

Refugee Status, Subsidiary Protection, and the Right to be Granted Asylum Under EC Law

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NEW ISSUES IN REFUGEE RESEARCH

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Refugee status, subsidiary protection, and the right to be granted asylum under EC law

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Introduction

On 29 April 2004, the Council of the European Union adopted the Directive 2004/83 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 granted¹ (hereinafter the Directive).

The Preamble states that ‘the main objective of this Directive is, on the one hand, to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection, and, on the other hand, to ensure that a minimum level of benefits is available for these persons in all Member States.’² The Directive therefore constitutes the first legally binding supranational instrument of regional scope in Europe that establishes the criteria that individuals need to meet in order to qualify as refugees or as persons otherwise in need of international protection and the rights attached to that status.

The Directive contributes to the clarification of some of the elements of the refugee definition in the UN Convention of the Status of Refugees³ (hereinafter, the Geneva Convention)⁴ that had been interpreted differently by the Member States, such as the recognition that persecution can arise from non-state actors (Art 6),⁵ as well as the recognition of gender and child specific forms of persecution (Art 9(2)).

The Directive also contains controversial provisions, such as the understanding that refugee status may not arise when an internal flight alternative exists (Art 8) and when protection can be provided by non-state actors (Art 7(1)). Furthermore, in order to ascertain the existence of protection (and therefore, the lack of refugee status), it is enough that the state or non-state actors take ‘reasonable steps to prevent the persecution’ (Art 7(2)), regardless of whether those steps lead to the *effective* protection of individuals or not. Other controversial elements of the Directive include the subtle, yet significant, modifications of the wording of the Refugee Convention on matters of cessation and exclusion, as well as provisions on revocation, and the definition and minimum rights guaranteed to persons granted subsidiary protection.

A matter that deserves particular attention is the limited legal competence to adopt Community legislation in the field of asylum. Article 63(1)(c) and Article 63(2)(a) of

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¹ [2004] OJ L/304/12.

² Recital 6.

³ Adopted 28 July 1951, entered into force 22 April 1954, 189 UNTS 137.

⁴ This expression is the one chosen by the Directive, Art. 2(b).

⁵ For a commentary on the judicial interpretation of persecution by non-state actors in France and Germany, see C Phuong, ‘Persecution by Non-state Agents: Comparative Judicial Interpretations of the 1951 Refugee Convention’ (2003) 4 *European Journal of Migration and Law* 521-532.

the Treaty Establishing the European Community⁶ (TEC) -which constitute two of the legal basis for this Directive- only confer powers on the Community for the adoption of *minimum standards*, therefore leaving a wider margin of discretion to Member States than if EC law were to harmonise these matters more fully. As I shall explain in the pages that follow, some of the provisions in the Directive raise issues in relation to their compatibility with the requirement for ‘minimum standards’ in Article 63 TEC.

It is not the purpose of this paper to provide a detailed commentary on the provisions of the Directive,⁷ but rather to undertake an overall assessment of the value of this instrument for refugee protection in Europe by addressing some of the key issues raised by it in light of international refugee and human rights law. I shall argue here that by virtue of its incorporation in an instrument of EC legislation, the obligation of Member States to grant protection and to recognise socio-economic rights to refugees and to other persons in need of international protection confers upon these individuals a subjective right to be granted asylum, protected by the Community legal order and enforceable before national courts and the ECJ. Accordingly, its scope of application and the limitations and derogations to which it may be subjected on security or other grounds, are to be interpreted by reference to the Community’s legal order and in particular, in light of the general principles of Community law, including human rights.

I shall first address the relationship between the Directive and the Geneva Convention, and other relevant international instruments, thus establishing the legal framework within which the Directive is to be interpreted and applied. I will then analyse the legal nature of the right of refugees and other persons to be granted protection and the scope of application of that right *ratione personae*. I shall then look at the limitations that may be placed upon this right within the Community legal order, in particular on security grounds and in relation to the effective enjoyment of the status granted.

The Directive’s refugee and human rights law framework

The Directive is an instrument of secondary EC Legislation. Given the primacy of EC law⁸ and the fact that Member States are required to take all appropriate steps to eliminate the incompatibilities between their obligations under EC law and under public international law (including by amending or denouncing pre-existing

⁶ [2002] OJ C/325/33.

⁷ For detailed commentaries on the Directive, see UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted* (OJ L 304/12 of 30.9.2004), January 2005; and ECRE, *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*, Doc. IN1/10/2004/ext/CN, October 2004. For an analysis of the Directive in relation to subsidiary protection, see J. McAdam, ‘The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime’, (2005) 17 *International Journal of Refugee Law* 461-516; and R. Piotrowicz and C. van Eck, ‘Subsidiary Protection and Primary Rights’ (2004) 53 *International and Comparative Law Quarterly* 107-138.

⁸ The Court of Justice of the European Communities (ECJ) established the primacy of Community law over the law of the Member States in the Case 6/64 *Costa v Enel* [1964] ECR-585.

international treaties that may be incompatible with EC law), as well as the obligation for EC law to comply with human rights as general principles of Community law, the question therefore arises as to how the Directive may relate to international refugee and human rights law.

The Relationship between EC law and international human rights treaties concluded by the member states

The relationship between the Directive and international refugee and human rights treaties for the purposes of establishing the obligations of *Member States*,⁹ is ruled by Article 307 TEC. This provision regulates the relationship between EC law and international treaties concluded by Member States *prior* to the entry into force of the TEC or for acceding states, before the date of their accession. Paragraph 1 of Article 307 establishes that the rights and obligations arising from the said treaties shall not be affected by the provisions of the TEC.

In the *Burgoa* case, the Court observed that paragraph 1 of Article 307 'is of general scope and it applies to any international agreement, irrespective of the subject matter'; it also clarified that the provision does not alter the nature of such agreements, and therefore, it does not 'adversely affect the rights which individuals may derive from [them]'.¹⁰ Therefore, when conflicts of obligations arise between those derived from EC law and those derived from pre-existing international human rights treaties, Member States must give priority to those pre-existing human rights treaties. Yet, the primacy of international human treaties concluded *after* the entry into force of the TEC or for acceding states, after the date of their accession, cannot be derived from Article 307, and therefore, EC law would take priority over those treaties.

Furthermore, despite the primacy of pre-existing treaties, paragraph 2 of Article 307 imposes an obligation on Member States to take all appropriate steps to eliminate the incompatibilities between them and EC law. What exactly is required on the part of Member States to eliminate these incompatibilities was only addressed for the first time by the ECJ in two judgments delivered in July 2000, where the Court elaborated on the scope of application of Article 307 paragraph 2. The Court acknowledged that Member States had a choice as to the appropriate steps to be taken to terminate incompatibilities, but it further stated that '[i]f a Member State encounters difficulties which make adjustment of an agreement impossible, an obligation to denounce that agreement cannot therefore be excluded'.¹¹ However, as Klabbers has pointed out, in

⁹ Although the TEC and the TEU confer powers on the EC/EU to conclude international agreements, international refugee and human rights treaties do not bind the EC/EU *as such*, in absence of accession by the EC/EU to them. In the current state of EC law, there is no legal basis for the EC/EU to accede to human rights treaties (Opinion 2/94 *Accession by the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759). The Constitutional Treaty partly provides for that legal basis in Article 7(2), which contains an obligation for the Union to seek accession to the European Convention of Human Rights.

¹⁰ Case 812/79, *Attorney-General v Burgoa* [1980] ECR 2787, paras 6 and 10 respectively.

¹¹ Case C-62/98 *Commission v Portugal* [2000] ECR I-5171, para 49, and C-84/98 *Commission v Portugal* [2000] ECR I-5215, para 58.

practice, this choice may be restricted to amending or denouncing the pre-existing treaties.¹²

At the time, the ECJ did not explicitly state that the obligation to denounce pre-existing international treaties under Article 307(2) was conditional on fulfilling the requirements established by international law, according to which, denunciation would only be permissible in accordance with Articles 54 and 56 of the Vienna Convention on the Law of Treaties, when the treaty specifically provides for it or when the possibility could be inferred from the character of the treaty or the intention of the parties.¹³ Manzini argued that this must be the case as otherwise, it would not only engage the responsibility of the Member State/s concerned, but it would also deprive paragraph 1 of its *effect utile*, which is to preserve the rights and obligations arising from pre-existing treaties.¹⁴ The ECJ has implicitly confirmed this interpretation in a recent case, where it found that by not denouncing the treaty in question, Austria had not violated Article 307, given that it had not had the opportunity of doing so, in compliance with Article 7(2) of the treaty itself, according to which, the next opportunity for Austria to denounce it is 30 May 2007 at the earliest.¹⁵

The question therefore arises as to whether Member States could be under an obligation derived from Article 307 to amend or denounce international human rights and refugee law instruments incompatible with EC law.

Article 63(1) TEC establishes that:

‘[t]he Council [...] shall [...] adopt [...] measures on asylum, 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*’ (emphasis added).

Therefore, the TEC establishes an obligation for EC secondary legislation on asylum to comply with the Geneva Convention and its Protocol,¹⁶ and arguably with other human rights treaties *as treaties* (and not merely as non-binding sources of general principles of Community Law), which would include the European Convention on Human Rights,¹⁷ the International Covenant on Civil and Political Rights¹⁸ and the Convention Against Torture.¹⁹

¹² J Klabbers, ‘Moribund on the Fourth of July? The Court of Justice on Prior Agreements of the Member States’ (2001) 26 *European Law Review* 196.

¹³ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

¹⁴ P Manzini, ‘The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law’ (2001) 12 *European Journal of International Law* 791.

¹⁵ C-203/03, *Commission v Austria*, judgment of the Court 1 February 2005, paras 61-64, not yet reported.

¹⁶ Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267. For an analysis of the relationship between the Directive and the Geneva Convention, see H Lambert, ‘The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law’ (2006) 55 *International and Comparative Law Quarterly* 184-190.

¹⁷ European Convention on Human Rights and Fundamental Freedoms (adopted 1950, entered into force) 213 UNTS 221.

It could therefore be argued that Article 63 is *lex specialis* to Article 307 as regards the legal effect of international refugee and human rights treaties,²⁰ and that therefore if EC asylum law required Member States to violate their obligations under international refugee and human rights law, the relevant EC law would be invalid without a further obligation on Member States to denounce the said treaties. This interpretation would also guarantee a uniform interpretation of EC law among Member States, which cannot be ensured by the sole applicability of Article 307, as this provision would preserve the effects of international human rights treaties for some Member States, but not for those who only acceded to the relevant instruments after the entry into force of the TEC or after accession.

However, the primacy of international refugee and human rights treaties thus established would only apply to EC secondary legislation whose legal basis is Article 63(1). EC law adopted under a different legal basis (such as Article 63(2) and (3), referring to subsidiary protection and to residence permits) would be exempted from that obligation of compliance, and priority would be given to the obligations arising from its provisions over those arising under international refugee and human rights treaties.²¹

Human Rights as general principles of Community Law

Even when not bound by international refugee and human rights *treaties* as such, EC secondary legislation must nevertheless conform to human rights as *general principles* of Community law. Article 6(2) of the Treaty on European Union,²² establishes that:

‘[t]he 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*’ (emphasis added).

This provision confirms the ECJ’s well established case law, that had already held that fundamental rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, are binding as general principles of Community law²³ and ensures that the legality of EC secondary

¹⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

¹⁹ 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.

²⁰ S Peers, ‘Human Rights, Asylum and European Community Law’ (2004) 24(2) *Refugee Survey Quarterly* 29.

²¹ Member States would nevertheless remain bound under obligations of *jus cogens*.

²² [2002] OJ C/325/5.

²³ Case 29/69 *Stauder* [1969] ECR 419, para 7. A detailed commentary on human rights as general principles of EC law is beyond the scope of this paper. There is extensive literature on this matter; see, for instance, GC Rodríguez Iglesias, ‘The Protection of Fundamental Rights in the Case Law of the Court of Justice of the European Communities’ (1995) *Columbia Journal of European Law* 169-181; K Lenaerts, ‘Fundamental Rights in the European Union’ (2000) *European Law Review* 575-600. For discussions on recent developments in the protection of human rights by the European Union,

legislation, regardless of the legal basis for its adoption, be assessed by reference to international human rights law.²⁴

While not yet legally binding, the Charter of Fundamental Rights of the European Union²⁵ (hereinafter, the Charter) is a most relevant instrument, as it recognises the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States.²⁶ The Charter was incorporated in the Treaty Establishing a Constitution for Europe²⁷ and therefore, its provisions would be legally binding upon the entry into force of this instrument. Human rights norms, including Articles 18 and 19 on the right to asylum and the prohibition of *refoulement* respectively, would therefore acquire the status of primary EC law with which secondary EC legislation would necessarily need to comply. However, the rejection of the Constitutional Treaty by referenda in France and the Netherlands has rendered the fate of the legally binding force of the Charter uncertain.

Despite this lack of legally binding force, the Charter constitutes a reference in determining which human rights are general principles of Community law (and therefore binding) and its authority as a standard of legality for EC law has already been stated by the institutions.²⁸ A few months after its publication, the Commission approved arrangements for the application of the Charter to all legislative proposals. The Commission agreed that '[a]ny proposal for legislation and any draft instrument to be adopted by the Commission will therefore, as part of the normal decision-making procedures, first be scrutinised for compatibility with the Charter.'²⁹ The Directive itself, as adopted by the Council, refers to its compatibility with the Charter and in particular, it states that it seeks to ensure full respect for the right to asylum.³⁰

following adoption of the Charter of Fundamental Rights of the EU, see P Alston and O de Schutter (eds), *Monitoring Fundamental Rights in the EU: The contribution of the Fundamental Rights Agency* (Oxford, Hart, 2005).

²⁴ The Directive 2003/86/EC on the right to family reunification ([2003] OJ L/251/12) has been challenged before the ECJ on its compatibility with human rights standards; *Parliament v. Council and Commission*, Case C-540/03, [2004] OJ C/47/21. In her Opinion, Advocate General Kokkot dismissed the claim, but nevertheless found that Article 8 of the Directive does not guarantee the effective protection of human rights and that accordingly, this provision is against Community law. Advocate General Opinion in Case C-540/03, *Parliament v. Council and Commission*, delivered on 8 September 2005, para 105. The ECJ however, found that the contested provisions do not infringe the right to respect for family life recognised by Article 8 of the European Convention on Human Rights noting that they merely afford a margin of discretion to Member States that requires them to weight the competing interests in each situation. Case C-540/03 *Parliament v Council and Commission*, judgment of 27 June 2006, paras 62-64, not yet reported.

²⁵ [2000] OJ C/364/1.

²⁶ Preamble.

²⁷ [2004] OJ C/314/1.

²⁸ For an analysis of the impact of the Charter for the protection of the rights of individuals in the fields of asylum and migration, see S Peers, 'Immigration, Asylum and the European Union Charter of Fundamental Rights' (2001) 3 *European Journal of Migration and Law* 141-169.

²⁹ SEC(2001)380/3, 13 March 2001, p. 3. In 2005, the Commission adopted a Communication on *Compliance with the Charter of Fundamental Rights in Commission legislative proposals. Methodology for systematic and rigorous monitoring* (on file with author). The main objective of this methodology is 'is to allow Commission services to scrutinise all Commission legislative proposals systematically and rigorously to ensure they respect all the fundamental rights concerned in the course of normal decision-making procedures' (para 6) given that 'the conformity of Commission actions with fundamental rights is a primary aspect of their constitutional legality' (para 8).

³⁰ Recital 10.

Whether protected by the Community legal order as international treaties or as general principles of Community law, human rights constitute a standard of legality of EC legislation in the field of asylum. The difference between human rights obligations as arising from international treaties or as general principles of EC law is however relevant in so far it determines the scope of the right in question and of the limitations and derogations that may be imposed on it.³¹ As the Directive is implemented and interpreted, the contours of the Community law based rights of refugees and other persons in need of international protection shall be developed.

The right to be granted asylum for refugees and other persons in need of protection

The starting point in any consideration on the right to be granted asylum is the acknowledgement that, while this right is the most fundamental one for refugees, at the time when the Directive was adopted, it had not been expressly recognised by any international human rights law instrument (including the Geneva Convention) of either universal or European scope.

The right to asylum however, had already been enshrined in international treaties of regional scope in the Americas and Africa.³² The Directive therefore brings Europe in line with other regions, as it constitutes the first legally binding instrument in Europe of supranational scope that imposes an obligation on states to grant asylum to refugees and other persons in need of protection.³³ It's worth noting that despite the lack of an international recognition of the right to be granted asylum of universal scope, following the entry into force of the Directive, around 100 of the 146 states parties to the Geneva Convention and/or its Protocol are now bound by an obligation under international law (of regional scope) to grant asylum.

The Directive, however, does not word it in these terms. Article 13 establishes that 'Member States shall grant *refugee status* to a third country national or a stateless person, who qualifies as a refugee' (emphasis added). Likewise, Article 18 establishes that 'Member States shall grant *subsidiary protection status* to a third country national or a stateless person eligible for subsidiary protection' (emphasis added). It is therefore necessary to examine what these terms mean for the purposes of the Directive.

Article 2(d) of the Directive establishes that "'refugee status" means the recognition by a Member State of a third country national or a stateless person as a refugee.' This wording is unfortunate, as a person is a refugee within the meaning of the 1951

³¹ For detailed commentary, see above n 21 at 24-38.

³² Article 22 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 114 UNTS 123, and Article 12(3) African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, printed in (1982) 21 I.L.M. 58. Grahl-Madsen considered that while the right of asylum had traditionally referred to the right of states to grant asylum, it was undeniable that the evolution of International Law and State practice in relation to refugee protection, allows one to speak of a right of the individual to (be granted) asylum. A Grahl-Madsen, *Territorial Asylum* (Stockholm, Almqvist & Wiksell International, 1980), 2.

³³ This obligation, which was enshrined in Art. 5 of the Commission's proposal, was immediately rejected by the Council at the very beginning of the negotiations process (see Doc. 10596/02 ASILE 36, 9 July 2002) although it was later reinstated.

Convention as soon as he fulfils the criteria contained in the definition³⁴ -regardless of whether his refugee status has been formally determined- something that the Directive itself recognises.³⁵ As UNHCR has pointed out, ‘the Qualification Directive appears to use the term “refugee status” to mean the set of rights, benefits and obligations that flow from the recognition of a person as a refugee. This second meaning is, in UNHCR’s view, better described by the use of the word “asylum”’.³⁶

A similar analysis can be made of the protection granted to other persons in need of protection, who don’t meet the criteria for the recognition of refugee status. Article 2(f) establishes that “subsidiary protection status” means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection.’

Despite the fact that the term asylum is not used in the Directive, one of its legal basis, as indicated above, is Art. 63(1)(c) TEC, which specifically refers to measures on asylum. Furthermore, the Directive itself states its compliance with the Charter and in particular with the right to asylum in Article 18.³⁷

Indeed, if asylum is defined as the protection accorded by a State to an individual who comes to seek it³⁸, the name that this protection status may receive is irrelevant, as long as it includes -at a minimum- the right to enter, the right to stay, the right not to be forcibly removed and the recognition of the fundamental rights of the individual. Furthermore, despite the trend in European Union (EU) instruments to refer to asylum in relation to Geneva Convention refugees only, asylum as an institution is not restricted to the category of individuals who qualify for refugee status. Rather on the contrary, this institution predates the birth of the international regime for the protection of refugees and has been known and practised throughout history protecting different categories of individuals.³⁹

In accordance with the transposition period established by Article 38, Member States are under an obligation to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 10 October 2006. Should they fail to do so, or should they transpose the Directive incorrectly, given the direct effect of EC law, individuals may nevertheless derive rights from the Directive upon the expiration date for transposition by invoking the direct effect of its provisions,⁴⁰ provided that they are clear and unconditional, and do not require a discretionary

³⁴ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1979, para 28.

³⁵ ‘The recognition of refugee status is a declaratory act.’ (Recital 14)

³⁶ UNHCR, Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004). January 2005, 10-11.

³⁷ Article 18(2) on the right to asylum establishes that ‘[t]he right to asylum shall be guaranteed with due respect for 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 Constitution.’

³⁸ Resolution of the Institute of International Law, September 1950. Institut de Droit International. *Annuaire de l’ Institut de Droit International*. Session de Bath, 1950. Vol. 43-II.

³⁹ On the historical evolution of the institution of asylum, see for instance A Grahl-Madsen, *Territorial Asylum* above n 33.

⁴⁰ Case 9/70 Grad [1970] ECR 825, para 5.

implementing measure.⁴¹ Articles 13 and 18 arguably meet the requirements for direct effect, and therefore, even when Member States fail to transpose the right to be granted protection into their domestic legal orders, or when they do so incorrectly (for instance, by imposing limitations incompatible with the right), individuals may nevertheless invoke this right as directly deriving from these provisions, including in legal procedures before courts.⁴²

The right to be granted protection as an EC law based right has therefore important implications in relation to the restrictions that Member States may impose to its effective enjoyment, as well as for its protection by national courts and under the European Convention of Human Rights, as I shall discuss below.

Scope of application of the right to be granted asylum

The Directive is applicable to refugees within the meaning of the Geneva Convention, as well as to other persons who, despite not fulfilling the criteria in this instrument are nevertheless protected under international human rights law against forced removal or the refusal of entry. The Directive also makes it clear that individuals who fall under the exclusion clauses of the Directive are not refugees or persons eligible for subsidiary protection within the meaning of this instrument.

The refugee in EC law

Art. 2(c) of the Directive defines a ‘refugee’ as:

‘a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it, and to whom Article 12 does not apply.’

While the Directive broadly reflects the terms in Article 1A of the Geneva Convention, not surprisingly, it is limited to third-country nationals and stateless persons, thereby excluding EU nationals from the protective scope of this instrument. This is in line with Protocol 29 to the TEC on asylum for nationals of Member States of the European Union.⁴³ This Protocol was the result of pressure exercised by Spain to prevent the examination of asylum applications by Member States lodged by EU nationals indicted or convicted of terrorist crimes, on the grounds that such

⁴¹ Case 44/84 *Hurd* [1986] ECR 29, para 47.

⁴² On the issue of enforceability of individual rights in the Community legal order, see T Eilmansberger, ‘The Relationship between Rights and Remedies in EC Law: In Search of the Missing Link’ (2004) 41 *Common Market Law Review* 1199-1246.

⁴³ European Union, *Selected instruments taken from the Treaties*, Book I, Volume I (Luxembourg: Office for Official Publications of the European Communities, 1999) 561.

applications were unfounded and aimed at delaying extradition proceedings and to give publicity to their cause.

The Protocol introduced a prohibition to examine asylum applications lodged by nationals of the EU's Member States. It nevertheless allowed for several exceptions, including the unilateral decision by any given Member State to do so,⁴⁴ which in practice deprives the prohibition of much of its impact. Although the Protocol constitutes an unnecessary statement (given that the exclusion clauses in the Geneva Convention suffice to accommodate state concerns in this regard), as a matter of law, Member States remain free to fulfil their international legal obligations towards refugees and asylum-seekers, including the one enshrined in Article 3 of the Geneva Convention not to discriminate on the grounds of nationality.⁴⁵

The Directive contains provisions developing the terms in the Geneva Convention definition, thus providing for the meaning of terms including persecution, actors of persecution, race, religion, nationality, particular social group, and political opinion. A detailed analysis of the issues raised by these provisions is beyond the scope of this paper.⁴⁶

Subsidiary protection for non nationals protected by international human rights law

The Directive is also applicable to individuals who, despite not qualifying as refugees within the meaning of the Geneva Convention, can nevertheless claim the protection of international human rights law on certain grounds. I have argued elsewhere that international human rights law has evolved in a manner that has conferred individuals falling within its protection scope protection claims vis-à-vis the State where they find themselves. Therefore, in addition to refugees within the meaning of the Geneva Convention, there are other categories of individuals that have a right to protection under international law and accordingly, they are 'refugees' in a broader sense.⁴⁷ The refugee in this broader sense includes not only those who have a well founded fear of persecution, but also those who have a substantial risk to be subjected to torture or to a serious harm if they are returned to their country of origin, for reasons that include war, violence, conflict and massive violations of human rights.⁴⁸

⁴⁴ Para (d) of its sole Article.

⁴⁵ In fact, Belgium introduced a Declaration to this Protocol, whereby 'in accordance with its obligations under the 1951 Geneva Convention and the 1967 New York Protocol, it shall, in accordance with the provision set out in point (d) of the sole Article of that Protocol, carry out an individual examination of any asylum request made by a national of another Member State.' European Union, *Selected instruments* (Luxembourg: Office for Official Publications of the European Communities, 1999) 737. In its commentary to the Directive, UNHCR recommends that implementing legislation make clear that protection under the Geneva Convention should be granted to all applicants who fulfil the Convention's refugee definition. UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection granted (OJ L 304/12 of 30.9.2004)*, January 2005, UNHCR Comment on Article 1.

⁴⁶ See above n 8.

⁴⁷ MT Gil-Bazo, 'La protección internacional del derecho del refugiado a recibir asilo en el Derecho internacional de los derechos humanos', in FM Mariño Menéndez (ed) *Derecho de Extranjería, Asilo y Refugio*, 2ª edición (Madrid, Ministerio de Asuntos Sociales, 2003) 691-692.

⁴⁸ Goodwin-Gill, 'Asylum: The Law and Politics of Change', 7 *IJRL* 7 (1995)

Article 2(e) of the Directive recognises these developments and defines a ‘person eligible for subsidiary protection’ as:

‘a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, 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’.

The Directive further lists in Article 15 the international human rights law grounds that give rise to subsidiary protection status:

- (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 scope of application of subsidiary protection is therefore limited to those who are protected against violations of their right to life and freedom from torture or other inhuman or degrading treatment (in their country of origin), as well as those at risk of individualised threats in situations of armed conflict. This limited scope of application is disappointing, as it does not include all individuals who are not removable under international human rights law grounds.⁴⁹

Given that Member States remain under an *obligation* of international law not to remove these broader categories of individuals, and they often do so by granting them some formal status, the Directive goes against its stated objective ‘to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection’⁵⁰ by creating a category of persons protected by EC law, *in addition* to those that shall remain protected by the national legal orders of Member States *in fulfilment of their international obligations*. As Gilbert has pointed out, the Directive as drafted is seriously misleading about the scope of the Member States’ international legal obligations, as it seems to suggest that *all* those outside the scope of application of the Directive are allowed to remain by Member States on

⁴⁹ For an overview of complementary protection mechanisms see, R Mandal *Protection Mechanisms Outside of the 1951 Convention (“Complementary Protection”)* UNHCR, Department of International Protection, Doc. PPLA/2005/02, June 2005. For an overview of the protection of refugees under the European Convention of Human Rights, see N Mole, *Asylum and the European Convention on Human Rights* (Strasbourg, Council of Europe, 2002). For an overview of the obligations of states under international human rights treaties regarding entry and forced removal, see MT Gil-Bazo, *The Right to Asylum as an Individual Human Right in International Law. Special Reference to European Law* (Ann Arbor: UMI, 1999), 213-426.

⁵⁰ Recital 6.

purely compassionate or humanitarian grounds (Recital 9), rather than on the basis of their international obligations.⁵¹

Furthermore, while international monitoring bodies have consistently found that international human rights law does not confer a right of entry and residence on non nationals, an incipient case law has been developed in this regard. The European Court of Human Rights has found that in light of the positive obligations of states to guarantee the rights in the Convention, the continuous refusal to recognise the right of permanent residence to certain categories of individuals with a particular connexion to the State constitutes a violation of Article 8 of the Convention. The Court has also established that limitations on this right are only justified on very serious grounds.⁵²

Likewise, the United Nations Human Rights Committee has established that the right to enter one's own country enshrined in Article 12(4) of the International Covenant on Civil and Political Rights applies not only to nationals but had a wider scope of application, covering individuals who despite not been nationals in the formal sense, are not foreigners within the meaning of Article 13 of the Convention, although they may be so to other effects. The Committee further clarified that while it is not possible to elaborate an exhaustive list of cases protected by Article 12(4), it would at a minimum cover individuals that due to their special connexion or entitlements vis-à-vis a particular State cannot be considered a mere foreigner.⁵³ Therefore, it is arguable that a right to be granted *some status*, beyond the mere prohibition of removal or denial of entry, may be derived from international human rights law under certain circumstances.

Accordingly, the Commission proposal reflected better the existing and evolving obligations of states under international human rights law, as it included a general clause as qualifying grounds for subsidiary protection, namely, a well founded fear to be subjected to a 'violation of a human right, sufficiently severe to engage the Member State's international obligations.'⁵⁴

Given the limited qualifying grounds for subsidiary protection, and the limited rights attached to this status, a so-called 'rendez-vous' clause was included in Article 37 of the Directive making it a priority to review this provision, as well as those relating to access to employment and to integration facilities. According to this provision:

'By 10 April 2008, the Commission shall report to the European Parliament and the Council on the application of this Directive and shall propose any amendments that are necessary. These proposals for amendments shall be made by way of priority in relation to Articles 15, 26 and 33'.

⁵¹ G Gilbert, 'Is Europe Living Up to Its Obligations to Refugees?' (2004) 15 *European Journal of International Law* 980.

⁵² *Sisojeva et autres c. Lettonie*, Application No. 60654/00, judgment of 16 June 2005, paras 104-105, and 108.

⁵³ *Stewart v Canada*, Communication No. 538/1993, views of 1 November 1996, Doc. CCPR/C/58/D/538/1993, of 16 December 1996.

⁵⁴ Article 15(b) 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.

A need for two separate protection regimes?

While the protection of non nationals who do not qualify for refugee status, but who fall under the protective scope of international human rights law is a most welcomed development, the question arises as to whether there is a need for a separate status, or whether a correct interpretation of the Geneva Convention would cover all persons in need of international protection.

Spijkerboer has argued that the necessity to develop a separate status for subsidiary protection is a political, rather than a legal one, arising from the restrictive interpretation of the term refugee in the Geneva Convention, which finds no support in the definitions of refugees prior to this instrument and the *travaux préparatoires* to the Geneva Convention. If the Convention definition was to be interpreted correctly, this is, as encompassing victims of collective persecution, rather than as being individual in nature, the need for subsidiary status would be much more limited than it appears today.⁵⁵ Subsidiary protection would only be needed to cover situations when the harm does not amount to persecution or when there is no nexus between persecution and the Convention recognised grounds.

Furthermore, the view has been advanced that Geneva Convention status should attach to *all* those whom the principle of *non-refoulement* (as developed by international human rights law) applies, therefore questioning the existence of a legal basis under international law for a separate subsidiary protection status. On the basis of the premise that 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, McAdam has convincingly argued that since the Geneva Convention is a specialist human rights instrument, the protection it embodies is necessarily extended by developments in human rights law. The Geneva Convention therefore acts as a form of *lex specialis* which applies to persons encompassed by that extended concept of protection, regardless of whether the legal source of the states' obligation to protect derives from the Geneva Convention itself or from other international human rights treaties.⁵⁶

The Directive is a missed opportunity to combine in one status all protected categories of individuals under international law, this is, Geneva Convention refugees and the broader category of non-removable individuals under international human rights law. Therefore, rather than establishing two separate status, the Directive could have reflected the evolution of international law by joining in one instrument the various legal grounds on which individuals are protected under international law and creating one status of the 'refugee' broadly considered under EC law.⁵⁷

⁵⁵ T Spijkerboer, 'Subsidiarity in Asylum Law. The Personal Scope of International Protection', in D Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Brussels, Bruylant, 2002) 28-29.

⁵⁶ J McAdam, 'Humane Rights: The Refugee Convention as a Blueprint for Complementary Protection Status', paper presented at 'Moving On: Forced Migration and Human Rights' Conference, NSW Parliament House, 22 November 2005.

⁵⁷ This position is not unknown to industrialised states. The US and Canada broadly follow this practice and some EU Member States used to do so, for instance, Spain until 1994. For a detailed analysis on the reasons behind the move towards a restriction on the right to asylum under Spanish legislation, see MT Gil-Bazo, 'The Role of Spain as a Gateway to the Schengen Area: Changes in the Asylum Law and their Implications for Human Rights' (1998) 10 *International Journal of Refugee Law* 214-229.

The Directive, however, reflects the duality of protection status that is most common in European national legislations: refugee status for those falling under the scope of the Geneva Convention and the so-called subsidiary protection for those protected by international human rights law.⁵⁸ This position reflects the common practice among Member States, where different forms of protection cohabit, among which, Convention status would be the most complete, highest protection status.

However, it is important to note that despite the special position that the Geneva Convention enjoys, refugees further benefit from the protection of international human rights law. The rights recognised under international human rights law are not only applicable to individuals with a 'subsidiary protection' claim, but also to Convention refugees, who can benefit from the greater protection that sometimes international human rights law may provide.

This has been acknowledged by early commentators and by international human rights monitoring bodies. Grahl-Madsen noted that developments under international human rights law occurred since 1951, which covered many of the aspects regulated by the Geneva Convention, had resulted in many of the rights in it enshrined being also protected and even expanded under these instruments, which protected legally recognised refugees as well as *de facto* refugees. He felt that an indepth analysis of these developments was necessary in order to ascertain the way in which the status of refugees could be improved.⁵⁹

Nevertheless and despite its limited scope of application in relation to individuals who don't meet the Geneva Convention criteria, as well as the limited content of the status to them granted, the Directive constitutes the first supranational legally binding instrument in Europe that recognises the status of individuals protected under international human rights law. Given that the Directive makes it explicit that beneficiaries of subsidiary protection are those who do not qualify as a refugee and that the ECJ may be ultimately called to interpret the refugee definition in the Geneva Convention, the Directive leaves room for skilful lawyers to argue an inclusive interpretation of the Geneva Convention definition in accordance with the terms of the Convention itself, the Directive, the EC's legal order, and with the rules of treaty interpretation, rather than on the basis of scattered state practice.⁶⁰

Security grounds as limitations on the right to asylum: Exclusion and *non-refoulement*.

How best to incorporate security concerns in the Directive was a matter of much debate during negotiations. It's worth noting that the Commission's proposal was adopted on 12 September 2001 and therefore was negotiated under the climate that followed the attacks in the US the previous day. The provisions finally agreed reflect

⁵⁸ For a survey of subsidiary protection status in the European Union, see ECRE, *Complementary/Subsidiary Forms of Protection in the EU Member States*, 2004.

⁵⁹ A Grahl-Madsen, 'Refugees and Refugee Law in a World of Transition' (1982), in *Transnational Legal Problems of Refugees. 1982 Michigan Yearbook of International Legal Studies* (New York, 1982) 78-79.

⁶⁰ Such inclusive interpretation would be in line with the conclusions adopted by the European Council in Tampere requiring that the Common European Asylum System be 'based on the full and inclusive application of the Geneva Convention', Conclusion 13, European Council, 15-16 October 1999.

the emphasis to ensure that protection legislation would not become an avenue for the impunity of those suspected of involvement in serious criminal activities and the difficulties faced by Member States in so doing while respecting their international refugee and human rights obligations.⁶¹

The Directive therefore contains provisions on exclusion, revocation and *non-refoulement* that arguably fall short of existing and evolving international law and standards. Article 14 paragraphs 4 and 5 include what constitute *de facto* provisions on exclusion, going beyond what is permissible by the Geneva Convention:

‘4. Member States may revoke, end or refuse to renew the status granted to a refugee by a governmental, administrative, judicial or quasi-judicial body, when:

(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.

5. In situations described in paragraph 4, Member States may decide not to grant status to a refugee, where such a decision has not yet been taken.’⁶²

Likewise, while Article 21 reaffirms the obligation of Member States to ‘respect the principle of *non-refoulement* in accordance with their international obligations.’ (paragraph 1), its paragraph 2 nevertheless contains an exception to the rule, similar to the one enshrined in paragraph 2 of Article 33 of the Geneva Convention:

‘Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoule a refugee, whether formally recognised or not, when:

(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; or

(b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State.’

⁶¹ See Conclusion 29 of the Extraordinary Justice and Home Affairs Council Meeting of 20 September 2001, in which “[t]he Council invites the Commission to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments”. Doc. SN 3926/6/01 REV 6, of 20 September 2001. The Commission presented its views on the matter in its Working Document of 5 December 2001 *The relationship between safeguarding internal security and complying with international protection obligations and instruments*, COM(2001) 743 final.

⁶² Para 6, however, acknowledges that individuals falling under paras 4-5 are entitled to the rights that all refugees enjoy, including those *unlawfully present*, under the Geneva Convention under Articles 3, 4, 16, 22, 31, 32, and 33.

The drafting history of the Directive's provisions on exclusion, revocation and non-refoulement

A careful look at the drafting history of the Directive may explain the unfortunate wording of these provisions. Right at the very first meeting of the Council's Asylum Working Party on the Directive, Article 19 of the Commission's proposal on *non-refoulement* was amended to include a proposal for an exception to the principle, mirroring Article 33(2) of the Geneva Convention. The general obligation enshrined in paragraph 1 was qualified by a new paragraph 2:

'Without prejudice to paragraph 1 a Member State may refoule a refugee or a person eligible for subsidiary protection when there are reasonable grounds for considering:

- (a) him or her as a danger to the security of the country in which he or she is; or
- (b) having been convicted by a final judgement of a particular serious crime, he or she constitutes a danger to the community of that country.'⁶³

However, this move was far from peaceful and only a few weeks later, the added paragraph 2 to Article 19 had been deleted and security concerns had instead become a ground for exclusion, rather than an exception to *non-refoulement*. The exclusion clauses in the draft Directive were thus expanded by adding a new clause excluding individuals from refugee status.⁶⁴

Member States became then divided among these two options to incorporate security concerns in the Directive. Belgium, Finland, the Netherlands, and Sweden –supported by the Commission- opposed security concerns as a ground for exclusion, which they understood as being contrary to the Geneva Convention by effectively expanding Article 1F of the said treaty. In their view, security considerations should constitute an exception to the principle of *non-refoulement*, given that a provision in this regard would mirror Article 33(2) of the Geneva Convention.⁶⁵

The same debate took place in relation to the provisions excluding individuals from subsidiary protection, and to the Commission's proposal replicating Article 1F, a paragraph was added to ensure that persons who constitute 'a danger to the community or to the security of the country in which' they are, would also be excluded from protection.⁶⁶ Only Sweden expressed concern at excluding individuals from subsidiary protection altogether, considering that exceptions to exclusion should be provided in cases where the person risks death penalty or torture in the country of origin. Sweden felt that these exceptions were necessary in order to ensure compliance by Member States with the absolute prohibition to remove individuals under those circumstances, regardless of security or other concerns.⁶⁷

⁶³ Doc. 12199/02 Asile 45, 25 September 2002.

⁶⁴ Article 14(4). Doc. 12620/02 Asile 54, 23 Oct. 2002.

⁶⁵ *Ibid*, Article 14(4) n 2.

⁶⁶ *Ibid*, Art. 17(1)(d).

⁶⁷ *Ibid*, Article 17(1) n 1.

Given the controversial nature of the existing options, the (Danish) Presidency of the EU addressed the Council's Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) in advance of its meeting in early November 2002 with a note explaining the respective rationale and purpose of Articles 1F and 33(2) of the Geneva Convention.⁶⁸

The Presidency noted that in its view 'the difference in treatment of a third country national or a stateless person who is excluded and that of a refugee who is not given the benefit of *non-refoulement* is insignificant'.⁶⁹ The Presidency therefore invited delegations to comment on whether an expansion of the exclusion clauses (which at the time was the preferred option by the majority of Member States to deal with security concerns) was acceptable. Given the opposition to this move by a number of Member States, as explained above, the Presidency also asked SCIFA to comment on whether 'it should be optional for Member States to grant refugee status or subsidiary protection status to a third country national or a stateless person, in spite of the fact that this person has been excluded from international protection'.⁷⁰

Exclusion from Subsidiary Protection

With regards to subsidiary protection, the Presidency stated in its note to SCIFA that although Member States agreed that the Directive's provision on exclusion from subsidiary protection 'should take its outset in Article 1 F of the Geneva-Convention,' they were nevertheless aware 'that they are not bound by any legal obligations with regard to the exclusion from subsidiary protection'.⁷¹ Sweden, however, did not agree with this view and a day later presented a proposal to SCIFA for an additional paragraph to Article 17:

'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*'⁷² (emphasis added).

Despite Sweden's reservation, Member States agreed that it should be mandatory to exclude individuals from subsidiary protection on security grounds,⁷³ a decision reflected in the final wording of Article 17 of the Directive as adopted.

The question arises as to the compatibility of this provision with the concept of 'minimum standards' in Article 63 TEC, and in particular as to whether those

⁶⁸ Doc. 13623/02 Asile 59, 30 Oct. 2002.

⁶⁹ For an in-depth explanation of this position, the Presidency referred delegations to a letter on the matter sent by UNHCR on 26 September 2002. *Ibid*, 3-4.

⁷⁰ *Ibid*, 6.

⁷¹ *Ibid*, 2.

⁷² Doc. 13623/02 ADD 1 Asile 59, 31 October 2002.

⁷³ Doc. 13648/02, Asile 61, 8 November 2002, Article 17.

minimum standards may be *below* those established by international refugee and human rights law, leaving it to Member States to develop them further in order to meet their obligations under international law.

Article 3 of the Directive explicitly establishes that ‘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,’ but it adds a qualification, as this is only allowed ‘in so far as those standards are compatible with this Directive.’ Accordingly, should Member States decide to grant protection to excludable individuals that they are not allowed to remove under international human rights law, this may be interpreted as a breach of Article 3 of the Directive by being incompatible with the obligation to exclude imposed by Article 17 of the Directive.

During the negotiations of the Directive, the Council Legal Service was called to give an opinion on the legal meaning of Article 3. The Legal Service recalled that, as in any other area of Community law, Member States remain free to legislate in areas which are outside the scope of the directive, within the limits of Article 10 TEC, which prohibits Member States from taking any measure which could jeopardise the attainment of the objectives of the Treaty. Accordingly, the Legal Service further noted that Member States were not precluded to legislate in areas which are outside the scope of the Directive, such as those referring to individuals allowed to remain for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, as they do not fall within the scope of the Directive.

However, it took a rather wide interpretation of the term ‘minimum standards’. The Legal Service stated that in order not to annihilate the objective of harmonization, the possibility to introduce more favourable standards allowed for in Article 3 could not be unlimited. It explicitly noted that any deviation in national law from the definitions laid down in Article 2 of the Directive and the related provisions that develop their content, including those on exclusion, would be incompatible with the objective of harmonizing the content of those notions.⁷⁴

As it has been shown above, the Directive’s scope of application does not cover *all* individuals vis-à-vis whom Member States are under an *international obligation* to protect; the question therefore arises as to whether a decision by Member States to grant protection to those individuals in accordance with those international obligations (rather than for mere compassionate or humanitarian reasons) would be considered a breach of EC law.

Therefore, even if the mandatory exclusion from subsidiary protection on security grounds might eventually not be construed as constituting a breach of the minimum

⁷⁴ Doc. 14348/02 JUR 449 ASILE 67, 15 November 2002, paras 5 and 7. Official access to this document has been refused by the Council (with the vote against by Sweden). See Letter from the General Secretariat of the Council of 23 May 2005, refusing full access to Documents 10560/02 and 14348/02, Doc. 9727/05 INF 111 API 85 JUR 240, of 3 June 2005, and Reply adopted by the Council on 24 June 2005 to Confirmatory Application No. 29/c/01/05 to the Council by email dated 2 June 2005, pursuant to Article 7(2) of Regulation (EC) No 1049/2001 for access to documents 10560/02 and 14348/02, Doc. 9729/05 INF 113 API 87 JUR 242, of 13 June 2005. However, the document is available at: <http://www.statewatch.org/news/2002/dec/14348.02.doc>.

standards requirement in Article 63 TEC (should the ECJ uphold the view of the Council Legal Service), the ECJ may nevertheless be called to assess the legality of Article 17 by reference to international human rights, as general principles of Community law.

The ECJ has consistently ruled that rights are not absolute prerogatives and that therefore they can be subject to restrictions in the general interest as long as those restrictions do not constitute a disproportionate and unreasonable interference in relation to the aim pursued, undermining the very substance of that right.⁷⁵ It is therefore possible that the ECJ may find that security grounds constitute an interference with the right to be granted protection under the Directive that is compatible with *Community standards*.

As Peers has pointed out, ‘the risk that the Community institutions might attempt to use the Community standard to justify limitations of rights which are non derogable under the ECHR can be seen in the Commission’s Green Paper on ‘return’ [expulsion] of third country-nationals, in which it asserted that refugees and other persons in need of international protection could be removed if there were public order grounds.’⁷⁶

Given the developments in international law regarding *non-refoulement*, the increasing recognition by the ECJ of the norms enshrined in the European Convention of Human Rights *as interpreted by the European Court of Human Rights*,⁷⁷ the recognition by the Charter itself that it ‘reaffirms [...] the rights as they result, in particular, from [...] the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights’,⁷⁸ and ultimately the monitoring that the European Court of Human Rights may exercise on the implementation by Member States of EC law, would suggest that when called upon the interpretation of rights consistently held as non derogable by international monitoring bodies, the ECJ might interpret EC law based rights in the light of existing international case law.

Should this not be the case, a conflict of obligations would arise for Member States, as they remain bound by their international human rights obligations when implementing Community law. As the European Court of Human Rights established in the case of *T.I. v the United Kingdom*, ‘[w]here States establish international organisations, or *mutatis mutandis* international agreements, to pursue co-operation in certain fields of activities, there may be implications for the protection of fundamental rights. It would be incompatible with the purpose and object of the Convention if Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution.’⁷⁹

However, the judgment of the European Court of Human Rights in *Bosphorus* questions the degree in which the international human rights *accountability* of

⁷⁵ See for instance, Case C-280/93 *Germany v Council* [1993] ECR I-4973 and Case C-122/95 *Germany v Council* [1995] ECR I-973.

⁷⁶ S Peers, ‘Taking Rights Away? Limitations and Derogations’, in Peers and Ward (eds), *The EU Charter of Rights: Politics, Law and Policy* (Oxford, Hart, 2004) 154.

⁷⁷ Case 374/87 *Orkem v Commission* [1989] ECR 3283, para 30.

⁷⁸ Preamble.

⁷⁹ *T.I. v the United Kingdom*, decision of 7 March 2000, 15, *Reports of Judgments and Decisions* 2000-III.

Member States may be upheld when implementing EC law in whose application Member States have no margin of discretion.

In *Bosphorus*, the Court recalled that states can subject themselves to the rule of an international organisation compatibly with the ECHR as long as that organisation has equivalent (understood as comparable rather than identical) standards to the ECHR, in terms of substantive protection and the procedural system for enforcement. While states are ‘considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention,’ the Court established that if such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. The presumption can only be rebutted if it is considered that the protection of Convention rights was manifestly deficient.⁸⁰

In absence of accession by the EC/EU to the European Convention of Human Rights and other international treaties, the risk of different interpretations by the ECJ and the European Court of Human Rights regarding the most fundamental rights, as well as the possible lack of effective international accountability of Member States’ implementation of Community law in this field, cannot be excluded.

Revocation of refugee status and the non-refoulement of refugees

As regards to refugees, Member States all agreed that security concerns needed to be reflected in the Directive, but remained divided between doing so by means of an expanded exclusion clause (therefore breaching the Geneva Convention) or by means of an exception to the *non-refoulement* prohibition (raising issues under Article 3 of the Convention Against Torture and other human rights instruments). Given the requirement in Article 63 TEC that measures on asylum be in compliance with the Geneva Convention and other relevant treaties, as examined above, none of these options was satisfactory.

Another alternative then emerged, namely, to add a new paragraph to a provision on revocation of refugee status that had already been introduced earlier on⁸¹ allowing Member States in security cases to ‘decide not to officially recognise a third country national or a stateless person as a refugee, where such a decision on recognition has not yet been taken.’ However, this provision constituted a *de facto* exclusion clause (regardless of whether it was called so or not) and therefore, the majority of Member States (Austria, Belgium, Finland, Luxembourg, the Netherlands, Portugal, Sweden, and the UK) pronounced themselves in favour of an exception to the principle of *non-refoulement*, which they saw as best fitting the Geneva Convention.⁸²

⁸⁰ *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi (Bosphorus Airways) v. Ireland* [GC], judgment of 30 June 2005, paras 155-156, *Reports of Judgments and Decisions* 2005-V (2006) 42 EHRR 1. For an analysis of this judgment and the doctrine of ‘equivalent protection’, including in relation to EC asylum and migration legislation, see C Costello, ‘The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe’ (2006) 6 *Human Rights Law Review* 87-130.

⁸¹ Article 14B above n 64.

⁸² Art. 14B(5) Doc. 14308/02 Asile 65, 15 November 2002.

Negotiations then proceeded and after further consultations with UNHCR in late November, the EU's Justice and Home Affairs Ministers were presented with a proposal for their approval, where the idea to expand the wording of the exclusion clause in the Directive was abandoned, and security concerns were introduced as a *de facto* exclusion ground in the revocation clause in Article 14B(5), as well as an exception to the *non-refoulement* obligation in Article 19(2).⁸³ And the Council so agreed at its meeting on 28 November 2002.⁸⁴

As stated above, the post September 11 climate explains the desire of Member States to retain discretion in security cases. The controversies surrounding the debate on how best to achieve that objective, as described above, show some willingness on the part of Member States to find an adequate solution. Yet, the outcome is far from adequate, and it seems to reflect the priority given to other considerations, such as the wish to find agreement at the expense of ensuring legal certainty in the respect of the international obligations of Member States. The Council could have, for instance, considered alternative options to deal with non removable individuals who pose a threat to security, such as those offered by international criminal law, in terms of prosecution or extradition.⁸⁵ Therefore, the provisions as adopted have been criticised by commentators as raising issues under international refugee and human rights law.

In relation to *non-refoulement*, the Council (admittedly, after having consulted with UNHCR), seems to have ignored the evolution of international law regarding this norm over the past 50 years⁸⁶ by introducing a clause similar to Article 33(2) of the Geneva Convention in a legally binding instrument of EC law. While this provision may not be at odds with the literal wording of the Geneva Convention, it does not reflect the broader international law obligations of Member States.

On the one hand, all Member States are Parties to the Convention Against Torture, which explicitly prohibits to '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', a provision that has been consistently interpreted as including an absolute prohibition even when security concerns apply, and therefore offering wider protection than the Geneva Convention.⁸⁷ Likewise, the European Court of Human Rights has consistently interpreted that Article 3 of the European Convention of Human Rights enshrines an absolute prohibition to remove anyone to prohibited treatment, regardless of the nature of the activities of the individual.⁸⁸

On the other hand, Member States had already agreed on the wording of this principle in Article 19 of the Charter, which establishes that '[n]o one may be removed,

⁸³ Doc. 14643/1/02 REV 1, Asile 68, 26 November 2002.

⁸⁴ Doc. 15068/02, Asile 77, 13 December 2002.

⁸⁵ For an analysis of the principle *aut dedere aut judicare* in relation to the question of excludable but non removable asylum seekers, see N Larsaeus, 'The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection. The Unresolved Issue of Excluded Asylum Seekers' (2004) 73 *Nordic Journal of International Law* 69-97.

⁸⁶ See Elihu Lauterpacht and D Bethlehem, 'The scope and content of the principle of *non-refoulement*: Opinion', in Erika Feller, Volker Türk and Frances Nicholson (eds) *Refugee Protection in International Law* (Cambridge, CUP, 2003) 87-177.

⁸⁷ *Páez v Sweden*, Communication No. 39/1996 (CAT), Views of 28 April 1997, Doc. CAT/C/18/D/39/1996, of 28 April 1997, para 14.5.

⁸⁸ *Chahal v the United Kingdom* judgment of 15 November 1996, para 80, *Reports of Judgments and Decisions* 1996-V (1997) 23 EHRR 413.

expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.’

Yet, the Directive as adopted allows Member States to *refouler* a refugee as long as such *refoulement* is not prohibited by international law.⁸⁹ Given that the Directive does not refer to extradition or expulsion, but rather to *refoulement*, a literal reading of the Directive would lead to an interpretation *ad absurdum*, as one must conclude that as the law stands today, *refoulement* is in *all* cases contrary to international human rights law, given that this legal term refers precisely to the removal of individuals to prohibited treatment. As one commentator has observed in relation to the limitation clauses in the Charter of Fundamental Rights, ‘one can only hope that the[y] will not be placed on the curriculum for training of future civil servants as examples of model drafting technique.’⁹⁰

A closer examination of this seemingly contradictory wording might make more sense if one looks at the possible motivations behind it. A look at the interpretation that some Member States have been advancing in relation to the prohibition of *refoulement* might shed some light on the matter.

In *Chahal*, the United Kingdom argued that ‘there was an implied limitation to Article 3 (art. 3) entitling a Contracting State to expel an individual to a receiving State even where a real risk of ill-treatment existed, if such removal was required on national security grounds.’ In support for this view, the United Kingdom referred to Article 33(2) of the Geneva Convention. In the alternative, the United Kingdom suggested that ‘the threat posed by an individual to the national security of the Contracting State was a factor to be weighed in the balance when considering the issues under Article 3 (art. 3). This approach took into account that in these cases there are varying degrees of risk of ill-treatment. The greater the risk of ill-treatment, the less weight should be accorded to the threat to national security.’⁹¹ The Court rejected this view and affirmed the absolute nature of the prohibition to remove anyone to treatment contrary to Article 3 of the Convention.

Yet, the United Kingdom continues to object to the absolute nature of the obligation enshrined in Article 3. The suggestion that the Court might need to reconsider its case-law was taken up by the European Commission in its response to the Council’s invitation to examine the relationship between security and protection:

‘Following the 11th September events, the European Court of Human Rights may in the future again have to rule on questions relating to the interpretation of Article 3, in particular on the question in how far there can be a “balancing act” between the protection needs of the individual, set off against the security interests of a state.’⁹²

Most recently, at the time the United Kingdom held the Presidency of the EU, it sought to bring this debate within the EU’s institutional framework by putting the discussion on the revision of the *Chahal* doctrine in the agenda of the Justice and

⁸⁹ The Council felt that there was no need to include a provision in relation to the *refoulement* of individuals with Subsidiary Protection, given that the exclusion clauses also apply on security grounds.

⁹⁰ Above n 77 at 178.

⁹¹ Above n 89, para 76.

⁹² European Commission, above n 62 para 2.3.1.

Home Affairs Council meeting in October 2005.⁹³ The United Kingdom failed to obtain a wide support for its views from other Member States, although Lithuania, Portugal and Slovakia joined in its third party intervention before the European Court of Human Rights in the case of *Ramzy v the Netherlands*.⁹⁴ The United Kingdom made this intervention in the hope that the Court will reconsider its position in *Chahal*, and allow for a balancing test to be made in cases where national security concerns apply.⁹⁵

A closer look at Article 21(2) of the Directive in the light of the above considerations may lead one to conclude that the Community legislator may have wished to ensure that the Directive left the door open for Member States to accommodate any future developments in the interpretation made by international monitoring bodies regarding permissible exceptions to the prohibition of *refoulement*.

However, as international law stands today, Article 21(2) of the Directive in its current wording allows Member States to remove individuals in breach of international law. Even if the Directive does not impose an obligation on Member States to do so, but merely leaves it to their discretion, arguably the provision is in itself contrary to Community law. As the Advocate General has explained in her Opinion on the Directive on Family Reunification, rules of Community law that allow Member States to adopt or maintain norms contrary to fundamental rights are in themselves contrary to those fundamental rights and therefore, contrary to Community law.⁹⁶

Should the ECJ may be called to pronounce itself on the compatibility of this provision with international human rights law (a prerequisite for the legality of EC law), the question arises as to whether the ECJ will depart from its established case-law and uphold the interpretation developed by international human rights monitoring bodies in relation to non derogable rights. The analysis made above in relation to conflicting obligations of Member States under international law and EC law in relation to exclusion from subsidiary protection is also applicable to this context.

Security grounds in EC law

Beyond the specific interpretation of security grounds as limitations on non derogable rights, the question also arises as to the precise scope of security grounds under EC law, as limitations on the more general right to be granted protection derived from the Directive.

⁹³ Council of the European Union, Conclusions of the Justice and Home Affairs Council, Doc. 12645/05 (Presse 247), 12 October 2005, 18.

⁹⁴ Application No. 25424/05, pending.

⁹⁵ See *Observations of the Governments of Lithuania, Portugal, Slovakia and the United Kingdom Intervening in Application No. 25424/05 Ramzy v The Netherlands*, 22 November 2005 (copy on file with author). The Court also allowed third party interventions on 22 November 2005 by the AIRE Centre; Liberty and Justice; and Amnesty International, The Association for the Prevention of Torture, Human Rights Watch, Interights, The International Commission of Jurists, Open Society Justice Initiative and Redress (copies on file with author). These organizations presented the Court with evidence of the evolution of international law (beyond the Court's own jurisprudence) on the absolute prohibition of *refoulement*, as found in international case-law, treaty law and literature.

⁹⁶ Above n 25 para 44.

Guild has argued that while international law places few limitations on a state's obligations to respect the choices of individuals as to the country in which they live, the transfer of competence from Member States to the European Community on matters relating to the entry and stay of non-nationals has resulted in a right of the individual against the Member State in the event of any interference by the sovereign state with the exercise of the choice of the individual. As the Community legislator implements the powers conferred by the Amsterdam Treaty in respect of third-country nationals, they will be entering into a framework already fixed by the development of free movement of persons and the position of third country nationals privileged by agreements between their state of nationality and the Community.⁹⁷ It is in this context that the right to protection as an EC law based right enshrined in the Directive, and its limitations, need to be examined.

The Directive has developed the provisions in Title IV TEC recognising a right to be granted protection for refugees and other persons protected by international law against forced removal or the refusal of entry. EC law however, allows Member States to restrict rights on certain grounds.

Given that the Directive has only been recently adopted, the ECJ has not yet had the opportunity to clarify the scope and interpretation given to the concepts of 'danger to the community' or 'danger to the security of Member States' enshrined in the Directive as grounds for exclusion, revocation, *refoulement*, and the concepts of 'national security' and 'public order' included in the Directive as limitations to the right to access to benefits, residence permits or travel documents. However, by virtue of their incorporation in an instrument of EC law, these concepts are subject to the principles applicable to the interpretation of limitations to the effective exercise of EC law based rights.

The limitations that Member States are allowed to impose on entry or residence of foreign nationals that currently fall under the scope of application of EC law on 'public policy' and 'public security' have been the object of extensive interpretation.⁹⁸

The principles applicable to the interpretation of these concepts may be referred to in the future in relation to the interpretation of the similar concepts enshrined in the Directive. In the case of the right to free movement of EU citizens, Member States may refuse them access to their territory when that access would *in itself* constitute a danger to public policy, public security or public health.⁹⁹ The ECJ has held that this exception is to be interpreted narrowly as it constitutes a limitation of the right to free

⁹⁷ E Guild, 'Discretion, Competence and Migration in the European Union', (1999) 1 *European Journal of Migration and Law* 62-67.

⁹⁸ For an analysis of the right of residence of foreigners and the limitations that may be imposed under EC law on public security and public order, see E Guild, 'Security of Residence and Expulsion of Foreigners: European Community Law', in E Guild and P Minderhoud (eds), *Security of Residence and Expulsion. Protection of Aliens in Europe* (The Hague, Kluwer, 2001) 59-80.

⁹⁹ Article 39(3) EC. This provision was developed in Directive 64/221/EEC on the coordination of special measures concerning the movement or residence of foreign nationals which are justified on grounds of public policy, public security or public health [1964] OJ 56/850. The Directive has been replaced by Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L/158/77, that codifies all existing Community law on freedom of movement of EU citizens.

movement and therefore, it requires that the presence or conduct of the individual constitute a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society.¹⁰⁰

In its Communication on Restrictions on Freedom of movement for EC nationals, the Commission sought to clarify the correct application of Community law on this matter, in light of the existing case law, legislative developments and the increasing number of complaints against Member States for the incorrect application of the restrictions.

The Commission recalled that measures on entry and expulsion of non nationals must be taken against a common background of respect for human rights and democratic principles, and that therefore 'any application of the notions of public policy and public security by the Member States will not only be subject to strict scrutiny so that their scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community, but also that such Community law scrutiny will be inspired by the basic human rights are enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms'. Moreover, the measures adopted on these grounds must be applied in accordance with the principle of proportionality, which requires justified grounds; justified balance between measure and objective; and justified balance of interests between individual and the State.¹⁰¹

Given the status of general principles of Community law as part of the Community legal order, whose infringement constitutes an infringement of the Treaty itself or of any rule of law relating to its application,¹⁰² the ECJ may in the future resort to general principles of Community law, other than human rights, to assess the validity and legality of restrictions on the right to be granted protection. Some of the principles already held by the ECJ as general principles of Community law include the right to sound administration, to legal certainty, to an effective remedy, the principle of non-discrimination, of the rule of law, of fairness, of equity, and the obligation of public authorities to make good the damage cause by an unlawful act or omission, to name a few.¹⁰³

In addition to the principles that apply in the Community legal order and the scrutiny of Member States' action by the Community institutions, Member States may remain subjected to scrutiny by the European Court of Human Rights and other international monitoring bodies for their compliance with international human rights law in the safeguarding of *Community law based rights*.

In a recent case, the European Court of Human Rights has found a violation of Article 8 of the Convention in a case relating to the delay of more than 14 years on the part of

¹⁰⁰ Case 36/75 *Rutili* [1975] ECR 1291, para 28; Case 30/77 *Bouchereau* [1977] 1999, para 35.

¹⁰¹ European Commission, Communication on the special measures concerning the movement and residence of citizens of the Union which are justified on grounds of public policy, public security or public health (Directive 64/221/EEC), COM(1999)372 final, 19 July 1999, 8.

¹⁰² Case T-54/99 *max.mobil.Telekommunikation Service v Commission* [2002] ECR II-303, paras 48 and 57.

¹⁰³ For an overview of general principles of Community law and their standing in the Community legal order, see K Lenaerts and P Van Nuffel, and R Bray (ed), *Constitutional Law of the European Union* (Sweet & Maxwell, 2005) 711-719.

the French authorities to issue a residence permit to a Spanish national, a right that the applicant derives from Community law.

The Court recalled its established case law regarding the lack of a right to entry or residence of non nationals under the Convention, but felt that the case under consideration required a special approach due to the fact that the right to be issued a residence permit was one that the applicant enjoyed directly under EC law. The Court further referred to the ECJ's well established case law that the issuance of a residence permit for EU nationals is of declaratory nature. Accordingly, the Court considered that Article 8 of the Convention needed to be interpreted in the light of Community law and in particular of the obligations imposed on Member States regarding the entry and residence of non nationals.¹⁰⁴

Given that the right to be granted protection derives from the Directive and that the recognition of refugee status is a declaratory act,¹⁰⁵ the Court might in the future pronounce itself on breaches of the Convention in light of the obligations of Member States towards refugees and other protected persons derived from Community law.

Effective exercise of the rights attached to protection status

The content of the status recognised to refugees in the Directive mostly reflects -and sometimes expands- that of the Geneva Convention, for instance, in relation to the right to access employment, education and health care, notwithstanding concerns in relation to other provisions, as indicated above. Regrettably, Article 34 of the Geneva Convention, which requires States Parties to facilitate the naturalisation of refugees, has not been reflected in the Directive.

On the contrary, the status accorded in the Directive to persons under subsidiary protection is either limited or largely left to the discretion of Member States. The measures adopted by Member States to give content to these provisions will therefore be scrutinised in relation to their compliance with international law and for their ability to ensure the *effective* enjoyment of the right to be granted protection.

Apart from the level of rights that protected persons may be able to claim, the question arises as to the extent in which access to the rights recognised may be restricted by the imposition of administrative requirements. Recital 30 of the Preamble establishes that:

‘[w]ithin 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.’

This requirement found its way into the Directive at the very end of the negotiations process. Although the Directive had found provisional agreement by Member States (pending reservations by Germany and Austria) at the Justice and Home Affairs

¹⁰⁴ *Aristimuño Mendizabal v France*, Application No. 51431/99, judgment of 17 January 2006, paras 65-69, not yet reported.

¹⁰⁵ As the Directive itself recognises, Recital 14 of the Preamble.

Council meeting of June 2003,¹⁰⁶ the preparations for the formal adoption of this instrument within the time-limit set by the Treaty of Amsterdam, required the lifting of reservations by Germany and Austria.

This allowed the United Kingdom to reopen the debate on provisions already agreed and to which it had not entered reservations at the time, regarding the level of socio-economic rights that would be recognised under the Directive. Although the proposed reduction of the level of rights was not agreed by all other Member States, a decision was reached to include a recital in the Preamble allowing Member States to require a residence permit as a prerequisite for the enjoyment of certain socio-economic rights.¹⁰⁷

Given that the Preamble has been at times greatly influential in the interpretation of secondary legislation by the European Court of Justice,¹⁰⁸ the question therefore arises as to what value this recital may have as a means to prevent the enjoyment of the rights attached to refugee and subsidiary protection status.

On the one hand, Article 24 of the Directive imposes an obligation on Member States to issue residence permits, although this obligation is qualified. Firstly, it only requires Member States to do so 'as soon as possible' after the status has been granted. Secondly, it allows for exceptions when 'compelling reasons of national security or public order otherwise require'. Therefore, in practice, protected persons may have to wait long delays before they see their residence permit issued, or may never see it issued at all, which could prevent their effective access to the rights attached to the status that they have been recognised.

On the other hand, given that residence permits are issued with a limited validity (3 years for refugees and 1 year for persons with subsidiary protection), the non renewal of permits may become an easy way for Member States effectively to deny protection without having to engage in a formal procedure to withdraw status. Explicit indication of this possibility can be found in Art. 21(3), whereby 'Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee' who falls under the *non-refoulement* exception in Article 21(2) for constituting a danger to the security of the Member State where he finds himself in or to the community of that Member State.

Therefore, there are a number of instances where individuals who have seen their refugee status recognised or subsidiary protection granted, may nevertheless find themselves undocumented in the country of asylum, and therefore prevented from enjoying the rights attached to their status. The question therefore arises as to the extent to which holding a resident permit may constitute a valid requirement for the enjoyment of the subjective rights of individuals under the Directive.

While the ECJ has already ruled that Member States may require individuals to comply with certain administrative formalities in order to have their rights

¹⁰⁶ Doc. 10576/03 Asile 40, 19 June 2003.

¹⁰⁷ Doc. 7482/04 Asile 16, 22 March 2004, Art. 22. The Preamble was subsequently agreed by Justice and Home Affairs Counsellors on 5 April 2004, in preparation for the adoption of the Directive by the Council on 29 April 2004. Doc. 8042/04 ASILE 22 OC 319, 5 April 2004.

¹⁰⁸ See for instance Case C-184/99 *Grzelczyk* [2001] ECR I-6193 para 44, and Case C-413/99 *Baumbast and R* [2002] ECR I-7091.

recognised,¹⁰⁹ the lack of compliance by Member States with such administrative formalities cannot result in preventing the effective exercise of the rights recognised.

As examined above, given that Articles 13 and 18 of the Directive recognise a subjective right of refugees and persons eligible for subsidiary protection respectively to be granted protection under EC law, the better view is that preventing the enjoyment of the rights attached to protection status through the imposition of a requirement to hold a residence permit undermines the very substance of the right to be granted protection, and is therefore contrary to EC law.

A different interpretation would render meaningless the right to protection enshrined in the Directive. The considerations expressed above in relation to the limitations of EC law based rights on security grounds and on the applicability of general principles of Community law, are also valid in relation to restrictions to the rights attached to the protection status granted.

Likewise, the legality of other provisions of Community law and the measures adopted by Member States to implement them, such as the application of the ‘safe third country’ concept, restrictions on the right to appeal, and other procedural safeguards, will also have to be checked against the effective enjoyment of the right to be granted protection.

Furthermore, in so far the socio-economic rights in question may be mandatory on Member States in a clear, precise and unconditional manner, they would give rise to direct effect, as explained above, and therefore individuals may rely directly on them against the Member State that prevents their access on the grounds that the individual does not hold a residence permit.

Conclusion

The Directive constitutes a major step forward in the recognition of the rights of refugees and other persons protected by international law. The obligation of Member States under EC law to grant protection and to recognise socio-economic rights to refugees and to the broader category of individuals who are not removable under international human rights law confers upon these individuals a subjective right to be granted asylum, protected by the Community legal order and enforceable before national courts and the ECJ.

The Directive however, falls short of international standards in a number of ways, notably, in relation to the qualifying grounds and the status of individuals under subsidiary protection and to the provisions on exclusion, revocation, and *non-refoulement*, which should have never found its way in the Directive.

Restrictions and limitations to the right to be granted protection on security or other grounds are however subject to the applicable principles of Community law, including the protection of fundamental rights, and therefore the legality of the Directive’s provisions and those enacted in national legislations to implement the Directive remain subjected to the scrutiny of national courts and the ECJ on these grounds. This

¹⁰⁹ See, for instance, case C-281/98, *Roman Angonese v Cassa di Risparmio di Bolzano – Italy* [2000] ECR I-4139, para 49.

leaves room to argue for an interpretation of this instrument in light of all existing and evolving obligations of Member States under international law.

These shortcomings, as well as the possible conflicting obligations arising for Member States under EC law and under international human rights law, call for the review of the Directive in the near future in a way that fully integrates Member States obligations under international law.

Beyond the review of provisions that fall short of international standards, a further reflection on the process and outcomes of the first stage in the establishment of a Common European Asylum System is called for in order to ensure that lessons are learned and that the EU lives up to its commitments to refugees and other categories of protected non nationals.

While it might not be easy to reconcile the human rights protection obligations of states with other legitimate interests, including the duty to prevent the serious threats posed by transnational criminality, states nevertheless remain bound by their international human rights obligations, even in the most serious circumstances, whether they act individually or collectively within international organizations and multilateral arrangements.

As Goodwin-Gill has observed, the protection of refugees under EC law must be clearly premised both on the specific requirements of the Geneva Convention and its Protocol, and on the foundations of international human rights law, the essentials of which are obligations *erga omnes* and much of which its authority from peremptory rules of international law (*jus cogens*). ‘States interests may have their place, but the sovereignty of the state exists within a community of principle’¹¹⁰

Beyond the inherent tensions that complying with conflicting obligations may pose, it is however far from clear that states are doing all in their power to ensure that their resources are used in the most efficient manner, thus minimising the actual scope of those tensions.

Some of the outcomes of the first stage in the harmonization of asylum policies might be explained by the inexperience of the institutional actors in the process and the lack of effective dialogue and transparency.

The European Commission’s Directorate-General (DG) for Justice, Freedom and Security is the newest and smallest of the Commission’s DGs. It was only established in October 1999, following the entry into force of the Treaty of Amsterdam on 1 May 1999.¹¹¹ Observers have pointed out to the fact that during this initial stage the DG may not have had an adequate level of expertise on EC law (let alone international

¹¹⁰ GS Goodwin-Gill ‘The Individual Refugee, the 1951 Convention and the Treaty of Amsterdam’, in E Guild and C Harlow (eds), *Implementing Amsterdam. Immigration and Asylum Rights in EC law* (Oxford, Hart, 2001) 160. See also European Commission for Democracy Through Law (Venice Commission), *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners*, Opinion No. 363/2005, Document CDL-AD(2006)009, 17 March 2006.

¹¹¹ [1997] OJ C/340/1. The Commission had previously set up a small task force for justice and home affairs when the Maastricht Treaty was signed in 1992.

human rights and refugee law) and institutional memory regarding cooperation and negotiations.

Insiders have also pointed out to the lack of experience of the Council itself in negotiating asylum matters as *Community law*, after more than two decades of state cooperation at intergovernmental level. Furthermore, the lack of transparency on the part of the Council has antagonised the European Parliament, whose mere consultative role has been reduced to a minimum, with most asylum instruments agreed by the Council in disregard of the Parliament's calls for amendments and sometimes even before the Parliament had adopted its opinion.¹¹²

The lack of transparency of Council negotiations also prevented other actors, such as international organizations, to contribute to the process in a meaningful manner, as their input was often based on informal accounts and had to take the shape of encrypted messages in order to maintain the appearance of discretion, effectively depriving Declaration 17 to the Treaty of Amsterdam of any meaning.¹¹³

Be as it may, the first stage of the asylum legislative process has resulted in the adoption of several pieces of EC legislation, whose compliance with the international obligations of states and with the EC's own internal legal order has been questioned by the European Parliament, international organisations and academics. The overall emphasis on finding agreement by all means has not only led to the adoption of a 'minimum common denominator', but also to provisions inadequately drafted or worded in such ambiguous terms that may be in themselves contrary to EC law.

In addition, as one commentator has observed, to rely on national implementation to cure the defects in EC asylum instruments would require a prolonged period of legal uncertainty and much litigation.¹¹⁴ This will be not only costly for Member States and for individuals, but will also render the system unable to achieve its stated goals of harmonisation of the Member States asylum systems and the provision of protection to refugees across the Union.

¹¹² See *Parliament v. Council and Commission*, Case C-540/03, ([2004] OJ C/47/21) where the Parliament called for the annulment of some of the provisions in the Family Reunification Directive on the grounds that they breach fundamental rights. See also Case C-133/06, *Parliament v Council*, Action brought on 8 March 2006, where the Parliament argues, inter alia, the breach on the part of the Council to cooperate in good faith.

¹¹³ 'Consultations shall be established with the United Nations High Commissioner for Refugees and other relevant international organisations on matters relating to asylum policy.' Declaration (No 17) on Article 63 (ex Article 73k) of the Treaty establishing the European Community, printed in European Union, *Selected instruments taken from the Treaties*, Book I, Volume I, (Luxembourg: Office for Official Publications of the European Communities, 1999) 696.

¹¹⁴ C. Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 *European Journal of Migration and Law*.