE 16 (n251).

<sup>255</sup> 6566/03 ADD 1 ASILE 10 (n200).

asylum seekers.<sup>256</sup> However, this drew criticism on the grounds that this would allow Member States to grant the very low level of rights contained in the Reception Conditions Directive,<sup>257</sup> rather than rights equivalent to nationals.

In March 2004, the German delegation issued a note to the Justice and Home Affairs Counsellors, setting out alternative texts to articles 23, 24, 26, 28, 29 and 33.<sup>258</sup> It reiterated in large part the existing text of article 28, but inserted its own amendments in bold:

Member States shall ensure that beneficiaries of refugee status and of subsidiary protection status who do not have sufficient resources to enable their subsistence receive, in the Member State that has granted such statuses, the necessary assistance in terms of social assistance as nationals of that Member State.

**With regard to beneficiaries of subsidiary protection Member States may limit equal treatment with nationals of the Member State in respect of social assistance to core benefits.**

Belgium, France and the Netherlands all preferred an earlier version of the text set out in 10576/03 ASILE 40, which provided equal access to social welfare and subsistence for both refugees and beneficiaries of subsidiary protection.<sup>259</sup> Although the final version of the text includes a recital which seeks to encourage States to provide equal treatment, the operative paragraphs do not require this. Not only does the current provision permit a hierarchical distinction between refugees and beneficiaries of subsidiary protection, but it may also encourage differing practices in Member States, undermining the Directive's aim of harmonization.

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<sup>256</sup> 9945/03 ADD 1 ASILE 32 (n213)

<sup>257</sup> Reception Conditions Directive (n201).

<sup>258</sup> 7469/04 ASILE 15 (n247). Formerly arts 21, 22, 24, 26, 27 and 31.

<sup>259</sup> 10576/03 ASILE 40 (n199).

## 6 Health Care (Article 29)<sup>260</sup>

This was another provision which required significant political compromise. As with article 28, Germany pressed for a distinction between treatment of refugees and beneficiaries of subsidiary protection, and ultimately succeeded.

From early on in the negotiation process, Germany made it clear that it sought distinctions between the different statuses.<sup>261</sup> One of its first suggestions was to grant refugees access to health care ‘under the same conditions as nationals of the Member State’, while limiting access for beneficiaries of subsidiary protection to ‘necessary health care in case of sickness, pregnancy and maternity under the same conditions as nationals’.<sup>262</sup>

As with article 28, there was a proposal to set the minimum level of assistance at that provided by the Reception Conditions Directive,<sup>263</sup> but this was similarly rejected on the grounds that it would set standards too low.

The final version is structured similarly to article 28. Article 29(1) provides the general rule that ‘beneficiaries of refugee or subsidiary protection status have access to health care under the same eligibility conditions as nationals of the Member State that has granted such statuses’. This is almost identical to the original provision, although that required Member States to ensure access to psychological care as well. Instead, reference to psychological treatment has been shifted to a recital in the Preamble, which although

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<sup>260</sup> Formerly art 27.

<sup>261</sup> 12199/02 ASILE 45 (n30).

<sup>262</sup> 6566/03 ADD 1 ASILE 10 (n200) 29 fn 2.

<sup>263</sup> Reception Conditions Directive (n201).

not binding, indicates that both physical and psychological treatment should be addressed within the notion of 'health care'.

The second paragraph, based on a German amendment,<sup>264</sup> provides an exception to the above rule: 'Member States may limit health care granted to beneficiaries of subsidiary protection to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals.'<sup>265</sup> Belgium, France and the Netherlands preferred the text of Article 29 as set out in 10576/03 ASILE 40,<sup>266</sup> which provided for equal treatment without exception, but ultimately a compromise had to be made in order for Germany to accept the rest of the Directive. For this reason, the Directive must be viewed as a political compromise rather than an optimal set of standards for refugees and beneficiaries of subsidiary protection.

## **7 Access to Integration Facilities (Article 33)<sup>267</sup>**

Article 33 now also differentiates between the rights of refugees and beneficiaries of subsidiary protection, and the rights of the latter are considerably reduced from the original proposal. In the original draft, beneficiaries of subsidiary protection were entitled to access to the same programmes as refugees, namely 'specific support programmes tailored to their needs in the fields of, inter alia, employment, education, healthcare and social welfare', but States had up to one year to provide access to them.

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<sup>264</sup> 7469/04 ASILE 15 (n247).

<sup>265</sup> Inserted by 7482/04 ASILE 16 (n251).

<sup>266</sup> 7728/04 ASILE 18 (n246) then art 27.

<sup>267</sup> Formerly art 31.

This one year limit was, for a time, deleted<sup>268</sup> from article 33(2) following objections to it by Finland, the Netherlands, Sweden<sup>269</sup> and the European Parliament,<sup>270</sup> but was ultimately reinserted.<sup>271</sup> It remained until the restructure of paragraph 2,<sup>272</sup> which did away with the need for a time limit by introducing a wholly discretionary regime.

Germany consistently pressured for paragraph 2 to become optional by replacing ‘Member States shall’ with ‘Member States may’.<sup>273</sup> Until the penultimate draft, the provision had remained along the lines of the following, with the one year limit periodically removed:

Member States shall grant beneficiaries of subsidiary protection access to integration programmes which they consider appropriate no later than one year after the subsidiary protection has been granted.<sup>274</sup>

However, this was replaced by what was to become the final article 33(2):

Where it is considered appropriate by Member States, beneficiaries of subsidiary protection status shall be granted access to integration programmes.<sup>275</sup>

The Netherlands entered a scrutiny reservation on this reworded paragraph, voicing its preference for the previous version in 10576/03 ASILE 40.<sup>276</sup>

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<sup>268</sup> 6275/03 ADD 1 ASILE 9 (n241).

<sup>269</sup> 12199/02 ASILE 45 (n30).

<sup>270</sup> European Parliament (n32) Amendment 82.

<sup>271</sup> 9945/03 ADD 1 ASILE 32 (n213).

<sup>272</sup> 7482/04 ASILE 16 (n251).

<sup>273</sup> 6566/03 ADD 1 ASILE 10 (n200); German proposal 7469/04 ASILE 15 (n247).

<sup>274</sup> 10576/03 ASILE 40 (n199).

<sup>275</sup> Inserted by 7482/04 ASILE 16 (n251).

<sup>276</sup> 7482/04 ASILE 16 (n251).

The result is a provision with considerable discretion. For refugees, the discretion concerns the types of support programmes a Member State may choose to provide based on what the State ‘consider[s] to be appropriate’. This creates potential for variation between States rather than a harmonized approach. With respect to beneficiaries of subsidiary protection, access to integration programmes need only be granted ‘[w]here it is considered appropriate by Member States’. Accordingly, Germany’s objection to the imperative ‘shall’ has been rendered void by the shift of the discretion on to States as to whether such access should be granted at all.<sup>277</sup>

#### **E ‘MINIMUM STANDARDS’—A HARMONIZED APPROACH?**

Article 3 (formerly 4), on ‘more favourable standards’, has remained virtually unchanged throughout the drafting process, providing:

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

It is strengthened by recital 8:

It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the

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<sup>277</sup> As early as 1975, it was recognized that ‘de facto refugees’ faced the same integration issues as Convention refugees: PA *Report on the Situation of De Facto Refugees* (5 August 1975) Doc 3642 ‘Explanatory Memorandum’ [15], [17].

meaning of Article 1(A) of the Geneva Convention, or a person who otherwise needs international protection.

Storey criticizes the provision, arguing that it runs counter to the harmonization process because it allows States to introduce differing levels of protection that go beyond the standards set out in the Directive.<sup>278</sup> This alone is a weak rationale for preventing the expansion and improvement of protection. Requiring otherwise would stunt the development of the law and confine standards to minimum levels. The Convention regime has functioned with a similar proviso to encourage the progressive realization of better standards. The EU context is, of course, particular, and it may be that in a regional context improvement ought to occur at a regional level. As a general principle, though, more favourable standards should be encouraged.

Of greater concern is the fact that, through the use of the conditional ‘may’, the provision permits States currently providing a higher level of protection to beneficiaries of subsidiary protection to lower their standards.<sup>279</sup> The European Parliament suggested an amendment to prevent States from using the provision to reduce their present standards,<sup>280</sup> however this was not taken up by the Member States. Even though the legal basis of the Directive, article 63(1)(c) of the Treaty establishing the European Community,<sup>281</sup> requires only that the Council adopt ‘minimum standards with respect to the qualification of nationals of third countries as refugees’, this does not mean that existing standards need be reduced.

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<sup>278</sup> Storey and others (n21).

<sup>279</sup> See J McAdam ‘The European Union Proposal on Subsidiary Protection: An Analysis and Assessment’ UNHCR *New Issues in Refugee Research* Working Paper No 74 (Geneva December 2002) 3; Goodwin-Gill and Hurwitz (n68) [20].

<sup>280</sup> European Parliament (n32) Amendment 18.

<sup>281</sup> TEC (n3).

A background document by the Legal Service provides an important analysis of the rationale behind article 3 and its potential function.<sup>282</sup> Although the compatibility of national standards with those in the Directive will require careful case-by-case analysis, the Legal Service developed some broad, general principles. First, deviations in national law from definitions set out in article 2 and related articles 6, 7, 9, 11, 12, 13, 15, 16, 17(1) and (2) would be incompatible with harmonization unless the definition itself permits the inclusion or exclusion of a particular group of persons as part of a wider category.<sup>283</sup> Secondly, 'shall' or 'may' roughly indicate whether or not a provision allows Member States to adopt or retain more favourable standards. Where 'may' defines the 'normative intensity' of a provision, it normally indicates that the provision is optional.<sup>284</sup> In articles 5(1) and (2), 'may' does not mean that those provisions are optional but rather defines specific aspects of the notions 'well-founded fear of being persecuted' and 'real risk of suffering serious harm'. Since these form part of the definitions in article 2, no derogation from them is possible. Most of the provisions in the Directive use the term 'shall', yet from their context it is apparent that they leave it open for Member States to grant more favourable treatment, since their objective is simply to set out minimum standards.<sup>285</sup> Finally, provisions that incorporate the term 'in particular' indicate that elements of the provision are not exhaustive, thus allowing Member States to take into account additional aspects in their national laws.<sup>286</sup>

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<sup>282</sup> Contribution of the Legal Service to Asylum Working Party 14348/02 JUR 449 ASILE 67 (15 November 2002).

<sup>283</sup> *ibid* [7] (then arts 9, 9A, 11, 13, 14, 14A, 15, 16, 17(1) and (2)).

<sup>284</sup> See arts 4(1), 8, 14(1), 14(4), 14(5), 19(1), 20(6), 20(7), 21(2) and 21(3).

<sup>285</sup> Contribution of the Legal Service (n282) [8].

<sup>286</sup> *ibid* [9].

In addition, Member States remain free to legislate in areas outside the Directive's scope, within the limits of article 10 TEC, and in this way may create national laws regulating other categories of persons permitted to remain for a protection or compassionate reason.<sup>287</sup> This is in any case envisaged by recital 9, which states that:

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

However, as Piotrowicz and van Eck caution, a Member State may be reluctant to introduce a more liberal protection regime, since in doing so it is likely to encourage more applications to its own territory as opposed to other Member States.<sup>288</sup>

## F CONCLUSION

The Directive has achieved a level of harmonization on complementary protection in the EU, but at a price. Due to political compromises in reaching agreement on the scope of threshold eligibility, rights accorded to beneficiaries of subsidiary protection have been diluted and more highly differentiated, not only in terms of refugee rights vis-à-vis those of beneficiaries of subsidiary protection, but also in terms of the latitude for States to implement varying rights based on their discretion and own interpretation of particular provisions.

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<sup>287</sup> *ibid* [4].

<sup>288</sup> Piotrowicz and van Eck (n84) 114.

The Directive should not be viewed as an example of complementary protection for universal adoption. Much of its content has been determined by regional conditions and concerns, and its scope is far narrower than protection principles under international human rights law, humanitarian law and international criminal law provide.

The next three chapters consider the scope for widened threshold eligibility for international protection under the CAT, ECHR, ICCPR and CRC. The final chapter analyses the resultant legal status for beneficiaries of complementary protection.

## CHAPTER 3

### AN ALTERNATIVE ASYLUM MECHANISM: THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

#### A INTRODUCTION

Over the past decade, a growing number<sup>1</sup> of asylum-seekers refused refugee status under article 1A(2) of the Refugee Convention have resorted to the CAT for protection. By bringing an individual complaint to the Committee against Torture<sup>2</sup> under article 22 CAT, successful claimants have been recognized as requiring protection from *refoulement* to ‘another State where there are substantial grounds for believing that [they] would be in danger of being subjected to torture’.<sup>3</sup>

The CAT was not conceived as an alternative mechanism for asylum claims, but rather as a means of reinforcing article 5 UDHR and article 7 ICCPR by ‘mak[ing] more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world.’<sup>4</sup> However, through the intersection of article 22 (individual communications), article 1 (definition of ‘torture’) and article 3 (prohibition

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<sup>1</sup> In 2002, only two of 14 complaints heard on the merits by the Torture Committee were not brought by rejected asylum-seekers, and of these two, one concerned an Iranian man who had been recognized as a refugee in Canada, but who now faced deportation on account of the number and nature of criminal convictions he had acquired in Canada since 1992: *BS v Canada* Comm No 166/2000 (14 November 2001) UN Doc CAT/C/27/D/166/2000 [2.2]; Report of the Committee against Torture UN GAOR 57<sup>th</sup> Session Supp No 44 UN Doc A/57/44 (2002).

<sup>2</sup> Established under CAT art 17 (Torture Committee).

<sup>3</sup> CAT art 3.

<sup>4</sup> Preamble. There is no reference to asylum in either the Preamble or any of the CAT provisions. Asylum is not referred to as a factor in Burger and Danelius’ analysis of the *travaux préparatoires*: JH Burgers and H Danelius *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers Dordrecht 1988).

on *refoulement*), the CAT provides ‘an alternative or additional measure of protection against *refoulement*’ for individuals facing deportation.<sup>5</sup>

Article 3 CAT is an absolute and non-derogable provision that states

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

explicitly drawing on the language of article 33 of the Refugee Convention. However, unlike the Refugee Convention, the CAT permits no exceptions to the principle of *non-refoulement* since the prohibition on torture is considered a peremptory norm of international law, regarded by the international community as so fundamental that it cannot be derogated from under any circumstances.<sup>6</sup> Article 3 CAT was also inspired by the case law of the European Commission of Human Rights<sup>7</sup> relating to article 3 ECHR, which prohibits States from subjecting individuals to torture or inhuman or degrading treatment or punishment.<sup>8</sup> The European Court of Human Rights has interpreted article 3 as obliging States not only to prevent such treatment from occurring within their own territories, but to prevent them from returning individuals to other States where they might be subjected to such abuse.<sup>9</sup>

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<sup>5</sup> GS Goodwin-Gill *The Refugee in International Law* (2<sup>nd</sup> edn OUP Oxford 1996) 153.

<sup>6</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 53. The norm is found in ICCPR art 7, ECHR art 3; ACHR art 5; African (Banjul) Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 5. The ICTY’s pronouncements on the customary international law prohibition on torture are also instructive: eg *Prosecutor v Furundzija* Case IT-95-17/1-T10 Trial Ct Judgment (10 December 1998).

<sup>7</sup> The European Court of Human Rights replaced the Commission and a part-time Court: Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established thereby (ETS No 155) (adopted 11 May 1994, entered into force 1 November 1998).

<sup>8</sup> *Burgers and Danelius* (n4) 125.

<sup>9</sup> *Soering v UK* (1989) 11 EHRR 439.

The CAT is an important complementary protection instrument in two respects. First, at the international level, the optional article 22 mechanism enables individuals to bring a claim against a State alleged to be in breach of its *non-refoulement* obligations under article 3. While the content of such protection is variable and depends on the laws of individual States, in some cases extending no further than *non-refoulement* through time,<sup>10</sup> it nonetheless places immense political pressure on States not to return a person to a place where he or she is likely to be tortured. Country reports by the Torture Committee clarify that article 3 applies to admission as well as removal. In a report on Cameroon, the Committee noted that article 3 would be breached ‘if foreigners who did not meet the conditions of entry into Cameroon were returned to a country where torture was practiced’.<sup>11</sup> Similarly, the Committee questioned Norway on the procedures in place to examine the possibility of *refoulement* if foreigners were denied entry.<sup>12</sup> Secondly, at the domestic and regional levels, some States have incorporated the terms of article 3 into their asylum procedures, so that protection may be claimed either directly on the basis of article 3, or the content of that provision may at least operate as a defence to deportation.

This chapter reviews both aspects of CAT-based complementary protection. The former constitutes complementary protection in its widest sense, granted on the basis of an international protection need outside—‘complementary to’—the Refugee Convention framework. It may be based on another human rights treaty, such as the CAT, or on more general principles, such as providing assistance to persons fleeing from generalized

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<sup>10</sup> This term was coined by Goodwin-Gill to refer to the situation where States respect the principle of *non-refoulement* by admitting persons to their territory, but do not grant them additional rights, essentially leaving them in a legal limbo: Goodwin-Gill (n5) 196–202.

<sup>11</sup> Report of the Committee against Torture UN Doc A/47/44 (1992) [255].

<sup>12</sup> Report of the Committee against Torture UN Doc A/48/44 (1993) [68].

violence (through the expansion of the principle of *non-refoulement*). In this pure form, complementary protection contains no exclusion clauses but simply operates as a form of human rights or humanitarian protection triggered by States' *non-refoulement* obligations, broadly conceived. The CAT mechanism is contrasted to other international protection procedures, such as under the ICCPR and the ECHR.

The second part turns to codified complementary protection based on torture. Like EU subsidiary protection, North American complementary protection contains exclusion clauses and specifies the rights and status to which its beneficiaries are entitled. However, by contrast to the EU regime, it is limited to protection from return to torture (US) and cruel or unusual treatment or punishment (Canada). Whereas this may be claimed as a primary ground for asylum in Canada, in the US it operates chiefly as a defence to deportation, resulting in a different legal status from refugees. These systems are contrasted in particular to Australia, where no onshore complementary protection exists.

## B THE STRUCTURE OF THE CAT

### 1 Definition of ‘Torture’

#### (a) Public element

The first notable feature of article 3 CAT is that only a person fearing *torture* is protected by the *non-refoulement* provision. This immediately distinguishes the scope of the CAT from the ICCPR, ECHR and ACHR,<sup>13</sup> which provide protection from inhuman or degrading treatment or punishment as well and are examined in the next chapter.

‘Torture’ is defined in article 1 CAT as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

A striking element of the definition is its public nature—‘pain or suffering ... inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity’—which may compromise claims based on

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<sup>13</sup> Claims alleging a violation of art 5(2) ACHR may be considered by the Inter-American Commission on Human Rights. Its decisions are not binding.

domestic violence or rape.<sup>14</sup> A higher degree of State complicity is required than under the Refugee Convention, which does not require persecutory acts to be linked to governmental authority and can accordingly encompass both public and private forms of persecution.<sup>15</sup> Similarly, neither the ECHR nor the ICCPR prohibitions on returning persons to a place of torture contain this public requirement.<sup>16</sup>

The rationale behind the public element of the definition is that criminal acts carried out by private individuals will be dealt with by domestic criminal law and accordingly not require the intervention of international law.<sup>17</sup> During the drafting process, there was little support for a French proposal to define torture by the intrinsic nature of the act itself, irrespective of the status of the perpetrator.<sup>18</sup> However, the

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<sup>14</sup> See feminist scholarship on this point, discussing the way in which rape has traditionally been viewed as a 'private' rather than a 'public' act: H Charlesworth, C Chinkin and S Wright 'Feminist Approaches to International Law' (1991) 85 AJIL 613, 625–30; CA MacKinnon 'On Torture: A Feminist Perspective on Human Rights' in KE Mahoney and P Mahoney (eds) *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff Publishers Dordrecht 1993) 21; C Chinkin 'Rape and Sexual Abuse of Women in International Law' (1994) 5 EJIL 326, 334; K Pratt and L Fletcher 'Time for Justice: The Case for International Prosecutions of Rape and Gender-Based Violence in the Former Yugoslavia' (1994) 9 Berkley Women's LJ 77. For perspectives on the potential of the CAT to enable asylum claims in the US based on gender-based persecution: B Cochrane Alexander 'Convention against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims' (2000) 15 American U Intl L Rev 895; M Anitto 'Comment: Asylum for Victims of Domestic Violence: Is Protection Possible after *In re R-A*?' (2000) 49 Catholic UL Rev 785; LM Dawkins and M Maurer 'Domestic Violence as Persecution and Grounds for Asylum, and the Use of the Convention against Torture as an Alternative Form of Relief' (1999) 4 Bender's Immigration Bulletin 328.

<sup>15</sup> This is the interpretation favoured by UNHCR: UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* UN Doc HCR/IP/4/Eng/Rev.1 (2<sup>nd</sup> edn Geneva 1992) [65].

<sup>16</sup> ICCPR: General Comment 20 of the Human Rights Committee specifically states that a claim under article 7 of the ICCPR can relate to acts committed by persons acting in an official capacity, in a non-official capacity or in a purely private capacity: HRC 'General Comment 20: Replaces General Comment 7 concerning Torture or Cruel, Inhuman or Degrading Treatment or Punishment (Art 7)' (10 March 1992) [2]; A Clapham *Human Rights in the Private Sphere* (OUP Oxford 1993) 108–11. ECHR: *Ahmed v Austria* (1997) 24 EHRR 278 [44] (absence of State authority immaterial); *HLR v France* (1997) 26 EHRR 29 [40]; *D v UK* (1997) 24 EHRR 423 [49]; *Altun v Federal Republic of Germany* (1984) 36 DR 209 [5]; T Einarsen 'The European Convention on Human Rights and the Notion of an Implied Right to *De Facto* Asylum' (1990) 2 IJRL 361, 369–70.

<sup>17</sup> Burgers and Danelius (n4) 119–20. Cautioning against this rationale: J Fitzpatrick 'Harmonized Subsidiary Protection in the European Union—A View from the United States' in D Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002) 126.

<sup>18</sup> Burgers and Danelius (n4) 45.

drafters agreed to enlarge the ‘public official’ beyond its forerunner in article 1 of the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>19</sup> to accommodate acts *tolerated* by the State. Accordingly, the terms ‘persons, acting in an official capacity’ and ‘acquiescence of a public official’ were incorporated in the definition at the suggestions of Austria and the US respectively.<sup>20</sup> However, in limiting the provision to acts of an official nature, the Federal Republic of Germany believed it was important to clarify that the term ‘public official’ could encompass ‘persons who, in certain regions or under particular conditions, actually hold and exercise [sic] authority over others and whose authority is comparable to government authority or—be it only temporarily—has replaced government authority or whose authority has been derived from such persons.’<sup>21</sup> This pre-empted the view of the Torture Committee in *Elmi v Australia*, in which it was held that quasi-governmental factions in Somalia, exercising certain prerogatives comparable to those normally exercised by legitimate governments, could be seen as the equivalent of official authorities for the purposes of article 1.<sup>22</sup> However, the Committee has noted that article 3 protection does not extend to requiring a State ‘to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government’.<sup>23</sup> Thus, it is clear that torture by non-governmental institutions per se does not fall within the scope of article 3. Egli queries whether this could be challenged on the ground that States’ obligations under the CAT include obligations of protection and prevention, but concedes that it may

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<sup>19</sup> UNGA Res 3452 (XXX) of 9 December 1975.

<sup>20</sup> Burgers and Danelius (n4) 45.

<sup>21</sup> *ibid.*

<sup>22</sup> Comm No 120/1998 (14 May 1999) UN Doc CAT/C/22/D/120/1998 [6.5].

<sup>23</sup> *GRB v Sweden* Comm No 83/1997 (15 May 1998) UN Doc CAT/C/20/D/83/997 [6.5].

be difficult to show how *omissions* on the part of authorities fulfill the article 1 requirement of intent.<sup>24</sup>

Nonetheless, if individuals would be left without redress because a State were unable or disinclined to protect them, then article 3 should protect them for the reason that a government will be taken to have acquiesced in torture if it does not act to prevent it.<sup>25</sup> As was noted in the Special Rapporteur on Torture's 1986 report, a State which does not intervene against quasi-public groups, such as tribes, that commit human rights abuses may be considered to have 'consented' or 'acquiesced' in their acts.<sup>26</sup>

Comparatively, under the ECHR, States may be liable for the conduct of private actors where domestic law does not adequately protect the rights guaranteed by the ECHR or guarantee an effective remedy if violated.<sup>27</sup> Accordingly, the scope of article 3 ECHR has been held to encompass treatment by State and non-State actors.<sup>28</sup> Where non-State actors are concerned, the key question will be whether the authorities in the receiving State can obviate the risk of harm by providing appropriate protection.<sup>29</sup> Hence the article 3 obligation 'involves the expelling state's responsibility for foreseeable consequences of its own action (expulsion), in principle regardless of whether the direct

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<sup>24</sup> AV Egli *Mass Refugee Influx and the Limits of Public International Law* (Martinus Nijhoff The Hague 2002) 204.

<sup>25</sup> NS Rodley 'United Nations Non-Treaty Procedures for Dealing with Human Rights Violations' in *Guide to International Human Rights Practice* (2<sup>nd</sup> edn University of Pennsylvania Press Philadelphia 1992) in DE Anker *Law of Asylum in the United States* (3<sup>rd</sup> edn Refugee Law Center Boston 1999) 503. Copelon has argued that the concepts of consent and acquiescence are sufficiently broad to encompass the failure of a State to protect individuals from private acts of domestic violence: R Copelon 'Recognizing the Egregious in the Everyday: Domestic Violence as Torture' (1994) 25 Columbia HR L Rev 291, 355–56.

<sup>26</sup> 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Report of the Special Rapporteur' UN Doc E/CN.4/1986/15 (1986) [38].

<sup>27</sup> C Ovey and RCA White *Ovey and White: European Convention on Human Rights* (3<sup>rd</sup> edn OUP Oxford 2002) 19.

<sup>28</sup> See n16 above.

<sup>29</sup> HLR (n16) [40].

source of these consequences are foreign authorities or a group of gangsters.’<sup>30</sup> This is paralleled by the ICCPR.<sup>31</sup>

(b) Lawful sanctions

A second feature of the definition of ‘torture’ is the exclusion of pain and suffering arising from lawful sanctions. The CAT neither defines ‘lawful sanctions’ nor indicates whether the term refers to an international standard or the domestic laws of each State party. The Swedish proposal which formed the basis for the drafting of the CAT sought to restrict the exception of lawful sanctions to cases where they were consistent with articles 31 to 34 of the Standard Minimum Rules for the Treatment of Prisoners,<sup>32</sup> echoing the 1975 Declaration.<sup>33</sup> However, the drafters felt it inappropriate to refer to a non-binding document in a binding international treaty. As an alternative, Denmark suggested that lawful sanctions be permitted ‘to the extent consistent with international rules for the treatment of persons deprived of their liberty’,<sup>34</sup> but the delegations rejected this proposal as well on the grounds that they could not identify a binding international instrument indicating which penal sanctions would be so harsh and severe as to contravene international standards.<sup>35</sup> While some argue that the resulting ‘lawful

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<sup>30</sup> M Pellonpää ‘ECHR Case-Law on Refugees and Asylum Seekers and Protection under the 1951 Convention: Similarities and Differences’ *The Changing Nature of Persecution* (2000 conference) 144, referring to *ibid*.

<sup>31</sup> HRC General Comment 20 (n16) [2]; Clapham (n16) 108–11.

<sup>32</sup> Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders (Geneva 1955), approved by ECOSOC Res 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>33</sup> Burgers and Danelius (n4) 121.

<sup>34</sup> *ibid* 42.

<sup>35</sup> *ibid* 47, 121.

sanctions' exception was necessary to make the CAT acceptable to a larger number of States, others believe it is far too wide.<sup>36</sup>

When the issue of lawful sanctions arose in *PQL v Canada*, the Torture Committee deferred to the domestic law of China instead of expounding a common standard applicable to all States, explaining that 'imprisonment and the normal conditions of detention do not as such constitute torture as defined by the Convention and interpreted by the Committee.'<sup>37</sup> Deferring to local standards has been criticized as potentially encouraging States to make acts of torture 'lawful sanctions', instead of outlawing them altogether.<sup>38</sup> In this respect, Voyame has questioned the legality under the CAT regime of practices such as sexual mutilation and prolonged detention, which may be lawful within some States' domestic legal systems, but which in other circumstances could constitute 'torture' under article 1.<sup>39</sup> Further, article 1(1) remains unclear as to whether a lawful sanction must be consistent with international law 'under which cruel, inhuman or degrading treatment or punishment is prohibited.'<sup>40</sup> Burgers and Danelius suggest that it could be argued that 'various forms of corporal punishment, including those involving mutilation, are not covered by the exception', but acknowledge that this position remains controversial.<sup>41</sup>

However, given the Committee's past willingness to prevent the removal of a person to a State party to the CAT if there did not appear to be sufficient safeguards of that person's freedom from torture, it may be receptive to an argument that a State's

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<sup>36</sup> *ibid* 121.

<sup>37</sup> Comm No 57/1996 (17 Nov 1997) UN Doc CAT/C/19/D/57/1996 [5.4].

<sup>38</sup> See Burgers and Danelius (n4) 121.

<sup>39</sup> Cited in H Lambert 'Protection against *Refoulement* from Europe: Human Rights Law Comes to the Rescue' (1999) 48 ICLQ 515, 534.

<sup>40</sup> Burgers and Danelius (n4) 122.

<sup>41</sup> *ibid*.

domestic lawful sanctions do in fact breach article 1 if they are disproportionate to ‘the sovereign’s right to survival or to its general obligations regarding the public welfare’<sup>42</sup> and are an infringement of international human rights law.<sup>43</sup> This argument is strengthened by the article 4(1) requirement that States parties ensure that all acts of torture are offences under their domestic criminal law, and the fact that under US law, the infliction of torture cannot be excused by virtue of its being a consequence of the imposition of ostensibly ‘lawful sanctions’ which themselves ‘defeat the object and purpose of the Convention Against Torture’.<sup>44</sup>

## 2 The Prohibition on *Refoulement*

Article 3 CAT provides:

1. No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

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<sup>42</sup> MR von Sternberg *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law: Canadian and United States Case Law Compared* (Martinus Nijhoff Publishers The Hague 2002) 125.

<sup>43</sup> See *ibid* 126, referring to UNHCR Handbook [59].

<sup>44</sup> 8 CFR §208.18(a)(3), as referred to in *In Re JE, Respondent 23 I&N Dec 291* (BIA 2002) <[www.usdoj.gov/eoir/vll/intdec/lib\\_vol23idxnet.html](http://www.usdoj.gov/eoir/vll/intdec/lib_vol23idxnet.html)> (12 April 2004) 317.

(a) Absolute and non-derogable

The first important feature of article 3 is that *non-refoulement* under the CAT is absolute and non-derogable.<sup>45</sup> Accordingly, article 3 applies to all persons, regardless of their conduct,<sup>46</sup> nationality or citizenship.<sup>47</sup> Its scope may thus extend to three groups of people denied protection under the Refugee Convention: those specifically excluded; those unable to demonstrate a link between torture as persecution and one of the five Refugee Convention grounds; and those overlooked as refugees due to narrow domestic interpretations of the Refugee Convention definition.<sup>48</sup>

In most cases, torture will amount to persecution under the Refugee Convention.<sup>49</sup> However, this will not always result in a grant of asylum due to the article 1A(2) requirement that persecution be based on the individual's race, religion, nationality, membership of a particular social group or political opinion. Even if 'persecution' is interpreted as a broadly inclusive concept, where 'denial of core, internationally recognized human rights' are acknowledged as a breach of States' basic protection

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<sup>45</sup> The Canadian approach, embodied in *Suresh v Canada* 2002 SCC 1, [2002] 1 SCR 3, which balances the right against compelling national security concerns, violates international law and has been criticized by the HRC: 'Consideration of Reports: Concluding Observations on Canada' UN Doc CCPR/C/79/Add.105 (7 April 1999) [13]; cf European approach *Selmouni v France* (1999) 29 EHRR 403 [95].

<sup>46</sup> *Tapia Paez v Sweden* Comm No 39/1996 (28 April 1997) UN Doc CAT/C/18/D/39/1996 [14.5]: 'The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention'; *Aemei v Switzerland* Comm No 34/1995 (9 May 1997) UN Doc CAT/C/18/D/34/1995 [9.8].

<sup>47</sup> Lambert (n39) 522.

<sup>48</sup> UNHCR has consistently stressed that persons who ought to fall within the definition should be recognized as Convention refugees, so that complementary protection does not become a substitute status. See also B Gorlick 'The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees' (1999) 11 IJRL 479.

<sup>49</sup> UNHCR 'Note on International Protection' (25 May 1998) UN Doc EC/48/SC/CRP.27 [6]. By contrast, not all forms of persecution amount to torture.

obligations,<sup>50</sup> the Convention's conceptual weakness lies in its definitional requirement that persecution be linked to one of five specific grounds.

Furthermore, certain persons are explicitly excluded from Convention protection by articles 1D to 1F and 33(2).<sup>51</sup> Despite the universal application of article 3 CAT, in practice it may not be possible for an individual who falls outside the scope of the Refugee Convention to make a claim based on that provision. Unless a State has made domestic provision for an article 3-based claim, or has made a declaration under article 22 CAT recognizing the competence of the Torture Committee to hear individual claims against the State, it will be very difficult for a person to successfully invoke protection from *refoulement* under article 3.<sup>52</sup> Even if a State's obligations under other international treaties, regional treaties and customary international law prevent *refoulement*, the relief to which an applicant will be entitled depends on the obligations which the State has implemented domestically and the mechanisms available for complaints to be brought.<sup>53</sup>

UNHCR welcomes article 3 CAT as 'a new avenue of protection for persons either erroneously rejected for refugee status or with clear protection needs whose circumstances are nevertheless not directly addressed by the 1951 Convention'.<sup>54</sup> This statement carefully bypasses the fact that the unconditional nature of article 3 CAT means that persons specifically excluded from the Refugee Convention may also claim

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<sup>50</sup> JC Hathaway 'Reconceiving Refugee Law as Human Rights Protection' (1991) 4 JRS 113, 122; see also AE Shacknove 'Who Is a Refugee?' (1985) 95 Ethics 274, 277.

<sup>51</sup> These categories are examined in Chapter 6.

<sup>52</sup> Although the *jus cogens* nature of torture may lead a court to find that a State violates customary international law or its CAT obligations by deporting a person to a place where he or she fears torture, domestic immigration law may be structured such that a court does not have the jurisdiction to examine such a claim. In Australia, for example, there is no opportunity for an individual to directly invoke article 3 CAT as a source of protection and the courts' very limited powers of review in asylum cases do not extend to merits review.

<sup>53</sup> Fitzpatrick (n17) 125, 133.

<sup>54</sup> UNHCR (n49) [11].

protection under the CAT, including criminals and terrorists. Thus, while UNHCR is a strong advocate of the CAT as a complementary form of protection, noting that its own policies should ‘reflect new and broadly endorsed human rights positions as regards the abhorrent nature of torture and inhumane or degrading treatment’,<sup>55</sup> its mandate precludes it from discussing the benefits of the CAT as they may apply to anyone whom the Refugee Convention or the UNHCR Statute exclude. This is reflected in an internal memorandum from 1998, which stated:

As a rule, UNHCR’s interaction with the human rights mechanisms generally, and the torture provisions in particular, should be linked to its mandate to protect from *refoulement*, all *bona fide* refugees and other individuals ‘of concern’ to the Office. Where the treaty mechanisms and the torture provisions can be used to prevent the *refoulement* of *bona fide* refugees or other cases of concern, then UNHCR will have a legitimate interest in those alternative and parallel systems.<sup>56</sup>

(b) ‘Another State’

Another important element of article 3 is the reference to ‘another State’. The Committee has held that this ‘refers to the State to which the individual concerned is being expelled, returned or extradited, as well as to any State to which the author may subsequently be expelled, returned or extradited.’<sup>57</sup> The point was developed in *Korban v Sweden*, which concerned an Iraqi citizen whose claim for permanent residence had been rejected on the grounds that his connections with Jordan would enable him to be received there without

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<sup>55</sup> UNHCR ‘International Protection (submitted by the High Commissioner)’ UN Doc A/AC.96/750 (27 August 1990).

<sup>56</sup> D McNamara (Director of DIP, UNHCR) ‘Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ UNHCR/IOM/57/98, UNHCR/FOM/61/98 (28 August 1998) [1.9].

<sup>57</sup> Report of the Committee against Torture UN GAOR 53<sup>rd</sup> Session Supp No 44 Annex IX 52–53 UN Doc A/53/44 (1998).

risk of being returned to Iraq. However, he argued that without a residence permit for Jordan, he would be at risk of expulsion to Iraq. The Committee found that Sweden had an obligation not to return him to Iraq *or* to Jordan, because of the risk of chain *refoulement*. The Committee noted that although Jordan was a party to the CAT, it had not made a declaration under article 22, and thus the applicant would not have the possibility of submitting another communication to the Committee if threatened with deportation from Jordan.<sup>58</sup> This the approach taken by the European Court of Human Rights<sup>59</sup> and the House of Lords,<sup>60</sup> and was a problem already acknowledged during the drafting of the Refugee Convention.<sup>61</sup>

The Torture Committee's rationale thus focuses on the status of the CAT in the country to which the individual may be expelled. Return to a State not party to the CAT 'would *de jure* bring the person to be expelled outside the protection of the Convention and its remedies of control.'<sup>62</sup> Thus, in *Mutombo*, the Committee stated that in addition to the danger that the applicant might be subjected to torture if returned to Zaire, it was concerned that the applicant would lose the legal possibility of again applying to the Committee for protection given that Zaire was not a party to the CAT.<sup>63</sup> This reasoning has been applied to a number of cases since.<sup>64</sup>

Even if the State in which torture is feared is a party to the CAT and has made a declaration under article 22, the Committee may nonetheless recommend that an

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<sup>58</sup> Gorlick (n48) 488–89, referring to *Korban v Sweden* Comm No 88/1997 (16 November 1998) UN Doc CAT/C/21/D/88/1997.

<sup>59</sup> *TI v UK* [2000] INLR 211.

<sup>60</sup> *R v Sect'y of State for the Home Dept, ex p Adan* [2001] 2 AC 477 (HL).

<sup>61</sup> CP 'Summary Record of the 16<sup>th</sup> Meeting' (11 July 1951) A/CONF.2/SR.16 (23 November 1951) 4 (Sweden).

<sup>62</sup> Egli (n24) 203.

<sup>63</sup> *Mutombo v Switzerland* Comm No 13/1993 (17 April 1994) UN Doc CAT/C/12/D/13/1993 [9.6].

<sup>64</sup> *Khan v Canada* Comm No 15/1994 (15 November 1994) UN Doc CAT/C/13/D/15/1994 [12.5].

individual not be returned there if a systematic practice of torture in that State can be documented.<sup>65</sup>

(c) Evidentiary threshold

The evidentiary standard of article 3 is that there are ‘substantial grounds’ for believing that a person would be in danger of being subjected to torture if sent to another State. The Committee has consistently noted that ‘substantial grounds’ involve a ‘foreseeable, real and personal risk’ of torture.<sup>66</sup> They are to be assessed on grounds that go ‘beyond mere theory or suspicion’ or ‘a mere possibility of torture’,<sup>67</sup> but the threat of torture does not have to be ‘highly probable’<sup>68</sup> or ‘highly likely to occur’.<sup>69</sup> The danger must be ‘personal and present’.<sup>70</sup> ‘Substantial grounds’ may be based not only on acts committed in the country of origin prior to flight, but also on activities undertaken in the receiving country.<sup>71</sup> Furthermore, ‘it is not necessary that all the facts invoked by the author [of the claim] should be proved; it is sufficient that the Committee should consider them to be

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<sup>65</sup> *Alan v Switzerland* Comm No 21/1995 (8 May 1996) UN Doc CAT/C/16/D/21/1995 [11.5].

<sup>66</sup> See eg *EA v Switzerland* Comm No 28/1995 (10 November 1997) UN Doc CAT/C/19/D/28/1995 [11.5]; *X, Y and Z v Sweden* Comm No 61/1996 (6 May 1998) UN Doc CAT/C/20/D/61/1996 [11.5]; *IAO v Sweden* Comm No 65/1997 (6 May 1998) UN Doc CAT/C/20/D/65/1997 [14.5]; *KN v Switzerland* Comm No 94/1997 (19 May 1998) UN Doc CAT/C/20/D/94/1997 [10.5]; *ALN v Switzerland* Comm No 90/1997 (19 May 1998) UN Doc CAT/C/20/D/90/1997 [8.7]; *JUA v Switzerland* Comm No 100/1997 (10 November 1998) UN Doc CAT/C/21/D/100/1997 [6.6]; *SMR and MMR v Sweden* Comm No 103/1998 (5 May 1999) UN Doc CAT/C/22/D/103/1998 [9.7]; *MBB v Sweden* Comm No 104/1998 (5 May 1999) UN Doc CAT/C/22/D/104/1998 [6.8]; *KT v Switzerland* Comm No 118/1998 (19 November 1999) UN Doc CAT/C/23/D/118/1998 [6.5]; *NM v Switzerland* Comm No 116/1998 (9 May 2000) UN Doc CAT/C/24/D/116/1998 [6.7]; *SC v Denmark* Comm No 143/1999 (10 May 2000) UN Doc CAT/C/24/D/143/1999 [6.6]; *HAD v Switzerland* Comm No 126/1999 (10 May 2000) UN Doc CAT/C/24/D/126/1999 [4.10]; *US v Finland* Comm No 197/2002 (1 May 2003) UN Doc CAT/C/30/D/197/2002 [7.8].

<sup>67</sup> *EA* (n66) [11.3].

<sup>68</sup> Report of the Committee against Torture (n57) Annex IX.

<sup>69</sup> *EA* (n66) [11.3].

<sup>70</sup> Report of the Committee against Torture (n57) Annex IX.

<sup>71</sup> *Aemei* (n46) [9.5].

sufficiently substantiated and reliable'.<sup>72</sup> In addition to an examination of the particular facts of the case at hand, article 3(2) requires attention to be paid to 'all relevant considerations', including the general human rights situation in the State to which return is contemplated. The burden of proof rests on the claimant, but UNHCR argues that it 'is no different' from that placed on an asylum-seeker for the purposes of a claim under article 1A(2) of the Refugee Convention.<sup>73</sup>

The Committee has emphasized that it will not allow doubts about the facts of the case to prevent it from ensuring the applicant's security.<sup>74</sup> To this end, it has repeatedly acknowledged that inconsistencies in applicants' stories are not material and should not cast doubt on 'the general veracity of the author's claims', because 'complete accuracy is seldom to be expected by victims of torture'<sup>75</sup> (especially where they are suffering from post-traumatic stress disorder<sup>76</sup>). This has led to the adoption of apparently contradictory approaches by the Committee, which has placed great reliance on both undisputed and disputed testimonies without indicating its reasons for doing so.<sup>77</sup> As Goodwin-Gill has noted, the brevity of the Committee's views in negative decisions, coupled with the formulaic conclusion that the facts alleged lack 'the minimum substantiation that would render the communication compatible with article 22 of the Convention against

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<sup>72</sup> *ibid* [9.6].

<sup>73</sup> *McNamara* (n56) Annex IV.6. Contrast this to CAT-based claims in US law, where the burden of proof is 'more likely than not', which is higher than the 'reasonable possibility' standard in asylum claims: *Fitzpatrick* (n17) 130; 8 CFR §208.16(c)(2) and §208.13(b)(2).

<sup>74</sup> *Mutombo* (n63) [9.2]; *Khan* (n64) [12.3].

<sup>75</sup> *Alan* (n65) [11.3]; *Kisoki v Sweden* Comm No 41/1996 (8 May 1996) UN Doc CAT/C/16/D/41/1996 [9.3]; *Tala v Sweden* Comm No 43/1996 (15 November 1996) UN Doc CAT/C/17/D/43/1996 [10.3].

<sup>76</sup> *Tala* (n75) [10.3].

<sup>77</sup> See *Goodwin-Gill* (n5) 155.

Torture’,<sup>78</sup> provide little further assistance in determining how, and against what standards of authority and corroboration, evidence is tested.

(d) Gross, flagrant or mass violations of human rights

Article 3(b) provides additional guidance on interpreting ‘substantial grounds’. The Committee has consistently held that paragraph (b) requires the applicant to establish an individual nexus with ‘a consistent pattern of gross, flagrant or mass violations of human rights’, noting that:

The aim of the determination ... is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country.<sup>79</sup>

Accordingly, ‘there must be specific reasons for believing that the person concerned is personally in danger.’<sup>80</sup> Conversely, however, the absence of a pattern of gross, flagrant or mass violations of human rights does not mean that a person is not in danger of being subjected to torture in a specific case.<sup>81</sup>

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<sup>78</sup> *X v Switzerland* Comm No 17/1994 (17 November 1994) UN Doc CAT/C/13/D/17/1994 [4.2]; *X v Switzerland* Comm No 18/1994 (23 November 1994) UN Doc CAT/C/13/D/18.1994 [4.2], cited in Goodwin-Gill (n5) 155.

<sup>79</sup> See inter alia *Alan* (n65) [11.2]; *Tala* (n75) [10.1]; *Tapia* (n46) [14.2]; *EA* (n66) [11.2]; *X, Y and Z* (n66) [11.1]; *IAO* (n66) [14.2]; *GRB* (n23) [6.3]; *KN* (n66) [10.2]; *ALN* (n66) [8.2]; *Chipana v Venezuela* Comm No 110/1998 (10 November 1998) CAT/C/21/D/110/1998 [6.3]; *JUA* (n66) [6.3].

<sup>80</sup> *Chipana* (n79) [6.3].

<sup>81</sup> *Mutombo* (n63) [9.3]; *Kisoki* (n75) [9.2].

### 3 Article 22: Taking a Claim to the Torture Committee

Under article 22 CAT, States parties may make an optional declaration recognizing ‘the competence of the Committee [against Torture] to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention’. To date, 56 of the 136 States that have ratified the CAT recognize the competence of the Committee to hear individual complaints.<sup>82</sup> An asylum-seeker will therefore only be able to bring a claim to the Committee against a country threatening to deport him or her if that country has ratified the CAT and made a declaration under article 22. The bulk of communications received in recent years has involved failed refugee claims in domestic determination procedures.<sup>83</sup> These cases have made a positive contribution to the legal framework of refugee protection by reinforcing States’ *non-refoulement* obligations.<sup>84</sup>

Under the CAT, and also the ICCPR and ECHR, matters must first be declared admissible before they can be heard on the merits, and are thus subject to various procedural admissibility requirements.<sup>85</sup> First, the applicant must have exhausted all domestic remedies,<sup>86</sup> unless they will be ‘unreasonably prolonged’<sup>87</sup> or ‘unlikely to bring

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<sup>82</sup>United Nations Treaty Collection

<<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp>> (18 May 2004).

<sup>83</sup> P Burns ‘The United Nations Committee against Torture and Its Role in Refugee Protection’ (2001) 15 Georgetown Immigration LJ 403, 405, referring to all 14 cases in the Committee’s 1999 Annual Report involving failed refugee claims: Report of the Committee Against Torture UN GAOR 54<sup>th</sup> Session Supp No 44 UN Doc A/54/44, Annex VII (1999).

<sup>84</sup> Gorlick (n48) 483.

<sup>85</sup> These are detailed in CAT art 22 and the Committee against Torture Rules of Procedure (adopted by the Committee at its 1<sup>st</sup> and 2<sup>nd</sup> sessions and amended at its 13<sup>th</sup>, 15<sup>th</sup> and 28<sup>th</sup> sessions) UN Doc CAT/C/3/Rev.4 (9 August 2002); ECHR art 35 and ECHR Rules of Court (November 2003); ICCPR art 41 and Rules of Procedure of the HRC, in Compilation of Rules of Procedure adopted by Human Rights Treaty Bodies UN Doc HRI/GEN/3.Rev.1 (28 April 2003) 25.

<sup>86</sup> ECHR art 35(1); ICCPR art 41(1)(c); ICCPR Optional Protocol arts 2, 5(2)(b).

<sup>87</sup> CAT art 22(5)(b); ICCPR art 41(1)(c); ICCPR Optional Protocol art 5(2)(b).

effective relief’.<sup>88</sup> In this respect, the Torture Committee has observed that, in principle, it is not within its competence to evaluate the prospects of success of domestic remedies, but only whether they are proper remedies for the determination of the author’s claims<sup>89</sup> (although Einarsen claims that in accordance with established theory and practice, ‘domestic remedies’ means only effective remedies<sup>90</sup>). Revised rule 107(f) of the CAT Rules of Procedure requires that ‘the time elapsed since the exhaustion of domestic remedies is not so unreasonably prolonged as to render consideration of the claims unduly difficult by the Committee or the State party’. The ECHR imposes a time limit by stipulating that the Court will only deal with the matter within six months from the date on which the final decision was taken.<sup>91</sup>

Secondly, both the CAT and the ECHR require that the claim has not been examined under another international procedure.<sup>92</sup> By contrast, the ICCPR’s Optional Protocol rules complaints inadmissible only where they are currently pending before another international body.<sup>93</sup> This means that the Human Rights Committee may examine a matter after it has already been considered by the Torture Committee or European Court of Human Rights.<sup>94</sup> To eliminate this duplication, most States parties to the ECHR have entered reservations to article 5 of the Optional Protocol so that it operates like article 22(5)(a) CAT.

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<sup>88</sup> CAT art 22(5)(b); see also CAT Rules (n85) revised rule 107(e).

<sup>89</sup> *MA v Canada* Comm No 22/1995 (9 May 1995) UN Doc CAT/C/14/D/22/1995 [4].

<sup>90</sup> Einarsen (n16) 381 fn 105.

<sup>91</sup> ECHR art 35(1)

<sup>92</sup> CAT art 22(5)(a); ECHR art 35(2)(b).

<sup>93</sup> ICCPR Optional Protocol art 5(2)(a).

<sup>94</sup> Optional Protocol to the ICCPR UNGA Res 2200A (XXI) of 16 December 1966 (entered into force 23 March 1976) 999 UNTS 302.

Finally, communications will be declared inadmissible if they are anonymous,<sup>95</sup> incompatible with the treaty's provisions,<sup>96</sup> or considered by the Committee to be an abuse of process<sup>97</sup> or manifestly unfounded.<sup>98</sup>

One of the main disadvantages shared by the CAT and ICCPR communications systems is that their decisions are not binding on States. This means that even when the Committee finds that the State in question has an obligation to refrain from returning the applicant to another State, the Committee is unable to enforce its decision because it is a monitoring body with declaratory powers only.<sup>99</sup> However, while the Committee has, diplomatically, been quick to stress that its decisions in no way prejudice domestic asylum procedures, it relies on their political effect for enforcement.<sup>100</sup> Their 'strong persuasive value'<sup>101</sup> and moral force are such that most States feel obliged to follow the Committee's recommendations,<sup>102</sup> including interim measures of protection.<sup>103</sup> Furthermore, in cases where a breach is found, it is common for the Committee to request the State Party to inform the Committee within a specific timeframe of what action it has taken in

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<sup>95</sup> CAT art 22(2); ECHR art 35(2)(a); ICCPR Optional Protocol art 3.

<sup>96</sup> CAT art 22(2); ECHR art 35(3); ICCPR Optional Protocol art 3.

<sup>97</sup> CAT art 22(2); ECHR art 35(3); ICCPR Optional Protocol art 3.

<sup>98</sup> CAT Rules (n85) revised rule 107(b); ECHR art 35(3).

<sup>99</sup> Report of Committee against Torture 1998 (n57) Annex IX.

<sup>100</sup> *ibid.*

<sup>101</sup> McNamara (n56) [1.4].

<sup>102</sup> R Towle 'Human Rights Standards: A Paradigm for Refugee Protection?' in AF Bayefsky and J Fitzpatrick (eds) *Human Rights and Forced Displacement* (Martinus Nijhoff The Hague 2000) 33. But see *Elmi v Australia* (n22) and commentary in Senate Legal and Constitutional References Committee *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (Commonwealth of Australia Canberra June 2000) [7.68]–[7.70], which shows how the lack of enforcement of the Committee's decisions, combined with the absence of a resultant legal status from a Committee finding of an international protection need, can lead to unpredictability in the nature of protection which the individual may receive.

<sup>103</sup> ECHR Rules (n85) rule 39; HRC Rules (n85) rule 86; CAT Rules (n85) revised rule 108. On 'good faith compliance': *Cruz Varas v Sweden* (1991) 14 EHRR 1 [90]–[104]. On high ECHR threshold: *Lambert* (n39) 531. For violation: *Chipana* [8].

conformity with the Committee's decision.<sup>104</sup> Both the Torture and the Human Rights Committees can appoint a rapporteur to follow up on decisions.<sup>105</sup>

By contrast, a significant advantage of the ECHR is that it is legally binding on contracting States, and those States agree to abide by the Court's judgments to which they are parties.<sup>106</sup> In addition to their substantial persuasive influence at the international level, they have enormous precedential value in domestic proceedings, such that '[a] single decision ... can have implications for the scope of discretion concerning national asylum law and policies among the several States of the Council of Europe.'<sup>107</sup> The flow-on effect of ECHR principles into domestic law may ultimately secure protection at an earlier stage.

In addition to problems of enforcement, Gorlick notes that treaty bodies are 'considerably overburdened and under-resourced', meeting only twice a year. Given the increasing number of cases being brought, he believes that 'it is not inconceivable that this may result in a stricter application of their respective mandates and the adoption of higher evidentiary burdens and legal tests, as well as a strict application of the rules of procedure'.<sup>108</sup>

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<sup>104</sup> CAT Rules (n85) revised rule 112(5).

<sup>105</sup> CAT Rules (n85) revised rule 114; HRC Rules (n85) rule 95.

<sup>106</sup> ECHR art 46(1).

<sup>107</sup> Einarsen (n16) 385.

<sup>108</sup> Gorlick (n48) 490; Towle (n102) 34.

## C TORTURE PROHIBITION IN DOMESTIC COMPLEMENTARY PROTECTION

The focus now shifts to the embodiment of international principles on torture domestically, as codified complementary protection. Whereas EU subsidiary protection recognizes complementary protection needs on three grounds, the prohibition on torture is the sole human rights basis for protection in the US, while Canada offers limited protection for persons facing a risk to their life or a risk of exposure to torture or to cruel and unusual treatment or punishment. Australia, by comparison, has no complementary protection.<sup>109</sup> The broadened refugee definitions in the African OAU Convention and the Latin American Cartagena Declaration do not expressly encompass acts of torture, but their scope is sufficiently broad for such acts to fall within their terms.

### 1 United States

In the US, two types of CAT-based protection exist: withholding of removal and deferral of removal.<sup>110</sup> A claim based on article 3 CAT will only be considered once a final order of removal has been issued and all other avenues of review have been exhausted.<sup>111</sup> In this respect, it functions primarily as a defence to deportation rather than as an

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<sup>109</sup> See J McAdam 'Submission No 35' 2, Senate Select Committee on Ministerial Discretion in Migration Matters *Report* (Commonwealth of Australia Canberra 2004)

[<www.aph.gov.au/Senate/committee/minmig\\_ctte/submissions/sublist.htm >](http://www.aph.gov.au/Senate/committee/minmig_ctte/submissions/sublist.htm) (15 September 2004).

<sup>110</sup> 8 CFR §208.16(4). The US has another form of complementary protection called Temporary Protected Status (TPS). TPS is not part of the refugee status determination system but a separate process. It is a provisional immigration status granted to eligible nationals of designated countries suffering the effects of an ongoing armed conflict, environmental disaster, or other extraordinary and temporary conditions. During the period for which the Secretary of Homeland Security has designated a country under the TPS program, beneficiaries are not required to leave the US and may obtain employment authorization.

<sup>111</sup> Anker (n25) 570.

affirmative source of protection upon which a primary application can be based. No formal processes exist in the US for people fearing return to inhuman or degrading treatment or punishment.<sup>112</sup>

In most cases, a person who fears torture will be able to bring his or her claim within the terms of article 1A(2) of the Refugee Convention. However, if a person's claim does not fall within one of the five Convention grounds, or if the person is excluded from the Refugee Convention's benefits, then invocation of the CAT may be the only possibility for him or her not to be deported.

If the applicant can show that he or she is 'more likely than not' to be tortured in the country of removal, then CAT-based protection will be granted. The burden of proof is higher than the 'reasonable possibility' standard in asylum claims.<sup>113</sup> The more generous form of such protection is 'withholding of removal', which accords beneficiaries some of the same benefits as refugees, but not family reunification or access to a special process to adjust to permanent residence.<sup>114</sup> Significantly, however, section 241(b)(3)(B) of the Immigration and Nationality Act excludes certain persons from such protection and renders them eligible only for 'deferral of removal'. These include any person who has persecuted another individual, has been convicted of a 'particularly serious crime' and presents a danger to the US community, or is suspected to have committed a serious non-political crime outside the US before arrival; and cases where there are reasonable grounds for suspecting that the applicant is a danger to US security.

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<sup>112</sup> Fitzpatrick states that the US is less exposed than European States to binding international judgments concerning human rights bars to deportation, as it does not accept the individual communication procedure under the Optional Protocol to ICCPR or CAT and consistently ignores rulings by the Inter-American Commission on Human Rights: Fitzpatrick (n17) 121.

<sup>113</sup> *ibid* 130: 8 CFR §208.16(c)(2) and §208.13(b)(2).

<sup>114</sup> Fitzpatrick (n17) 120.

A 'particularly serious crime' encompasses aggravated felonies, which are very broadly defined in US law and include such things as theft and drug offences.<sup>115</sup> Accordingly, deferral of removal in practice tends only to be invoked by persons with criminal convictions who are either barred from the Refugee Convention through its exclusion clauses or because they have been convicted of an 'aggravated felony'.

A grant of deferral of removal does not confer a legal immigration status<sup>116</sup> or necessarily require that an applicant be released from detention or prison if held in such a facility.<sup>117</sup> Furthermore, the grant can be withdrawn quickly and easily once the risk of torture has diminished.<sup>118</sup> Although beneficiaries are entitled to a work permit, they are denied access to many other rights, including rights to public benefits and family reunion. Deferral of removal effectively amounts to nothing more than a 'tolerated' status. Accordingly, Chung argues that neither of the US article 3 remedies can be considered 'relief' since they provide only minimal protection.<sup>119</sup>

## **2 Canada**

Whereas the European approach to incorporating human rights obligations in international protection has been to create subsidiary protection regimes, 'Canadians have given meaning to those instruments through their interpretation of persecution and

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<sup>115</sup> For definition: INA §101(a)(43), 8 USC §1101(a)(43) (2001).

<sup>116</sup> 8 CFR §208.17(b)(i) (2000).

<sup>117</sup> 8 CFR §208.17(b)(ii) (2000).

<sup>118</sup> 8 CFR §208.17(b)(iii) (2000).

<sup>119</sup> EY Chung 'A Double-Edged Sword: Reconciling the United States' International Obligations under the Convention against Torture' (2002) 51 Emory LJ 355, 371.

particular social group under the Convention.’<sup>120</sup> Although the net of persons incorporated by the latter may be more narrowly cast, the advantage is that they receive Convention status rather than a subsidiary legal status.

In addition, the Canadian Immigration and Refugee Protection Act 2001 came into force on 28 June 2002. It extended the Immigration and Refugee Board’s jurisdiction beyond claims based on article 1A(2) of the Convention to include two additional new grounds for refugee protection (the ‘consolidated grounds’), forming part of a single determination procedure. The first ground encompasses persons outside the scope of the Convention who face a personal danger of being tortured, as defined in article 1 CAT. The second encompasses persons falling outside the Convention who face a persons risk to life or a risk of cruel and unusual treatment or punishment where

- (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
- (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
- (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
- (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.<sup>121</sup>

A recipient of this extended protection is called a ‘person in need of protection’, and section 97(2) provides that the regulations may prescribe further classes of such persons.

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<sup>120</sup> Immigration and Refugee Board ‘Consolidated Grounds in the *Immigration and Refugee Protection Act: Persons in Need of Protection: Risk to Life or Risk of Cruel and Unusual Treatment or Punishment* (Canada 15 May 2002) 40.

<sup>121</sup> Immigration and Refugee Protection Act s 97(1).

By virtue of section 95(1), persons in need of protection are accorded Convention status, receiving identical rights and benefits as Convention refugees. The practical effect of this provision has been to incorporate torture as another ground on which an asylum claim may be based.

Like subsidiary protection under the Qualification Directive, the Convention's exclusion clauses apply to protection based on the consolidated grounds.<sup>122</sup> Since the Federal Court has rejected a balancing test under article 1F between the seriousness of the crime committed and the danger of risk if an individual is removed, the exclusion clauses apply irrespective of a danger of torture. In *Arica*,<sup>123</sup> the court held that exclusion per se does not violate Canada's constitutional duty under section 7 of the Charter, which guarantees the right to 'life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice', since exclusion does not necessarily mean deportation. According to this argument, section 7 (and Canada's international *non-refoulement* obligations) are only engaged once a deportation order is made.<sup>124</sup>

The most concerning development in Canadian jurisprudence on torture is the 2001 decision of *Suresh*. Although the court stated that, as a general rule, the State should not deport persons to countries where a substantial risk of torture exists, it accepted that in 'exceptional' cases the State may balance the interests of national security against Canada's constitutional commitments under section 7 of the Charter.

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<sup>122</sup> Immigration and Refugee Board 'Consolidated Grounds in the *Immigration and Refugee Protection Act: Persons in Need of Protection: Danger of Torture*' (Canada 15 May 2002) 53–55.

<sup>123</sup> *Arica v Canada* (1995) 182 NR 392 (FCA).

<sup>124</sup> Exclusion will necessarily impact on legal status, however, discussed in Chapter 6.

Accordingly, its effect is to render the principle of *non-refoulement* with respect to torture non-absolute in Canada.

Insofar as Canada is unable to deport a person where there are substantial grounds to believe that he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s.7 of the Charter generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive.<sup>125</sup>

The decision runs contrary to international law, setting a dangerous precedent and necessarily weakening torture-based human rights protection in Canada. Although its application is restricted to the most exceptional cases, it undermines a *jus cogens* principle of international law and cannot be reconciled with the absolute protection from torture in human rights treaties and customary international law.<sup>126</sup> Despite this, the complementary protection framework for ‘persons in need of protection’ in Canada is comparatively strong, since it accords Convention status irrespective of the source of the protection need.<sup>127</sup>

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<sup>125</sup> *Suresh* (n45) [78].

<sup>126</sup> See generally E Lauterpacht and D Bethlehem ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’ in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP Cambridge 2003).

<sup>127</sup> See also Pre-Removal Risk Assessment (PRRA), which replaced Post-Determination Refugee Claimant in Canada Unit (PDRCC). Prior to removal, PRRA can reconsider the risk of a person’s exposure to the consolidated grounds where there is fresh evidence.

### 3 Australia

In Australia, there is no mechanism for lodging a protection application based on article 3 CAT or any other human rights instrument. If a person who fears torture cannot come within the definition of a refugee in article 1A(2) of the Refugee Convention, then the only way in which a torture claim may be considered is if, following a negative primary decision and an unsuccessful appeal to the Refugee Review Tribunal (RRT), a section 417 application is made to the Minister for Immigration requesting that he or she exercise his or her non-compellable,<sup>128</sup> non-delegable<sup>129</sup> and non-reviewable<sup>130</sup> discretion in the applicant's favour.<sup>131</sup> Should the Minister choose to exercise his or her power under section 417(1), then neither the decision relating to the exercise of power, nor the ultimate decision, can be reviewed.<sup>132</sup> Since the Minister is only entitled to substitute a

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<sup>128</sup> Migration Act 1958 (Cth) s 417(7).

<sup>129</sup> *ibid* s 417(3). According to section 417(7), the Minister does not have a duty to consider whether to exercise the discretion. Only the decision to exercise or not to exercise the discretion is personal and cannot be delegated. The discretion to decide not to consider whether to exercise the discretion may be delegated to departmental officers: *Ozmanian v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 137 ALR 103. On appeal, this point was not at issue: *Minister for Immigration and Multicultural Affairs v Ozmanian* (1996) 141 ALR 322. For commentary: M Crock *Immigration and Refugee Law in Australia* (Federation Press Sydney 1998) 275.

<sup>130</sup> Migration Act (n128) s 476(2) provides that: 'the Federal Court and the Federal Magistrates Court do not have any jurisdiction in respect of a decision of the Minister not to exercise, or not to consider the exercise, of the Minister's power under ... section ... 417'. The Federal Court has interpreted a decision under section 417 as a privative clause decision pursuant to section 474, which cannot be challenged 'unless one or more of the *Hickman* limitations can be made out': *QAAE of 2002 v Minister for Immigration and Multicultural & Indigenous Affairs* [2002] FCA 1213, [48] (Cooper J). The High Court has maintained that mandamus cannot issue in respect of a section 417 decision due to the absence of a duty on the Minister to consider whether to exercise the power under section 417(1): *Re Minister for Immigration and Multicultural and Indigenous Affairs, ex p Applicants S134/2002* [2003] HCA 1, [48] (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ); [100] (Gaudron and Kirby JJ).

<sup>131</sup> The section 417 mechanism was recently reviewed by the Senate Select Committee on Ministerial Discretion in Migration Matters: Senate Select Committee on Ministerial Discretion in Migration Matters *Report* (Commonwealth of Australia March 2004) <[www.aph.gov.au/senate/committee/minmig\\_ctte/report/index.htm](http://www.aph.gov.au/senate/committee/minmig_ctte/report/index.htm)> (8 January 2005) esp Ch 8 (Ministerial Discretion Report).

<sup>132</sup> Nor can a decision not to exercise the power be reviewed. The RRT has the power to recommend particular cases to the Minister, but the Minister is under no obligation to consider them. For numbers of cases referred by the RRT from 1999 to 2003: Migration Review Tribunal and Refugee Review Tribunal

more favourable decision, he or she can only consider a case once it has been heard by the RRT. Accordingly, applicants whose claims are based solely on an alternative source of protection, such as article 3 CAT, must nonetheless submit a claim for refugee status as a prerequisite to triggering the possibility of appealing to the Minister. This roundabout process is so unpredictable and opaque that it cannot be considered to be an effective protection mechanism.<sup>133</sup>

The mechanism does not adequately meet Australia's international obligations under the CAT and ICCPR. The absolute prohibition on *refoulement* to torture in those instruments is at odds with the Minister's non-compellable and non-reviewable discretion. There is no obligation on the Minister to exercise the discretion where an applicant fears *refoulement* for reasons of torture or inhuman or degrading treatment or punishment, and need only do so where he or she believes that it is in the public interest. This test is highly subjective and clearly contravenes the *jus cogens* character of *non-refoulement* in cases of torture by allowing the Minister to personally determine when a claim based on the CAT or the ICCPR is even considered.<sup>134</sup>

References to the CAT and the ICCPR in ministerial guidelines<sup>135</sup> do not constitute incorporation of those treaties in Australian law and as such do not create enforceable rights and obligations.<sup>136</sup> As noted by the Law Council of Australia, the

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Submission to the Senate Select Committee on Ministerial Discretion in Migration Matters (4 August 2003) <[www.aph.gov.au/Senate/committee/minmig\\_ctte/submissions/sub11.doc](http://www.aph.gov.au/Senate/committee/minmig_ctte/submissions/sub11.doc)> (8 January 2005) 5.

<sup>133</sup> See also S Taylor 'Australia's Implementation of Its Non-Refoulement Obligations under the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights' (1994) 17 U of New South Wales LJ 432.

<sup>134</sup> Senate Legal and Constitutional References Committee (n102) [2.77]. On the *jus cogens* character of *non-refoulement*: Lauterpacht and Bethlehem (n126).

<sup>135</sup> Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where It May Be in the Public Interest to Substitute a More Favourable Decision under s 345, 351, 391, 417, 454 of the Migration Act 1958 (MSI 225, 31 March 1999).

<sup>136</sup> Senate Legal and Constitutional References Committee (n102) [2.63].

absence of strict incorporation of these treaties in domestic law means that breaches of *non-refoulement* obligations under these instruments are not illegal within Australia<sup>137</sup> (although Australia's failure to respect these obligations is a breach of international law). Accordingly, '[t]here is no mechanism that is subject to rule of law, which provides a safeguard against people being returned to countries in circumstances which are contrary to Australia's obligations under treaties other than the Refugee Convention'.<sup>138</sup>

As a result of a 2003 inquiry into the exercise of ministerial discretion, the Senate recommended that the Australian government consider adopting a system of complementary protection. This has recommendatory force only, and to date the government's responses to proposals have been mixed.<sup>139</sup> It is too early to tell whether or not the government will take this into account.<sup>140</sup> However, previous recommendations to examine the most appropriate means to explicitly incorporate the CAT and ICCPR's *non-refoulement* obligations into Australian law<sup>141</sup> were not implemented.

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<sup>137</sup> *ibid* [2.64], citing Law Council of Australia 'Submission No 73' 1075.

<sup>138</sup> *ibid*, citing Refugee and Immigration Legal Centre 'Submission No 38' 317–18.

<sup>139</sup> Email from Brett Solomon, Amnesty International Australia (22 December 2004), on the basis of a joint submission by the Refugee Council of Australia, National Council of Churches in Australia and Amnesty International Australia 'Complementary Protection: The Way Ahead' (April 2004) <[www.amnesty.org.au](http://www.amnesty.org.au)> (2 January 2005).

<sup>140</sup> Ministerial Discretion Report (n131) xxiv–xxv (Recommendation 19).

<sup>141</sup> Senate Legal and Constitutional References Committee (n102) Summary of Conclusions and Recommendations, Recommendation 2.2.

## D CONCLUSION

The CAT is an important complementary instrument to the Refugee Convention. It applies to people who do not meet the article 1A(2) definition of a refugee, thus extending protection to at least some of those who might be excluded from Refugee Convention protection by virtue of strict State interpretations of the Refugee Convention definition. Further, *non-refoulement* under the CAT is absolute and not subject to the exclusion clauses under the Refugee Convention. Accordingly, in States where a domestic claim based on torture is not possible, or in States party to the CAT but not to the Refugee Convention, access to the Torture Committee's jurisdiction under article 22 is an important resource.

However, as has been demonstrated, no legal status accrues from recognition by the Torture Committee that an individual has a protection need under article 3. By contrast, regional and national protection models that give effect to States' broader international protection obligations are instructive for an international complementary protection regime, although vary widely in the rights they accord to beneficiaries. Canada's grant of Convention status to 'persons in need of protection' is particularly commendable, although the scope for threshold eligibility is narrower than under the Qualification Directive.

The next chapter considers the broader principle of *non-refoulement* under article 3 ECHR and article 7 ICCPR—non-return to torture as well as to inhuman or degrading

treatment or punishment—and analyses the capacity of other provisions in these instruments to protect persons from return to serious harm.

## CHAPTER 4

### THE SCOPE OF ILL-TREATMENT UNDER THE ECHR AND ICCPR

#### A INTRODUCTION

As the last chapter examined, the scope of *non-refoulement* is recognized under international law as extending beyond article 33 of the Convention to encompass torture. Article 3 ECHR and article 7 ICCPR broaden *non-refoulement* further to prevent removal to ‘inhuman or degrading treatment or punishment’ as well. The chapter considers the scope of this phrase by examining in particular its potential to act as a ‘generic’ right—a mechanism for asserting breaches of other human rights by characterizing them as forms of inhuman or degrading treatment—given its absolute and unconditional character under international law (and absent a general human rights provision in the Qualification Directive). The chapter then critically examines the capacity of other ECHR rights independently to give rise to successful protection claims, drawing parallels, where relevant, to the ICCPR.<sup>1</sup>

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<sup>1</sup> The chapter only briefly considers the comparative procedural merits of the two mechanisms. For more, see M O’Flaherty *Human Rights and the UN: Practice before the Treaty Bodies* (2<sup>nd</sup> edn Martinus Nijhoff The Hague 2002); cf D McGoldrick *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (OUP Oxford 1991) 381; R Alleweldt ‘Protection against Expulsion under Article 3 of the European Convention on Human Rights’ (1993) 4 EJIL 360. Further, it does not consider the question of whether and how, if certain ECHR provisions give rise to a right not to be removed, they should apply to persons seeking admission from outside the territory of an ECHR Member State. For comparative studies: H Lambert ‘Protection against *Refoulement* from Europe: Human Rights Law Comes to the Rescue’ (1999) 48 ICLQ 515; L Heffernan ‘A Comparative View of Individual Petition Procedures under the European Convention on Human Rights and the International Covenant on Civil and Political Rights’ (1997) 19 HRQ 78.

## B THE ECHR AND ASYLUM

The ECHR is not an asylum instrument. It contains neither a right of asylum nor a right of residence for aliens, nor does it expressly safeguard the principle of *non-refoulement*. However, the European Court of Human Rights (Court) and the domestic courts of States parties recognize that in some cases, an individual's removal will breach the ECHR. The protection offered by the ECHR can be therefore be characterized as 'indirect', since the Court cannot directly review the legality of expulsion orders due to the fact that the right of asylum and the right not to be expelled are not explicitly contained in the ECHR.<sup>2</sup>

Yet, as early as the 1960s, the European Commission interpreted article 3 as encompassing the principle of *non-refoulement*.<sup>3</sup> This principle was subsequently incorporated in a Council of Europe Parliamentary Assembly recommendation in 1965—'by prohibiting inhuman treatment, [article 3] binds contracting parties not to return refugees to a country where their life or freedom would be threatened'<sup>4</sup>—but was not affirmed by the Court for another 24 years.

In *Soering*,<sup>5</sup> the Court held that extraditing a person to a territory where he or she faces a real risk of harm may breach article 3 ECHR. *Chahal* confirmed the principle's application to expulsion cases as well.<sup>6</sup> Both cases emphasized the absolute nature of

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<sup>2</sup> *Abdulaziz v UK* (1985) 7 EHRR 471; *X v UK* (1982) 29 DR 176–93, cited in D Bouteillet-Paquet 'Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union' in D Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002) 223.

<sup>3</sup> *X v Belgium* App No 984/61 (29 May 1961) 6 CD 39–40; *X v Federal Republic of Germany* (1963) 6 Yearbook 462, 480, cited in Alleweldt (n1) 361 fn 5.

<sup>4</sup> Recommendation 434 (1965) concerning the Granting of the Right of Asylum to European Refugees.

<sup>5</sup> *Soering v UK* (1989) 11 EHRR 439.

<sup>6</sup> *Chahal v UK* (1996) 23 EHRR 413.

article 3, which applies irrespective of an applicant's conduct,<sup>7</sup> and its consequently broader scope than articles 32 and 33 of the Refugee Convention.<sup>8</sup> Article 3 may therefore provide protection to persons expressly excluded from the Refugee Convention.<sup>9</sup> As Blake and Husain remark, a 'text that at first blush failed to afford any rights to those seeking protection from persecution, has thus now extended protection in some areas beyond that provided by the Refugee Convention itself'.<sup>10</sup>

## 1 Procedural Issues

Before considering substantive provisions, it is worth considering the comparative procedural merits of the ECHR vis-à-vis the CAT and ICCPR. Within Europe, asylum-seekers may commence proceedings before the Torture Committee, the HRC or the European Court, except in Andorra, Albania and the UK, where claims may only be brought via the ECHR.<sup>11</sup> Having reviewed the alternatives, Lambert concludes that the ECHR provides the 'best option' against *refoulement* in Europe,<sup>12</sup> which 'can complement the protection of refugees by revealing and filling certain gaps existing in the regimes applied by specialized refugee authorities.'<sup>13</sup> Both Andrysek and Heffernan similarly argue that the ECHR and its enforcement mechanisms 'outperform' the

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<sup>7</sup> *Soering* (n5) [88].

<sup>8</sup> *Chahal* (n6) [80].

<sup>9</sup> *Ahmed v Austria* (1997) 24 EHRR 278 (criminal posing threat to national security).

<sup>10</sup> N Blake and R Husain *Immigration, Asylum and Human Rights* (OUP Oxford 2003) [2.4].

<sup>11</sup> These States have not recognized the competence of the Torture Committee or the HRC. Some other European States only recognize the competence of one.

<sup>12</sup> Lambert (n1) 543; 517–18.

<sup>13</sup> M Pellonpää 'ECHR Case-Law on Refugees and Asylum Seekers and Protection under the 1951 Convention: Similarities and Differences' *The Changing Nature of Persecution* (2000 conference) 150.

universal human rights treaties.<sup>14</sup> While the universal treaties set out comprehensive human rights standards, they lack vigorous application and extensive supervision.<sup>15</sup> Compared to the European system, the quasi-judicial UN-based treaty monitoring mechanisms are younger with a less-developed jurisprudence, and their non-binding ‘views’ rely on voluntary State compliance for effectiveness.<sup>16</sup>

Nevertheless, a number of restrictive EU-created ‘admissibility devices, of a jurisdictional and substantive nature’,<sup>17</sup> such as the policies of ‘safe third countries’, ‘manifestly unfounded claims’, ‘safe countries of origin’ and non-arrival policies severely restrict access to the ECHR.<sup>18</sup> Though not considered here in any detail, their purpose is to effectively deny asylum-seekers access to the ECHR mechanisms through a presumption of inadmissibility, and to legitimize States’ recourse to accelerated removal procedures. However, in an important decision in December 2004, the House of Lords ruled that the UK’s non-arrival policies for Czech Roma were unlawful.<sup>19</sup>

Lambert identifies the ICCPR as ‘the least suitable instrument’ for complementary protection.<sup>20</sup> Although some ICCPR rights are more expansive than the ECHR,<sup>21</sup> and the HRC’s proceedings are comparatively shorter and its views simpler, these do not outweigh its restrictive use of evidence,<sup>22</sup> inconsistent reasoning,<sup>23</sup> and the

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<sup>14</sup> O Andrysek ‘Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures’ (1997) 9 IJRL 392, 393; Heffernan (n1) 91.

<sup>15</sup> Andrysek (n14) 400.

<sup>16</sup> See O’Flaherty (n1) 47 fn 68; cf McGoldrick (n1) 381.

<sup>17</sup> Lambert (n1) 524 fn 37.

<sup>18</sup> See Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 8771/04 ASILE 33 (30 April 2004). For a discussion of the impact of such policies: M Fullerton ‘Failing the Test: Germany Leads Europe in Dismantling Refugee Protection’ (2001) 36 Texas Intl LJ 231.

<sup>19</sup> *R v Immigration Officer at Prague Airport, ex p European Roma Rights Centre* [2004] UKHL 55.

<sup>20</sup> Lambert (n1) 543.

<sup>21</sup> Right to self determination; freedom from discrimination; prohibition on incitement to national, racial, or religious hatred; children’s rights; right to life; rights of detainees; right to vote.

<sup>22</sup> ICCPR Optional Protocol art 5(1), including requirement for written evidence.

fact that it has considered comparatively few removal cases.<sup>24</sup> The HRC's jurisprudence reveals little more than 'a restrictive application of the principles developed by the Strasbourg organs'.<sup>25</sup> For these reasons, this chapter does not examine the ICCPR independently as an alternative asylum mechanism, but utilizes it comparatively where relevant.

## 2 Article 3

Article 3 ECHR provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Article 7 ICCPR additionally prohibits 'cruel treatment' and 'cruel punishment', but the difference in wording is immaterial for the purposes of this discussion, since the HRC tends not to distinguish between the different categories of treatment, instead referring generically to 'severe treatment' or 'ill-treatment'.<sup>26</sup>

The concept of 'inhuman or degrading treatment or punishment' was first enunciated during the drafting of the UDHR and ultimately embodied in article 5, aimed at preventing future occurrences of acts such as those perpetrated by the Nazis.<sup>27</sup> It has

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<sup>23</sup> Lambert (n1) 532 fn 85; see McGoldrick (n1) 368–71.

<sup>24</sup> *Ng v Canada* Comm No 469/1991 (5 November 1993) UN Doc CCPR/C/49/D/469/1991; *García v Ecuador* Comm No 319/1988 (5 November 1991) UN Doc CCPR/C/40/D/319/1988; *Cox v Canada* Comm No 539/1993 (31 October 1994) UN Doc CCPR/C/52/D/539/1993; *GT v Australia* Comm No 706/1996 (4 November 1997) UN Doc CCPR/C/61/D/706/1996; *C v Australia* Comm No 900/1999 (28 October 2002) UN Doc CCPR/C/76/D/900/1999.

<sup>25</sup> Lambert (n1) 543.

<sup>26</sup> M Nowak *UN Covenant on Civil and Political Rights: CCPR Commentary* (NP Engel Arlington 1993) 135.

<sup>27</sup> UNGA OR (3<sup>rd</sup> Session) Pt I Third Committee 'Summary Records of Meetings' (21 September–8 December 1948) 215, cited in A Fabbicotti 'The Concept of Inhuman or Degrading Treatment in International Law and Its Application in Asylum Cases' (1998) 10 IJRL 637, 639.

since been incorporated in numerous human rights<sup>28</sup> and humanitarian law<sup>29</sup> instruments, although never defined. Generally, it is regarded as part of a hierarchy of ill-treatment, with torture its most severe manifestation.<sup>30</sup> With over 150 States party to at least one binding international instrument proscribing inhuman or degrading treatment or punishment, Lauterpacht and Bethlehem assert that the prohibition on torture or cruel, inhuman or degrading treatment or punishment has attained the status of customary international law,<sup>31</sup> binding on *all* States.

In the *Greek* case, the European Commission established that the notion of ‘inhuman treatment’ covers ‘at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. ... Treatment or punishment of an individual may be said to be degrading if it grossly

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<sup>28</sup> In addition to ICCPR, CAT and ECHR, see UDHR art 5; Convention on the Prevention and Punishment of the Crime of Genocide UNGA Res 260A (III) of 9 December 1948 (entered into force 12 January 1951) art 2 (implicit in ‘genocide’); ACHR art 5(2); International Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 1976) 1015 UNTS 244 art 2; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment UNGA Res 3452 (XXX) of 9 December 1975 arts 1, 2; African (Banjul) Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 art 5; Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (adopted 26 November 1987, entered into force 1 February 1989) ETS No 126, as amended by ETS Nos 151, 152; CRC art 37; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families UNGA Res 45/158 of 18 December 1990 (entered into force 1 July 2003) art 10; Declaration on the Protection of All Persons from Enforced Disappearances UNGA Res 47/133 of 18 December 1992 art 1. See also non-binding documents relating to prisoners and detainees in Fabbriotti (n27) 641.

<sup>29</sup> 1949 Geneva Conventions art 3; GC1 art 50; GC2 art 51; GC3 art 130; GC4 art 147; AP I art 75; AP II art 4; Rome Statute arts 8(2)(a)(ii), 55(1)(b); ICTY Statute art 2; ICTR Statute art 2.

<sup>30</sup> *Ireland v UK* (1979–80) 2 EHRR 25 [167], reflecting Declaration on the Protection of All Persons (n28); DE Anker *Law of Asylum in the United States* (3<sup>rd</sup> edn Refugee Law Center Boston 1999) 465, 482, 485; W Suntinger ‘The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg?’ (1995) 49 *Austrian J Public Intl L* 203, 212.

<sup>31</sup> E Lauterpacht and D Bethlehem ‘The Scope and Content of the Principle of *Non-Refoulement*: Opinion’ in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP Cambridge 2003) [222]–[229]; HRC ‘General Comment 24: Issues relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant’ (4 November 1994) [8]; UNGA Res 39/118 of 14 December 1984 ‘Human Rights in the Administration of Justice’ UN Doc A/RES/39/118 [1].

humiliates him before others or drives him to act against his will or conscience.’<sup>32</sup> It does not have to encompass actual bodily harm.<sup>33</sup>

The concept of ‘degrading treatment’ was comprehensively considered in the *East African Asians* case, where the applicants suggested that it was constituted by treatment that lowers a person ‘in rank, position, reputation or character, whether in his own eyes or in the eyes of other people’.<sup>34</sup> The Commission considered this helpful but too broad, requiring additionally that it grossly humiliate the person before others or drive that person to act against his or her will or conscience.<sup>35</sup> Humiliation, rather than actual pain or suffering, is key.<sup>36</sup> More recently in *Pretty v UK*, the Court stated that ‘degrading treatment’ occurs

[w]here treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3.<sup>37</sup>

Degrading treatment may also encompass the denial of insufficient provision of basic services necessary for a dignified existence, including access to health, shelter, social security, and the education and protection of children, provided that a minimum level of severity is met.<sup>38</sup> These matters also form part of the individual’s right to respect

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<sup>32</sup> *Greek case* (1969) 12 Yearbook 1, 186.

<sup>33</sup> *Soering* (n5) [100]; *Ireland* (n30) [167].

<sup>34</sup> (1973) 3 EHRR 76 [189].

<sup>35</sup> *Greek case* (n32) 186; see *East African Asians* (n34) [189], [195].

<sup>36</sup> See *Tyrer v UK* (1979–80) 2 EHRR 1 [32]. A lack of intent to humiliate will not conclusively rule out a violation of article 3: *Peers v Greece* (2001) 33 EHRR 51 [74].

<sup>37</sup> *Pretty v UK* (2002) 35 EHRR 1 [52]; see also *Ireland* (n30) [167]. There has not yet been a case in which the threat of degrading treatment alone has given rise to a protection obligation: *Pellonpää* (n13) 146.

<sup>38</sup> *Blake and Husain* (n10) [2.97]; O Schachter ‘Human Dignity as a Normative Concept’ (1983) 77 AJIL 848, 851.

for private life (as an aspect of bodily and physical integrity) under article 8(1),<sup>39</sup> but whereas degrading treatment under article 3 can never be justified, article 8(2) permits the State to balance the individual's right with legitimate interests of the wider community, including social and economic considerations.

'Inhuman' and 'degrading punishment' describe acts of inhuman and degrading treatment respectively that are imposed as a reprimand or penalty.<sup>40</sup> Punishment may also be inhuman where it is wholly disproportionate to the offence committed,<sup>41</sup> or where the individual faces an unjustified or disproportionate sentence for political reasons.<sup>42</sup> In the context of article 7 ICCPR, the HRC has stated that 'for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty.'<sup>43</sup>

To trigger article 3 in a protection case, an applicant must show that there are substantial grounds for believing that he or she would face a real ('foreseeable'<sup>44</sup>) risk of being subjected to torture or inhuman or degrading treatment or punishment if removed.<sup>45</sup> A mere possibility of harm is insufficient, but nor is it necessary to show definitively that ill-treatment will occur. The ill-treatment must qualitatively attain a 'minimum level of severity',<sup>46</sup> the assessment of which is relative and 'depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances,

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<sup>39</sup> *Blake and Husain* (n10) [2.102].

<sup>40</sup> *Alleweldt* (n1) 364.

<sup>41</sup> *Kotälla v The Netherlands* (1978) 14 DR 238, 240.

<sup>42</sup> *Altun v Federal Republic of Germany* (1984) 36 DR 209, 233; *A v Switzerland* App No 11933/86 (14 April 1986).

<sup>43</sup> *Vuolanne v Finland* Comm No 265/1987 (7 April 1989) UN Doc CCPR/C/35/D/265/1987 [9.2].

<sup>44</sup> *Soering* (n5) [100].

<sup>45</sup> See *Lauterpacht and Bethlehem* (n31) [246], [249], [252].

<sup>46</sup> *Greek case* (n32) [11]; *Ireland* (n30) [162]; *Tyrrer* (n36) [29]–[30]; *Soering* (n5) [100].

the sex, age and state of health of the victim.’<sup>47</sup> Thus, even a small risk can be significant and ‘real’ where the foreseeable consequences are very serious.<sup>48</sup> Fabbricotti asserts that the more the ill-treatment is caused by underlying social and political disorder, such as civil war or terrorism, the higher the minimum level of severity will be assessed.<sup>49</sup>

### 3 The Scope of Other ECHR Rights

The parallel effect of the article 3 cases has been to expand the ambit of article 1 ECHR to include State responsibility for acts exposing individuals to proscribed ill-treatment *outside* their territorial jurisdiction. Although this is sometimes called the principle of extraterritoriality, it is better described as State responsibility arising from the foreseeable consequences of a removal decision which exposes an individual to a ‘real risk’<sup>50</sup> of ill-treatment in a third State.<sup>51</sup> The same principle is embodied in the ICCPR.<sup>52</sup>

The question is whether this responsibility is limited only to acts that constitute inhuman or degrading treatment or punishment, or whether it may also extend to breaches of other human rights. The European Court has stated that the removal of a person from a Member State may give rise to a protection issue under articles 2 or 3, and

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<sup>47</sup> *Soering* (n5) [100], [104]. See also *Ireland* (n25) [162], [167], [174]; *Tyrer* (n36) [29], [80].

<sup>48</sup> T Einarsen ‘The European Convention on Human Rights and the Notion of an Implied Right to *De Facto* Asylum’ (1990) 2 IJRL 361, 372 (eg *Soering* (n5)).

<sup>49</sup> Fabbricotti (n27) 646. See J Oraá *Human Rights in States of Emergency in International Law* (Clarendon Press Oxford 1992) 96. See Pt E below.

<sup>50</sup> *Cruz Varas v Sweden* (1991) 14 EHRR 1 [75], [76], [83]; *Vilvarajah v UK* (1991) 14 EHRR 248 [107]–[108].

<sup>51</sup> *Kacaj v Sect’y of State for the Home Dept* [2002] EWCA Civ 314 [26]; *TI v UK* [2000] INLR 211, 228. It is not extraterritorial vicarious liability for the acts themselves. Goodwin-Gill likens this restrictive test to *Wednesbury* unreasonableness: GS Goodwin-Gill *The Refugee in International Law* (2<sup>nd</sup> edn OUP Oxford 1996) 320, referring to *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 230.

<sup>52</sup> *Kindler v Canada* Comm No 470/1991 (30 July 1993) UN Doc CCPR/C/48/D/470/1991 [6.2]; see also *ARJ v Australia* Comm No 692/1996 CCPR/C/60/D/692/1996 (11 August 1997) [6.8].

exceptionally under articles 5 or 6.<sup>53</sup> Article 8 has also been relied on in removal cases, although not necessarily in relation to international protection.<sup>54</sup> The HRC recognizes, at least in principle, that States' *non-refoulement* obligations may be triggered 'when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.'<sup>55</sup>

In the recent domestic case of *Ullah*, the House of Lords comprehensively reviewed ECHR jurisprudence relating to *non-refoulement* to ask whether provisions other than article 3 'could be engaged in relation to a removal of an individual from the United Kingdom where the anticipated treatment in the receiving state will be in breach of the requirements of the Convention, but such treatment does not meet the minimum requirements of article 3 of the Convention.'<sup>56</sup> Overturning the Court of Appeal,<sup>57</sup> it concluded that in the right factual circumstances *any* ECHR provision could give rise to a *non-refoulement* obligation.<sup>58</sup>

Yet, though this appears to provide a very broad canvas for claiming a right not to be removed, in most cases 'it will be virtually impossible for an applicant to establish that control on immigration was disproportionate to any breach',<sup>59</sup> since, unlike the absolute nature of article 3, most ECHR provisions permit a balancing test between the interests of the individual and the State. Although this implies that it will be easier to establish a breach of an unqualified right, even those provisions are subject to stringent legal

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<sup>53</sup> *Soering* (n5) [91]; *Cruz Varas* (n50) [69]–[70]; *Vilvarajah* (n50) [103].

<sup>54</sup> See Pt E below.

<sup>55</sup> HRC 'General Comment 15: The Position of Aliens under the Covenant' (11 April 1986) [5]; see also HRC 'General Comment 18: Non-Discrimination' (10 November 1989).

<sup>56</sup> *Ullah v Sect'y of State for the Home Dept* [2004] UKHL 26 [1].

<sup>57</sup> [2002] EWCA Civ 1856, [2003] 1 WLR 770.

<sup>58</sup> *Ullah* (n56) [24]–[25] (Lord Bingham), [49]–[50] (Lord Steyn), [67] (Lord Carswell). See also *Kacaj* (n51) [39]; *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745, 795 (Judge Matscher).

<sup>59</sup> *Kacaj* (n51) [26].

thresholds which place protection from *non-refoulement* out of reach in all but the most exceptional circumstances.

Though immigration control per se does not justify State interference with ECHR rights,<sup>60</sup> it provides ‘the medium through which other legitimate aims are promoted’.<sup>61</sup> The Court has consistently held that immigration control relates to recognized legitimate aims set out in paragraph 2 of articles 8–11, such as measures taken to protect national security, public safety, public health or morals, rights and freedoms of others, the country’s economic well-being, and to prevent disorder or crime.<sup>62</sup> Where a violation of a right in articles 8–11 is alleged, paragraph 2 operates as a balancing clause that permits interference in the primary right where it is for a legitimate motive, prescribed by law and is necessary rather than merely desirable (the proportionality concept).<sup>63</sup> The ICCPR regime is broadly similar,<sup>64</sup> but contains a balancing cause with respect to freedom of movement but not in respect of family and private life.<sup>65</sup>

Immigration controls must be ‘exercised consistently with Convention obligations’,<sup>66</sup> and although not tested in the asylum area, there is some authority to suggest that interference with a right solely as a deterrence mechanism is not a legitimate aim.<sup>67</sup> However, such controls will be justifiable where the restrictions they place on rights are necessary and proportionate, and represent the minimum interference necessary

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<sup>60</sup> With the exception of art 5(1)(f).

<sup>61</sup> *Blake and Husain* (n10) [4.72].

<sup>62</sup> *Abdulaziz* (n2) [65]; *Vilvarajah* (n50) [102]; *Chahal* (n6) [73]; *D v UK* (1997) 24 EHRR 423 [46]; *Bensaid v UK* (2001) 33 EHRR 205 [32]; *Boultif v Switzerland* (2001) 33 EHRR 50 [46]. Discussion: *Blake and Husain* (n10) [4.72]; C Ovey and RCA White *Ovey and White: European Convention on Human Rights* (3<sup>rd</sup> edn OUP Oxford 2002) 204. This is a long-established principle of international law: I Brownlie *Principles of Public International Law* (5<sup>th</sup> edn OUP Oxford 1998) 522; *Saadi v Sect’y of State for the Home Dept* [2002] UKHL 41, [2002] 1 WLR 3131 [31].

<sup>63</sup> *Blake and Husain* (n10) [4.2]. Note that art 18 ECHR prevents any further qualifications.

<sup>64</sup> ICCPR arts 18(3), 19(3), 22(2).

<sup>65</sup> ICCPR arts 12(3), 17.

<sup>66</sup> *Abdulaziz* (n2) [59].

<sup>67</sup> *Rutili v Ministre de l’Intérieur* [1975] ECR 1219 (ECJ).

to secure the desired aim.<sup>68</sup> Ovey and White suggest it is relatively simple for a State to characterize its actions as falling within a prescribed exception,<sup>69</sup> but the Court will rigorously analyse the measures taken to secure the legitimate aim in assessing questions of necessity and proportionality.

For all these reasons, applicants seeking to rely on other ECHR provisions typically invoke them *in conjunction with* article 3, since it is a recognized ground for non-removal and an unqualified provision. The Court's approach is to first consider the article 3 claim, and if that is successful then the other grounds are not addressed. Where the article 3 claim fails, Strasbourg jurisprudence suggests there is little likelihood of the facts reaching the relevant severity threshold under other articles, given that they generally permit balancing of the rights of the individual vis-à-vis the State.

#### **4 Rationale for Examining Other Rights**

There is a reassuring simplicity in tying any ECHR protection need to article 3—it is a non-derogable provision, echoed in article 3 CAT and article 7 ICCPR, and the subject of a well-established extraterritoriality jurisprudence in the European Court of Human Rights.<sup>70</sup> Characterizing breaches of other ECHR rights as article 3 violations in removal cases gives rise unequivocally to the benefit of *non-refoulement*. With the deletion of a general human rights basis for claiming protection under the Qualification Directive,

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<sup>68</sup> Ovey and White (n62) 5.

<sup>69</sup> *ibid* 204.

<sup>70</sup> Cases establishing article 3 as a ground for reliance in a foreign case: *Chahal* (n6), *D v UK* (n62); *Cruz Varas* (n50); *Vilvarajah* (n50); *HLR v France* (1997) 26 EHRR 29; *Gonzalez v Spain* App No 43544/98 (29 June 1999); *Dehwari v The Netherlands* (2000) 29 EHRR CD 74; *Hilal v UK* (2001) 33 EHRR 2.

article 15(b)<sup>71</sup> on inhuman and degrading treatment looks set to become the litmus test for establishing a human rights basis for protection under that instrument.

Yet it is also important not to stultify the development of jurisprudence under other ECHR provisions by neglecting their own inherent capacity for founding protection claims. The fact that human rights treaties expressly list a range of positive rights, rather than leaving them implicit in the prohibition of ‘torture and inhuman or degrading treatment or punishment’, supports their independent use in removal claims. In particular, making a breach of one article contingent on the factual and legal thresholds of another may subject the alleged ill-treatment to an additional level of analysis against inappropriate criteria by requiring every ‘flagrant denial or gross violation’<sup>72</sup> to also qualify as inhuman or degrading treatment. While in many cases it will—suggesting that the threshold under other provisions is very similar to article 3—there is value in acknowledging that particular forms of ill-treatment may independently constitute grounds for remaining in a Member State. Of particular interest is defining the gap between treatment that does not reach the article 3 threshold but that may flagrantly breach another provision.

Finally, aside from their potential *non-refoulement* value, it is worth examining the ECHR rights to determine what precisely they protect. If nothing else, examining Strasbourg jurisprudence on the interpretation of other ECHR provisions gives content to ‘treatment’ under article 3.

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<sup>71</sup> Note that the Qualification Directive limits this requirement to the country of residence.

<sup>72</sup> *Devaseelan v Sect’y of State for the Home Dept* [2003] Imm AR 1 [111].

## C UNQUALIFIED RIGHTS

The majority of ECHR rights are unqualified. Whereas the qualified rights (articles 8–11) are subject to interference to secure certain ‘legitimate’ State aims,<sup>73</sup> the unqualified rights do not permit the weighing up of individual and State interests.

Articles 2, 3, 4(1), 7 and article 4 of Protocol 7 cannot be derogated from in any circumstances, and in this sense are absolute rights. Of these, articles 2 and 3 are already incorporated in the Qualification Directive as triggers for subsidiary protection.<sup>74</sup> Piotrowicz and van Eck, who argue that there is ‘no justification, on the basis of ECtHR case law, for an obligation to allow aliens to remain in the absence of a serious risk of a breach of one of the non-derogable rights, or else perhaps a threat of a flagrant violation of another convention right’,<sup>75</sup> suggest that articles 4(1) (prohibition of slavery and servitude) and 7 (no punishment without law) could also give rise to a *non-refoulement* obligation, especially since these rights are common to the ECHR, ICCPR and ACHR and are also recognized as *jus cogens*.<sup>76</sup> Although the court in *Ullah* did not distinguish between derogable and non-derogable rights in finding that on the right facts, any ECHR right could give rise to *non-refoulement*, the legal threshold will arguably be easier to meet where a non-derogable, unqualified right is concerned.

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<sup>73</sup> The list of circumstances in which interference is permitted is exhaustive: ECHR art 18.

<sup>74</sup> Arts 15(a) and (b).

<sup>75</sup> R Piotrowicz and C van Eck ‘Subsidiary Protection and Primary Rights’ (2004) 53 ICLQ 107, 129.

<sup>76</sup> See Oraá (n49) 96; US Restatement of the Foreign Relations Law of the USA (American Law Institute Washington 1987) 174–75. For background on the *travaux* of the non-derogable rights in the ICCPR, ECHR and ACHR, see Oraá 88–94.

## 1 Article 2

The right to life in article 2 imposes a positive obligation on the State to take all reasonable measures to safeguard the right to life and deter those who might kill.<sup>77</sup> It excludes deaths resulting from lawful acts of war<sup>78</sup> and the intentional deprivation of life as a criminal penalty.<sup>79</sup> However, Protocol 6 prohibits the imposition of the death penalty in peace time<sup>80</sup> and Protocol 13 now prohibits the death penalty absolutely,<sup>81</sup> reflected in article 15(a) of the Qualification Directive. Paragraph 2 lists three other circumstances in which killing a person will not contravene the general rule in paragraph 1,<sup>82</sup> but as the court observed in *McCann*, the fact that these are expressly enumerated as justifications for taking a life underscores the fundamental importance of the primary right.<sup>83</sup>

Although Court jurisprudence suggests that article 2 may prevent removal where there are general risks to life, to date no case has succeeded solely on this ground.<sup>84</sup> The Commission observed the incongruity that would arise if article 3 could be relied on but article 2 could not, '[g]iven the special importance attached to the right to life by modern

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<sup>77</sup> *McCann v UK* (1995) 21 EHRR 97.

<sup>78</sup> ECHR art 15(2).

<sup>79</sup> ECHR art 2(1).

<sup>80</sup> Protocol No 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty (adopted 28 April 1983, entered into force 1 March 1985) ETS No 114.

<sup>81</sup> Protocol No 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in All Circumstances (adopted 3 May 2002, entered into force 1 July 2003) ETS No 187.

<sup>82</sup> These have been adopted in HRC jurisprudence on art 6 ICCPR: *Guerrero v Columbia* (1982) in Report of HRC UNGAOR 37<sup>th</sup> session Supp No 40 (1982) 137, as cited in McGoldrick (n1) 341.

<sup>83</sup> *McCann v UK* (n77) [147]: 'as a provision ... which not only safeguards the right to life but sets out the circumstances when the deprivation of life may be justified, Article 2 ... ranks as one of the most fundamental provisions in the Convention.'

<sup>84</sup> *Tatete v Switzerland* App No 41874/98 (6 July 2000) (settlement reached); *D v UK* (n62) (decided on article 3); *Mamatkulov v Turkey* App Nos 46827/99;46951/99 (6 February 2003) (see also admissibility decision 31 August 1999).

human rights instruments'.<sup>85</sup> Likewise, Lord Steyn observed in *Ullah* that '[i]f article 3 may be engaged it is difficult to follow why, as a matter of logic, article 2 could be peremptorily excluded. There may well be cases where article 3 is not applicable but article 2 may be'.<sup>86</sup> He suggests that had the court not found a breach under article 3 in *D v UK*, the applicant would have clearly succeeded under article 2.<sup>87</sup> In *D v UK*, the Court did not regard the article 2 claim as unfounded in principle, but found it unnecessary to review the article 2 claim separately from article 3. In other cases, despite acknowledgment that 'an issue might arise under Article 2 of the Convention ... in circumstances in which the expelling State knowingly puts the person concerned [at] such high risk of losing his life as for the outcome to be a near-certainty',<sup>88</sup> article 2 claims have failed on the facts.<sup>89</sup>

Article 2 may also be relevant to protection claims involving women at risk of late-term abortions or forced sterilization under China's one-child policy. ECHR jurisprudence on abortion and foetal rights remains unsettled,<sup>90</sup> but the Commission rejected the proposition that article 2 recognizes an absolute right to life for an unborn child, since that life must be balanced against the mother's right to life.<sup>91</sup> Although article 2 is an unqualified right, the weighing-up of interests in that case was between competing claims to life by two individuals, rather than against interests of the State, and therefore appropriate.

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<sup>85</sup> *Dehwari* (n70) [62].

<sup>86</sup> *Ullah* (n56) [40] (Lord Steyn). See also *Sect'y of State for the Home Dept v Kacaj* [2002] Imm AR 213 (Collins J); *Osman v UK* (1998) 29 EHRR 245.

<sup>87</sup> *D v UK* (n62) [59].

<sup>88</sup> *Dehwari* (n70) [61].

<sup>89</sup> *Gonzalez* (n70); *Dehwari* (n70).

<sup>90</sup> National responses under the Refugee Convention have varied. See *Fabbricotti* (n27) 658ff.

<sup>91</sup> *X v UK* (1980) 19 DR 244.

Although the Canadian Federal Court of Appeal characterized the threat of forced sterilization as ‘a fundamental violation of basic human rights’ and ‘cruel, inhuman and degrading treatment’,<sup>92</sup> a conflicting approach was taken by the same court in *Chan v Canada* on the basis that the State was pursuing a legitimate aim, namely birth control.<sup>93</sup> In the context of the Refugee Convention, decision-makers have tended to view population control measures as permissible social policies that are not inherently persecutory.<sup>94</sup> However, there are also difficulties with construing persons who object to a general social policy as a ‘particular social group’ under article 1A(2). To overcome this, the US modified the refugee definition to include persons who have been ‘forced to abort a pregnancy or to undergo involuntary sterilization’, or who have been persecuted for failure to undergo such procedures, as having a well-founded fear of persecution on grounds of political opinion.<sup>95</sup>

The issue remains to be conclusively ruled upon in the European context, but the Commission has observed that in the right factual circumstances, forced sterilization could violate articles 2 and 3 ECHR.<sup>96</sup> Importantly, even if there may be legitimate reasons for the State to sanction forced sterilization, if that treatment is found to violate articles 2 or 3, those provisions’ absolute nature means that legitimate State interests are irrelevant—the treatment is *prima facie* unjustifiable.

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<sup>92</sup> *Cheung v Canada* [1993] 2 FC 314 (FCA) 324.

<sup>93</sup> [1993] 20 ImmLR (2d) 81. The Supreme Ct affirmed the decision, but largely on evidentiary grounds: *Chan v MEI* [1995] 3 SCR 593.

<sup>94</sup> *Matter of Chang* 20 I & N Decisions 38 (BIA) 1989 (USA); *Applicant A v Minister of Immigration and Ethnic Affairs* (1997) 190 CLR 225 (Australia); cf *Chan* (n93) (Canada); discussion in T Alexander Aleinikoff ‘Protected Characteristics and Social Perceptions: An Analysis of the Meaning of “Membership of a Particular Social Group”’ in Feller, Türk and Nicholson (n31) 306–08.

<sup>95</sup> INA §101(a)(42), 8 USC §1101(a)(42).

<sup>96</sup> App No 1287/61, cited in *Ovey and White* (n62) 227.

This is why the characterization of the act is so crucial to the protection outcome. For example, although article 8 may provide an alternative source of protection for abortion–sterilization cases, as a qualified right it permits balancing the individual’s rights against broader national interests.

## 2 Article 4

Article 4 prohibits slavery and servitude absolutely, and ‘forced or compulsory labour’ to the extent that it is unqualified by paragraph 3. These prohibitions are reiterated in article 4 UDHR, article 8 ICCPR and subject-specific international treaties,<sup>97</sup> and generally considered customary international law as well.<sup>98</sup> The difference between the two is degree: slavery suggests complete legal ownership by another person, while servitude implies a more limited form of subrogation which may include ‘the obligation on the part of the “serf” to live on another’s property and the impossibility of changing his condition’.<sup>99</sup> The prohibition cannot be abrogated by consent, since ‘[i]t should not be possible for any person to contract himself into bondage’.<sup>100</sup>

Piotrowicz and van Eck argue that article 4(1) should provide recourse for victims of human trafficking,<sup>101</sup> which is recognized as a contemporary form of slavery<sup>102</sup> and a

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<sup>97</sup> eg Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, 60 LNTS 253; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (adopted 7 September 1956, entered into force 30 April 1957).

<sup>98</sup> *Barcelona Traction case* (1970) ICJ Rep 3, 32; M Whiteman *Digest of International Law* (Washington 1968) vol 2 866–67.

<sup>99</sup> *Van Droogenbroeck* (9 July 1980) Series B No 44, 30. See 1926 Slavery Convention (n97) for ‘slavery’ definition; 1956 Supplementary Convention (n97) art 7 for ‘servitude’ definition.

<sup>100</sup> Drafters of Supplementary Convention on Slavery and the ICCPR UN Doc A/2929, 33, cited in Ovey and White (n62) 100. This has been supported by the court in *De Wilde, Ooms and Versyp v Belgium* (1979–80) 1 EHRR 373.

<sup>101</sup> Piotrowicz and van Eck (n75) 125–26.

crime posing serious threats to basic human rights.<sup>103</sup> Trafficking encompasses the forced ‘recruitment, transportation, transfer, harbouring or receipt of persons’ for the purposes of exploitation, including by ‘the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.’<sup>104</sup> There are obvious overlaps between this definition and that of ‘slavery’ in the 1926 and 1956 Slavery Conventions.<sup>105</sup> The 1926 treaty defines slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’,<sup>106</sup> broadened by the 1956 Convention to include debt-bondage, serfdom, servile marriage and child labour (the last two typical of contemporary trafficking).<sup>107</sup>

Despite being a non-derogable right, there is little article 4 jurisprudence involving asylum cases. While a strong article 4 claim will typically also succeed under article 3 ECHR,<sup>108</sup> this does not mean that article 4 should be redundant. As Lord

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<sup>102</sup> Report of the Working Group on Contemporary Forms of Slavery ‘Contemporary Forms of Slavery’ E/CN.4/Sub.2/1998/14 (6 July 1998) Recommendation [97]; Report of the Working Group on Contemporary Forms of Slavery E/CN.4/Sub.2/2004/36 (20 July 2004) Recommendations 19–31 [39].

<sup>103</sup> Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others UNGA Res 317(IV) of 2 December 1949 (entered into force 25 July 1951); Convention against Transnational Organized Crime UNGA Res 55/25 of 15 November 2000 (entered into force 29 September 2003); Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children UNGA Res 55/25 of 15 November 2000 art 3(a) (definition of ‘trafficking’), art 7; Rome Statute arts 8(2)(b)(xxii), 7(c), 7(g); Treaty on the European Union [2002] OJ C 325/5 art 29. See also R Piotrowicz ‘European Initiatives in the Protection of Victims of Trafficking Who Give Evidence against Their Traffickers’ (2002) 14 IJRL 263. For comprehensive list of trafficking treaties from 1904, see L Reanda ‘Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action’ (1991) 13 HRQ 202.

<sup>104</sup> Trafficking Protocol 2000 (n103) art 3(1).

<sup>105</sup> For discussion: J Morrison and B Crosland ‘The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy’ UNHCR *New Issues in Refugee Research* Working Paper (Geneva April 2001) 50.

<sup>106</sup> 1926 Slavery Convention (n97) art 1(1).

<sup>107</sup> For an overview of the international law on slavery, see D Weissbrodt and Anti-Slavery International ‘Consolidation and Review of the Conventions on Slavery, Executive Summary of the Working Paper’ (1999) (prepared for Working Group on Contemporary Forms of Slavery 24<sup>th</sup> Session) UN Doc E/CN.4/Sub.2/AC.2/1999/6.

<sup>108</sup> *Ould Barar v Sweden* (1999) 28 EHRR CD 213. See also *W, X, Y and Z v UK* (1968) 11 Yearbook 562.

Bingham observed in *Ullah*, ‘it would seem to be inconsistent with the humanitarian principles underpinning the Convention to accept that, if the facts were strong enough, a claim would be rejected even if it were based on article 4 alone.’<sup>109</sup> The UK Court of Appeal has also stated that ‘the right is fundamental and there can be no derogation’ and it ‘can be equated to Article 3.’<sup>110</sup>

Simply having been trafficked will be insufficient to sustain an article 4 protection claim, since to engage the principle of *non-refoulement* it will be necessary to show a real risk of serious harm to the individual if removed. Thus, while article 4(1) will be highly relevant to an individual at risk of re-trafficking (or to other conditions constituting slavery or servitude) which the receiving State is unable or unwilling to prevent, the generality of article 3 may otherwise better encapsulate the harm feared on repatriation, such as ‘reprisals or retaliation from trafficking rings or individuals ... severe community or family ostracism, or severe discrimination.’<sup>111</sup> Importantly, once any violation of article 4(1) gives rise to *non-refoulement*, it will apply without exception.

Similarly, an individual’s subjection to forced labour contrary to article 4(2) will not give rise to a right to remain unless that person will be persecuted or subjected to other serious harm if removed. Where, however, the individual fears removal to forced or compulsory labour<sup>112</sup> (that is not permitted by article 4(3)), article 4(2) may provide an appropriate basis for the claim.

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<sup>109</sup> *Ullah* (n56) [16]; see also [41] (Lord Steyn).

<sup>110</sup> *Kacaj* (n51) [4], citing IAT decision (n86) [22] (this aspect was not questioned on appeal).

<sup>111</sup> UNHCR ‘Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees’ UN Doc HCR/GIP/02/01 (7 May 2002) [18].

<sup>112</sup> For meaning, see Convention concerning Forced or Compulsory Labour (ILO No 29) (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55, supplemented by the Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959) 320 UNTS 291; *Iversen v Norway* (1963) 6 Yearbook 278, 308, 328; *X v Federal Republic of Germany* (1974) 17 Yearbook 148; *X v Federal*

Finally, in some circumstances, human trafficking may constitute a war crime or a crime against humanity.<sup>113</sup> Article 8(2)(b)(xxii) of the Rome Statute provides that ‘sexual slavery, enforced prostitution, forced pregnancy [and] enforced sterilization’ are war crimes, while ‘enslavement’<sup>114</sup> and ‘sexual slavery, enforced prostitution, forced pregnancy [and] enforced sterilization’<sup>115</sup> can constitute crimes against humanity when committed as part of a widespread or systematic attack against a civilian population. ‘Enslavement’ explicitly includes human trafficking.<sup>116</sup> As Chapter 2 explained, it is incongruent that victims of acts constituting the most serious of international crimes should not also be able to found the basis of a protection claim.

### 3 Articles 5 and 6

Although articles 5 and 6 have not yet prevented removal, there is considerable authority to suggest that they could in the right factual circumstances.

#### (a) Article 5

Article 5 protects the right to liberty and security of the person. Where an individual is expelled to a State and detained pursuant to a conviction that was a flagrant denial of justice, article 5 (and possibly also article 6) will be breached,<sup>117</sup> and responsibility will

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*Republic of Germany* (1980) 18 DR 216; *X v The Netherlands* (1983) 32 DR 180; cf *W, X, Y and Z v UK* (n108); *Ovey and White* (n62) 100.

<sup>113</sup> For discussion of the role of international criminal law in complementary protection, see Ch 2.

<sup>114</sup> Rome Statute art 7(1)(c).

<sup>115</sup> Rome Statute art 7(1)(g).

<sup>116</sup> Rome Statute art 7(2)(c).

<sup>117</sup> *Drozd* (n58) [118].

lie with the expelling State.<sup>118</sup> Accordingly, Member States are obliged not to cooperate with extradition requests based on convictions resulting from ‘a flagrant denial of justice’.<sup>119</sup> According to Lord Steyn, given the importance of article 5 in upholding the rule of law, treatment should not need to reach the severity of article 3 to constitute a breach.<sup>120</sup>

Although deprivation of liberty clearly encompasses detention, its scope is not clear-cut. Curtailment of the right to move freely within a country may constitute a deprivation of liberty, but it may also be subject to legitimate restrictions.<sup>121</sup> ECHR jurisprudence determines the issue on the basis of the degree and intensity of deprivation rather than its nature or substance,<sup>122</sup> considering factors ‘such as the type, duration, effects and manner of implementation of the measure in question.’<sup>123</sup> Accordingly, compulsory residence on an island<sup>124</sup> and surveillance in an airport transit zone hotel<sup>125</sup> have been found to constitute deprivation of liberty under article 5. In the latter case, the Court rejected France’s assertion that the asylum-seekers could voluntarily depart France at any time, holding not only that this did not negate the deprivation of liberty, but was only theoretically possible if no other State that could offer comparable protection was willing to accept them.<sup>126</sup>

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<sup>118</sup> *Blake and Husain* (n10) [3.12]; *Bankovic v Belgium* (2001) 11 BHRC 435 [67]–[68]; arguments in *Mar v UK* (1996) 23 EHRR CD 120 (ultimately settled).

<sup>119</sup> *Drozd* (n58) [110]. Complaints under arts 5 and 6 admissible in relation to expulsion: *Mar* (n118).

<sup>120</sup> *Ullah* (n56) [43] (Lord Steyn). See links between arts 7 and 10(1) ICCPR.

<sup>121</sup> cf UNHCR ‘Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers’ (3 February 1999): definition supports confinement notion.

<sup>122</sup> *Guzzardi v Italy* (1981) 3 EHRR 333 [93].

<sup>123</sup> *ibid* [92].

<sup>124</sup> *ibid*.

<sup>125</sup> *Amuur v France* (1996) 22 EHRR 533.

<sup>126</sup> *ibid* [48].

Detention of asylum-seekers by Member States will generally be incidental to (rather than give rise to) a right to remain, but there may be cases where the imposition of detention unjustifiably obstructs access to protection. Thus in *Amuur*, the Court stated that the ‘immigration control’ exception to detention in article 5(1)(f) cannot be used ‘to foil [asylum seekers’] increasingly frequent attempts to circumvent immigration restrictions’ by depriving them of the protection afforded by the Refugee Convention and the ECHR.<sup>127</sup> Claiming asylum, without more, does not constitute unauthorized entry within the meaning of article 5(1)(f) and therefore cannot justify detention.<sup>128</sup>

(b) Article 6

There is continued support for the *Soering* proposition that article 6 may, in exceptional circumstances, prevent States from removing a person who ‘has suffered or risks suffering a flagrant denial of a fair trial in the requesting country’<sup>129</sup> (especially where there is a risk of execution<sup>130</sup>). Although unsuccessful on the facts, the Court in *Soering* accepted that ‘in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country’, article 6 may require the Member State not to remove an applicant.<sup>131</sup> In *Einhorn v France*, the Court observed that extradition would raise an issue under article 6 ‘if there were substantial grounds for

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<sup>127</sup> *ibid* [43].

<sup>128</sup> *Blake and Husain* (n10) [3.29]; Refugee Convention art 31; UNHCR ‘Revised Guidelines’ (n121).

<sup>129</sup> *Soering* (n5) [113]; *Drodz* [110]; *Einhorn v France* App No 71555/01 (16 October 2001) [32]; *Razaghi v Sweden* (App No 64599/01 (11 March 2003); *Tomic v UK* App No 17837/03 (14 October 2003).

<sup>130</sup> *Tomic* (n129) [3]; *Soering* (n5) [113].

<sup>131</sup> *Soering* (n5) [113]. See also *Bankovic* (n118) [68]; *Einhorn* (n129) [32].

believing that [the applicant] would be unable to obtain a retrial in that country and would be imprisoned there in order to serve the sentence passed on him in absentia.’<sup>132</sup>

#### **4 Article 7**

Article 7, proscribing retroactivity of penal laws, is absolute and non-derogable. Although unlikely to arise in the immigration context, Lord Steyn reasons that it should be addressed in the same manner as the Court’s rulings on extradition and expulsion involving a real risk of a flagrant violation of a fair trial.<sup>133</sup> Similarly, Piotrowicz and van Eck suggest that where a person can demonstrate a serious risk of exposure to a breach of article 7, States’ protection obligations should take effect.<sup>134</sup>

#### **5 Article 14**

Article 14 prohibits discrimination in the ‘enjoyment of the rights and freedoms’ contained in the ECHR. It cannot be invoked autonomously but must be raised in conjunction with another article.<sup>135</sup> Importantly, provided that the application falls within the ambit of an ECHR right or freedom,<sup>136</sup> there is no need in discrimination cases to establish a substantive violation of the additional provision may provide particularly in cases where a claim based solely on that other article would be insufficient to establish a

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<sup>132</sup> *Einhorn* (n129) [33].

<sup>133</sup> *Ullah* (n56) [45] (Lord Steyn).

<sup>134</sup> *Piotrowicz and van Eck* (n75) 127.

<sup>135</sup> There is a freestanding right to non-discrimination in Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 11 April 2000) ETS No 177.

<sup>136</sup> See *Belgian Linguistics case* (1968) 1 EHRR 252; *Poirrez v France* App No 40892/98 (30 September 2003).

breach.<sup>137</sup> The question then is whether ‘a lack of respect or interference that is discriminatory’ contravenes article 14.<sup>138</sup> The list of grounds on which discrimination may occur is not exhaustive. However, given the very high thresholds for treatment sufficiently severe to prevent removal, unless the substantive provision which is relied upon is also breached, the non-discrimination principle will not prevent removal or permit admission. Accordingly, only where the discrimination itself is so serious that itself breaches article 3 may it provide the desired relief.<sup>139</sup>

## D QUALIFIED RIGHTS

Of the four qualified rights, only articles 8 and 9 have formed the basis of ECHR protection claims and are examined below. Given the four provisions’ similar construction, the reasoning behind those decisions would also apply to claims under articles 10 or 11.

### 1 Article 8<sup>140</sup>

Article 8(1) of the ECHR protects the right to respect for private and family life,<sup>141</sup> home and correspondence, qualified by economic, health and security factors in paragraph (2).

Although article 8 has given rise to a significant body of ECHR jurisprudence, it has been

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<sup>137</sup> See *Belgian Linguistics case* (n136); *Poirrez* (n136); Ovey and White (n62) 349.

<sup>138</sup> *Blake and Husain* (n10) [6.8].

<sup>139</sup> *East African Asians* (n34); *Abdulaziz* (n2); *Cyprus v Turkey* (2002) 35 EHRR 30.

<sup>140</sup> See D Feldman ‘The Developing Scope of Article 8 of the European Convention on Human Rights’ [1997] European HR L Rev 265; C Warbrick ‘The Structure of Article 8’ [1998] European HR L Rev 32.

<sup>141</sup> See J Liddy ‘The Concept of Family Life under the ECHR’ [1998] European HR L Rev 15; U Kilkelly *The Child and the European Convention on Human Rights* (Ashgate Dartmouth 1999) ch 7.

decisive in only a handful of asylum cases—either due to the facts or deferral to article 3.<sup>142</sup> Decisions in the general immigration context reveal inconsistencies, taking a case-by-case approach instead of applying precise criteria in assessing the existence and necessity of an interference.<sup>143</sup>

(a) Family life

The right to family unity is a widely acknowledged,<sup>144</sup> yet commonly flouted,<sup>145</sup> principle of international law. It obliges States to refrain from action that would lead to family separations, to take measures to maintain family unity, and to reunite close family members who are unable to enjoy the right to family unity elsewhere (thus incorporating the right to family reunification).<sup>146</sup>

Family reunification has special significance in the protection context—it may be the only way of ensuring respect for a refugee’s right to family unity, since the refugee

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<sup>142</sup> eg *Amrollahi v Denmark* App No 56811/00 (11 July 2002) [44]; H Lambert ‘The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion’ (1999) 11 IJRL 427, 448. While article 8 claims relate to the consequences of expulsion on the family or private life *within* the Member State, and article 3 is a more appropriate provision for claims relating to consequences feared in the State of origin, cases that invoke both and succeed under article 3 will not address article 8.

<sup>143</sup> Lambert (n142) 434.

<sup>144</sup> CRC art 10(1); GC4 arts 26, 82, 49, 25, 140; API art 74; APII art 4(3)(b); Migrant Workers Convention (n28) art 44; UNHCR Global Consultations ‘Summary Conclusions: Family Unity’ (Geneva 8–9 November 2001); Temporary Protection Directive art 15; Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification [2003] OJ L251/12.

<sup>145</sup> C Petty ‘Family Tracing and Reunification—Safeguarding Rights and Implementing the Law’ (1996) 4 Intl J of Children’s Rights 174. Problems lie in lack of implementation and enforcement mechanisms, rather than an insufficient legal framework.

<sup>146</sup> For summary, ‘Summary Conclusions: Family Unity’ (n144).

cannot return to the country of origin.<sup>147</sup> The HRC therefore argues that the right to family unity will sometimes outweigh States' discretion relating to border control.<sup>148</sup>

Family reunion will rarely comprise the sole basis of a *protection* claim. It may be a reason advanced to secure admission or non-removal, but it is rare to claim that persecution or serious harm is entirely constituted by the inability to enjoy family unity in the country of origin.<sup>149</sup> Rupture of family unity is more commonly a consequence of such harm rather than constitutive of it. Protection claims are generally based on a provision such as article 3, with article 8 included as an *additional* ground. Should the primary claim fail, however, then the right to family unity may become crucial to securing a right to remain in or enter another State.<sup>150</sup>

In assessing whether article 8 has been breached in an immigration matter, the Court first considers whether there is an effective family life between the members of the family concerned. This is a question of fact, and relevant questions include whether there is financial<sup>151</sup> or other<sup>152</sup> dependency, or cohabitation (although the latter is not necessarily determinative<sup>153</sup>). While only husband–wife and dependent parent–child relationships have been expressly recognized as sufficiently close in cases involving non-citizens,<sup>154</sup>

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<sup>147</sup> *ibid* [9].

<sup>148</sup> HRC 'General Comment 19: Protection of the Family, the Right to Marriage and Equality of the Spouses' (27 July 1990) [5]. Although the ICCPR contains no balancing clause with respect to family reunion, this comment reveals that it will be balanced against legitimate State interests.

<sup>149</sup> See Piotrowicz and van Eck (n75) 128. They believe it is best regulated by instruments such as the Family Reunification Directive (n144).

<sup>150</sup> One reason why it has entered the asylum debate is due to States' restrictions on family immigration channels. In non-asylum removal cases it may be the primary right, including in cases where initially there was an asylum claim that, over time, has given way to a family unity claim.

<sup>151</sup> *eg* Qualification Directive art 23(5).

<sup>152</sup> Family Reunification Directive (n144) art 4(2)(b): health grounds.

<sup>153</sup> *Berrehab v The Netherlands* (1988) 11 EHRR 322 [21] (where children lived with only one parent); *Abdulaziz* (n2) [61]–[63].

<sup>154</sup> *East African Asians v UK* (n34); *X and Y v UK* (1972) 39 CD 104; *Abdulaziz* (n2); *Berrehab* (n153). See further Ovey and White (n62) 233–34 fn 80.

the Court has accepted that the relationship between grandparents and grandchildren,<sup>155</sup> an uncle and nephew,<sup>156</sup> and an orphaned child and aunt<sup>157</sup> could qualify in certain circumstances. Same sex relationships are considered to fall outside the scope of ‘family life’ but recognized as part of ‘private life’.<sup>158</sup> Article 12 may be useful where applicants cannot yet demonstrate an existing family life but have an intention to establish one,<sup>159</sup> such as an engaged couple.

Once the ‘family’ test is satisfied, the Court determines whether there is an interference with article 8(1). There is a clear distinction between *admission* cases seeking family reunification, and *removal* cases that will disrupt family unity.

(i) *Admission*

In admission cases, the Court balances individual–State interests at the point of determining whether there is an interference with the right to family life. If it is possible and not unreasonable for the family to reside in a third State, then there will be no interference. The threshold is set particularly high since ‘as a matter of well-established

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<sup>155</sup> *Marckx v Belgium* (1979) 2 EHRR 330 [45].

<sup>156</sup> *Boyle v UK* (1995) 19 EHRR 179. Where the uncle and nephew or niece have not been residing together, the relationship has been found not to be close enough: *X v Federal Republic of Germany* (1968) 11 Yearbook 494, 518. More liberal interpretations better reflect European trends: eg PA Recommendation 1327 (1997) on the Protection and Reinforcement of the Human Rights of Refugees and Asylum-Seekers in Europe [8.vii(o)].

<sup>157</sup> *Nsona v The Netherlands* App No 23366/94 (29 November 1996) [144]. This involved family reunion of a non-citizen.

<sup>158</sup> *X and Y v UK* App No 9369/81 (3 May 1983); *Norris v Ireland* (1988) 13 EHRR 186; *Dudgeon v UK* (1981) 4 EHRR 149.

<sup>159</sup> *Abdulaziz* (n2). See H Storey ‘The Right to Family Life and Immigration Case Law at Strasbourg’ (1990) 39 ICLQ 328, 341.

international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory'.<sup>160</sup>

Since the core of protection cases is that return to the country of origin is impossible, immigration control that results in the separation of family members will inevitably constitute an interference.<sup>161</sup> Recognizing this, a codified right to family reunion already exists for Convention refugees and beneficiaries of subsidiary protection in the EU.<sup>162</sup> While its definitional limitations may still prompt independent article 8 claims, its general use as a separate avenue of appeal has been curbed and may explain the lack of admission cases concerning persons in need of international protection.

Exceptionally, an individual in the Member State may seek the admission under article 8 of a relative in the country of origin who faces serious harm and is unable to obtain protection independently, although depending on the closeness of the relationship, that person may be eligible for derivative status.<sup>163</sup> If the applicant is not a beneficiary of international protection but merely tolerated by the State, the key problem will be proving why he or she cannot return to the country of origin to establish family life there.<sup>164</sup> This will be particularly difficult where the State has already rejected a protection claim. In *Gül*, the Court implied that the State must only admit a non-citizen relative where the

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<sup>160</sup> *Abdulaziz* (n2) [67].

<sup>161</sup> The facts of the cases heard by the Court have not yet given rise to this result. For 'categories' of persons seeking family reunification and legal position, see K Jastram 'Family Unification, Including Migration of Children' (Discussion Paper for International Legal Norms and Migration Project Conference Geneva 23–25 May 2002) [21]–[33].

<sup>162</sup> Qualification Directive art 23. Derivative status for family members of Convention refugees exists in many States. See also Family Reunification Directive (n144) which applies to lawfully resident third country nationals, expressly including refugees (but not beneficiaries of subsidiary protection).

<sup>163</sup> AR Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Oxford 2004) 175.

<sup>164</sup> *Gül v Switzerland* (1996) 22 EHRR 93 [41]–[43]; *Ahmut v The Netherlands* (1996) 24 EHRR 62. See softening of approach in *Sen v The Netherlands App* No 31465/96 (21 December 2001).

individual already residing in the Member State would face treatment violating article 3 were he or she to return to the country of origin.

At the international level—and binding on all ECHR States parties—article 10(1) CRC provides the strongest entitlement to family reunification where minor children are concerned. It establishes a mutual right that can be triggered either by a parent or a child:

In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.

Its reference to article 9 CRC emphasizes that ‘the obligation there imposed to ensure the unity of families within the State also determines the State’s action regarding families divided by its borders.’<sup>165</sup> Jastram and Newland argue that article 10 contains a presumption in favour of family reunion applications. This is supported by minimal reservations to article 10 (implying that the provision imposes a general duty to allow entry for family reunification<sup>166</sup>), and by the CRC Committee’s view that failure to permit family reunification is a violation of that right (rather than evidence that the right does not exist<sup>167</sup>).

Given States’ wide margin of appreciation ‘in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the

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<sup>165</sup> K Jastram and K Newland ‘Family Unity and Refugee Protection’ in Feller, Türk and Nicholson (n31)578.

<sup>166</sup> *ibid* 579; GS Goodwin-Gill ‘Protecting the Human Rights of Refugee Children: Some Legal and Institutional Possibilities’ in J Doek, H van Loon and P Vlaardingerbroek (eds) *Children on the Move: How to Implement Their Right to Family Life* (Martinus Nijhoff The Hague 1996) 97.

<sup>167</sup> CS Anderfuhren-Wayne ‘Family Unity in Immigration and Refugee Matters: United States and European Approaches’ (1996) 8 IJRL 347, 351–52.

community and of individuals,'<sup>168</sup> the Court tends to uphold State refusals of entry.<sup>169</sup> Applications must disclose a very serious need for admission to convince the Court that the State has incorrectly balanced competing interests of the applicant's family with those of the community.<sup>170</sup> Accordingly, in admission cases, the Court will not consider article 8(2) if there is no obstacle to family life being established in a third State.

(ii) *Removal*

By contrast, removal cases place a greater burden on the State, since the weighing-up process occurs at the later point of deciding whether removal is 'necessary'. In cases involving long-term residents and second-general migrants, the Court tends to find in the individual's favour.<sup>171</sup> For example, where removal may completely destroy a marriage, the Court has held that the right to respect for family life includes a right to residence and any attempt to expel an individual will require justification.<sup>172</sup> By contrast to admission cases, expulsion cases concern the separation of families *within* the Member State, and interference is therefore relatively simple to prove. This is why the balancing test occurs later, in relation to paragraph 2.

There are three steps in the Court's assessment of whether an interference is justified: whether it is in accordance with the law;<sup>173</sup> whether it pursues a legitimate aim under paragraph 2; and whether it is in all circumstances necessary in a democratic

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<sup>168</sup> *Belgian Linguistic Case* (n136) [5], [10]; *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578 [39], [47]; *Rasmussen v Denmark* (1985) 7 EHRR 371 [40].

<sup>169</sup> eg *Gül* (n164).

<sup>170</sup> cf *Mowbray* (n163).

<sup>171</sup> *Berrehab* (n153); *Moustaquim v Belgium* (1991) 13 EHRR 802; *Sen* (n164). For relevant criteria, see *Boultif* (n62) [48].

<sup>172</sup> *Moustaquim* (n171) [36]; *Beljoudi v France* (1992) 14 EHRR 801.

<sup>173</sup> *Sunday Times v UK* (1979–80) 2 EHRR 245; *Barthold v Germany* (1985) 7 EHRR 383.

society<sup>174</sup>—that is, it responds to an important social need and is proportionate.<sup>175</sup> It is this last step that involves balancing the severity of the restriction on the individual against the public interest, mindful of the State's wide margin of appreciation in determining what is proportionate. If the answer at any stage is 'no', then the interference will not be justified.

Proportionality is key, since only minimum interference is legitimate. In assessing proportionality, relevant matters include the length of residence in the State (although this factor no longer outweighs the existence of serious offences committed by the applicant);<sup>176</sup> the strength of family and other social ties;<sup>177</sup> immigration controls;<sup>178</sup> whether the applicant or family members were born in the ECHR State;<sup>179</sup> the nature of links with the country of origin;<sup>180</sup> whether the applicant remains a national of the country of origin or desires to become a national of the ECHR State;<sup>181</sup> and finally, if removal is due to an offence committed by the applicant, assessing its gravity, the age and mental health of the offender, and whether the offending behaviour persists.<sup>182</sup>

It is usually insufficient to simply show that family life can be established elsewhere; rather, a decision to remove must be justified by a pressing social need proportionate to the legitimate aim pursued.<sup>183</sup> However, unless family members are recognized refugees, nationals of the ECHR State or fully integrated non-citizens, then

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<sup>174</sup> This analysis applies to ECHR arts 8–11.

<sup>175</sup> *Silver v UK* (1983) 5 EHRR 347 [97].

<sup>176</sup> For list of factors, see *Lambert* (n142) 446–47.

<sup>177</sup> *Berrehab* (n153); *Beljoudi* (n172); *Mehemi v France* (2000) 30 EHRR 739.

<sup>178</sup> *Cruz Varas* (n50); *Boughanemi v France* (1996) 22 EHRR 228.

<sup>179</sup> *Beljoudi* (n172); *Mehemi* (n177).

<sup>180</sup> *El Boujaidi v France* (2000) 30 EHRR 223 cf *Mehemi* (n177).

<sup>181</sup> *Boughanemi* (n 178) cf *Beljoudi* (n172).

<sup>182</sup> *Moustaquim* (n171) cf *Chorfi v Belgium* sub nom *C v Belgium* App No 21794/93 (7 August 1996). See general list in *Amrollahi* (n142) [35], in which expulsion of a refugee was found to be a breach of art 8.

<sup>183</sup> *Abdulaziz* (n2) [67]; *Berrehab* (n153) [28]–[29]; *Moustaquim* (n171) [43]; *Beljoudi* (n172) [74].

the Court may consider it reasonable for the whole family to move to the State to which the family member is to be expelled.<sup>184</sup> Similarly, Lambert argues that this jurisprudence has limited relevance to asylum-seekers, since they can rarely demonstrate sufficiently strong social links or disruption of family life that would, on balance, secure a right to remain.<sup>185</sup> The position may be different for asylum-seekers who have been in the State for a number of years awaiting a final decision.

Lambert also laments the different approaches taken in admission and removal cases, arguing that the distinction between the State's positive obligation to guarantee and respect family unity (by admission) and its negative obligation not to interfere with family life (by removal) seems artificial in practice. 'Any refusal to admit a family member, particularly a child, to the territory of a member State, indeed, suggests a strong expectation that the person lawfully residing in the territory will have to return to his or her country of origin.'<sup>186</sup>

(b) Private life

The term 'private life' has not been exhaustively defined, but includes 'physical and moral integrity of the person'<sup>187</sup> and mental health, since '[t]he preservation of mental stability is ... an indispensable precondition to effective enjoyment of the right to respect for private life.'<sup>188</sup> This may be relevant to persons traumatized by treatment in their

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<sup>184</sup> See Lambert (n142) 448; *Amrollahi* (n142) [35].

<sup>185</sup> See Lambert (n142) 447–50; *Berrehab* (n153); *Moustaquim* (n171); *Beljoudi* (n172); *Boughanemi* (n178); *Mthokozisi v Sect'y of State for the Home Dept* [2004] EWHC 2964 (Admin).

<sup>186</sup> Lambert (n142) 442 (citation omitted).

<sup>187</sup> *Stubbings v UK* (1997) 23 EHRR 213 [59].

<sup>188</sup> *Bensaid* (n62) [47].

country of origin who wish to avoid removal because they will be exposed to ill-treatment not reaching the severity of article 3, or where extreme subjective fear does not match the actual risk of harm, but nonetheless constitutes real fear in the applicant's mind.<sup>189</sup>

In *Bensaid*, the Court acknowledged that ill-treatment falling below the article 3 threshold could nonetheless breach the right to a private life under article 8 'where there are sufficiently adverse effects on physical and moral integrity'.<sup>190</sup> The English Court of Appeal similarly accepted in principle that the expulsion of a homosexual to a State in which he or she might be subjected to a flagrant violation of article 8 rights could breach the ECHR.<sup>191</sup>

Blake and Husain argue that it is reasonable for articles 3 and 8 to cover different levels of ill-treatment, both unjustifiable under the ECHR.<sup>192</sup> In theory, if article 8 recognizes a lower threshold, it obviates the need for a concurrent article 3 claim. However, protection of private life remains subject to the balancing test, and for that reason most applicants will also test their claim against article 3. If that succeeds, then the Court will not examine the article 8 claim.<sup>193</sup> Lambert criticizes the 'strong interdependent relationship in practice' forged between the two provisions,<sup>194</sup> which undermines their theoretical distinction. Moreover, given the Court's reluctance to

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<sup>189</sup> *Brückman's case* App 6242/73 in *Stocktaking on the European Convention on Human Rights: The First Thirty Years, 1954–1984* (1984) 152–54, cited in Einarsen (n48) 374.

<sup>190</sup> *Bensaid* (n62) [46], referring to *Costello-Roberts v UK* (1995) 19 EHRR 112 [36] (corporal punishment).

<sup>191</sup> *Z v Sect'y of State for the Home Dept* [2002] Imm AR 560.

<sup>192</sup> Blake and Husain (n10) [4.134].

<sup>193</sup> *Chahal* (n6); *D v UK* (n62).

<sup>194</sup> H Lambert 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities' Special Issue of the RSQ, forthcoming 2005 (copy with author).

intervene in domestic immigration policy, it is likely to set the article 8 balancing test at a particularly high level for individuals to tip it in their favour.<sup>195</sup>

There is potential for further development of the right to private life,<sup>196</sup> both in scope and application. The Court's confirmation that the concept extends to 'relationships of a professional or business nature',<sup>197</sup> since it is 'in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world',<sup>198</sup> reveals its relevance to a wide range of circumstances beyond the ambit of other ECHR rights. However, because the right is subject to justified interferences, it is likely that its widened scope will be offset by increasingly liberal interpretations of legitimate State aims in order to confine its applicability in protection matters.

## 2 Article 9

Like article 8, the general right in paragraph 1 of article 9 is significantly diminished by the limitations of paragraph 2. Article 9 formed the basis of a claim before the House of Lords in *Ullah*, which questioned whether the applicant's removal to Pakistan could be prevented, given Pakistan's anticipated denial of his freedom 'either alone or in community with others and in public or private, to manifest his religion or belief, in

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<sup>195</sup> On deference to the original decision-maker, see *Blake and Husain* (n10) [5.209]–[5.220].

<sup>196</sup> *Ovey and White* (n62) 217.

<sup>197</sup> *Chorfi* (n182) [25].

<sup>198</sup> *Niemetz v Germany* (1993) 16 EHRR 97 [29]; *Chorfi* (n182) [25].

worship, teaching, practice and observance',<sup>199</sup> even though such treatment would not breach article 3.

The House of Lords was referred to only one Strasbourg authority on whether article 9 could prevent removal. In *Razaghi v Sweden*,<sup>200</sup> the applicant argued that his expulsion to Iran raised an issue under article 9 relating to his conversion to Christianity and adultery. However, because article 3 was also invoked, the court stated:

As regards the applicant's right to freedom of religion, the Court observes that, in so far as any alleged consequence in Iran of the applicant's conversion to Christianity attains the level of treatment prohibited by Article 3 of the Convention, it is dealt with under that provision. The Court considers that the applicant's expulsion cannot separately engage the Swedish Government's responsibility under Article 9 of the Convention.<sup>201</sup>

As Lord Bingham observed, it is unclear whether the court intended to show that article 9 could never independently apply in a removal case, or whether the complaint in *Razaghi* was so closely linked to the article 3 complaint that it raised no separate issue.<sup>202</sup> Lord Carswell posited that it was the latter which caused the Court to find no breach of article 9.<sup>203</sup>

Accordingly, Lord Bingham did not rule out the possibility of article 9 preventing removal in *Ullah*, but found it hard to imagine 'that a person could successfully resist expulsion in reliance on article 9 without being entitled either to asylum on the ground of a well-founded fear of being persecuted for reasons of religion or personal opinion or to

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<sup>199</sup> ECHR art 9(1).

<sup>200</sup> *Razaghi* (n129).

<sup>201</sup> *ibid.*

<sup>202</sup> *Ullah* (n56) [19].

<sup>203</sup> *ibid* [67] (Lord Carswell).

resist expulsion in reliance on article 3.’<sup>204</sup> Nevertheless, the court accepted in principle that denial of the right to practice one’s religion of choice should be sufficient to engage article 9 without having to construe such treatment as inhuman or degrading. Ultimately, the facts in *Ullah* did not sustain the article 9 claim.

In addition to protecting ‘freedom of thought, conscience and religion’, article 9(1) also protects freedom of ‘belief’. The court has held that a ‘belief’ is not limited to a religious belief but extends to other convictions and philosophies that reach ‘a certain level of cogency, seriousness, cohesion and importance’.<sup>205</sup> Inherent in this freedom is the right to manifest one’s belief.<sup>206</sup>

Although article 9 suggests a possible protection avenue for conscientious objectors, Ovey and White observe that this is undermined by article 4(3)(b) (excluding compulsory military service from the prohibition on forced or compulsory labour).<sup>207</sup> That provision implies that not all States are required to recognize a right to conscientious objection, and where they do, conscientious objectors may be exempted from military service.<sup>208</sup> In most Member States, such persons must show that the sanction for refusing to partake in military service is disproportionate and discriminatory, or that it would imply participation in activities contrary to international humanitarian law or in a conflict condemned by the international community.<sup>209</sup> The Court has similarly found that ECHR

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<sup>204</sup> *ibid* (n56) [25] (Lord Bingham); [67] (Lord Carswell).

<sup>205</sup> *Campbell v UK* (1982) EHRR 293 [36].

<sup>206</sup> *Kokkinakis v Greece* (1994) 17 EHRR 397 [31] (concurring opinion of Loucaides).

<sup>207</sup> Ovey and White (n62) 270–71.

<sup>208</sup> See *Grandrath v Federal Republic of Germany* (1967) 10 Yearbook 626.

<sup>209</sup> For egs: *Bouteillet-Paquet* (n2) 231; Qualification Directive art 9(2).

rights may be violated where penalties imposed on conscientious objectors are excessive.<sup>210</sup>

## E PROTECTION FOR SOCIO-ECONOMIC REASONS

### 1 General Country Conditions

There is limited support for a right to remain in a Member State for socio-economic reasons or due to a severe paucity of resources in the country of origin where treatment violates article 3 and creates a particular individual risk to the applicant.<sup>211</sup> Given that the ECHR is weak on the protection of socio-economic rights,<sup>212</sup> it is unsurprising that such claims have been based on article 3. There is no specific protection mechanism under international law for people fleeing violations of economic, social or cultural rights who ‘perceive that survival in minimally acceptable conditions is at risk or impossible’,<sup>213</sup> prompting Cassese’s argument that ‘nothing could warrant [article 3’s] possible

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<sup>210</sup> *Tsirlis v Greece* (1998) 25 EHRR 198: the court found a violation of art 5(1) when two Jehovah’s Witnesses ministers were imprisoned for refusing to do military service. The Court did not find it necessary to also examine the complaint under art 9. For complexities of conscientious objection: Goodwin-Gill (n51) 54–59; T Spijkerboer ‘Subsidiarity in Asylum Law: The Personal Scope of International Protection’ in Bouteillet-Paquet (ed) (n2) 35–36.

<sup>211</sup> *Vilvarajah* (n 50) [111]; cf J Crawford and P Hyndman ‘Three Heresies in the Application of the Refugee Convention’ (1989) 1 IJRL 155, in relation to the misplaced singling-out requirement of the Convention. Storey and Wallace adhere to the ‘exceptionality’ approach, arguing that persons fearing generalized violence who seek to bring themselves within article 1A(2) of the Convention must show that he or she was ‘differentially at risk’: H Storey and R Wallace ‘War and Peace in Refugee Jurisprudence’ (2001) 95 AJIL 349. Compare to a breach of art 3 within a Member State: eg *Ahmed* (n9).

<sup>212</sup> See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 1 (adopted 20 March 1952, entered into force 18 May 1954) ETS No 9 arts 1, 2.

<sup>213</sup> PA Taran ‘Human Rights of Migrants: Challenges of the New Decade’ (2000) 38 Intl Migration 7, 29; cf JC Hathaway ‘Is Refugee Status Really Elitist? An Answer to the Ethical Challenge’ in J-Y Carlier and D Vanheule (eds) *Europe and Refugees: A Challenge?* (Kluwer Law International The Hague 1997). The ICESCR does not contain such a mechanism.

limitation to only physical or psychological mistreatment in the area of civil rights.’<sup>214</sup> Nonetheless, as the case law shows, the threshold of ill-treatment in ‘general conditions’ cases is extremely high, and the likelihood of it developing into a meaningful alternative protection basis is remote.

The primary case on this issue is *D v UK*. There, the Court held that removing an AIDS patient in the terminal stages of illness to St Kitts would violate article 3, since ‘he would be deprived of his current medical treatment and his already weakened immune system would be exposed to untreatable opportunistic infections which would reduce further his limited life expectancy and cause him severe pain and mental suffering. He would be homeless and without any form of moral, social or family support in the final stages of his deadly illness.’<sup>215</sup> The Court was meticulous in emphasizing the exceptional nature of this case.<sup>216</sup> A combination of factors made his treatment incompatible with article 3: the abrupt withdrawal of medical facilities; poor medical conditions in St Kitts which could ‘further reduce his already limited life expectancy and subject him to acute mental and physical suffering’<sup>217</sup>; no assurance that he would get a hospital bed; no strong family ties or other moral or social support;<sup>218</sup> the fact that his lack

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<sup>214</sup> A Cassese ‘Can the Notion of Inhuman and Degrading Treatment Be Applied to Socio-Economic Conditions?’ (1991) 2 EJIL 141 [4].

<sup>215</sup> *D v UK* (n62) [45]; [40], [51]–[53]; *Hilal* (n70) [67]. See also earlier Commission decision *Von Volsem v Belgium* App No 14641/89 (9 May 1990), where it was acknowledged that social or economic conditions could violate art 3; App No 8247/78 (4 July 1979) in which the Commission hinted that in some circumstances the lack of a pension could lead to treatment breaching art 3; in *Cyprus v Turkey* (1976) 4 EHRR 482 the Commission noted that withholding an adequate supply of food, water and medical treatment from detainees was inhuman treatment: see Cassese (n214) 143–44 fn 8.

<sup>216</sup> *D v UK* (n62) [54].

<sup>217</sup> *ibid* [52]. See also *Pretty* (n37) [52]; *Keenan v UK* (2001) 33 EHRR 38; *Bensaid* (n62); *Tanko v Finland* App No 23634/94 (19 May 1994).

<sup>218</sup> In *BB v France* App No 30930/96 (9 March 1998), the Commission observed that facing AIDS alone at an advanced stage would constitute degrading treatment.

of shelter and proper diet in St Kitts could expose him to infections unable to be properly treated, in addition to the country's *general* health and sanitation problems.<sup>219</sup>

*D v UK* does not prevent States from removing individuals simply where conditions in the country of origin are poor.<sup>220</sup> *HLR* similarly held that the mere existence of generalized violence was not in itself sufficient to bring a claim within the scope of article 3 of the ECHR.<sup>221</sup> In *D v UK*, poor conditions *plus* a variety of other factors, including the specific impact of the conditions on the individual concerned<sup>222</sup> and 'the compelling humanitarian considerations at stake',<sup>223</sup> created circumstances which would have resulted in treatment breaching article 3 had he been returned. Accordingly, States may return persons to countries that do not provide an equivalent level rights to the ECHR,<sup>224</sup> provided that there will not be a flagrant breach—complete denial or nullification<sup>225</sup>—of the right in question on return.<sup>226</sup> Simply because rights in the home State are less comprehensive than those enjoyed by the applicant in the Member State is insufficient to counter removal.<sup>227</sup>

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<sup>219</sup> *D v UK* (n62) [52]. See 'cumulative grounds' in art 3 CAT; *Ahmed* (n9); *HLR* (n70). The *D v UK* principle is contained in the UK Immigration and Nationality Directorate API on 'Humanitarian and Discretionary Leave APU Notice 1/2003 (1 April 2003).

<sup>220</sup> *D v UK* (n62) [54]. This was recently affirmed in *Henao v The Netherlands* App No 13669/03 (24 June 2003), which had similar facts to *D v UK* but was declared inadmissible because the circumstances were not exceptional. See also discussion in relation to Sweden in Ch 5, Pt F1(a).

<sup>221</sup> *HLR* (n70) [42]. See views of Torture Committee eg *AD v The Netherlands* Comm No 96/1997 (24 January 2000) CAT/C/23/D/96/1997 [7.2].

<sup>222</sup> *Vilvarajah* (n50) [111] (requires personal risk to applicant); cf *Kalashnikov v Russia* (2002) 36 EHRR 587 (key question is nature of ill-treatment).

<sup>223</sup> *D v UK* (n62) [54]; see also *Bensaid* (n62) [38]–[40].

<sup>224</sup> *Piotrowicz and van Eck* (n75) 129; *Devaseelan* (n72) [107]; C Tomuschat 'A Right to Asylum in Europe' (1992) 13 HRLJ 257, 260; *Drozd* (n58) [110].

<sup>225</sup> *Devaseelan* (n72) [111], aff'd in *Ullah* (n56) [24] (Lord Bingham); [69] (Lord Carswell).

<sup>226</sup> Although the breach will normally result from the receiving State's inability or unwillingness to accord the right in question, in *D v UK* (n62) the ill-treatment was not an intentional State act but stemmed from generally poor living conditions. See also M Sepúlveda *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia Antwerpen 2003).

<sup>227</sup> *Bensaid* (n62) [38].

There is a difference between article 3 cases concerning removal to a State in which certain social and economic rights are not guaranteed (or are only available at minimum levels), and cases in which it is alleged that Member States themselves are not affording sufficient socio-economic rights to non-citizens in their territories. In the former, only very exceptional circumstances will prevent removal—thus the threshold of ‘inhuman or degrading treatment or punishment’ in *D v UK* was not reached ‘merely’ by the fact that the individual concerned would have been homeless and without moral, social or family support; it was the cumulation of other factors that elevated the overall treatment to a threshold such that return would violate article 3.<sup>228</sup> By contrast, domestic ECHR jurisprudence supports the view that within a Member State, circumstances do not need to reach the same exceptional level to breach article 3.<sup>229</sup>

There are accordingly varying standards of ‘inhuman or degrading treatment or punishment’. The reason for the distinction is that Member States must adhere to international and ECHR standards, whereas Member States do not have to ensure that receiving States meet those same levels and are not required to retain individuals simply because their rights will be diminished in the receiving State.<sup>230</sup>

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<sup>228</sup> cf *Henao* (n220).

<sup>229</sup> *Q v Sect’y of State for the Home Dept* [2003] EWHC 2507 (Admin); *Q v Sect’y of State for the Home Dept* [2003] EWCA Civ 364, [2003] 3 WLR 365; *Sect’y of State for the Home Dept v Limbuela* [2004] EWCA Civ 540 [119] (Carnwath LJ). See also *Pancencko v Latvia* App No 40772/98 (28 October 1999); *BB* (n218).

<sup>230</sup> *Drozd* (n58) [110]. It is largely a political response which regards asylum as an inappropriate solution to underdevelopment and poverty. On competing political theories and the admission of non-citizens: MJ Gibney ‘Liberal Democratic States and Responsibilities to Refugees’ (1999) 93 *American Political Science Rev* 169, 171, 176–77.

## 2 Lack of Education

In *Holub*, the UK Court of Appeal held that the right to education under article 2 Protocol 1 ECHR is a limited social right that does not comprise a right to remain where the State, exercising effective immigration control, refuses such leave.<sup>231</sup> It invoked Strasbourg jurisprudence as indicating clearly that ‘rights which are not absolute, such as the right to education, are not engaged where a state is exercising legitimate immigration control.’<sup>232</sup> Although the Court has not considered the matter in a protection case, it has entertained an argument based on the ECHR and CRC that the forced relocation of children may lead to a denial of access to education (in cases involving the moving on of gypsies), although that case was unsuccessful on the facts.<sup>233</sup>

### F THE INTERNATIONAL REACH OF THE ECHR

Although the ECHR is a European instrument, its effects may reach far beyond territorial borders. In extreme cases, it may provide recourse for asylum-seekers who are subject to severe ill-treatment in the country in which asylum is claimed, or who have no means of asserting a claim based on extra-Convention grounds because the host State does not recognize complementary protection.

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<sup>231</sup> *Holub v Sect’y of State for the Home Dept* [2001] 1 WLR 1359 (CA).

<sup>232</sup> *ibid* [21].

<sup>233</sup> *Coster v UK* (2001) 33 EHRR 479; *Lee v UK* (2001) 33 EHRR 677; *Smith (Jane) v UK* (2001) 33 EHRR 712.

The first issue was engaged in a recent test case concerning the ECHR's application to two asylum-seekers in British consular premises in Australia.<sup>234</sup> Two teenage brothers, Hazara asylum-seekers from Afghanistan, escaped from immigration detention in Woomera and made their way to the British Consulate in Melbourne. There they requested 'asylum, refugee and humanitarian protection' from the UK government, citing the UK's obligations under international human rights treaties as well as the ECHR and the Human Rights Act.<sup>235</sup> They alleged that handing them over to Australian authorities would expose them to a real threat of inhuman and degrading treatment, sufficiently severe to breach article 3 ECHR, through their return to detention. Additionally, they claimed that they were at risk of indefinite and arbitrary detention amounting to a flagrant breach of their article 5 ECHR rights. They further argued that the Secretary of State and consular officials would breach the ECHR and Human Rights Act by refusing to allow the applicants to remain in the Consulate.<sup>236</sup>

The Court has consistently held that States must secure ECHR rights to all persons within their actual authority and responsibility,<sup>237</sup> including on ships bearing the flag of a contracting State, in consular premises and sometimes through acts by consular officials.<sup>238</sup> This has also been affirmed by the HRC with respect to ICCPR rights.<sup>239</sup> After extensively examining Strasbourg jurisprudence on the application of article 1

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<sup>234</sup> *R (on the Application of 'B') v Sect'y of State for the Foreign and Cth Office* [2004] EWCA Civ 1344. Australia deported the children and their family to Pakistan on 30 December 2004.

<sup>235</sup> *ibid* [8].

<sup>236</sup> *ibid* [22].

<sup>237</sup> *Cyprus v Turkey* (n215) [8].

<sup>238</sup> *Ullah* (n56) [29] (Lord Steyn). *X v Federal Republic of Germany* (1965) 8 Yearbook 158, 168 (acts of German consul in Morocco); *Cyprus v Turkey* (n215) (acts of armed forces); *X and Y v Switzerland* (1977) 9 DR 57, 73 (Swiss official acts with effect in Liechtenstein); *B's case* (n234); *Loizidou v Turkey* (1995) 20 EHRR 90 [62].

<sup>239</sup> HRC 'General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (21 April 2004) [10] [unedited version].

ECHR,<sup>240</sup> the court concluded that the actions of UK diplomatic and consular officials in Melbourne fell ‘within the jurisdiction’ of the UK.<sup>241</sup> It therefore followed that the Human Rights Act was capable of applying to their actions. The final question was whether their actions in the instant case breached the Human Rights Act or the ECHR.<sup>242</sup>

Given that the asylum-seekers had fled custody, the court considered them as fugitives and examined their position in relation to extradition law principles.<sup>243</sup> The court established the test that consular officials cannot decline to surrender fugitives unless it is ‘clearly necessary in order to protect them from the immediate likelihood of experiencing serious injury.’<sup>244</sup>

In the instant case, the court determined that the perceived threat was not ‘so immediate and severe’ that the officials could have refused to return the applicants to Australian authorities, without violating their other diplomatic duties under international law.<sup>245</sup> For that reason, the court did not consider the issue of whether the actual treatment already experienced by the applicants in detention, and that to which they might be exposed on return, violated article 3 ECHR.

This was despite well-documented evidence of the ill-treatment faced by the applicants in particular<sup>246</sup> and the appalling detention conditions at Woomera generally, including a 2004 report by the Australian Human Rights and Equal Opportunities Commission finding that the government’s failure to remove children from immigration detention with their parents ‘amounted to cruel, inhumane and degrading treatment of

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<sup>240</sup> See *B’s case* (n234) [30]–[79].

<sup>241</sup> *ibid* [79].

<sup>242</sup> *ibid* [25].

<sup>243</sup> *ibid* [88]–[89].

<sup>244</sup> *ibid* [89].

<sup>245</sup> *ibid* [93].

<sup>246</sup> *ibid* [11]–[12].

those children in detention'.<sup>247</sup> Furthermore, the court acknowledged that Australian law 'does not ... include a right to challenge a failure to secure the enjoyment of human rights', since domestic law has not incorporated relevant international human rights treaties to which Australia is a party.<sup>248</sup>

Clearly a very high threshold of particular ill-treatment is required in such cases. The implication is that 'immediate likelihood of experiencing serious injury' is higher than a 'real risk' of ill-treatment under article 3 ECHR—it requires *probability* that serious injury will occur almost as soon as the individual is surrendered. It does not seem to leave room for protection from general ill-treatment, even where that treatment is itself sufficiently severe to breach article 3.

## G CONCLUSION

Given the Court's restrictive approach, it appears that ill-treatment under any right other than article 3 must almost reach the severity of an article 3 violation to constitute an unjustifiable breach. Accordingly, ECHR rights will only give rise to a *non-refoulement* obligation where there are substantial grounds of a real risk of serious and 'irreparable'<sup>249</sup> harm caused by a 'flagrant'<sup>250</sup> denial of the right in the receiving State. This approach is echoed by the ICCPR, requiring 'substantial grounds for believing that there is a real risk

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<sup>247</sup> Human Rights and Equal Opportunity Commission *A Last Resort? National Inquiry into Children in Immigration Detention* (HREOC April 2004) 6; Report of the Working Group on Arbitrary Detention 'Civil and Political Rights, including the Question of Torture and Detention: Addendum: Visit to Australia' UN Doc E/CN.4/2003/8/Add.2 (24 October 2002).

<sup>248</sup> *B's case* (n234) [90].

<sup>249</sup> HRC 'General Comment 31' (n239) [12].

<sup>250</sup> *Soering* (n5) [113]: 'The Court does not exclude that an issue might exceptionally be raised under Article 6 (art. 6) by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.' See also *Einhorn* (n129) [32].

of *irreparable harm*'.<sup>251</sup> Accordingly, avoiding removal under article 2 ECHR requires 'near-certainty' of death,<sup>252</sup> article 6 requires a risk of a flagrant denial of the right to a fair trial in the receiving State,<sup>253</sup> and article 5 mandates a similar standard. For qualified rights, the test will usually turn on whether the interference can be justified by a legitimate State aim. Given that States normally have strong grounds for justifying conduct such as 'the great importance of operating firm and orderly immigration control in an expulsion case [and] the great desirability of honouring extradition treaties made with other states',<sup>254</sup> the ECHR is not a straightforward alternative protection mechanism. However, by contrast to jurisdictions without any complementary protection, it does secure protection from *refoulement* in circumstances outside the Refugee Convention's scope.

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<sup>251</sup> HRC 'General Comment 31' (n239) [12] (emphasis added); T Buergenthal 'To Respect and to Ensure: State Obligations and Permissible Derogations' in L Henkin (ed) *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia UP NY 1981) 74; T Meron 'Extraterritoriality of Human Rights Treaties' (1995) 89 AJIL 78, 79–80; cf *Sale v Haitian Centers Council, Inc* 113 S Ct 2549 (1993) on the Refugee Convention. On that case, see L Henkin 'Notes from the President' ASIL Newsletter (Sept–Oct 1993) 1.

<sup>252</sup> *Dehwari* (n70) [61].

<sup>253</sup> *Soering* (n5) [113]; *Drozd* (n58) [110]; *Einhorn* (n129) [32].

<sup>254</sup> *Ullah* (n56) [24].

## CHAPTER 5

### PROTECTION AND ‘THE BEST INTERESTS OF THE CHILD’— THE CONVENTION ON THE RIGHTS OF THE CHILD

#### A INTRODUCTION

The near-universal ratification<sup>1</sup> of the CRC underscores its authority as a set of international norms setting down the minimum rights which States owe to children.<sup>2</sup>

Article 3, binding all States without reservation, provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Although this principle influences the procedures and treatment relating to child asylum-seekers, especially unaccompanied minors, consideration of the ‘best interests’ principle in the substantive determination of refugee status itself is widely overlooked. This chapter argues that the best interests of the child, reflecting an absolute principle of international law, are highly relevant in determining whether or not a child needs international protection. The principle applies to any protection claim concerning children, irrespective of whether they are unaccompanied, accompanied by family

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<sup>1</sup> The exceptions are Somalia and the US, although both have signed it. Nearly nine-tenths of the 191 States that ratified the CRC did so within five years of the CRC’s adoption by UNGA.

<sup>2</sup> C Price Cohen ‘The United Nations Convention on the Rights of the Child: Implications for Change in the Care and Protection of Refugee Children’ (1992) 3 IJRL 675, 676.

members (even where the child is not the primary applicant), or seeking family reunion. In conjunction with the principle of family unity in article 9 CRC, best interests are also relevant to removal cases which will personally affect a child, such as where the State seeks to deport a parent.

Though the requirement that children's best interests shall be a primary consideration in all actions concerning them should necessarily affect States' application of article 1A(2) of the Refugee Convention to cases involving children by imposing an additional layer of consideration, it may also constitute a complementary ground of protection in its own right. In particular, it may provide a ground for protection for children fleeing generalized violence. Goodwin-Gill and Hurwitz argue that wherever children are involved, 'a duty to protect may arise, absent any well-founded fear of persecution or possibility of serious harm.'<sup>3</sup>

## **B SPECIAL PROTECTION OF CHILDREN UNDER INTERNATIONAL LAW**

The 1924 Declaration of the Rights of the Child was the first international instrument to exclusively address the special needs of children,<sup>4</sup> and the 1946 IRO Constitution included 'war orphans' as one of four refugee categories.<sup>5</sup> During the drafting of the Refugee Convention, the US delegation proposed a specific 'unaccompanied children'

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<sup>3</sup> GS Goodwin-Gill and A Hurwitz 'Memorandum' in Minutes of Evidence Taken before the EU Committee (Sub-Committee E) (10 April 2002) [10], in House of Lords Select Committee on the EU *Defining Refugee Status and Those in Need of International Protection* (The Stationery Office London 2002) (Oral Evidence Section) 2.

<sup>4</sup> Geneva Declaration of the Rights of the Child (adopted 26 September 1924) [1924] LN OJ Spec Supp 21, 43.

<sup>5</sup> International Refugee Organization Constitution UNGA Res 77 of 15 December 1946 (entered into force 20 August 1948) 18 UNTS 3; see also Convention relating to the International Status of Refugees of 28 October 1933, 159 LNTS 199 art 9.

category,<sup>6</sup> encompassing ‘[a]ny unaccompanied child sixteen years of age or under, who is a war orphan, or whose parents have disappeared, who is unable or unwilling to avail himself of the protection of the government of his country of nationality or former nationality, and who has not acquired another nationality.’<sup>7</sup> The Director-General of the IRO doubted the ‘continuing usefulness’ of its inclusion, however, in light of legal difficulties concerning guardianship, experienced in relation to the IRO war orphans provision.<sup>8</sup>

Children’s special circumstances have historically led to special forms of protection. In the wake of *Kristallnacht* in 1938, the *Kindertransport* brought 10,000 Jewish children from Germany to the UK. It was run by private refugee organizations, and host families were responsible for supporting and educating the children until they were of an age to support themselves or able to rejoin their parents.<sup>9</sup> Their envisaged repatriation, plus assurances that no child would become a public charge, hastened the UK government’s approval of the scheme.<sup>10</sup> The Home Office waived customary formalities of passports and visas, instead introducing a single form detailing a few particulars of each child.<sup>11</sup> This programme had precedents—during the First World War,

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<sup>6</sup> art IA(3)(b). This was also included in a provision draft of article 1: AHC ‘Provisional Draft of Parts of the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees, Prepared by the Working Group on this Article’ UN Doc E/AC.32/L.6 (23 January 1950).

<sup>7</sup> AHC ‘United States of America: Memorandum on the Definition Article of the Preliminary Draft Convention Relating to the Status of Refugees (and Stateless Persons) (E/AC.32.2)’ E/AC.32/L.4 (18 January 1950) art 1A(3)(b).

<sup>8</sup> AHC ‘Memorandum from the Secretariat of the International Refugee Organization’ E/AC.32/L.16 (30 January 1950).

<sup>9</sup> Council for German Jewry Minutes of the Meeting of the Executive (17 November 1938) CBF Reel 1 File 2, cited in R Göpfert *Der jüdische Kindertransport von Deutschland nach England 1938/39: Geschichte und Erinnerung* (Campus Verlag Frankfurt 1999) 55.

<sup>10</sup> Cabinet Conclusions (16 November 1938) Public Record Office (London) CAB 23/96 XC157295, 8; 11 cited in Göpfert (n9) 55.

<sup>11</sup> See JH Simpson *The Refugee Problem: Report of a Survey* (OUP London 1939) 343.

the UK had admitted several thousand Belgian children.<sup>12</sup> Between May 1936 and November 1938, the Inter-Aid Committee for Children from Germany brought 471 German children to the UK. The majority came at the invitation of English families, often relatives of friends of the children's parents, which assumed responsibility for educating and maintaining them.<sup>13</sup> In May 1937, 3800 Basque children were admitted to the UK as refugees of the Spanish Civil War. They were fostered in hostels or homes and had their maintenance paid by private organizations. Their admission was conditional on their not establishing themselves permanently in the UK, and they were consequently repatriated in small numbers almost from the time of their arrival.<sup>14</sup>

Although the schemes' legal basis was not discussed in parliamentary debates,<sup>15</sup> the schemes themselves reflect a consistent practice of States' granting special humanitarian assistance to minors. Such international concern for the protection of children foreshadowed the development of the CRC as an expression of children's rights under international law, but there was a shift away from a purely welfare-based approach to one that recognized the agency and views of children as well.<sup>16</sup>

## C THE CONVENTION ON THE RIGHTS OF THE CHILD

The CRC establishes a protection framework of nearly universal acceptance, having been ratified by every State except Somalia (without a recognized government) and the US,

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<sup>12</sup> Hansard Bd 341 Sp 1471 ff (21 November 1938), cited in Göpfert (n9) 57.

<sup>13</sup> See Göpfert (n9) 54.

<sup>14</sup> See Simpson (n11) 343. On emigration to Palestine, see Hansard Bd 341 Sp 1438 (21 November 1938) and Sp 2005–2105, 2029f (24 November 1938), cited in Göpfert (n9) 56.

<sup>15</sup> Hansard Bd 341 Sp 1471 ff (21 November 1938), cited in Göpfert (n9) 57.

<sup>16</sup> CRC art 12.

which has signed the CRC and, though not legally bound by it, is obliged to refrain from acts that would undermine or defeat its objectives.<sup>17</sup> Furthermore, the CRC does not permit derogation from any of its provisions at any time. This means that in some situations, children may be entitled to a wider range of rights than adults, since the ICCPR contains a derogation clause permitting the suspension of certain obligations in times of officially proclaimed emergencies threatening the life of the nation.<sup>18</sup>

The CRC supplements the universal human rights treaties by reinforcing their general provisions, but also includes additional rights crafted specifically for children.<sup>19</sup> Described as ‘a critical milestone in legal protection generally’<sup>20</sup>, it is unique as the only binding human rights treaty protecting the full range of rights encompassed by the UDHR.<sup>21</sup> The CRC incorporates principles from a number of international instruments,<sup>22</sup> most notably the ICCPR and ICESCR—recognizing that the family should receive ‘protection by society and the State’<sup>23</sup> and that ‘special measures of protection and assistance should be taken on behalf of all children and young persons’<sup>24</sup>—and the 1949 Geneva Conventions and their Additional Protocols, which contain around 25 articles on

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<sup>17</sup> Both Somalia and the US are parties to the Refugee Convention and/or Protocol. 48 States are parties to the CRC and not the Refugee Convention (as at 1 December 2004). See also *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (HCA); *Baker v Canada* [1999] 2 SCR 817; *Beharry v Reno* 183 F Supp 2d 584 (EDNY 2002).

<sup>18</sup> I Cohn ‘The Convention on the Rights of the Child: What It Means for Children in War’ (1991) 3 IJRL 100, 106.

<sup>19</sup> Article 22, for example, pertains specifically to refugee and asylum-seeking children, but is not discussed in this chapter since it contains no guidance on the *assessment* of refugee claims involving children.

<sup>20</sup> GS Goodwin-Gill *The Refugee in International Law* (OUP Oxford 1996) 257.

<sup>21</sup> Price Cohen (n2) 680. It does not, however, recognize freedom of movement.

<sup>22</sup> Set out in Preamble: Declaration of the Rights of the Child 1924 (n4); Declaration of the Rights of the Child UNGA Res 1386 (XIV) of 20 November 1959; Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally UNGA Res 41/85 of 3 December 1986; Standard Minimum Rules for the Administration of Juvenile Justice (‘Beijing Rules’) UNGA Res 40/33 of 29 November 1985; Declaration on the Protection of Women and Children in Emergency and Armed Conflict UNGA Res 3318 (XXIX) of 14 December 1974.

<sup>23</sup> ICCPR art 23(1).

<sup>24</sup> ICESCR art 10(3).

children and consistently link their protection to the maintenance of family life.<sup>25</sup> The Geneva Conventions invoke children as persons entitled to special protection,<sup>26</sup> and enumerate rights not previously protected in any international treaty—such as the right to identity, to foster care, to adoption and to special treatment as a juvenile offender.<sup>27</sup>

Recalling articles 25(2) and 16(3) of the UDHR, the Preamble establishes that the CRC is founded on the notions that ‘childhood is entitled to special care and assistance’ and that the family is ‘the fundamental group of society.’ It is governed by four main principles: non-discrimination (article 2), the best interests of the child (article 3), the child’s right to life, survival and development (article 6) and respect for the views of the child (article 12).<sup>28</sup> Article 3 is the most relevant in determining a child’s eligibility for international protection, and is examined below.

#### **D ‘THE BEST INTERESTS OF THE CHILD’—ARTICLE 3**

Article 3 is an umbrella provision that prescribes the approach to be taken ‘in all actions concerning children.’ It can also be seen as a mediating principle to assist in resolving conflicts between rights where they arise within the overall framework of the CRC, and to evaluate laws, policies and practices concerning children which are not covered by express obligations in the CRC.<sup>29</sup> Article 3 is based on principles 2 and 7 of the 1959 UN

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<sup>25</sup> Goodwin-Gill (n20) 258.

<sup>26</sup> eg AP I art 77; AP II art 4.

<sup>27</sup> Price Cohen (n2) 680–81. See this reference for detailed footnotes to these treaties.

<sup>28</sup> Office of the High Commissioner for Human Rights ‘Fact Sheet No.10 (Rev.1), The Rights of the Child’ <[www.unhchr.ch/html/menu6/2/fs10.htm#i](http://www.unhchr.ch/html/menu6/2/fs10.htm#i)> (15 February 2002).

<sup>29</sup> P Alston and B Gilmour-Walsh ‘The Best Interests of the Child: Towards a Synthesis of Children’s Rights and Cultural Values’ (UNICEF ICDC Florence 1996) 1.

Declaration on the Rights of the Child;<sup>30</sup> article 5 of the 1986 UN Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally;<sup>31</sup> and articles 5(b) and 16(1)(d) of CEDAW. It is also articulated in article IV of the African Charter on the Rights and Welfare of the Child.<sup>32</sup> In addition, the principle has long been an element of domestic family law in a variety of countries.<sup>33</sup>

Several variations of the principle appear in other provisions of the CRC,<sup>34</sup> but the central formulation in article 3(1) is of most relevance to children in need of international protection. This provision requires decision-makers and legislators not only to *consider* the best interests of the child in any actions ‘concerning’ children, but to make those interests ‘a primary consideration.’ Van Bueren notes the significance of the child’s best *interests* rather than best rights, arguing that ‘interests’ are a broader concept and a precondition of rights.<sup>35</sup> ‘Consideration’ implies that the child’s best interests must actually be taken into account, not merely noted. According to Alston, ‘[s]uch consideration must be genuine rather than token or merely formal and must ensure that all aspects of the child’s best interests are factored into the equation.’<sup>36</sup> This means that

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<sup>30</sup> Declaration on Rights of the Child (n22).

<sup>31</sup> Declaration on Social and Legal Principles (n22).

<sup>32</sup> OAU Doc CAB/LEG/24.9/49 (1990) (entered into force 29 November 1999).

<sup>33</sup> For example, in Part VII of the Family Law Act 1975 (Cth) in Australia, the best interests of the child are referred to as a ‘paramount consideration’; in the UK, section 1(1) of the Children Act 1989 (UK) c 41 states that the child’s best interests will be the paramount consideration in determining any question relating to the upbringing of a child or the administration of a child’s property or the application of any income arising from it; in New Zealand, section 23 of the Guardianship Act 1968 (NZ) states that the welfare of the child is the ‘first and paramount’ consideration: S Parker ‘The Best Interests of the Child—Principles and Problems’ in P Alston (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* (OUP Oxford 1994) 40 fn 3.

<sup>34</sup> See arts 3(1), 9(1), 9(3), 18(1), 20(1), 21, 37(c) and 40(2)(b)(iii).

<sup>35</sup> G Van Bueren *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers Dordrecht 1995) 47, referring to J Kleinig ‘Crime and the Concept of Harm’ (1978) 15 *American Philosophical Q* 27.

<sup>36</sup> P Alston ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’ in Alston (ed) (n33) 13.

decision-makers ‘should consider children’s best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them.’<sup>37</sup>

## **1 ‘In all actions concerning children’**

In *Teoh*,<sup>38</sup> the High Court of Australia stated that ‘concerning’ should be given a broad reading and wide-ranging application, since this is ‘more likely to achieve the objects of the Convention.’<sup>39</sup> It therefore describes actions ‘regarding, touching, in reference or relation to; about’ children.<sup>40</sup> Accordingly, even if a child is not the subject of a decision, the best interests principle will apply if that decision affects him or her.<sup>41</sup> In relation to refugee status determination, the best interests principle should therefore apply not only when a child independently claims asylum, but also when the child is affected by a parent’s application (either through derivative status or through a subsequent family reunion application).

This is supported by *Baker v Canada*,<sup>42</sup> in which the Canadian Supreme Court held that the best interests of a child whose parent had been ordered deported were relevant—and should be a primary consideration—in deciding whether that parent could apply for permanent residence on humanitarian and compassionate grounds. This

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<sup>37</sup> *Baker* (n17) [75].

<sup>38</sup> *Teoh* (n17).

<sup>39</sup> *ibid* [30] (Mason CJ and Deane J).

<sup>40</sup> *ibid* [30] (Mason CJ and Deane J); [31] (Toohey J).

<sup>41</sup> See M Lees and M Wilkie ‘Human Rights Brief No 1: The Best Interests of the Child, Australian Human Rights and Equal Opportunities Commission’ (last amended March 1999)

<[www.hreoc.gov.au/human\\_rights/briefs/brief\\_1.html](http://www.hreoc.gov.au/human_rights/briefs/brief_1.html)> (8 January 2004).

<sup>42</sup> *Baker* (n17). It should be noted that in Canada, asylum-seekers are entitled to the full protection of the Canadian Charter of Rights and Freedoms, Pt I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982 c 11, which guarantees to all persons within Canada’s borders the rights to life, liberty and security.

overturned previous authority, which had considered it unnecessary to decide whether a child's interests would be affected in removal proceedings because 'only the parent who would be separated from the child was a party to the proceedings, not the child.'<sup>43</sup>

## 2 The Indeterminacy of the Best Interests Principle

Despite the principle's existence in a variety of domestic legal systems, 'the best interests of the child' has been given very diverse interpretations and has yet to acquire much specific content.<sup>44</sup> As such, it has been heavily criticized for its indeterminacy.<sup>45</sup> During the CRC's drafting, the content of the principle was not discussed at any length, despite the Venezuelan representative's concern at the apparent subjectivity of the standard.<sup>46</sup> Alston argues that indeterminacy is a characteristic feature of human rights norms generally,<sup>47</sup> and suggests that the CRC 'as a whole goes at least some of the way towards providing the broad ethical or value framework' giving 'a greater degree of certainty to the content of the best interests principle.'<sup>48</sup> The rights encompassed by the CRC provide a starting point for distinguishing 'primary' interests from other interests.<sup>49</sup>

Notwithstanding this, some writers have expressed concern that the principle is open to different cultural interpretations which may undermine the basic consensus that

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<sup>43</sup> *Sellakkandu v Canada* [1993] 68 FTR 291 (TD); *Baker v Canada* [1997] 2 FC 127 (CA).

<sup>44</sup> Alston (n36) 4, 5.

<sup>45</sup> P Tuitt 'The State, the Family and the Child Refugee' in D Fottrell (ed) *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child* (Kluwer Law International The Hague 2000) 152; Parker (n33); S Detrick *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers The Hague 1999) 88.

<sup>46</sup> Detrick (n45) 89, citing UN Doc E/CN.4/1989/48 [120].

<sup>47</sup> Alston (n36) 18.

<sup>48</sup> *ibid* 19.

<sup>49</sup> *ibid* 11–12.

CRC seeks to protect.<sup>50</sup> For example, some States parties to the CRC regard female genital mutilation as central to a child's cultural and social development and a sign of her membership in the community.<sup>51</sup> In Sweden, however, a girl who faced the likelihood of genital mutilation if she were returned to Togo, was granted humanitarian protection because Sweden regards the practice of female genital mutilation as inconsistent with the best interests principle.<sup>52</sup> Some commentators have suggested that States should retain the discretion to implement culturally sensitive interpretations of various provisions in the CRC, provided that these considerations do not ultimately override norms established by the CRC, especially where a clear conflict with human rights norms becomes apparent<sup>53</sup> (such as damaging traditional practices or violent punishments<sup>54</sup>). Nonetheless, establishing those norms may prove controversial.

Despite criticisms of the best interests principle's indeterminacy, it remains the dominant international legal standard in actions concerning children. Its indeterminacy may give it a flexibility which the specificity of the refugee definition in article 1A(2) prevents.

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<sup>50</sup> See Alston and Gilmour-Walsh (n29) 2; J Bhabha 'Minors or Aliens? Inconsistent State Intervention and Separated Child Asylum-Seekers' (2001) 3 EJML 283, 309.

<sup>51</sup> Amnesty International 'Female Genital Mutilation: A Human Rights Information Pack' AI Index ACT 77/05/97 (1997) <[www.amnesty.org/ailib/intcam/femgen/fgm1.htm#a7](http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm#a7)> (19 February 2002)

<sup>52</sup> <[www.un.se/praxis](http://www.un.se/praxis)> UN 356-96, UN 30-93, cited in J Schiratzki 'The Best Interests of the Child in the Swedish Aliens Act' (2000) 14 Intl J of L, Policy and the Family 206, 212.

<sup>53</sup> See Alston and Gilmour-Walsh (n29) 39.

<sup>54</sup> R Hodgkin and P Newell *Implementation Handbook for the Convention on the Rights of the Child* (UNICEF NY 1998) 40; Executive Office for Immigration Review (Chicago) Decision by Immigration Judge Zerbe (13 March 1998), cited in Bhabha (n50) 308.

## E THE WEIGHT TO BE GIVEN TO THE CHILD'S BEST INTERESTS

Although States' must regard a child's best interests as *a* primary consideration, Alston argues that the *travaux préparatoires* of the CRC reveal unanimous support for the 'clear' principle that the phrase 'should not be interpreted in any way as a rejection of the overall principle that actions *should always be taken in the best interests* of the child and the taking into account of the child's rights.'<sup>55</sup> He maintains that the indefinite article 'a' was selected in preference to 'the' purely to ensure sufficient flexibility, 'at least in certain *extreme cases*',<sup>56</sup> for taking competing interests into account. The Federal Court of Canada has also observed that 'it is not sufficient for an immigration officer to *merely* consider the best interests of the child in reaching a decision; the child's interests are also to be accorded *substantial* weight.'<sup>57</sup> Alston goes further, arguing that whenever other interests are to tip the balance away from a decision in the child's best interests, the burden of proof will rest on those seeking to follow that approach to show that no other acceptable alternative exists.<sup>58</sup>

The archetypal 'extreme' example concerns the competing rights of mother and child where there are complications in childbirth. If a mother's life is in danger, her interests may outweigh those of her unborn child. In asylum determinations, however, the concept of competing rights is more nebulous. In most cases, the interests of the child will be balanced against interests of the State rather than those of another individual. The question will therefore be whether policies, such as immigration control, may

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<sup>55</sup> P Alston 'The Legal Framework of the Convention on the Rights of the Child' *Bulletin of Human Rights* 91/2, 9 (emphasis added).

<sup>56</sup> Alston (n55) 9 (emphasis added).

<sup>57</sup> *Wu v Canada* 2001 FCT 1274 [9] (emphasis added).

<sup>58</sup> See Alston (n36) 9.

legitimately outweigh the child's interests in the particular case.<sup>59</sup> For example, the Australian Federal Court considered that the correct approach of a decision-maker would be to 'identify what the best interests of [the] children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the *cumulative effect* of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration.'<sup>60</sup> In Goodwin-Gill's view, '[t]he welfare of the child, and the special protection and assistance which are due in accordance with international standards, prevail over the narrow concerns of refugee status.'<sup>61</sup>

'Best interests' may be difficult to determine, particularly where there are tensions between that principle and the principle of family unity under article 9 CRC. That provision stipulates that children shall not be separated from their parents except where necessary for their best interests. It warns against refugee solutions involving the removal of a child from an actual or potential family environment, but also warns against return to the country of origin where that would leave a child without care and support (for example where relatives have not been located).<sup>62</sup> If family exists in the country of origin, the question will be whether return to them is outweighed by the harm feared by the child, or more general factors such as '[h]igh levels of poverty, low living standards, and the absence of basic health and education services'<sup>63</sup> in the country of origin. In some cases, parents send children into flight as 'unaccompanied minors', sometimes

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<sup>59</sup> On the tensions between immigration control and child welfare: Bhabha (n50) 293–99.

<sup>60</sup> *Wan v Minister for Immigration and Multicultural Affairs* [2001] FCA 568 [32] (emphasis added).

<sup>61</sup> Goodwin-Gill (n20) 358.

<sup>62</sup> See *ibid* 258.

<sup>63</sup> S Ruxton *Separated Children Seeking Asylum in Europe: A Programme for Action* (2000) 60–61.

through exploitative travel with people smugglers,<sup>64</sup> sometimes due to a genuine fear for their safety, and sometimes as ‘anchor children’—in the hope that they will be granted international protection and subsequently be able to bring their family to the host State through family reunification programmes.<sup>65</sup> There are also cases of families selling their children into child labour, prostitution or trafficking.<sup>66</sup> The issue in these cases is whether return to those families, for the sake of family unity, is in the children’s best interests.<sup>67</sup> Although the jurisprudence remains unsettled, a number of Canadian cases suggest that where children have been trafficked by their parents, and risk re-trafficking, they may be eligible for Convention protection.<sup>68</sup>

Once the child’s best interests have been ascertained, the next question is the weight they should be given as a ‘primary’ consideration. Unlike articles 8–11 ECHR, which set out an exhaustive list of ‘legitimate aims’ permitting the State to interfere in individual rights, the CRC does not indicate what interests will trump the best interests of the child. Each case must be decided on its particular facts by reference to established principles of proportionality and reasonableness,<sup>69</sup> as well as a consideration of the child’s own views.<sup>70</sup> Relevant interests may include immigration controls, deterrence of

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<sup>64</sup> Bhabha (n50) 289. Families who cannot afford smuggling fees for more than one member tend to send children.

<sup>65</sup> States have provided only anecdotal evidence of this phenomenon: UNHCR ‘Separated Children Seeking Asylum in Canada: A Discussion Paper Adapted from an Original Report Researched and Written by Wendy Ayotte’ (Ontario July 2001) 42, citing Secretariat of the Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia *Report on Unaccompanied Minors: Overview of Policies and Practices in IGC Participating States* (Geneva 1997).

<sup>66</sup> See case discussed in J Bhabha and W Young ‘Not Adults in Miniature: Unaccompanied Child Asylum Seekers and the New US Guidelines’ (1999) 11 *IJRL* 84, 112 fn 133.

<sup>67</sup> eg *Bian v Canada* FCTD IMM-1640-00 (11 December 2000); *Shu Ping Li v Canada* FCTD IMM-932-00 (11 December 2000); *Canada v Ward* [1993] 2 SCR 689, 724, 726.

<sup>68</sup> eg *Shu Ping Li* (n67); see Bhabha (n50) 379.

<sup>69</sup> Bhabha and Young (n66) 97.

<sup>70</sup> CRC art 12; J Eekelaar ‘The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism’ in Alston (ed) (n33).

people smuggling networks,<sup>71</sup> ‘national security, public order, public health or morals, or the rights and freedoms of others’.<sup>72</sup> In Sweden, cases in which residence permits are granted to a child or a family with children for humanitarian reasons often result from ‘balancing the child’s psychological health status, experiences in the home country and the time spent in Sweden together with the psychological status of the parents.’<sup>73</sup>

The cases examined below indicate that where children do not have a supportive family base to return to, they will frequently be allowed to remain in a host State,<sup>74</sup> but often the domestic basis for such protection will be a discretionary humanitarian ground (as in Spain and Denmark<sup>75</sup>) or mere toleration. According to Ruxton, this outcome is due less to legal acknowledgment of the best interests principle and more to States not knowing what else to do with children in such circumstances.<sup>76</sup> While State discretion may at times operate in a child’s favour, it may have damaging consequences for status at others. As Bhabha tentatively concludes, the trade-off of admission may be denial of the formal international protection which children deserve—‘minority reduces the chances of obtaining refugee status but that it also reduces the risk of refoulement or return.’<sup>77</sup>

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<sup>71</sup> Bhabha and Young (n66) 97.

<sup>72</sup> This list from article 10(2) CRC provides further examples of considerations the State may seek to rely on. See also Australian government ‘Direction—Visa Refusal and Cancellation under section 501—No 17’ (in force 16 June 1999), which requires the decision-maker to consider three primary considerations: the protection of the Australian community; the expectations of the Australian community; and in all cases involving a parental relationship between a child or children and the person under consideration, the best interests of the child or children.

<sup>73</sup> ‘The Best Interests of the Child: The Rights and Needs of Children Seeking Asylum’ 15 (unpublished article in author’s possession, from UNHCR).

<sup>74</sup> See also S Ruxton *Separated Children and EU Asylum and Immigration Policy* (Save the Children November 2003) 13; UNHCR 1997 [9.4].

<sup>75</sup> Ruxton (n63) 79.

<sup>76</sup> *ibid.*

<sup>77</sup> Bhabha (n50) 314.

## **F JURISPRUDENCE ON ‘THE BEST INTERESTS OF THE CHILD’**

Aside from the procedural function<sup>78</sup> of the best interests principle—directing decision-makers to make the child’s best interests a primary consideration in their determinations—the principle is also relevant to substantive questions such as ‘defining the behaviour that counts as persecution of a child, the circumstances that give rise to a well-founded fear in a child, and the threshold that a child must meet to discharge their burden of proof.’<sup>79</sup> This suggests that the best interests principle may mitigate the stringent definitional requirements of article 1A(2) of the Refugee Convention by providing an additional source of protection.

### **1 Children’s Interests and Admission**

Accompanied children’s protection claims are typically subsumed in the ‘primary’ application of another family member, usually the parent or legal guardian, and if a protection status is accorded, the child’s status is derivative. The child as a member of a family group thus assumes an essentially passive role, with the implication that someone other than the child is the real focus of harm.<sup>80</sup> Accordingly, a child’s individual claim to refugee status is generally only considered when the child is unaccompanied. The rationale for this is the principle of family unity. Yet, ECRE maintains that accompanied

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<sup>78</sup> eg Separated Children in Europe Programme ‘Statement of Good Practice’ (3<sup>rd</sup> edn 2004) 12(a).

<sup>79</sup> Bhabha and Young (n66) 97.

<sup>80</sup> Tuitt (n45) 153.

children should also be entitled to lodge an application in their own right,<sup>81</sup> which is the position in Sweden.<sup>82</sup>

(a) Sweden

The liberal application of the best interests principle in Sweden provides a model for the incorporation of human rights principles into determination proceedings for international protection. Since 1997, chapter 1 section 1(2) of the Swedish Aliens Act has required the best interests of the child to be considered in all cases concerning children,<sup>83</sup> including consideration of the child's health and development. Accordingly, the authorities must take this into account on reception, during investigation of the asylum claim, in assessing whether there are humanitarian reasons for granting a residence permit, in questions concerning family reunion, and where entry is refused.

Prior to the introduction of this section, the government noted that the best interests of the child were not to be given 'such far-reaching meaning that being a child became almost a criterion in its own right for the award of a residence permit.' This was to prevent families from exploiting their children by trying to settle in Sweden. According to the government, this would place a burden of hopes and responsibilities on the child that would be incompatible with the child's best interests.<sup>84</sup>

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<sup>81</sup> ECRE 'Position on Refugee Children' (November 1996) [23].

<sup>82</sup> Schiratzki (n52) 222 fn 47.

<sup>83</sup> The Social Services Act is the only other Swedish public law statute to include a reference to the best interests principle: *ibid* 207.

<sup>84</sup> Govt Bill Prop 1996/97: 25 at 247f, cited in *ibid* 210.

The government further emphasized that a child's best interests could not generally override regulated immigration.<sup>85</sup> This means that a child, like an adult, must be able to establish the probability of falling within one of the international protection categories in the Aliens Act (chapter 3 sections 2 to 3). Accordingly, a child's reasons for needing protection are assessed in the same way as an adult's, although there is acknowledgement of child-specific reasons for seeking protection.<sup>86</sup>

Although Schiratzki's comprehensive survey of Swedish best interests jurisprudence in 1997 and 1998 did not reveal any case in which a child's fears *alone* gave rise to a right for the whole family to remain (that is, without corroborating evidence), she noted that 'children's mental reactions to excesses have been deemed to strengthen the credibility and weight of the reasons pleaded by the parent as grounds for asylum.'<sup>87</sup> Further, the *travaux préparatoires* of the Aliens Act state that the best interests of the child can allow residence permits to be granted on humanitarian grounds for less compelling reasons when children are affected than otherwise.<sup>88</sup> Thus, children may be permitted to stay even when they cannot demonstrate the usual level of harm feared, for example when they are physically or mentally ill,<sup>89</sup> disabled or have come from States involved in armed conflict.

In one case, a six year old girl's exposure and subsequent reaction to the rape and abuse of her mother was held to strengthen the credibility of the mother's claim to asylum, since the abuse was deemed to be directly linked to the mother's involvement with a minority group. Both the mother and daughter were granted residence permits as

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<sup>85</sup> *ibid.*

<sup>86</sup> Schiratzki (n52) 212.

<sup>87</sup> UN95/10540, cited in *ibid.*

<sup>88</sup> Gov Bill Prop 1996/97, 25 at 249, cited in *ibid* 218.

<sup>89</sup> Aliens Appeals Board 970130, 970314, cited in *ibid* 218.

refugees.<sup>90</sup> Another mother and daughter were permitted to remain because the daughter's political and social rights could not be guaranteed in Iran.<sup>91</sup>

In a case concerning a family from Togo, the father's refugee claim based on political opinion was rejected. However, the family also argued that if returned, their two daughters would be subjected to genital mutilation which the parents could not prevent. 'A risk of persecution on account of sex was judged to exist, since the possibility of the girls suffering genital mutilation could not be excluded.'<sup>92</sup> Here, the *children's* fear of persecution resulted in the whole family obtaining protection, in accordance with the principle of family unity.<sup>93</sup>

Since the best interests of the child under the CRC are *a* rather than *the* primary consideration, interests may be balanced against matters of the States' own choosing,<sup>94</sup> such as immigration control. Van Bueren argues that the discretion is to some extent limited by articles 18 and 19 CRC, which provide that the child's best interests are the parent's 'basic concern' and protect the child against abuse and neglect.<sup>95</sup> However, returning a child to difficult living conditions in the country of origin will not necessarily undermine the best interests principle.<sup>96</sup> In Swedish jurisprudence, a deciding factor is the degree to which the child's psychological development will be permanently damaged. For example, a Lebanese child in Sweden with his parents, who had a serious hearing impediment and was paralysed on his right side due to cerebral palsy, was granted

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<sup>90</sup> UN95/10540, cited in *ibid* 212.

<sup>91</sup> Schiratzki (n52) 222.

<sup>92</sup> UN 356-96, UN 30-93 (n52). Persecution on account of sex is incorporated as a ground of persecution in the Swedish Aliens Act.

<sup>93</sup> See Schiratzki (n52) 212.

<sup>94</sup> Van Bueren (n35) 46.

<sup>95</sup> *ibid* 46.

<sup>96</sup> G Håkansson 'The Best Interests of the Child in Refugee Law: Swedish Law and Practice' (18 May 2000) 3 (unpublished article in author's possession).

residence because during his stay in Sweden he had developed his only language, Swedish sign language, and return to Lebanon would put an end to this development.<sup>97</sup> By contrast, two Bulgarian boys suffering from haemophilia were not granted residence, even though they could not obtain the same medical treatment in Bulgaria. It was found that it would place too great an economic burden on Sweden if such a ground were accepted.

The Swedish government is reluctant to have the child's best interests become an independent ground for asylum, noting that they 'cannot be deemed so fundamentally important a factor as to constitute sufficient grounds *per se* for being granted a residence permit.'<sup>98</sup> Related concerns are that parents with a strong desire to remain in Sweden may overemphasize the child's interests in the determination process, seeing them as an 'entrance ticket' to Sweden.<sup>99</sup> Håkansson judges that '[v]ery determined or desperate parents tend to abdicate from their parental responsibilities, using the children consciously or unconsciously as a means to get [a] residence permit, because finally the children's health are in such danger that the interest's of the child becomes the decisive factor and [a] residence permit is granted.'<sup>100</sup> Certainly this is a disturbing problem, but it does not justify the alternative—denying the application of the best interests principle in those (or all) cases.

The main significance of the best interests principle in Sweden is its relevance to the assessment of whether there are humanitarian grounds for a residence permit, and its potential to 'mitigate' the weight normally required for demonstrating fear of harm if

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<sup>97</sup> *ibid* 3–4.

<sup>98</sup> 'Children in the Aliens Processing System—Summary: Report from the Swedish Migration Board, February 2001' (Migrationsverket Norrköping 2001) 4.

<sup>99</sup> 'The Best Interests of the Child' (n73).

<sup>100</sup> Håkansson (n96) 4–5. For other egs, see 'The Best Interests of the Child' (n73).

removed. Where there is doubt as to whether a permit should be granted, ‘the best interests of the child may be the factor that tips the scales in favour of granting a residence permit.’<sup>101</sup>

(b) Denmark and Finland

In Denmark, unaccompanied asylum-seeking children assessed by the Danish Immigration Service to be insufficiently mature to go through standard refugee status determination are granted a residence permit without having their asylum claims formally examined.<sup>102</sup> This is not asylum but immigrant status. As Ruxton notes, while the benefit is that almost all such children are granted residence permits, they do not receive refugee status (and its resultant rights) even though they may be entitled to it.<sup>103</sup> Furthermore, the use of maturity as a measure of subjective fear and competence has been heavily criticized.<sup>104</sup> Although Goodwin-Gill agrees that channelling child asylum-seekers into refugee status determination processes ‘will often merely interpose another obstacle between the child and a solution’,<sup>105</sup> he approaches the problem from the perspective of the child’s best interests. He argues that an emphasis on maturity is misguided because there is no necessary correlation between any particular level of maturity and the existence of a well-founded fear; maturity is irrelevant to the question of whether the child may be persecuted; and maturity does not affect a child’s capability of feeling

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<sup>101</sup> ‘The Best Interests of the Child’ (n73).

<sup>102</sup> Danish Immigration Service ‘Unaccompanied Children’ <[www.udlst.dk/english/Asylum/unaccompanied\\_children.htm](http://www.udlst.dk/english/Asylum/unaccompanied_children.htm)> (4 December 2004).

<sup>103</sup> Ruxton (n74) 65.

<sup>104</sup> eg Goodwin-Gill (n20) 357; Bhabha (n50) 297–98. The UNHCR ‘Refugee Children: Guidelines on Protection and Care’ (UNHCR Geneva 1994) 100–01 retain maturity as a guideline in claims by unaccompanied children.

<sup>105</sup> Goodwin-Gill (n20) 358.

fear,<sup>106</sup> but ‘may affect merely their capacity to understand the events or conditions which are the basis of that fear’.<sup>107</sup> Even if the outcome of the Danish policy is appropriate, its underlying basis is flawed.

In Finland, section 6(1) of the Aliens Act states that in decisions concerning children under 18, ‘special attention shall be paid to the best interest of the child and to circumstances related to the child’s development and health.’<sup>108</sup> Section 146(1) specifically provides that ‘[w]hen considering refusal of entry, deportation or prohibition of entry ... particular attention shall be paid to the best interest of children and the protection of family life.’ An express requirement in issuing residence permits for personal humanitarian reasons to unaccompanied children is that it is in the children’s best interests.<sup>109</sup>

(c) Canada

Canadian ‘best interests’ jurisprudence is most developed in relation to deportation cases affecting children, considered in part 2(b) below. The leading case of *Baker v Canada* has nevertheless influenced status determination under section 25(1) of the Immigration Act, which requires the best interests of the child to be considered in humanitarian and compassionate cases.

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<sup>106</sup> See eg *Yusuf v MEI* [1992] 1 FC 629 (Hugessen JA).

<sup>107</sup> *Goodwin-Gill* (n20) 357.

<sup>108</sup> Aliens Act 301/2004 (unofficial translation, Ministry of the Interior Finland). See also Directorate of Immigration Finland ‘Guidelines for Interviewing (Separated) Minors’ (March 2002) (copy with author).

<sup>109</sup> Aliens Act s 52(4). On Norwegian practice: T Einarsen ‘The Legal Condition of Refugees in Norway’ (1994) 7 JRS 277. Note that in the 1950s, the Norwegian government decided protection claims concerning Hungarian children ‘on the basis of the freely expressed wish of the parents and the best interest of the children’: File Note of P Weis (Deputy High Commissioner) ‘Unaccompanied Hungarian Minors in Norway—Folios 111A and 119 of File 1/7/5 HUN’ (13 June 1958) Ref.G.XV.1/7/5 [1], UNHCR Archives (Geneva) HUN Fonds 11 Subfonds 1, 6/1/HUN.

The Canadian Federal Court has held that where children's claims are heard jointly with their parents', the Immigration and Refugee Board must nevertheless expressly consider whether the children are refugees in their own right. This may, in turn, affect whether the whole family is granted protection.<sup>110</sup> Canadian Guidelines recognize that children may manifest their fears differently from adults,<sup>111</sup> and harmful actions that may reach the level of harassment or discrimination when applied to adults may constitute persecution in relation to a child.<sup>112</sup> In both *Frigole* and *Iruthayathas*, the court ordered that the matters be reheard, since in its consideration of the families' protection needs, the tribunal 'just seemed to forget about the children', which could be considered 'the most important thing.'<sup>113</sup> In *Sahota*, the court expressly stated that the CRC should be taken into account when making a refugee determination.<sup>114</sup>

A final resort for unsuccessful asylum-seekers in Canada is Pre-Removal Risk Assessment (PRRA), which can reconsider the risk of a person's exposure to the Convention or CAT grounds where there is fresh evidence. This replaced the Post-Determination Refugee Claimant in Canada Unit (PDRCC), which assessed claims against three categories: personal risk to life (for reasons other than inadequate health care), inhuman treatment, and excessive punishment. According to a senior officer in the Unit, *Baker* caused the best interests of the child to be incorporated in the analysis of

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<sup>110</sup> *Nadesalingam v Canada* FCTD IMM-5711-93 (13 December 1994).

<sup>111</sup> Canada was the first State to issue child-specific guidelines in 1996: Child Refugee Claimants: Procedural and Evidentiary Issues (Canada September 1996) B1.

<sup>112</sup> Separated Children in Europe Programme (n78) 12.2.1; *Malchikov v Canada* IMM-1673-95 (18 January 1996).

<sup>113</sup> *Frigole v Canada* FCTD T-13-93 (9 January 1996); see also *Iruthayathas v Canada* (1994) 82 FTR 154 (FCTD).

<sup>114</sup> *Sahota v Canada* [2002] 3 FC D28 (FCTD); see also CRDD File T99-00210 (29 June 1999). Noting the special impact events may have on children, a US court stated that 'when a young girl loses her father, mother and brother—sees her family effectively destroyed—she plainly suffers severe emotional and developmental injury': *Kahssai v INS* 16 F 3d 323, 329 (9<sup>th</sup> Cir 1994), cited in Bhabha (n50) 307.

child-related claims. Since the risk had to fall within one of the three categories above, ‘a child who is without any caregiver in the home country could be considered at risk of inhuman treatment if the only placement possible were in an inadequate state institution.’<sup>115</sup> PRRA officers have not been given written instructions for applying the best interests principle.<sup>116</sup>

(d) International model

In 1989, the Comprehensive Plan of Action for Indo-Chinese Refugees was adopted at the second International Conference on Indo-Chinese Refugees in Geneva.<sup>117</sup> Based on the assumption that not everyone leaving Vietnam was escaping repression or persecution, the plan required screening of Vietnamese arriving in neighbouring countries in order to separate out ‘refugees’ (to be resettled) from ‘economic migrants’ (to be returned). Under the plan, a special screening procedure was established for unaccompanied minors, based not only on the Convention standard of ‘well-founded fear of persecution’ but also on the best interests of the child and family unity, inspired by the CRC.<sup>118</sup>

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<sup>115</sup> Ayotte (n65) 40.

<sup>116</sup> W Ayotte and K Peloffy ‘Background Paper 2: Separated Children in Canada: Immigration Procedures’ International Bureau for Children’s Rights (no date) <[www.ibcr.org/BP2\\_Immigration%20procedures.pdf](http://www.ibcr.org/BP2_Immigration%20procedures.pdf)> (8 January 2005) 3.

<sup>117</sup> International Conference on Indo-Chinese Refugees (Geneva 13–14 June 1989) reproduced in (1989) 1 IJRL 574.

<sup>118</sup> D O’Donnell ‘Resettlement or Repatriation: Screened-out Vietnamese Child Asylum Seekers and the Convention on the Rights of the Child’ (1994) 6 IJRL 382, 391. ‘Family Reunification Operation’ in UN Doc A/AC.96/808 [2.0.13]. The plan formally ended on 30 June 1996 for ASEAN countries and 30 June 1997 for Hong Kong: UNHCR <[www.un.org.vn/unag/unhcr1/unhcr.htm](http://www.un.org.vn/unag/unhcr1/unhcr.htm)> (16 February 2002).

In guidelines adopted under the plan, a distinction was drawn between unaccompanied children under 15 years of age and those over 15. The older children, assumed to be mature enough to have developed their own well-founded fear of persecution, were subject to a two-stage determination process. They first had their eligibility for refugee status assessed according to conventional criteria. If found to have a well-founded fear of persecution, they were referred for resettlement; if not, the case was reviewed by a Special Committee to 'select a durable solution in the best interest of the minor.'<sup>119</sup> Children under 15 were presumed to be too immature to have a well-founded fear of persecution, and as such their cases were considered directly by the Special Committee charged with finding the 'solution' in the child's best interests.<sup>120</sup> Based on this, some child asylum-seekers who did not qualify for refugee status under the Convention were nevertheless recommended for resettlement on the basis of medical conditions requiring treatment not available in Vietnam, or on the grounds of family reunification with other relatives, where the parents in Vietnam had a history of child abuse. In almost two-thirds of cases, the Special Committee's 'best interests' decisions favoured family reunion in Vietnam.<sup>121</sup>

While the model itself was crafted for a very specific context and is not suggested as the basis for future international action, it nevertheless demonstrates how the best interests principle can be used as a primary means of assessing a child's protection needs.

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<sup>119</sup> Note on Unaccompanied Minors [10], cited in O'Donnell (n118) 392.

<sup>120</sup> See n104 above for criticism of age-based assessments.

<sup>121</sup> 'Programming for the Benefit of Refugee Children' UN Doc EC/SC.2/CRP.15 (25 August 1993) [15].

## 2 Children's Interests in Relation to a Parent's Deportation

The cases discussed below in the Australian, Canadian and US contexts illustrate the emerging influence of international law on domestic practices. While the three cases focus on the best interests of the child in relation to the deportation of a parent, rather than the determination of a child's protection status, they nevertheless show the capacity of the CRC to constrain States' action with respect to removal, and the principles they elucidate may apply to the protection context.

### (a) Australia

One of the first authoritative cases to discuss the role of the best interests principle was *Minister of State for Immigration and Ethnic Affairs v Teoh*.<sup>122</sup> Mr Teoh was a Malaysian citizen who was the husband, father and stepfather of Australian citizens. He applied for permanent residency in Australia, but was rejected on character grounds because he had committed a number of serious drug offences, and was ultimately issued with a deportation order. The question before the High Court was whether Australia's ratification of the CRC could give rise to a legitimate expectation that in determining Mr Teoh's fate, the relevant decision-maker would take the best interests of his children into account as a primary consideration.<sup>123</sup>

Although the judgment pertains specifically to cases where an administrative discretion is exercised, and Australian decision-makers no longer exercise discretion in

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<sup>122</sup> *Teoh* (n17).

<sup>123</sup> See *ibid* [29].

the strict sense when deciding protection visa applications, there is sufficient obiter dicta in the judgment to suggest that the reasoning may apply to any decision contemplated by article 3, namely one by ‘courts of law, administrative authorities or legislative bodies.’

If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail. ... Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.<sup>124</sup>

The majority of the court found that Australia’s ratification of the CRC gave rise to a legitimate expectation that in any actions concerning children, such actions would be conducted in a manner which adhered to the relevant principles of the CRC. In a joint judgment, Mason CJ and Deane J stated that:

Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as ‘a primary consideration’. It is not necessary that a person seeking to set up such a legitimate expectation should be aware of the Convention or should personally entertain the expectation; it is enough that the expectation is reasonable in the sense that there are adequate materials to support it.<sup>125</sup>

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<sup>124</sup> *ibid* [27]–[28].

<sup>125</sup> *ibid* [34] (Mason CJ and Deane J).

The High Court drew attention, however, to the fact that the best interests principle, insofar as it creates a legitimate expectation, affords a procedural right only: ‘the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations.’<sup>126</sup> Nor does it compel a decision-maker to act in a particular way. ‘That is the difference between a legitimate expectation and a binding rule of law.’<sup>127</sup>

Nevertheless, fearing that *Teoh* could lead to ‘back door’ incorporation of international treaties, the Australian government repeatedly sought to legislatively override the principle of legitimate expectations arising from ratified international treaties. Since the mid-1990s, the government has introduced three bills to that effect, all of which have lapsed upon the calling of elections.<sup>128</sup>

Although *Teoh* still stands, the 2003 decision of *Lam*<sup>129</sup> suggests that the present High Court would overturn its ruling on legitimate expectations arising out of ratification of a treaty. Since *Lam* did not rely formally upon *Teoh*, the court did not make a final pronouncement on its application. However, four of five judges strongly criticized the reasoning and decision in that case, questioning the relevance of the doctrine of legitimate expectation,<sup>130</sup> and criticizing the court’s reasoning on the relationship between international obligations and the domestic constitutional structure.<sup>131</sup>

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<sup>126</sup> *ibid* [27]. This principle comes from *R v Home Sect’y, ex p Brind* [1991] 1 AC 696(HL) 748.

<sup>127</sup> *ibid* [36].

<sup>128</sup> eg Senate Bills List (Abstracts eg Administrative Decisions (Effect of International Instruments) 1999 Bill. See also <[www.aph.gov.au/library/pubs/bd/1999-2000/2000BD100.htm](http://www.aph.gov.au/library/pubs/bd/1999-2000/2000BD100.htm)> (26 January 2002) ‘Background.’

<sup>129</sup> *Re Minister for Immigration and Multicultural Affairs; ex p Lam* [2003] HCA 6, (2003) 195 ALR 502.

<sup>130</sup> *ibid* [81]–[83] (McHugh and Gummow JJ); [122] (Hayne J); [139]–[141] (Callinan J).

<sup>131</sup> *ibid* [98]–[99] (McHugh and Gummow JJ); [122] (Hayne J).

(b) Canada

The leading Canadian case is *Baker v Canada*.<sup>132</sup> In *Baker*, the appellant was issued with a deportation order after it was determined that she had worked illegally in Canada and had overstayed her visitor's visa. She applied for an exemption from the requirement to apply for permanent residence outside Canada, based upon humanitarian and compassionate considerations pursuant to section 114(2) of the Immigration Act, RSC, 1985—namely, that her deportation would have a negative impact on her Canadian-born children.<sup>133</sup>

The key question was whether federal immigration authorities were required to treat the best interests of the Canadian child as a primary consideration in assessing her claim. Although that question has since been answered by article 25(1) of the new Immigration and Refugee Protection Act 2001, which requires the Minister, in considering applications for humanitarian and compassionate consideration, to take into account 'the best interests of a child directly affected', the court's reasoning remains relevant to the application of international law principles in domestic matters.

Although the majority concluded that because the CRC had not been incorporated into Canadian law its provisions had no direct effect domestically,<sup>134</sup> it recognized that 'the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review', and that in so far as possible, interpretations that reflect the values and principles of international law should be

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<sup>132</sup> *Baker* (n17).

<sup>133</sup> For background, see *ibid* [3].

<sup>134</sup> *ibid* [69].

preferred.<sup>135</sup> Justice L'Heureux-Dubé, for the majority, stated that all those 'whose important interests are affected by the decision in a fundamental way must have a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.'<sup>136</sup>

While both *Teoh* and *Baker* only go so far as to recognize the best interests of the child as a procedural right, rather than as a right to directly enforce the CRC, this is sufficient in the context of determining refugee claims. *Teoh* can still be relied upon in Australia to assert that there is a legitimate expectation that decision-makers will act in conformity with one or all of the provisions of the CRC, while in Canada, where the legitimate expectations doctrine in this context has been rejected, *Baker* stands as authority for the proposition that statutory interpretation and judicial review should, so far as possible, reflect the CRC's values and principles. Bhabha and Young conclude that the principle can influence the decision-making process as an interpretative aid to broaden and deepen the scope of protection, but cannot determine the result.<sup>137</sup>

Both cases have been described as 'salutory challenges to governmental hypocrisy (or perhaps incompetence) in ratifying international treaties and failing to address the domestic law implications of those treaties. Viewing unratified treaties as persuasive authority in interpreting domestic statutes and in shaping administrative discretion is a healthy development.'<sup>138</sup> Where the CRC has direct effect, it provides an even stronger basis for reliance in refugee status determination.

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<sup>135</sup> *ibid* [70]–[71], citing R Sullivan *Driedger on the Construction of Statutes* (3<sup>rd</sup> edn Butterworths Toronto 1994) 330.

<sup>136</sup> *ibid* [32].

<sup>137</sup> Bhabha and Young (n66) 98.

<sup>138</sup> SJ Toope 'Inside and Out: The Stories of International Law and Domestic Law' (2001) 50 *U of New Brunswick LJ* 11.

(c) United States

The US counterpart to these cases is *Beharry v Reno*,<sup>139</sup> a 2002 decision of the District Court. Initial reactions to the case described it as ‘unprecedented ... in holding that international law requires that American officials determine whether the deportation of a parent would be in the “best interests of the child.”’<sup>140</sup>

The US has not ratified the CRC, but has signed it, evidencing an intention that it will not act contrary to the principles embodied in the treaty. Judge Weinstein in *Beharry* found, however, that non-ratification did not eliminate the impact of the CRC on US law,<sup>141</sup> and went so far as to suggest that in any case, the best interest principle was

not so novel as to be considered outside the bounds of what is customary [international law]. ... Given its widespread acceptance, to the extent that it acts to codify longstanding, widely-accepted principles of law, the CRC should be read as customary international law. ... Congress’s failure to ratify the CRC is not a sufficiently clear statement to constitute repudiation of the customary international law principles contained in and underlying this treaty.<sup>142</sup>

As in the Australian and Canadian cases, Judge Weinstein referred to the fact that Congress ‘has not expressed a clear intent to overrule this principle of customary international law which is otherwise binding upon United States courts. ... It is

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<sup>139</sup> *Beharry* (n17).

<sup>140</sup> W Glaberson ‘Judge Says Child’s Well-Being Is a Factor in a Deportation’ NY Times (12 February 2002) <[www.nytimes.com/2002/02/12/nyregion/12IMMI.html](http://www.nytimes.com/2002/02/12/nyregion/12IMMI.html)> (12 February 2002).

<sup>141</sup> *Beharry* (n17) 596.

<sup>142</sup> *ibid* 600.

appropriate to interpret the statute in a way which does not violate international law.’<sup>143</sup>

The similarity of language and principle in these three cases is striking, given the fact that they were made completely independently of each other. They evidence an emerging body of jurisprudence supporting the view that decisions made in a domestic forum are circumscribed by international law, where domestic law contains no indications to the contrary.

Although *Beharry* was reversed on appeal due to the non-exhaustion of administrative remedies, the court did not find it necessary to discuss the District Court’s analysis of the interaction between international law and the domestic provisions under consideration. However, the following statement suggests it did not support that court’s finding: ‘Nothing in our decision to reverse on other grounds the judgment of the district court should be seen as an endorsement of the district court’s holding that interpretation of the INA in this case is influenced or controlled by international law.’<sup>144</sup>

Interestingly, an initial draft of the US Guidelines for Children’s Asylum Claims referred to the need for sensitive treatment of child asylum-seekers extending beyond interviewing techniques (that is, a procedural application) to ‘the legal analysis of a child’s claim’ (that is, a substantive application).<sup>145</sup> However, the final Guidelines retracted this approach, limiting the application of the principle to procedural and evidentiary issues and baldly asserting that the best interests principle ‘does not play a role in determining substantive eligibility under the U.S. refugee definition.’<sup>146</sup> As Bhabha and Young note, this directly contradicts the direction to States in article 22 CRC

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<sup>143</sup> *ibid* 604 (citation omitted).

<sup>144</sup> *Beharry v Ashcroft* 329 F 3d 51 (2d Cir 2003) 63 (citation omitted).

<sup>145</sup> Draft Guidelines 14, at Bhabha and Young (n66) 97.

<sup>146</sup> US Guidelines for Children’s Asylum Claims (10 December 1998) 3, as cited in Bhabha and Young (n66) 97.

to ‘protect and assist’ child asylum-seekers,<sup>147</sup> as well as the terms of article 3 itself. The Guidelines contain no explanation for this interpretation. One might speculate that the retraction indicates the drafters’ appreciation of the potential scope and potency of the best interests principle as it relates to asylum-seekers, realizing that its influence on substantive legibility would necessarily change the way in which asylum claims involving children would be considered.

## G CONCLUSION

Since States’ obligations under international law stem from the combination of international instruments they have ratified, treaties must be viewed as part of a whole rather than as discrete, unrelated documents,<sup>148</sup> and ‘all international treaties in force for a given State must be read together for maximum protection.’<sup>149</sup> As Goodwin-Gill notes, ‘the system for the international protection of refugees is incomplete, confined by relatively narrow definitions and offering no direct path to asylum or other durable solution’, in the same way that ‘the international law of the child, at the point where principles move to practice, at the interface of international law and national law and its implementation’ is also deficient.<sup>150</sup> Wolf concludes that the best interests standard ‘exceeds traditional concepts of protection’ and is open to new developments and legal

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<sup>147</sup> Bhabha and Young (n66) 97.

<sup>148</sup> On fragmentation of international law: ILC Study Group on Fragmentation (Koskenniemi) ‘Fragmentation of International Law’ (2003) esp 1.3; 3 (self-contained regimes).

<sup>149</sup> Cohn (n18) 107.

<sup>150</sup> See GS Goodwin-Gill ‘Protecting the Human Rights of Refugee Children: Some Legal and Institutional Possibilities’ (International Conference ‘Children on the Move’ The Hague 22–26 October 1994) no page, text before fn 10 (copy with author).

explanation,<sup>151</sup> while Pask suggests that the application of any other test ‘may be contrary to public policy in public international law’.<sup>152</sup>

The attributes that define children are immutable characteristics, whereas refugee definitions may change or develop over time. If a line is to be drawn, a child is foremost a child before he or she is a refugee, and protection needs must be assessed accordingly. It is therefore vital to view the rights of child asylum-seekers not only in the context of the Refugee Convention, but also in the specific framework of the CRC, in an attempt to fill the gaps and achieve the best possible combination of protection measures available under international law.

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<sup>151</sup> J Wolf ‘The Concept of the “Best Interest” in Terms of the United Nations Convention on the Rights of the Child’ in M Freeman and P Veerman (eds) *The Ideologies of Children’s Rights* (Martinus Nijhoff Publishers Dordrecht 1992) 129.

<sup>152</sup> ED Pask ‘Unaccompanied Refugee and Displaced Children: Jurisdiction, Decision-Making and Representation’ (1989) 1 IJRL 199, 211.

## CHAPTER 6

### THE LEGAL STATUS OF PERSONS TO WHOM THE REFUGEE CONVENTION DOES NOT APPLY

#### A INTRODUCTION

The issue of status was considered briefly in the context of the Qualification Directive in Chapter 2, where it was argued that there is no legal justification for differentiating the rights of beneficiaries of international protection based on the *source* of the protection need. This chapter extends and refines that argument by contending that beneficiaries of complementary protection are entitled to the same legal status as Convention refugees, given their analogous circumstances and the Convention's function as a *lex specialis* for persons protected by the norm of *non-refoulement*.

The Convention denies refugee status to certain excluded persons under article 1F,<sup>1</sup> and accordingly does not restrict States' general discretion to remove them. However, where an excluded person is at risk of serious harm if removed, he or she may be protected by human rights law. The absolute protection conferred by human rights *non-refoulement* means that no matter how abhorrent the individual's conduct, he or she cannot be returned to a place where that protection principle might be violated.<sup>2</sup> The question then arises—are excluded yet non-removable persons also entitled to Convention status? Since this would seem contrary to the Convention's underlying

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<sup>1</sup> Articles 1D and 1E are also relevant, but are not discussed here. The principle under customary international law parallels the treaty obligations.

<sup>2</sup> Given the expansion of *non-refoulement* under human rights law, it may be that at least the principle of *non-refoulement* is severable from other Convention rights when it comes to excluded persons who cannot be removed.

principles, it is necessary to find a means of accommodating ‘countervailing desires’ to broaden relief for beneficiaries of complementary protection ‘without simultaneously doing the same for human rights abusers’.<sup>3</sup> Accordingly, this chapter also explores the status under international law of persons who have a right not to be removed but who cannot access Convention protection. Since no international legal instrument stipulates the nature and substance of the rights of persons who are excluded from protection status but cannot be expelled due to the operation of other legal principles or for practical reasons,<sup>4</sup> as well as persons protected for compassionate or humanitarian reasons outside the scope of international protection, this chapter considers the protection capacity of general human rights law, as well as extra-Convention responses to forced migration such as mass influx, to determine the minimum content of legal status under human rights law.

## B THE IMPORTANCE OF STATUS

On the whole, the issue of status has not been substantively considered either by courts or scholars. Academic and judicial inquiry has tended to focus instead on the definition and the preliminary implied right of *non-refoulement* (correlative to the State’s *non-refoulement* obligations), without going further to examine what, if any, other rights should attach once that entitlement is recognized. Although in the context of a single asylum procedure it has been stated that States must avoid redefining protection to its

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<sup>3</sup> EY Chung ‘A Double-Edged Sword: Reconciling the United States’ International Obligations under the Convention against Torture’ (2002) 51 Emory LJ 355, 365.

<sup>4</sup> Commission of the European Communities ‘Commission Working Document: The Relationship between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments’ (Brussels 5 December 2001) COM (2001) 743 final [2.4].

most basic—*non-refoulement* alone<sup>5</sup>—there has been little legal analysis of what *positive* rights should adhere.

Since refugees were first made subjects of international law, they have been granted a privileged legal status by comparison to other aliens, due to their loss of national protection (which other aliens retain). Two points need to be made here. The first is that understandings of who is a refugee under international law have not remained fixed since that privileged treatment was first accorded. Rather, the notion of refugeehood has changed over time, such that it is not accurate to pinpoint a single definition and argue that there is an age-old understanding that persons within *that* definition deserve special treatment. This is closely related to the second point: if historical definitions are considered, then persons who today ‘only’ fall within complementary protection would in some cases have been recognized as refugees under previous formal legal definitions, and persons who today fall within article 1A(2) may in the past have been excluded.

To invoke the Convention refugee definition as intrinsically and exclusively legitimate in giving rise to a privileged alien status is therefore both historically inaccurate and legally flawed. If we look at the process by which the privileged status has been extended, we see that it is premised on the type of harm or circumstances being fled and the absence of national State protection. There is no legal basis, or, as ECRE suggests, common sense basis, for differentiating between the status of a person who fears persecution in his or her country of origin on grounds of political opinion, and someone who has lost his or her home and fears for his or her life due to an armed

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<sup>5</sup> E Feller ‘International Refugee Protection 50 Years on: The Protection Challenges of the Past, Present and Future’ (2001) 83 IRRC 581, 596.

conflict in the country of origin.<sup>6</sup> The status is motivated by a need for a third State to substitute protection which would normally be provided by the alien's home State. 'A person who cannot avail himself or herself of the protection of his or her government, not because of fear of being persecuted individually but simply because there is no longer a central authority capable of providing protection in the home country, is in a comparable situation of requiring protection from an asylum country or from the international community.'<sup>7</sup> For this reason, the Convention provides a more specific *status* than the general principles expressed in human rights law, which apply to all persons.<sup>8</sup>

## 1 *Non-refoulement*

If the principle of *non-refoulement* is respected by States, then why does it matter whether its source is the Convention, another human rights instrument, or customary international law?<sup>9</sup> As Lambert posits, '[i]n the language of protection, it does not really matter whether protection against *refoulement* is provided under the Refugee Convention or under principles of human rights law, so long as it is effective.'<sup>10</sup> The answer is legal

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<sup>6</sup> ECRE 'The Need for a Supplementary Refugee Definition' (April 1993) 6.

<sup>7</sup> *ibid* 6.

<sup>8</sup> Certain exceptions exist with respect to political rights reserved for citizens (art 25); see also arts 12(3), 13. On customary law of State responsibility towards aliens: CF Amerasinghe *State Responsibility for Injuries to Aliens* (Clarendon Press Oxford 1967); CA Fieman 'A State's Duty to Protect Refugees under Customary International Law: A Case Study of Thailand and the Cambodian "Displaced Persons"' (1989) 21 *Columbia HR L Rev* 287.

<sup>9</sup> Standards are largely treaty-based, but as Lauterpacht and Bethlehem detail, there is an emergent human rights principle of *non-refoulement* as well, complementing the *jus cogens* principle based on article 33 of the Convention: E Lauterpacht and D Bethlehem 'The Scope and Content of the Principle of *Non-Refoulement*: Opinion' in E Feller, V Türk and F Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (CUP Cambridge 2003); GS Goodwin-Gill *The Refugee in International Law* (2<sup>nd</sup> edn OUP Oxford 1996) 143.

<sup>10</sup> H Lambert 'Protection against *Refoulement* from Europe: Human Rights Law Comes to the Rescue' (1999) 48 *ICLQ* 515, 519; *Ahmed v Austria* (1997) 24 *EHRR* 278; *BB v France* App No 30930/96 (9 March 1998).

status. Whereas a grant of Convention status entitles a recipient (under international law) to the full gamut of Convention rights, no comparable status arises from recognition of an individual's protection need under a human rights instrument. The expanded scope of *non-refoulement* under customary international law does not carry a specified legal status,<sup>11</sup> and even decisions of the international committees or the European Court of Human Rights concerning the application of the *non-refoulement* principle under other human rights treaties do not constitute decisions on status. Although they provide important statements of the scope of *non-refoulement* and broaden the protection threshold under international law, they are weak in their delivery of actual rights. Thus, the Convention alone creates a status recognized in domestic law.<sup>12</sup>

*Non-refoulement* is certainly the most fundamental principle of refugee law—indeed, its application to persons in need of international protection might be described as a ‘qualifying’ or ‘constitutive’ of that status. The question, who are the beneficiaries of international protection?, is a converse way of asking, who is protected by the principle of *non-refoulement*? And yet, conceiving of ‘international protection’ solely in terms of *non-refoulement* obscures the other rights that comprise refugee status. Where an individual fears removal to serious harm, respect for *non-refoulement* is the most important principle a State can observe. Yet extending its protection to an individual does not also entail the grant of legal status. According to Suntinger, it is the ‘minimum

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<sup>11</sup> See Lauterpacht and Bethlehem (n9).

<sup>12</sup> Lambert (n10) 519; *Ahmed* (n10); *BB* (n10).

protection'<sup>13</sup> which States should accord persons in need of protection. It is a fundamental *part* of status, but insufficient on its own.<sup>14</sup>

As Goodwin-Gill explains, *non-refoulement* is both a 'link and a line' between the legal norm of non-return, and the 'continuing discretionary aspect of a State's right ... in the treatment to be accorded to those in fact admitted.'<sup>15</sup> Individuals with a demonstrable need for protection by the principle of *non-refoulement* are not necessarily entitled to asylum, in the sense of permanent admission, since this remains in the domain of State discretion. However, the '*quid pro quo*' of this discretion is 'a clear and uncompromising duty to extend a broad-ranging set of rights to all refugees under one's jurisdiction',<sup>16</sup> with an emphasis on socio-economic rights in order to assist self-sufficiency. In the Convention, these rights are spelt out in binding form, rather than the aspirational standards of the ICESCR.

In the context of mass influx situations, the price that States have demanded for admitting large numbers of refugees and asylum-seekers is a *de facto* suspension of all but the most immediate and compelling Convention rights. A similar quality–quantity trade-off can be observed with respect to complementary protection. While States have been prepared to admit such persons to their territories for 'humanitarian' reasons, they have, on the whole, been reluctant to grant formal rights, particularly at an equivalent level to Convention status. As the eligibility threshold has expanded, so the rights to which beneficiaries are entitled has gradually narrowed. For example, section 51 of the

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<sup>13</sup> W Suntinger 'The Principle of Non-Refoulement: Looking Rather to Geneva than to Strasbourg?' (1995) 49 *Austrian J of Public Intl L* 203, 203.

<sup>14</sup> See Goodwin-Gill (n9) 196 on *non-refoulement* through time.

<sup>15</sup> *ibid* 202.

<sup>16</sup> JC Hathaway and AK Cusick 'Refugee Rights Are Not Negotiable' (2000) *Georgetown Immigration LJ* 481, 485.

German *Ausländergesetz* prohibited deportation where a person's life or freedom would be threatened on account of his or her race, religion, nationality, political opinion or membership of a particular social group.<sup>17</sup> Although this appears to be a simple rehearsal of article 33 of the Convention, this provision functioned as a bar to deportation rather than as a positive right to claim asylum. It was colloquially known as 'lesser asylum', since it prevented *refoulement* but did not provide the individual with Convention status. In German practice, it applied to two groups of asylum-seekers. First, it protected people fearing persecution by non-State agents, which was not recognized in Germany as falling within the Refugee Convention. Secondly, it protected persons who could demonstrate well-founded fear of persecution but who could not produce evidence of their travel route. German authorities presumed that these asylum-seekers had come by land, passed through a safe third country, and were consequently ineligible for asylum in Germany.<sup>18</sup> This ran close to a contravention of article 31 of the Convention, since it effectively prevented persons unable to prove their travel route from obtaining the protection to which they were entitled under international law. By contrast to early complementary protection responses (France, Hungary, de facto refugees) which tended to extend the dominant legal protection to additional groups in a comparatively liberal, humanitarian spirit, there has been a marked tendency over the past 20 years to narrow down protection only to persons who cannot be removed.

When the need for a more formal international complementary protection regime was discussed in 1989, it was assumed that any expansion of protection would occur

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<sup>17</sup> For details: J McAdam 'The European Union Proposal on Subsidiary Protection: An Analysis and Assessment' UNHCR *New Issues in Refugee Research* Working Paper No 74 (Geneva December 2002) 8.

<sup>18</sup> M Fullerton 'Failing the Test: Germany Leads Europe in Dismantling Refugee Protection' (2001) 36 *Texas Intl LJ* 231, 266.

within the framework of international law.<sup>19</sup> The rationale was to avoid disparate and ad hoc responses by States at the domestic level, such as ‘tolerance’ permits, which were frequently unstructured and provided only informal protection, leaving refugees in a legal ‘limbo’.<sup>20</sup>

However, the *non-refoulement* norm has been decontextualized. Within the Convention, it works to legally secure for refugees the remaining rights in the Convention. In the human rights context, however, it has been separated from these other rights to provide the trigger for protection without any corresponding legal status.<sup>21</sup> The result is a protection gap.

## 2 Why Human Rights Alone Are Insufficient

Beyond providing a widened threshold for claiming protection, international human rights law is an inadequate alternative source of substantive protection. Although the universal human rights instruments guarantee a comprehensive set of rights to all persons within a State’s jurisdiction,<sup>22</sup> international human rights law is strong on principle but weak on delivery.<sup>23</sup> Furthermore, many States undertake human rights obligations at the formal level, but do not ensure that the rights subscribed to can actually be claimed.<sup>24</sup> Unless special measures are taken to ensure that such provisions are translated into

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<sup>19</sup> Annex to UNHCR ‘Solution to the Refugee Problem and the Protection of Refugees’ (SCIP) (23 August 1989) UN Doc EC/SCP/55, entitled ‘Report of the Round Table on Solutions to the Problem of Refugees and the Protection of Refugees’ (San Remo Italy 12–14 July 1989) Conclusion [12].

<sup>20</sup> *ibid* [55].

<sup>21</sup> *eg Vijayanathan v France* (1993) 15 EHRR 62.

<sup>22</sup> With the exception of certain rights granted to citizens only: (n8).

<sup>23</sup> Thanks to Prof Chris McCrudden (Lincoln College, University of Oxford) for this description.

<sup>24</sup> GS Goodwin-Gill and J Kumin ‘Refugees in Limbo and Canada’s International Obligations’ (Caledon Institute of Social Policy September 2000) 4.

national law, then certain benefits may be inaccessible.<sup>25</sup> Even where individuals may not be barred from enjoyment of a right, ‘they are in practice often deprived of it inasmuch as it is dependent on the fulfilment of certain formalities, such as production of documents, intervention of consular or other authorities, with which ... they are not in a position to comply.’<sup>26</sup> While human rights law requires States to respect the rights it sets out in relation to *all* persons within its jurisdiction or territory, the quality of each right may vary depending on the individual’s legal position vis-à-vis the State. Thus, while the *standard* of compliance with human rights law is international, the State retains discretion in its choice of *implementation*<sup>27</sup>—whether and how to incorporate treaty provisions into domestic law.

There is therefore a gap between the theory of human rights and the ability to enjoy those rights.<sup>28</sup> As Hathaway notes, ‘[t]he divergence between the theory and the reality of international human rights law is strikingly apparent.’<sup>29</sup> At the international level, rights’ content is very broad and ill-defined, and it may be possible for States to ‘guarantee’ such rights without doing much towards their positive implementation. A common problem is that State constitutions often guarantee rights only to ‘citizens’,<sup>30</sup> making enforcement for non-citizens’ rights difficult. In 1967, Weis described

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<sup>25</sup> *ibid* 5.

<sup>26</sup> AHC ‘A Study of Statelessness’ UN Doc E/1112, E/1112.Add.1 (NY August 1949); O Andrysek ‘Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures’ (1997) 9 *IJRL* 392, 411.

<sup>27</sup> Goodwin-Gill (n9) 237.

<sup>28</sup> UNHCR ‘Note on International Protection’ A/AC.96/898 (3 July 1998) [45].

<sup>29</sup> JC Hathaway ‘Reconceiving Refugee Law as Human Rights Protection’ (1991) 4 *JRS* 113, 113.

<sup>30</sup> ECOSOC Commission on Human Rights ‘Prevention of Discrimination: The Rights of Non-Citizens’ (26 May 2003) E/CN.4/Sub.2/2003/23 [24]; HRC ‘General Comment 15: The Position of Aliens under the Covenant’ UN Doc (11 April 1986) [3].

international measures for safeguarding human rights as ‘modest’,<sup>31</sup> and nearly 25 years later Hathaway still characterized them as ‘generally sluggish and only occasionally effective.’<sup>32</sup> As Goodwin-Gill observes, the test of whether a treaty is effectively implemented domestically depends not on form alone, but on an overall assessment of practice.<sup>33</sup>

It is this that makes reliance on human rights law, either alone or in combination with *non-refoulement* under customary international law,<sup>34</sup> a dangerous option. Even though the Convention repeats many of the same rights as the universal treaties, its retention as a specialist refugee instrument is not redundant. As Kälin writes, repetition of the Convention’s provisions in general human rights law does not justify its abolition, since ‘guarantees crucial for refugees would be abolished within the framework of a regime based solely on human rights law’,<sup>35</sup> most notably the principle of *non-refoulement*. Furthermore, protection from expulsion in article 32 goes further than article 13 ICCPR, while the provision of identity and travel documents does not have a parallel in general human rights law. Similarly, Khiddu-Makubuya argues for the necessity to focus on refugees’ specific needs and interests while nonetheless drawing support from human rights norms.<sup>36</sup> Hathaway argues that refugee law has its own

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<sup>31</sup> P Weis ‘Human Rights and Refugees’ Lecture, Yale University Law School (7 November 1967) 13 (RSC Archive WEIS A21.6 WEI).

<sup>32</sup> Hathaway (n29) 113.

<sup>33</sup> Goodwin-Gill and Kumin (n24) 4.

<sup>34</sup> For its scope, see Lauterpacht and Bethlehem (n9).

<sup>35</sup> W Kälin ‘The Legal Condition of Refugees in Switzerland’ (1994) 7 JRS 82, 94.

<sup>36</sup> E Khiddu-Makubuya ‘The Legal Condition of Refugees in Switzerland’ (1994) 7 JRS 402, 410.

legitimacy, and cautions that coordination between refugee and human rights law should not lead to a downgrading of protection for persons in need of international protection.<sup>37</sup>

If the substantive rights of beneficiaries of complementary protection were dependent on human rights law, the quality of protection would be contingent on the combination of treaties ratified (and implemented) by the State and status would consequently be very inconsistent.<sup>38</sup> For example, while the ICESCR and many of the ILO Conventions cover similar rights to articles 17 to 24 of the Convention, certain parties to the Convention have not ratified those instruments and hence they would not apply.<sup>39</sup>

### **3 Legal Limbo**

This matrix is part of the trade-off between international human rights law and State sovereignty. States are prepared to make various human rights commitments, which are monitored by UN Committees and at times may form the subject of individual complaints, provided that they retain the right to determine how their obligations are implemented domestically. As the UK Immigration Appeals Tribunal explained:

A successful claimant under the Refugee Convention is recognised as a refugee, which is a status existing at the level of international law. It is also a status which confers on him certain civil, political, social and

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<sup>37</sup> Hathaway (n29) 117. States that are not party to the Convention do not have superior protection regimes: see eg BS Chimni 'The Legal Condition of Refugees in India' (1994) 7 JRS 378, 398; A Helton 'What is Refugee Protection?' (1990) Spec Issue IJRL 119, 125.

<sup>38</sup> In monist States, international treaties have direct effect, whereas in dualist States, they must be implemented domestically following ratification to be justiciable.

<sup>39</sup> Kälin (n35) 95. However, as Pt F below shows, it is precisely on such rights that persons ineligible for Convention protection must rely, and for this reason it is necessary to establish the minimum status that international human rights law provides.

economic rights specified in Arts 2-33 of the Refugee Convention. ... By contrast, a successful claimant under the Human Rights Convention [ECHR], even if found to be unremovable unless Article 3 is to be violated, is not entitled to receive any status. As a matter of current policy only he is granted certain civil, political, social and economic rights and he may also get exceptional leave to remain for varying periods.<sup>40</sup>

Accordingly, at the national level there is diverse State practice on the treatment of extra-Convention refugees, ranging from recognition based solely on State discretion to formal codification of complementary protection. The European Court of Human Rights, whose decisions are binding on States party to the ECHR, has not yet ruled on what legal status should accrue to persons who cannot be removed. Blake and Husain rightly assert that where the law precludes an individual's removal, 'then a status permitting residence and the ability to acquire some semblance of a normal life is required.'<sup>41</sup>

The case of *Vijayanathan v France*<sup>42</sup> is significant in this respect, more for the European Court's silence on the issue than any positive statement about the legal rights of tolerated persons. There, two Tamils had been issued with a direction—but not a formal expulsion order—to leave France. Their provisional documents had expired, and they were left in a situation where they were 'tolerated' (and in that sense, protected from *refoulement*) but had no formal legal status and few substantive rights. In *TI v UK*, the court regarded as 'irrelevant' information that any permission for the applicant to remain in the UK would only be for three months and subject to review.<sup>43</sup> Lambert characterizes

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<sup>40</sup> *Gurung v Sect'y of State for the Home Dept* [2002] UKIAT 04870 (14 October 2002) [145].

<sup>41</sup> N Blake and R Husain *Immigration, Asylum and Human Rights* (OUP Oxford 2003) [2.105], noting that States retain a wide margin of appreciation. See *R v Sect'y of State, ex p Quaquah (No 1)* [2000] INLR 196 (failure to consider art 6 in expulsion rendered decision flawed); *R v Sect'y of State, ex p Andries* (10 December 1999) (immigration limbo caused by fundamental contradictions in applicant's account of his country of nationality not unlawful).

<sup>42</sup> *Vijayanathan* (n21).

<sup>43</sup> *TI v UK* [2000] INLR 211. Similarly, in the UK case of *R (on the Application of Shahid) v Sect'y of State for the Home Dept* QBD (Admin) (13 October 2004, Gibbs J), the High Court found that it was

the court's approach as 'one of redress', showing concern only for States' compliance with judgments rather than their effects on the claimant.<sup>44</sup> Similarly in *Ahmed*, the European Court failed to address questions of status despite recognizing a protection need under article 3. Austria failed to grant the applicant a residence permit or authority to remain, although continued to 'tolerate' his presence. After several months of instability and lack of support, he committed suicide.<sup>45</sup> As a lawyer on the case noted:

After years of ... subsisting in constant threat of deportation and a state of complete uncertainty, the otherwise favourable Judgment of the European Court remained mute on attendant issues, including the reinstatement of refugee status (and whether it was withdrawn illegally) and the denial of access to social security, medical care and the labour market. Whether such circumstances in themselves amount to inhuman or degrading treatment is yet to be tested.<sup>46</sup>

This question has still not been determined in the European Court, although in *Pancenko v Latvia* it acknowledged that poor living conditions could raise an issue under article 3 ECHR if they reached a minimum level of severity.<sup>47</sup> In a separate opinion to the Commission in *BB v France*,<sup>48</sup> Cabral Barreto expressed the view that an alien forced to live in a country without any social protection would face treatment contrary to article

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reasonable for the Home Secretary to deny indefinite leave to remain to an extra-Convention refugee permitted to remain in the UK on the basis of article 8 ECHR, and instead grant only discretionary leave for three years. The Home Secretary's decision was considered consistent with the article 8 right to remain, simply because it granted that right (irrespective of its duration and substance).

<sup>44</sup> H Lambert 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities' Special Issue of the RSQ, forthcoming 2005 (copy with author).

<sup>45</sup> Blake and Husain (n41) [2.104], referring to *Ahmed* (n10).

<sup>46</sup> Andrysek (n26) 412. Sadly, Mr Ahmed committed suicide.

<sup>47</sup> *Pancenko v Latvia* App No 40772/98 (28 October 1999); *BB* (n10) Cabral Barreto. The Australian Human Rights Commission recognized this issue as early as 1985, recommending that the immigration department ensure that 'persons within Australia are not put into a situation where they are, in effect, subject to inhuman or degrading treatment by virtue of their status as PNCs [prohibited non-citizens] or their equivocal position while seeking change of status.': Human Rights Commission *Human Rights and the Migration Act 1958* (Report No 13) (Australian Government Publishing Service Canberra 1985) [55].

<sup>48</sup> *BB* (n10).

3,<sup>49</sup> and agreed with the majority in *HLR v France* that an alien barred from work or social support ‘is in a situation which fails to meet the requirements of Article 8 of the Convention’.<sup>50</sup> The right to respect for private life under article 8 may include ‘a positive duty on a state to regularize an immigrant’s status with no prospect of removal within a reasonable timescale, where the result of limbo status is destitution through an inability to access the labour market together with a denial of access to the mainstream benefits regime.’<sup>51</sup>

*HLR* confirmed that more than mere abstinence from expulsion is necessary to respect the ECHR—that is, *non-refoulement* alone is inadequate. Blake and Husain assert that where social deprivation creates such difficulties, there is little doubt that the minimum level of severity for article 3 purposes is reached. ‘Suffering can be caused by deprivation of facilities as well as deliberate harm.’<sup>52</sup> The Supreme Courts of France, Germany and Belgium have endorsed this view, recognizing that persons in irregular situations are entitled to minimum health and social services, noting that no individual can be denied minimal dignity even when he or she is in an irregular situation.<sup>53</sup>

In the UK, a number of destitute asylum-seekers successfully argued that the State’s denial of social benefits and the right to work under section 55 of the Nationality,

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<sup>49</sup> cf *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* [2003] FCAFC 70.

<sup>50</sup> (1997) 26 EHRR 29.

<sup>51</sup> Blake and Husain (n41) [4.64].

<sup>52</sup> *ibid* [2.104].

<sup>53</sup> France: Conseil constitutionnel DC 93-325 (13 August 1993); DC 97-39 (22 April 1997); DC 79-109 of 9 January 1980); Belgium: Judgment of the Court of Arbitration (22 April 1998); Judgment of Labour Tribunal of Liège 2<sup>nd</sup> Chamber (24 October 1997) RG 24.764/96; Germany: Federal Constitutional Court Judgment (8 January 1959) BVerfGE 9, 89; Judgment (21 June 1987) BVerfGE 45, 187; Judgment (17 January 1979) BVerfGE 50; Judgment (24 April 1986) BVerfGE 172, cited in D Bouteillet-Paquet ‘Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union’ in D Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002) 240 fn 98.

Immigration and Asylum Act 2002<sup>54</sup> constituted inhuman and degrading treatment violating article 3 ECHR. For 18 months, that section operated to deny support to in-country adult asylum-seekers who could not satisfy the Home Office that they had applied 'as soon as reasonably practicable' for asylum. As at October 2003, these cases represented 25% of the Administrative Court's caseload, with approximately 60 cases a week.<sup>55</sup> They typically concerned asylum-seekers sleeping rough, with various health problems and no money except that obtained by begging. In 90% of cases, the courts found that denial of support would, in the circumstances, amount to 'inhuman or degrading treatment', and accordingly granted injunctions requiring the National Asylum Support Service (NASS) to provide accommodation and support.<sup>56</sup> Blake and Husain argue that where individuals are precluded from employment or social welfare, such matters should properly be considered as part of the individual's right to respect for bodily and physical integrity as part of their private life, protected by article 8 ECHR.<sup>57</sup>

The Court of Appeal's decision of 21 May 2004 in *Limbuella* led to a change of policy.<sup>58</sup> The effect of the judgment was that NASS should provide support unless *positively* satisfied that the individual has an alternative source of support. Although the Home Office intends to appeal to the House of Lords,<sup>59</sup> it has provisionally revised its eligibility procedures to extend section 55 support to all asylum-seekers, unless it is

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<sup>54</sup> Nationality, Immigration and Asylum Act 2002 (UK) c 41 (entered into force 8 January 2003). For discussion of similar, earlier provisions: R Cholewinski 'Enforced Destitution of Asylum Seekers in the United Kingdom: The Denial of Fundamental Human Rights' (1998) 10 IJRL 462; *R v Hammersmith and Fulham LBC, ex p M* (1998) 30 HLR 10.

<sup>55</sup> S Sedley 'The Rocks or the Open Sea: Where is the Human Rights Act Heading?' 2003 Legal Action Group Lecture (London 3 November 2003) [38] (copy with author).

<sup>56</sup> *Q v Sect'y of State for the Home Dept* [2003] EWHC 2507 (Admin); *Q v Sect'y of State for the Home Dept* [2003] EWCA Civ 364, [2003] 3 WLR 365. For background, see 'Destitution by Design: Section 55: GLA Impact Assessment for London' (December 2003) (copy with author).

<sup>57</sup> Blake and Husain (n41) [2.102].

<sup>58</sup> *Sect'y of State for the Home Dept v Limbuella* [2004] EWCA Civ 540.

<sup>59</sup> <[www.homeoffice.gov.uk/n\\_story.asp?item\\_id=960](http://www.homeoffice.gov.uk/n_story.asp?item_id=960)> (10 November 2004). The case is not expected to be heard until 2005.

believed that the individual has alternative means of support.<sup>60</sup> Since these new procedures took effect on 28 June 2004, there have been no denials,<sup>61</sup> emphasizing the draconian nature of the previous policy.

### C THE CONVENTION AS A *LEX SPECIALIS* AND ITS SIGNIFICANCE FOR STATUS

The first chapter introduced the idea of the Convention as a *lex specialis* for persons protected by the principle of *non-refoulement*, based on the Convention's function as 'a charter of minimum rights to be guaranteed to refugees',<sup>62</sup> which the drafters envisaged would extend to additional groups of refugees.

As a specialist human rights treaty comprising one part of a holistic human rights regime,<sup>63</sup> it is argued that the Convention's application has been extended through the expansion of *non-refoulement* under human rights law (and, by analogy, to protection granted in accordance with humanitarian and international criminal law), rather than by the conventional means of a Protocol. At the international level and in State practice, no distinction is drawn between refugee status under article 1A(2) and an entitlement to *non-refoulement* under article 33(1).<sup>64</sup> Once an individual can satisfy the test in article 1A(2),

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<sup>60</sup> See <[www.refugeecouncil.org.uk/publications/pub014.htm#s55](http://www.refugeecouncil.org.uk/publications/pub014.htm#s55)> (10 November 2004).

<sup>61</sup> Email from Nancy Fancott (Hammersmith & Fulham Community Law Centre) to NASS email list 'Various Updates on NASS and Changes to the Amnesty Concession' (27 August 2004). Correct as at 27 August 2004.

<sup>62</sup> CP 'Summary Record of the 24<sup>th</sup> Meeting' (17 July 1951) UN Doc A/CONF.2/SR.24 (27 November 1951) 8 (UK); see also AHC 'Summary Record of the 12<sup>th</sup> Meeting' (25 January 1950) UN Doc E/AC.32/SR.12 (1 February 1950) [17].

<sup>63</sup> Koskenniemi views human rights as a self-contained regime: 'Human rights law contains well-developed systems of reporting and individual complaints that claim priority to general rules of State responsibility', in ILC Study Group on Fragmentation (Koskenniemi) 'Fragmentation of International Law' (2003) 3.2.

<sup>64</sup> In State practice, the legal correlation between articles 1A(2) and 33(1) is demonstrated by the fact that 'entitlement to the protection of *non-refoulement* is conditioned simply upon satisfying the well-founded fear criterion': Goodwin-Gill (n9) 138; see also CP 'Summary Record of the 35<sup>th</sup> Meeting' (25 July 1951)

full Convention protection follows. Since the scope of *non-refoulement* has been broadened by subsequent human rights instruments, this necessarily widens the Convention's application.

The reason why human rights instruments do not themselves provide for status resulting from *non-refoulement* can be explained through the example of CAT. Article 3 CAT triggers eligibility for international protection, but does not elaborate the legal status that should be granted to persons recognized as having such a need. One explanation for this may be that the CAT's drafters did not envisage the provision's extraterritorial application to asylum-seekers.<sup>65</sup> However, notwithstanding this, it would in any case be futile for instruments like the CAT to enumerate the legal status arising from the application of *non-refoulement*, since the Convention (as the *lex specialis*) already provides an appropriate status for any person protected by that principle. The failure of human rights law to establish a complementary protection *status*, as opposed to an eligibility *threshold*, is not because international law is unconcerned with the legal treatment of such persons, but rather because the Convention already provides an appropriate protection regime. Furthermore, the purpose of a treaty like the CAT is to strengthen the existing prohibition of torture and other cruel, inhuman or degrading treatment or punishment under international law through a number of supportive

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UN Doc A/CONF.2/SR.35 (3 December 1951) 22; *Sivakumaran v Secty' of State for the Home Dept* [1988] AC 958 (HL).

<sup>65</sup> Burgers and Danelius note that asylum was not discussed even during the drafting of article 3 CAT, a time at which the shortcomings of the Convention were evident through the State practice of de facto and temporary protection: JH Burgers and H Danelius *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff Publishers Dordrecht 1988).

measures,<sup>66</sup> not to enumerate the rights of persons it protects from *refoulement* in article 3. Finally, the express use of the term '*non-refoulement*' in that treaty (which has been read into article 3 ECHR and article 7 ICCPR) links the article 3 trigger for protection to the legal status provided by the Convention.

Article 1A(1) of the Convention further supports the argument for the Convention's wider application. This provision extends Convention status to refugees protected by pre-1951 legal instruments, even though not all would qualify for protection under article 1A(2). This bolsters the idea that there is nothing intrinsic in the Convention regime that prevents its extension to persons outside the article 1A(2) definition, particularly given the similarities between article 1A(1) refugees and certain beneficiaries of complementary protection. Article 1A(1) directly contradicts any claims that the Convention rights are not applicable to persons fleeing situations of generalized violence or civil war, and suggests a single status for persons needing international protection. This mandates against the creation of additional statuses for other persons in need of international protection who do not fall within the Convention definition, strengthening the argument that persons protected by the extended principle of *non-refoulement* are entitled to the legal status established by the Convention.

As Chapter 1 explained, early extensions of international protection afforded beneficiaries identical rights to Convention refugees, such as arrangements regarding Hungarian refugees in the 1950s. UNGA Resolution 1959 (XVIII) of 12 December 1963 reflected a growing acceptance by States that extra-Convention refugees should be entitled to the same standards of treatment as Convention refugees. There, the General

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<sup>66</sup> *ibid* 1. There is no reference to asylum in either the Preamble or any of the provisions of the CAT. Asylum is not referred to as a factor in Burgers and Danelius's analysis of the *travaux préparatoires* of the CAT.

Assembly invited States to continue to support the alleviation of refugee problems by, *inter alia*,

improving the legal status of refugees residing in their territory, particularly in new refugee situations ... by treating new refugee problems in accordance with the principles and the spirit of the Convention.<sup>67</sup>

In 1965, Grahl-Madsen proposed the 'really radical solution' of extending the benefits of the Convention to 'any person who finds himself abroad as a political refugee in the widest sense.' He argued that if a State has granted an individual asylum, 'it would seem reasonable that such a State also would be prepared to bind itself to give such person a satisfactory legal status.'<sup>68</sup> At that time, he acknowledged that such a proposal 'may be to ask too much.'<sup>69</sup> However, now, given the expansion of *non-refoulement* not just in practice but in law, and noting the influence of human rights law generally on concepts of 'persecution' and 'protection', Grahl-Madsen's idea is far from extreme, providing a logical, legal solution to the issue of status.

## **1 The Status of Refugees vis-à-vis Stateless Persons**

It is also useful to consider the rights of stateless persons, whose international legal status is premised not on the home State's inability or unwillingness to protect them, but rather on the fact that there is no State to which the individuals concerned can be attributed

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<sup>67</sup> UNGA Res 1959 (XVIII) of 12 December 1963 para 2(b). See also P Weis 'The 1967 Protocol Relating to the Status of Refugees and Some Questions of the Law of Treaties' (1967) 42 BYBIL 39.

<sup>68</sup> A Grahl-Madsen 'Further Development of International Refugee Law' (1965) 35 Nordisk Tidsskrift for International Ret 159, 163.

<sup>69</sup> *ibid*

through the link of nationality. During the drafting of the Refugee Convention, the UK and US delegates argued that both stateless persons and refugees were ‘unprotected persons’ entitled to the same level of international protection, regardless of why they lacked national protection.<sup>70</sup> A Draft Protocol on stateless persons annexed to the Refugee Convention extended *mutatis mutandis* most substantive rights contained in the Convention to stateless persons.<sup>71</sup> Interestingly, the High Commissioner remarked that the Draft Protocol was restricted to only those Convention rights ‘which might be considered as basic, and which did not in any way provide for special treatment that might be justified for refugees by reason of their special position, but could not be justified in the case of stateless persons generally.’<sup>72</sup>

The Draft Protocol formed the model for the 1954 Convention relating to the Status of Stateless Persons. This instrument extends to stateless persons identical rights to Convention refugees, with the exception of inapplicable articles 17(2), 19(2), 28(2), 31, 33, and articles 15 (right of association) and 17(1) (wage-earning employment), which grant to stateless persons treatment as favourable as possible than that accorded to aliens generally in the same circumstances, rather than most favoured nations treatment accorded to refugees.

The absence of Convention articles 31 and 33 underscores the different premise for stateless persons’ protection. It is based not fear of persecution (remedied by *non-refoulement*), but rather on their anomalous legal position under international law arising

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<sup>70</sup> AHC ‘Summary Record of the 4<sup>th</sup> Meeting’ (NY 18 January 1950) UN Doc E/AC.32/SR.4 (26 January 1950) [7] (UK).

<sup>71</sup> Protocol: ‘Now therefore undertake to apply, *mutatis mutandis*, the provisions of Articles 2 to 4, 6 to 11, 12 paragraph 1, 13, 14 paragraph 1, 15 to 23, 24 paragraphs 1 and 2, 27, 29 and 31 of the Convention relating to the Status of Refugees, to stateless persons to whom that Convention does not apply’, in CP ‘Texts of the Draft Convention and the Draft Protocol to be Considered by the Conference: Note by the Secretary-General’ UN Doc A/CONF.2/1 (12 March 1951).

<sup>72</sup> CP ‘Summary Record of the 2<sup>nd</sup> Meeting’ (2 July 1951) UN Doc A/CONF.2/SR.2 (20 July 1951) (HC).

from a lack of nationality and hence national protection. Differences in substantive rights are most obvious in article 17. Whereas the Draft Protocol had applied article 17 *mutatis mutandis* to stateless persons, paragraph (2) was deleted during the Statelessness Convention's drafting,<sup>73</sup> and criticized by the World Jewish Congress as being without justification.<sup>74</sup> It seems that the deletion reflected pragmatic concerns about depressed economic conditions in certain States rather than a philosophical bias,<sup>75</sup> and was also due to the high number of reservations to paragraph 2 under the Refugee Convention,<sup>76</sup> and the benefit accorded by article 5.<sup>77</sup>

Even though it was generally accepted that a conceptual distinction could be drawn between 'the humanitarian problem of the refugees and the primarily legal problem of stateless persons',<sup>78</sup> there was general agreement that their rights should be the same. As the UK delegate explained, 'hardly any distinction could be drawn between the *treatment* to be applied to refugees and to stateless persons who were not refugees.'<sup>79</sup> This is of particular consequence to beneficiaries of complementary protection, who, like refugees, flee situations of serious harm. The underlying reason for their international protection need is substantially similar. To differentiate between these two groups' rights, when quite a different underlying reason for protection nonetheless secures almost

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<sup>73</sup> CPSS 'Revision of the Draft Protocol relating to the Status of Stateless Persons: Articles Adopted by the Conference, in First Reading, For Inclusion in a Protocol or Convention relating to the Status of Stateless Persons' UN Doc E/CONF.17/L.11 (20 September 1954) 6–7.

<sup>74</sup> CPSS 'Revision of the Draft Protocol relating to the Status of Stateless Persons: Statement submitted by the World Jewish Congress, A Non-Governmental Organization in Category B Consultative Status' UN Doc E/CONF.17/NGO.1 (20 September 1954) 2.

<sup>75</sup> eg CPSS 'Summary Record of the 7<sup>th</sup> Meeting' (16 September 1954) UN Doc E/CONF.17/SR.7 (29 September 1954) 9–10 (Belgium, France, Turkey).

<sup>76</sup> CPSS 'Summary Record of the 9<sup>th</sup> Meeting' (17 September 1954) UN Doc E/CONF.17/SR.9 (30 September 1954) 8.

<sup>77</sup> *ibid* 10.

<sup>78</sup> AHC 'Summary Record of the 2<sup>nd</sup> Meeting' (NY 17 January 1950) UN Doc E/AC.32/SR.2 (26 January 1950) [18] (USA).

<sup>79</sup> AHC 'Summary Record of the 3<sup>rd</sup> Meeting' (NY 17 January 1950) UN Doc E/AC.32/SR.3 (26 January 1950) [34] (UK) (emphasis added).

identical rights for refugees and stateless persons,<sup>80</sup> seems to run counter to the international law framework.

## 2 Regional Precedents

There are also strong regional precedents for extending Convention status to a wider group of beneficiaries. Both the OAU Convention and the Cartagena Declaration<sup>81</sup> cite the Convention as the legal basis of rights and duties for their broader refugee mandate. Article 8(2) of the OAU Convention describes it as a regional *complement* to the Convention—a point that was reaffirmed in 1999 on the 30<sup>th</sup> anniversary of the OAU Convention.<sup>82</sup> On its face, the only possible interpretation of this provision is that a person recognized as a refugee under either branch of the definition in the *complementary* OAU Convention is entitled to the rights contained in the *primary* 1951 Convention. According to Fitzpatrick, African states of refuge do not create a hierarchy between the two definitions,<sup>83</sup> regarding the need for international protection as more important than the cause of displacement. For this reason, the African instrument does not elaborate an alternative legal status for extra-Convention refugees. As Jackson notes, despite the geographical limitation of the refugee definition, there was no suggestion during the drafting of the Convention that its substantive rights were unsuited to non-European

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<sup>80</sup> For example, it was acknowledged that some persons could choose to become stateless by evading normal duties of citizenship such as military service: UN Yearbook (1954) 415.

<sup>81</sup> art 8.

<sup>82</sup> 'Comprehensive Implementation Plan' (CONF.P/OAU30TH/REPORT—Annex II) (2001) 20 RSQ 32. Furthermore, domestic legislation may include incorporation of both definitions, eg South Africa's Refugees Act 1998.

<sup>83</sup> J Fitzpatrick 'Temporary Protection of Refugees: Elements of a Formalized Regime' (2000) 94 AJIL 279, 283.

refugee situations.<sup>84</sup> This is confirmed by paragraph 7 of the draft Preamble,<sup>85</sup> embodied in Recommendation E of the Final Act.

The Convention's framework already envisages protection attaching at different levels dependent on the individual's length of residence in the host State, and accordingly provides an appropriate model for extending protection to extra-Convention refugees. However, there is one caveat. The Convention contains exclusion clauses which deny the benefits of the Convention to persons considered undeserving of international protection, even though they might have a well-founded fear of persecution. These are absent from (and contrary to) the absolute protection from *refoulement* guaranteed by human rights law, which cannot be denied no matter how abhorrent the claimant's conduct. Since the protection of the Convention is expressly denied to persons falling within article 1F,<sup>86</sup> it cannot be provided to *all* persons who benefit from human rights *non-refoulement*. However, these persons cannot be removed. Accordingly, it is necessary to determine the type of treatment to which they are entitled under international law. This is examined in Part F below.

#### **D THE ARCHITECTURE OF THE REFUGEE CONVENTION**

The Convention is characterized by a gradual improvement of standards of treatment over time, reflecting the refugee's assimilation into the host State, with 'a more fulsome range of needs and aspirations be[ing] met as the refugee's relationship to the asylum state is

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<sup>84</sup> IC Jackson *The Refugee Concept in Group Situations* (Martinus Nijhoff Publishers The Hague 1999) 74.

<sup>85</sup> A/CONF.2/1 (n71).

<sup>86</sup> Only rights attaching to lawful stay are denied to persons denied protection under article 33(2): see Ch 2 at B2.

solidified.’<sup>87</sup> Some provisions of the Convention are limited to refugees ‘lawfully staying’<sup>88</sup> in Contracting States, some apply to those ‘lawfully in’<sup>89</sup> such States, while others apply to refugees regardless of the nature of their stay. The differing terminology is intentional,<sup>90</sup> and depends to a large extent on which rights carry financial or social responsibilities or multilateral implications for the host State.<sup>91</sup> It was based on French law which granted basic rights to all refugees, with additional rights adhering as the refugee’s legal status was consolidated.<sup>92</sup>

During the drafting of the Convention, the US representative explained that ‘lawfully in’ was intended to apply to all refugees lawfully in the country, even those who were not permanent residents,<sup>93</sup> and noted that ‘[t]here was no harm in the provision even if it theoretically applied to refugees who were in a country for a brief sojourn, since the individuals would hardly seek the benefit of the rights contemplated.’<sup>94</sup> The term ‘lawfully staying’ was adopted as the most accurate translation of the French concept of ‘résidant régulièrement’.<sup>95</sup> The drafters emphasized that it was the de facto circumstances of the refugee that determined whether or not the third level of attachment was met; in other words, the refugee’s presence had to be on-going in practical terms.<sup>96</sup> According to

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<sup>87</sup> Hathaway and Cusick (n16) 491.

<sup>88</sup> Convention arts 15, 17, 19, 21, 23, 24, 28.

<sup>89</sup> Convention arts 18, 26, 32.

<sup>90</sup> See eg AHC ‘Summary Record of the 25<sup>th</sup> Meeting’ (NY 10 February 1950) UN Doc E/AC.32/SR.25 (17 February 1950) [16]–[17], [41]–[42]; AHC ‘Summary Record of the 41<sup>st</sup> Meeting’ (Geneva 23 August 1950) UN Doc E/AC.32/SR.41 (28 September 1950) 9–18; AHC ‘Summary Record of the 42<sup>nd</sup> Meeting’ (Geneva 24 August 1950) UN Doc E/AC.32/SR.42 (28 September 1950) 11–36.

<sup>91</sup> UNHCR ‘“Lawfully Staying”: A Note on Interpretation’ (3 May 1988) [11].

<sup>92</sup> AHC ‘Summary Record of the 15<sup>th</sup> Meeting’ (NY 27 January 1950) UN Doc E/AC/32/SR.15 (6 February 1950) (France).

<sup>93</sup> UN Doc E/AC.32/SR.41 (n90) 9–10; UN Doc E/AC.32/SR.25 (n90) [17].

<sup>94</sup> UN Doc E/AC.32/SR.25 (n90) [17].

<sup>95</sup> CP ‘Draft Convention relating to the Status of Refugees: Report of the Style Committee’ UN Doc A/CONF.2/102 (24 July 1951).

<sup>96</sup> See UN Doc E/AC.32/SR.42 (n90) 12, 33–34 (France); UN Doc E/AC.32/SR.41 (n90) 17 (France). Canada’s reservation to articles 23 and 24 states that ‘lawfully staying’ applies only to refugees granted

Grahl-Madsen, lawful stay may be implied from an officially tolerated stay beyond the last date on which an individual was permitted to remain in the State without securing a residence permit (normally three to six months).<sup>97</sup> This may have important consequences for securing the rights of persons who are tolerated in a State but denied a formal legal status.

Articles 18 (self-employment), 26 (freedom of movement) and 32 (expulsion) apply to refugees whose presence is lawful. Lawful presence (being ‘lawfully in’ the territory) implies admission in accordance with the law, which is valid even for a temporary purpose (such as a visitor’s visa). According to UNHCR, at a minimum, presence will be lawful when formalities have been officially dispensed with.<sup>98</sup> It would become unlawful if a refugee were ‘in contravention of terms imposed as a condition of his admission or sojourn.’<sup>99</sup> By contrast, lawful residence,<sup>100</sup> described by the term ‘lawfully staying in’ (which gives rise to the enjoyment of such Convention rights as association, gainful employment, social security and labour protection, and the right to apply for travel documents) describes persons enjoying asylum in the sense of residence and lasting protection.<sup>101</sup> It therefore goes beyond lawful presence. The *travaux préparatoires* support this view, with the French representative to the Ad Hoc Committee noting that ‘an examination of the various articles in which the words “résident

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permanent residence status. However, provincial governments in practice apply less stringent standards which allow claimants to be eligible for social and health protection programmes: F Crépeau and M Barutciski ‘Refugee Rights in Canada and the 1951 Geneva Convention’ (1994) 7 JRS 239, 245.

<sup>97</sup> A Grahl-Madsen *The Status of Refugees in International Law* vol 2 (AJ Sijthoff Leyden 1972) 353–54.

<sup>98</sup> UNHCR (n 53) [9].

<sup>99</sup> AHC ‘Report of the Ad Hoc Committee on Refugees and Stateless Persons’ (Geneva 14 August–25 August 1950) E/1850, E/AC.32/8 (25 August 1950) [20].

<sup>100</sup> It was decided not to use the term ‘lawful residence’ in the Convention, apart from in relation to travel documents, due to the word ‘resident’ having ‘different connotations in different countries’: UN Doc E/AC.32/SR.25 (n90) [17].

<sup>101</sup> Goodwin-Gill (n 20) 308.

régulièrement” appeared would show that they all implied a settling down and, consequently, a certain length of residence’.<sup>102</sup>

Admittedly the distinction between lawful presence and lawful residence is often difficult to maintain in practice due to the different approaches adopted in national systems.<sup>103</sup> Yet at the same time, the vast body of State practice which now exists in applying the Convention to different circumstances and regions should provide a solid basis for clarifying the thresholds between the different levels of attachment envisaged by the Convention. Such an exercise would go a long way towards giving content to *non-refoulement* through time—based on the *lex specialis* of international refugee law rather than extra-Convention regimes.

Given that human rights law advocates that all protected persons should have a status that allows them to live with dignity, an amount of certainty and stability is necessary.<sup>104</sup> In UNHCR’s view, simply observing the principle of *non-refoulement*, without conferring a positive legal status, is insufficient to meet this requirement.<sup>105</sup> Once persons in need of protection have been admitted and tolerated for a number of years, and no other State will assume responsibility for them, asylum States cannot hide behind the semantic ambiguity of ‘lawfully in’ or ‘lawfully staying’ clauses to deny them the full benefits of the Convention.<sup>106</sup> Yet this is the kind of distinction which the Qualification

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<sup>102</sup> UN Doc E/AC.32/SR.42 (n90) 12.

<sup>103</sup> Goodwin-Gill (n 20) 307.

<sup>104</sup> In particular, respect for family unity provides one of the most crucial ways in which beneficiaries of complementary protection may obtain some stability in their lives: EXCOM Standing Committee 18<sup>th</sup> Meeting ‘Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime’ (9 June 2000) UN Doc EC/50/SC/CRP.18 [18]. See recent EXCOM Conclusions 85 (1998) UN Doc A/AC.96/911 [21] and 88 (1999) UN Doc A/AC/96/928 [21].

<sup>105</sup> EXCOM Standing Committee (n104) [13]–[14].

<sup>106</sup> This argument has been made in the context of mass influx situations: J-F Durieux and J McAdam ‘*Non-Refoulement* through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies’ (2004) 16 IJRL 4, 15.

Directive seeks to entrench. It provides a perpetually lower status than Convention status, regardless of how long the need for subsidiary protection lasts and despite the fact that beneficiaries of subsidiary protection are ‘lawfully staying’ in the State.

If one looks at the rights in the Convention defined solely in relation to non-citizens, two types of treatment are contemplated: most favoured nation treatment,<sup>107</sup> and treatment that is not less favourable than that accorded to aliens generally in the same circumstances. The former depends on special arrangements concluded between various countries, while the latter implies that ‘refugees should be accorded rights where these are generally enjoyed by aliens as a result of statute or treaty arrangements with other countries’<sup>108</sup> (although the IRO expressed concern that some States might misinterpret ‘general treatment’ as meaning ‘treatment accorded to aliens who were not beneficiaries of treaties’<sup>109</sup>). During the Convention’s drafting, some delegations were concerned with the phrase’s imprecision, noting the ‘unequal treatment’ of aliens depending on whether a bilateral treaty of establishment existed between the country of residence and the country of nationality, or whether they held a permanent or temporary residence permit.<sup>110</sup> Furthermore, Weis noted the difficulties in determining ‘what was the law applicable to

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<sup>107</sup> GS Goodwin-Gill *International Law and the Movement of Persons between States* (OUP Oxford 1978) 186.

<sup>108</sup> AHC ‘Compilation of the Comments of Governments and Specialized Agencies on the Report of the Ad Hoc Committee on Statelessness and Related Problems’ UN Doc E/AC.32/L.40 (10 August 1950) art 4 Comments of IRO [16]; see AHC comments annexed to UN Doc E/1618; AHC ‘Report of the Ad Hoc Committee on Statelessness and Related Problems’ (NY 16 January–16 February 1950) E/1618, E/AC.32/5 (17 February 1950) Annex II, art 4(2).

<sup>109</sup> UN Doc E/AC.32/L.40 (n108) art 4 Comments of IRO [16].

<sup>110</sup> CP ‘Summary Record of the 6<sup>th</sup> Meeting’ (4 July 1951) UN Doc A/CONF.2/SR.6 (20 November 1951) (Egypt).

aliens generally', given that it could be found in precedents, administrative practice as well as legislation.<sup>111</sup>

The meaning of 'in the same circumstances' is provided by article 6 of the Convention:

any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling.<sup>112</sup>

This standard applies to articles 13 (property), 18 (self-employment), 19 (liberal professions), 21 (housing), 22 (education other than elementary) and 26 (freedom of movement).

In real terms, the situation of Convention refugees and non-excludable beneficiaries of complementary protection is very similar. And, as was noted in Chapter 1, the dynamic nature of protection means that members of the latter may come to be subsumed in the former, such as conscientious objectors and persons persecuted by non-State agents.<sup>113</sup> Recalling the misconception that complementary protection is an intrinsically temporary status, States might argue that even if extra-Convention refugees were considered under the Convention framework, they would receive different rights, since on the basis of their 'temporary' status they are not 'in the same circumstances' as Convention refugees. Accordingly, the 'aliens generally in the same circumstances'

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<sup>111</sup> AHC 'Summary Record of the 31<sup>st</sup> Meeting' (16 February 1950) UN Doc E/AC.32/SR.31 (16 February 1950) [12].

<sup>112</sup> For background, see CP 'Draft Convention relating to the Status of Refugees: Israel–UK: Note on Article 3(B)' UN Doc A/CONF.2/84 (17 July 1951).

<sup>113</sup> Although most States recognized these categories as refugees, this has been formally acknowledged in the Qualification Directive arts 6(c), 9(2).

against whom their entitlements would be gauged would have lower benefits. This argument is fundamentally flawed. Characterizing complementary protection as temporary conveniently overlooks the fact that the *Convention* regime itself is predicated on temporary stay, as indicated by its cessation clauses, and accordingly grants rights on the basis of the refugee's assimilation into the asylum state. There is a danger that States may channel persons into complementary protection schemes, affording time-bound protection with more limited rights, as a means of circumventing the need to apply the Convention's cessation clauses.

There is another flaw in the temporariness argument, evidenced by the operation of the EU Temporary Protection Directive. Although its suspension of normal asylum procedures effectively postpones enjoyment of Convention rights, it offsets this by granting treatment roughly equivalent to Convention status. While this acknowledges that some persons in the mass influx may in fact be Convention refugees, it also undermines States' own argument that beneficiaries of less permanent protection require less comprehensive protection.<sup>114</sup>

It is important also to recall that the Convention sets out *minimum* standards. Article 5 stipulates that its provisions are not exhaustive and do not restrict more far-reaching benefits from being granted. Grahl-Madsen, for example, argued that rights concerning property, employment, freedom of peaceful assembly and social security should be improved to the level of national treatment.<sup>115</sup> The Convention's provisions may also be supplemented by general human rights standards, and by special clauses

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<sup>114</sup> 'Explanatory Memorandum' in Commission of the European Communities Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection COM (2001) 510 final (12 September 2001)

<sup>115</sup> Grahl-Madsen (n68) 163–64.

relating to refugees contained in other international agreements, such as the regional UNESCO Conventions on the recognition of diplomas and degrees in higher education and articles 2 to 6 of the OAU Convention.<sup>116</sup> In States which are not parties to the Convention, the provisions of the UDHR, ICCPR and ICESCR, as well as the principle of *non-refoulement*, ‘form the basis for the protection of refugees’.<sup>117</sup>

## E CATEGORIES OF RIGHTS

Four broad categories of asylum-seekers can be identified who, although not Convention refugees, may nonetheless have a right not to be removed from the State in which asylum is sought. Apart from a sub-group in the first category—persons who are not Convention refugees and are not excluded by article 1F, but who still need international protection—the remaining three groups fall outside UNHCR’s competence. Since they are explicitly excluded from the organization’s mandate,<sup>118</sup> UNHCR is unable to adopt guidelines or issue notes on their treatment. As a consequence, there has been little discussion of their predicament in refugee law discourse.

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<sup>116</sup> UNHCR (DIP) ‘Categories of Persons to Whom the High Commissioner is Competent to Extend International Protection’ (IOM/FOM (no number) 5 August 1981) [7].

<sup>117</sup> *ibid* [7].

<sup>118</sup> UNHCR Statute art 7(d). But see J Fitzpatrick ‘The Post-Exclusion Phase: Extradition, Prosecution and Expulsion’ (2000) 12 Spec Supp IJRL 272, 291–92, who asserts that even where UNHCR determines status, ‘a recommendation that an excluded asylum seeker should nevertheless benefit from binding human rights bars to expulsion would be consistent with UNHCR’s mission.’ (292). Further, ‘UNHCR could advocate for reform of national law to provide an effective and fair opportunity for persons facing deportation or extradition to raise human rights claims.’ (291)

## 1 Not a Convention Refugee (and Not Excluded)

This category comprises two sub-groups: persons who have no claim to protection, and persons who have a claim on a basis other than the Refugee Convention.

### (a) No protection claim

Persons who are unable to substantiate a protection claim under the Convention or any other instrument, and who have no other legal justification for remaining in a State, may normally be removed. However, as has already been discussed, in some circumstances it may not be practically possible to remove an individual, or compassionate grounds may weigh in favour of the individual's continued presence in the State.<sup>119</sup> Although these factors are generally regarded as outside the scope of international obligations and within the realm of State discretion, in certain instances they may give rise to an independent claim under human rights law.<sup>120</sup> It is important for the development of refugee jurisprudence and for the status of beneficiaries that such claims are given proper consideration and are not automatically conceived of as extra-legal. Only once it has been determined that the individual has neither a claim for protection nor a compassionate basis on which to remain, ought an individual to be removed.<sup>121</sup>

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<sup>119</sup> See EXCOM Standing Committee (n104) [5].

<sup>120</sup> eg *D v UK* (1997) 24 EHRR 423.

<sup>121</sup> Given that the same evidence will need to be assessed to determine whether a person has an international protection need or a compassionate ground on which to remain, it seems logical and pragmatic to implement a single asylum procedure, as advocated by UNHCR: Global Consultations 'Complementary Forms of Protection' EC/GC/01/18 (4 September 2001) [8]–[10].

(b) Human rights protection claim

Persons who are non-removable in this category have a right to *non-refoulement* on a basis other than the Refugee Convention, such as the CAT, ICCPR, CRC or ECHR, or protection based on principles of humanitarian or international criminal law. This category therefore describes persons seeking complementary protection.

The arguments above about the Convention's architecture and its function as a *lex specialis* for persons in need of protection explain why beneficiaries of complementary protection should receive the same legal status as Convention refugees.<sup>122</sup> Yet, even without this reasoning, the principle of non-discrimination in human rights law provides support for granting identical status.

The key question is whether there is a legal justification for distinguishing between the rights of Convention refugees, on the one hand, and (non-excludable) beneficiaries of complementary protection, on the other. Although 'the general rule is that each one of the rights of the [ICCPR] must be guaranteed without discrimination between citizens and aliens',<sup>123</sup> the precise application of the principle of non-discrimination to non-citizens remains unclear.<sup>124</sup> International law permits distinctions between aliens who are in materially different circumstances, but prohibits unequal treatment of those similarly placed.<sup>125</sup> In general, differential treatment between non-citizens is allowed where the

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<sup>122</sup> The legal status contemplated by PA Recommendation 773 (1976) on the Situation of *De Facto* Refugees also supports this view.

<sup>123</sup> HRC 'General Comment 15' (n30); CERD 'General Recommendation XI on Non-Citizens (Art 1)' (19 March 1993) in UN Doc A/46/18.

<sup>124</sup> J Fitzpatrick 'Speaking Law to Power: The War against Terrorism and Human Rights' (2003) 14 EJIL 241, 255.

<sup>125</sup> Blake and Husain (n41) [6.16]; see also *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55 [29]–[34] (Gaudron J); ECHR art 14 'safeguards persons ... "who are placed in analogous situations" against discriminatory treatment; *Lithgow v UK* (1986) 8 EHRR 329; see also *Fredin v Sweden*

distinction pursues a legitimate aim, has an objective justification,<sup>126</sup> and there is reasonable proportionality between the means used and the aims sought to be realized.<sup>127</sup>

States may therefore be justified in carving out separate rights regimes for different types of non-removable persons, provided that they can identify materially different circumstances justifying differential treatment.<sup>128</sup> If they cannot, then the treatment may be discriminatory. The ‘materially different circumstances’ premise is fundamental to determining the legality of aliens’ relative rights under international law, and is crucial to the argument that beneficiaries of complementary protection deserve the same status as Convention refugees on the basis that their circumstances are materially identical.

The assumption underlying some Convention jurisprudence—that discrimination cannot arise when an entire class of persons receives differential treatment<sup>129</sup>—is erroneous, since ‘[i]t is also necessary to examine if the treatment suffered by this category of persons is discriminatory in relation to that suffered by another category of

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(1991) 13 EHRR 784; *Van der Musselle v Belgium* (1984) 6 EHRR 163. For non-discrimination principles: Charter of the United Nations; ICCPR; ICESCR; CRC; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families UNGA Res 45/158 of 18 December 1990 (entered into force 1 July 2003); African (Banjul) Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58; ACHR; ECHR; European Framework Convention for the Protection of National Minorities (adopted 1 February 1995, entered into force 1 July 1998) ETS No 157.

<sup>126</sup> CERD ‘General Recommendation XIV: Definition of Discrimination’ (22 March 1993) [2]; HRC ‘General Comment 18: Non-Discrimination’ (10 November 1989) [13]; *Abdulaziz v UK* (1985) 7 EHRR 471 [78].

<sup>127</sup> J Fitzpatrick ‘The Human Rights of Migrants’ Conference on International Legal Norms and Migration (Geneva 23–25 May 2002) <[http://heiwww.unige.ch/conf/psio\\_230502/files/fitzpatrick.doc](http://heiwww.unige.ch/conf/psio_230502/files/fitzpatrick.doc)> (5 September 2004) 4; HRC ‘General Comment 18’ (n126) [13]; ECOSOC Commission on Human Rights (n30); See eg *Belilos v Switzerland* (1988) 10 EHRR 466.

<sup>128</sup> In ECHR context, see *Chassagnou v France* (2000) 29 EHRR 615 [91]–[92].

<sup>129</sup> Austria [53]–[54], Germany [72], France [47], [101], US [67], *Vilvarajah v UK* (1991) 14 EHRR 248 [36]; J-Y Carlier ‘General Report’ in J-Y Carlier and others *Who is a Refugee?: A Comparative Case Law Study* (Kluwer Law International The Hague 1997) 703.

persons in a similar situation.’<sup>130</sup> Importantly, this will be the case even if the more favourable treatment goes beyond what is required by the human rights instrument itself.<sup>131</sup>

It might be argued that the Qualification Directive contains sufficient benefits for beneficiaries of subsidiary protection, since the Convention itself contemplates different levels of rights for different types of aliens. But there is no reasonable justification for such distinctions. Indeed, the absence of legal reasoning behind the curtailment of Convention rights for beneficiaries of subsidiary protection during the Qualification Directive’s drafting bears out the view that there is no *legal* justification for such restrictions, but rather that they reflect *political* motivations. Under international law, both Convention and extra-Convention refugees are protected by the *jus cogens* principle of *non-refoulement*. States have accepted its application beyond article 33 of the Convention by ratifying international treaties broadening its scope. There is no reasonable justification for granting different rights based purely on the different sources of that obligation. The protection rationale, based on ‘sheltering those who flee human rights violations’,<sup>132</sup> is the same for both groups: the country of origin can no longer provide national protection, and for that reason international protection is required.

The ECHR’s non-discrimination provision (article 14) does not require absolute equality of treatment in all situations, but permits special measures on the basis of an explicit ECHR provision (such as articles 6, 8, 15, 16 and 57).<sup>133</sup> The European Court has ruled that differential treatment is only discriminatory when it does not pursue a

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<sup>130</sup> *ibid* 703.

<sup>131</sup> *Abdulaziz* (n126).

<sup>132</sup> ECRE ‘Position on Exclusion’ (March 2004) [12].

<sup>133</sup> *Lambert* (n44).

‘legitimate aim’ or there is no ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’<sup>134</sup>—that is, where it ‘has no objective and reasonable justification’. In demonstrating a ‘legitimate aim’, the State must describe the nature of the aim and show why it requires differential treatment.<sup>135</sup> Ovey and White observe that this will generally be fairly easy for the State to justify,<sup>136</sup> since it will commonly be cast in political rather than legal terms. It may be more difficult, however, to establish that the means by which the aim is to be realized are proportionate to the aim itself.<sup>137</sup> For example, even though immigration control is a legitimate aim for States to pursue, the question will be whether particular restrictions on the rights of aliens are proportionate to that aim.<sup>138</sup> In *Abdulaziz*, the construction of immigration rules to protect the domestic labour market was considered legitimate, but in doing so, discrimination on the grounds of sex was not sufficiently integral to justify the differential treatment.<sup>139</sup> Similarly, restrictions on temporary protection beneficiaries’ right to work may be justifiable where unemployment is high, but the longer the individual remains in the host State, ‘the balance between the severity of the deprivation and the benefit to the state of refuge is likely to shift.’<sup>140</sup>

In the recent case of *Poirrez v France*, the European Court, finding that the denial of a disability allowance to certain aliens was discriminatory, reiterated that States parties

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<sup>134</sup> *Belgian Linguistics case* (1968) 1 EHRR 252 [10].

<sup>135</sup> *Larkos v Cyprus* (2000) 30 EHRR 597 [31].

<sup>136</sup> C Ovey and RCA White *Ovey and White: European Convention on Human Rights* (3<sup>rd</sup> edn OUP Oxford 2002) 356; *Gillow v UK* (1989) 11 EHRR 335.

<sup>137</sup> *Lithgow* (n125) [177]. Regional agreements, eg economic agreements, might themselves constitute ‘an objective and reasonable ground for differentiation, [but] no general rule can be drawn therefrom’: *Karakurt v Austria* Comm No 964/2000 (4 April 2002) UN Doc CCPR/C/74/D/965/2000 [8.4].

<sup>138</sup> Immigration policies must be subject to ECHR requirements: *Abdulaziz* (n126); *Maaouia v France* (2001) 33 EHRR 42.

<sup>139</sup> *Abdulaziz* (n126) [79].

<sup>140</sup> J Fitzpatrick ‘Human Rights and Forced Displacement: Converging Standards’ in AF Bayefsky and J Fitzpatrick (eds) *Human Rights and Forced Displacement* (Martinus Nijhoff The Hague 2000) 10.

to the ECHR undertake to ‘secure to everyone within their jurisdiction the rights and freedoms’ in the ECHR.<sup>141</sup> Lambert stresses the ruling’s importance for refugees, given States’ traditionally wide margin of appreciation in determining ‘whether and to what extent differences in otherwise similar situations justify a different treatment in law.’<sup>142</sup> In conjunction with the forthcoming Protocol 12 on non-discrimination (applying to discrimination in the enjoyment of *any* right in national law), this finding ‘should allow the door to open to numerous individual cases, including appeals against contravention of social rights not necessarily covered by the ECHR.’<sup>143</sup>

The US and Germany<sup>144</sup> have sought to distinguish the entitlements of Convention refugees from beneficiaries of complementary protection on the basis that the former have a positive right to remain under article 1A(2), whereas the latter have only a right not to be removed. The absence of this argument from formal negotiations on the Qualification Directive may reinforce the view that this characterization places unjustified restrictions on extra-Convention refugees’ status, diluting States’ human rights protection to little more than *non-refoulement* through time. However, the distinction may provide an appropriate legal basis for distinguishing between the rights of ‘included’ and ‘excluded’ persons—a distinction adopted by the UDHR and Convention, and carried through international and regional agreements relating to refugees, such as the Declaration on Territorial Asylum, the OAU Convention and EU instruments on temporary and subsidiary protection. The Qualification Directive rightly recognizes the same positive right of other non-excludable beneficiaries of complementary protection to

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<sup>141</sup> ECHR art 1; *Poirrez v France* App No 40892/98 (30 September 2003).

<sup>142</sup> H. Lambert *The Position of Aliens in Relation to the European Convention on Human Rights* (Human Rights Files No 8 Council of Europe 2001) 14, cited in Lambert (n44).

<sup>143</sup> Protocol No 12 requires ten ratifications before it enters into force.

<sup>144</sup> *Ausländergesetz* (Aliens Act) s 51.

remain—allowing asylum to be claimed directly on a complementary legal basis—even though it provides them with a less favourable status than Convention status. By contrast, complementary *non-refoulement* may prevent the removal of a person whom States, under the Convention, could legitimately exclude on the grounds that persons who are suspected of committing such acts are undeserving of protection. In this context, it operates as a restraint on deportation and can accordingly be construed as a right not to be removed. States may then provide a less comprehensive status to such persons, given the differing rationales for remaining in the host State. It is both a moral and a legal distinction.

## 2 Excluded and Removable<sup>145</sup>

This section considers when a person may be excluded. The Convention's exclusion clauses are contained in articles 1D, 1E and 1F. Whereas articles 1D and 1E exclude from the Convention's benefits persons already receiving either UN-based or quasi-national protection, article 1F excludes individuals who are considered *undeserving* of international protection due to their suspected criminal activities.<sup>146</sup> The drafters were

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<sup>145</sup> The purpose of this section is not to examine the circumstances that give rise to exclusion, but rather to determine the legal status of various categories of persons vis-à-vis the Convention. For discussion of the former: UNHCR 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees' HCR/GIP/03/05 (4 September 2003); UNHCR (DIP) 'Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees' (4 September 2003); G Gilbert 'Current Issues in the Application of the Exclusion Clauses' in Feller, Türk and Nicholson (eds) (n9); (2000) 12 Spec Issue IJRL; ECRE (n132).

<sup>146</sup> See S Kapferer 'The Interface between Extradition and Asylum' (UNHCR Legal and Protection Policy Research Series) DIP PPLA/2003/05 (November 2003) [320]–[321]. Similar exclusion clauses are contained in the OAU Convention, *but* there are no exceptions to *non-refoulement*.

concerned that *non-refoulement* should not provide a safe-haven for serious non-political criminals.<sup>147</sup>

Generally, where there are ‘serious reasons for considering’ that an individual falls within article 1F, he or she is not entitled to protection under the Convention and may be removed from the State in which asylum is sought. The factual standard of proof—‘serious reasons for considering’—is an unfamiliar legal standard that has led to considerable difficulties for decision-makers and to inconsistent State practice.<sup>148</sup> The *travaux* give no guidance as to what was intended by the phrase, and UNHCR’s Guidelines on the Application of the Exclusion Clauses are similarly opaque.<sup>149</sup> It is less than the criminal standard ‘beyond a reasonable doubt’, since the decision maker is not required to determine whether the applicant has in fact committed the offence under article 1F.<sup>150</sup> Nor is formal proof of any prior penal prosecution necessary.<sup>151</sup> Yet, given the serious consequences of excluding an individual from the Convention, a high threshold is necessary. For this reason, Bliss suggests that the minimum standard should be the ‘balance of probabilities’, since anything lower ‘would inevitably result in the exclusion of persons genuinely deserving protection.’<sup>152</sup> The Lawyers Committee for Human Rights recommends that there should exist ‘clear and convincing information’

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<sup>147</sup> Gilbert (n145) 477; SJ Aiken ‘Manufacturing “Terrorists”: Refugees, National Security and Canadian Law—Pt II’ (2001) 19(4) *Refugee* 116.

<sup>148</sup> M Bliss ‘“Serious Reasons for Considering”: Minimum Standards of Procedural Fairness in the Application of the Article 1F Exclusion Clauses’ (2000) 12 *Spec Supp IJRL* 92, 115. For a survey of national jurisprudence, see Bliss 115–16.

<sup>149</sup> UNHCR (DIP) ‘The Exclusion Clauses: Guidelines on Their Application’ (unpublished Geneva 1996) [11], in Bliss (n148) 115.

<sup>150</sup> Bliss (n148) 115.

<sup>151</sup> UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* UN Doc HCR/IP/4/Eng/Rev.1 (2<sup>nd</sup> edn Geneva 1992) [149].

<sup>152</sup> Bliss (n148) 116.

implicating the individual in an article 1F offence.<sup>153</sup> As EXCOM observes, States should have ‘substantially demonstrable grounds for invoking an exclusion clause.’<sup>154</sup> Similarly, the UNHCR Handbook states that given the serious consequences of exclusion for the individual concerned, the interpretation of the exclusion clauses must be restrictive.<sup>155</sup>

Unless the person’s extradition is specifically requested by another State, the normal means of removal is deportation. In these cases, any prosecution of the deportee by the receiving State will depend on that State’s knowledge that the individual is suspected of having committed a crime.<sup>156</sup>

By contrast, extradition is contingent on a request from a State to return an individual to it specifically for prosecution or punishment, pursuant to bilateral or multilateral extradition agreements, or international treaties imposing a duty to either extradite or prosecute through the ‘aut dedere aut judicare’ principle.<sup>157</sup> If a State refuses

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<sup>153</sup> Lawyers Committee for Human Rights ‘Safeguarding the Rights of Refugees under the Exclusion Clauses: Summary Findings of the Project and a Lawyers Committee for Human Rights Perspective’ (2000) 12 IJRL 317, 326. See also Kapferer (n146) [329].

<sup>154</sup> UNHCR ‘Note on the Exclusion Clauses’ UN Doc EC/47/SC/CRP.29 (30 May 1997) [4].

<sup>155</sup> UNHCR Handbook (n151) [149].

<sup>156</sup> Fitzpatrick (n118) 287. Article 32 on expulsion applies only to refugees lawfully in the territory who present a threat to national security.

<sup>157</sup> eg CAT art 7(1); Inter-American Convention to Prevent and Punish Torture (adopted 9 December 1985, entered into force 28 February 1987) OAS TS 67 art 14; Inter-American Convention on Forced Disappearance of Persons (adopted 9 June 1994, entered into force 28 March 1996) (1994) 33 ILM 1429 art VI; International Convention against the Recruitment, Use, Financing and Training of Mercenaries (adopted 4 December 1989, entered into force 20 October 2001) 29 ILM 91 art 9(2); Convention on the Safety of United Nations and Associated Personnel (adopted 9 December 1994, entered into force 15 January 1999) 2051 UNTS 363 art 10(4); European Convention on Extradition (adopted 13 December 1957, entered into force 18 April 1960) ETS No 24 art 7; South Asian Association for Regional Cooperation Regional Convention on Suppression of Terrorism (adopted 4 November 1987, entered into force 22 August 1998) art IV; Arab Convention on the Suppression of Terrorism (adopted 22 April 1998, entered into force 7 May 1999) art 6(h); Convention of the Organization of the Islamic Conference on Combating International Terrorism (adopted 1 July 1999) art 6(8); OAU Convention on the Prevention and Combating of Terrorism (Algiers Convention) (14 July 1999) art 8(4); Convention for the Suppression of Unlawful Seizure of Aircraft (adopted 16 December 1970, entered into force 14 October 1971) 860 UNTS 105 art 7; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1973) 947 UNTS 177 art 7; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (adopted 14 December 1973, entered into force 20 February 1977) 1035 UNTS 167 art 7; International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3

or is unable to extradite, then it must submit the matter to competent domestic authorities for prosecution. Although the Convention does not expressly oblige States to render or prosecute excluded asylum-seekers,<sup>158</sup> it is argued that refugee law should follow the ‘aut dedere aut judicare’ principle, rather than simply leaving a non-removable person in legal limbo. Domestic refugee determination procedures on the whole do not adequately deal with the ‘extradite or punish’ question, instead focusing solely on ensuring that excludable persons are excluded from Convention status.<sup>159</sup> The principle attempts to reconcile the contradiction between the State’s duty to combat serious criminal acts, and the right of the individual to be protected from *refoulement*. Goodwin-Gill observes that the inclusion of ‘aut dedere aut judicare’ in international treaties on the suppression of crime indicates that ‘even the serious criminal may deserve protection against persecution or prejudice, while not escaping trial or punishment.’<sup>160</sup>

In some circumstances, extradition may be made conditional on guarantees by the receiving State that the transfer will not breach international law. For example, State practice reflects that an undertaking by the receiving State not to seek or to impose the death penalty, even though its domestic law permits it, will normally be regarded as sufficient to enable the host State to extradite within its human rights obligations,

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June 1983) 1316 UNTS 205 art 8(1); Convention on the Physical Protection of Nuclear Material (adopted 3 March 1980, entered into force 8 February 1987) 1456 UNTS 101 art 10, cited in Kapferer (n146) [24], [27], [29], [30]. See also MC Bassiouni and EM Wise *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff Dordrecht 1995). They argue that the principle has become customary international law: 20–26; 43–50. For a counter-opinion, see B Swart ‘Arrest and Surrender’ in A Cassese, P Gaeta and JRWD Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (OUP Oxford 2002) 1662–63; G Gilbert *Transnational Fugitive Offenders in International Law* (Martinus Nijhoff The Hague 1998) 14.

<sup>158</sup> Fitzpatrick (n118) 274.

<sup>159</sup> GS Goodwin-Gill ‘Crime in International Law: Obligations *Erga Omnes* and the Duty to Prosecute’ in GS Goodwin-Gill and S Talmon *The Reality of International Law: Essays in Honour of Ian Brownlie* (Clarendon Press Oxford 1999) 222.

<sup>160</sup> Goodwin-Gill (n9) 149.

provided that the assurance effectively eliminates the risk of the human rights violation.<sup>161</sup>

There are conflicting viewpoints on the legality of this practice, however, exemplified by ECRE's argument that the absolute nature of guarantees under article 3 ECHR and the CAT cannot be 'contracted out of' by States through a guarantee.<sup>162</sup>

Extradition is a legitimate law enforcement mechanism, provided that the encroachment on individual rights is both necessary and proportionate.<sup>163</sup> Although the exclusion clauses effectively operate as an exception to *non-refoulement* under article 33, an extradition request may also be made in relation to a non-serious non-political crime falling outside the scope of article 1F. Here, *non-refoulement* will apply.<sup>164</sup> This is buttressed by extradition agreements concluded post-1951, prohibiting extradition whose purpose is to prosecute or punish an individual on account of race, religion, nationality or political opinion, or where 'that person's position may be prejudiced for any of those reasons'.<sup>165</sup>

In some cases, removal by *any* means will be prohibited through the broader operation of *non-refoulement* under human rights law. The following sections explore the implications of extended *non-refoulement* in terms of legal status for otherwise excludable persons.

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<sup>161</sup> Kapferer (n146) [121], [143]–[147]; Commission of the European Communities (n4) [2.3.2]; Fitzpatrick (n118) 291.

<sup>162</sup> ECRE 'Comments on the Commission Working Document on the Relationship between Safeguarding Internal Security and Complying with International Protection Obligations and Instruments' (London May 2002) <[www.ecre.org/statements/security.shtml](http://www.ecre.org/statements/security.shtml)> (4 February 2004) [2.3.2]; see also *Kindler v Canada* Comm No 470/1991 (30 July 1993) UN Doc CCPR/C/48/D/470/1991 [6.7]; Kapferer (n146) [137], [241], 44 fn 228.

<sup>163</sup> J Dugard and C van den Wyngaert 'Reconciling Extradition with Human Rights' (1998) 92 AJIL 187, 205, 210–12. The European Commission on Human Rights found that with respect to the right to family life (article 8 ECHR), a decision to extradite constitutes an interference with that right, but is permissible in accordance with the restrictions contemplated by article 8(2): *Raidl v Austria* App No 25342/94 (4 September 1995), cited in S Kapferer (n146) [117] fn 221; on extraditable offences: [59]–[63].

<sup>164</sup> Goodwin-Gill (n9) 147–48.

<sup>165</sup> European Convention on Extradition (n157) art 3(2).

Before turning to those issues, it is important to comment on the relationship between articles 32 and 33(2) on expulsion and removal respectively, and article 1F. Although there is some overlap between these provisions, their legal consequences differ:

Article 1 F relates to the question of qualification thresholds for refugee status and the possible individual responsibility for the commission of serious crimes; Article 32 and 33 (2) apply to persons who have been recognised as refugees, implicating determinations about the effect of the continued presence of an individual refugee on a State and its people. Article 32 deals with the expulsion of a recognised refugee on grounds of national security or public order, Article 33 (2) removes the non-refoulement protection from a refugee and allows the State to remove him or her, because s/he is regarded as a danger to the security or the community of the country.<sup>166</sup>

Article 1F provides for ‘pre-admission’ exclusion and is assessed on a relatively low standard of proof without the need for a formal trial.<sup>167</sup> By contrast, a refugee under article 33(2) is not considered unworthy of protection in general terms, but through his or her criminal actions or links forfeits the right to claim on-going protection from the host State.<sup>168</sup> The standard of proof here is more exacting, requiring the individual to have been convicted by a final judgment of a ‘*particularly serious crime*’ (emphasis added). Although Hathaway asserts that the conviction must also ‘sustain the conclusion that the offender “constitutes a danger to the community”’,<sup>169</sup> Goodwin-Gill demonstrates that the extent to which, if at all, a person who has been convicted of a ‘particularly serious crime’ must also be shown to be a danger to the community is unclear.<sup>170</sup> Thus, the general principle of *non-refoulement* in article 33(1) may be derogated from where an

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<sup>166</sup> ECRE (n132) [64].

<sup>167</sup> JC Hathaway *The Law of Refugee Status* (Butterworths Canada 1991) 225.

<sup>168</sup> Fitzpatrick (n118) 288; see also Ch 2; Goodwin-Gill (n9) 147–50.

<sup>169</sup> Hathaway (n167) 226.

<sup>170</sup> Goodwin-Gill (n9) 140.

individual poses a threat to national security, or where the individual, having been convicted of a ‘particularly serious crime’,<sup>171</sup> presents a danger to the community.<sup>172</sup>

A person who has committed a ‘particularly serious crime’ will normally be punished in the host State (where the crime was committed), although may be deported in lieu of the sentence if human rights *non-refoulement* does not prevent it.<sup>173</sup> Given that removal is only possible once the person has been convicted in accordance with the host State’s formal criminal process, the evidentiary threshold is much higher than ‘serious reasons for considering’ under article 1F. A balancing test between the nature of the offence and the degree of harm feared means that the crime must be very grave for exclusion to be justified.<sup>174</sup>

### 3 Excluded and Non-Removable

Persons may fall into this category for a practical reason (such as inability to obtain transit visas) or a legal reason. Human rights and refugee law bars to removal take precedence over any duty to extradite,<sup>175</sup> as stressed by the Human Rights Committee,<sup>176</sup>

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<sup>171</sup> For Convention meaning, see UNHCR Handbook (n151) [155]–[156]. For broad US interpretation, see Ch 3.

<sup>172</sup> See also Convention relating to the International Status of Refugees of 28 October 1933, 159 LNTS 199 art 3; Convention concerning the Status of Refugees coming from Germany of 10 February 1938, 192 LNTS 59 art 5(2).

<sup>173</sup> See four prosecution mechanisms outlined by Gilbert (n145) 477–78.

<sup>174</sup> UNHCR Handbook (n151) [156]; Goodwin-Gill (n9) 104–05. Although note recent authority against the balancing test: *Pushpanathan v Canada* [1998] 1 SCR 982; *INS v Aguirre-Aguirre* 526 US 415 (1999); *T v Sect’y of State for the Home Dept* [1996] AC 742 (HL); *Gurung* (n40) [96]; Anti-Terrorism, Crime and Security Act 2001 (UK) c 24 s 34(1)(a).

<sup>175</sup> Kapferer (n146) vi, [41].

<sup>176</sup> *Kindler* (n162) [6.2]; *Ng v Canada* Comm No 469/1991 (5 November 1993) UN Doc CCPR/C/49/D/469/1991 [16.4]; HRC ‘General Comment 20: Replaces General Comment 7 concerning Prohibition of Torture and Cruel Treatment or Punishment’ (10 March 1992) [9].

the Torture Committee<sup>177</sup> and the European Court of Human Rights.<sup>178</sup> Although in some cases it may be possible to render the person to an international tribunal (such as the ICTY, ICTR or ICC), their jurisdiction is limited by temporal and geographical restrictions, and problematic procedural questions may arise.<sup>179</sup> Other legal reasons mandating against the individual's removal may include the absence of a State willing to accept the individual, or the absence of extradition relations between the host State and the State of origin due to the latter's criminal justice system being severely defective.<sup>180</sup>

Both ECRE and the Commission of the European Communities argue that if the individual is non-removable, then the State should instigate criminal proceedings for the alleged crime.<sup>181</sup> This accords with the well-established principle of extradition law—'aut dedere aut judicare'—which recognizes that even the most serious criminals deserve protection from serious harm, while not escaping trial or punishment.<sup>182</sup> Certain crimes in paragraphs (a) and (c) of article 1F are already subject to universal jurisdiction or covered by treaties embracing this principle.<sup>183</sup> Furthermore, the 'very nature'<sup>184</sup> of these international crimes 'produce[s] an obligation *erga omnes* to extradite to another

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<sup>177</sup> *Chipana v Venezuela* (110/1998) (10 November 1998) UN Doc CAT/C/21/D/110/1998 [6.2]; Committee against Torture 'General Comment 1: Implementation of Article 3 of the Convention in the Context of Article 22' (21 November 1997) [6], where it is stated that the risk of torture must be established 'beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable.'

<sup>178</sup> *Soering v UK* (1989) 11 EHRR 439.

<sup>179</sup> Fitzpatrick has also suggested that although surrender to a tribunal should theoretically be appropriate, since it is not surrender to the State where torture is feared, it may be unwise to rely solely on a tribunal's good faith: Fitzpatrick (n118) 290.

<sup>180</sup> Fitzpatrick (n118) 278. In the US, for example, extradition cannot take place if the US has no extradition treaty with the State where the crime was committed: Fitzpatrick (n118) 275. Sometimes this may lead to 'disguised extraditions': JJ Paust and others (eds) *International Criminal Law: Cases and Materials* (Carolina Academic Press Durham 1996) 404–25.

<sup>181</sup> ECRE (n132) [11], [60]; Commission of the European Communities (n4) [2.4].

<sup>182</sup> Goodwin-Gill (n9) 149.

<sup>183</sup> For a comprehensive list, see MC Bassiouni *International Criminal Law Conventions and Their Penal Provisions* (Transnational Publishers NY 1997). For selected regimes, see GS Goodwin-Gill (n159) 207–10.

<sup>184</sup> M Ragazzi *The Concept of International Obligations Erga Omnes* (Clarendon Press Oxford 1997) 182–83.

competent state, prosecute locally, or surrender the person concerned to the jurisdiction of a competent international tribunal.’<sup>185</sup> By contrast, since serious non-political crimes in article 1F(b) must have been committed outside the host State, the host State itself may lack the jurisdiction to prosecute.<sup>186</sup>

If the host State is in a situation of armed conflict, it might be possible to intern individual suspects in accordance with humanitarian law.<sup>187</sup> However, any State seeking detention as a means to curtail suspects’ rights will be thwarted by the high standards of treatment mandated by articles 79 to 135 of the 4<sup>th</sup> Geneva Convention, which require such treatment to be accorded even to persons ‘definitely suspected of or engaged in activities hostile to the security of the State’ (to the extent that it is consistent with the State’s security).<sup>188</sup> Furthermore, internment may only last for as long as those interned present a threat to security,<sup>189</sup> and must in any case cease at the end of hostilities.

Prosecution depends on the State having jurisdiction and meeting sufficient evidentiary standards in court. If an individual is found guilty of an offence, then he or she should be dealt with in the same manner as any national found guilty of the same offence. Protection principles cease to apply, to the extent that the person is subject to criminal procedures and not able to take advantage of complementary protection rights. But it is essential that an appropriate legal status is determined for that individual once released. It is unacceptable to release such a person into a legal void with an ill-defined

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<sup>185</sup> GS Goodwin-Gill (n159) 220.

<sup>186</sup> In Europe, see Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States [2002] OJ L190/1, which establishes conditions and procedures for extradition, cited in ECRE (n132) [60].

<sup>187</sup> *ibid* [57].

<sup>188</sup> GC4 art 5.

<sup>189</sup> *ibid* art 42.

status and vulnerable to State discretion.<sup>190</sup> Although the UNHCR Handbook does not consider this issue directly, it touches on a similar question with respect to evaluating whether an individual should be excluded under article 1F(b). Where someone convicted of a serious non-political crime has already served his or her sentence, been granted a pardon or has benefited from an amnesty, this will be relevant to an assessment of the nature of the alleged crime.<sup>191</sup> Where an amnesty has been granted, 'there is a presumption that the exclusion clause is no longer applicable, unless it can be shown that, despite the pardon or amnesty, the applicant's criminal character still predominates.'<sup>192</sup> Grahl-Madsen contends that in any of the above cases, article 1F(b) cannot be invoked to deny refugee status,<sup>193</sup> and Weis similarly argues that:

[i]t is ... difficult to see why a person who before becoming a refugee, has been convicted of a serious crime and has served his sentence should forever be debarred from refugee status. Such a rule would seem to run counter to the generally accepted principle of penal law that a person who has been punished for an offence should suffer no further prejudice [that is, not be punished again] on account of the offence committed.<sup>194</sup>

Finally, the Conference on Territorial Asylum confirmed that exclusion on the grounds of criminality should only prevent persons 'still liable to prosecution or punishment' from claiming asylum.<sup>195</sup>

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<sup>190</sup> See status accorded in *Hussain v UK* (1996) 22 EHRR 1.

<sup>191</sup> UNHCR Handbook (n151) [157].

<sup>192</sup> *ibid.*

<sup>193</sup> A Grahl-Madsen *The Status of Refugees in International Law* vol 1 (AW Sitjhoff Leyden 1966) 291–92. This is the position in Canada: *Canada v Ward* [1993] 2 SCR 689.

<sup>194</sup> P Weis 'The Concept of the Refugee in International Law' (1960) 87 *Journal du droit international* 928, 984–86, cited in Hathaway (n167) 223. To continue to exclude runs contrary to the spirit of article 4 Protocol 7 ECHR.

<sup>195</sup> UN Doc A/CONF.78/12 (4 February 1977), cited in A Grahl-Madsen *Territorial Asylum* (Almqvist and Wiksell International Stockholm 1980) 209.

It is argued that ECRE's recommended post-extradition procedure is also suitable post-prosecution: 'Upon completion of the trial if acquitted and of the sentence if found guilty, access to a procedure, in which the application for asylum will be examined, must be guaranteed.'<sup>196</sup> Notwithstanding a continuing need for protection, asylum will not be granted automatically due to the differing standards of proof under criminal law and refugee law. For example, where acquittal results from an inability to attain the criminal standard of proof (beyond a reasonable doubt), the State may be able to argue that there remain 'serious reasons for considering' the person has committed an act under article 1F. The same applies to prosecutions under article 33(2). By contrast, acquittal due to proven innocence (such as a case of mistaken identity) should normally lead to Convention status being granted, given that the exclusion clauses should only have been triggered after a determination that the individual satisfied article 1A(2).<sup>197</sup>

Where a person has been admitted, tried, convicted and subsequently released, and has in all likelihood been in the State for a number of years (given the seriousness of the crimes under article 1F and consequent punishment), it seems reasonable that Convention status should attach if protection is still required. It is acknowledged that such status may be tempered by any domestic laws concerning ex-prisoners' rights, particularly where the individual is on parole. Even if no protection need remains but a person has served a sentence of considerable length, it may be appropriate for the host State to grant a compassionate status. Merely tolerating a released person without according any legal status may constitute inhuman or degrading treatment or punishment.

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<sup>196</sup> ECRE (n132) [61].

<sup>197</sup> UNHCR Handbook (n151) [141]; Kapferer (n146) [304], [321]; Amnesty International 'United Kingdom: Comments on Initial Proposals for Emergency Legislation' (November 2001) AI Index EUR 45/017/2001, 5. Accelerated procedures may jeopardize a full examination of eligibility under article 1A(2).

The case of *D v UK*<sup>198</sup> establishes that in some circumstances, the State's obligations to protect prisoner's health and well-being due to its control over individuals in custody may extend beyond the period of detention. There, withdrawing life-supporting medical treatment from a prisoner on release was considered to constitute ill-treatment. Although cases finding an actual violation in such circumstances are rare,<sup>199</sup> other cases also suggest that the detention of persons with acute medical needs is only permissible where these needs are met.<sup>200</sup>

#### **4 Excluded but Non-Removable and Non-Prosecutable**

Where removal is not possible, the 'aut dedere aut judicare' principle requires the State to prosecute domestically. However, this depends on the State having the jurisdiction to try the offence of which the individual is suspected, or to have jurisdiction over punishment of an offence for which that person may have already been tried. If a State's national criminal law provides for universal competence, then the State may actively prosecute and punish individuals suspected of crimes of universal jurisdiction. However, as the Commission of the European Communities has observed, in practice it is often not possible to prosecute due to strict rules on the admissibility of evidence and the high standards of proof in EU Member States, which exceed the standards required for refugee exclusion or expulsion proceedings.<sup>201</sup> Furthermore, in some cases the authorities may be

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<sup>198</sup> *D v UK* (n120).

<sup>199</sup> *Blake and Husain* (n41) [2.95].

<sup>200</sup> eg *Price v UK* (2001) *The Times* (13 August 2001); *Keenan v UK* (2001) 33 EHRR 38.

<sup>201</sup> Commission of the European Communities (n4) [2.2.1].

unwilling to disclose intelligence information that would be crucial for a successful conviction.<sup>202</sup>

An unresolved issue in international law is what status should be accorded to individuals who are excluded from Refugee Convention protection but who cannot be successfully removed *or* prosecuted. This is the case where the individual is protected from return to the country of origin by the broader principle of *non-refoulement*, and there has been no extradition request by any other State that is also able to guarantee protection from *refoulement* and there is no other State to which the individual may be expelled. Furthermore, the host State lacks the necessary jurisdiction to try the individual domestically, or for evidentiary reasons, the prosecution is unable to establish a case against the individual.

The Qualification Directive has not closed this gap. As Statewatch has argued, '[i]t would have been preferable either to address the status of such persons in this proposal, indicating what status should be extended to such persons, or to indicate that a separate proposal on such persons would be made in the near future.'<sup>203</sup> Simply leaving this status to State discretion does not bode well for a harmonized EU asylum regime.

The difficulty is determining what rights to grant to persons who cannot be prosecuted, even though they might still be 'suspected' of having committed a crime. ECRE argues that such individuals must benefit from some form of 'albeit limited' legal status, since although they are 'undeserving of international refugee protection, these

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<sup>202</sup> Privy Counsellor Review Committee *Anti-Terrorism, Crime and Security Act 2001 Review: Report* HC 100 (The Stationery Office London 18 December 2003) [228]–[239]; [207]. For comparison of treatment of evidence in adversarial and investigative systems: [234].

<sup>203</sup> Memorandum by Statewatch (8 March 2001 [sic 2002]) [10] in House of Lords Select Committee on the EU *Defining Refugee Status and Those in Need of International Protection* (The Stationery Office London 2002) 46. For a Canadian comparison, see Goodwin-Gill and Kumin (n24); *Suresh v Canada* 2002 SCC 1, [2002] 1 SCR 3.

individuals require other international and national human rights protection.’<sup>204</sup> ECRE does not elaborate what this might be, but repeats the view of the European Court of Human Rights in *Chahal v UK* that ‘issues concerning national security are immaterial’ when assessing an article 3 ECHR claim, given the ‘irreversible nature of the harm that might occur if the risk of ill-treatment materialised’.<sup>205</sup> At this threshold level, it is undeniable that protection from *refoulement* is absolute. As we have seen, it is the subsequent legal status that States use to create a hierarchy of beneficiaries of complementary protection. Yet, recalling the uniformity of the threshold requirement is important, because it shows recognition of the obligation to give refuge to persons whom a State might otherwise reject, and the necessity to afford them treatment that itself does not violate article 3 (or any other human right). Article 5 ECHR, for example, prevents persons from being held in prolonged detention without charge.

In this connection, ECRE argues that universal jurisdiction should be developed for crimes contained in article 1F of the Convention, bearing in mind that ‘a finding of exclusion is equivalent neither to a finding of culpability nor to an indictment: the outcome of a trial may in fact be “not guilty”, a reality which creates a greater onus on a State to seek to subject the excludee to a trial.’<sup>206</sup> As was argued in the previous section, it is only once an individual has been tried for the alleged crime that it is possible to conclusively determine his or her legal status. If found not guilty, then the individual cannot remain excluded from the Convention, in which case treatment accorded to Convention or extra-Convention refugees would apply.

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<sup>204</sup> ECRE (n132) [11]; see also [62].

<sup>205</sup> *Chahal v UK* (1996) 23 EHRR 413 [151].

<sup>206</sup> ECRE (n132) [63].

In the absence of universal jurisdiction, however, standards of minimum treatment developed outside the Convention framework may assist in determining a legal status for excludable, non-removable and non-prosecutable individuals. There remains a possibility that certain of such persons may, if prosecution were possible, be found innocent and hence entitled to full international protection.

In the US, persons in this situation may be granted ‘deferral of removal’. This can only be accorded at the point of a final administrative order of removal being made, and only where an alien would ‘more likely than not’ be tortured if removed. Deferral of removal does not confer a legal immigration status<sup>207</sup> or necessarily require that an applicant be released from detention.<sup>208</sup> Furthermore, the grant can be withdrawn once the risk of torture has diminished.<sup>209</sup> According to Chung, it is highly unlikely that such persons will be released into the community. Instead, they are held in detention facilities or prisons until it is possible for them to be deported. Accordingly, Chung argues that this remedy cannot be considered ‘relief’ since it provides only minimal protection.<sup>210</sup> This procedure would not be permitted in Europe by virtue of article 5(1)(f) ECHR, which only permits detention where ‘action is being taken with a view to deportation’. Even if an intention to deport is maintained but removal is temporarily impossible, this is incompatible with the article 5(1)(f) duty.<sup>211</sup>

Describing the Conference of Plenipotentiaries’ task in 1951 as ‘framing a charter of minimum rights to be guaranteed to refugees’, the UK representative remarked that ‘[i]n all civilized countries even a criminal possessed such rights, and a man who had

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<sup>207</sup> 8 CFR § 208.17(b)(i) (2000).

<sup>208</sup> 8 CFR § 208.17(b)(ii) (2000).

<sup>209</sup> 8 CFR § 208.17(b)(iii) (2000).

<sup>210</sup> Chung (n3) 371.

<sup>211</sup> Commission of the European Communities (n4) [2.4.2]; *Chahal* (n205).

been committed to prison for a crime, though he had temporarily to forego his social security benefits, still retained the right of access to the courts, as was explicit, for example, in the right to appeal.<sup>212</sup> Thus, while the exclusion clauses send a message about the types of persons States do not wish to assist, in circumstances where such persons are in a State and cannot be removed, then States cannot use moral or political arguments to deny them legal rights.

The Human Rights Committee emphasizes that States' responsibilities under the ICCPR extend to tolerating the right of aliens to enter or reside in the State, *despite* their criminal activities, when issues of non-discrimination, prohibition of inhuman treatment and respect for family life arise.<sup>213</sup> However, the Committee acknowledges that conditions of entry may restrict rights such as freedom of movement, residence and employment.<sup>214</sup> In other words, where *non-refoulement* prevents the removal of suspected criminals, their right to remain is balanced by the grant of a more limited set of substantive rights. Differentiation occurs at the level of status rather than entry.

(a) Suspected Terrorists

The complexities of status are poignantly demonstrated in the 'war on terror'. Terrorist acts are not explicitly enumerated as a ground of exclusion in the Refugee Convention, but may constitute grounds for exclusion if they amount to crimes against peace, war crimes, crimes against humanity, serious non-political crimes outside the country of

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<sup>212</sup> UN Doc A/CONF.2/SR.24 (n62) 8 (UK).

<sup>213</sup> HRC 'General Comment 15' (n30) [5].

<sup>214</sup> *ibid* [5]–[6]. The Committee acknowledges, in particular, that the right to freedom of movement may be subject to distinction between different categories of aliens, provided it accords with article 12(3) and is consistent with the other rights in the ICCPR: [8].

refuge, or acts contrary to the purposes and principles of the United Nations.<sup>215</sup> UNHCR states that article 1F(c) is ‘only triggered in extreme circumstances by activity which attacks the very basis of the international community’s coexistence’.<sup>216</sup> In cases involving a terrorist act, the decisive criterion is whether the act ‘impinges on the international plane—in terms of its gravity, international impact, and implications for international peace and security.’<sup>217</sup> Similarly, the ICC’s mandate does not explicitly encompass terrorism unless it is associated with another serious crime defined in article 5(1) of the Rome Statute. These crimes may partly codify excludable offences under article 1F of the Convention.<sup>218</sup>

Responding to the perceived threat of terrorism in the UK following the US 11 September 2001 attacks, the UK declared a ‘public emergency threatening the life of the nation’ in order to derogate from article 5(1) ECHR.<sup>219</sup> Since the UK sought to detain foreign nationals whom it was unable to deport, this derogation enabled it to circumvent the European Court’s ruling in *Chahal v UK* that detention under article 5(1)(f) is only permissible where ‘action is being taken with a view to deportation’.<sup>220</sup>

The UK consequently enacted the Anti-Terrorism, Crime and Security Act 2001, authorizing the Home Secretary to certify as a ‘suspected international terrorist’ [or ‘suspected’] any foreign national whom he reasonably (*a*) believes is a risk to national

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<sup>215</sup> See Kapferer (n146) [335]–[338]. See also UNHCR ‘Background Note’ (n145) [79]–[84]; UNHCR ‘Guidelines’ (n145) [25]–[27].

<sup>216</sup> UNHCR ‘Guidelines’ (n145) [17].

<sup>217</sup> *ibid.*

<sup>218</sup> Commission of the European Communities (n4) [2.2.2]. See also European Convention on the Suppression of Terrorism (n157); International Convention for the Suppression of the Financing of Terrorism (adopted 9 December 1999, entered into force 10 April 1992).

<sup>219</sup> Human Rights Act (Designated Derogation) Order 2001, SI 3644/2001 (entered into force 13 November 2001). The UK was the only one of 43 Member States of the COE to have derogated for this reason, and this derogation was held to be unlawful in *A v Sect’y of State for the Home Dept* [2004] UKHL 56.

<sup>220</sup> See *Chahal* (n205) [112]; *Lynas v Switzerland* (1976) 6 DR 141.

security and (b) suspects is a ‘terrorist’—that is, a person who is or has been concerned in the commission, preparation or instigation of acts of international terrorism, or is a member of or has links with an international terrorist group.<sup>221</sup> It followed from the terms of the UK’s ECHR derogation from article 5 ECHR that this was limited to people linked to al Qaeda and associated groups.<sup>222</sup>

Where a suspected terrorist could not be removed from the UK for a legal or practical reason,<sup>223</sup> the Act permitted his or her indefinite detention in a high security institution without charge or trial.<sup>224</sup> Under Part 4 of the Act, detention would end only where another State accepted the individual (with the individual’s consent); the Special Immigration Appeals Commission (SIAC) granted bail or found there were no reasonable grounds for the Home Secretary’s belief; the Home Secretary revoked the certification; or the detention powers themselves lapsed.<sup>225</sup> This provision required the UK’s derogation from article 5 ECHR and article 9 ICCPR.

Furthermore, persons who were recognized refugees or were seeking asylum prior to being certified as ‘suspected international terrorists’ were denied Convention protection. According to Amnesty International, most if not all of the individuals detained under the Act fell into this group.

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<sup>221</sup> ATCSA (n174) s 21.

<sup>222</sup> Privy Counsellor (n202) [174].

<sup>223</sup> ATCSA (n174) s 23(1).

<sup>224</sup> The Home Office and prison service agreed to provide accommodation more appropriate to the suspects’ non-convicted status, in response to Lord Carlile’s recommendation: House of Commons Debates (3 March 2003) col 588, as cited in Privy Counsellor (n202) [199]. By contrast, a bill before the NSW Parliament proposes a new security classification for prisoners considered the highest threat, to be imposed solely on inmates with *suspected* terrorist links: Crimes (Administration of Sentences) Amendment (Category AA Inmates) Regulation 2004; S Gibbs ‘Top Jail Rating for Terrorism Suspects’ Sydney Morning Herald (30–31 October 2004) 6.

<sup>225</sup> They were due to lapse on 10 November 2006, with their continuation subject to period parliamentary approval.

Although certification under Part 4 was intended as a ‘last resort’ where an individual was both non-removable and non-prosecutable,<sup>226</sup> the House of Lords held in December 2004 that Part 4 was incompatible with articles 5 and 14 ECHR because it discriminated on the ground of nationality and was disproportionate to the aim of countering terrorist threats. It applied only to foreign nationals, and the government was not prepared to subject its own nationals to the same treatment.<sup>227</sup> Furthermore, Lord Hoffmann, although in the minority, held that there was no emergency threatening the life of the nation, thereby undermining the very premise of Part 4. The House of Lords thus quashed the UK’s order derogating from the ECHR, and issued a declaration of incompatibility.

It is important to recognize that not all excluded persons pose a security risk to the host State, reflected by the fact that States do not automatically detain war criminals excluded from protection.<sup>228</sup> An alternative to detention is the ‘less damaging’ option of imposing restrictions on the suspects’ freedom of movement (such as by curfews or daily reporting-in to police) and on their ability to use financial services, communicate or associate freely (such as limiting use to specific bank accounts or phones).<sup>229</sup> If restrictions are contravened, custodial detention could result. Similar systems operate in France<sup>230</sup> and Sweden.<sup>231</sup> Non-custodial alternatives, such as reporting requirements or

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<sup>226</sup> Privy Counsellor (n202) [179]; House of Lords Debates (29 November 2001) col 509 (Lord Rooker).

<sup>227</sup> *A’s case* (n219). See generally Fitzpatrick (n124) 257.

<sup>228</sup> Commission of the European Communities (n4) [2.4.2].

<sup>229</sup> Privy Counsellor (n202) [251].

<sup>230</sup> *Rapport présenté par la France au Comité du contre-terrorisme en application du paragraphe 6 de la résolution 1373 du Conseil de Sécurité, en date du 28 septembre 2001*, 19 which refers to arts 28 and 35bis of *Ordonnance no 45-2658 du 2 novembre 1945 relative aux conditions d’entrée et de séjour des étrangers en France*, cited in Privy Counsellor (n202) [251].

<sup>231</sup> Discussed in *Tagging Offenders: The Role of Electronic Monitoring in the Scottish Criminal Justice System* (October 2000), cited in Privy Counsellor (n202) [251].

'residence surveille',<sup>232</sup> are preferable to detention and are both more humane and effective.<sup>233</sup>

## F MINIMUM STANDARDS OF TREATMENT FOR NON-REMOVABLE PERSONS

This section distils the minimum status that must be afforded to all non-citizens, irrespective of their immigration status, based on international human rights law. Identifying a minimum human rights status is important for persons who are expressly excluded from the Convention regime and who are not removable or prosecutable, as well as for unsuccessful asylum-seekers to whom States fail to accord a legal status, despite tolerating their presence.<sup>234</sup>

Hathaway's four-tier rights hierarchy, based on States' obligations under the ICCPR, ICESCR and the UDHR, is particularly instructive for this task.<sup>235</sup> The first tier comprises the most basic and inalienable rights, from which no derogation is permitted under any circumstances.<sup>236</sup> Accordingly, States must always ensure freedom from: arbitrary deprivation of life; torture or cruel, inhuman or degrading treatment or punishment; slavery or servitude; imprisonment as a result of inability to fulfil a

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<sup>232</sup> Commission of the European Communities (n4) [2.4.2].

<sup>233</sup> ECRE (n162) [1.6].

<sup>234</sup> Although this thesis argues that Convention status should apply, it is nonetheless important to identify States' *minimum* obligations in the event that States refuse to apply the Convention.

<sup>235</sup> Hathaway (n167) 108–12. See also M Gibney and M Stohl 'Human Rights and US Refugee Policy' in M Gibney (ed) *Open Borders? Closed Societies? The Ethical and Political Issues* (Greenwood Press NY 1988) 159. Fitzpatrick identifies five tiers: (a) rights that apply equally to non-citizens and citizens, either because the right is absolute or because selective denial cannot be justified as reasonable or proportionate; (b) provisions preventing arbitrary State action, which permit narrow distinctions between citizens and non-citizens, such as detention (within the limits of international law) of non-citizens for the purposes of immigration control; (c) distinctions justifiable under limitations clauses permitting restriction for reasons of national security or public order; (d) political rights reserved expressly for non-citizens; and (e) provisions specifically protecting non-citizens (article 13 ICCPR on expulsion) or classes of non-citizens (such as settled immigrants, article 12(1) ICCPR): Fitzpatrick (n124) 255; Fitzpatrick (n127) 5–6.

<sup>236</sup> ICCPR arts 6, 7, 8(1), 8(2), 11, 15, 16, 18.

contractual obligation; criminal prosecution for *ex post facto* offences; and respect the right to: recognition as a person before the law; and freedom of thought, conscience and religion. When the ECHR and ACHR are taken into account, the four common non-derogable rights are the freedom from: arbitrary deprivation of life; torture and other inhuman or degrading treatment or punishment; slavery or servitude; and criminal prosecution for *ex post facto* offences. These are considered to be not only customary international law but also *jus cogens*.<sup>237</sup> Therefore, States bound by the ICCPR must secure all its non-derogable provisions to all persons within their jurisdiction. All other States will be bound, at a minimum, by the four common non-derogable rights recognized as *jus cogens*. States bound by the ACHR must also respect its other non-derogable rights.<sup>238</sup>

Secondly, there are rights from which States may derogate in exceptional circumstances. Article 4(1) ICCPR and article 15(1) ECHR permit derogation in a ‘public emergency which threatens the life of the nation’. The ECHR also permits derogation ‘in time of war’, while article 27(1) of the ACHR expands the concept even further to mean ‘in time of war, public danger, or other emergency that threatens the independence or security of a State Party’. Fitzpatrick argues that an emergency which threatens the life of the nation ‘must imperil some fundamental element of statehood or survival of the population—for example, the functioning of a major constitutional organ,

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<sup>237</sup> See J Oraá *Human Rights in States of Emergency in International Law* (Clarendon Press Oxford 1992) 96; US Restatement of the Foreign Relations Law of the USA (American Law Institute Washington 1987) 174–75. For background on the *travaux préparatoires* of the non-derogable rights in the ICCPR, ECHR and ACHR: Oraá 88–94.

<sup>238</sup> ACHR art 27(2): art 3 (right to juridical personality), art 12 (freedom of conscience and religion), art 17 (rights of the family), art 18 (right to a name), art 19 (rights of the child), art 20 (right to nationality), art 23 (right to participate in government).

such as the judiciary or legislature, or the flow of vital supplies'.<sup>239</sup> Since these rights constitute the remainder of universal human rights, Hathaway argues that 'failure to ensure any of these rights will generally constitute a violation of a state's basic duty of protection, unless it is demonstrated that the government's derogation was strictly required by the exigencies of a real emergency situation, was not inconsistent with other aspects of international law, and was not applied in a discriminatory way.'<sup>240</sup> Accordingly, States must continue to respect these rights unless they can justify an emergency derogation.

At the third level are the ICESCR rights. Although social and economic rights lack the same legal weight as the civil and political rights, based on progressive realization rather than immediate guarantees,<sup>241</sup> their deprivation may amount to inhuman or degrading treatment or punishment, as the British NASS cases illustrate.<sup>242</sup> Scrutiny of alternate protection regimes, such as temporary protection in mass influx or the Guiding Principles on Internal Displacement,<sup>243</sup> reveals that they are considered a fundamental part of basic protection, reflecting the interpretation of the Limburg Principles on the Implementation of the ICESCR that, regardless of their level of development, States must ensure minimum subsistence rights for all.<sup>244</sup> According to Hathaway, a State will breach

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<sup>239</sup> J Fitzpatrick *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency* (University of Pennsylvania Press Philadelphia 1994) 56.

<sup>240</sup> Hathaway (n167) 110, referring to ICCPR art 4(1).

<sup>241</sup> ICESCR art 2(1); Cholewinski (n54) 56.

<sup>242</sup> See text to n 54.

<sup>243</sup> The Guiding Principles on Internal Displacement UN Doc CN.4/1998/53/Add.2 (11 February 1998) are based on a slightly different premise from other regimes, given that displacement occurs within the country of origin and thus restricts the ability of the international community to directly intervene.

<sup>244</sup> (1986) 37 ICJ Rev 43 [25]–[28].

its duties where it has the financial capacity to provide ICESCR rights but fails to, or where it excludes certain groups from rights granted to the rest of the population.<sup>245</sup>

The ICESCR non-discrimination provision contains one exception, namely that *developing* countries ‘may determine to what extent’ they will guarantee *economic* rights to non-nationals, ‘with due regard to human rights and their national economy’.<sup>246</sup> Restrictions on social or cultural rights are not permitted. Article 4 may imply further permissible distinctions—the State may subject ICESCR rights ‘only to such limitations as are determined by law[,] only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.’

States cannot hide behind the progressive realization mechanism to deny rights. Although *full* realization may be achieved progressively, ‘deliberate, concrete and targeted’ steps towards that goal ‘must be taken within a reasonably short time after the Covenant’s entry into force’ in that State.<sup>247</sup> ‘It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.’<sup>248</sup> Furthermore, the Committee regards States’ ‘minimum core obligation’ under the ICESCR as guaranteeing ‘at the very least, minimum essential levels of each of the [ICESCR] rights’,<sup>249</sup> within the context of any resource constraints anticipated by article 2(1). ‘In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all

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<sup>245</sup> Hathaway (n167) 111. See also D Trubek ‘Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs’ in T Meron (ed) *Human Rights in International Law: Legal and Policy Issues* (OUP Oxford 1984) 215.

<sup>246</sup> ICESCR art 2(3).

<sup>247</sup> HRC ‘General Comment 3: The Nature of States Parties Obligations’ (4 December 1990) [2].

<sup>248</sup> *ibid* [9].

<sup>249</sup> *ibid* [10].

resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.’<sup>250</sup> Thus, even where resources are clearly inadequate, the State must ‘strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.’<sup>251</sup>

Finally, Hathaway identifies a fourth tier of rights, present in the UDHR but not codified in the ICCPR or ICESCR, which probably fall outside the scope of States’ basic protection obligations.<sup>252</sup>

That ‘universal’ rights can be deconstructed in this way is not in itself revelatory. Given that ‘to some extent the whole of immigration law is based on distinctions with respect to nationality’,<sup>253</sup> international law accepts that States will adopt different levels of treatment for individuals within their territories according to their formal attachment to the State. Thus, minimum human rights status should comprise all first-tier rights in all circumstances; all second-tier rights, except where an emergency justifies derogation; and all third-tier rights, except where an absolute lack of State resources prevents their accrual.<sup>254</sup> As we have seen above, States may technically respect their human rights obligations while guaranteeing rights in a very minimal way. Given a fairly high threshold for what constitutes inhuman or degrading treatment, States may get away with providing minimal assistance. Nonetheless, States’ failure to provide food, shelter, health care and so on may constitute inhuman treatment.<sup>255</sup>

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<sup>250</sup> *ibid* [10].

<sup>251</sup> *ibid* [11].

<sup>252</sup> eg UDHR arts 17, 23.

<sup>253</sup> *Blake and Husain* (n41) [6.17], referring to *Moustaquim v Belgium* (1991) 13 EHRR 802.

<sup>254</sup> Hathaway (n167) 112.

<sup>255</sup> Given the rights-as-reward structure of the Council Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers [2003] OJ L31/18, it may be possible that such treatment is not only inhuman and degrading but also amounts to punishment.

Similarly, although the ECHR does not contain extensive provisions on socio-economic rights,<sup>256</sup> it might be possible to rely on the general language of other provisions to demand them. Under article 6(1) ECHR, the European Court has found that State welfare benefits may amount to ‘civil rights’.<sup>257</sup> Since that provision requires a fair and public hearing in the determination of an individual’s civil rights and obligations, this may help to secure benefits for persons who are tolerated but without a proper legal status. In *Poirrez v France*, the European Court found that a disability allowance constituted a non-contributory social benefit—a ‘possession’ within the meaning of article 1 ECHR Protocol 1. Its denial to certain aliens was found not to be based on any ‘objective and reasonable justification’,<sup>258</sup> and accordingly constituted discriminatory treatment.

### **Extra-Convention Rights Regimes**

Outside the Convention framework, a number of other protection regimes carve out rights for specific types of circumstances (such as mass influx) or stages of the asylum process (rights for asylum-seekers).<sup>259</sup> Although they do not override States’ human rights obligations discussed above, they isolate rights which the international community has been willing to grant to persons even where they may subsequently be found to be

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<sup>256</sup> See eg *Pancenko* (n47).

<sup>257</sup> *Feldbrugge v The Netherlands* (1986) 8 EHRR 425; *Deumeland v Germany* (1986) 8 EHRR 448; *Salesi v Italy* (1993) 26 EHRR 187.

<sup>258</sup> *Poirrez* (n141) [49].

<sup>259</sup> eg IDP Guiding Principles (n243), Temporary Protection Directive, Reception Conditions Directive (n255), EXCOM Conclusion No 22 (XXXII) ‘Protection of Asylum-Seekers in Situations of Large-Scale Influx’ (1981).

excludable. The first model, EXCOM Conclusion No 22,<sup>260</sup> has served as a basis for many extra-Convention regimes, and was described as recently as 2001 as an enduring ‘important yardstick’ for both UNHCR and States.<sup>261</sup> This is followed by consideration of the EU’s Reception Conditions Directive.<sup>262</sup>

(a) EXCOM Conclusion 22: Mass Influx

EXCOM Conclusion 22 was drafted to deal with the large-scale exodus from Indo-China that had occurred since the mid-1970s, rendering individual processing impossible. It sought to provide a temporary status for those asylum-seekers, who included Convention refugees as well as persons seeking refuge due to ‘external aggression, occupation, foreign domination or events seriously disturbing public order in either part of, or the whole of their country of origin or nationality’. Importantly, unlike the EU Temporary Protection Directive, it contained no exclusion clauses, and hence may be considered to provide a set of basic standards, drawn from human rights and humanitarian law principles,<sup>263</sup> which additionally observes the principle of *non-refoulement*, or, at a minimum, temporary refuge.<sup>264</sup>

In general, EXCOM Conclusion 22 contains a rather mixed assortment of standards, and the rationale behind some limitations on refugee rights is not made clear.

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<sup>260</sup> EXCOM Conclusion No 22 (n259).

<sup>261</sup> UNHCR Global Consultations ‘Protection of Refugees in Mass Influx Situations: Overall Protection Framework’ (EC/GC/01/4) (19 February 2001) [8]; see also EXCOM Standing Committee (n104) [12]; IIHL ‘14<sup>th</sup> Round Table on Current Problems of International Humanitarian Law’ (San Remo 12–16 September 1989) 20–21.

<sup>262</sup> Reception Conditions Directive (n255).

<sup>263</sup> GJL Coles *The Question of a General Approach to the Problem of Refugees from Situations of Armed Conflict and Serious Internal Disturbance* (IIHL San Remo 1989) 27.

<sup>264</sup> IIHL (n261) 20–21.

It imports standards contained in articles 31 and 33 of the Convention, alongside vague wording referring to ‘the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights’.<sup>265</sup> The status it provides was summarized and endorsed in a 1992 UNHCR discussion note proposing a minimum content for complementary protection:

- (a) No penalty for illegal presence.
- (b) Respect for fundamental civil rights [especially those in the UDHR].
- (c) Food, shelter and other basic necessities of life [including sanitary and health facilities].
- (d) No cruel, inhuman or degrading treatment.
- (e) No discrimination.
- (f) Considered as persons before the law.
- (g) Safe and secure location.
- (h) Respect for family unity.
- (i) Assistance in tracing relatives.
- (j) Protection of minors and unaccompanied children.
- (k) Provision for sending and receiving mail.
- (l) Permission for friends and family to assist.
- (m) Arrangements to register births, deaths, and marriages.
- (n) Necessary facilities for obtaining durable solution.
- (o) Permission to transfer assets.
- (p) Facilitation of voluntary repatriation.<sup>266</sup>

EXCOM Conclusion 22’s value as a general protection regime must be qualified by recognition of the fact that it was crafted within a specific context—the Indo-Chinese exodus—in which the front-line States were not party to the Convention. It therefore filled a gap by identifying existing normative standards for States not bound by the Convention or Protocol.<sup>267</sup> ECRE has stressed that there is no good reason to transfer the

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<sup>265</sup> art IIB2(b).

<sup>266</sup> UNHCR ‘Protection of Persons of Concern to UNHCR Who Fall Outside the 1951 Convention: A Discussion Note’ (2 April 1992) UN Doc EC/1992/SCP.CRP.5 [17], [19]–[21].

<sup>267</sup> Fitzpatrick (n83) 295.

Conclusion's notion of 'basic minimum standards of treatment' to the context of western States bound by the Convention regime.<sup>268</sup> Goodwin-Gill describes the Conclusion as outlining 'minimum requirements geared to an acute problem [which] represent a point of departure only.'<sup>269</sup> In different circumstances, he argues, even temporary solutions may require more comprehensive provisions, 'including the opportunity to earn a living and to have access to education, housing, and social assistance.'<sup>270</sup>

However, in the context of status for non-removable *excluded* persons, the Conclusion provides a useful reinforcement of the minimum human rights to which all persons protected by *non-refoulement* are entitled. Although it repeats many of the rights set out in the universal human rights treaties, it fleshes out other benefits especially important in the context of flight, such as family unity.

In terms of legal status, EXCCOM Conclusion 22 endorses certain minimum standards in the cases of mass influx, but these are tempered by the assumption that the host State is overwhelmed by large numbers that necessarily inhibit its response. The logical conclusion would be that where extra-Convention refugees arrive individually or in small groups, more comprehensive protection should adhere. Yet, the opposite occurs under the Qualification Directive.

During discussions on the former Yugoslavia, reference was made to a 'general agreement' to improve standards beyond the minimum of EXCOM Conclusion 22 whenever the period of protection is prolonged. However, standards of treatment may in fact differ due to States' reception capacity, the national system of social welfare, and the

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<sup>268</sup> ECRE (n6) 7.

<sup>269</sup> GS Goodwin-Gill 'Non-Refoulement and the New Asylum Seekers' (1986) 26 Virginia JIL 897, 906.

<sup>270</sup> Ibid; see suggested minimum standards in Annex 916-18.

State's economic situation.<sup>271</sup> In particular, it was stated that in observance of the principle of non-discrimination, any substantial differences between the treatment of Convention refugees and other beneficiaries of complementary protection 'should be related to genuine differences in their situation, such as, for example, the reasonable expectation that the stay of a particular group in the country of refuge was expected to be of short duration.'<sup>272</sup>

While this rationale is understandable in the context of a mass influx emergency, the lack of concrete standards seems unjustifiable with respect to individual determinations of complementary protection and cannot be explained by overwhelmed procedures or resources in the emergency phase. While a temporary suspension of rights and freedoms at the start of a refugee emergency will generally be regarded as non-problematic, as the situation drags on the same limitations are likely to be seen as increasingly intolerable. Crisp observes that in too many situations, refugees' 'right to life has been bought at the cost of almost every other right'.<sup>273</sup>

(b) EU Reception Conditions Directive: Protection for Asylum-Seekers

A very restrictive approach to rights is found in the EU Reception Conditions Directive, which sets out the minimum entitlements States owe to asylum-seekers seeking Convention protection.<sup>274</sup> Since this Directive provides rights for persons prior to refugee

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<sup>271</sup> UNHCR 'Note on International Protection' UN Doc A/AC.96/830 (7 September 1994) [49].

<sup>272</sup> *ibid.*

<sup>273</sup> J Crisp 'No Solutions in Sight: The Problem of Protracted Refugee Situations in Africa' UNHCR *New Issues in Refugee Research* Working Paper No 75 (Geneva January 2003) 11.

<sup>274</sup> For a more general framework: See also EXCOM Conclusion No 82 (XLVIII) 'Safeguarding Asylum' (1997). The extension of these conditions to persons seeking complementary protection is optional, and will not apply for example in the UK: 'Implementation of Council Directive 2003/9/EC of 27 January 2003

status determination, it necessarily encompasses persons who may ultimately be declared excludable. Rather than echoing the aspirational tone of international human rights instruments, the Reception Conditions Directive dilutes States' obligations to the bare minimum, providing services such as housing and health only when asylum-seekers are financially incapable of supporting themselves.<sup>275</sup> Furthermore, access to State-funded support may be made conditional on residence in a particular place.<sup>276</sup> Rights may also be withdrawn if a person abandons the place of residence without informing officials, or fails to comply with any reporting requirements (article 16(1)). The overall effect is to characterize 'rights' as a reward rather than a duty of the State

At a minimum, States must allow asylum-seekers free movement within an assigned area that does not interfere with private life or ability to access the rights in the Directive.<sup>277</sup> Residence may be assigned for reasons of public interest, public order, or for processing and effective monitoring (article 7(2)), and individuals may be confined to a particular place for legal reasons or public order (article 7(3)), although States must provide for the possibility for temporary leave from the assigned place (article 7(5)). Hathaway argues that assigned residence contravenes articles 26 and 31(2) of the Convention, which permits States to curtail asylum-seekers' movement only until their identities are established and basic security concerns are investigated (regularization of status).<sup>278</sup> Where States provide housing, then they undertake to respect family unity as much as possible (article 8). Housing may include accommodation centres, provided

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laying down Minimum Standards for the Reception of Asylum Seekers: A Consultation Document issued by the Home Office on 10 September 2004' (copy with author) [2.5].

<sup>275</sup> This echoes the 'bare minimum' approach to threshold eligibility, discussed in Ch 2.

<sup>276</sup> art 7(4).

<sup>277</sup> art 7(4); see ICCPR art 12.

<sup>278</sup> JC Hathaway 'What's in a Label?' (2003) 5 EJIL 1, 11.

they guarantee an adequate standard of living, protect family life, and permit communication with relatives, lawyers and NGOs (article 14).

States may restrict access to employment for a period of up to at least one year (article 11), and once access is granted, States may give priority to EU citizens, States parties to the EEA Agreement and legally resident third-country nationals (article 11(4)). Access to vocational training may be granted (article 12).

States must ensure ‘a standard of living adequate for the health of applicants and capable of ensuring their subsistence’ (article 13(2)), in particular for persons in detention or with special needs, but only where individuals cannot support themselves (article 13(3)). This provision, combined with article 16, which permits the denial of benefits where the asylum-seeker did not claim asylum as soon as practicable after arrival in the host State, underlines article 55 of the Nationality, Immigration and Asylum Act.<sup>279</sup> Its effect is to define ‘a standard of living adequate for the health of applicants and capable of ensuring their subsistence’ as anything fractionally above destitution.

## G CONCLUSION

Drawing on these two extra-Convention regimes, the minimum status provided is one that enables a ‘standard of living adequate for the health of applicants and capable of ensuring their subsistence’. It includes rights to employment (although waiting periods

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<sup>279</sup> Nationality, Immigration and Asylum Act (n54).

may apply); health care; social welfare; education; housing;<sup>280</sup> limited recognition of family reunion; recognition of children's special needs; and non-discrimination.<sup>281</sup>

These regimes do not reflect the minimum level of rights prescribed by international human rights law, identified by Hathaway's four-tier classification discussed above. Although regional agreements and soft-law instruments cannot legally undermine States' obligations under international treaty and customary law, their dilution of existing standards to a 'bare minimum' level is regrettable. The Reception Conditions Directive in particular gives content to the general, aspirational standards of international human rights law in a very restrictive way.

The absolute nature of the first-tier rights identified by Hathaway makes them the strongest challengers to any alleged human rights breach. If denial of a second- or third-tier right can also be characterized as a breach of a first-tier right, then the State will have an absolute duty to rectify it. Scott suggests that if the 'right to life' in article 6 ICCPR encompasses a 'right to an adequate standard of living' in article 11 ICESCR, then the stronger possibility of enforcement of the former may provide an appropriate method for bringing States to account for breaches of their socio-economic duties.<sup>282</sup> In the same way, denial of basic health care may also implicate fundamental rights.<sup>283</sup> In the European context, the developing jurisprudence on human dignity under articles 3 and 8

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<sup>280</sup> Note that the HRC believes that housing means not only shelter, but 'the right to live somewhere in security, peace and dignity', including 'the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence': HRC 'General Comment 4: The Right to Adequate Housing' (13 December 1991) [7], [9].

<sup>281</sup> Reception Conditions Directive (n255) arts 8, 10, 11, 13–15, Preamble [6]; UDHR. Finally, even the HRC Guidelines for victims of trafficking require, which are not based on international protection needs, require the provision of safe and adequate shelter, and access to primary health care: OHCHR 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (text presented to ECOSOC as an addendum to the report of UNHCHR (E/2002/68/Add.1)) Guidelines 6(1)–(6).

<sup>282</sup> See C Scott 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights' (1989) 27 Osgoode Hall LJ 769, 780.

<sup>283</sup> Fitzpatrick (n127) 11.

ECHR may require the European Court to give greater consideration to the status granted to non-removable persons,<sup>284</sup> and ultimately require States to provide rights beyond the level of subsistence alone.

For all other persons with an international protection need, who are not expressly excluded by the Convention, the Convention acts as a *lex specialis*. As this chapter has illustrated, there is no legal justification for differentiating between the rights of persons protected by the principle of *non-refoulement*, based purely on the source of that protection.

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<sup>284</sup> Lambert (n44).

## CONCLUSION

Protection should reflect the broad spectrum of human rights, and not begin and end with the principles of asylum or *non-refoulement*.<sup>1</sup>

This thesis has argued that human rights law extends States' international protection obligations beyond the scope of the 1951 Refugee Convention, such that the concept of *non-refoulement* is informed by both refugee and human rights law principles. It has shown how the historical context and structure of the Convention, in addition to early examples of complementary protection and current regional models, support the extension of Convention status, as a *lex specialis*, to persons with an international protection need. Persons expressly excluded from the Convention regime are entitled to at least a minimum status under human rights law.

Drawing together the arguments made in the thesis, its conceptual basis is that in order to provide maximum protection, international human rights treaties must not be viewed as discrete, unrelated documents, but as interconnected instruments which together constitute the international obligations to which States have agreed. In effect, therefore, it argues for a reconsideration of international law as a holistic and integrated system. Compartmentalizing international law into parallel but autonomous and non-intersecting branches leads not only to stultification, but to ineffectual implementation of the interlocking duties which States have undertaken to respect. Viewing the Convention as a discrete instrument implies that refugee law 'possesse[s] its own special purposes and principles which [are] determined essentially by its own constituent instruments and

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<sup>1</sup> GS Goodwin-Gill 'Protecting the Human Rights of Refugee Children: Some Legal and Institutional Possibilities' (International Conference 'Children on the Move' The Hague 22–26 October 1994) no page, text before fn 2 (copy with author).

which [are] thus independent of those of human rights law.’<sup>2</sup> But human rights law, in addition to international humanitarian and criminal law, contains principles that are explicitly or implicitly applicable to the refugee context,<sup>3</sup> having both influenced and been influenced by it. Human rights law not only provides an additional source of protection for persons with an international protection need, but also strengthens the status accorded to *all* refugees through its universal application.

Illustrating the strong foundational links between the 1951 Convention and human rights law, this thesis has argued that the Convention is a specialist human rights treaty which acts as a *lex specialis* for persons in need of international protection. Whereas pre-1951 concepts of protection, based on national category, were expanded incrementally through their application to new national groups, the Convention conceptualization has been extended through developments in human right law, which have informed both the meaning of ‘persecution’ and the scope of *non-refoulement*. Accordingly, while human rights law widens threshold eligibility for protection, the Convention remains the blueprint for rights and legal status.

The thesis then examined the scope of protection provided by the CAT, ICCPR, ECHR and CRC, demonstrating the capacity of human rights law to provide protection from serious harm in circumstances that exceed the threshold eligibility categories of the EU the Qualification Directive. It showed that human rights-based sources of protection extend beyond the commonly acknowledged provisions of article 3 ECHR, article 3 CAT and article 7 ICCPR, thus enhancing the potential for protection claims founded on rights other than freedom from torture or inhuman or degrading treatment or punishment.

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<sup>2</sup> GJL Coles ‘Refugees and Human Rights’ (1992) 91 Bulletin of HR 63, 63.

<sup>3</sup> *ibid.*

If international law already accommodates complementary protection within its existing framework, then why is there no discernable universal system of complementary protection? The problem lies not in international law itself, but rather in States' failure to adequately implement their international legal obligations in a holistic and bona fide manner, combined with a lack of enforcement mechanisms. A benefit of codifying States' complementary protection obligations in a new international instrument would be to clearly elucidate the source and (non-exhaustive) content of those obligations—explicitly drawing the links between States' general human rights obligations and their specific relevance to the protection context—and to expressly describe the legal status that results from recognition of a protection need on those grounds.

The dangers of codifying complementary protection have been amply illustrated by the negotiations on the Qualification Directive. They show that States may seek to dilute their obligations to a minimum level, extrapolating some aspects of existing law but not others, and closing off potential avenues for future protection needs. In the context of setting out fundamental standards of humanity, the Commission on Human Rights noted that any new instrument may be seen to 'undermine existing international standards ... or pose a risk to existing treaty law',<sup>4</sup> even where such standards are largely a 'repackaging' of existing international law. As such, it is imperative to identify the international legal basis of obligations in any codified complementary protection regime, so that 'soft law' is not used to fudge standards or replace treaty-based obligations.

Although UNHCR is preparing for the adoption of an EXCOM Conclusion on complementary protection, as envisaged by the Agenda for Protection, it is unlikely that it

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<sup>4</sup> Minimum Humanitarian Standards: Analytical Report of the Secretary-General submitted pursuant to Commission on Human Rights Resolution 1997/21 UN Doc E/CN.4/1998/87 (5 January 1998) [94].

will reflect a model advocating broadened threshold eligibility with resultant Convention status, given the current political climate and the recent deliberations of the EU. Yet, as one commentator poignantly observes:

In the past forty years the rich first world countries have received so many *de facto* refugees that it would not have made any difference if they had agreed to an expanded international definition ... . In fact, it would here have helped clarify and identify those circumstances which were insufficiently clear-cut to merit recognition as refugee-like situations.<sup>5</sup>

By retaining the political discretion to determine to whom, and when, protection will be granted, States have in fact complicated the protection regime. Diverging statuses, different eligibility thresholds and variations from State-to-State have created incentives for asylum-seekers to forum-shop and appeal decisions granting subsidiary status. It is arguably in States' own interests to grant a single legal status based on the Convention to all persons in need of international protection. In this way, they acknowledge complementary protection as the natural 'extraterritorial' response to their commitment to uphold and promote respect for human rights. A creative use of human rights law can thus enhance the legal status of refugees and asylum-seekers,<sup>6</sup> basing international protection on need rather than the legal source of the obligation.

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<sup>5</sup> P Nobel 'Blurred Vision in the Rich World and Violations of Human Rights—A Critical Assessment of the Human Rights and Refugee Linkage' (1992) 91 Bulletin of HR 74, 80.

<sup>6</sup> GS Goodwin-Gill 'The Language of Protection' (1989) 1 IJRL 6, 16.

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