



**COMMENTS FROM THE EUROPEAN COUNCIL  
ON REFUGEES AND EXILES**

**on the**

**European Commission Proposal to recast the  
Qualification Directive**

March 2010

## 1. Introduction

A common understanding of who qualifies for international protection as a refugee or as a beneficiary of subsidiary protection falls at the core of the Common European Asylum System (CEAS).<sup>1</sup> The significance of the Qualification Directive is even greater considering that it constitutes the first supranational legally binding instrument in Europe, which confers on individuals a subjective right to be granted a protection status, comprising not only a residence permit but also a number of socio-economic rights.<sup>2</sup> Thus ECRE generally welcomed the Qualification Directive's adoption as part of the incremental process towards the development of a fairer and more efficient CEAS, which is capable of delivering effective protection to those fleeing persecution and serious harm.<sup>3</sup> Research conducted by UNHCR and ECRE shows that indeed transposition has advanced standards in some specific areas and countries, for example concerning the recognition of non-State actors as agents of persecution or the introduction of subsidiary protection, which were incorporated into the legal system of some Member States for the first time.<sup>4</sup>

However, ECRE as well as UNHCR and other legal experts also take the view that some of the Directive's provisions do not adequately reflect the 1951 Refugee Convention.<sup>5</sup> The European Commission has subsequently acknowledged that: "the cumulative effect of all [the Directive's] restrictive provisions, ambiguities, deliberate 'gaps' and derogation possibilities is that the current Directive does not guarantee the full compatibility of national implementation measures with [refugee law and human rights standards]".<sup>6</sup> Documented areas of concern include insufficient safeguards against *refoulement*, a tendency to favour restrictive interpretations of legal concepts such as the internal protection alternative, actors of protection, serious harm, exclusion and revocation, as well as the granting of different levels of rights to refugees and beneficiaries of subsidiary protection.<sup>7</sup> On this

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<sup>1</sup> ECRE, [Comments on the European Commission Proposal for the Qualification Directive](#), March 2002, p. 1.

<sup>2</sup> Articles 13, 18 and Chapter VII of the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304, 30.9.2004 ("Qualification Directive"). On the right to asylum, see H. Battjes, "Subsidiary Protection and Reduced Rights", p. 49, in: K. Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues and Implementation in Selected Member States*, Nijmegen: Wolf Legal Publishers, 2007 ("Battjes 2007"); M. Gil-Bazo, "Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to be Granted Asylum", pp. 236-9; in A. Baldaccini et al. (eds), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, 2007, Oxford: Hart Publishing ("Gil Bazo 2007").

<sup>3</sup> ECRE, [Information Note on the Qualification Directive](#), ("ECRE Information Note"), October 2004, p. 3.

<sup>4</sup> See UNHCR, [Asylum in the European Union: A Study of the Implementation of the Qualification Directive](#), ("UNHCR Study"), November 2007; ELENA, [The Impact of the EU Qualification Directive on International Protection](#), ("ELENA Survey"), October 2008; ELENA is the European Legal Network on Asylum, a forum for legal practitioners in the area of asylum coordinated by ECRE (more information available at: [http://www.ecre.org/about\\_us/elena](http://www.ecre.org/about_us/elena)).

<sup>5</sup> 1951 Convention relating to the Status of Refugees 28 July 1951 and Protocol of 31 January 1967 ("1951 Refugee Convention"); ECRE Information Note, p. 5; UNHCR, [UNHCR Annotated Comments on the Qualification Directive](#), ("UNHCR Annotated Comments"), January 2005, p. 13; Battjes 2007; Gil Bazo 2007; H. Storey "EU Refugee Qualification Directive: A Brave New World?" pp. 7-13 Oxford University Press 2008 ("Storey 2008"); J. McAdam, *The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime*, Oxford University Press 2005 ("McAdam 2005"); M. Garlick, "UNHCR & the implementation of the Qualification Directive" in: K. Zwaan (ed.), *The Qualification Directive: Central Themes, Problem issues & Implementation in Selected Member States*, Nijmegen: Wolf Legal Publishers, 2007. ("Garlick 2007").

<sup>6</sup> European Commission, *Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast) – Impact Assessment*, SEC (2009) 1371, ("Impact Assessment"), 21.10.2009 p. 11.

<sup>7</sup> ELENA Survey and UNHCR Study. On the social rights attached to subsidiary protection, see also France Terre d'Asile, *Asile. La protection subsidiaire : une mosaïque de droits*, Cahier du social n°18, September 2008 ("FTdA Study on Subsidiary Protection"). A summary is available at: [http://www.france-terre-asile.org/images/stories/publications/cahiersdusocial/cs18\\_bon\\_de\\_commande.pdf](http://www.france-terre-asile.org/images/stories/publications/cahiersdusocial/cs18_bon_de_commande.pdf)

basis, ECRE has repeatedly urged Member States to adopt higher standards that fully comply with their obligations under international refugee and human rights law.<sup>8</sup>

The offending provisions of the Directive are not in accordance with the general principles of EU law, which include respect for the 1951 Refugee Convention as well as the European Convention of Human Rights (ECHR),<sup>9</sup> Furthermore these provisions are in conflict with the right to asylum guaranteed by the Charter of Fundamental Rights<sup>10</sup> and the provisions of the Treaty on the Functioning of the European Union (TFEU).<sup>11</sup>

The current Directive has not fulfilled its objective as a harmonising instrument for the development of the CEAS, one of the main aims of the Directive, as noted in its recital<sup>12</sup> The notorious divergences of interpretation on the concepts mentioned above have been partly responsible for the dramatically differing recognition rates for asylum seekers from the same countries among the Member States.<sup>13</sup> The European Commission notes for example that for the period 2005-2007 recognition rates for applicants varied from 63% in Austria to 0% in Slovakia for asylum seekers from Russia, mostly of Chechen background, while the percentage of positive decisions for Somali asylum-seekers was 98% and 55% in Malta and in the UK respectively against 0% in Greece.<sup>14</sup> ECRE has also documented the varying treatment faced by Iraqi asylum seekers seeking sanctuary in different Member States.<sup>15</sup> This evidences that the CEAS can be a dangerous lottery. The need to address such disparities has been recognised also by the European Council in the European Pact on Immigration and Asylum and, more recently, in the Stockholm Programme.<sup>16</sup> While the European Asylum Support Office (EASO) could play a significant role in reducing the differences in recognition rates and raising protection standards in the Member States,<sup>17</sup> practical cooperation measures “are insufficient, on their own, to adequately and comprehensively address the problems which flow from the ambiguities and possibilities for derogations in the legislation itself”.<sup>18</sup> In order to establish a fair and efficient CEAS that effectively respects fundamental rights, it must be based on a solid EU law framework.

The reform of the Qualification Directive is essential to achieve this objective. The Commission recast proposal<sup>19</sup> comes at a time when the Lisbon Treaty has established a strengthened legal basis for a common policy on asylum and subsidiary protection,<sup>20</sup> and gives the provisions of the Charter of Fundamental Rights of the European Union, which enshrine the right to asylum, binding legal force.

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<sup>8</sup> See ECRE Information Note, p. 4; ELENA Survey, pp. 35-7.

<sup>9</sup> See S. Peers 'Human Rights, Asylum and European Community Law', *Refugee Studies Quarterly*, 2005, Vol 24, Issue 2, for an academic analysis of the general principles of EU law in this field.

<sup>10</sup> Charter of Fundamental Rights of the European Union [2000] OJ C364/1 7 December 2000. Article 18, as amended by the Treaty of Lisbon provides that “The right to asylum shall be guaranteed with due respect to the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as “the Treaties”). On the scope of this provision see M. Gil-Bazo, “The Charter of Fundamental Rights of the European Union and the Right to be granted asylum in the Union’s Law”, *Refugee Survey Quarterly*, 2008, Vol. 27, p. 37 (“Gil Bazo 2008”).

<sup>11</sup> Article 78 (TFEU) which replaces Article 63 of the EC Treaty as a legal basis for the EU asylum acquis, requires the development of a common policy on asylum which “must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”. See OJ 2008 C115/47.

<sup>13</sup> Impact Assessment p. 13; ECRE [Submission in response to the Commission's Green Paper on the Future Common European Asylum System](#), (“Green Paper Response”), September 2007.

<sup>14</sup> Impact Assessment, p. 13.

<sup>15</sup> ECRE [Five years on Europe is still ignoring its responsibilities towards Iraqi refugees](#), March 2008.

<sup>16</sup> Council of the European Union, *The Stockholm Programme - An open and secure Europe serving the citizen*, 2 December 2009 (final version), p. 29 (“Stockholm Programme”); Council of the European Union, *European Pact on Immigration and Asylum*, Council Doc. 13440/08, 24 September 2008, p. 11.

<sup>17</sup> ECRE [Comments on EU plans to establish a European Asylum Support Office \(EASO\)](#) December 2008.

<sup>18</sup> Impact assessment, p. 17.

<sup>19</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (Recast)*, COM (2009) 551 final/2, 23.10.2009 (“Recast Proposal”).

<sup>20</sup> Article 78 TFEU.

The proper involvement of the European Parliament through the co-decision procedure and qualified majority voting in the Council provides the framework for the development of a common approach less sensitive to purely national interests.

At the same time a recast of the Asylum Procedures Directive has been proposed.<sup>21</sup> The Commission, in examining statistical evidence of insufficient harmonization, has acknowledged that “data points to a causal link between the fairness and quality of procedures and the numbers of persons qualified for international protection under the Qualification Directive”.<sup>22</sup> It is essential that high procedural standards are also in place to ensure a fair application of the provisions in the Qualification Directive. Both the provisions for qualifying for international protection and procedural standards lie at the heart of the CEAS.

### 1.1 Summary of views

The recast proposal purports “to address the deficiencies identified during the first-phase of the asylum legislation and to ensure higher and more harmonized standards of protection”.<sup>23</sup> ECRE supports this objective and believes that the proposal generally constitutes a step forward in harmonising eligibility criteria and the content of protection at EU level and bringing all provisions of the Directive in line with international refugee and human rights law and standards.

ECRE welcomes in particular the following elements of the Commission proposal and urges the Member States and the European Parliament to uphold them during the negotiations:

- The extension of the definition of family members to take into account the range of situations in which a child can be dependent and to uphold the best interest of the child (recast Article 2 (j)).
- The clarification that the list of actors of protection included in the Directive is exhaustive and that the protection provided should be effective and durable (recast Article 7).
- The provision that an applicant needs to be able to safely and legally travel, gain admittance and settle in an area of the country of origin as a pre-condition for Member States to apply the internal protection alternative, in line with the jurisprudence of the European Court of Human Rights (EctHR) (recast Article 8).
- The clarification of the causal nexus requirement (i.e. the requirement of a connection between the acts of persecution and the reasons for persecution under the 1951 Refugee Convention) to explicitly state that it also covers situations where there is a connection between the grounds for persecution and the absence of protection against persecution on the part of the State (recast Article 9).
- The provision that gender-related aspects should be given due consideration for the purpose of establishing membership of a particular social group (recast Article 10).
- The introduction of an exception to cessation of refugee and subsidiary protection status which provides for the continuation of protection for “compelling reasons arising from previous persecution” reflecting Article 1C (5) of the 1951 Refugee Convention and a general humanitarian principle (recast Article 11 and Article 16).
- The alignment of the rights granted to refugees and subsidiary protection beneficiaries, which *de facto* results in a uniform status for all those granted international protection (recast Chapter VII).

However, ECRE regrets that the recast proposal does not fully address a number of issues, which are considered at odds with international refugee and human rights standards. These include the following:

- The scope of the Directive is still limited to third-country nationals or stateless persons (Article 1 and Article 2(i)).

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<sup>21</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (Recast)*, COM (2009) 554/4.

<sup>22</sup> European Commission, *Staff Working Document Accompanying the Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (recast) Impact Assessment*, SEC(2009) 1376, 21.10.2009 p. 10.

<sup>23</sup> Recast proposal, p. 5.

- Non-State actors continue to be considered as potential actors of protection (Article 7).
- The notion of particular social group remains unchanged and thus open to restrictive interpretation requiring that applicants both share an innate characteristic that cannot be changed AND are perceived as a distinct group by the surrounding society (Article 10 (1) (d)).
- The grounds for subsidiary protection have not been sufficiently clarified in order to protect all categories of persons who are in need of protection but do not qualify for refugee status (Article 15).
- National security reasons and conviction for a “particularly serious crime” are maintained as quasi-exclusion grounds under the revocation provisions, which is potentially in breach of Member States’ obligations under the 1951 Refugee Convention (Article 14 (4) and (5)).

While these shortcomings are not addressed in the recast proposal, ECRE forcefully urges Member States to make use of the possibility to adopt or maintain higher standards when implementing (as explicitly provided for by Article 3 of the Qualification Directive) the recast Directive. Due to the recast legislative technique room for amendments of the Qualification Directive is limited to provisions the Commission has modified in the recast proposal. ECRE reminds the EU institutions of the objectives of the Stockholm Programme to develop a Common European Asylum Policy based on the full and inclusive application of the 1951 Refugee Convention and other international treaties and of the need to continue working towards improving the framework for refugee protection in Europe.

This paper will firstly provide observations on the amendments proposed in the recast Qualification Directive, accompanied with key recommendations to the European Parliament and the Council for modifications to a number of Articles. In a second section this paper will discuss issues in the Qualification Directive that were not addressed in the recast proposal.

## 2. Proposals for amendments

### 2.1 Definition of family and best interest of the child – Articles 2 and 31

ECRE welcomes recast Article 2 (j) amending the definition of “family members” to eliminate the requirement that the minor children of the beneficiary of international protection are dependent and to include married minor children, when it is in their best interest to reside in the same country as the beneficiary; the parents or another adult relative responsible for the beneficiary when he/she is a minor, including when he/she is married if it is in his/her best interest to reside in the same country as his/her parents or other adult responsible; and the minor siblings of the beneficiary, including when they are married if it is in their best interest to reside in the same country. These amendments ensure consistency with the definition of family members in the recast proposals of the Reception Conditions Directive<sup>24</sup> and the Dublin Regulation.<sup>25</sup> This broadened definition of family reflects ECHR jurisprudence relating to family life under Article 8 ECHR.<sup>26</sup> These amendments are necessary to take into account the wide range of situations where children may be considered dependent, “while ensuring that the decisive criteria is the best interest of the child”.<sup>27</sup> The inclusion of a definition of minor as a person below the age of 18 in recast Article 2 (k) contributes to align the Directive to the UN Convention on the Rights of the Child (UNCRC).<sup>28</sup> Nevertheless, concerning the definition of family, ECRE regrets that the definition of family members is still limited “in so far as the family already

<sup>24</sup> European Commission, *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers*, (recast) COM (2008) 815 final/2, 9.12.2008 (“Recast proposal for the Reception Conditions Directive”).

<sup>25</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing an application for international protection lodged in one of the Member States by a third-country national or a stateless person* (Recast), COM (2008) 0243 final, 3.12.2008.

<sup>26</sup> The ECtHR has refrained from giving a definition of family but take a pragmatic approach in examining the existence of family life on the facts of each case. For example in *Marckx v Belgium*, Application No. 6833/74, 13 June 1975, the Court ruled that “family life” within the meaning of Article 8 includes at least the ties between near relatives. Siblings also fall within the meaning of family see for e.g. *Olsson v Sweden*, Application No. 00013441/87, 24 March 1988.

existed in the country of origin". This fails to accommodate family ties which have been formed during flight or in the host country, thus excluding them from the guarantees of the Directive.

ECRE welcomes the introduction of a requirement to establish procedures for tracing the members of unaccompanied minors' families as soon as possible after status recognition (recast Article 31). This reflects the obligations under Article 9, Article 10 and Article 22 (2) of the UNCRC in relation to family unity and the best interests of the child.<sup>29</sup> This amendment also complements the proposed Article 23 (3) in the recast Reception Conditions Directive<sup>30</sup> which introduces an obligation for Member States to trace family members as soon as possible after an application for international protection is lodged while protecting his/her best interest. Where protection status was granted to an unaccompanied child before a tracing procedure was started, the proposed amendment ensures that tracing procedures are in place not only for unaccompanied asylum seeking children but also once they have obtained a protection status.<sup>31</sup>

ECRE welcomes recast Article 2 (j) extending the definition of family members and recast Article 2 (k) defining a minor as a person under the age of 18 in line with the UN Convention on the Rights of the Child.

ECRE welcomes the obligation for Member States to establish a tracing procedure as required by Article 31(5).

ECRE recommends deleting the wording "in so far as the family already existed in the country of origin" from recast Article 2 (j).

## 2.2 Actors of protection – Article 7

Recast Article 7 introduces changes clarifying the concept of actors of protection. According to the European Commission, as the Directive stands now "[t]he lack of clarity of the concept allows for wide divergences and for very broad interpretations which may fall short of the standards set by the Geneva Convention on what constitutes adequate protection".<sup>32</sup> Problems resulting from the implementation of this provision relate in particular to the possibility of regarding non-State agents as actors of protection, an option that has been taken up by most Member States in their national legislation.<sup>33</sup> As a result, entities such as UN bodies, UNHCR camps, NGOs, clans and tribes have been considered as potential actors of protection.<sup>34</sup> The recast proposal intends to remedy this situation by specifying that the list of actors of protection is exhaustive, as well as by requiring that protection must be effective

<sup>27</sup> European Commission, Detailed Explanations of the Proposal, COM (2009) 551 final, Annex ("Detailed Explanations of the Proposal"), p. 2. This is in accordance with Article 3 of the UN Convention on the Rights of the Child (UNCRC): 3(1) "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." This principle was explicitly referred to by the ECtHR case of *Maslov v Austria*, Application No. 1638/03, 23 June 2006 amongst others, for further information see Immigration Law Practitioner's Association (ILPA), *Consideration by the European Court of Human Rights of the UN Convention on the Rights of the Child 1989*, July 2008.

<sup>28</sup> UNCRC Article 1 "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

<sup>29</sup> For further information see also the UN Committee on the Rights of the Child, CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005 CRC/GC/2005/6. While it is an accepted principle that family tracing should start as soon as possible, UNHCR suggests that there are exceptions, notably "where information becomes available suggesting that tracing or reunification could put the parents or other family members in danger, that the child has been subjected to abuse or neglect, and/or where parents or family members may be implicated or have been involved in their persecution. See UNHCR, *Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009.

<sup>30</sup> For further commentary on this recast proposal see ECRE [Comments on the European Commission Proposal to recast the Reception Conditions Directive](#), April 2009.

<sup>31</sup> ECRE also urges Member States who have not opted into the Reception Conditions Directive to implement Article 31(5) so that the tracing procedure is initiated whilst the unaccompanied minor is in the international protection procedure.

<sup>32</sup> Impact Assessment, p. 11.

<sup>33</sup> ELENA Survey, p. 16.

<sup>34</sup> *Ibid.* See also UNHCR Study, pp. 10 and 47-52.

and durable and that the parties and organisations in question should be able and willing to enforce the rule of law.

These modifications in the recast proposal, while positive, are insufficient. ECRE welcomes the assertion in recast Article 7 (1) that “[p]rotection against persecution or serious harm must be effective and durable”. Regrettably, this amendment is undermined by paragraph 2, which merely requires that actors of protection take “reasonable steps” to prevent the infliction of persecution or harm irrespective of whether these steps lead to protection being actually available.<sup>35</sup> ECRE reiterates previous recommendations “for a stronger reference to the need for the effectiveness of State protection measures to be taken into account when assessing the need for protection”.<sup>36</sup> There are also principled problems with the notion of non-State agents as actors of protection. Non-state actors are not and cannot be parties to international human rights instruments and therefore cannot be held accountable for non-compliance with international refugee and human rights obligations.<sup>37</sup> “Protection” by non-state agents is usually limited in scope; limited in time (e.g. international organizations do not have a mandate to ensure the security of a place for “ever”), and indeed may prove to be surprisingly volatile (e.g. Srebrenica).<sup>38</sup> Furthermore, given that non-state parties and organisations lack the attributes of the State, it is difficult to see how they may reasonably be able to enforce the rule of law, as required in the recast proposal.<sup>39</sup>

In view of these limitations, notwithstanding their inclusion into Member State’s national legislation, it is not surprising that the notion of non-state actors of protection has also proved problematic in practice. For instance, UNHCR research on the implementation of the Qualification Directive concludes that even if national authorities show some readiness when it comes to regarding international organisations as possible actors of protection, in general relevant organisations were eventually found unable to provide such protection.<sup>40</sup>

ECRE emphasises that the central focus should be on the effectiveness and durability of any protection measures in place and whether the applicant can access it in reality. ECRE is of the view that non-State actors should never be considered as actors of protection for both principled and practical reasons.

ECRE notes in relation to this issue the recent judgment of the Court of Justice of the European Union, *Salahadin Abdulla & Others v Bundesrepublik Deutschland* which stated that Article 7(1) “does not preclude the protection from being guaranteed by international organisations, including protection ensured through the presence of a multinational force in that territory”.<sup>41</sup> However, it should be noted that the Court’s conclusion that actors of protection may comprise international organisations must be read in the context of the case presented to the Court.<sup>42</sup> The German Bundesverwaltungsgericht asked whether it would be sufficient if protection can be assured only with the help of multinational troops. The Court merely reiterates the wording in Article 7 (1) and states that this provision allows international organisations to be considered as actors of protection. Furthermore, the Court confirms that there must be a verification of whether the actor of protection operates an effective legal system of protection as required under Article 7 (2) of the Qualification Directive. As part of this verification the competent authority must assess “in particular, the conditions of operation of, on the one hand, the institutions, authorities and security forces and, on the other, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution” in addition to the elements to be taken into consideration in Article 4 of the Qualification Directive. If any conclusion can be drawn on this issue, it is clear that the mere presence of an international organisation, even when it

<sup>35</sup> ELENA Survey, pp. 16-7.

<sup>36</sup> ECRE Information Note p. 5.

<sup>37</sup> *Ibid*, p. 7.

<sup>38</sup> In July 1995 more than 8000 Muslim men and boys were killed in Srebrenica after an attack by the Bosnian Serb army despite the fact that it was designated as a “safe area” and under the protection of the UN Protection Force. See United Nations, General Assembly, *Report of the Secretary-General pursuant to General Assembly resolution 53/35. The Fall of Srebrenica*, 15 November 1999.

<sup>39</sup> See for example UNHCR Annotated Comments on the present text, p. 18.

<sup>40</sup> UNHCR Study, p. 48.

<sup>41</sup> Joined cases C-175/08, C-176/08, C-178/08 and C-179/08 *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland*, Judgment of the Court of Justice of the European Union (Grand Chamber), 2 March 2010; See in particular paras 74-75.

<sup>42</sup> This judgment primarily dealt with the application of the ‘Ceased Circumstances’ clause in Article 11 of the Qualification Directive.

includes the presence of a multinational force, is not sufficient to conclude that an actor of protection is available. As stated by the Advocate General, “The existence of an actor of protection and the availability, effectiveness and enduring nature of the protection provided by that actor in the refugee’s country of nationality are questions of fact which must be assessed by the national court in the light of the above considerations”.<sup>43</sup> ECRE reiterates its view that non-state actors should never be considered as actors of protection for the reasons stated above.

ECRE recommends amending recast Article 7 (1) to ensure that only State authorities can be considered actors of protection.

### 2.3 Internal protection - Article 8

Firstly it should be noted that the concept of an internal relocation alternative is not part of the text of the 1951 Refugee Convention, however state practice has arisen in this area over time.<sup>44</sup> Recast Article 8, provides that Member States may determine that an applicant is not in need of international protection if an internal protection alternative (IPA) is available. It clarifies the concept of IPA providing that the applicant needs to have access to protection against persecution or serious harm in a part of the country of origin where “he or she can safely and legally travel, gain admittance and settle”. Paragraph 3 allowing for the application of the internal protection alternative “notwithstanding technical obstacles to return” is deleted for being inconsistent with these requirements. A third modification introduced to Article 8 (2) requires the competent authorities to obtain precise and up-to-date information from various sources including from UNHCR. This is in alignment with Article 8 (3)(b) of the present Asylum Procedures Directive.<sup>45</sup>

ECRE fully supports these amendments, which were necessary to bring the Qualification Directive in line with the jurisprudence of the European Court on Human Rights. In the judgment of *Salah Sheek v the Netherlands* the European Court on Human Rights outlined the safeguards for applying this concept:

“The Court considers that as a precondition for relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, to gain admittance and be able to settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment.”<sup>46</sup>

As UNHCR notes, Article 8 in its present formulation omits “an essential and even pre-conditional, requirement of an internal protection alternative, i.e. that the proposed location is practically, safely and legally accessible to the applicant”,<sup>47</sup> thus allowing Member States to deny protection to a person who has no accessible protection alternative in reality.<sup>48</sup> Furthermore, some EU countries leave those persons refused protection on the basis of Article 8 but who cannot be returned, in a legal limbo, refusing to grant them a residence permit and access to rights.<sup>49</sup>

Drawing on available evidence on the impact of the Qualification Directive, ECRE recommends a number of additional amendments to Article 8. Firstly, the recast Qualification Directive should provide a strong presumption against the application of the internal flight alternative when the State or agents

<sup>43</sup> Joined cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla, Kamil Hasan, Ahmed Adem, Hamrin Mosa Rashi & Dier Jamal v Bundesrepublik Deutschland*, Opinion of Advocate General Mazák, 15 September 2009, par. 59.

<sup>44</sup> See also paragraph 91 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, (“UNHCR Handbook”).

<sup>45</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ L 326/13 13.12.2005.

<sup>46</sup> ECtHR, *Salah Sheek v the Netherlands*, Application No. 1948/04, 11 January 2007, para. 141.

<sup>47</sup> UNHCR Study, p. 10.

<sup>48</sup> ECRE Information Note, p. 8.

<sup>49</sup> *Ibid.*

associated with the State are the actors of persecution. According to the Michigan Guidelines “There must be a reason to believe that the reach of the agent or author of persecution is likely to remain localized outside the designated place of internal relocation. There should therefore be a strong presumption against finding an ‘internal protection alternative’ where the agent or author of the original risk of persecution is, or is sponsored by, the national government”.<sup>50</sup> At present, a number of Member States allow for the use of Article 8 in such situations, even though refugees can rarely, if ever, expect durable protection anywhere in their countries of origin when persecution is inflicted by State authorities.<sup>51</sup>

Secondly, ECRE also recommends maintaining the requirement to assess whether the applicant “can reasonably be expected to stay” in Article 8 in line with the UNHCR guidelines on “Internal Flight or Relocation Alternative”<sup>52</sup> so as to ensure that the person concerned can relocate to the country of origin and lead a relatively normal life there, without undue hardship.<sup>53</sup> In this respect UNHCR indicates that a “reasonableness analysis” includes the assessment of different factors, including the personal circumstances of the applicant and the possibility for economic survival in the area.<sup>54</sup> A number of Member States already take these elements into consideration.<sup>55</sup>

ECRE supports recast Article 8 making the application of the internal protection alternative conditional on the ability of the applicant to safely and legally travel, gain admittance and settle in the area and deleting the “technical obstacles” derogation.

ECRE recommends amending the recast proposal to provide a strong presumption against the application of the internal flight alternative when the State or agents associated with the State are the actors of persecution.

ECRE recommends maintaining the requirement in Article 8 (1) that the applicant “can reasonably be expected to stay” in order to ensure that the person concerned can relocate to the country of origin and lead a relatively normal life there, without undue hardship.

## 2.4 Acts of persecution - Article 9

ECRE supports recast Article 9 (3) clarifying that a person would also qualify for refugee status when an act of persecution is not committed for reasons related to the 1951 Refugee Convention – that is, on account of race, religion, nationality, membership of a particular social group or political opinion - but protection is withheld on such grounds. This amendment is necessary to address protection gaps arising in particular when persecution emanates from non-State actors:

“In many cases where the persecution emanates from non-State actors, such as militia, clans, criminal networks, local communities or families, the act of persecution is not committed for reasons related to a Geneva Convention ground but, for instance, with criminal motivations or for private revenge. However, it often happens in such cases that the State is unable or unwilling to provide protection to the individual concerned because of a reason related to the Geneva Convention”.<sup>56</sup>

This point is further elucidated in Lord Hoffman’s speech in the case of *Islam v SSHD ex parte Shah*:

“A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they

<sup>50</sup> Michigan Guidelines on the International Protection of Refugees, *the Michigan Guidelines on the Internal Protection Alternative* 1999, para. 15-16.

<sup>51</sup> ELENA Survey, p. 18.

<sup>52</sup> UNHCR, *Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 23 July 2003, (“UNHCR Guidelines on Internal Flight or Relocation Alternative”).

<sup>53</sup> UNHCR Annotated Comments, p. 19.

<sup>54</sup> UNHCR Guidelines on Internal Flight or Relocation Alternative, pp. 5-7.

<sup>55</sup> ELENA Survey, pp. 17-8; UNHCR Study, pp. 59-61.

<sup>56</sup> European Commission, Detailed Explanations, p. 5. On this issue, see also Battjes 2006, pp. 258-60 and Storey 2008, p. 26.

would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is. An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question "Why was he attacked?" would be "because a competitor wanted to drive him out of business." But another answer, and in my view the right answer in the context of the Convention, would be "he was attacked by a competitor who knew that he would receive no protection because he was a Jew."<sup>57</sup>

ECRE recalls that Article 9 (2) provides an illustrative list of possible examples of persecution and is not exhaustive. In accordance with the recast proposal's objective of clarifying the legal concepts in the Directive ECRE recommends adding a recital relating to Article 9 (2) (e) to recognise persecution arising from conscientious objection to military service. This would include situations where the person can establish that mandatory performance of military service will require his or her participation in military actions which are irreconcilable with his or her deeply held moral, religious or political convictions, or other valid reasons of conscience. This interpretation of conscientious objection is consistent with the UNHCR Handbook,<sup>58</sup> evolving human rights law,<sup>59</sup> and actual practice in certain Member States.<sup>60</sup> The recast Directive should more clearly confirm such an interpretation of persecution.

ECRE supports recast Article 9 (3) clarifying that the causal nexus requirement encompasses not only situations when there is an act of persecution but also where there is a failure to provide protection for Convention reasons.

ECRE recommends adding a recital relating to Article (9) (2)(e) to recognise persecution arising from conscientious objection to military service.

## 2.5 Reasons for persecution - Article 10

ECRE welcomes the amendment proposed by the European Commission to Article 10 (1)(d) specifying that gender-related aspects should be given due consideration for the purpose of recognising membership of a particular social group or identifying such a group, and deleting the formulation indicating that gender would not alone create a presumption for the applicability of this provision. ECRE shares UNHCR's view that "[g]ender is a clear example of a social subset of persons who are defined by innate and immutable characteristics and who are frequently subject to differentiated treatment and standards".<sup>61</sup> Some Member States have expanded protection by defining persecution solely by reason of gender as persecution based on membership in a particular social group.<sup>62</sup>

However, ECRE takes the view that Article 10 needs to be further amended to ensure that the concept of "particular social group" is interpreted in an inclusive manner by unequivocally envisaging the granting of protection on the basis of either an innate or common characteristic of fundamental importance (protected characteristics approach) or social perception, rather than requiring both, as Article 10 (1)(d) states now. At present, State practice varies, although in ten Member States it already suffices that one of the two requirements is met for the purposes of defining a particular social group.<sup>63</sup> It is recommended that this approach is adopted throughout the Member States to avoid any protection gaps whereby a particular social group may fulfil only one or the other of these approaches to this 1951 Refugee Convention ground.

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<sup>57</sup> UK House of Lords, *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v* [1999] UKHL 20.

<sup>58</sup> UNHCR Handbook, paras. 167-74.

<sup>59</sup> For example, in General Comment No. 22 (48) on Article 18 ICPPR (right to freedom of thought, conscience and religion), the Human Rights Committee confirmed that a right to conscientious objection can be derived from Article 18).

<sup>60</sup> ELENA Survey, p. 20.

<sup>61</sup> UNHCR Annotated Comments, p.23; ECRE Information Note, p. 10.

<sup>62</sup> ELENA Survey, p. 6.

<sup>63</sup> Either on the basis of national law or jurisprudence; ELENA Survey, p. 20.

ECRE supports recast Article 10 (1)(d) specifying that gender-related aspects of an asylum claim should be duly considered in terms of establishing membership of a particular social group.

ECRE recommends further amending Article 10 (1)(d) to specify that, for the purposes of defining a particular social group, it suffices that one of the two requirements – either innate characteristic or social perception is met.

### **Cessation – Articles 11 and 16**

ECRE supports recast Articles 11 (3) and 16 (3) incorporating an exception to cessation in relation to compelling reasons derived from previous persecution as set out in Articles 1C (5) and 1C (6) of the 1951 Refugee Convention both for refugees and beneficiaries of subsidiary protection. As noted in the UNHCR Handbook, this exception reflects a general humanitarian principle in recognition that “a person who--or whose family--has suffered under atrocious forms of persecution should not be expected to repatriate”, even though there may have been a change in the circumstances of the country of origin.<sup>64</sup> An example of an appropriate application of this provision would be a torture victim being re-habilitated in the country of refuge who no longer has a well-founded fear of persecution in the country of origin. In such a case the individual can not be expected to return to the country of origin where he or she has been subjected to torture.

ECRE supports the proposed amendments to Articles 11 and 16, which reflect a general humanitarian principle.

### **Content of protection – Article 2 and Chapter VII**

The proposed recast introduces the concept of “beneficiaries of international protection“ which includes both refugees and beneficiaries of subsidiary protection, “so as to reflect the overall approximation of applicable rules“. ECRE supports this approximation as it significantly diminishes the risk of creating two classes of “protected persons“. ECRE reminds the Council and the European Parliament that the objective of establishing a single uniform status for both refugees and beneficiaries of subsidiary protection has been reaffirmed in the Stockholm Programme.<sup>65</sup>

The alignment of both statuses is reflected in Chapter VII of the proposed recast, which includes a range of amendments levelling the social rights granted to beneficiaries of refugee status and subsidiary protection. These include:

- The discretion afforded to Member States to treat differently family members of subsidiary protection beneficiaries regarding access to social rights and benefits is removed (recast Article 23).
- Beneficiaries of subsidiary protection are granted a residence permit valid for at least three years, the same duration as for refugees (recast Article 24).
- The current limitation to issue travel documents to beneficiaries of subsidiary protection “at least when serious humanitarian reasons ... require their presence in another State” is deleted (recast Article 25).
- The provision allowing the limitation of access to employment for beneficiaries of subsidiary protection based on “the situation on the labour market” is deleted. Both categories should gain access to the labour market immediately after status is obtained (recast Article 26).
- The possibility to limit social assistance to core benefits in the case of beneficiaries of subsidiary protection is removed. Access to social welfare should be on the same conditions as nationals for both categories (recast Article 29). The same applies to health care (recast Article 30).
- Subsidiary protection beneficiaries are granted access to integration programmes on the same basis as refugees. It is specified that such programmes could include the introduction of programmes and language training tailored as far as possible to the needs of beneficiaries of international protection (recast Article 34).

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<sup>64</sup> UNHCR Handbook, para 136.

<sup>65</sup> Stockholm Programme, p. 69.

ECRE fully supports the proposed amendments.<sup>66</sup> The new provisions ensure compliance with the principle of non-discrimination, as interpreted by the European Court of Human Rights.<sup>67</sup> It is hard to find an objective justification for the situation established by the current text of the Qualification Directive, where a person fleeing serious harm can be afforded fewer entitlements than a refugee fleeing persecution.<sup>68</sup> This approach enshrines a vision of subsidiary protection as a lesser, temporary form of protection, which is clearly not its purpose. As stressed by the European Parliament, in the Explanatory Statement included in its 2002 report on the Commission proposal, both statuses are meant to be “complementary rather than hierarchical”.<sup>69</sup> There is no indication whatsoever that a well-founded fear of being persecuted will last longer than a risk of serious harm.<sup>70</sup> The needs of all international protection beneficiaries are equally compelling and therefore should be met with the same rights.<sup>71</sup>

Furthermore, it is highly doubtful whether upholding the differential treatment of international protection beneficiaries in terms of the content of protection granted is desirable in practical terms and from the point of view of resources.<sup>72</sup> In this respect, the European Commission notes that the approximation of the rights granted to the two categories of beneficiaries of international protection would “streamline procedures and reduce administrative costs and burdens”.<sup>73</sup> Similarly, it will reduce the incentives of persons granted subsidiary protection to appeal that decision in order to get refugee status, thus contributing to make national asylum systems more cost-effective.<sup>74</sup>

Many Member States already follow this approach and have taken steps towards closing the gaps between the rights provided to refugees and subsidiary protection beneficiaries.<sup>75</sup> However, national legislation still diverges to a significant extent, thus creating a “mosaic of rights” which evidences the Directive’s limitations when it comes to ensuring effective and consistent access of subsidiary protection beneficiaries to basic social rights across the EU.<sup>76</sup> The granting of a lower level of rights works against the integration in their host communities of subsidiary protection beneficiaries, who face a less secure legal status, as well as obstacles to accessing the labour market and the receipt of vocational training. The European Commission has indeed recognised that the current standards in the Directive are not adequate “to achieve the Treaty objective of promoting social cohesion and the integration of legally residing third-country nationals nor to give effect to the integration mandate set by the Tampere and the Hague Programmes.”<sup>77</sup> They are also inconsistent with the Stockholm

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<sup>66</sup> These reflect a long-standing ECRE recommendation. See ELENA Survey, pp. 7 and 31-5; ECRE Green Paper Response, pp. 2 and 18-9; ECRE, [The Way Forward: Towards the Integration of Refugees in Europe](#), (“ECRE Way Forward on Integration”), July 2005 pp. 6 and 22-5; ECRE, [The Way Forward: Towards Fair and Efficient Asylum Systems in Europe](#), (“ECRE Way Forward Asylum Systems”) September 2005 p.47; ECRE Information Note, pp. 11-7.

<sup>67</sup> See ECtHR, *Niedzwiecki v. Germany*, Application No. 58453/00 and ECtHR, *Okpiz v. Germany* Application No. 59140/00, 25 October 2005. The Court did not discern sufficient reasons justifying the different treatment with regard to the granting of benefits to aliens who were in possession of a stable residence permit on one hand and those who were not, on the other. Consequently, the Court ruled that there was a violation of Article 14 ECHR prohibiting discrimination in conjunction with Article 8 of the Convention.

<sup>68</sup> For a discussion on the legal and political grounds for differential treatment among international protection beneficiaries, see Battjes 2007, pp. 49-55 and McAdam 2005, pp. 497-514.

<sup>69</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*, (“EP Report on the proposal for a Qualification Directive”) A5-0333/2002, 8 October 2002.

<sup>70</sup> *Ibid*, p. 53.

<sup>71</sup> For further analysis on this point see J. McAdam, “Status Anxiety: Complementary Protection and the Rights of Non-Convention Refugees”, *University of New South Wales Faculty of Law Research Series* 2010 Paper 1.

<sup>72</sup> *Ibid*, p. 54.

<sup>73</sup> Recast proposal, p. 4.

<sup>74</sup> Battjes 2007, p. 54; Impact Assessment, p. 42.

<sup>75</sup> Impact Assessment, p. 18; ELENA Survey, pp. 31-5. In relation to family reunification for beneficiaries of subsidiary protection, in its report on the application of the Family Reunification Directive, the Commission announced: “The Commission is committed to closing this gap in Community law. It will therefore examine possible amendments to the Qualification Directive to extend Community rules on family reunification to beneficiaries of subsidiary protection”. However, this issue is not addressed in the recast proposal.

<sup>76</sup> FTdA Study on Subsidiary Protection. This limitation is also recognised in the Impact Assessment, p. 1.

<sup>77</sup> Impact assessment, p. 11.

Programme, which reasserts the need to ensure a fair treatment for legally residing third country nationals, through a “more vigorous integration policy [which] should aim at granting them rights and obligations comparable to those of EU citizens”.<sup>78</sup>

ECRE also welcomes the proposed amendments upgrading the content of a number of rights, which include requiring Member States to facilitate access to employment-related education and vocational training for international protection beneficiaries (recast Article 26 (3)); remove obstacles, including financial ones, to the recognition of qualifications (recast Article 28); and ensure equal opportunities in access to accommodation (recast Article 32). These changes are necessary to enhance the integration of international protection beneficiaries, while accommodating the specificities of their situation. For example, due to the forced nature of their migration, these persons may have left behind their diplomas and certificates and be unable to access the institutions which issued them in the country of origin.<sup>79</sup> Recast Article 28 now ensures that such persons have access to procedures for recognition of qualifications obtained in their country of origin allowing them to fulfil their potential in the host Member State. Research also evidences the need for positive action to tackle discrimination and facilitate the access of international protection beneficiaries to private housing.<sup>80</sup> Furthermore, the proposed amendments give practical expression to the Common Basic Principles (CBPs) on integration, the building blocks of EU integration policies.<sup>81</sup> ECRE welcomes the fact that Member States must take into account the situation of vulnerable persons with special needs in implementing the rights and entitlements of beneficiaries of this Directive. In the recast proposal the Commission has clarified that victims of trafficking and persons with mental health problems also have special needs to be taken into consideration. ECRE recalls that the examples of vulnerable persons listed in Article 20 (3) are only illustrative and not exhaustive.

ECRE fully supports recast Chapter VII aligning the level of rights recognised to refugees and subsidiary protection beneficiaries.

ECRE also welcomes amendments upgrading the content of a number of rights in the Directive to accommodate the specific needs of international protection beneficiaries.

## Section II – Issues not addressed in the Commission proposal

This section briefly discusses a number of issues that have not been amended in the Commission proposal but which ECRE would like to see addressed in the future. It reiterates at the same time some of our key recommendations to Member States on how to implement the Qualification Directive in a manner which ensures full consistency with international human rights and refugee law and standards.

### Scope of the Directive

ECRE regrets that the definition of refugee in the Qualification Directive, which otherwise broadly reflects Article 1 A (2) of the 1951 Refugee Convention, is still limited to a “third country national” or a “stateless person” and therefore does not include nationals of the Member States of the EU. The same limitation features in the newly added definition of “applicant” in recast Article 2 (i). This distinction is discriminatory and therefore in breach of Article 3 of the 1951 Refugee Convention.<sup>82</sup> It is also difficult to sustain it in logical terms. As the European Parliament rightly noted on its 2002 report on the

<sup>78</sup> Stockholm Programme, p. 64.

<sup>79</sup> ECRE [Policy Briefing on the Assessment of skills & recognition of qualifications of refugees & migrants in Europe](#), NGO network of integration focal points, 6 March 2007.

<sup>80</sup> ECRE [Policy Briefing on Housing for Refugees and Migrants in Europe](#), NGO network of integration focal points, 6 March 2007; France Terre d’Asile, Panorama des initiatives sur l’accès au logement des réfugiés dans 15 Pays Européens, [http://www.france-terre-asile.org/images/stories/publications/ETUDE-LOGEMENT-version20\\_01\\_2009.pdf](http://www.france-terre-asile.org/images/stories/publications/ETUDE-LOGEMENT-version20_01_2009.pdf). This is a study on 15 European initiatives on access to housing for refugees for e.g. restoring buildings and providing financial assistance.

<sup>81</sup> See in particular CBP 3 (employment), CBP 5 (education) and CBP 6 (access to services and public and private goods). Council of the EU, *Immigrant Integration Policy in the EU*, Council document 14615/04, 19 November 2004.

<sup>82</sup> This provision states “The contracting states shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin”.

proposal for a Directive, “[I]f the EU member states are as safe as the Commission believes, restoring the scope of the proposed Directive to cover simply ‘person or persons’ carries no risk and maintains our international obligations. If the EU member states are not safe, then the provision is needed”.<sup>83</sup>

In practice, the existence of severe discrimination against certain groups such as the Roma in some EU countries is well documented, as is the fact that these persons may find only limited redress in the right to free movement concomitant to European citizenship.<sup>84</sup> In this respect, the recognition as refugees in non-EU countries of persons of Roma descent who originate from EU Member States indicates that the restricted personal scope of the EU asylum *aquis* continues to be unwarranted and unfair.<sup>85</sup> The EU Protocol on Asylum for Nationals of Member States does allow for EU nationals to apply for asylum in limited circumstances given that EU Member States are considered to be safe countries of origin.<sup>86</sup> ECRE continues to recommend that the term “third country national” be replaced by the term “any person” in order to properly reflect Article 1A of the 1951 Refugee Convention.

To ensure compatibility with the 1951 Refugee Convention Member States should apply this Directive to all persons and not limit its application to ‘third country nationals’ or ‘stateless persons’.

### Evidentiary assessment

Article 4 (1) of the Qualification Directive allows Member States to require the applicant to submit all elements needed to substantiate an application for international protection “as soon as possible.” This is somewhat alleviated by the use of the phrase “elements ...at the applicant’s disposal” in Article 4(2). However, research on the implementation of this provision shows that, in practice, most countries count lack of evidence or its late submission against the applicant’s credibility.<sup>87</sup> ECRE has recommended that asylum seekers be granted reasonable time to prepare and provide all necessary evidence for the determination procedure.<sup>88</sup> It should be noted that the 1951 Refugee Convention does not permit States to sanction refugees for a perceived lack of cooperation in any stage of the asylum procedure. Thus, Member States should not apply sanctions against applicants merely for failure to submit all available evidence, or to submit evidence in a timely manner.<sup>89</sup>

Regarding the application of the ‘benefit of the doubt’ principle, ECRE has expressed concerns about article 4 (5)(b) and (d) (respectively, requiring the applicant to justify the absence of relevant evidence, or failure to apply for protection at “the earliest possible time”), as they do not take into account the fact that asylum seekers often have to flee their country without an opportunity to collect documents, and also often have valid reasons for not immediately applying for asylum. Article 4(5)(d) is particularly worrying and failure to apply at the earliest possible time should not impact upon the status of a claim for international protection. As previously stated by ECRE “this provision appears to be an unreasonable construction of Article 31 of the 1951 Refugee Convention that envisages late claims as potentially attracting immigration penalties only, rather than influencing whether or not the applicant qualifies for refugee status”.<sup>90</sup> ECRE believes that in the absence of evidence to substantiate some aspects of the applicant’s account, the benefit of the doubt should be given provided that all available

<sup>83</sup> EP Report on the proposal for a Qualification Directive p. 53.

<sup>84</sup> Fundamental Rights Agency, *The situation of Roma EU citizens moving to and settling in other EU Member States*, November 2009; *Housing conditions of Roma and Travellers in the European Union: Comparative report*, October 2009; OSCE High Commissioner on National Minorities, *Recent Migration of Roma in Europe*, a study by Mr. Claude Cahn and Professor Elspeth Guild, 10.12.2008 (“Roma Migration Report”); Council of Europe, Office of the Commissioner for Human Rights, *Final Report on the Human Rights Situation of the Roma, Sinti and Travellers in Europe*, Comm DH(2006)1, 15.02.2006.

<sup>85</sup> Roma Migration Report, p. 37.

<sup>86</sup> According to Protocol No 24 on asylum for nationals of Member States of the European Union, asylum applications made by nationals of a Member State may be taken into consideration or declared admissible where a Member State takes measures to derogate from its obligations under Article 15 ECHR, where the procedure of Article 7 Treaty on the European Union (TEU) is initiated or applied or if a Member State decides so unilaterally. See OJ 2008 C 115/305.

<sup>87</sup> ELENA Survey, p. 11.

<sup>88</sup> ECRE Way Forward Asylum Systems, p. 40.

<sup>89</sup> ELENA Survey, p. 14.

<sup>90</sup> ECRE Information Note, p. 6.

information has been examined, and the examiner is satisfied as to the applicant's general credibility.<sup>91</sup> At the moment this is not the case in all Member States.<sup>92</sup>

Member States should not automatically consider lack of documents or their late submission as evidence of insufficient cooperation or lack of credibility.<sup>93</sup>

The applicant should enjoy the benefit of the doubt if all available information has been examined and the deciding authority is satisfied as to the credibility of the applicant's claim in accordance with the UNHCR Handbook and the UNHCR Note on the Burden and Standard of Proof in Refugee Claims<sup>94</sup>

### **Protection needs arising *sur place***

ECRE welcomed the inclusion in the Qualification Directive of a definition of international protection needs that may arise *sur place*, in line with the UNHCR Handbook.<sup>95</sup> In the recast proposal ECRE also welcomes the deletion of Articles 20 (6) and (7) which limited the benefits of international protection under the Directive for refugees or beneficiaries of subsidiary protection who obtained their protection status on the "basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognized as a refugee" or as a person eligible for subsidiary protection. However, it is disappointing to note that the opportunity was not taken to amend Article 5 (3), which permits refugee status to be denied to applicants who file a subsequent application "if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin" without prejudice of the 1951 Refugee Convention. ECRE reiterates that the fundamental consideration must be whether the activities may reasonably be expected to give rise to a well-founded fear of being persecuted in the country of origin.<sup>96</sup>

The decisive criteria concerning protection needs arising *sur place* should be whether the applicant's activities or the change of circumstances in the country of origin may reasonably be expected to give rise to a well-founded fear of being persecuted in the country of origin.

### **Eligibility criteria for subsidiary protection**

In the Policy Plan on Asylum, the European Commission affirmed that it intended to propose amendments to the criteria for qualifying for international protection under the Directive, noting that the current wording of the provisions on eligibility for subsidiary protection "allows for substantial divergences in the interpretation and the application of the concept across Member States".<sup>97</sup> Such divergences, resulting in particular from the application of Article 15 (c) on qualification for subsidiary protection against a "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict", have been widely documented. Research has also shown a tendency to narrow the scope of certain notions in this provision, most prominently that of "individual threat".<sup>98</sup> Some Member States require that the applicant is personally targeted or, in line with the restrictive approach enshrined in recital 26, that the applicant faces a greater risk of harm than the general population or a section of it.<sup>99</sup> The result is, UNHCR

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<sup>91</sup> UNHCR Handbook, paras. 203-204. It is noted that under the recast proposal for the Asylum Procedures Directive Article 4(2) provides that the responsible authorities shall receive training in evidence assessment including the principle of the benefit of the doubt.

<sup>92</sup> ELENA Survey, p. 14.

<sup>93</sup> *Ibid.*

<sup>94</sup> Particularly para. 9 and 11 of the UNHCR Note on the Burden and Standard of Proof in Refugee Claims 16<sup>th</sup> December 1998.

<sup>95</sup> UNHCR Handbook, paras. 203-204.

<sup>96</sup> *Ibid.*

<sup>97</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Policy Plan on Asylum, an integrated approach to protection across the EU*, Com (2008) 360 final, 17.6.2008 p. 5.

<sup>98</sup> ELENA Survey, pp. 26-9; UNHCR Study, pp. 82-90. See also Garlick 2007, pp. 62-3.

<sup>99</sup> ELENA Survey, p. 27; UNHCR study, p. 11.

concludes, that “in practice, subsidiary protection is not granted to significant numbers of persons who appear to be in need of international protection.”<sup>100</sup>

The European Commission has argued that modifying Article 15 (c) was eventually deemed unnecessary in view of the ruling by the European Court of Justice (now the Court of Justice of the European Union) in *Elgafaji v. Netherlands* interpreting this provision.<sup>101</sup> While welcoming the guidance given by the ECJ, ECRE notes that there are still issues surrounding its application in Member States as illustrated in the recent judgment of the Dutch Council of State of 26 January 2010 concerning a Somali asylum seeker.<sup>102</sup> In the case, the assessment of the situation in Mogadishu by the State Secretary was mainly based on the fact that the number of civilian casualties in the conflict was not considered high enough to qualify as a situation of ‘indiscriminate violence’. The Court ruled that it is insufficient for the government to simply refer to the number of civilian casualties in the context of an armed conflict when determining the applicability of Article 15 (c).

ECRE advocates that Member States should elect to apply higher standards and a more inclusive approach than the Directive demands and refrain from applying the words “and individual” in Article 15 (c).<sup>103</sup> Furthermore, Member States should not apply an overly technical approach to the nature of the violence that the asylum seeker may face through adopting a narrow interpretation of the term “indiscriminate violence”.<sup>104</sup> In addition, Member States should not apply an inappropriately high standard of proof in respect of Article 15 (c), as indicated by the requirement that the applicant must only demonstrate “a threat” to life or person.

The scope of Article 15 (c) is also limited by its application only in ‘situations of international or internal armed conflict’. It should also cover situations of generalized violence and systematic human rights violations, which do not equate to armed conflicts under international humanitarian law. This would remove any remaining ambiguities and allow for the realisation of Article 15(c)’s key added value, which lies in its potential “to provide protection from serious risks which are situational, rather than individually targeted”.<sup>105</sup> As ECRE has previously stated, subsidiary protection should accrue to any individual entitled to a right of non-return under the European Convention on Human Rights, international human rights law or international humanitarian law.<sup>106</sup> This would reflect Member State’s ECHR obligations to protect individuals against violations of fundamental rights that may take place outside their territory for e.g. the right to liberty and security (Article 5); the right to a fair trial (Article 6); the right to respect for private and family life (Article 8); freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); and the right to an effective remedy (Article 13).<sup>107</sup> This is now even more pertinent under the Lisbon Treaty, which provides for EU accession to the ECHR.

Member States should elect to apply higher standards than the Directive demands and refrain from applying the words “and individual” in Article 15 (c).

<sup>100</sup> UNHCR Study, p. 11.

<sup>101</sup> C- 465/07 *Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie*, Court of Justice of the European Union (Grand Chamber), 17 February 2009. In this ruling, the Court found that Art. 15(c) “covers a more general risk of harm” in contrast with Art. 15(a) and (b), as implied by the term “indiscriminate”. Hence the term “individual” in Art.15(c) is to be understood as covering harm to all civilians, where violence reaches such a high level as to show “substantial grounds” to believe that a civilian, if returned, would face a real risk solely on the basis of being present. The more the applicant is able to show an individual risk due to factors related to personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection, See in particular, paras. 35, 39 and 43.

<sup>102</sup> Raad van State, Case no. 200905017/1/V2.

<sup>103</sup> ELENA Survey, p. 29.

<sup>104</sup> For example see the UK judgment: *KH (Iraq) v Secretary of State for the Home Department* CG [2008] UKAIT 00023. In this judgment the Tribunal took a restrictive interpretation of “indiscriminate violence” in ruling that Article 15(c) did not cover threats that are by reason of all kinds of violence specifying in particular that it did not include purely criminal violence or other non-military violence. The Tribunal also required a ‘consistent pattern’ of violence.

<sup>105</sup> UNHCR, *Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence*, January 2008, p. 6.

<sup>106</sup> ECRE Information Note, p. 10.

<sup>107</sup> UK House of Lords, *Regina v Special Adjudicator (Respondent) ex parte Ullah (FC) (Appellant)* [2004] UKHL 26; *EM (Lebanon) v Secretary of State for the Home Department* [2008] UKHL 64.

Member States should adopt a more inclusive approach by applying Article 15 (c) in a manner which covers situations of generalised violence, which do not amount to international or internal armed conflicts.

Subsidiary protection should be granted to any individual entitled to non-return under the ECHR, international human rights law or international humanitarian law.

### **Exclusion, revocation and exceptions to non-refoulement**

The Qualification Directive includes provisions on exclusion, revocation and non-*refoulement* that fall short of international legal standards.<sup>108</sup> For instance, Article 12 (3) requires the exclusion from refugee status of persons who “instigate or otherwise participate” in the commission of the crimes referenced in this provision, a formulation not included in Article 1F(b) of the 1951 Refugee Convention. More significantly, Article 12 (2)(b) expands upon the text of Article 1F(b) and removes its geographical and temporal limitations, in referring to serious non-political crimes committed at “..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”. This could be interpreted as allowing applicants to be excluded on the basis of crimes committed in the country of refuge pending recognition of their refugee status. ECRE reminds Member States that refugee status is declaratory rather than constitutive; therefore Article 12 (2)(b) should only be interpreted as excluding applicants who committed serious non-political crimes prior to their physical presence in the Member State.

Regarding the grounds for revocation of refugee status, Article 14 (4)-(5) effectively allows refugee status to be denied on security grounds and therefore for reasons that go beyond the (exhaustive) exclusion clauses in Article 1 (F) of the 1951 Refugee Convention. UNHCR has noted that these provisions “run the risk of introducing substantive modifications to the exclusion clauses of the 1951 Convention”.<sup>109</sup> Articles 14 (4) – (5) conflate the 1951 Refugee Convention grounds for exclusion (Article 1F) with exclusion (Articles 32 and 33). Thus ECRE reiterates that it is misleading to call Article 14 a revocation article (as opposed to Article 12, the exclusion article), because no meaningful difference is drawn between revocation and exclusion.<sup>110</sup> Furthermore, under Article 21 the Directive provides for revocation of the right of non-*refoulement* for refugees on the basis of security reasons or that the person in questions constitutes a danger to the community of the state. This already reflects Article 33 (2) of the 1951 Refugee Convention albeit with the modification that Member States may *refouler* a refugee “whether formally recognised or not”.

ECRE has consistently emphasised the importance of interpreting the exclusion clauses of the 1951 Refugee Convention restrictively,<sup>111</sup> and therefore regrets that the European Commission has not seized the opportunity to introduce the necessary changes to this problematic exclusion regime. While it is still early to assess the full impact of these provisions, it appears that the Directive may have served as a tool for an increasingly expansive use of exclusion clauses in the Member States.<sup>112</sup> For example, some countries have defined the notion of instigation or participation with reference to their national criminal laws, rather than to agreed standards of international law such as the 1998 Rome Statute of the International Criminal Court.<sup>113</sup> UNHCR also documents national practice merging provisions on exclusion with provisions which flow from exceptions to the principle of non-*refoulement*.<sup>114</sup>

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<sup>108</sup> Gil-Bazo 2007, p. 246; Battjes 2006, p. 265; McAdam 2007, pp. 14-6 and 23-4.

<sup>109</sup> UNHCR Study p. 94.

<sup>110</sup> ELENA Survey, p. 24.

<sup>111</sup> See in particular ECRE, [Position on Exclusion from Refugee Status](#), March 2004.

<sup>112</sup> UNHCR study, p. 13.

<sup>113</sup> For further information see the Article 25 of the Rome Statute of the International Criminal Court 1998, which deals with individual criminal responsibility.

<sup>114</sup> Article 33(2) of the Refugee Convention; UNHCR Study, pp. 13 and 94.

Member States should apply the exclusion clauses narrowly, given their exceptional nature as a limitation on a human rights provision and in view of the extremely serious consequences that can ensue from a refusal of international protection.

Article 14 (4) and 14 (5) should not be applied by Member States as they misconstrue the provisions of both Article 1F and Article 33 (2) of the 1951 Refugee Convention, placing the Member State in violation of the 1951 Refugee Convention.

### **Concluding Remarks**

ECRE welcomes the opportunity provided in the recast proposal of the Qualification Directive to ensure higher protection standards and to increase the harmonisation of existing protection standards across Europe. However, the recast proposal does not address all the issues surrounding the implementation of this Directive. Accordingly, Member States should ensure that they utilise their ability to adopt more favourable standards under Article 3 of the Directive. During negotiation, rather than exploring the lowest limits of protection it requires, Member States and the EU institutions should recall the Directive's fundamental purpose and use it as a tool for "*the full and inclusive application*" of the 1951 Refugee Convention.

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