

SAFE AT LAST?

LAW AND PRACTICE IN SELECTED EU MEMBER STATES
WITH RESPECT TO ASYLUM-SEEKERS
FLEEING INDISCRIMINATE VIOLENCE



A UNHCR RESEARCH PROJECT

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United Nations High Commissioner for Refugees
Brussels, July 2011

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PRELIMINARY EXPLANATIONS

I. THE USE OF TERMINOLOGY

For the purposes of this report, the Office of the United Nations High Commissioner for Refugees (UNHCR) has used terminology drawn from the European Union (EU) *Council Directive 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* (Qualification Directive or QD);¹ and *Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status* (Asylum Procedures Directive).² Some of the terms drawn from these Directives and used in this report are not normally used in other UNHCR documents for global audiences, and their use should not imply that these are UNHCR's preferred terms.

In particular, it should be noted that in the context of international and regional human rights and refugee law, various terms are used to describe situations of violence, for example: “*generalized violence*”,³ “*endemic violence*”,⁴ “*general violence*” or “*general situation of violence*”,⁵ and “*indiscriminate violence*”.⁶ In this report, the term “*indiscriminate violence*” is used, as this is the language of the Qualification Directive. However, the terminology of the European Court of Human Rights is employed where its case law is described. Likewise, this report uses the term “*internal protection*”, although UNHCR employs the terms “*internal flight alternative*” or “*internal relocation alternative*” to describe this concept.

The term “*international protection*” is used in this report to describe protection in accordance with the Qualification Directive. This Directive incorporates both the refugee definition from the 1951 Convention Relating to the Status of Refugees (1951 Convention),⁷ and subsidiary protection for persons at risk of serious harm as defined in the Directive's Article 15. The terms “*international protection*” and “*subsidiary protection*”, as used in this report, do not encompass other national protection statuses derived from domestic law provisions, with one exception: “*Political asylum*” derived from Germany's Basic Law (also called “*Constitutional asylum*”) is included in grants of refugee status.

¹ Council of the European Union, *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*, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023:EN:PDF>.

² *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>.

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

⁴ Council of the European Union, *Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving such Persons and Bearing the Consequences Thereof* (Temporary Protection Directive), Article 2 (c) (i), at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:212:0012:0023:EN:PDF>.

⁵ Both terms are used by the European Court of Human Rights. See, for example, *NA. v. The United Kingdom*, Appl. No. 25904/07, Council of Europe: European Court of Human Rights, 17 July 2008, at: <http://www.unhcr.org/refworld/docid/487f578b2.html>.

⁶ Qualification Directive, Article 15 (c).

⁷ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, UNTS, vol. 189, p. 137, at: <http://www.unhcr.org/refworld/docid/3be01b964.html>. Note that the Qualification Directive limits the definition of asylum applicant to third country (i.e. non-EU nationals) nationals, whereas the 1951 Convention contains no such limitation.

A list of acronyms used in this report can be found in Annex 2. For the sake of consistency, the French appeal court, *Cour Nationale du Droit d'Asile* (CNDA) is referred to as such throughout this report, although this body had a different name and, consequently, a different acronym prior to 2008.⁸ Similarly, the Court of Justice of the EU (CJEU) is referred to by its present name, although it was known as the European Court of Justice before entry into force of the Treaty on the Functioning of the EU (TFEU)⁹ in December 2009.

ii. THE USE OF STATISTICS

The national statistics used in this report were provided to UNHCR by the determining authorities of the Member States.¹⁰ The figures remain provisional as they are subject to revision by the Member States.

The presentation of data in this report may differ from that of the determining authorities in their official publications and from that used by Eurostat.¹¹ The presentation of data in this report also differs in some respects from the presentation of statistics in other UNHCR publications.¹² These differences are explained by the fact that this report seeks to disaggregate statistics relating to grants of subsidiary protection derived from the provisions of the Qualification Directive, and to present international protection rates reflecting grants of refugee status and subsidiary protection status (not including national protection statuses). Data on relevant national protection statuses has therefore also been disaggregated and is presented separately in the report.

Some caution should be exercised with regard to comparative analysis of the data in the report, as some inconsistencies in presentation could not be avoided. According to the national determining authorities, the statistics provided and used in this report relate to first instance decisions in 2010 only.¹³ They relate to individuals (not cases) and include claims lodged by unaccompanied and/or separated children. The statistics presented in this report do not include persons who have been admitted to a Member State through resettlement or relocation programmes. The data for Belgium, France and Sweden reflect decisions on first-time applications only. In other words, decisions on subsequent (also called repeat) applications are not included. The statistics for Germany, the Netherlands and the UK include subsequent applications.

It should also be noted that all absolute figures relating to the UK have been rounded to the nearest five, at the request of the determining authority, the UK Border Agency.

⁸ In 2008, the *Commission des Recours des Réfugiés* (CRR) became the *Cour Nationale du Droit d'Asile* (CNDA).

⁹ European Union, *Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, 30 March 2010, [OJ C 83,], Article 78 (1), at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:EN:PDF>.

¹⁰ The sources for statistics in this report, unless otherwise specified, were the following:

Belgium: CGRS, *Asylum Statistics, Overview 2010*, at: <http://www.cgra.be/en/Chiffres/>.

France: Data provided by OFPRA. All figures exclude grants of protection to resettled Iraqis and Somalis relocated from Malta to France.

Germany: BAMF, *Subsidiärer Schutz, Erst- u. Folgeanträge, Berichtszeitraum, 01.01.2010 - 31.12.2010*, ("Subsidiary protection, first and subsequent applications, reporting period 1 January - 31 December 2010").

The Netherlands: Data provided by the IND Informatie- en Analysecentrum (INDIAC).

Sweden: Data provided by the Swedish Migration Board.

UK: Data provided by the UK Border Agency.

¹¹ Eurostat is the statistical office of the European Union. See Eurostat, *Asylum applicants and first instance decisions on asylum applications in 2010*, issue number 5/2011. It should be noted that the 2010 statistics of the determining authorities may have been revised since they were submitted to Eurostat for publication.

¹² See UNHCR, *Global Trends 2010*, June 2011, at: <http://www.unhcr.org/4dfa11499.html> and UNHCR, *Asylum Levels and Trends in Industrialized Countries 2010*, at: <http://www.unhcr.org/4d8c5b109.pdf>.

¹³ UNHCR recognizes that protection rates may be higher if decisions on appeal are taken into account. Appeal statistics are not consistently available, and it is difficult to relate them to first instance decisions.

Total decisions: This includes all decisions taken on applications within the asylum procedure i.e. the sum of decisions to grant refugee status, subsidiary protection, any national protection statuses, to reject on the merits, and to “otherwise close” on, for example, safe third country grounds (including on the basis of the *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin Regulation)*)¹⁴ and on technical grounds (including non-compliance, withdrawal or death).¹⁵ See below with respect to France and the Netherlands.

Otherwise closed: This term refers to decisions to refuse to examine the merits of an application, whether on “safe third country” grounds (including on the basis of the Dublin Regulation), or on technical grounds (including non-compliance, or when applications are explicitly or implicitly withdrawn, or the applicant has died during the course of the procedure). Statistics for cases which are “otherwise closed” are not provided by the determining authorities in France and the Netherlands.

Total decisions on the merits: The sum of decisions to grant refugee status, subsidiary protection, any national protection statuses, and to reject the application on the merits within the asylum procedure. In other words, this does not include cases which are “otherwise closed”. The only exception is the Netherlands, where according to the determining authority; total decisions on the merits include decisions taken on the basis of the Dublin Regulation.

Refugee recognition rate: The number of grants of refugee status divided by the number of decisions on the merits.¹⁶

Subsidiary protection rate: The number of grants of subsidiary protection status divided by the number of decisions on the merits.¹⁷

International protection rate: The total number of grants of refugee status and subsidiary protection divided by the number of decisions on the merits.¹⁸ Applications which result in grants of national forms of protection, or are “otherwise closed” have been excluded from the calculation.¹⁹

iii. TRANSLATIONS

All translations contained in this report are unofficial translations by UNHCR, unless otherwise specified.

¹⁴ Council of the European Union, *Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national*, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF>.

¹⁵ In some Member States, the explicit or implicit withdrawal of an application may not be considered as a “decision” and therefore not counted in the total decisions.

¹⁶ See the exception stated above with regard to the Netherlands.

¹⁷ Idem.

¹⁸ Idem.

¹⁹ In Belgium, applications for international protection are considered to be denied on the “merits” based on the application of concepts referred to as “recent stay” in a third country, “real residence alternative” or “country of habitual residence”. Further information on this is found in section 6.

1. INTRODUCTION: BACKGROUND, AIMS AND METHODOLOGY OF THE RESEARCH



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1.1. BACKGROUND AND AIMS

The broad objective of this research was to investigate the extent to which implementation of the Qualification Directive delivers international protection to persons fleeing situations of indiscriminate violence, and to ascertain whether a protection gap exists.

This Directive sets out two distinct but complementary statuses of international protection, namely refugee status derived from the 1951 Convention²⁰ and subsidiary protection status for persons at real risk of serious harm as defined in Article 15 of the Qualification Directive. EU Member States were required to transpose the Qualification Directive into national legislation by October 2006.²¹

²⁰ All EU Member States are States Parties to the 1951 Convention and its 1967 Protocol.

²¹ Qualification Directive, Article 38.

The Qualification Directive goes to the heart of UNHCR's mandate as the agency entrusted by the United Nations General Assembly with responsibility for providing international protection to refugees, and for seeking permanent solutions for the problem of refugees.²² UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto [...]”²³ The duty of Contracting States to co-operate with UNHCR in the exercise of its functions, as well as UNHCR's supervisory responsibility, are reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol Relating to the Status of Refugees.²⁴ UNHCR's specific role has also been reflected in EU law.²⁵ Since its creation in 1951, UNHCR has been working with States, including the Member States of the EU, to identify and respond to international protection needs, including those arising in situations of indiscriminate violence.

The organization's original mandate, set out in its Statute, was based on the definition of a refugee as a person with a well-founded fear of persecution on grounds of race, religion, nationality, or political opinion,²⁶ reproduced (with the addition of membership in a particular social group) in Article 1A of the 1951 Convention. Nothing in either definition excludes its application to persons fleeing persecution in situations of indiscriminate violence.

In the years following adoption of UNHCR's Statute and of the 1951 Convention, the UN General Assembly and Economic and Social Committee extended UNHCR's competence *ratione personae*.²⁷ This was not done by amending the statutory refugee definition, but by empowering UNHCR to protect and assist particular groups of people whose circumstances did not necessarily meet the definition in the Statute.²⁸ In practical terms, this has extended UNHCR's mandate to a variety of situations of forced displacement resulting from conflict, indiscriminate violence or public disorder. In light of this evolution, UNHCR considers that serious (including indiscriminate) threats to life, physical integrity or freedom resulting from generalized violence or events seriously disturbing public order are valid reasons for international protection under its mandate.²⁹

Since the end of the Second World War, there have been more than 400 armed conflicts around the world, taking an estimated 100 million lives - approximately the number of World Wars I and II combined.³⁰ Many of the casualties have been civilians. Millions of others have been displaced both within and across borders due to conflict. The moral and legal imperative for the international community to provide protection to persons in need is therefore as strong as ever.

²² See UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

²³ *Ibid.*, paragraph 8 (a).

²⁴ UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

²⁵ European Union, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340/134, 10.11.1997], at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>. provides that “Consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy.” See also Qualification Directive, Recital 15.

²⁶ *Statute of the Office of the United Nations High Commissioner for Refugees*, paragraph 6.

²⁷ See UNHCR, *Note on International Protection, submitted to the 45th session of the Executive Committee of the High Commissioner's Programme*, UN Doc. A/AC.96/830, 7 September 1994, <http://www.unhcr.org/refworld/docid/3f0a935f2.html>.

²⁸ In such cases, the institutional competence of UNHCR is based on paragraph 9 of its Statute: “The High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the General Assembly may determine, within the limits of the resources placed at his disposal.”

²⁹ UNHCR, *Providing International Protection Including Through Complementary Forms of Protection, Executive Committee of the High Commissioner's Programme, Standing Committee*, UN Doc. EC/55/SC/CRP.16, 2 June 2005, paragraph 26, at: <http://www.unhcr.org/refworld/docid/47fdb49d.html>.

³⁰ Data on the number of conflicts varies widely, depending on criteria used. For one approach, see Human Security Report Project, *Conflict Onsets and Terminations by Year*, at: www.hsrgroup.org; for data on casualties during the World Wars, see: <http://www.bbc.co.uk/dna/h2g2/A2854730>.

Three of the most visible and protracted conflicts of the recent period have taken place in Afghanistan, Iraq and Somalia. Citizens of these countries today constitute 52 percent of the refugees under the mandate of UNHCR worldwide.³¹ Most have fled to countries such as Pakistan and Iran (for Afghans), Syria and Jordan (for Iraqis), and Kenya, Ethiopia and Yemen (for Somalis), where they have been received in massive numbers and where protection space has come under considerable strain.

In the EU as a whole in 2010, Afghans, Iraqis and Somalis represented 20 percent of asylum applicants.³² Across the 27 Member States, on average 51 percent of first instance decisions taken in 2010 on the merits regarding Afghan claims resulted in a denial of the need for *any* form of protection, whether refugee status under the 1951 Convention, subsidiary protection under the Qualification Directive, or a national complementary protection status. For Iraqis, the corresponding figure was 44 percent, and for Somalis, 33 percent. These averages mask some very significant differences in approach at national levels. While many Afghans, Iraqis and Somalis received protection in the EU in 2010, a significant number of others did not.³³

These three countries of origin were selected for study not only because of the numbers involved, but also because of the nature of these conflicts. In view of the religious, ethnic and political roots of these conflicts as well as their scope, many persons fleeing Afghanistan, Iraq and Somalia have a well-founded fear of persecution based on one or more of the grounds outlined in Article 1 A (2) of the 1951 Convention. They may also qualify for subsidiary protection within the meaning of Article 15 (a) and (b) of the Qualification Directive, which reflects Member States' obligations under Article 3 of the European Convention on Human Rights (ECHR).³⁴ Still others are eligible for subsidiary protection because they risk serious harm in accordance with Articles 2 (e) and 15 (c) of the Qualification Directive.³⁵

³¹ UNHCR, *Global Trends 2010*.

³² UNHCR, *Asylum Levels and Trends in Industrialized Countries, 2010*. This publication reports a total of 235,930 asylum applicants in the EU in 2010, of whom 19,566 were Afghans, 14,506 were Iraqis and 13,885 were Somalis.

³³ UNHCR, *Global Trends 2010*.

³⁴ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5, at: <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>. Article 3 states that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

³⁵ UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan* (UNHCR Afghanistan Eligibility Guidelines), 17 December 2010, HCR/EG/AFG/10/04, at: <http://www.unhcr.org/refworld/docid/4d0b55c92.html>; UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia* (UNHCR Somalia Eligibility Guidelines), 5 May 2010, HCR/EG/SOM/10/1, at: <http://www.unhcr.org/refworld/docid/4be3b9142.html>; UNHCR, *Note on the Continued Applicability of the April 2009 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers* (UNHCR Note on the Continued Applicability of Iraq Guidelines), 28 July 2010, at: <http://www.unhcr.org/refworld/docid/4c4fed282.html>.

For the purposes of this study, UNHCR restricted its focus to applications for international protection lodged by Afghans, Iraqis and Somalis in six of the 27 EU Member States - Belgium, France, Germany, the Netherlands, Sweden and the UK. In 2010, these six countries together received 75 percent of all asylum applications in the EU.³⁶ In all six countries, the Qualification Directive, including Articles 2 (e) and 15 setting out the grounds for subsidiary protection, has been transposed into national legislation.³⁷

One of the main aims of the Qualification Directive is “to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection.”³⁸ However, several years after entry into force of the Directive, UNHCR and partners have regularly expressed concern that Afghans, Iraqis and Somalis in need of protection were not receiving it, and that the Directive was not being applied in a consistent manner. Indeed, first instance rates for international protection (which the Qualification Directive intended to harmonize) for Afghan, Iraqi and Somali applicants in the six Member States studied in this report diverged significantly in 2010, as the table below demonstrates.³⁹

Table 1. First instance international protection rates in 2010

Country of asylum/ Country of origin	Afghanistan	Iraq	Somalia
Belgium	62.4 %	78.5 %	49.7 %
France	34.4 %	49.1 %	62.5 %
Germany	17.8 %	56.2 %	89.4 %
Netherlands	24.5 %	38.8 %	34.3 %
Sweden	54.3 %	39.2 %	80.5 %
United Kingdom	9.7 %	10.9 %	48.2 %

Even allowing for variations in the profile of asylum-seekers arriving in these six Member States, it is evident that there are broad differences in the application of the international protection provisions of the Qualification Directive. This research seeks to understand why this is the case, and to contribute to a more consistent application of the Qualification Directive across the EU in order, in line with UNHCR’s global mandate, to ensure international protection for those in need of it.

Specifically, the research sought to gather information on the extent to which the six Member States’ interpretation and application of Article 15 (c) of the Qualification Directive address the protection needs of persons fleeing indiscriminate violence in Afghanistan, Iraq and Somalia.

³⁶ UNHCR, *Asylum Levels and Trends in Industrialized Countries, 2010*.

³⁷ Belgium: Article 48/4 of the Law of 15 December 1980 on access to the territory, residence, establishment and expulsion of aliens (hereafter Aliens Law), as amended by the Law of 15 September 2006 (Moniteur Belge, 6 October 2006, p. 53533). France: Article L. 712.1 *Ceseda*. Germany: Act on Implementation of Residence and Asylum-Related Directives of the European Union of 19 August 2007 (Federal Law Gazette I, p. 1970) which amended the Residence Act of 30 July 2004 (Federal Law Gazette I, p. 1950). Article 15 has been transposed in Section 60 of the Residence Act, as amended, under the heading ‘Prohibition of deportation’. Section 60 (3) transposes Article 15 (a) QD; Section 60 (2) transposes Article 15 (b) QD; and Section 60 (7) sentence 2 transposes Article 15 (c) QD, The Netherlands: Article 29 (1) (b) Aliens Act 2000. Sweden: Chapter 4 Section 2 of the Aliens Act as amended on 30 December 2009. UK: Paragraph 339C of the Immigration Rules.

³⁸ Qualification Directive, Recital 6.

³⁹ These figures exclude the outcome of appeals. It is recognised that significant numbers of persons are granted international protection upon appeal. However, complete statistics from judicial bodies across the EU are not available. Also, some Member States provide a national form of complementary protection. See preliminary explanation ii. “The Use of Statistics.”

Articles 15 (c) and 2 (e) of the Qualification Directive extend subsidiary protection to persons who do not qualify as refugees but in respect of whom substantial grounds have been shown for believing that, if returned to their country of origin, or in the case of stateless persons their country of former habitual residence, would face a real risk of suffering serious harm defined as a “*serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.*” At the time of the adoption of the Qualification Directive, UNHCR strongly supported the creation of a legal obligation to grant a subsidiary protection status to persons fleeing situations of indiscriminate violence, and expressed hope that the adoption of a harmonized status of subsidiary protection would close a long-standing protection gap in the EU.⁴⁰ This research seeks to assess the extent to which this has been achieved.

1.2. METHODOLOGY

The research was conducted from October 2010 through April 2011 in Belgium, France, Germany, the Netherlands, Sweden and the UK. The selection of these countries was based on several factors. First, as indicated earlier, these States together received three quarters of all asylum applications lodged in the EU in 2010, including 70 percent of all applications lodged by Afghans, 80 percent of applications lodged by Iraqis and 90 percent of applications lodged by Somalis.⁴¹

Secondly, the selected States were of particular interest, given their different approaches to applying either the 1951 Convention refugee definition or subsidiary protection provisions of the Qualification Directive in respect of persons fleeing situations of indiscriminate violence.

The researchers studied national legislation implementing the Qualification Directive, interviewed determining authorities and other stakeholders (lawyers, judges, academics and civil society representatives), and scrutinized appeal decisions. All interviewees were informed of the purpose and methodology of the research, and all agreed to participate. Interviews were conducted in person or by telephone. Researchers also studied parliamentary reports, policy guidelines and legal commentaries.

This research would not have been possible without the full commitment of the determining authorities of the Member States concerned. UNHCR is grateful for their cooperation and support. Whilst this study cannot be considered exhaustive, UNHCR believes that its findings provide solid insight into the implementation of the Qualification Directive.

⁴⁰ UNHCR, *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)*, (UNHCR Annotated Comments on the Qualification Directive), 28 January 2005, at: <http://www.unhcr.org/refworld/docid/4200d8354.html>.

⁴¹ UNHCR, *Asylum Levels and Trends in Industrialized Countries 2010*.

2. INTERNATIONAL LEGAL FRAMEWORK



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2.1. INTERNATIONAL AND REGIONAL REFUGEE LAW

States bear the primary responsibility for protecting their citizens. A need for international protection arises when state protection is absent. This may occur as a result of persecution or other threats. Forced displacement is often a manifestation of a State's failure to provide protection, and must be distinguished from situations where individuals leave or stay outside their countries of origin for other reasons.⁴²

With the 1951 Convention and its 1967 Protocol, States adopted a framework that, if properly applied, can address most international protection needs, including those arising in the context of conflict and serious

⁴² See UNHCR, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, 9 June 2000, EC/50/SC/CRP.18, at: <http://www.unhcr.org/refworld/docid/47dfb491a.html>.

public disorder. In Africa, the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa explicitly covers not only persons fleeing persecution for the reasons set out in the 1951 Convention, but also people threatened by indiscriminate violence.⁴³ Similarly, in Latin America, the 1984 Cartagena Declaration on Refugees recommended the recognition as refugees of “persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”⁴⁴ The revised text of the 1966 Bangkok Principles on the Status and Treatment of Refugees adopted by the Asian-African Legal Consultative Organization (formerly Committee) in 2001 incorporates a refugee definition similar to that of the OAU Refugee Convention.⁴⁵

Several attempts have been made in the Council of Europe to adopt a broad approach to the 1951 Convention refugee definition.⁴⁶ However, these recommendations have not been taken up by the Council of Europe Member States. Unlike the regions mentioned above, European States do not collectively apply an extended refugee definition which includes people fleeing indiscriminate violence. In 2001, the Council of Europe Committee of Ministers therefore recommended that subsidiary protection be granted to such persons.⁴⁷ Ultimately, it was in the framework of the EU, rather than the Council of Europe, that the Qualification Directive was adopted in 2004, providing a harmonized legal basis for subsidiary protection in the 27 EU Member States. The Qualification Directive was drafted to reflect the principle that the cornerstone of the EU asylum system would remain the full and inclusive application of the 1951 Convention, complemented by subsidiary protection status for those not covered by the 1951 Convention but nonetheless in need of international protection.⁴⁸

Article 2 (e) of the Qualification Directive describes a person as eligible for subsidiary protection if s/he is:

*a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.*⁴⁹

⁴³ Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa* (“OAU Convention”), 10 September 1969, 1001 UNTS 45, at: <http://www.unhcr.org/refworld/docid/3ae6b36018.html>, Article 1(2), “Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to, seek refuge in another place outside his country of origin or nationality.”

⁴⁴ *Cartagena Declaration on Refugees*.

⁴⁵ Asian-African Legal Consultative Organization (AALCO), *Bangkok Principles on the Status and Treatment of Refugees* (“Bangkok Principles”), 31 December 1966, at: <http://www.unhcr.org/refworld/docid/3de5f2d52.html>.

⁴⁶ Council of Europe: *Parliamentary Assembly, Recommendation 773 (1976) on the situation of de facto refugees*, 26 January 1976, 775 (1976), at: <http://www.unhcr.org/refworld/docid/4720706b2.html>.

⁴⁷ Council of Europe: *Committee of Ministers, Recommendation Rec(2001) 18 of the Committee of Ministers to Member States on Subsidiary Protection*, 27 November 2001, (2001) 18, at: <http://www.unhcr.org/refworld/docid/3dde4c184.html>, footnote 14. See also: McAdam, J. The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime, *International Journal of Refugee Law*, Vol. 17, Issue 3 (2005), p. 462, footnote 2.

⁴⁸ European Commission, *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*, 12 September 2001, COM(2001) 510 final, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0510:FIN:EN:PDF>.

⁴⁹ To qualify for subsidiary protection status, the exclusion clauses stated in Article 17 must not apply.

The term “serious harm” is defined in Article 15 as:

- (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.

2.2. INTERNATIONAL AND EUROPEAN HUMAN RIGHTS LAW

Certain human rights obligations, especially protection of the right to life and the absolute prohibition of torture or cruel, inhuman and degrading treatment or punishment, have been interpreted by the supervisory organs of human rights instruments as prohibiting forcible return (*refoulement*) to places where there is a risk of such treatment.⁵⁰ *Non-refoulement* is accepted as part of customary international law.⁵¹ These provisions thus complement the protection mechanisms available under international refugee law.

Specifically, Article 3 of the ECHR provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Article 3 is not subject to any derogation⁵² and the European Court of Human Rights has consistently held that returning an individual to a country where there are substantial grounds for believing that s/he is “at real risk of being subjected to torture or inhuman or degrading treatment or punishment” is a violation of Article 3 ECHR.⁵³ In a recent Chamber judgment, which is not final at the time of writing, the European Court of Human Rights stated that if the existence of such a risk is established, “the applicant’s removal would necessarily breach Article 3, regardless of whether the risk emanates from a general situation of violence, a personal characteristic of the applicant, or a combination of the

⁵⁰ In the context of the Article 7 of the 1966 International Covenant on Civil and Political Rights, the UN Human Rights Committee has highlighted that removal must not result in a “real risk of irreparable harm.” See UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, at: <http://www.unhcr.org/refworld/docid/478b26ae2.html>. The UN Committee against Torture has consistently held that for the purposes of Article 3 of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, “a foreseeable, real and personal risk must exist of being tortured in the country to which a person is returned.” See for instance, UN Committee Against Torture, *E.A. v. Switzerland*, CAT/C/19/D/028/1995, UN Committee Against Torture (CAT), 10 November 1997, paragraph 11.5. Similarly, *S.C. v. Denmark*, CAT/C/24/D/143/1999, UN Committee Against Torture (CAT), 2 September 2000, paragraph 6.6; and *Mehdi Zare v. Sweden*, CAT/C/36/D/256/2004, UN Committee Against Torture (CAT), 17 May 2006, paragraph 9.3. In the view of the Committee, such a risk “must be assessed on grounds that go beyond mere theory or suspicion”, but “does not have to meet the test of being highly probable.” See UN Committee Against Torture (CAT), *General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications)*, 21 November 1997, A/53/44, annex IX, at: <http://www.unhcr.org/refworld/docid/453882365.html>.

⁵¹ See UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93*, 31 January 1994, at: <http://www.unhcr.org/refworld/docid/437b6db64.html>.

⁵² *Soering v. The United Kingdom*, 1/1989/161/217, Council of Europe: European Court of Human Rights, 7 July 1989, paragraph 88, at: <http://www.unhcr.org/refworld/docid/3ae6b6fec.html>. In subsequent decisions, the Court specified that “even in the most difficult of circumstances, such as the fight against organized terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment.” See, for example, *Aksoy v. Turkey*, 21987/93, Council of Europe: European Court of Human Rights, 26 November 1996, paragraph 62, at: <http://www.unhcr.org/refworld/docid/3ae6b6fa4.html>. In *Chahal v. The United Kingdom*, 70/1995/576/662, Council of Europe: European Court of Human Rights, 15 November 1996, paragraph 80, at: <http://www.unhcr.org/refworld/docid/3ae6b69920.html>; the Court explicitly stated: “The prohibition provided by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees [...]”.

⁵³ See *Soering v. the United Kingdom*, paragraph 88 and 91. See also *Cruz Varas and Others v. Sweden*, 46/1990/237/307, Council of Europe: European Court of Human Rights, 20 March 1991, paragraph 80, at: <http://www.unhcr.org/refworld/docid/3ae6b6fe14.html>; in which the Court confirmed that Article 3 is applicable in cases of extradition and expulsion.

two.”⁵⁴ The assessment under Article 3 ECHR must, therefore, focus on the foreseeable consequences of the removal of the applicant to the country of destination and should take into account any general situation of violence existing there.⁵⁵

The case law of the European Court of Human Rights has established that not every general situation of violence will entail a violation of Article 3 ECHR in the event of expulsion.⁵⁶ However, the case law has “never excluded the possibility that a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.”⁵⁷

Until June 2011, the European Court of Human Rights had not found a violation of Article 3 ECHR solely on the ground of *refoulement* to a situation of general violence which met the requisite standard of intensity. Case law relating to the situations in Afghanistan⁵⁸ and Iraq⁵⁹ has held that, at the pertinent time, there was not a situation of “*extreme general violence*”. In a case involving proposed removal to Kinshasa in the Democratic Republic of Congo (DRC), the Court stated that “*the general situation in the DRC at the present time certainly gives cause for concern ... with the circumstances in the Kivu provinces in the north-east being particularly dire. [...] The applicant resided in Kinshasa before he left his country of origin. It is therefore considered that there is no reason to assume that he would be expelled to the north-eastern part of the DRC*” – thus hinting that the situation in the north-east of the DRC might constitute a situation of extreme general violence – and found that the general situation in the DRC as a whole was not one of such “*extreme general violence*.”⁶⁰

⁵⁴ See the Chamber judgment in the lead case of *Sufi and Elmi v. United Kingdom*, Applications nos. 8319/07 and 11449/07, Council of Europe: European Court of Human Rights, 28 June 2011, at: <http://www.unhcr.org/refworld/docid/4e09d29d2.html>. At the time of writing, this Chamber judgment is not final. See Council of Europe, European Court of Human Rights, Press Release issued by the Registrar of the Court, *The United Kingdom would violate human rights of two Somali nationals if it returned them to Mogadishu*, ECHR 076 (2011), 28 June 2011, at: <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=73418679&skin=hudoc-pr-en&action=request>. “Under Articles 43 and 44 of the ECHR, during a three month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.”

⁵⁵ See *NA v. the United Kingdom*, paragraph 113.

⁵⁶ *Ibid.*, paragraph 114. See also, *Muslim v. Turkey*, Application no. 53566/99, Council of Europe: European Court of Human Rights, 26 April 2005, at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=muslim&sessionId=73418863&skin=hudoc-en>; *Sultani c. France*, 45223/05, Council of Europe: European Court of Human Rights, 20 September 2007, at: <http://www.unhcr.org/refworld/docid/470cf3432.html>; *Venkadajalasarma v. The Netherlands*, 58510/00, Council of Europe: European Court of Human Rights, 17 February 2004, at: <http://www.unhcr.org/refworld/docid/414d8f004.html>; and *Thampibillai v. The Netherlands*, 61350/00, Council of Europe: European Court of Human Rights, 17 February 2004, at: <http://www.unhcr.org/refworld/docid/414d8e2a4.html>.

⁵⁷ *NA v. the United Kingdom*, paragraph 115.

⁵⁸ *N. v. Sweden*, no. 23505/09, Council of Europe: European Court of Human Rights, 20 July 2010, paragraph 52, at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=N%20%7C%20sweden&sessionId=73419408&skin=hudoc-en>.

⁵⁹ *F.H. v. Sweden*, no. 32621/06, Council of Europe: European Court of Human Rights, 20 January 2009, paragraph 93, at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=F.H.%20%7C%20SWEden&sessionId=73419583&skin=hudoc-en>. The ECtHR stated that the situation at the time of its examination of the case was not so serious as to cause, by itself, a violation of Article 3 of the Convention.

⁶⁰ See *Mawaka v. The Netherlands*, Application no. 29031/04, Council of Europe: European Court of Human Rights, 1 June 2010, at: <http://www.unhcr.org/refworld/docid/4c209ab12.html>.

However, on 28 June 2011, the European Court of Human Rights issued a judgment, which, although not final at the time of writing, considers that there is a situation of extreme general violence in Mogadishu, and that there may also be such situations of extreme general violence in other areas of southern and central Somalia. In that case, *Sufi and Elmi v. the United Kingdom*,⁶¹ the Court was called upon to examine whether substantial grounds were shown for believing that the applicants, if deported to Somalia, would face a real risk of being subjected to treatment contrary to Article 3 ECHR on account of the general situation of violence there. It was required first to consider the general situation in Mogadishu which would be the applicants' first point of return, and then the remainder of southern and central Somalia. In its judgment, the Court considered that:

*The large quantity of objective information overwhelmingly indicates that the level of violence in Mogadishu is of sufficient intensity to pose a real risk of treatment reaching the Article 3 threshold to anyone in the capital. In reaching this conclusion the Court has had regard to the indiscriminate bombardments and military offensives carried out by all parties to the conflict, the unacceptable number of civilian casualties, the substantial number of persons displaced within and from the city, and the unpredictable and widespread nature of the conflict.*⁶²

The Court then added a caveat, already established in the UK case law relating to Somalia,⁶³ and concluded that *"the violence in Mogadishu is of such a level of intensity that anyone in the city, except possibly those who are exceptionally well-connected to 'powerful actors', would be at real risk of treatment prohibited by Article 3 of the Convention."*⁶⁴

With regard to the situation in parts of southern and central Somalia other than Mogadishu, the European Court of Human Rights acknowledged that there is violence in various towns but noted that there is little information with regard to its intensity. It did not consider it feasible or appropriate to assess the level of general violence in every part of southern and central Somalia. The Court was prepared to accept that it might be possible for a returnee to travel from Mogadishu international airport to another part of southern and central Somalia without being exposed to a real risk of treatment proscribed by Article 3 ECHR solely on account of the situation of general violence. However, this would very much depend upon where the returnee's home area is and would, therefore, need to be assessed on a case by case basis.⁶⁵ The judgment is significant, among other reasons, because the Court for the first time established specific criteria for assessing the level of severity of a situation of general violence.

In the absence of a situation of extreme general violence, the European Court of Human Rights has held that an applicant must show special distinguishing features that expose him/her to a real risk of ill-treatment contrary to Article 3 ECHR.⁶⁶ Where an applicant alleges that s/he is a member of a group systematically exposed to a practice of ill-treatment, the Court has held that Article 3 ECHR applies when the applicant establishes that there are serious reasons to believe in the existence of the practice in question and his or

⁶¹ See the Chamber judgment in the case of *Sufi and Elmi v. the United Kingdom*. This is a lead case which establishes the principles which will be applied to all similar pending cases. According to a press release issued by the Registrar of the Court, at the time of the delivery of the Chamber judgment on 28 June 2011, there were 214 similar cases pending before the European Court of Human Rights. Council of Europe, European Court of Human Rights, Press Release issued by the Registrar of the Court, *The United Kingdom would violate human rights of two Somali nationals if it returned them to Mogadishu*.

⁶² *Sufi and Elmi v. the United Kingdom*, paragraph 248.

⁶³ See section 5.1.3 below.

⁶⁴ *Sufi and Elmi v. the United Kingdom*, paragraphs 250 and 293.

⁶⁵ *Ibid.*, paragraph 271.

⁶⁶ *Vilvarajah and Others v. The United Kingdom*, 45/1990/236/302-306, Council of Europe: European Court of Human Rights, 26 September 1991, paragraph 111f, at: <http://www.unhcr.org/refworld/docid/3ae6b7008.html>.

her membership of the group concerned: “In those circumstances, the Court will not then insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3.”⁶⁷ The Court has further stated that it considers that it is appropriate to take into account the general situation of violence in a country if this makes it more likely that the authorities (or any persons or group of persons from whom the danger emanates) will systematically ill-treat the group in question.⁶⁸

Armed conflict and violence can also have a devastating impact on the humanitarian situation in a country. The European Court of Human Rights in its interim judgment in the *Sufi and Elmi v. the United Kingdom* case, mentioned above, has indicated that a distinction should be drawn between dire humanitarian situations which are solely or even predominantly attributable to poverty or to a lack of state resources to deal with naturally occurring phenomena such as drought; and a humanitarian crisis which is predominantly due “to the direct and indirect actions of the parties to the conflict.”⁶⁹ With regard to the latter situation, the Court suggested that the appropriate test, to determine whether the humanitarian conditions reach the Article 3 threshold, required contracting parties to assess an applicant’s ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame.⁷⁰ Consequently, the Court concluded that:

Where it is reasonably likely that a returnee would find himself in an IDP camp, such as those in the Afgooye Corridor, or in a refugee camp, such as the Dadaab camps in Kenya, the Court considers that there would be a real risk that he would be exposed to treatment in breach of Article 3 on account of the humanitarian conditions there...⁷¹

The case law of the European Court of Human Rights is important not only because it prohibits forcible return to a risk of treatment in violation of Article 3. It is important also because a risk of treatment described in Article 3 constitutes a form of serious harm giving rise to protection under the terms of Article 15 (b) of the Qualification Directive.⁷² Therefore, an applicant in respect of whom substantial grounds have been shown for believing that s/he, if returned to his or her country of origin, would face a real risk of torture, or inhuman or degrading treatment or punishment, is eligible for subsidiary protection status, as long as the Directive’s provisions on exclusion and internal protection do not apply.

Although the application of Article 15 (b) was not a primary focus of this study, as will be seen later in this report, in most of the six Member States of focus, grants of subsidiary protection to Afghans, Iraqis and Somalis are most frequently based on Article 15 (b).⁷³

⁶⁷ See *NA v. the United Kingdom*, paragraph 116, in which the ECtHR refers to its own case law in *Salah Sheekh v. The Netherlands*, Council of Europe: European Court of Human Rights, 11 January 2007, at: <http://www.unhcr.org/refworld/docid/45cb3dfd2.html>. In the *Salah Sheekh* case, the ECtHR held that the ill-treatment of the Ashraf clan in certain parts of Somalia, and the fact that the applicant’s membership of the Ashraf clan was not disputed, meant that his expulsion to Somalia would be in violation of Article 3 ECHR. Also, the ECtHR in its Chamber judgment in *Sufi and Elmi v. the United Kingdom*, considered that a returnee with no recent experience of living in Somalia would be at real risk of being subjected to treatment proscribed by Article 3 in an al-Shabaab controlled area. See also *Saadi v. Italy*, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, at: <http://www.unhcr.org/refworld/docid/47c6882e2.html>.

⁶⁸ See *NA v. the United Kingdom*, paragraph 117. See also, *Salah Sheekh v. the Netherlands*; and *Saadi v. Italy*.

⁶⁹ *Sufi and Elmi v. The United Kingdom*, paragraph 282.

⁷⁰ *Ibid.*, paragraph 283. This was the test adopted in *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, at: <http://www.unhcr.org/refworld/docid/4d39bc7f2.html>.

⁷¹ *Sufi and Elmi v. The United Kingdom*, paragraph 296.

⁷² See section 2.1.

⁷³ See section 4.2 below.

At the time of writing, the judgment in the case of *Sufi and Elmi v. the United Kingdom*, mentioned above, is not yet final. The final judgment will not only establish legal and country guidance with regard to Somalia for the 214 similar cases pending before the European Court of Human Rights,⁷⁴ but it will also provide guidance for the assessment of applications for subsidiary protection under Article 15 (b) of the Qualification Directive.

Moreover, one Member State studied considers that, given the European Court of Human Rights' case law with regard to situations of extreme general violence, Article 15 (c) of the Qualification Directive represents a strand of protection offered by Article 3 ECHR.⁷⁵ The European Court of Human Rights has recently noted that it is not persuaded that Article 3 ECHR does not offer comparable protection to that afforded by Article 15 (c) of the Qualification Directive. It highlighted in particular that Article 3 ECHR and Article 15 (c) of the Qualification Directive set similar thresholds which may be attained "*in consequence of a situation of generalised violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there.*"⁷⁶ This issue is discussed in more detail later in this report.

⁷⁴ Press Release issued by the Registrar of the Court, ECHR 076 (2011), 28 June 2011.

⁷⁵ See section 5.3.

⁷⁶ *Sufi and Elmi v. the United Kingdom*, paragraph 226.

3. PRIMACY OF THE 1951 CONVENTION AND ITS APPLICABILITY WITH REFERENCE TO CONFLICT SITUATIONS



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This research sought primarily to assess the extent to which the interpretation and application of Article 15 (c) of the Qualification Directive by six Member States responds to the protection needs of persons fleeing indiscriminate violence in Afghanistan, Iraq and Somalia. However, as the protection provided by Article 15 is by definition subsidiary to that of the 1951 Convention, it is also important to review the relevance of that Convention to persons fleeing contemporary situations of indiscriminate violence.

Over the past sixty years, the 1951 Convention (and more recently, its 1967 Protocol) has afforded protection to people fleeing a variety of threats. In the post-Cold War period, as armed conflicts rooted in ethnic and religious differences have become increasingly prevalent, the continuing relevance of the 1951 Convention definition is beyond question.

Indeed, in armed conflicts and situations of endemic violence, whole communities may be exposed to persecution for 1951 Convention reasons. There is no requirement that an individual suffer a form or degree of harm different to others within those communities or groups. Violence in many forms, including sexual

violence, is used as an instrument of persecution. Bombs, shelling, suicide attacks or improvised explosive devices are used against targets or in areas where civilians of specific ethnic, religious or political profiles reside, work or gather. There is nothing in the 1951 Convention refugee definition that excludes its application to persons fleeing persecution in conflict situations.⁷⁷

However, there are startling variations in refugee recognition rates at first instance with regard to applicants from Afghanistan, Iraq and Somalia, as the tables below demonstrate. This is the case even when allowing for a variation in the profiles of applicants, as well as for disparities in asylum procedures and the presentation of data. The variation extends to as much as 33 percent with regard to first instance decisions relating to Afghanistan in 2010, 50 percent with regard to Iraq and 72 percent with regard to Somalia.

Table 2. Afghanistan – 2010 first instance decisions, refugee status

	Total decisions	Otherwise closed	Total decisions on merits	Grants of refugee status	Refugee status recognition rate
Belgium	1106	18	1088	387	35.6 %
France⁷⁸	453	n/s	453	142	31.3 %
Germany	5007	430	4577	567 ⁷⁹	12.4 %
Netherlands⁸⁰	1907	n/a	1907	49	2.6 %
Sweden	1510	51	1459	162	11.1 %
United Kingdom	2985	710	2275	215	9.5 %

Table 3. Iraq – 2010 first instance decisions, refugee status

	Total decisions	Otherwise closed	Total decisions on merits	Grants of refugee status	Refugee status recognition rate
Belgium	981	55	926	303	32.7 %
France⁸¹	169	n/a	169	79	46.7 %
Germany	6564	644	5920	3305 ⁸²	55.8 %
Netherlands⁸³	2253	n/a	2253	132	5.9 %
Sweden	1846	179	1667	569	34.1 %
United Kingdom	1020	155	865	80	9.2 %

⁷⁷ UNHCR, *Conclusion on International Protection*, 9 October 1998, No. 85 (XLIX) - 1998, at: <http://www.unhcr.org/refworld/docid/3ae68c6e30.html>. See also: UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, p. 6, at: <http://www.unhcr.org/refworld/docid/3b20a3914.html>.

⁷⁸ See OFPRA, *Report on activities*, 2010, available at: http://www.ofpra.gouv.fr/documents/RA_2010_Ofpra.pdf. As indicated earlier, France does not provide statistics for cases “otherwise closed”. Therefore the total number of decisions and decisions on the merits are identical.

⁷⁹ This figure includes 549 grants of 1951 Convention refugee status and 18 grants of constitutional asylum.

⁸⁰ As indicated earlier, the Netherlands does not provide statistics for cases ‘otherwise closed’. Therefore the total number of decisions and decisions on the merits are identical.

⁸¹ These figures were provided to UNHCR by the OFPRA in June 2011 and exclude grants of protection to Iraqis resettled in France through an exceptional procedure (*Opération Irak 500*). As indicated earlier, France does not provide figures for cases ‘otherwise closed’. Therefore total decisions and total decisions on the merits are identical.

⁸² This figure includes 27 grants of constitutional asylum and 3,278 grants of refugee status under the 1951 Convention.

⁸³ As indicated earlier, the Netherlands does not provide figures for cases “otherwise closed”. Therefore total decisions and total decisions on the merits are identical.

Table 4. Somalia – 2010 first instance decisions, refugee status

	Total decisions	Otherwise closed	Total decisions on merits	Grants of refugee status	Refugee status recognition rate
Belgium	180	7	173	44	25.4 %
France⁸⁴	225	n/a	225	103	45.7 %
Germany	914	405	509	378	74.3 %
Netherlands	5329	n/a	5329	97	1.8 %
Sweden	5357	393	4964	464	9.3 %
United Kingdom	1090	125	965	440	45.6 %

Although the application of the 1951 Convention to persons fleeing situations of indiscriminate violence was not the primary focus of this research, some issues emerged during the research, which warrant mention.

In all of the six Member States studied, national legislation, regulations or policy guidance require decision-makers to examine qualification for refugee status first, and to only examine qualification for subsidiary protection if the applicant is not eligible for refugee status.⁸⁵ Moreover, case law in some Member States emphasizes the requirement to grant refugee status to those who fear persecution for 1951 Convention reasons, particularly in the context of countries experiencing conflict.⁸⁶ Whilst the statistics above indicate a robust refugee recognition rate in some Member States, in others the refugee recognition rate is low. Evidence emerged in the course of the research indicating that in some Member States, recognition of refugee status under the 1951 Convention may be inappropriately denied due to restrictive interpretations and procedures.

In one Member State, case law holds that persons fleeing armed conflict or large-scale violence do not qualify as refugees under the 1951 Convention unless they can demonstrate that they are differentially impacted by showing a fear of persecution for 1951 Convention reasons over and above the ordinary risks of conflict.⁸⁷ Such an approach may fail to recognize that war and violence are frequently the means chosen

⁸⁴ See OFPRA, *Report on activities, 2010*. However, the figure for total decisions on the merits was provided to UNHCR by the OFPRA in June 2011 and excludes 48 Somalis who were relocated to France from Malta. The data in the OFPRA Report on activities 2010 includes these persons.

⁸⁵ Belgium: Article 48/4 of the Aliens Law. France: Article L. 712-1 Céseda. Germany: Handbook for Adjudicators, “Decision”, especially overview 2.4.5, “Structure of a decision”, p. 18. Netherlands: Letter from the Ministry of Justice to the Speaker of the Lower House of the Netherlands Parliament, of 17 March 2009, regarding the ruling of the European Court of Justice of the European Communities in respect of the Qualification Directive. Sweden: Chapter 4 Section 2 of the Act amending the Aliens Act which entered into force on 1 January 2010. UK: Paragraph 339C of the Immigration Rules.

⁸⁶ France: Council of State, Melle KONA, 15 May 2009, decision n° 292564; Council of State, OFPRA v. Melle NSILU DIMBENI, 24 November 2010, decision 315822; and Council of State, OFPRA v. Melle GOUPI, 17 December 2010, decision n° 315822. Germany: FAC, decision of 27 April 2010, BVerwG 10 C 4.09 – VGH 8 A 611/08.A, paragraph 33.

⁸⁷ *R v. Secretary of State for the Home Department, Ex parte Adan, Ex parte Aitseguer*, United Kingdom: House of Lords, 19 December 2000, at: <http://www.unhcr.org/refworld/docid/3ae6b73b0.html>. The UK determining authority’s guidance to decision-makers with regard to Somalia states that where: “a state of civil war exists it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show a differential impact. In other words, he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare.” Operational Guidance Note on Somalia v 20.0, UKBA, July 2010.

by persecutors to repress or eliminate whole groups targeted on account of their ethnicity, religious beliefs or other affiliations.⁸⁸

Furthermore, it appeared in some of the Member States studied that applicants may be denied refugee status under the 1951 Convention due, in particular, to:

- A narrow interpretation of the five 1951 Convention grounds for persecution;
- An expansive interpretation of “actors of protection”;
- A high standard of proof placed on the applicant to demonstrate a nexus between the threat of persecution and the 1951 Convention reasons, and other onerous evidentiary requirements;
- Flawed credibility assessments.

A restrictive interpretation of the 1951 Convention grounds, in particular, of (imputed) political opinion and membership in a particular social group, was noted in several Member States. For example, some determining authorities considered the following groups fleeing situations of armed conflict to fall outside the scope of the 1951 Convention:

- Women and children with a well-founded fear of sexual violence;
- Children and young men with a well-founded fear of forcible recruitment into armed groups;
- People at risk of persecution because they exercise a particular occupation.⁸⁹

These are all group profiles that UNHCR has highlighted with regard to Afghanistan, Iraq and Somalia as requiring a particularly careful examination of possible risks with reference to the 1951 Convention.

One determining authority informed UNHCR that, based on national case law, persons from Iraq who were at risk of targeted violence because they exercised a particular profession – such as doctors, academics or musicians – could not be considered members of a particular social group within the meaning of the cumulative criteria of Article 10 (1) (d) of the Qualification Directive because members of those groups do not share an innate or immutable characteristic.⁹⁰ Similarly, another determining authority did not consider women with a well-founded fear of sexual violence to fall within the definition of a particular social group because the group is not “perceived as being different by the surrounding society” within the terms of Article 10 (1) (d) of the Qualification Directive.⁹¹ In another Member State, UNHCR observed appeal decisions involving applicants who alleged a well-founded fear of persecution because their occupation was per-

⁸⁸ UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, p.6. Also, by way of comparison, the case law of the European Court of Human Rights has established that Article 3 of the European Convention on Human Rights is applicable where an applicant alleges that s/he is a member of a group systematically exposed to a practice of ill-treatment. In those circumstances, the Court will not insist that the applicant show the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. See *Salah Sheekh v. the Netherlands*.

⁸⁹ See UNHCR Afghanistan Eligibility Guidelines, and UNHCR, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum-Seekers* (UNHCR Iraq Eligibility Guidelines), April 2009, at: <http://www.unhcr.org/refworld/docid/49f569cf2.html>. The validity of these Guidelines has been confirmed by the UNHCR Note on the Continued Applicability of Iraq Guidelines. The issuance of revised guidance covering further developments in Iraq is in preparation. See also UNHCR Somalia Eligibility Guidelines.

⁹⁰ See Swedish Migration Court of Appeal, UM 7669-08, UM 240-09 and UM 1664-09 of 22 December 2009. Article 10 (1) (d) states: “a group shall be considered to form a particular social group where in particular: - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and – that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; ...”

⁹¹ See UNHCR, Guidelines on International Protection No. 1: Gender-related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (UNHCR Guidelines on International Protection No. 1: Gender), 7 May 2002, HCR/GIP/02/02, at: <http://www.unhcr.org/refworld/docid/3d36f23f4.html>.

ceived to contravene particular religious rules or to oppose certain political views, yet the 1951 Convention reasons of “*religion*”, “*political opinion*” and/or “*membership of a particular social group*” did not appear to be taken into consideration.

Some interviewees noted that some determining authorities too readily deny refugee status on the basis that state or non-state protection is available, whereas the interviewees questioned whether such protection was accessible and effective.

Interviewees in some Member States felt that the standard of proof placed on applicants who have fled situations of violence is unduly high, and that it is practically impossible for an applicant to prove – in the terms required by the determining authority – the nexus between the persecution and one or more of the five 1951 Convention grounds, as well as other facts such as their nationality, place of origin and prior residence, and details regarding their departure from the country of origin.

Finally, some interviewees stressed that flawed credibility assessments, which fail to take into account the age, education and social position of the applicant, often result in the denial of refugee status.

4. PROTECTION OF PERSONS FLEEING INDISCRIMINATE VIOLENCE WHO FALL OUTSIDE THE SCOPE OF THE REFUGEE DEFINITION



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It has long been recognized that there are persons who flee indiscriminate violence, who fall outside the scope of the 1951 Convention, but nevertheless require international protection.⁹² As mentioned above, UNHCR selected Afghanistan, Iraq and Somalia as case studies for this research because it was UNHCR's assessment in 2010 that in all three countries, civilians may be exposed to serious harm on account of the high levels of indiscriminate violence.⁹³

⁹² UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, 7 May 2002, p.7. See also, UNHCR, *Complementary Forms of Protection: Their Nature and Relationship to the International Refugee Protection Regime*, 9 June 2000.

⁹³ UNHCR Afghanistan Eligibility Guidelines; UNHCR Somalia Eligibility Guidelines; UNHCR Note on the Continued Applicability of Iraq Guidelines.

With regard to Afghanistan, it was UNHCR's view at the time of the research in 2010 that there was a worsening security situation in certain parts of the country – in particular Helmand, Kandahar, Kunar and parts of Ghazni and Khost province – with high levels of violence and human rights violations linked to the conflict.⁹⁴ Moreover, other provinces, including Uruzgan, Zabul, Paktika, Nangarhar, Badghis, Paktya, Wardak and Kunduz were also experiencing significant although fluctuating levels of violence. The violence continued to cause significant population displacement and high numbers of civilian casualties, in particular due to suicide attacks and the use of improvised explosive devices. The United Nations Assistance Mission in Afghanistan (UNAMA) documented 3,268 civilian casualties during the first six months of 2010 alone.⁹⁵

In Iraq, although the overall security situation had improved as compared to previous years, acts of indiscriminate violence continued to take their toll on civilians.⁹⁶ During 2010, armed groups continued to target crowded public areas, killing and maiming civilians indiscriminately. Mass casualty attacks claimed the lives or injured hundreds of civilians mostly in the central governorates of Baghdad, Diyala, Kirkuk, Ninewa and Salah al Din as well as in Al Anbar.⁹⁷ The Iraq Body Count (IBC), a project that maintains data on civilian fatalities, recorded 4,036 civilian deaths from violence in 2010.⁹⁸ In view of the human rights situation and ongoing security incidents in the country, most predominantly in the five aforementioned central governorates, UNHCR continued throughout 2010 to consider all Iraqi asylum-seekers from these five central governorates to be in need of international protection.

In Somalia, the collapse of the State, lawlessness and anarchy have led to one of the most alarming humanitarian crises in the world today. In 2010, the violence in southern and central Somalia and the ensuing humanitarian crisis was acute and showed no sign of abating. In Mogadishu, civilians bore the brunt of the conflict, with road-side and vehicle bombs, fighting with light weapons, and indiscriminate mortar fire and shelling causing death and destruction and forcing hundreds of thousands of people to flee the city. Other parts of southern and central Somalia were also affected by human rights violations and high levels of violence causing significant casualties among the civilian population such that UNHCR considered that the situation in southern and central Somalia constituted a situation of indiscriminate violence arising from an internal armed conflict within the meaning of Article 15 (c) QD.⁹⁹

It was with this backdrop that this study examined the contribution that Article 15 (c) QD has made to the protection of Afghans, Iraqis and Somalis seeking refuge in Belgium, France, Germany, the Netherlands, Sweden and the UK.

⁹⁴ UNHCR Afghanistan Eligibility Guidelines.

⁹⁵ See UN Assistance Mission in Afghanistan (UNAMA), *Annual Report on Protection of Civilians in Armed Conflict, Mid Year Report 2010*, August 2010, at: <http://www.unhcr.org/refworld/docid/4c6120382.html>.

⁹⁶ See the second report of the Special Representative of the UN Secretary-General for Iraq pursuant to paragraph 6 of resolution 1936 (2010), 31 March 2011, in which the Special Representative reports that the security environment remains volatile with ongoing acts of violence both targeted and random against civilians perpetrated by armed opposition groups and criminal gangs.

⁹⁷ UNHCR Note on the Continued Applicability of Iraq Guidelines; Iraq Body Count (IBC) recorded 567 fatalities and 1,633 persons injured as a result of just 9 large-scale bombings in 2010, at: www.iraqbodycount.org.

⁹⁸ *Ibid.*, Iraq Body Count.

⁹⁹ UNHCR Somalia Eligibility Guidelines.

4.1. INTENT OF ARTICLE 15 (C)

Articles 2 (e) and 18 of the Qualification Directive, together with Article 15, provide that Member States shall grant subsidiary protection status to 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 if s/he is returned to the country of origin or, in the case of a stateless person, the country of former habitual residence, s/he would face a real risk of serious harm. One of three forms of “serious harm” stated in Article 15 is set out in sub-paragraph (c) as a “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.”

In its explanatory memorandum to the Proposal for the Qualification Directive issued in 2001, the European Commission explained that its intention with Article 15 (c) was to cover persons who would be protected by the EU’s Directive on Temporary Protection (in a “mass influx” situation),¹⁰⁰ when they arrive individually and do not qualify for refugee status.¹⁰¹

In other words, Article 15 (c) QD was formulated to address a protection gap at the regional level: the need to protect persons who have fled indiscriminate violence.¹⁰² This need had been addressed on other continents, as mentioned above;¹⁰³ and UNHCR had long advocated for the creation of a specific basis in European Union law for the protection of persons falling under UNHCR’s mandate, but outside the scope of the 1951 Convention refugee definition.

Although UNHCR expressed some concern regarding the terminology ultimately adopted in Article 15 (c) QD,¹⁰⁴ the organization welcomed the European Commission’s proposal to establish a subsidiary protection status,¹⁰⁵ expressing hope that it would ensure protection for people fleeing indiscriminate violence.

As this research did not involve a systematic review of first instance decisions, UNHCR relied on statistics from determining authorities, information from many stakeholders, and the review of appeal decisions to provide insight into the significance of Article 15 (c) in practice for the protection of persons from Afghanistan, Iraq and Somalia.

¹⁰⁰ Temporary Protection Directive. Article 2 (c) encompasses (i) “[p]ersons who have fled areas of armed conflict or endemic violence”; and (ii) “[p]ersons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.”

¹⁰¹ European Commission, COM (2001) 510 final, p. 26.

¹⁰² Whilst the European Court of Human Rights has never excluded the possibility that removal of a person to a general situation of violence could entail a breach of Article 3 of the ECHR, the Court has taken a cautious approach and protection on this ground alone has remained theoretical until recently. The Court has stated in *NA. v. the United Kingdom*, paragraph 115, that it would find a breach of Article 3 only in the “most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.” However, in the Chamber decision in the case of *Sufi and Elmi v. the United Kingdom*, paragraph 248, the Court has ventured further, finding that the level of violence in Mogadishu is “of sufficient intensity to pose a real risk of treatment reaching the Article 3 threshold to anyone in the capital.”

¹⁰³ OAU Convention, Article 1.2; and Cartagena Declaration on Refugees, III.3.

¹⁰⁴ UNHCR, *UNHCR Statement on Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence* (UNHCR Statement on Subsidiary Protection), January 2008, at: <http://www.unhcr.org/refworld/docid/479df7472.html>.

¹⁰⁵ See UNHCR, *Some Additional Observations and Recommendations on the European Commission ‘Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection’* (COM(2001) 510 final, 2001/0207(CNS) of 12 September 2001), July 2002, at: <http://www.unhcr.org/refworld/docid/3e493dc94.html>.

4.2. STATISTICS¹⁰⁶

As a starting point, UNHCR reviewed statistics of first instance decisions by the determining authorities in the six Member States selected for this study. However, UNHCR was not able to extract a comprehensive overview of grants of subsidiary protection based on Article 15 (c) QD because, of the six Member States reviewed, only the determining authorities in France (OFPRA), Germany (BAMF) and Sweden (Swedish Migration Board) have disaggregated subsidiary protection statistics according to their respective legal bases. The other three Member States provide a figure for grants of subsidiary protection as a whole but without specifying the legal bases as they relate to Article 15 (a), (b) and/or (c).

In Belgium, it appears that Article 15 (c) is an important protection tool, affording protection at first instance to significant numbers of persons from Afghanistan, Iraq and Somalia. In Sweden, given that the transposition of Article 15 (c) into domestic law occurred at the beginning of 2010, it is too early to gauge its significance in practice, but first instance statistics for 2010 indicate that it provided protection to significant numbers of applicants from Afghanistan and Somalia in particular. However, in the other four Member States, Article 15 (c) appears to have been of little or no relevance.

The figures below should be analyzed with caution. Statistics on grants of subsidiary protection must be considered vis-à-vis refugee recognition rates. For example, a Member State may have a robust refugee recognition rate, making recourse to subsidiary protection status less necessary.

Belgium - first instance decisions 2010

In Belgium, Article 15 (c) seems to have made a meaningful contribution to the protection of persons fleeing indiscriminate violence. Transposition of the Qualification Directive established subsidiary protection in Belgium for the first time in 2006.¹⁰⁷ The 2010 statistics for first instance decisions by the determining authority, the CGRS (Office of the Commissioner General for Refugees and Stateless Persons) show that subsidiary protection status has become a significant tool of international protection.¹⁰⁸ Official statistics do not indicate whether subsidiary protection was granted based on Article 15 (a), (b) or (c), but according to the CGRS, most grants are based on Article 15 (c).¹⁰⁹

Table 5. First instance decisions in Belgium, 2010, international protection

	Total decisions	Other-wise closed	Total decisions on merits	Refugee status	Refugee recognition rate	Subsidiary protection ¹¹⁰	Subsidiary protection rate	International protection rate
Afghanistan	1106	18	1088	387	35.6 %	292	26.8 %	62.4 %
Iraq	981	55	926	303	32.7 %	424	45.8 %	78.5 %
Somalia	180	7	173	44	25.4 %	42	24.3 %	49.7 %

¹⁰⁶ See Preliminary explanation, ii. the use of statistics.

¹⁰⁷ Article 48/4 of the Belgian Aliens Law transposed Article 2e) and 15 and became effective as of 10 October 2006. Before this date, no statutory complementary protection status was available in Belgium.

¹⁰⁸ The introduction of subsidiary protection status does not appear to have affected refugee recognition rates. For example, in 2005, prior to the transposition of the Qualification Directive, the refugee recognition rate for Afghans was 30 percent: UNHCR Statistical Yearbook 2007, applications and refugee status determination by country of asylum. This is less than the refugee recognition rate for this group in 2010.

¹⁰⁹ Interview with the CGRS of 11 March 2011. This was supported by a review of some decisions of the CGRS and appeal decisions by the Council for Aliens' Law Litigation (CALL).

¹¹⁰ This equates to protection in accordance with Article 48/4 of the Aliens Law.

Sweden - first instance decisions 2010

In Sweden, at the time of the entry into force of the Qualification Directive, the provisions of Article 15 (c) were considered to be broadly covered by Chapter 4 Section 2 of the Aliens Act (2005:716).¹¹¹ A governmental inquiry which assessed the extent to which the Qualification Directive required further transposition concluded, *inter alia*, that national legislation could be further clarified by adopting more closely the language of Article 15 (c) QD.¹¹² The Aliens Act was amended by the Act amending the Aliens Act (2005:716) which entered into force on 1 January 2010. Thus, a new legal provision transposing Article 15 (c) was applicable for the first time in 2010.¹¹³ Statistics on first instance decisions taken by the Swedish Migration Board (SMB) in 2010 indicate that grants of subsidiary protection based on Article 15 QD were significant concerning applicants from Afghanistan and Somalia, and much higher than the refugee recognition rate for these nationality groups. Even subsidiary protection on the basis of Article 15 (c) alone exceeded grants of refugee status for these two nationality groups.

Table 6. First instance decisions in Sweden, 2010, international protection

	Total decisions	Other-wise closed	Total decisions on merits	Refugee status	Refugee recognition rate	Subsidi-ary pro-tection ¹¹⁴	Subsidi-ary pro-tection rate	Interna-tional protec-tion rate
Afghanistan	1510	51	1459	162	11.1 %	631	43.2 %	54.3 %
Iraq	1846	179	1667	569	34.1 %	85	5.1 %	39.2 %
Somalia	5357	393	4964	464	9.3 %	3532	71.2 %	80.5 %

¹¹¹ The Aliens Act entered into force on 31 March 2006. Chapter 4 entitled 'Refugees and persons otherwise in need of protection' states at Section 2: "In this Act a 'person otherwise in need of protection' is an alien who in cases other than those referred to in Section 1 is outside the country of the alien's nationality, because he or she 1. feels a well-founded fear of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment, 2. needs protection because of external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses, or 3. is unable to return to the country of origin because of an environmental disaster."

¹¹² The Skyddsgrundsutredningen presented the result of its inquiry on 19 January 2009 (SOU 2006:6 Skyddsgrundsdirektivet och svensk rätt – En anpassning av svensk lagstiftning till EG-direktiv 2004/83/EG angående flyktingar och andra skyddsbehövande).

¹¹³ Article 2 (e) and 15 QD is transposed by Chapter 4 Section 2 of the Aliens Act which states: "In this Act, a 'person eligible for subsidiary protection' is an alien who in cases other than those referred to in Section 1 [refugee status] is outside the country of the alien's nationality, because 1. there are substantial grounds for assuming that the alien, upon return to the country of origin, would run a risk of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment or as a civilian would run a serious and personal risk of being harmed by reason of indiscriminate violence resulting from an external or internal armed conflict, and 2. the alien is unable or, because of a risk referred to in point 1, unwilling to avail himself or herself of the protection of the country of origin. The first paragraph, point 1 applies irrespective of whether it is the authorities of the country that are responsible for the alien running such a risk as is referred to there or whether these authorities cannot be assumed to offer protection against the alien being subjected to such a risk through the actions of private of individuals. [...]". This is an official translation. The language is not exactly the same as the English language version of Article 15(c) Qualification Directive. However, it is understood that this provision is intended to provide a literal transposition of Article 15 (c).

¹¹⁴ Grants of subsidiary protection on the basis of Chapter 4 Section 2 Aliens Act, as amended by the Act amending the Aliens Act (2005:716).

Table 7. Sweden, Breakdown of 2010 first instance decisions to grant subsidiary protection

	Total decisions on merits	Article 15 (a) and (b) ¹¹⁵	Article 15 (c) ¹¹⁶	Grants based on Art. 15 (c) as a percent of decisions on merits
Afghanistan	1459	252	379	26 %
Iraq	1667	81	4	0.2 %
Somalia	4964	999	2533	51 %

In stark contrast to the situation in Belgium and Sweden, Article 15 (c) appears practically irrelevant as a basis for protection in the other four Member States studied.

United Kingdom - first instance decisions 2010

UK statistics reveal few grants of subsidiary protection at first instance.¹¹⁷ In 2010, as a percentage of all decisions on the merits for each nationality of focus, 0.2 percent (Afghanistan), 1.7 percent (Iraq) and 3.1 percent (Somalia) were grants of subsidiary protection. The last figure should be considered in the light of a robust refugee recognition rate for Somalis. The UKBA does not have disaggregated statistics showing the legal bases on which subsidiary protection is granted. Thus, from the statistics alone, it is not possible to determine how many of the grants were based on Article 15 (a) and (b) and how many, if any, fell under Article 15 (c) of the Qualification Directive. However, interviewees in the UK suggested that most decisions to grant subsidiary protection derive from Article 15 (b), and it is not clear whether a grant of protection has ever been made on the basis of Article 15 (c).

Table 8. First instance decisions in the UK, 2010, international protection

	Total decisions	Other-wise closed	Total decisions on merits	Refugee status	Refugee recognition rate	Subsidi-ary pro-tection ¹¹⁸	Subsidi-ary pro-tection rate	Interna-tional protec-tion rate
Afghanistan	2985	710	2275	215	9.5 %	5	0.2 %	9.7 %
Iraq	1020	155	865	80	9.2 %	15	1.7 %	10.9 %
Somalia	1090	125	965	440	45.6 %	30	3.1 %	48.7 %

¹¹⁵ Chapter 4 Section 2 (1) first clause Aliens Act.

¹¹⁶ Chapter 4 Section 2 (1) second clause Aliens Act.

¹¹⁷ See sections 5.1.6 and section 8.4 for information concerning other forms of complementary protection in the UK.

¹¹⁸ This equates to Humanitarian Protection in accordance with paragraph 339C of the Immigration Rules which transposes Articles 2 (e), 15 and 18 QD.

Netherlands first instance decisions 2010¹¹⁹

In the Netherlands, grants of subsidiary protection to persons from Afghanistan, Iraq and Somalia are statistically much higher than in the UK. However, refugee recognition rates for these three nationality groups are the lowest of all the six Member States studied. The statistics do not distinguish between the legal grounds for subsidiary protection. However, stakeholders informed UNHCR that Article 15 (c) QD has hardly been applied and that most grants of subsidiary protection are based on Article 15 (b) QD.

Table 9. First instance decisions in the Netherlands, 2010, international protection

	Total decisions	Refugee status	Refugee recognition rate	Subsidiary protection ¹²⁰	Subsidiary protection rate	International protection rate
Afghanistan	1907	49	2.6 %	418	21.9 %	24.5 %
Iraq	2253	132	5.9 %	741	32.9 %	38.8 %
Somalia	5329	97	1.8 %	1732	32.5 %	34.3 %

Germany - first instance decisions 2010

In Germany, grants of subsidiary protection in percentage terms are lower than in the Netherlands, but this needs to be assessed in the light of the much higher refugee recognition rates for Iraqis and Somalis in particular.

Table 10. First instance decisions in Germany, 2010, international protection

	Total decisions	Otherwise closed	Total decisions on merits	Refugee status ¹²¹	Refugee recognition rate	Subsidiary protection ¹²²	Subsidiary protection rate	International protection rate
Afghanistan	5007	430	4577	567	12.4 %	245	5.4 %	17.8 %
Iraq	6564	644	5920	3305	55.8 %	25	0.4 %	56.2 %
Somalia	914	405	509	378	74.3 %	77	15.1 %	89.4 %

As seen below, grants of subsidiary protection based on Article 15 (c) to Afghans and Iraqis are rare in Germany. Subsidiary protection has been mostly granted to these nationality groups based on Article 15 (b).

¹¹⁹ As indicated earlier, the Netherlands does not provide figures for cases "otherwise closed". To the extent that Dublin cases are included in the total decisions, this will affect protection rates.

¹²⁰ Grants of protection based on Article 29 (1) (b) of the Aliens Act, which transposes Article 15 QD.

¹²¹ Includes grants of constitutional asylum to 18 applicants from Afghanistan and 26 from Iraq. There were no grants of constitutional asylum to Somali applicants in 2010.

¹²² Grants of protection based on Section 60 (2), (3) and (7) sentence 2 Residence Act which transpose Article 15 (b), (a) and (c) QD respectively.

Table 11. Germany, breakdown of 2010 first instance decisions to grant subsidiary protection

	Total decisions on merits	Article 15 (a) ¹²³	Article 15 (b) ¹²⁴	Article 15 (c) ¹²⁵	Grants based on Art. 15 (c) as a percentage of total decisions on merits
Afghanistan	4577	3	229	13	0.3 %
Iraq	5920	0	19	6	0.1 %
Somalia	509	0	17	60	11.8 %

France - first instance decisions 2010¹²⁶

The figures for subsidiary protection should be considered in light of a refugee status recognition rate that exceeded 30 percent for each nationality group in 2010. Subsidiary protection on the basis of Article 15 (c) is granted more commonly to Somalis than to the other two nationalities.

Table 12. First instance decisions in France, 2010, international protection

	Total decisions	Refugee status	Refugee recognition rate	Subsidiary protection ¹²⁷	Subsidiary protection rate	International protection rate
Afghanistan	453	142	31.3 %	14	3.1 %	34.4 %
Iraq	169	79	46.7 %	4	2.4 %	49.1 %
Somalia	225	103	45.7 %	38	16.9 %	62.6 %

Table 13. France, breakdown of 2010 first instance decisions to grant subsidiary protection

	Total decisions on merits	Article 15 (a) ¹²⁸	Article 15 (b) ¹²⁹	Article 15 (c) ¹³⁰	Grants based on Art. 15 (c) as a percentage of total decisions on merits
Afghanistan	453	—	9	5	1.1 %
Iraq	169	—	—	4	2.4 %
Somalia	225	—	6	32	14.2 %

¹²³ This equates to grants of protection based on Section 60 (3) Residence Act.

¹²⁴ This equates to grants of protection based on Section 60 (2) Residence Act.

¹²⁵ This equates to grants of protection based on Section 60 (7) sentence 2 Residence Act.

¹²⁶ OFPRA, *Report on activities 2010*. The figures reported in the table with regard to Iraq were provided to UNHCR by the OFPRA in June 2011 and exclude grants of protection to Iraqis resettled in France through an exceptional procedure (*Opération Irak 500*). The figures reported in the table with regard to Somalis exclude 48 Somalis relocated to France from Malta.

¹²⁷ This relates to grants of protection based on Article L. 712-1 *Ceseda* which transposes Article 15 QD.

¹²⁸ This equates to grants of protection based on Article L. 712-1 a) *Ceseda*.

¹²⁹ This equates to grants of protection based on Article L. 712-1 b) *Ceseda*.

¹³⁰ This equates to grants of protection based on Article L. 712-1 c) *Ceseda*.

5. INTERPRETATION OF ARTICLE 15 (C)



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The language of Article 15 (c) was a political compromise. It appears to create separate and multiple hurdles which an applicant for protection must overcome. UNHCR was interested to explore whether Member States interpret Article 15 (c) in line with its object and purpose, and how it is applied in the context of available country of origin information. The research reveals that in some Member States a narrow interpretation of Article 15 (c) seems to have rendered this provision an empty shell in protection terms.

The boundaries of Article 15 (c) are still largely to be defined by the CJEU. The Court has had only one opportunity to date to address the meaning of Article 15 (c), when the Dutch Administrative Jurisdiction Division of the Council of State lodged a reference for a preliminary ruling with regard to the case of *Elgafaji v. Staatssecretaris van Justitie*.¹³¹ The Dutch Council of State in essence asked the CJEU whether Article 15 (c) of the Qualification Directive, in comparison with Article 3 of the European Convention on Human

¹³¹ *Elgafaji v. Staatssecretaris van Justitie*, C-465/07, European Union: European Court of Justice, 17 February 2009, at: <http://www.unhcr.org/refworld/docid/499aeee52.html>.

Rights, offers supplementary or other protection; and if so, what are the criteria for determining qualification for subsidiary protection under Article 15 (c), read in conjunction with Article 2 (e) of the Qualification Directive.

In its 2009 ruling, the CJEU found Article 15 (c) to be applicable without the applicant having to produce evidence that s/he is specifically targeted by reason of factors particular to his or her personal circumstances; and that a threat to life or person may exceptionally be considered to be established where the degree of indiscriminate violence characterizing the armed conflict reaches such a high level that substantial grounds are shown for believing that a civilian would solely on account of his or her presence on the territory face a real risk of being subject to that threat.

5.1. KEY QUESTIONS OF INTERPRETATION

The research identified a number of key issues with respect to the interpretation of Article 15(c) to be explored in further detail in the next sections of this report:

- In some Member States, policy and/or practice reflect the view that Article 15 (c) is only applicable in relation to **exceptional situations of indiscriminate violence**;
- Some Member States require an **extremely high level of indiscriminate violence** in order to establish a real risk of serious harm in the absence of individual characteristics or circumstances enhancing the risk of harm;
- Member States have **divergent assessments** of the risk of serious harm posed by the levels of indiscriminate violence in Afghanistan, Iraq and Somalia;
- Member States have **different methodologies** for judging the degree of indiscriminate violence and for making the risk assessment;
- Some stakeholders have alleged that some Member States do **not always take a cautious approach** with regard to the forward-looking prognosis of levels of indiscriminate violence;
- Some stakeholders believe that some Member States are reluctant to find that violence poses a real risk of serious harm to civilians on the basis of Article 15 (c) because of **a fear that this would introduce a form of group or prima facie recognition “through the back door”** and constitute a *“pull factor”*. For similar reasons, official assessments of whether levels of indiscriminate violence pose a real risk of serious harm to civilians merely on account of their presence on the territory may not be made public;
- **The “sliding scale” test** set out in CJEU’s *Elgafaji v. Staatssecretaris van Justitie* judgment for application of Article 15 (c) **is not always applied**. According to this test, the more an applicant is able to show that s/he is specifically affected by reason of factors particular to his or personal circumstances, the lower the level of indiscriminate violence required;
- The practice of some States shows that there is **a lack of clarity regarding the added value of Article 15 (c) as compared to Article 15 (b)**;
- There are **divergences** among and within some Member States **as to the meaning of a number of terms contained in Article 15 (c)**.

5.1.1. “Real risk of serious harm” and the requirement of exceptionality

The CJEU, in *Elgafaji v. Staatssecretaris van Justitie*, held that a serious and individual threat to the life or person of an applicant, in terms of Article 15 (c), may:

*exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place [...] reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.*¹³²

National determining authorities and appellate bodies must assess whether the degree of indiscriminate violence is sufficiently high to pose such a risk. The Court did not explain how intense the indiscriminate violence must be to reach the threshold of a “real risk”, nor how to assess the level of indiscriminate violence.

The CJEU’s interpretation in *Elgafaji v. Staatssecretaris van Justitie* has been applied by the courts and determining authorities in France;¹³³ Germany;¹³⁴ the Netherlands;¹³⁵ Sweden;¹³⁶ and the UK.¹³⁷ The Belgian appeal instance CALL frequently refers to the *Elgafaji* decision, even though Belgium did not transpose the term “individual” in its national legislation. Article 48/4 §2 (c) of the Aliens Law defines serious harm as a “serious threat to a civilian’s life or person for reason of indiscriminate violence in situations of international or internal armed conflict.”¹³⁸ The Belgian legislator stressed that an applicant must show that s/he, irrespective of personal circumstances, if returned to the country or region in question, faces a situation where the serious threat to life or person is evident.¹³⁹ Accordingly, the Belgian courts require that the applicant

¹³² *Elgafaji v. Staatssecretaris van Justitie*.

¹³³ Council of State, decision n° 320295, M. Baskarathas, 3 July 2009. See also the conclusions of the Rapporteur on the Council of State decision n°292564, Melle Kona, 15 May 2009.

¹³⁴ FAC, decision of 14 July 2009, BVerwG 10 C 9.08, under ‘Headnote’ at: http://www.bundesverwaltungsgericht.de/enid/d784285c8853a8acbf757ebbc0da745.0/Decisions_in_Asylum_and_Immigration_Law/BVerwG_ss_C_9_8_m9.html. The Court ruled: “1. A substantial individual danger to life or limb within the meaning of Section 60 (7) Sentence 2 of the Residence Act that also satisfies the equivalent requirements of Article 15 (c) of Directive 2004/83/EC (the ‘Qualification Directive’) may also arise from a general danger to a large body of civilians within a situation of armed conflict if the danger is concentrated on the person of the foreigner. a) Such a concentration, or individualisation, may result from circumstances specific to the foreigner’s person that increase[s] risk. b) By exception, it may also arise irrespectively of such an individualisation in an extraordinary situation that is characterised by such a high degree of risk that practically any civilian would be exposed to a serious individual threat solely on account of his presence on the relevant territory (concurring, CJEU, judgment of 17 February 2009 - C 465/07 - *Elgafaji*).”

¹³⁵ Council of State judgment of 25 May 2009 in case 200702174/2/V2 at: www.raadvanstate.nl.

¹³⁶ Migration Court of Appeal, UM 334-09 of 6 October 2009 and UM 10061-09 of 24 February 2011. The latter judgment found that it is not necessary that the person demonstrate that the threat is specifically aimed at him due to personal circumstances. The requirements of a personal risk are fulfilled if the indiscriminate violence is so serious that there is reason to believe that a person would be subjected to a real risk of harm merely by being present in the country.

¹³⁷ QD and AH v SSHD [2009] EWCA Civ 620, paragraph 40, stated the test as the following: “Is there in Iraq or a material part of it such a high level of indiscriminate violence that substantial grounds exist for believing that an applicant such as QD or AH would, solely by being present there, face a real risk which threatens his life or person?” See also, the more recent country guidance case of HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010 paragraph 67 (e); and Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence, September 2010, paragraph D, UK Border Agency.

¹³⁸ Art.48/4§2 Loi du 15 septembre 2006, modifiant la loi du 15 décembre 1980 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers, *Moniteur Belge*, 6 octobre 2006.

¹³⁹ Exposé des motifs, Projet de loi modifiant la loi du 15 décembre 1980 sur l’accès au territoire, le séjour, l’établissement et l’éloignement des étrangers, Doc. Parl, Chambre, 2006, no 2478/001, p.87; pp. 103-104.

demonstrate “a link with his person”; a mere reference to the general situation in the country of origin does not suffice.¹⁴⁰ The determining authorities and courts conduct an assessment of the levels of indiscriminate violence in order to determine whether there is a real risk.

In Germany, the Netherlands and the UK, the evaluation of whether the degree of indiscriminate violence has reached or is likely in the foreseeable future to reach such a level as to pose a real risk of harm to civilians is a specific enquiry and tends to be the main focus with regards to the applicability of Article 15 (c). On the other hand, in Belgium,¹⁴¹ France,¹⁴² and Sweden,¹⁴³ the evaluation of the level of indiscriminate violence is performed as part of the assessment of whether or not there is an international or internal armed conflict.

In the *Elgafaji v. Staatssecretaris van Justitie* case, the CJEU sought to make clear that its interpretation was not invalidated by the wording of recital 26 of the Qualification Directive, according to which “[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.” The CJEU said that while recital 26 implies that:

*the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15 (c) of the Directive have been met in respect of a specific person, its wording nevertheless allows – by the use of the word “normally” – for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.*¹⁴⁴

The UK Court of Appeal has taken the view that the *Elgafaji v. Staatssecretaris van Justitie* judgment has not introduced an additional test of exceptionality but that the use of the word “exceptional” was simply to stress that “it is not every armed conflict or violent situation which will attract the protection of article 15 (c), but only one where the level of violence is such that, without anything to render them a particular target, civilians face real risks to their life or personal safety.”¹⁴⁵ Nevertheless, according to the assessment of the UK determining authority and the courts to date, it would appear that such levels of violence are in practice considered to be exceptional.¹⁴⁶

¹⁴⁰ Council of State, 29 November 2007, no. 177.396. Also, Council of State, 24 November 2006, no. 165.109, *T. Vreemd* 2007, 269; Council of State 27 July 2007, no 1025; Council of State 27 November 2007, no 1593; Council of State 23 July 2008, no 3113. See also CALL 25 April 2010 no 41584: “A mere reference to the general situation in country of origin is not sufficient to justify a “real risk of serious harm” in the sense of article 48/4 Aliens Law (subsidiary protection). The applicant **must ascertain (make plausible) a certain link with his person, although a proof of individual threat is not required.**” [Emphasis added]. Also, CALL 23 July 2010, no 3113; CALL 11 August 2010, no 47. 186.

¹⁴¹ Interview with the CGRS of 11 March 2011.

¹⁴² Council of State, decision n° 328420, OFPRA c/ Melle MPEKO, 15 December 2010. See also Council of State, decision n° 320295, M. Baskarathas, 3 July 2009, and the conclusions of the Rapporteur on the Council of State decision n°292564, Melle KONA, 15 May 2009.

¹⁴³ This approach was re-affirmed by the Migration Court of Appeal in UM 10061-09 of 24 February 2011. The Migration Court of Appeal judgment, under the heading ‘Internal armed conflict in southern and central Somalia’ sets out the requirements, established in its previous decision MIG 2009:27, for an internal armed conflict in accordance with the Swedish Aliens Act. The third requirement states that: “the violence stemming from the conflict is indiscriminate and of such severity that there is a founded reason to presume that a civilian would by his/her mere presence run a real risk of being subjected to a serious and personal threat against his/her life and limb”.

¹⁴⁴ *Elgafaji v. Staatssecretaris van Justitie*, paragraph 37.

¹⁴⁵ QD and AH v SSHD [2009] EWCA Civ 620, paragraph 25.

¹⁴⁶ See section 5.1.2.

Both the case law and government policy of the Netherlands reflect the view that Article 15 (c) Qualification Directive applies only to “*exceptional situations*” of indiscriminate violence and, therefore, Article 15 (c) will rarely be applied.

The Dutch Council of State, in its decision on the *Elgafaji v. Staatssecretaris van Justitie* case, following the judgment of the CJEU, stressed that Article 15 (c) is only applicable in “*exceptional situations*” and held that Article 15 (c) in conjunction with Article 2 (e) offers protection:

*in the unlikely event that the degree of indiscriminate violence in the ongoing armed conflict is so high that substantial grounds exist for believing that a civilian who returns to the country or, in this case, to the area concerned, simply by his presence there, [is at a real risk of serious harm].*¹⁴⁷

The Dutch State Secretary of Justice also stated that “*I am of the opinion that the wording of the judgment shows that this will involve a very limited number of situations.*” His letter to Parliament regarding the CJEU judgment in the *Elgafaji v. Staatssecretaris van Justitie* case, as well as Dutch policy documents and case law, repeatedly refer to the requirement of an “*exceptional situation.*”¹⁴⁸

5.1.2. Requirement of a high threshold of violence

In some Member States, the determining authorities’ assessment of the levels of indiscriminate violence and whether these are sufficiently high to pose a real risk of harm to applicants is not made public.¹⁴⁹ In such cases, this report is based on information provided by the determining authorities during interviews with UNHCR.

In general, the research showed that the level of indiscriminate violence required by the authorities and/or courts in some Member States is very high. It is fair to ask whether the threshold of violence required by national determining authorities and courts has been set so high that civilians who face a “*real risk*” of serious harm are denied international protection.

At the time of writing, there are several dozen armed conflicts being waged across the globe.¹⁵⁰ Yet the six Member States of focus in this research are only in agreement that one city in one region of one country is currently experiencing a level of indiscriminate violence such as to pose a risk of serious harm to civilians in the sense of Article 15 (c) QD. That city is Mogadishu, Somalia.

¹⁴⁷ Judgment of 25 May 2009 in case 200702174/2/V2 at: www.raadvanstate.nl.

¹⁴⁸ Letter from the Ministry of Justice to the Speaker of the Lower House of the Netherlands Parliament, of 17 March 2009, regarding the judgment of the European Court of Justice of the European Communities in respect of the Qualification Directive.

¹⁴⁹ France and Germany.

¹⁵⁰ See www.ploughshares.ca for one overview.

The UK Border Agency, in line with the case law of the UK courts, considers that there is no State or region which is experiencing the required severity of indiscriminate violence arising from an armed conflict so that substantial grounds are shown for believing that any civilian returned there, would, solely on account of presence there, face a real risk of serious harm. Mogadishu is considered to satisfy this threshold only for “most” civilians.¹⁵¹ It is the UK Government’s view that:

*in none of the following countries (or in parts of the countries) would a claim based on indiscriminate violence automatically succeed: Iraq (including KRG); Afghanistan; and Southern and Central Somalia. Therefore, claims from any of these countries will only succeed if a sliding scale/enhanced risk is established.*¹⁵²

Indeed, with the exception of Mogadishu, no State or region within a state has ever been determined by the UK courts to have experienced the required threshold of indiscriminate violence since the entry into force of domestic law transposing the Qualification Directive on 9 October 2006.¹⁵³

Similarly, until November 2010, the Netherlands had not recognized that any armed conflict reached the intensity of indiscriminate violence required to engage Article 15 (c), and no protection had been granted on the basis of that provision.¹⁵⁴ However, on 19 November 2010, the Minister for Immigration and Asylum stated, in response to questions in Parliament, that there is currently indiscriminate violence in the city of Mogadishu of the intensity and severity required by Article 15 (c).¹⁵⁵

The determining authority in Germany, the BAMF, informed UNHCR that it also considers that only the armed conflict in Mogadishu manifests the level of indiscriminate violence required to engage Article 15 (c).¹⁵⁶ To UNHCR’s knowledge, there are relatively few court decisions in Germany that have addressed this issue with regard to Afghanistan, Iraq or Somalia.¹⁵⁷

¹⁵¹ AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 0009, paragraph 6 (i): “The armed conflict taking place in Mogadishu currently amounts to indiscriminate violence at such a level of severity as to place **the great majority of the population** at risk of a consistent pattern of indiscriminate violence. On the present evidence Mogadishu is no longer safe as a place to live in for the great majority of returnees whose home area is Mogadishu”. In a more recent Court of Appeal case, HH and Others of 2010, the Court stated that: “The country guidance relating to Mogadishu is now such that **most potential returnees** will be entitled to subsidiary protection” [Emphasis added]: HH and others (Somalia) V SSHD [2010] EWCA CIV 426, paragraph 34.

¹⁵² Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence, Sept. 2010, paragraph E.

¹⁵³ Having said this, it must be noted that the UK courts’ interpretation of Article 15 (c) prior to the Elgafaji judgment has been held to have been wrong in law and the application of the current interpretation of the law to levels of indiscriminate violence experienced in some countries prior to the Elgafaji judgment may have had a different outcome. This was indicated in a recent country guidance case on Iraq, when the UK Upper Tribunal speculated that the “levels of violence in the peak years of 2006 and 2007 were very high, and suggest that Article 15 (c) was engaged in those parts of Iraq where this level of violence (or a higher level) was occurring”. See HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010. It should also be noted that, at the time of writing, judgment is pending in a new country guidance case heard by the UK Upper Tribunal.

¹⁵⁴ In September 2009, the province of Valle del Cauca in Colombia was labelled as a region experiencing an internal armed conflict. However, the level of violence was not considered sufficiently high to constitute an exceptional situation in the sense of Article 15 (c): decision of the State Secretary of Justice of 25 September 2009, amending the Aliens Act Implementation Guidelines 2000, Dutch Government Gazette 2009 nr. 15037, 5 October 2009, p. 4. For further information on group protection under national protection statuses, see section 8 below.

¹⁵⁵ On 30 March 2011, the Minister for Immigration and Asylum took a decision which was published in the Staatscourant nr 6054, dated 6 April 2011, that the situation in Mogadishu engages Article 15 (c) QD, although an internal protection alternative may be applicable. The district court of Assen has requested that the determining authority better motivate its determination that this threshold has not been reached in southern and central Somalia: Court of Assen 27 July 2010, Awb 10/13429; the District Court of Amsterdam has held that the level of indiscriminate violence experienced in Kismayo does meet this threshold: Court of Amsterdam 12 October Awb 10/26699. At the time of writing, this judgment has been appealed by the Government of the Netherlands.

¹⁵⁶ Interview with the BAMF on 1 December 2010. The BAMF’s policy analysis of situations in countries of origin and the consequent determination of the applicability of Section 60 (7) sentence 2 Residence Act (which transposes Article 15 (c)) is not made public in policy statements or instructions.

¹⁵⁷ There are no specialized asylum courts in Germany. Asylum decisions may be appealed to one of 52 local administrative courts, and onward under certain conditions to the 15 higher administrative courts of the Federal States. Appeal to the Federal Administrative Court is possible under limited conditions. Not all court decisions are automatically published.

Similarly, in France, the determining authority, OFPRA, informed UNHCR that only the situation prevailing in Mogadishu and “neighboring areas” is considered to engage Article 15 (c) without the need for the applicant to demonstrate individual factors or circumstances increasing the risk of harm.¹⁵⁸ UNHCR observed that the overwhelming majority of appeal decisions reviewed regarding Afghanistan which granted protection based on Article L. 712-1 c) Ceseda (Article 15 (c) QD) referred to individual factors or circumstances and were not based on the level of indiscriminate violence alone. However, as stated below, UNHCR did review several appeal decisions that may be indicative of a new assessment that the levels of indiscriminate violence alone in certain regions of Afghanistan engage Article 15 (c).¹⁵⁹

The assessment in 2010 by the determining authorities of France, Germany, the Netherlands and the UK contrasted with the assessment of the determining authorities in Belgium and Sweden.

The Belgian authority, the CGRS, has enumerated a list of provinces, and districts within provinces, in Afghanistan considered to be experiencing levels of indiscriminate violence which are sufficiently high to engage Article 15 (c).¹⁶⁰ Furthermore, the levels of indiscriminate violence in Baghdad and the five central governorates of Iraq,¹⁶¹ the eastern region of the Democratic Republic of Congo (DRC),¹⁶² Darfur (Sudan),¹⁶³ Gaza,¹⁶⁴ and southern and central Somalia,¹⁶⁵ were all considered to engage Article 15 (c) at the time of writing.

The determining authority of Sweden, the Swedish Migration Board (SMB), informed UNHCR that, in addition to Mogadishu in Somalia, it considered that ten provinces of Afghanistan;¹⁶⁶ the north-eastern region of the DRC; and Darfur in Sudan were experiencing the requisite levels of indiscriminate violence.¹⁶⁷ Moreover, on 24 February 2011, the Swedish Migration Court of Appeal held that “*there for now exists a state of internal armed conflict, in accordance with the Swedish Aliens Act, in the southern and central parts of Somalia.*”¹⁶⁸

¹⁵⁸ Interview with OFPRA of 2 March 2011; see also CNDA, decision n°10013192, 1 March 2011.

¹⁵⁹ See section 5.1.3 below.

¹⁶⁰ See section 5.1.3 below.

¹⁶¹ Interview with CGRS on 4 March 2011. See also Kruispunt Migratie, at: <http://www.kruispuntmi.be/vreemdelingenrecht/wegwijs.aspx?id=248>.

¹⁶² See for instance; CALL 22 November 2010, no 51369, CALL 29 November 2010, no 51882

¹⁶³ See for instance, CALL 28 July 2008, no 14529: “*From the information of the CGRS it seems that the violence in Darfur, West Sudan, is omnipresent and hundreds of thousands civilians became the victim of a civilian war which caused hunger, rape, murder, displacement and ethnic cleansing, and where the government is taking actively part in the fights. Therefore, subsidiary protection shall be granted to the applicant, whose identity and origins from Darfur are not disputed.*” Even though no recent jurisprudence of the CALL could be found, the CGRS confirmed that subsidiary protection is still granted to Sudanese nationals originating from Darfur. (Interview with CGRS, March 10, 2011).

¹⁶⁴ According to CGRS statistics for 2010, subsidiary protection was granted to 14 persons of “*undetermined nationality*” and Palestinians.

¹⁶⁵ Interview with CGRS on 4 March 2011.

¹⁶⁶ Farah, Ghazni, Kandahar, Khost, Kunar, Helmand, Oruzgan, Paktia, Paktika, and Zabul.

¹⁶⁷ Interview with the SMB on 29 November 2010.

¹⁶⁸ UM 10061-09 of 24 February 2011. As mentioned above, the evaluation of the level of indiscriminate violence is performed as part of the assessment of whether there is an international or internal armed conflict. The determination that there is an internal armed conflict means that the violence arising from the conflict is “*indiscriminate and of such severity that there is a founded reason to presume that a civilian would by his/her mere presence run a real risk of being subjected to a serious and personal threat against his/her life and limb*”: UM 10061-09 of 24 February 2011.

5.1.3. Divergent assessments of risk

The assessment of the risk of harm posed by levels of violence varies not only from one Member State to another; it can also vary within some Member States among courts, and between the courts and the determining authorities.¹⁶⁹

Afghanistan

The severity of conflict-related violence and the risk to civilians has been assessed by UNHCR in its Guidelines on the basis of several cumulative indicators: civilian casualties as a result of indiscriminate acts of violence; conflict-related security incidents; and conflict-induced population displacements and voluntary returns.¹⁷⁰ At the end of 2010, in light of the increasing number of civilian casualties; the worsening security environment in certain parts of the country; and significant population displacements, UNHCR expressed the view that the situation in certain parts of Afghanistan - in particular Helmand, Kandahar, Kunar and parts of Ghazni and Khost province - could be characterized as one of generalized violence.¹⁷¹ Other provinces, including Uruzgan, Zabul, Paktika, Nangarhar, Badghis, Paktya, Wardak and Kunduz were also experiencing significant although fluctuating levels of violence, casualties and forced displacement.

However, the determining authorities of Germany,¹⁷² the Netherlands¹⁷³ and the UK¹⁷⁴ did not consider that the levels of indiscriminate violence in Afghanistan or regions within it were high enough to pose a real risk of serious harm to civilians merely on account of their presence there. In Germany, there are individual ad-

¹⁶⁹ For example, in Sweden, until 24 February 2011 when the Migration Court of Appeal issued its judgment with regard to the situation in southern and central Somalia, the determining authority, the Migration Court of Stockholm and some judges within the Migration Court of Malmo considered that the levels of indiscriminate violence were not sufficiently high in southern and central Somalia to constitute an internal armed conflict. Instead, it was considered that the region was experiencing a 'severe conflict' in terms of the national protection status 'persons otherwise in need of protection' in accordance with Chapter 4 Section 2a of the Aliens Act. However, the Migration Court of Gothenburg and some judges in the Migration Court of Malmo considered that there was an internal armed conflict in southern and central Somalia. The Migration Court of Appeal resolved the divergence and held that based on its established criteria of 'internal armed conflict' and taking into account the available country of origin information "there for now exists a state of internal armed conflict, in accordance with the Swedish Aliens Act, in the southern and central parts of Somalia which are not composed of Somaliland and Puntland": UM 10061-09 of 24 February 2011.

¹⁷⁰ UNHCR Afghanistan Eligibility Guidelines.

¹⁷¹ Ibid.

¹⁷² Whilst the BAMF informed UNHCR that it considers that the existence of armed conflict in certain provinces of Afghanistan cannot be excluded, it is of the view that the degree of risk in these provinces is not high enough to assume that practically any civilian would be exposed to a serious individual threat of harm solely on account of his/her presence: interview with the BAMF on 1 December 2010.

¹⁷³ Aliens Circular C24/1.6.5. This policy is supported by the case law. See Council of State, 26 April 2010, ABRvS, 201000956/1/V2 (Afghanistan) Council of State, 4 May 2011, 201101993/1/V2: the Council of State referred to the ECtHR's case *N. v. Sweden*, paragraph 52: "Whilst being aware of the reports of serious human rights violations in Afghanistan, ..., the Court does not find them to be of such a nature as to show, on their own, that there would be a violation of the Convention if the applicant were to return to that country. The Court thus has to establish whether the applicant's personal situation is such that her return to Afghanistan would contravene Article 3 of the Convention." See also Council of State, 19 November 2009, 200907711/1/V2: the Council of State referred to the ECtHR judgment in *Ghulami c. France*, Application no. 45302/05, Council of Europe: European Court of Human Rights, 7 April 2009, at: <http://www.unhcr.org/refworld/docid/4a1bc7102.html>.

¹⁷⁴ Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence, September 2010, paragraph E. See also Afghanistan OGN v8 issued in March 2011. GS (Article 15 (c): Indiscriminate violence) Afghanistan CG [2009] UKAIT 00044: "There is not in Afghanistan such a high level of indiscriminate violence that substantial grounds exist for believing that a civilian would, solely by being present there, face a real risk which threatens the civilian's life or person, such as to entitle that person to the grant of humanitarian protection, pursuant to article 15 (c) of the Qualification Directive." In a more recent country guidance case on Afghanistan (HK and Others), the Upper Tribunal, which had available country of origin information relating to 2009 and the first half of 2010, stated that "even though there is shown to be an increase in the number of civilian casualties, we are not satisfied that the evidence is sufficient to show that the guidance given by the AIT in GS is no longer to be regarded as a valid": HK and others (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG [2010] UKUT 378 (IAC). It should be noted that at the time of writing, a judgment was pending from the Upper Tribunal in a case which is about risks specific to minors in Afghanistan.

ministrative and higher administrative court decisions which have held that the level of violence in certain provinces of Afghanistan is sufficiently high to render Section 60 (7) sentence 2 Residence Act applicable without the need to demonstrate individual factors increasing risk; however, these decisions are often not upheld upon appeal.¹⁷⁵

In contrast, the determining authorities of Belgium¹⁷⁶ and Sweden¹⁷⁷ consider that there are a number of provinces and/or districts within provinces in Afghanistan that are experiencing levels of indiscriminate violence sufficiently high to pose a real risk of serious harm to civilians merely on account of their presence on the territory. In Belgium, recent first instance and appeal decisions refer to UNHCR Eligibility Guidelines for assessing the international protection needs of asylum-seekers from Afghanistan of 17 December 2010.¹⁷⁸

At the time of writing, the position of the determining authority in France, OFPRA, was under study.¹⁷⁹ A review by UNHCR of a sample of decisions by the CNDA revealed that the overwhelming majority of decisions granting protection based on Article L. 712-1 c) Ceseda (Article 15 (c) QD) referred to individual factors or circumstances and not the level of violence alone.¹⁸⁰ However, UNHCR viewed some CNDA decisions where the level of indiscriminate violence per se in Nangarhar,¹⁸¹ Baghlan¹⁸² and Ghazni¹⁸³ justified the grant of protection under Article L. 712-1 c). It is unclear at this stage whether these decisions are indicative of a new assessment of the level of violence in some regions of Afghanistan.

¹⁷⁵ See for example Higher Administrative Court of Hesse, decision of 25 January 2010, 8 A 303/09.A which held that the level of violence in the province of Logar in Afghanistan was sufficiently high to engage Section 60 (7) sentence 2 Residence Act; however, this judgment was overturned by the Federal Administrative Court (FAC, 14 July 2010, 10 C 9.08) on the grounds that the Higher Administrative Court had not sufficiently established the facts insofar as it had not conducted a quantitative assessment of the intensity of the indiscriminate violence. On the 26 August 2010, the Administrative Court of Gießen held that sufficiently high levels of violence were being experienced throughout Afghanistan and that the appellant, if returned, would face a significant individual danger to life or limb in terms of Section 60 (7) sentence 2: AC Gießen, decision dated August 26, 2010, 2 K 1754/10.GI.A. To UNHCR's knowledge, this decision has now become final.

¹⁷⁶ "CGRS Policy with regard to asylum claims of Afghan asylum seekers – Regions of Subsidiary Protection, September 2010", 11 October 2010, at: www.cgra.be. This policy paper lists the following provinces: North; Takhar*, Kunduz, Baghlan (whole province except for few districts), Balkh*, Jawzjan*, Faryab*. Centre: Kapisa*, Parwan*, Kabul*, Logar, Wardak, Daykundi*. East: Nuristan, Kunar, Laghman, Nangarhar. West: Herat, Farah, Ghor, Badghis (the whole province, except for few districts). South: Nimroz, Helmand, Kandahar, Uruzgan, Zabul, Ghazni, Paktika, Paktya, Khost. * indicates certain districts only. With regard to the city of Kabul, CALL jurisprudence, in line with a CGRS update of 17 August 2010 concerning the security situation in the city between November 2009 and August 2010, has assessed that violence in the city had decreased during 2010, has described the city as quiet and has held that there is no real risk that civilians face a serious threat to their life or person as a result of indiscriminate violence: CALL 8 November 2010, no 50899.

¹⁷⁷ The SMB informed UNHCR that following a fact-finding mission to Afghanistan in 2009 the SMB considered that the levels of indiscriminate violence were sufficiently high in 10 provinces of Afghanistan: Farah, Ghazni, Kandahar, Khost, Kunar, Helmand, Uruzgan, Paktya, Paktika, and Zabul: interview with the SMB on 29 November 2010.

¹⁷⁸ See CALL 30 November 2010, no 52161, and CALL 22 November 2010, no 51401.

¹⁷⁹ OFPRA informed UNHCR that it was in the process of considering its position and drafting new policy guidance for decision-makers: interview with OFPRA on 2 March 2011.

¹⁸⁰ See, for example, with regard to Afghanistan: CNDA, decision n°090 24256, 2 December 2010; CNDA, decision n° 09023376, 1 September 2010; CNDA, decision n° 09019365, 1 September 2010 UNHCR was informed by OFPRA that most applicants from Iraq are Christian and recognised as refugees in accordance with the 1951 Convention and established case law; therefore issues relating to Article L. 712-1 c) Ceseda do not arise: see Council of State, Melle KONA, 15 May 2009, decision n° 292564.

¹⁸¹ CNDA, decision n° 10012894, 23 December 2010.

¹⁸² CNDA, decision n° 08008198, 23 December 2010.

¹⁸³ CNDA, decision n° 10018212, 23 December 2010.

Iraq

During 2010 UNHCR held the view that in light of the precarious human rights situation and ongoing security incidents in the country, most predominantly in the five central governorates of Baghdad, Diyala, Kirkuk, Ninewa and Salah Al-Din, all Iraqi asylum-seekers originating from these five central governorates were in need of international protection. Where such persons did not qualify for refugee status, UNHCR believed they should be considered to be at risk of serious harm and granted protection under Article 15 of the Qualification Directive.¹⁸⁴

In line with UNHCR's guidance in 2010, the determining authority in Belgium, the CGRS, granted subsidiary protection in accordance with Article 15 (c) to Iraqis from central Iraq.¹⁸⁵

In contrast, the determining authorities of Germany,¹⁸⁶ the Netherlands,¹⁸⁷ Sweden,¹⁸⁸ and the UK,¹⁸⁹ while they may assess the situation in central Iraq as critical, do not consider that the level of indiscriminate violence in Iraq or any regions within it is sufficiently high to pose a real risk of serious harm to civilians merely on account of their presence on the territory. This assessment is supported by the case law in Sweden¹⁹⁰

¹⁸⁴ UNHCR Note on the Continued Applicability of Iraq Guidelines; UNHCR Iraq Eligibility Guidelines.

¹⁸⁵ Interview with CGRS on 4 March 2011.

¹⁸⁶ BAMF informed UNHCR that whilst it does not exclude the existence of an internal armed conflict in Baghdad, Ninewa (core area: Mosul), Diyala and Tameem; it does not consider that the degree of risk in these provinces is high enough to assume that practically any civilian would be exposed to a serious individual threat solely on account of his/her presence: interview with the BAMF on 1 December 2010.

¹⁸⁷ Aliens Circular C24/11.6.5. (11/10/2009, WBV 2009/26): "According to the report from the Ministry of Foreign Affairs, the security situation in Iraq in 2008 and early 2009 has improved considerably compared to 2006/2007. Nevertheless, the overall security situation remains critical. The security situation varies greatly per region. However, in no (part of an) area of Iraq is an exceptional situation in place. Although the security situation in Iraq is critical, it is not so critical that a citizen who returns to Iraq, just because of his/her presence, runs a real risk of ill-treatment in contravention of Article 3 ECHR", at: <https://www.vluchtweb.nl/livelinkvw/lisapi.dll?func=ll&objid=2068489&objaction=open&nexturl=percent2Flivelinkvw percent2Flisapi percent2Edll percent3Ffunc percent3Dll percent26objid percent3D20228 percent26objAction percent3Dbrowse percent26sort percent3Dname>.

¹⁸⁸ The SMB does not consider that there is an internal armed conflict in any part of Iraq: interview with the SMB on 29 November 2010. In Sweden, a high level of indiscriminate violence such that there are reasonable grounds to believe that a civilian by his or her mere presence would run a real risk of a serious and personal threat to life or limb is one of the criteria which must be satisfied to qualify a conflict as an internal armed conflict. Therefore, the assessment of whether there are high levels of indiscriminate violence is conducted as part of the evaluation of whether there is an internal armed conflict. It is the view of the SMB that there is not an international or internal armed conflict in Iraq but it considers that there is a 'severe conflict' in Baghdad, Diyala, Ninewa and Tameem: interview with the SMB on 29 November 2010. The existence of a 'severe conflict' may qualify an applicant for the national protection status of a 'person otherwise in need of protection' in accordance with Chapter 4 Section 2a of the Aliens Act.

¹⁸⁹ Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence, September 2010, paragraph E. The OGN on Iraq of 1 October 2010 states that, "as confirmed by the courts in the case of HM and Others, the current evidence is that the level of indiscriminate violence in Iraq is not at such a high level that substantial grounds exist for believing that an applicant, solely by being present there, faces a real risk which threatens his life or person. For a claim to succeed under Article 15 (c) of the Qualification Directive, an individual would need to show that their personal circumstances are such that they would be at real risk and that there was no internal relocation option open to them": OGN on Iraq, v6 1 October 2010 at 3.6.24.

¹⁹⁰ Migration Court of Appeal, UM 6696-07, of 18 October 2007. In this case, the Migration Court of Appeal held that there was not an internal armed conflict in Baghdad but there was a "severe conflict" within the meaning of the domestic law status of "persons otherwise in need of protection" in accordance with Chapter 4 Section 2a of the Aliens Act.

and the UK;¹⁹¹ and by the case law of the Council of State in the Netherlands.¹⁹² To UNHCR's knowledge, there are no recent judgments of the courts in Germany which have held that the violence being experienced in Iraq or regions within it is sufficiently high to engage Section 60 (7) sentence 2 Residence Act (Article 15 (c) QD) without the applicant having to demonstrate individual factors increasing the risk.

In France, the number of Iraqi asylum-seekers is relatively low and there has been little recourse to subsidiary protection.¹⁹³ A recent decision of the CNDA in France has held that the situation in Mosul in particular and in Iraq in general cannot be considered an armed conflict in the sense of Article L. 712-1 c) Ceseda and, therefore, Article 15 (c) is not applicable.¹⁹⁴

Somalia

UNHCR considers that the:

*widespread disregard of their obligations under international humanitarian law by all parties to the conflict and the reported scale of human rights violations make it clear that any person returned to southern and central Somalia would, solely on account of his/her presence in southern and central Somalia, face a real risk of serious harm.*¹⁹⁵

At the time of writing, all the Member States of focus agree that the level of indiscriminate violence in Mogadishu is sufficiently high that substantial grounds are shown for believing that a civilian, returned to Mogadishu, would solely on account of his or her presence in Mogadishu, face a real risk of being subject to a threat to his/her life or person.¹⁹⁶

¹⁹¹ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 278 (ii): “We do not find that the degree of indiscriminate violence characterising the current armed conflict taking place in Iraq reaches such a high level that substantial grounds are shown for believing that any civilian returned there, would, solely on account of his presence there face a real risk of being subject to that threat.” Although, the Tribunal did not rule out that if in certain areas “the figures rise to unacceptable levels”, taking into account both a quantitative and qualitative assessment, Article 15 (c) might be engaged. It conceded that in Ninewa and Mosul, “the population is experiencing particular problems”.

¹⁹² The Government refers to the judgments of the Administrative Jurisdiction Division of the Council of State of 10 June 2010, 201000765/1 and 8 March 2010, 200909295/1/V2. As both the Government and the Council of State consider that Article 15 (c) QD refers to an exceptional situation of violence triggering Article 3 ECHR protection as interpreted by the ECtHR, i.e. extreme cases of general violence; the Government refers to the most recent case law of the ECtHR with regard to Iraq, F.H. v. Sweden, as evidence of the fact that the situation in Iraq does not engage Article 15 (c) QD.

¹⁹³ Of 336 decisions taken by the OFPRA on new Iraqi claims in 2010, 167 related to resettled refugees who are given refugee status upon arrival. UNHCR was informed by OFPRA that most applicants from Iraq are Christian and recognised as refugees in accordance with the 1951 Convention and established case law; therefore issues relating to Article L. 712-1 c) Ceseda do not arise in these cases: see Council of State, Melle KONA, 15 May 2009, decision n° 292564.

¹⁹⁴ CNDA, decision 613430/07016562, 11 March 2010: “[...] In particular, the situation of generalised insecurity prevailing in the region of Mosul and the protectorate of Ninewa which is characterised by attacks against minorities, in particular the Christian minority, this situation of internal troubles and tensions can not be defined as a situation of internal armed conflict; in particular the attacks emanating from the extremist Sunni and radical Kurdish rebels do not satisfy the degree of organisation or objectives required by the definition [of armed conflict].”

¹⁹⁵ UNHCR Somalia Eligibility Guidelines.

¹⁹⁶ Belgium: interview with CGRS on 4 March 2011. France: interview with OFPRA of 2 March 2011 and CNDA, decision n° 639474, 9 June 2009 and CNDA, decision n°10013192, 1 March 2011. Germany: interview with the BAMF of 1 December 2010. The Netherlands: Decree of the Minister for Immigration and Asylum of December 9, 2010, number WBV 2010/19, amending “the 2000 Circular” on Aliens. On 30 March 2011, the Minister for Immigration and Asylum published a decision in the Staatscourant nr 6054, dated 6 April 2011, which stated that Mogadishu engages Article 15 (c) QD, although an internal protection alternative may be applicable. Sweden: interview with SMB on 29 November 2010 and Migration Court of Appeal, UM 10061-09 of 24 February 2011.

However, the assessment of the UK courts with regard to Mogadishu is nuanced insofar as the case law states that:

*[t]he armed conflict taking place in Mogadishu currently amounts to indiscriminate violence at such a level of severity as to place **the great majority of the population** at risk of a consistent pattern of indiscriminate violence. On the present evidence Mogadishu is no longer safe as a place to live in **for the great majority of returnees** whose home area is Mogadishu.*¹⁹⁷ [Emphasis added].

Mogadishu is considered not to be safe for most civilians with the exception of those with close connections to powerful actors in the city such as prominent businessmen or senior figures in the insurgency or powerful criminal gangs.

In a more recent UK Court of Appeal case, the Court stated that “[t]he country guidance relating to Mogadishu is now such that **most potential returnees** will be entitled to subsidiary protection.”¹⁹⁸ [Emphasis added].

The European Court of Human Rights, in a recent judgment which is not yet final and concerned male applicants, reflects the view taken by the UK courts and considers that the situation of general violence in Mogadishu is sufficiently intense to enable it to conclude that any returnee would be at real risk of ill-treatment proscribed by Article 3 of the European Convention on Human Rights solely on account of his presence there, unless it could be demonstrated that he was sufficiently well connected to powerful actors in the city to enable him to obtain protection. However, the Court found that membership of a majority clan alone would not be sufficient. It is also noteworthy that the Court acknowledged that the cases in which it could be shown that an applicant could claim such protection would be rare.¹⁹⁹

There are divergences among Member States with regard to the assessment of the situation in southern and central Somalia generally. The Governments of Belgium and Sweden, in agreement with UNHCR, consider that the level of indiscriminate violence in southern and central Somalia is sufficiently high to pose a real risk of serious harm to civilians merely on account of their presence on the territory.²⁰⁰

The Swedish Migration Court of Appeal has held that there is an internal armed conflict in Mogadishu specifically²⁰¹ and in southern and central Somalia generally with the exception of Puntland and Somaliland in the North.²⁰² As previously mentioned, in Sweden, a high level of indiscriminate violence sufficient to pose a risk of serious harm to civilians on account of their mere presence on the territory is a criterion for the determination of whether there is an internal armed conflict.²⁰³

¹⁹⁷ AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 0009, paragraph 6 (i).

¹⁹⁸ HH and others (Somalia) V SSHD [2010] EWCA CIV 426, paragraph 34.

¹⁹⁹ *Sufi and Elmi v. the United Kingdom*, paragraph 249.

²⁰⁰ Interview with CGRS on 4 March 2011.

²⁰¹ UM 334-09; and UM 10061-09 of 24 February 2011.

²⁰² Migration Court of Appeal, UM 10061-09 of 24 February 2011.

²⁰³ Migration Court of Appeal, UM 334-09, UM 8628-08, UM 133-09 of 6 October 2009; and UM 10061-09 of 24 February 2011.

The determining authorities of France,²⁰⁴ Germany,²⁰⁵ the Netherlands²⁰⁶ and the UK²⁰⁷ do not consider that the levels of indiscriminate violence in southern and central Somalia are sufficiently high to pose a real risk of serious harm to civilians merely on account of their presence on the territory.

The French determining authority, OFPRA, informed UNHCR that it considers that the level of violence is “*extraordinarily high in most parts of southern and central Somalia*” and there is a situation of internal armed conflict, but applicants would be required to demonstrate an individual factor or circumstance to qualify under Article L. 712-1 c) *Ceseda*, which transposes Article 15 (c) QD.²⁰⁸ This would appear to suggest that OFPRA does require individual factors or circumstances enhancing the risk of serious harm.

The District Court of Assen asked the Dutch Government to explain why the situation in southern and central Somalia does not fall within the scope of Article 15 (c).²⁰⁹ Also, notwithstanding the fact that the Council of State, on 10 September 2010, considered that the situation in Kismayo did **not** fall within the scope of Article 15 (c),²¹⁰ the District Court of Amsterdam in a judgment of 12 October 2010, determined that the situation in Kismayo **did** fall within the scope of Article 15 (c).²¹¹ However, the Council of State on 27 December 2010 upheld the appeal by the Government.²¹²

5.1.4. Assessing the level of violence – what indicators?

This research did not examine in depth the country of origin information used by the six Member States studied and, therefore, cannot assess to what extent the discrepancies in assessment of risk with regard to situations in countries of origin, which are described above, relate to variations in country of origin information used.²¹³ Some interviewees believed that the disparities between Member States are more likely due to a lack of a common understanding of the level and nature of indiscriminate violence required to establish a “*real risk*”, and that the discrepancies reflect differences in the policy conclusions drawn from available country of origin information rather than differences in the information itself.

UNHCR observed that the methodology employed to assess country of origin information, in terms of the indicators used to measure the level and nature of indiscriminate violence and, consequently the risk of harm to civilians, may also be one of the reasons for variations in assessment.

²⁰⁴ OFPRA confirmed its position to UNHCR on 9 June 2011.

²⁰⁵ The BAMF informed UNHCR that in regions other than Mogadishu, it considers that the level of indiscriminate violence is not sufficiently high to satisfy the requirements of Article 15 (c): interview with the BAMF of 1 December 2010.

²⁰⁶ Paragraph 4 of the Decree of the Minister for Immigration and Asylum of 9 December 2010, WBV 2010/19 amending the Aliens Circular 2000. Although, referring to the country report of the Minister of Foreign Affairs of 20 September 2010, it states that the general security situation throughout Somalia is unrelentingly bad and that indiscriminate violence is especially common in the regions of central and southern Somalia, it does not consider that the level of indiscriminate violence is as high as in Mogadishu and therefore determines that outside Mogadishu the “*situation is not such that it may be called an exceptional situation.*”

²⁰⁷ Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence, September 2010, paragraph E.

²⁰⁸ Interview with OFPRA of 2 March 2011 and confirmed by OFPRA on 9 June 2011. Note that the CJEU, in *Elgafaji v. Staatssecretaris van Justitie*, held that “*the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.*”

²⁰⁹ Court of Assen, 27 July 2010, Awb 10/13429. Upon appeal, the Council of State did not address this issue as the applicant originated from Mogadishu and the appeal by the Government was held to be unfounded: Council of State, 13 December 2010, 201007596/1/V2.

²¹⁰ Council of State, 10 September 2010, 201004673/1/V2.

²¹¹ Court of Amsterdam, 12 October 2010, Awb 10/26699.

²¹² Council of State, 27 December 2010, 201010066/1/V2. An application is, at the time of writing, filed with the European Court of Human Rights.

²¹³ A number of the determining authorities interviewed highlighted the scarcity of up to date, objective and reliable information regarding the situation in Somalia in particular.

Some decision-makers informed UNHCR that within their determining authority there are still great disparities with regard to the methodology used in the assessment of country of origin information. It is, therefore, unsurprising that disparities are also reflected across Member States. However, shortcomings in the methodology used may result in a failure to properly assess the risk of harm.

With regard to the practice of most of the Member States reviewed for this research, the indicators or measures used by the determining authorities to assess the level of indiscriminate violence in countries experiencing conflict are not explicitly stated in public policy documents. Most of the determining authorities informed UNHCR that there is no specific list of indicators or criteria that are applied.

UNHCR also reviewed a number of appeal decisions, to see whether they provide some insight as to the assessment. Court decisions in some Member States have explicitly addressed the methodology that should be applied (see for example, the case law in Germany, the Netherlands and the UK below). However, court decisions in some Member States are rather brief with regard to references to the country of origin information and UNHCR observed that often references to indicators are implicit, short and stated in very general terms, so that it is difficult to draw firm conclusions from a review of decisions alone.²¹⁴

While the approach to the assessment of levels of indiscriminate violence and risk of harm is not uniform or consistent across or within Member States, based primarily on UNHCR's interviews with determining authorities and review of some appeal decisions, there appeared to be some consensus that the assessment should be based on both quantitative and qualitative evidence, including the following:

- The security situation, including the nature and patterns of violence, violations of international human rights and humanitarian law;
- Figures for casualties and security incidents;
- Population displacement;
- Foreseeable socio-economic, political and security-related developments (including factors affecting the capabilities of combatants);
- The capacity of actors of protection to provide protection and indicators relating to state failure;
- The humanitarian situation.²¹⁵

However, in one Member State, the assessment of the level of violence and, therefore, the risk of serious harm posed to civilians appears to have been reduced to a simple arithmetic calculation.

²¹⁴ For example, in France, the decisions of the CNDA may refer to a high level of civilian casualties, forced displacement and violent attacks without referring to specific sources and figures. See for instance CNDA, decision n° 639474 (08019905), (Somalia) 9 June 2009, CNDA, decision n° 09016633, 1 September 2010 (Darfur). More recent judgments of the Swedish Migration Court of Appeal set out summary assessments of the country situation and refer to some civilian casualty figures, evidence regarding population displacement, and the human rights and security situation: for example, UM 334-09 and UM 10061-09 of 24 February 2011.

²¹⁵ In a recent case, the ECtHR assessed the level of violence in Somalia by adopting indicators used by the UK's Asylum and Immigration Tribunal in its country guidance case on Somalia (AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 03444). The ECtHR stated: "first, whether the parties to the conflict were either employing methods and tactics of warfare which increased the risk of civilian casualties or directly targeting civilians; secondly, whether the use of such methods and/or tactics was widespread among the parties to the conflict; thirdly, whether the fighting was localized or widespread; and finally, the number of civilians killed, injured and displaced as a result of the fighting". The Court stated that these criteria should not be viewed as an exhaustive list to be applied in all future cases. The Court also took into account evidence regarding the humanitarian situation in determining whether return to such conditions would breach Article 3 ECHR, See *Sufi and Elmi v. the United Kingdom*.

In Germany, the Federal Administrative Court held that this assessment requires a quantitative determination of the total number of inhabitants living in a certain area and the number of acts of violence committed by the parties to the conflict against the life or person of civilians in this region, as well as a general assessment of the number of victims and the severity of the casualties (deaths and injuries).²¹⁶ Neither the applicable time frame nor the geographic scope has been specified by the Federal Administrative Court.

The case law of the Federal Administrative Court has been interpreted by the administrative and higher administrative courts to require, as a starting point, a calculation of the number of civilian casualties in a particular area related to the number of inhabitants living in the same area. This calculation does not always appear to include numbers of civilians injured and is sometimes confined to deaths only. Furthermore, from the texts of court judgments reviewed, when the courts consider that the number of civilian deaths or casualties, as a percentage of the total population in a particular area, is low, it is concluded that the level of indiscriminate violence is not sufficiently high to pose a risk of serious harm, without seeming to take into account or give due weight to any other qualitative evidence or other quantitative indicators.

The German Ministry of Interior informed UNHCR that the assessment should be holistic and include both a quantitative and qualitative assessment, although a pre-defined set of indicators was not considered to be appropriate.²¹⁷ However, the case law does not always reveal evidence of such an assessment.

This is demonstrated by the following judgment of the Higher Administrative Court of Baden-Württemberg on 25 March 2010 with regard to Iraq:

Such a high degree of danger that practically every civilian would be subject to a serious individual threat simply because of his or her presence in the affected area, can, however, not be determined for Tameem province, from which the petitioner comes. [...] In Tameem province, with the provincial capital Kirkuk, where a total of between 900,000 and 1,130,000 people live (approx. 750,000 in the capital Kirkuk), there were 99 attacks with a total of 288 deaths in 2009, [...]. For 900,000 inhabitants, this would be 31.9 deaths per 100,000 inhabitants and/or, if assuming 1,130,000 inhabitants, 25.5 deaths per 100,000 inhabitants. According to these findings, even if an internal or international conflict in Tameem province is presumed, the degree of indiscriminate violence characterizing this conflict cannot be assumed to have reached such a high level that practically every civilian is subject to a serious individual threat simply because of his or her presence in this region.²¹⁸

This approach is also reflected in the case law of other Administrative Courts. For instance, on 28 April 2010, the Administrative Court of Regensburg held with regard to Iraq:²¹⁹

The petitioner comes from the Sheikan area. [...] While, based on information submitted, no statements regarding the number of attacks and victims relative to the number of inhabitants can be made for this area (...), statements can be made about Ninewa province, within which most of the Sheikan area is located. [...] According to these statements, the statistical probability of falling victim to a fatal attack in Ninewa or Mosul was approx. 0.03 percent in 2009. The court concurs with the conclusion drawn from this by the senate that, based on the current security situation, Iraqis returning to Mosul are generally not subject to significant individual threats to life and limb according to Sec. 60 Para 7 Sentence 2 Residence Act.

²¹⁶ FAC decision of 27 April 2010, BVerwG 10 C 4.09 – VGH 8 A 611/08.A, paragraph 33.

²¹⁷ Interview of 30 November 2010.

²¹⁸ Higher Administrative Court of Baden-Württemberg, 25.03.2010, A2 p. 364/09. See also, HAC of Bavaria, decision dated 21 January 2010, 13a B 08.30304, paragraph 27.

²¹⁹ Administrative Court Regensburg, decision 28 April 2010, RO 8 K 09.30272.

A similar mathematical approach was initially taken by the Belgian determining authority,²²⁰ but was rejected by the Belgian Council of State in 2007.²²¹ Also, in a judgment of 9 September 2010, the Dutch Council of State held that the Minister of Justice, in referring solely to the number of civilian casualties, had not provided sufficient grounds for the determination that the intensity of violence did not engage Article 15 (c).²²² Likewise, the UK Upper Tribunal, having itself conducted a mathematical calculation,²²³ held that:

*we do not rule out that if in certain areas the figures rise to unacceptable levels (relative to the size of the population in that area) that Article 15 (c) might be engaged, at least in respect to the issue of risk in the home area, although we would emphasise that any assessment would be one that was both quantitative and qualitative and took into account a wide range of variables, not just numbers of attacks or deaths;*²²⁴

and:

*our overall assessment of Article 15 (c) risk has to be a holistic one looking at a range of variables.*²²⁵

The Upper Tribunal stressed that such “evidence cannot be confined to the numbers of casualties” and “[f]igures in any event only furnish a part of the overall evidence needed to assess Article 15 (c) risk.”²²⁶

To the extent that quantitative data on casualties is a relevant indicator, the assessment as set out in some of the judgments of the German administrative and higher administrative courts cited above is questionable in a number of respects.

Firstly, some of the assessments appear to equate civilian victims of indiscriminate violence with the number of civilians killed by the violence. This appears incorrect as Article 15 (c) QD is concerned not just with threats to life but also to person.²²⁷ In Germany, Section 60 (7) sentence 2 Residence Act refers to “a substantial individual danger to life or limb.” The Federal Administrative Court has held that the term “substantial individual danger to life or limb” covers death and bodily injury caused by indiscriminate violence²²⁸ and requires a quantitative determination of the number of acts of indiscriminate violence committed by the parties to the conflict against the life and person of civilians in the relevant region.²²⁹

²²⁰ Initially, the CGRS assessed the risk of harm on the basis of a mathematical calculation. For example, the CGRS concluded that subsidiary protection according to Art. 48/4§2c Aliens Law could not be granted to an Afghan civilian from Nangarhar province given “the estimated surface area of 7700 square km and the estimated population of 1.3 million for Nangarhar province, there were “merely” 106 civilian casualties counted for the period January – May 2007.” (CGRS decision, 12 July 2007).

²²¹ Council of State, 10 August 2007, no 167.754.

²²² Council of State, 9 September 2010, 201005094/1/V2.

²²³ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 275 with regard to Iraq: “As a point of comparison, in rough terms it would appear that the average number of daily executed attacks per province is slightly over two a day (adding up the number of daily executed attacks in each province gives 28; dividing the number of provinces/governorates (18) by the population of Iraq (approx. 30,077,000) the figure then comes to 2.14”).

²²⁴ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 278 (ii).

²²⁵ Ibid., paragraph 253.

²²⁶ Ibid., paragraphs 76 and 258 respectively.

²²⁷ See Section 5.4.2 below for further information on Member States’ interpretation of these terms.

²²⁸ FAC decision of 27 April 2010, BVerwG 10 C 4.09 – VGH 8 A 611/08.A It should be noted that the term “threat to civilian’s ... person” has been interpreted as “bodily injury” in the case law of the Federal Administrative Court and the General Administrative Regulations regarding the Residence Act (*Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz* of 26 October 2009) state that restrictions on freedom do not fall within the scope of Section 60 (7) sentence 2 (Article 15 (c)). No. 60.7.2.5: “The protected rights are life and physical integrity. Section 60 (7)2 as a rule is not applicable in case of measures restricting freedom (“freiheitsbeschränkenden Maßnahmen”), e.g. internment by the parties to the conflict.”

²²⁹ FAC decision of 27 April 2010, BVerwG 10 C 4.09 – VGH 8 A 611/08.A, paragraph 33.

Courts in some of the other Member States reviewed for this research have taken a more inclusive approach. In the Netherlands, for example, the District Court of Arnhem, in a judgment of 23 April 2010, held that the type of evidence relevant to establishing whether Article 15 (c) is engaged cannot be confined to the number of casualties, as victims are not only those killed or wounded. Article 15 (c) refers to both the threat to life and person and therefore the Minister of Justice had to take into account threats to the person of the civilian, for example, rape, arbitrary arrest, and detention.²³⁰ This clearly has implications for the evidence used to assess the intensity and nature of the indiscriminate violence.

In a similar vein, the UK Upper Tribunal held that it would be wrong to equate civilian victims of indiscriminate violence only with those killed. Article 15 (c) is concerned not just with threats to life but also to person and these must encompass significant physical injuries, serious mental trauma and serious threats to bodily integrity. *“This has significance for the type of evidence relevant to establishing whether Article 15 (c) is engaged. Such evidence cannot be confined to the numbers of casualties.”*²³¹

Secondly, the German Federal Administrative Court has held that the assessment of risk requires a quantitative determination of the number of acts of indiscriminate violence committed by the parties to the conflict against the life or person of civilians in the particular region. Such an approach would appear to exclude consideration of acts of violence against non-civilians. UNHCR observed other appeal decisions that also appeared to discount violence directed towards non-civilians. For example, a decision of the Belgian appeal body, CALL, stated:

*[t]he rebel actions are limited now to shootings and ambushes, attacks directed against members of the security forces and government officials and arson in public buildings and homes of government employees. If there are civilian casualties and/ or injuries, then this is often caused due to an accidental armed clash between the rebels and police troops. Consequently, the situation is not such that there is a “real” risk of serious harm for civilians as a result of indiscriminate violence in situations of armed conflict, within the meaning of Art. 48 / 4, § 2, c Aliens Law.*²³²

While acknowledging that Article 15 (c) is concerned with the protection of civilians, the UK Upper Tribunal stated that it would be wrong to exclude from the data on casualties the victims who are not civilians, such as the police, military or militias; and it would be incorrect to discount acts of discriminate violence in order to assess the risk to civilians generally. The Tribunal held that Article 15 (c) *“ordinarily requires decision-makers to adopt an inclusive approach when seeking to determine the levels and extent of indiscriminate violence, subject only to there being a sufficient causal nexus.”*²³³ The Upper Tribunal also stated that it considers that *“an attempt to distinguish between a real risk of targeted and incidental killing of civilians during armed conflict... is not a helpful exercise in the context of Article 15 (c) nor does it reflect the purposes of the Directive.”*²³⁴ The Tribunal recognized that whilst there are important differences between targeted and non-targeted attacks, *“we know all too well from armed conflicts arising in Iraq and elsewhere in the world today that civilians can be adversely affected by violence whatever its source”* and that targeted attacks can result in heavy collateral damage causing death and injury not just to particular groups but to the civilian population at large. Indeed this can sometimes be a deliberate strategy employed by parties to the

²³⁰ Court of Arnhem, 23 April 2010, Awb 10/5495.

²³¹ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 76. The Tribunal stated, paragraph 241, that *“On the basis of the figures we have already analysed it would appear that the ratio of ‘wounded’ to ‘killed’ can be from between 2-5 times higher.”*

²³² CALL, 22 November 2010, no 51410.

²³³ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 239.

²³⁴ Ibid., paragraph 73.

conflict.²³⁵ It pointed out that decision-makers should be wary of assuming that insurgent groups would not change their tactics or deploy methods against civilians generally. The Tribunal thus adopted an inclusive approach and took into account evidence of different types of violence in Iraq.

Thirdly, both the geographic and temporal scope against which the number of casualties and security incidents are considered can distort policy conclusions. In a decision of the Administrative Jurisdiction Division of the Dutch Council of State on 26 January 2010,²³⁶ it was held that the determining authority had not satisfactorily motivated its assessment that the intensity and nature of the indiscriminate violence in Mogadishu was not such as to pose a real risk of serious harm to the applicant merely by his or her presence there. The Minister for Justice did not accept that such an assessment should be restricted to an area the size of a city, and proposed to undertake the assessment with regard to the whole territory of southern and central Somalia.²³⁷ In a further judgment of 9 September 2010, the Council of State held that the Minister of Justice should have assessed the degree to which Article 15 (c) was engaged by the level of indiscriminate violence in Mogadishu, not the whole of southern and central Somalia; and that the Minister of Justice in referring solely to the number of civilian casualties had not provided sufficient grounds for the determination that the intensity of violence did not engage Article 15 (c).²³⁸

Fourthly, statistics on casualties and security incidents depend on collection of data by hospitals and morgues, the media, non-governmental, inter-governmental and governmental organizations. In situations of indiscriminate violence, the dead may not be taken to morgues, but left to lie where killed or buried in makeshift graves; the injured may not be able to seek treatment at hospitals; and victims of and witnesses to violence may not report the incident to any institution. Furthermore, in situations of indiscriminate violence, the presence on the ground of the media, non-governmental and inter-governmental organizations may be non-existent or scarce. Indeed, it is in one sense paradoxical, given the emphasis on quantitative data in the assessments of some Member States, that the only region of the world that all the six Member States of focus in this research consider to be experiencing levels of indiscriminate violence high enough to engage Article 15 (c) is Mogadishu, where very little reliable quantitative data is available due, in part, to the virtual absence of independent media and civil society.

With regard to Iraq, the UK Upper Tribunal underlined the significant under-reporting of violence and accepted that it was likely that the number of casualties recorded by various sources would be lower than they actually were.²³⁹

²³⁵ *Ibid.*, paragraph 75.

²³⁶ ABRvS 26 January 2010, JV 2010, 78.

²³⁷ Letter from the Minister of Justice to the Chairman of the Dutch House of Representatives of 29 March 2010 on jurisprudence regarding protection on international grounds and the Administrative Jurisdiction Division of the Council of State's ruling of 26 January 2010.

²³⁸ Council of State, 9 September 2010, 201005094/1/V2.

²³⁹ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 240 referring to the KH case, paragraph 160 and paragraph 246. At paragraph 241, the Tribunal also stated that it would appear that the ratio of 'wounded' to 'killed' can be from 2-5 times higher.

Moreover, the methodologies and criteria applied to the collation of data vary depending on the source.²⁴⁰ In a judgment of the District Court of the Hague²⁴¹ concerning an Afghan national, it was determined that the Dutch Government could not rely on the country report on Afghanistan of the Minister of Foreign Affairs from July 2010, because with regard to statistics on civilian casualties, the report failed to take into account evidence leaked on WikiLeaks in late July 2010 that civilian casualties were far higher than officially reported by the US and NATO forces. The Government contested that the accuracy of the Wikileaks' information could not be assured and therefore could not be treated as an objective source of country of origin information.²⁴² The Council of State upheld the appeal by the Government.²⁴³

Fifth, an over-reliance on quantitative data on casualties from a past period may also result in a failure to adequately take into account a prognosis of the future nature and patterns of conflict and, therefore, the risk of serious harm upon return.

Finally, with regard to the calculations relating to casualties and security incidents, it is not known what broad target figure for civilian casualties and security incidents must be attained for the level of violence to be considered by decision-makers to be sufficiently high to warrant subsidiary protection in accordance with Article 15 (c). Understandably, those determining authorities asked could not provide an abstract threshold.²⁴⁴

Some Member States have considered that UNHCR's involvement in voluntary return programmes is relevant to the assessment of international protection needs of asylum-seekers from the country in question. In the case of Iraq, some Member States have argued that UNHCR's involvement in return activities is relevant to the determination of whether there is a real risk of serious harm to civilians solely on account of their presence on the territory of that country or a region within it.²⁴⁵

While UNHCR's engagement in the promotion of voluntary return may indeed be a relevant factor, the organization has not reached the stage of promoting or even actively facilitating returns to Iraq, although it may provide support to those who, having been informed fully of the security situation in the country, nevertheless decide to return.

²⁴⁰ See, for example, www.standaard.be, Hancke, C., « *Juggle with numbers, NATO counts less civilian casualties than UN* », 19-20 February 2011; and HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 253, in which the Tribunal acknowledged that none of the figures could be treated as having great precision and in relying on the most commonly cited sets of figures for Iraq the Tribunal stated that particular note should be taken of the highest figures.

²⁴¹ Court of the Hague, Awb 09/41019 of 14 October 2010. Other similar judgments were reached by the District Courts of Zwolle (27/08/10), Utrecht (6/10/10), and Amsterdam (13/10/10, 14/10/10, 19/10/10 and 25/10/10).

²⁴² Answers of Minister Rosenthal (Foreign Affairs) on behalf of the Minister of Immigration and Asylum and the State Secretary of Safety and Justice, received on 14 March 2011.

²⁴³ Council of State, 9 March 2011, 201009737/1.

²⁴⁴ However, it is implicit in the UK Upper Tribunal's reasoning that the levels of casualties in Iraq in 2006/2007 were indicative of an intensity of violence which should have engaged Article 15 (c) QD. Indeed, the Tribunal stated that "*the levels of violence in the peak years of 2006 and 2007 were very high, and suggest that Article 15 (c) was engaged in those parts of Iraq where this level of violence (or a higher level) was occurring*": HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 255. The figures for civilian casualties that the Tribunal was referring to were for the year 2007 somewhere between 20,000 to 25,000 civilian casualties depending on the source (the Tribunal cited an IBC figure of 24,295 and a Brookings figure of 23,600 civilian casualties in Iraq for 2007).

²⁴⁵ Ibid., paragraph 277; and the Dutch Government's letter to the European Court of Human Rights of 29 October 2010 on expulsions to Iraq.

5.1.5. Assessing the levels of violence – the need for a cautious approach

Determining authorities and appeal instances are concerned with carrying out a forward-looking evaluation of the situation in the country of origin in order to determine foreseeable risk upon return. This is particularly challenging when the situation in the country of origin is one where levels of violence may fluctuate sharply.

The difficulties are well-illustrated by a UK case in which the applicant from Mogadishu was denied international protection on appeal at the end of 2007 by the Tribunal (AIT), notwithstanding the submission of expert evidence describing high levels of indiscriminate violence.²⁴⁶ The Tribunal considered that although the situation in Mogadishu was serious, the security situation had settled down since the mass exodus from the city in early 2007. On further appeal to the Court of Appeal, the Court stated two years later (in 2010) that:

*[t]he irony is that we now know ... that, even as the AIT was writing its judgment, conditions in Mogadishu were beginning to deteriorate and during 2008 became dramatically worse. The country guidance relating to Mogadishu is now such that most potential returnees will be entitled to subsidiary protection.*²⁴⁷

The Court of Appeal could only suggest that the appellant make a fresh application for international protection. The whole process involved financial cost for the UK Government and undoubtedly tremendous personal cost to the individual involved.

5.1.6. Individual assessment and provisions for group protection

Some stakeholders asserted that the reluctance on the part of some governments to find that violence poses a real risk of serious harm to civilians in terms of Article 15 (c) arises from a fear that this would introduce a form of group or *prima facie* recognition “through the back door” and constitute a “pull factor”. For similar reasons, the assessment of some governments whether levels of indiscriminate violence pose a real risk of serious harm to civilians merely because of their presence on the territory may not be publicly stated.

In recent years, steps have been taken by the Government of the Netherlands to end its national group-based protection status (known as “group-based” or “categorical” protection) for certain nationality groups such as Iraqis and Somalis.²⁴⁸ These steps were taken in the context of a longer-term plan to abolish the legal status altogether.²⁴⁹ Lawyers interviewed were concerned that this will result in a protection gap for persons fleeing indiscriminate violence.

²⁴⁶ HH (Mogadishu: armed conflict: risk) Somalia CG [2008] UKAIT 00022.

²⁴⁷ HH and others (Somalia) V SSHD [2010] EWCA CIV 426.

²⁴⁸ Group-based or “categorical” protection is granted on the basis of Article 29 (d) of the Aliens Act when it is considered that return to the country of origin would be particularly harsh with regard to the general situation there. Group-based protection for applicants from central Iraq was ended on 22 November 2008; and for Somalis on 2 July 2009: Decision of the State Secretary of Justice of 2 July 2009, n. 2009/16, containing an amendment to the Aliens Act Implementation Guidelines 2000, Dutch Government Gazette 2009, 11449. See section 8.2 below for further information.

²⁴⁹ Parliamentary documents II 2009/10, 19 637, no. 1314. At the time of writing, categorical protection is still provided to non-Arabs from Darfur, Sudan.

Previously, the UK had the status of Exceptional Leave to Remain (ELR), which in practice was granted to particular nationalities or categories of nationalities fleeing armed conflict and indiscriminate violence:

*[T]he rationale behind having the blanket ELR country policies ... was that trying to distinguish a minority of cases for outright refusal would be counter-productive where there is no certainty that the refusals would survive exhaustive legal challenges and where there was even less likelihood that removal would be feasible at the end of the day. Consideration of all cases from the country in question would be slowed down and resources drained by intensive post-decision work, undermining the capacity to process other cases.*²⁵⁰

This status was replaced by Humanitarian Protection (subsidiary protection status) and Discretionary Leave (a national form of complementary protection)²⁵¹ in April 2003 with the express aim of removing what was perceived to be a “pull factor”²⁵² and to reduce the proportion of successful asylum applications from 25 percent to 10 percent.²⁵³ The latter was achieved broadly by the end of 2003. And as has been seen earlier in this report, the percentage of applicants from Afghanistan, Iraq and Somalia granted subsidiary protection status in 2010 was between 0.2 percent and 3.1 percent at first instance. Non-governmental organizations allege that the UK’s criteria for international protection have narrowed since the introduction of subsidiary protection status, effectively barring people from international protection who would previously have been granted protection under ELR, thereby creating a protection gap.²⁵⁴

Interviewees in some Member States stated that the determining authorities have not taken a factual approach to the interpretation of Article 15 (c). It was alleged that some determining authorities’ approach to determining the levels of indiscriminate violence, and the consequent risk posed, is influenced more by a desire to avoid creating a form of *de facto* group protection that could constitute a pull factor. Consequently, in some Member States the bar for protection in line with Article 15 (c) has been set at the highest level permissible in law, and governments seem determined to contest any potential lowering of the bar by the courts.

5.2. THE “SLIDING SCALE”

The CJEU, in *Elgafaji v. Staatssecretaris van Justitie*, held that “the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.”²⁵⁵ The applicant is thus not required to adduce evidence that s/he is specifically targeted by reason of factors particular to personal circumstances.²⁵⁶ Instead, the assessment is one of whether personal factors or circumstances expose an applicant to greater risk of serious harm in the context of indiscriminate violence.

²⁵⁰ Still Human Still Here, *At the end of the line: Restoring the integrity of the UK’s asylum system*, February 2010, at: <http://www.unhcr.org/refworld/docid/4cb81c902.html>, p.14 citing witness statement of Andrew Saunders in *A, H and AH v SSHD* [2006] EWHC 526.

²⁵¹ See section 8.4 below for further information.

²⁵² Immigration Minister Beverley Hughes said, “I believe that our use of ELR has encouraged abuse and acted as a pull factor”. Blunkett orders new crackdown on asylum, *Independent*, 30 November 2002.

²⁵³ BBC News, 29 November 2002.

²⁵⁴ Still Human Still Here, February 2010, p. 14.

²⁵⁵ *Elgafaji v. Staatssecretaris van Justitie*, paragraph 39.

²⁵⁶ *Ibid.*

The research revealed divergent interpretations of this statement among and within the six Member States of focus.

In France,²⁵⁷ Germany,²⁵⁸ and the UK,²⁵⁹ the CJEU position is applied by the determining authorities and courts with regard to national legal provisions transposing Article 15 (c). Indeed, in France, it was noted that most appellate decisions granting subsidiary protection on the basis of Article 15 (c) (Article L.712.1 c) Ceseda) referred to individual factors or circumstances considered to enhance risk of serious harm. Interviewees expressed the view that Article 15 (c) is used as a “safety net” when the application for refugee status is considered unsubstantiated.

However, practice appears to be more ambiguous in Belgium, the Netherlands and Sweden.

The Belgian determining authority, CGRS, informed UNHCR that it does not consider Article 15 (c) to require an assessment of personal factors or circumstances increasing the risk of harm in situations of indiscriminate violence. Such factors are examined in the context of the application of the refugee definition, Article 15 (a) and (b) QD.²⁶⁰ However, a review of a sample of decisions by the appellate body, the CALL, revealed that personal factors and circumstances have been considered as part of the assessment of risk arising from indiscriminate violence.²⁶¹

In the Netherlands, the Council of State, in its decision in the *Elgafaji v. Staatssecretaris van Justitie* case of 25 May 2009, following the preliminary ruling of the CJEU, held that Article 15 (c) is only applicable in “exceptional situations” where the degree of indiscriminate violence characterizing the armed conflict taking place reaches such a high level that substantial grounds are shown for believing that a civilian returned to that country or region would solely on account of his presence on the territory of that country or region face

²⁵⁷ Council of State, OFPRA c/ M.Baskarathas, decision n° 320295, 3 July 2009. The Council of State affirms that “the more the applicant is able to show that he is specifically affected by reason of factors particular to his own personal circumstances the lower the level of individual violence required for him to be eligible for subsidiary protection”.

²⁵⁸ FAC, decision of 14 July 2009, BVerwG 10 C 9.08, under ‘Headnote’: “1. A substantial individual danger to life or limb within the meaning of Section 60 (7) Sentence 2 of the Residence Act that also satisfies the equivalent requirements of Article 15 (c) of Directive 2004/83/EC (the ‘Qualification Directive’) may also arise from a general danger to a large body of civilians within a situation of armed conflict if the danger is concentrated in the person of the foreigner. a) Such a concentration, or individualisation, may result from circumstances specific to the foreigner’s person that increase[s] risk.” See also, FAC, decision of 27.04.2010, BVerwG 10 C 4.09 – VG 8 A 611/08.A – paragraph 33: “[I]f there are no personal circumstances increasing risk, an especially high level of indiscriminate violence is necessary; if personal circumstances increasing risk are present, a lower level of indiscriminate violence will suffice.” However, the Federal Administrative Court further elaborated “[b]ut even in the case of personal circumstances that increase danger, a high level of indiscriminate violence or a high density of danger to the civilian population must be found in the region in question.”

²⁵⁹ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 236: “Where a national of Iraq is able to show some specific risk characteristic(s) over and above being a mere civilian, he or she will potentially be able to qualify for refugee status under the Refugee Convention and, if not, then both Article 15 (b) and (c) may well assist. In respect of Article 15 (c) for such persons it will not be necessary to show the existence of indiscriminate violence at a high level”. See also HH and Others (Somalia) v SSHD [2010] EWCA Civ 426, paragraph 12. The UKBA Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence, September 2010, paragraph D.8. states, under the sub-heading ‘The Sliding Scale/Enhanced Risk Categories’ that if applicants do not meet the Elgafaji test on the grounds of a serious risk due to mere presence as a civilian alone, the test may “also be applied on a sliding scale i.e. the more the applicant is able to show that he is specifically affected by factors particular to his personal circumstances (e.g. age, disability, gender, ethnicity or by virtue of being a perceived collaborator, teacher or government official etc), the lower the level of indiscriminate violence required for him to be eligible.”

²⁶⁰ Interview with the CGRS, 10 March 2011.

²⁶¹ See for example, CALL, 28 November 2007, no 4192; and CALL 20 July 2010, no 46530 (not published) where it was stated “(...) bearing in mind the fact that the applicant finds himself in an extremely vulnerable position, given his young age and low intelligence quotient that is somewhere between 70 and 76 IQ points (...) in the opinion of the Council given the current Afghan context, the Council concludes that the applicant is eligible for the subsidiary protection status within the meaning of Art. 48 / 4§2 c of the Aliens Law.”

a real risk of serious harm.²⁶² The Council of State does not apply the so-called “*sliding scale*” in the context of Article 15 (c) as it considers that personal factors or circumstances are not relevant with regard to the application of Article 15 (c). Similarly, Dutch Government policy does not indicate that the “*sliding scale*” is applied with regard to Article 15 (c) as that sub-paragraph is understood to refer solely to “*exceptional situations*” of violence; and otherwise the policy refers to personal factors or circumstances in the context of qualification in accordance with Article 15 (b).²⁶³

In contrast, the District Courts in the Netherlands have specifically adhered to the above-mentioned interpretation of the CJEU in the context of Article 15 (c), notwithstanding the rulings of the Council of State, and declared that the Government may not limit its interpretation of Article 15 (c) to “*exceptional situations*” of violence, but must examine whether there are any personal factors or circumstances which render the applicant specifically affected by the indiscriminate violence.²⁶⁴ However, such decisions may be overruled by the Council of State.

For example, on 26 April 2010, the Council of State overruled a judgment of the District Court of The Hague in which the District Court had considered that the applicant’s Hazara ethnicity could be of significant importance in the context of Article 15 (c). The Council of State explicitly countered that the District Court had misunderstood that this personal factor (or any personal factor or circumstance) is of no importance or relevance in an assessment of the applicability of Article 15 (c) as in accordance with the aforementioned judgment of the Council of State of 25 May 2009, the:

*purpose of Article 15 (c) QD is only to offer protection in an exceptional situation where the level of indiscriminate violence in an ongoing armed conflict is sufficiently high that there are substantial grounds for believing that every citizen will merely on account of his presence in the country or region, regardless of ethnic background, face a real risk of serious harm.*²⁶⁵

The Council of State further states that individual factors are of relevance under Article 15 (b) QD (Article 3 ECHR).²⁶⁶

In Sweden, it is not yet clear from the case law of the Migration Court of Appeal whether the “*sliding scale*” will be applied with regard to the wording of Chapter 4 Section 2 paragraph 1 of the Aliens Act (on subsidi-

²⁶² Judgment of 25 May 2009 in the case 200702174/2/V2, at: www.raadvanstate.nl. See also Council of State judgment 200908528/1/V2 of 15 January 2010; and 200706464/1/V2 of 08/12/2009, paragraph 2.9.1.

²⁶³ Letter from the Ministry of Justice to the Speaker of the Lower House of the Netherlands Parliament, of 17 March 2009, regarding the judgment of the European Court of Justice of the European Communities in respect of the Qualification Directive. In this letter the State Secretary of Justice set out how applications would henceforth be assessed in relation to Article 29 (1) (b) of the Aliens Act. No mention is made of the need for an assessment to determine whether an applicant is specifically affected by reason of factors particular to his/her personal circumstances.

²⁶⁴ See Rb Almelo (Afghanistan), 04/09/2007, Awb 07/32074 and Awb 07/32071; Rb Haarlem (Afghanistan), 26/11/2009, Awb 09/35460 and Awb09/35458, paragraph 2.34; Rb Amsterdam (Afghanistan), 11/12/2009, Awb 09/43059, paragraph 5.5; Rb Maastricht (Iraq), 15/01/2010, Awb 09/2653; Rb Maastricht (Iraq), 20/01/2010, Awb 09/12750.

²⁶⁵ Paragraph 2.1.8. of Council of State judgment 201000956/1/V2 of 26 April 2010.

²⁶⁶ In *Salah Sheekh v. the Netherlands*, in determining that the Ashraf group was vulnerable to human rights abuses, the ECtHR noted that the Ashraf were not the victims of indiscriminate violence but were clearly targeted. See also *Saadi v. Italy*, paragraph 132: “in cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the Court considers that the protection of Article 3 of the Convention enters into play when the applicant establishes, ..., that there are serious reasons to believe in the existence of the practice in question and his or her membership of the group concerned.” See *NA. v. The United Kingdom*, paragraphs. 116-117, referring to the case law of the ECtHR in *Saadi v. Italy* and *Salah Sheekh v. the Netherlands*.

ary protection), which transposes Article 15 (c) QD.²⁶⁷ The Swedish Migration Board informed UNHCR that it does not apply this interpretation with regard to Chapter 4 Section 2 paragraph 1, but that this interpretation is instead implemented through Chapter 4 Section 2a paragraph 1 of the Aliens Act which provides for a national status as a “person otherwise in need of protection.”²⁶⁸ Chapter 4 Section 2a states:

In this Act, a ‘person otherwise in need of protection’ is an alien who in cases other than those referred to in Sections 1 [refugee status] and 2 [subsidiary protection] is outside the country of the alien’s nationality, because he or she (1) needs protection because of an external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses.

According to the Swedish Migration Board, this national protection status is applied when the degree of indiscriminate violence is not as high as required for subsidiary protection but the applicant can demonstrate a risk of serious abuse due to factors particular to his/her personal circumstances. This approach limits the scope of subsidiary protection derived from Article 15 (c). It was reported that there is some confusion amongst stakeholders as to the relative ambit and application of Chapter 4 Section 2 and Section 2a paragraph 1.²⁶⁹ Some of the judges of the Migration Court of Stockholm have stated that it can be argued that “*the interpretation of article 15 (c) presented by the European Court of Justice, which should affect the application of Chapter 4 Section 2 in the Aliens Act, significantly narrows the scope of Chapter 4 Section 2a.*”²⁷⁰

UNHCR has observed that practice in some Member States recognizes personal factors as increasing the risk of harm and therefore lowering the level of indiscriminate violence required for eligibility in accordance with Article 15 (c).²⁷¹ For example, in a decision of 27 April 2010, the German Federal Administrative Court held:

These factors that increase risk primarily include those personal circumstances that make the applicant appear more severely affected by general, non-selective violence, for example because he is forced by reason of his profession – e.g. as a physician or journalist – to spend time near the

²⁶⁷ In a recent Migration Court of Appeal decision relating to Somalia, the Court did not refer to this part of the CJEU judgment in the *Elgafaji v. Staatssecretaris van Justitie* case as the Court held that the level of indiscriminate violence in Mogadishu and southern and central Somalia was so severe as to pose a risk of harm to the applicant if returned merely on account of his presence there, without the need for the applicant to demonstrate individual factors increasing the risk: UM 10061-09 of 24 February 2011. Chapter 4 Section 2 (1) states that a person is eligible for subsidiary protection when “*there are substantial grounds for assuming that the alien, upon return to the country of origin, would run a risk of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment or as a civilian would run a serious and personal risk of being harmed by reason of indiscriminate violence resulting from an external or internal armed conflict.*”

²⁶⁸ Interview with the SMB on 29 November 2010. The Government website states that the declaration of status as a person eligible for subsidiary protection (Chapter 4 Section 2 paragraph 1) is an international status declaration based on the provisions in the Qualification Directive whereas declaration as a person otherwise in need of protection (Chapter 4 Section 2a paragraph 1) is a Swedish status which only applies in Sweden, at: www.migrationsverket.se/info/443_en.html.

²⁶⁹ Interviews with stakeholders held on 29 November 2010, 1 and 2 December 2010.

²⁷⁰ Information received on 15 March 2011.

²⁷¹ In Belgium, the case law of the CALL has referred to single Afghan women (CALL, 28 November 2007, no 4192), young age and low intelligence (CALL 20 July 2010, no 46530 (not published)) as risk factors of relevance under Article 48 / 4, paragraph 2, c) of the Aliens Law of December 15, 1980. In France, a shepherd in Afghanistan was deemed to be at greater risk since he was more likely to come into contact with armed groups: CNDA, decision n° 09023376, 1 September 2010. In the UK, persons living or working near e.g. churches, mosques, government buildings, military bases, the homes of security force members and areas where search and seizure are being operated were stated as possible risk factors which might be raised under Article 15 (c) in *HM and Others* (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 86. Also in *HK and others* (minors – indiscriminate violence – forced recruitment by Taliban – contact with family members) Afghanistan CG [2010] UKUT 378 (IAC), paragraph 23, the Upper Tribunal acknowledged that there were risks associated with living near areas of fighting, where there were search and seizure operations and being located near to military bases: “*Civilians have been killed and injured as a result of their proximity to military bases.*”

*source of danger. But in the Court's opinion, it may also include personal circumstances by reason of which the applicant, as a civilian, is additionally subject to the danger of selective acts of violence – for example because of his religious or ethnic affiliation – to the extent that recognition of refugee status does not come under consideration on that basis.*²⁷²

The German determining authority, BAMF, informed UNHCR with regard to Afghanistan that the fact that an applicant's home is close to areas of conflict, police stations, government buildings and strategically important roads may be considered a personal circumstance which increases the risk of harm. Similarly, with regard to Iraq, a home in close proximity to, for instance, places where public assemblies take place, markets, recruitment offices and strategically important roads might enhance the risk of harm in terms of Section 60 (7) sentence 2 that transposes Article 15 (c). The BAMF further informed that, insofar as the applicant has not been granted refugee status, particular groups of persons such as journalists, academics, and doctors may be at greater risk of serious harm from indiscriminate violence.²⁷³ Nonetheless, it should be noted that as part of the overall evaluation of an application for international protection, the determining authority considers whether the applicant is able to divest him/herself of the personal factor or circumstance which may heighten the risk of persecution and/or serious harm and thereby lower the risk in the future. For example, journalists may be considered able to refuse assignments requiring their presence in areas experiencing high levels of indiscriminate violence, but a doctor would not.

However, UNHCR has also noted that in some Member States, applicants with certain personal factors which heighten the risk of targeted violence are not considered to fall within the scope of the 1951 Convention and, therefore, are not being recognized as refugees, though they may be granted subsidiary protection under Article 15 (c).²⁷⁴ For example, UNHCR has observed appeal decisions in which male applicants at risk of forced recruitment into armed groups were not granted protection under the 1951 Convention or Article 15 (b) QD, but this personal circumstance was considered to heighten the risk of becoming a victim of indiscriminate violence.²⁷⁵ Decisions were also reviewed in which female applicants, who had endured grave sexual violence and were considered not to enjoy the protection of their community, were not recognized as refugees but were granted protection under Article 15 (c).²⁷⁶ UNHCR also observed decisions in which personal factors related to political opinion or imputed political opinion were considered to heighten risk of serious harm in terms of Article 15 (c), but it was not clear from the facts and reasoning in the decision whether this was taken into account as a ground for refugee status and if so, why it was

²⁷² FAC, decision of 27.04.2010, BVerwG 10 C 4.09 – VGH 8 A 611/08.A – paragraph 33.

²⁷³ Interview with the BAMF on 1 December 2010.

²⁷⁴ For example, in France, a tailor from Afghanistan was not recognized as a refugee but was considered to be at risk of serious harm in terms of Article L. 712-1 c) Ceseda (Article 15 (c)) because he dealt with female clients and was quite well-off: CNDA, decision n° 09019365, 1 September 2010. The Swedish Migration Board informed UNHCR that certain jobs and/or wealth may not be considered to fall within the scope of a “particular social group” but could constitute factors increasing risk of serious harm in situations of indiscriminate violence: interview with the SMB on 29 November and 2 December 2010. The SMB informed that in three cases concerning Iraq before the Migration Court of Appeal on 22 December 2009 (MIG 2009/36), it was held that a person who exercised a profession such as a doctor, academic or musician could not be considered to be part of a particular social group because members of that group do not share an innate characteristic or a common background that cannot be changed. A profession was determined not to be an immutable characteristic. However, it was recognized that such a personal characteristic may increase the risk of harm in the context of violence arising from a conflict.

²⁷⁵ See, for example, CNDA decision no. 09014572, 25 May 2010; CNDA decision no. 09022050, 21 June 2010: the young male applicants were considered as coming from provinces experiencing high levels of generalised violence and they were considered to be at heightened risk of harm due to the risk of forced recruitment, particularly by Taliban forces.

²⁷⁶ For example, CNDA, decision n° 09023167, 27 October 2010 in which the female applicant from Northern Kivu, DRC, was granted protection in France on the basis of Article L. 712-1 c) Ceseda (Article 15 (c)). UNHCR also viewed a number of decisions in France in which young males who did not enjoy any support from their family or community were granted protection on the basis of Article L. 712-1 c) Ceseda: CNDA, n° decision 09005818, 25 February 2010; CNDA, decision n° 09022050, 21 June 2010; CNDA, decision n° 0902456, 2 December 2010.

found lacking.²⁷⁷ Some interviewees in France alleged that Article 15 (c) is used as a safety net when the determining authorities are concerned, in the context of qualification for refugee status, about the credibility of evidence, or consider the applicant's statements unsupported by evidence, as long as criteria for designation of an international or internal armed conflict are satisfied. Moreover, the tendency to refer to individual factors or circumstances in decisions granting subsidiary protection according to Article 15 (c) was believed to be symptomatic of a fear of creating a form of group protection.

5.3. THE SCOPE OF ARTICLE 15 (B) AND ARTICLE 15 (C) – THE ADDED PROTECTION VALUE OF ARTICLE 15 (C)

The question which the Dutch Council of State posed to the CJEU in the *Elgafaji v. Staatssecretaris van Justitie* case was in essence whether the scope of Article 15 (c) was broader than or distinct from the scope of Article 3 ECHR (mirrored in Article 15 (b) QD) as interpreted by the case law of the European Court of Human Rights. This issue was considered unclear because the European Court of Human Rights had explicitly stated that it has never excluded the possibility that:

*a general situation of violence in a country of destination will be of a sufficient level of intensity as to entail that any removal to it would necessarily breach Article 3 of the Convention. Nevertheless, the Court would adopt such an approach only in the most extreme cases of general violence, where there was a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.*²⁷⁸

The CJEU stated that Article 15 (b) corresponds in essence to Article 3 ECHR and that, by contrast, the content of Article 15 (c) was different and must be interpreted independently, although with due regard for fundamental rights as guaranteed under the ECHR.²⁷⁹ The CJEU then provided an interpretation of the word “individual” in Article 15 (c) which it considered was “likely to ensure that Article 15 (c) of the Directive has its own field of application.” It stated:

*the word ‘individual’ must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place ... reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred to in Article 15 (c) of the Directive.*²⁸⁰

²⁷⁷ See, for example, CNDA, decision n° 606683, 3 December 2008, in which the applicant who worked with a former governor of a province in the DRC was not recognised as a refugee but was granted protection in France under Article L. 712-1 c) Ceseda (Article 15 (c)). In CNDA, decision n° 09015434, 29 April 2010 in which the applicant was the driver of a military official who was involved in intelligence gathering against the Taliban, it was not clear that imputed political opinion was considered as a relevant ground for refugee status. Similarly, CNDA, decision n° 09014706, 17 July 2010 in which the male child of a Taliban officer refused to take part in armed activities following his father's death, it is not clear that imputed political opinion was considered as a relevant ground for refugee status.

²⁷⁸ *NA v. the United Kingdom*, paragraph 115. Note, for example, in the case of *Mawaka v. The Netherlands*, Application no. 29031/04, Council of Europe: European Court of Human Rights, 1 June 2010, at: <http://www.unhcr.org/refworld/docid/4c209ab12.html>, paragraph 41, the Court said that “the general situation in the DRC at the present time certainly gives cause for concern ..., with the circumstances in the Kivu provinces in the north-east being particularly dire.” However, the Court noted that there was no reason to assume that the applicant would be expelled to the north-eastern part of the DRC, and held that the situation in the rest of the DRC is not one of such extreme general violence that there exists a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.

²⁷⁹ *Elgafaji v. Staatssecretaris van Justitie*, paragraph 28.

²⁸⁰ *Ibid*, paragraph 36.

This interpretation of Article 15 (c) bears striking similarities to case law of the European Court of Human Rights under Article 3 ECHR. As a result, the distinct ambit of Article 15 (c) remains unclear.

Indeed, on 25 May 2009, the Administrative Jurisdiction Division of the Dutch Council of State rendered its judgment in the *Elgafaji v. Staatssecretaris van Justitie* case and held that “the material scope of the application of Article 15 (c) QD is, in accordance with the Court’s [CJEU] ruling of 17 February 2009, not broader than that of Article 3 ECHR.”²⁸¹ Thus, in the Netherlands, Article 15 (c) continues to be considered a strand of protection offered by Article 3 ECHR.²⁸²

The Dutch Council of State, the District Courts and the Government, in applying Article 15 (c), refer explicitly to Article 3 ECHR and the case law of the European Court of Human Rights.²⁸³ The case law is referred to not only for guidance on the interpretation of legal concepts, but as providing country-specific guidance with regard to the application of Article 15 (c). For example, in a recent decision of the Dutch Council of State, it was held that Article 15 (c) was not applicable in the case of an applicant from Afghanistan as the European Court of Human Rights had held in *N. v. Sweden*²⁸⁴ that the general security situation in Afghanistan is not such that there are substantial grounds for believing that citizens deported to Afghanistan face a real risk of violation of Article 3 of the ECHR simply on account of their presence there.²⁸⁵ Similarly, the European Court of Human Rights judgment in *F. H. v. Sweden*²⁸⁶ was considered to provide guidance to the effect that Article 15 (c) is not engaged with regard to the situation in Iraq; and the judgment in *Mawaka v. Netherlands*²⁸⁷ is cited in support of decisions that Article 15 (c) does not apply with regard to the DRC.²⁸⁸

Moreover, as set out above, neither the Council of State nor the determining authority, the IND, consider that personal factors or circumstances are relevant for the assessment in relation to Article 15 (c). These are considered in the context of Article 15 (b) in line with the case law of the European Court of Human Rights.

In conclusion, with regard to legal practice of the Council of State and government policy in the Netherlands, Article 15 (c) is understood to have no added scope of protection beyond that of Article 15 (b)/Article 3 ECHR.

In the UK, however, the Upper Tribunal has reiterated that the scope of protection provided by Article 15 (c) “is an autonomous concept distinct from and broader than Article 3 protection even as interpreted by the European Court of Human Rights in *NA v United Kingdom*.”²⁸⁹ It has also noted the considerable overlap

²⁸¹ See Council of State, 10 June 2010, 201000765/1/V2. Also, letter from the Secretary of State of Justice to the Lower House of Parliament of 29 June 2009 – Parliamentary documents II 2008/09, 19637, no. 1292.

²⁸² Letter from the Minister of Justice to the Chairman of the Dutch House of Representatives of 29 March 2010 on the jurisprudence regarding protection on international grounds and the Administrative Jurisdiction Division of the Council of State’s ruling of 26 January 2010.

²⁸³ See for example, Court of Amsterdam, 30 December 2009, Awb 08/15991 and 08/15988.

²⁸⁴ *N. v. Sweden*, paragraph 52: “Whilst being aware of the reports of serious human rights violations in Afghanistan, ..., the Court does not find them to be of such a nature as to show, on their own, that there would be a violation of the Convention if the applicant were to return to that country. The Court thus has to establish whether the applicant’s personal situation is such that her return to Afghanistan would contravene Article 3 of the Convention.”

²⁸⁵ Council of State, 4 May 2011, 201101993/1/V2.

²⁸⁶ *F.H. v. Sweden*, paragraph 93: “the Court concludes that whilst the general situation in Iraq, and in Baghdad, is insecure and problematic, it is not so serious as to cause, by itself, a violation of Article 3 of the Convention if the applicant were to return to that country.”

²⁸⁷ *Mawaka v. the Netherlands*, paragraph 44: “The Court therefore cannot but conclude that the general situation in the DRC is not one of such extreme general violence that there exists a real risk of ill-treatment simply by virtue of an individual being exposed to such violence on return.”

²⁸⁸ Council of State, 11 October 2010, 201008862/1/V2.

²⁸⁹ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC), paragraph 67 referring to *Elgafaji v. Staatssecretaris van Justitie* paragraphs 33-36; QD paragraphs 20 and 35; HH and Others paragraph 31.

between the protection afforded by Articles 2 and 3 ECHR and that afforded by Article 15 (c), and suggested that the difference is perhaps narrow in practice, at least a difference of emphasis or starting points, but that this does not mean that Article 15 (c) does not have its distinct ambit and purpose.²⁹⁰ However, it is not yet clear that there is any difference in scope in national legal practice.²⁹¹

It is the view of the Ministry of the Interior in Germany that there is a difference in scope but that this will only become apparent through the evolving case law of the ECtHR and the CJEU in the future.²⁹²

In a recent Chamber judgment, the European Court of Human Rights has stated that, based on the CJEU's interpretation in the *Elgafaji v. Staatssecretaris van Justitie* case, it [ECtHR] :

*is not persuaded that Article 3 of the Convention as interpreted in NA, does not offer comparable protection to that afforded under the Directive. In particular, it notes that the threshold set by both provisions may, in exceptional circumstances, be attained in consequence of a situation of general violence of such intensity that any person being returned to the region in question would be at risk simply on account of their presence there.*²⁹³

In summary, the lack of clarity regarding the distinct scope of Article 15 (c) QD, combined with a greater awareness amongst stakeholders of the case law of the ECtHR with regard to Article 3 ECHR, may at least partially explain the obscurity of Article 15 (c) in protection terms in some of the Member States of focus.

5.4. DIVERGENCES IN INTERPRETATION WITH REGARD TO OTHER TERMS OF ARTICLE 15 (C)

5.4.1. Civilian

It appears that the term “civilian” has seldom been the subject of interpretation by Member States’ courts.²⁹⁴ In the absence of an interpretation by the CJEU, variations have emerged in the interpretation applied by Member States.

²⁹⁰ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC), paragraphs 87 and 88: “Whilst in *NA v UK* the ECtHR recognized at [115-117] that in exceptional cases of generalized violence Article 3 protection may be available, the essential concept was based on personalized individual risk, and only in the most extreme cases would it extend to risk of ill treatment on a more general basis. Thus Article 3 has broadened so that it can apply to certain kinds of harm in situations of armed conflict.” “Article 15 (c) also has a different starting point: indiscriminate violence in a situation of armed conflict.”

²⁹¹ Interview with UKBA on 9 November 2010 and interviews with lawyers in November 2010.

²⁹² Interview on 30 November 2010.

²⁹³ *Sufi and Elmi v. the United Kingdom*.

²⁹⁴ France: interview with CNDA on 2 March 2011. Sweden: interview with Swedish Migration Board on 29 November 2010, interview with judge of the Migration Court of Appeal on 1 December 2010, and written response by some judges of the Migration Court of Stockholm to questions raised by the United Nations High Commissioner for Refugees, 15 March 2011.

In Belgium, the appeal body CALL has interpreted the term with reference to Article 50 (1) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts.²⁹⁵ As such, the CALL has stated that a civilian is “any person not belonging to the armed forces of a party to a conflict.”²⁹⁶ On the issue of the benefit of the doubt, the CALL, in accordance with Article 50 (1) of the 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the protection of victims of international armed conflicts, has held that, in case of doubt, an applicant shall be considered to be a civilian.²⁹⁷ Notwithstanding this ruling, UNHCR has observed decisions where the benefit of the doubt does not appear to have been afforded. For example, in a judgment of 4 December 2007, an Iraqi was denied subsidiary protection on the grounds that it was “impossible to make an accurate assessment of his position in his country of origin and therefore impossible to judge (i) whether he is a civilian or not, (ii) given his former claimed high position within the Baath party,…”²⁹⁸ This was despite the absence of any indicators – except for military service from 1983 to 1988 – that the applicant had taken part in any hostilities in the context of an armed conflict.²⁹⁹ In a more recent case, the CALL held:

*the benefit of the doubt can be granted and he can be considered to be a civilian if he has fulfilled his obligation to cooperate by making credible statements in order to allow the determining authorities to establish a picture of his social position and his need for protection. Given the personal conduct of the applicant, it is impossible to make an accurate assessment of his position in his country of origin and therefore impossible to judge (i) whether or not he is a civilian, (ii) whether or not he is covered by the application of Article 55 / 4 [exclusion clause] of the aforementioned Aliens Law (iii) whether or not he can invoke protection options (iv) whether or not he faces a real risk. Therefore, subsidiary protection status cannot be granted to the applicant.*³⁰⁰

²⁹⁵ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, at: <http://www.unhcr.org/refworld/docid/3ae6b36b4.html>, Article 50 (1) states that “[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” Article 43 states that “1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict. 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities. 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.” International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, at: <http://www.unhcr.org/refworld/docid/3ae6b36c8.html>; states at Article 4 that: “A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war. (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power... (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”

²⁹⁶ CALL 17 August 2007, no 1244. See also for instance, CALL, 20 April 2010, no 41975: “given his former activities as an active combatant, the applicant cannot be considered as a civilian in line with art. 50 Protocol 1977.”

²⁹⁷ CALL, 17 August 2007, no 1244.

²⁹⁸ CALL, 4 December 2007, no 4460.

²⁹⁹ UNHCR has emphasized the need to apply the inclusion and exclusion clauses of the 1951 Convention before assessing qualification for subsidiary protection, and expressed concern with regard to the interpretation of the term ‘civilian’. See, for example, an advisory opinion submitted by UNHCR on 16 December 2008 in support of a subsequent application following CALL judgment no. 4460 of 4 Dec. 2007, at: http://www.kruispuntmi.be/uploadedFiles/Vreemdelingenrecht/Wegwijs/verblijfsstatuten/Asiel/Advies_percent20UNHCR_percent20bij_percent20RvV_percent204460.pdf.

³⁰⁰ CALL 24 August 2010, no 47380.

The German Federal Administrative Court has similarly held that combatants are not considered to be “members of the civilian population” within the meaning of Section 60 (7) sentence 2 Residence Act, transposing Article 15 (c).³⁰¹ However, the determining authority in Germany, the BAMF, informed UNHCR that it considers that the term “combatant” is of limited applicability in the context of Article 15 (c) as the issues under examination do not relate to international humanitarian law but to the provision of international protection. The BAMF consequently considers that the following persons are not part of the civilian population:

- Persons with the status of combatant under international humanitarian law i.e. persons who, regardless of the legality of the conflict, are entitled to carry out military actions (members of the regular armed forces, police and security personnel to the extent that they form part of and have been declared to be part of the regular armed forces); members of insurgent groups combating invading troops in the absence of available regular armed forces and which adhere to international humanitarian law; and guerrilla fighters who openly carry arms and use them in the course of armed conflicts;
- Persons who take part in fighting without having the status of a combatant since they have not been made part of the armed forces and do not carry weapons openly;
- Partisans, i.e. civilian persons who take part in armed conflict even though this is forbidden to parts of the civilian population under international humanitarian law, unless this is done in order to exercise the right to self-defense;
- Foreign mercenary soldiers.³⁰²

In the absence of precedent-setting case law on the interpretation of “civilian”, the appeal instance in France, CNDA, informed UNHCR that it considers, in light of the provisions of Additional Protocol I to the 1949 Geneva Conventions, that the concept of “armed forces” should be interpreted as broadly as possible, to encompass structured armed groups – whether regular or irregular - militias, rebels, mercenaries etc.³⁰³ The determining authority OFPRA confirmed to UNHCR that it takes the same approach, and if it is established that an applicant has been a member of a military group or combat unit, s/he will no longer be considered as a civilian even if s/he did not take an active part in combat, but provided logistical support. Civil servants or members of the state administration whose departments make a decisive and direct contribution to the conflict are not considered as civilians either.³⁰⁴ Similarly, if it is established that a person voluntarily and repeatedly provided information to armed groups with a direct link to the conduct of military operations, then s/he will not be considered a civilian.³⁰⁵

In the UK, the courts have held that interpreting Article 15 (c) through the prism of international humanitarian law can result in its terms being construed inappropriately given the object and purpose of Article 15

³⁰¹ FAC, decision of 24 June 2008, BVerwG 10 C 43.07 – VHG 13 a B 05.30833, paragraph 35.

³⁰² Interview with the BAMF on 1 December 2010.

³⁰³ Interview with CNDA, 2 March 2011.

³⁰⁴ Interview with OFPRA, 2 March 2011.

³⁰⁵ Interview with OFPRA, 2 March 2011.

(c) to provide international protection to persons fleeing armed conflict.³⁰⁶ The Court of Appeal held that the Qualification Directive must be treated as autonomous and with its own object and purpose. Consequently, the courts have held that the term “civilian” applies to genuine non-combatants and not merely someone who is not in uniform.³⁰⁷ According to the UK courts, whether a former combatant “falls within the definition of a civilian, will be a question of fact and degree in every case in which the issue arises.”³⁰⁸ More recently, the Upper Tribunal in a country guidance case on Iraq added that “[c]ivilian’ means all genuine non-combatants **at the time when the serious threat of real harm may materialise.**”³⁰⁹ [Emphasis added].

5.4.2. “Serious ... threat to life or person”

The meaning of the phrase “serious ... threat to life or person” has been a focus of enquiry for the courts in only some of the Member States studied.³¹⁰ In those Member States, there appears to be a lack of common understanding as to the interpretation to be given to the phrase “serious ... threat to ... person.” The CJEU, in the *Elgafaji v. Staatssecretaris van Justitie* case, only stated that this term covers “a more general risk of harm” than those stipulated in Article 15 (a) and (b) QD.³¹¹

In Germany, this term has been narrowly interpreted to encompass threats to physical integrity. The term is transposed by Section 60 (7) sentence 2 Residence Act which refers to “a substantial individual danger to life or limb.” The Federal Administrative Court has held that the term “substantial individual danger to life or limb” covers death and bodily injury caused by indiscriminate violence.³¹² Moreover, the General Administrative Regulations regarding the Residence Act (*Allgemeine Verwaltungsvorschrift zum Aufenthaltsgesetz* of 26 October 2009) state that restrictions on freedom do not, as a rule, fall within the scope of Section 60 (7) sentence 2:

*The protected rights are life and physical integrity. Section 60 (7)2 as a rule is not applicable in case of measures restricting freedom (“freiheitsbeschränkenden Maßnahmen”), e.g. internment by the parties to the conflict. Insofar as the internment is accompanied by degrading and inhumane treatment, the prerequisites of Section 60 (2) might be fulfilled.*³¹³

Section 60 (2) Residence Act transposes Article 15 (b). Moreover, Section 60 (7) sentence 1 Residence Act, which constitutes a ground for a national complementary protection status, explicitly refers to a concrete danger to “life and limb or liberty.” [Emphasis added]. As such, the phrase “serious ... threat to ... person” appears to be restricted to threats to physical integrity only.

³⁰⁶ *QD and AH v. SSHD* [2009] EWCA Civ 620, paragraph 18. The Court of Appeal also recognised that whilst Article 17 (1) (a) explicitly refers to the treaty definitions of crimes against peace, war crimes and crimes against humanity, Article 15 (c) is silent: paragraph 34. UNHCR in its submission to the Court of Appeal pointed out that Recital 25 to the Qualification Directive states that the criteria for subsidiary protection “should be drawn from international obligations under human rights instruments and practices in Member States” – it does not mention IHL. Also, the CJEU in *Elgafaji* stated that the Qualification Directive and Article 15 (c) in particular must be interpreted with “due regard for fundamental rights, as they are guaranteed under the ECHR” paragraph 28, but did not refer to IHL; and finally that IHL and Subsidiary Protection status are two separate legal regimes with different objects and purposes.

³⁰⁷ *QD and AH v. SSHD* [2009] EWCA Civ 620, paragraph 37 See also Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence, September 2010, paragraph D.1.

³⁰⁸ GS (Article 15 (c): indiscriminate violence) Afghanistan CG [2009] UKAIT 00044, paragraph 26.

³⁰⁹ *QD and AH v. SSHD*, paragraph 37; upheld in *HM and Others*, paragraph 67.

³¹⁰ Belgium, France and Sweden.

³¹¹ *Elgafaji v. Staatssecretaris van Justitie*, paragraph 33.

³¹² FAC decision of 27 April 2010, BVerwG 10 C 4.09 – VG 8 A 611/08.A.

³¹³ No. 60.7.2.5.

The UK courts have adopted a broader interpretation of the term by including serious mental trauma within its scope. The UK Upper Tribunal has held that the term must “*extend to significant physical injuries, serious mental traumas and serious threats to bodily integrity.*”³¹⁴ The Asylum and Immigration Tribunal rejected the submission that all forms of serious physical or psychological harm, including flagrant breaches of qualified rights, such as freedom of thought, conscience and religion, were covered by Article 15 (c).³¹⁵ It considered that such forms of harm were more appropriately dealt with, if they reached Article 3 ECHR levels or were otherwise sufficiently flagrant, by Article 15 (b). The Tribunal said that there was no precise definition that could be applied to the phrase “*or person*”, and that the meaning of that phrase must be read in the light of the need for serious harm. The Tribunal stated that “*it is possible to read across the provisions of Article 15 (b) to understand the level (but not type) of harm required to obtain the protection of Article 15 (c).*”³¹⁶ As such, the UK determining authority UKBA, has issued guidance to decision-makers which states that “*For practical purposes, the level of harm that must be demonstrated may be considered equivalent to the level of harm that would be necessary to establish a breach of Article 3 ECHR, although the type of harm may be different.*”³¹⁷

A review of judgments by the Dutch Council of State did not reveal an interpretation of “*serious ... threat to ... person*”. However, given the position of the Council of State³¹⁸ that Article 15 (c) is simply an expression of a strand of protection provided by Article 3 ECHR, and that Article 15 (c) must be considered in the light of the case law on Article 3 ECHR, the District Court of Arnhem held that in assessing the degree of indiscriminate violence, all types of harm which are prohibited by Article 3 ECHR must be considered, including arbitrary arrest and detention.³¹⁹ This would, therefore, constitute a broader interpretation of “*threat to person*” than that in Germany.

5.4.3. “*By reason of*”: The nexus between the harm and the indiscriminate violence in a situation of armed conflict

Article 15 (c) provides protection from a serious and individual threat to a civilian’s life or person “*by reason of*” indiscriminate violence “*in situations of international or internal armed conflict*”.

Today’s armed conflicts are characterized not just by indiscriminate violence perpetrated by parties to the conflict, but indiscriminate violence by other actors exploiting a breakdown of law and order. In fact, it is frequently difficult to distinguish between threats of violence emanating from combatants and those deriving from criminals.³²⁰ From the perspective of civilians present in areas ravaged by such violence, the threat to life or person remains real regardless of the perpetrators or their motives. Indeed, there is nothing in Article 15 (c) that limits its application according to the source of the violence as long as it arises in the context of an armed conflict.

³¹⁴ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 76. Note that the Tribunal further added that this “*has significance for the type of evidence relevant to establishing whether Article 15 (c) is engaged. Such evidence cannot be confined to the numbers of casualties.*”

³¹⁵ GS (Article 15 (c): indiscriminate violence) Afghanistan CG [2009] UKAIT 00044, paragraph 72.

³¹⁶ Ibid.

³¹⁷ Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence, September 2010, paragraph D.4.

³¹⁸ Council of State, 10 June 2010, 201000765/1/V2.

³¹⁹ Court of Arnhem, 23 April 2010, Awb 10/5495.

³²⁰ As UNHCR has stated in its Iraq Eligibility Guidelines, p. 23-4, paragraph 27: “*Due to the complex situation of a high number of actors involved in providing security and actors involved in violence, where the lines are often blurred, an asylum-seeker’s failure to identify the perpetrator of violence should not be considered as detrimental to his/her credibility.*”

In Germany, according to the jurisprudence to date, the substantial and individual danger has to be a direct consequence of the indiscriminate violence by parties to the conflict and only the threat of death and serious physical injury caused directly by such violence has so far been taken into account. The Federal Administrative Court has held that criminal violence will not be taken into account if it is not committed by one of the parties to the conflict.³²¹

This interpretation stands in contrast to that in other Member States reviewed.

The review of judgments of the Belgian appeal instance, CALL, indicated that it does not require that the threat to life or person be posed by the protagonists in the armed conflict in question.³²² Similarly, the Dutch Council of State has stated that the indirect consequences of armed conflict should be considered.³²³

In Sweden, although this issue is yet to be addressed by the Migration Court of Appeal with regard to Chapter 4, Section 2 paragraph 1 of the Act amending the Aliens Act,³²⁴ some of the judges from the Regional Migration Court in Stockholm informed UNHCR that there have been rulings where the Stockholm Migration Court has not required that the violence be a direct consequence of the internal armed conflict.³²⁵ Furthermore, the determining authority, the Swedish Migration Board, informed UNHCR that it considers that the threat of harm does not need to arise from the actions of a party to the armed conflict and may emanate from other actors due to a breakdown of law and order related to the armed conflict.³²⁶

Similarly, UK courts have held:

We see no reason in principle why criminal acts should not be included in the scope of indiscriminate violence and, indeed, it is often difficult to separate armed conflict from a criminal act. It is hard to envisage an act more criminally culpable than carrying and detonating a bomb in a crowded marketplace, whatever the intention of the person concerned. [...] The correct approach is not simply to ask whether the indiscriminate violence is criminal, or in pursuance of the armed conflict. It is a question of causation. [...] There therefore needs to be a causal link between the threat to life or person and the indiscriminate violence, but that indiscriminate violence does not need to be caused by one or more armed factions or the state. We emphasise that, criminal acts, as with any other form of indiscriminate violence, need to be of sufficient severity to pass the Elgafaji test, and produce a serious and individual threat to a civilian's life or person [...] Not all criminal acts, by a very long way, would fall into that category.³²⁷

³²¹ FAC, decision of 24 June 2008, BVerwG 10C 43.07 – VGH 13a B 05.30833, paragraph 24. It should be noted that the MOI informed UNHCR that it considers that the scope of Article 15 (c) was explicitly limited to situations arising from armed conflicts and therefore state failure can only be taken into consideration in exceptional situations – e.g. Somalia – where there is a direct link between state failure and the armed conflict and as long as the armed conflict is going on: interview on 30 November 2010.

³²² See for instance CALL 19 May 2009, no 27580; and CALL 22 November 2010, no 51369.

³²³ Council of State, 3 April 2008, 200701108/1 and Council of State, 7 July 2008, 200802709/1.

³²⁴ Interview with the SMB on 29 November 2010.

³²⁵ Answers to questions raised by the United Nations High Commissioner for Refugees, Migration Court of Stockholm, 15 March 2011: For example, “when an applicant has fled from a more or less collapsed state, focus is on the applicant’s need of protection because of the armed conflict in a wide context rather than who is performing the violence.”

³²⁶ Interview with SMB on 29 November 2010.

³²⁷ GS (Article 15 (c): indiscriminate violence) Afghanistan CG [2009] UKAIT 00044, paragraph 65.

This ruling has been confirmed recently when the Upper Tribunal stated:

*In our judgment the nexus between the generalised armed conflict and the indiscriminate violence posing a real risk to life and person is met when the intensity of the conflict involves means of combat (whether permissible under the laws of war or not) that seriously endanger non-combatants as well as result in such a general breakdown of law and order as to permit anarchy and criminality occasioning the serious harm referred to in the Directive.*³²⁸

The UK Tribunal agreed with the finding of the French Council of State in the case of Baskarathas and stated that *“it is not necessary for the threat to life or person to derive from protagonists in the armed conflict in question: it can simply be a product of the breakdown of law and order.”*³²⁹

The life of civilians may also be threatened by the destruction of the means to survive (for example, access to food, potable water, shelter or medical care). This may be a deliberate tactic employed by a party to an armed conflict or it may be an indirect consequence of the armed conflict. For example, in southern and central Somalia, the indiscriminate violence as well as threats resulted in the suspension of food distribution by the World Food Programme to most regions of southern and central Somalia and impacted on the capacity of aid organizations to deliver much needed assistance to civilian populations.³³⁰

According to the German Federal Administrative Court, indirect threats to life or person due to the destruction of the means to survive *“cannot be included in the assessment of the density of danger.”*³³¹ The Federal Administrative Court has, on the other hand, stressed that, in the context of evaluating the existence of an internal protection alternative, it is necessary to establish that the person has an assurance of at least a minimum livelihood in the proposed area of internal protection.³³²

In contrast, in the Netherlands, a Council of State decision of 7 July 2008 stated that the indirect consequences of armed conflict should be considered,³³³ and UNHCR has noted judgments of Dutch District Courts that affirm the humanitarian situation has to be taken into consideration.³³⁴

Similarly, UNHCR was informed that the determining authority in Sweden, the SMB, considers that the threat of harm may derive from the destruction of the necessary means to survive due to the indiscriminate violence.³³⁵

This is also the view of the UK courts. According to UK case law, the serious and individual threat does not have to be a direct effect of the indiscriminate violence; it is sufficient if the latter is an operative cause and

³²⁸ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 80. The Upper Tribunal recognised the heavy overlap between criminal and military violence, paragraphs 75 and 92, stated that the Tribunal in the GS case was right to conclude that risk of exposure to criminal violence resulting from the failure of protection arising from armed conflict would fall within the ambit of Article 15 (c) QD.

³²⁹ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 80. See Council of State, OFPRA v. Baskarathas decision no. 320295, 3 July 2009.

³³⁰ UNHCR Somalia Eligibility Guidelines.

³³¹ FAC, decision of 24 June 2008, BVerwG 10C 43.07 – VGH 13a B 05.30833, paragraph 35.

³³² Ibid., paragraph 28.

³³³ Council of State, 7 July 2008, 200802709/1.

³³⁴ Court of Arnhem 23 April 2010, Awb 10/5495, Court of Haarlem 27 April 2010, Awb 10/134580.

³³⁵ Interview with SMB on 29 November 2010. See also Migration Court of Appeal UM 334-09.

the nexus is not too remote.³³⁶ Consequently, it has been held that “[d]estruction of the necessary means of living, if not simply a remote consequence may equally be a relevant factor” in assessing whether Article 15 (c) is engaged.³³⁷ However, the courts in the UK have held that there must be a close nexus between the “indiscriminate violence” and the humanitarian conditions threatening the life or person of civilians. It does not suffice that the link is with the armed conflict generally. The Tribunal stated:

*One consequence of the years of conflict is that agriculture, and food distribution, have suffered and that has given rise to difficulties of food supply. In our judgment it cannot be said that such a general situation has come about ‘by reason of indiscriminate violence in situations of international or internal armed conflict’. The food supply difficulties arise from a situation that has gone on for many years, and have not been shown to be the result of indiscriminate violence, as opposed to the targeted violence of armed groups against one another. Also, there is no satisfactory evidence that, even without an armed conflict, the situation in Afghanistan in this regard would be a great deal better. The food supply problem cannot be shown to be connected otherwise than very remotely to indiscriminate violence, even if it is more closely connected to armed conflict.*³³⁸

However, the Tribunal stated that if, for example, indiscriminate bombing led to the population of a particular village fleeing to an area where they could not be fed, this would satisfy the need for a causal nexus with the indiscriminate violence.³³⁹

With regard to Article 15 (b) of the Qualification Directive, the European Court of Human Rights has recently indicated that the forcible return of a person to a humanitarian situation which is dire, due predominantly to the direct and indirect actions of the parties to the conflict, and in which s/he is vulnerable to ill-treatment and unable to cater for his/her most basic needs, such as food, hygiene and shelter, would constitute a breach of Article 3 ECHR.³⁴⁰ Consequently, the Court considered that where it is reasonably likely that a returnee would find him or herself in an IDP camp, such as those in the Afgooye Corridor in Somalia, or in a refugee camp, such as the Dadaab camps in Kenya, there would be a real risk that s/he would be exposed to treatment in breach of Article 3 ECHR on account of the humanitarian conditions there.³⁴¹

5.4.4. Reconciling “individual threat” with “indiscriminate” violence

While Belgium, the Netherlands, Sweden and the UK have transposed the word “indiscriminate” in their national legislation, France and Germany have not.

In France, national legislation refers to “generalized” violence rather than “indiscriminate” violence.³⁴² Based on an observation of a sample of decisions, it appears that the CNDA systematically refers to the concept

³³⁶ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraphs 8 -79 and referring to GS (following AM and AM (Armed conflict: risk categories) Somalia CG [2008] UKAIT 00091. AM & AM, paragraphs 93 – 97, had already ruled that the causal requirement was satisfied if the indiscriminate violence was an effective cause of the serious threat of harm. The indiscriminate violence does not need to be the only cause. The indiscriminate violence must be one, albeit not necessarily the only, operative reason for the risk, provided that the consequences were not connected only remotely. This was upheld in GS (Afghanistan), paragraph 66. This is also consistent with Article 9 (3) of the Qualification Directive.

³³⁷ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 92.

³³⁸ GS (Article 15 (c): indiscriminate violence) Afghanistan CG [2009] UKAIT 00044, paragraph 69.

³³⁹ *Ibid.*, paragraph 70.

³⁴⁰ *Sufi and Elmi v. the United Kingdom*.

³⁴¹ *Ibid.*, paragraph 296.

³⁴² Article L.712.1 c) *Ceseda* states that subject to the provisions on exclusion, subsidiary protection is granted to a person who does not qualify for refugee status but is exposed to a “serious, direct and individual threat to a civilian’s life or person by reason of **generalised violence** resulting from a situation of internal or international armed conflict.” [Emphasis added].

of “generalized violence”, but the Council of State, in its precedent-setting decision in the Baskarathas case, refers to “generalized and indiscriminate violence”.³⁴³ It is not clear from the case law whether this difference in language has any legal implications for the scope of protection offered. In its decision in the Baskarathas case, the Council of State held that the concept of “generalized violence” is inherent in a situation of armed conflict and in fact characterizes it. The Rapporteur noted that “it would be to disregard the reality of modern armed conflicts to pretend that the resulting violence occurs only on the battlefield, which itself is difficult to define since ordered battle has given way to skirmish wars.”³⁴⁴

The term “indiscriminate violence”, translated as “willkürliche Gewalt” in the German language version of the Qualification Directive, was omitted from the text of Section 60 (7) sentence 2 Residence Act. However, this omission was addressed by the jurisprudence of the Federal Administrative Court which held that the existence of indiscriminate violence arising from armed conflict constitutes a criterion for the assessment of qualification under Section 60 (7) sentence 2.³⁴⁵

The CJEU, in *Elgafaji v. Staatssecretaris van Justitie*, stated that the term “indiscriminate” implies that the threat “may extend to people irrespective of their personal circumstances.”³⁴⁶ UNHCR has noted that, in some Member States, the ruling of the CJEU in the *Elgafaji v. Staatssecretaris van Justitie* case has been interpreted as requiring that every civilian or practically every civilian physically present in the relevant region of armed conflict must face a real risk of being subject to a serious threat to life or person.

In its judgment of 14 July 2009, the German Federal Administrative Court emphasized that “a substantial individual danger ... can be assumed only if the general danger impending in Iraq is of such density or of such a high degree that practically any civilian is exposed to a serious individual threat solely on account of his or her presence there.”³⁴⁷ In applying the ruling of the Federal Administrative Court, the Higher Administrative Courts have also required “[s]uch a high degree of danger that practically every civilian would be subject to a serious individual threat merely on account of his or her presence in the affected area.”³⁴⁸

In the Netherlands, the State Secretary of Justice stated that:

*I am of the opinion that the wording of the judgment shows that this will involve a very limited number of situations, namely the fact that **each civilian**, whoever he or she may be, finds himself or herself in a situation that poses a concrete threat to him or her, as can be the case for example when war crimes such as genocide or human rights violations are being committed on a large scale against the population.*³⁴⁹ [Emphasis added].

³⁴³ Council of State, *OPFRA v. Baskarathas*, decision n° 320295, 3 July 2009.

³⁴⁴ Translation p. 254 in Lambert, H., Farrell, T., “The changing character of armed conflict and the implications for refugee protection jurisprudence”, *International Journal of Refugee Law*, Vol. 22, No 2, pp. 237-273.

³⁴⁵ See FAC, decision of 24 June 2008, BVerwG 10C 43.07 – VGH 13a B 05.30833, paragraph 36 : “[...] Although this requirement is not mentioned explicitly in Section 60 (7) Sentence 2 of the Residence Act, the statement of reasons for the government’s bill points out that the provision encompasses ‘the distinguishing characteristics under Article 15 Letter c of the Qualification Directive’, which is to be implemented, the granting of subsidiary protection ‘in cases of indiscriminate violence’ in connection with armed conflicts. [...]”

³⁴⁶ *Elgafaji v. Staatssecretaris van Justitie*, paragraph 34.

³⁴⁷ FAC, decision of 14 July 2009, BVerwG 10 C 9.08.

³⁴⁸ For example, the Higher Administrative Court of Baden-Württemberg, 25.03.2010, A2 p 364/09; and the Higher Administrative Court of Bavaria, decision of 21 January 2010, 13a B 08.30304: “The concentration of danger in Kirkuk cannot be assumed to be so high that practically every civilian would be subject to a serious individual threat simply because of his or her presence in the affected region.”

³⁴⁹ Letter from the Ministry of Justice to the Speaker of the Lower House of the Netherlands Parliament, of 17 March 2009, regarding the judgment of the European Court of Justice of the European Communities in respect of the Qualification Directive. The requirement that every citizen in the area must be at real risk of serious harm was repeated in a letter by the Minister of Justice to the Chairman of the Dutch House of Representatives on 29 March 2010.

In applying this criterion to the situation in Darfur at the time, the State Secretary of Justice concluded “[i]t follows from these reports that the situation in Darfur is not such that each citizen faces a real risk of serious harm solely on account of his or her presence. It is the mainly non-Arabic population groups that are facing this risk.”³⁵⁰ Moreover, at that time, whilst conceding that the security situation in large towns such as Mogadishu was dismal, with reference to the entire region of central or southern Somalia, the State Secretary of Justice concluded that it did not follow that “each civilian in that entire region of Central or Southern Somalia faces a real risk on account of his or her presence in the relevant region. [...] This leads me to conclude that in this case an “exceptional situation”, as defined by the ECJ, cannot be said to exist.”³⁵¹

The Federal Administrative Court in Germany has held that indiscriminate violence encompasses acts that do not target particular individuals or groups of persons but affect civilians irrespective of their personal circumstances.³⁵² This concurs with the recent case law of the UK Upper Tribunal which considered that “an attempt to distinguish between a real risk of targeted and incidental killing of civilians during armed conflict... is not a helpful exercise in the context of Article 15 (c) nor does it reflect the purposes of the Directive.”³⁵³ Policy guidance of the UK determining authority, UKBA, summarizes some of the other relevant case law of the courts when it states that indiscriminate violence is “the converse of consistency; it carries the risk of random death or injury. It covers real risks and real threats presented, for example, by car bombing in market places or snipers firing at people in the street.”³⁵⁴

The meaning of “indiscriminate” has not yet been specifically addressed by the higher courts in other Member States of focus in this research.³⁵⁵

5.4.5. The definition of “international or internal armed conflict”

Article 15 (c) requires that the threat to a civilian’s life or person by reason of indiscriminate violence occurs “in situations of international or internal armed conflict”.

The determination of whether a conflict may be defined as an “international or internal armed conflict” has been considered to be of crucial importance in the case law of Belgium, France and Sweden.³⁵⁶ This contrasts with the approach now adopted by the courts in the Netherlands and the UK where defining whether a conflict constitutes an international or internal armed conflict is considered to divert focus away from the priority enquiry of whether there is a real risk of serious harm to the applicant on account of the intensity and nature of the indiscriminate violence.

³⁵⁰ Ibid.

³⁵¹ Ibid.

³⁵² See judgment of the FAC, 27 April 2010, BVerwG 10 C 4.09, paragraph 34.

³⁵³ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 73.

³⁵⁴ Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence, September 2010, paragraph D.6. This refers to the ruling in QD and AH (Iraq) v. SSHD [2009] EWCA Civ 620, paragraphs 27, and 31-32.

³⁵⁵ This has not yet been specifically addressed by the CALL in Belgium nor the Migration Court of Appeal in Sweden.

³⁵⁶ Sweden: Migration Court of Appeal, UM 334-09 of 6 October 2009: “it is of crucial importance for the assessment of X’s protection needs to determine whether it can presently be said that an armed conflict exists in his country of origin or parts of it. If this was the case, he would in principle be entitled to protection in Sweden on the basis of Chapter 4 § 2, subparagraph 2 of the SAA. The interpretation of the concept of internal armed conflict is therefore material.” Such a declaration would now render an applicant eligible for protection in accordance with Chapter 4 Section 2 paragraph 1 of the Act amending the Aliens Act which entered into force on 1 January 2010 and transposes Article 15 (c) QD.

The IND in the Netherlands informed UNHCR that since the CJEU's judgment in the *Elgafaji v. Staatssecretaris van Justitie* case, and given the interpretation of the Dutch national courts that Article 15 (c) is encompassed by Article 3 ECHR as interpreted by the ECtHR, the assessment of whether there is an international or internal armed conflict is no "*longer of great importance for the assessment*" under Article 15(c).³⁵⁷ As such, there is no current assessment by the IND as to whether there is an international or internal armed conflict in, for example, Afghanistan, Iraq or Somalia.³⁵⁸ Indeed, UNHCR reviewed three recent Ministry of Foreign Affairs country reports on Afghanistan, Iraq and Somalia and the wording "*international armed conflict*" or "*internal armed conflict*" is absent from all three reports;³⁵⁹ and, at the time of writing, there is no explicit mention in the Aliens Circular as to whether there is currently an international or internal armed conflict in Afghanistan, Iraq or Somalia.³⁶⁰

This approach is also exemplified by the case law of the UK Court of Appeal and the guidance provided by the UKBA to its decision-makers which states that an application for subsidiary protection, with regard to Article 15 (c), should be assessed according to the following key test:

*Is there in [X Country] or a material part of it such a high level of indiscriminate violence that substantial grounds exist for believing that an applicant would, solely by being present there, face a real risk which threatens his life or person?*³⁶¹

The test does not mention the requirement of an "*internal or international armed conflict*". UKBA's guidance to its decision-makers explains that:

*[t]he focus is on the level of violence and not the nature of the armed conflict, which is why the test set out by the Court of Appeal does not refer to an armed conflict. Not every situation of armed conflict will meet the threshold; the key issue in this regard is the level of the violence.*³⁶²

Consequently, where it is considered that the intensity of violence does not reach the threshold required to engage Article 15 (c), unless the applicant has individual factors which enhance the risk of harm, a determination of whether there is an international or internal armed conflict can be avoided.³⁶³ This approach has also been adopted by at least one higher administrative court in Germany.³⁶⁴

³⁵⁷ Information received from IND on 8 March 2011.

³⁵⁸ Ibid.

³⁵⁹ Review conducted on 14 February 2011. 29.10.2010 - Source: Netherlands Ministry of Foreign Affairs. Iraq: *Algemeen ambtsbericht Irak*, at: <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/ambtsberichten/2010/10/29/irak-2010-10-29/aab-irak-oktober-2010-definitieve-versie.pdf> Country report (as of: October 2010) [ID 151473] 20.09.2010 - Source: Netherlands Ministry of Foreign Affairs, Somalia: *Algemeen ambtsbericht Somalië*: Country report (as at September 2010) [ID 146640], at: <http://www.minbuza.nl/dsresource?objectid=buzabeheer:249051&type=org>. 21.07.2010 - Source: Netherlands Ministry of Foreign Affairs, Afghanistan: *Algemeen ambtsbericht Afghanistan*: Country report (as of July 2010) [ID 146646], at: <http://www.minbuza.nl/dsresource?objectid=buzabeheer:233713&type=org>. This was confirmed by the IND in a message to UNHCR on 8 March 2011.

³⁶⁰ See for example paragraphs 4 and 4.1 of Decree of the Minister for Immigration and Asylum of 9 December 2010, WBV 2010/19 amending the Aliens Circular 2000.

³⁶¹ Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence, September 2010, paragraph D. This is the test set out by the Court of Appeal in QD and AH (Iraq) v. SSHD [2009] EWCA Civ 620.

³⁶² Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence, September 2010, paragraph D5.

³⁶³ See for instance the UK country guidance case on Afghanistan, GS (Article 15 (c): indiscriminate violence) Afghanistan CG [2009] UKAIT 00044, which does not explicitly pronounce on whether there was an international or internal armed conflict in Afghanistan. See also, HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 84: "*Even if the level of violence in Iraq today can still sensibly be considered as "armed conflict" involving organised parties with some continuing capacity to inflict deadly force, the ultimate question for us in this case is whether the intensity of the violence threatening life and bodily integrity is such as to pose a real risk of harm to a civilian*".

³⁶⁴ See for instance Higher Administrative Court Baden-Wuerttemberg, decision of 25 March 2010, A 2 p 364/09; and Higher Administrative Court Baden-Wuerttemberg, decision 12 August 2010, A 2 p. 1134/10: "*even if a domestic conflict is presumed in Baghdad, it cannot be assumed that the degree of indiscriminate violence characterizing this conflict has reached such a high level that practically every civilian is subject to a serious individual threat simply because of his/her presence in this region.*"

By contrast, in Belgium, France and Sweden, the assessment of whether the intensity of violence is sufficiently high that substantial grounds are shown for believing that a civilian would solely on account of his/her presence on the territory run a real risk of harm to his/her life or person is performed as part of the evaluation of whether there is an international or internal armed conflict in these Member States.³⁶⁵

The specific term “*internal armed conflict*” has been interpreted by the courts in Belgium,³⁶⁶ France,³⁶⁷ Germany,³⁶⁸ the Netherlands³⁶⁹ and Sweden³⁷⁰ with reference to international humanitarian law (IHL). This is notwithstanding the fact that IHL has its own objects and purposes that differ from those of the Qualification Directive. Moreover, there is no agreed definition of “*internal armed conflict*” in IHL.³⁷¹ IHL³⁷² and international criminal law (ICL)³⁷³ offer a variety of definitions for their own objects and purposes. Although national judicial understanding of the relevance of IHL definitions for the interpretation of “*international and internal armed conflict*” in the context of the Qualification Directive has evolved in recent years, IHL remains central to the interpretation or at least is considered to provide guidance on the upper and lower thresholds of internal armed conflict.³⁷⁴

³⁶⁵ In Sweden, this is due to the fact that the Migration Court of Appeal has established this as one of the criteria for an ‘international or internal armed conflict’. See Migration Court of Appeal, UM 334-09, UM 8628-08, UM 133-09 on 6 October 2009.

³⁶⁶ See for instance, CALL, 17 August 2007, no 1244 and CALL, 19 May 2009, no 27574.

³⁶⁷ Council of State, 3 July 2009, n. 320295 – OFPRA v. M. Baskarathas. The Council of State has underlined several times the direct link between generalized violence and armed conflict: see Council of State, 30 December 2009, n. 322375 and 322376, MM. Seker and Augustin and in Council of State, 15 December 2010, n. 328420, Mlle Mpeko. According to OFPRA, the determination of whether there is an internal armed conflict is based on Article 1 of the Second Additional Protocol to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977: interview with OFPRA, 2 March 2011.

³⁶⁸ FAC, decision of 24 June 2008, BVerwG 10 C 43.07 – VGH 13a B 05.30833, paragraph 21 and in the ‘Headnotes’.

³⁶⁹ Council of State, 20 July 2007, 200608393/1; and Council of State, 3 April 2008, 200701108/1.

³⁷⁰ See for instance, Migration Court of Appeal, UM 334-09, 6 October 2009.

³⁷¹ A fact that has been recognised by the Swedish Migration Court of Appeal in UM 334-09 of 6 October 2009: “*It can be observed, as a preliminary point, that a completely unambiguous definition of this international law concept does not exist.*”

³⁷² IHL offers definitions of international and non-international armed conflicts. With regard to the latter, see, for example, Common Article 3 of the 1949 Geneva Conventions and Article 1 (1) of Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts states that internal armed conflicts “*must take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [Protocol II]*” The ICRC has proposed the following definition as reflecting strong prevailing legal opinion: “*1. International armed conflicts exist whenever there is resort to armed force between two or more States. 2. Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.*” See ‘How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law? Opinion Paper of the International Committee of the Red Cross (ICRC), March 2008.

³⁷³ See, for example, the deliberations of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of Tadic (IT-94-1) in which the ICTY determined the existence of a non-international armed conflict “*whenever there is [...] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.*”

³⁷⁴ Germany: see FAC, decision of 27 April 2010, BVerwG 10C 4.09 – VGH 8 A 611/08.A, paragraph 23: “*[T]he orientation to international humanitarian law means that on the one hand – at the lower end of the scale – cases of internal disturbances and tensions such as riots, isolated and sporadic acts of violence, and other acts of a similar nature cannot be considered internal armed conflict (article 1 (2) of Protocol II), and on the other hand – at the upper end of the scale – such a conflict will in any case exist if the criteria of article 1 (1) of Protocol II are satisfied – i.e., if armed conflicts occur within the territory of a state between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of the territory of the state as to enable them to carry out sustained and concerted military operations, and to implement this Protocol (Protocol II). The assumption of an armed conflict within the meaning of article 15 (c) of the Directive is not automatically excluded for conflicts falling between these two forms of manifestation. Typical examples are civil-war disputes and guerrilla warfare. However, the conflict must in any case demonstrate a certain degree of intensity and constancy.*” Sweden: see Migration Court of Appeal, UM 334-09 of 6 October 2009: “*international humanitarian law is central to any context where the issue of interpretation of the concept of internal armed conflict arises*”. The Netherlands: see Council of State, 7 July 2008, 200802709/1.

The courts in the UK have taken issue with this approach. In the UK, prior to 2009, the case law also interpreted Article 15 (c) through the prism of IHL.³⁷⁵ It was thought that because the vocabulary of Article 15 (c) was found in IHL, that was the context in which Article 15 (c) should be interpreted. However, since 2009, the UK courts have held that this was incorrect, stating that IHL has its own purpose and specific area of operation which does not include the grant of protection to persons fleeing armed conflict. As such, the Qualification Directive must be treated as autonomous and with its own purpose, as interpreting Article 15 (c) through the prism of IHL results in the language of Article 15 (c) being interpreted inappropriately.³⁷⁶ The UK Upper Tribunal more recently stated:

*Armed conflict and indiscriminate violence are not terms of art governed by IHL, but are terms to be generously applied according to the objects and purpose of the Directive to extend protection as a matter of obligation in cases where it had been extended to those seeking to avoid war conflict zones as a matter of humanitarian practice.*³⁷⁷

The Federal Administrative Court in Germany has noted the evolution in the case law in the UK but nevertheless considers that it is not incorrect to proceed as a starting point from the guidance provided by IHL. The Court held that such an approach by no means presupposes an unconditional adoption of the requirements of IHL, but it provides orientation.³⁷⁸ Moreover, the Federal Administrative Court has expressly emphasized that the relevance of IHL in providing guidance for interpretation is limited, where it is counter to the purpose of the Qualification Directive to provide protection to civilians who are threatened by indiscriminate violence in an armed conflict.³⁷⁹

The Federal Administrative Court concluded that its approach:

*takes sufficient account of the concern, emphasised in the more recent British case law, with making sufficient allowance for the different objectives of international humanitarian law on the one hand, and international protection under the Qualification Directive, on the other hand, without interpreting the characteristic of an armed conflict entirely in isolation from the previous understanding of this concept in international humanitarian law, and thus depriving it of any contour and – contrary to the letter of the provision – making it virtually superfluous.*³⁸⁰

The Upper Tribunal in the UK has acknowledged that IHL continues to inform the judgments of some other national courts and tribunals in the EU, and conceded a limited relevance of IHL, stating that:

*[a]lthough IHL does not define the operative concepts, in order to identify circumstances when they are clearly engaged, we can see nothing in the case law binding on us that makes it impermissible to draw assistance from the rules of IHL as to when violence goes beyond casual criminality and becomes armed conflict.*³⁸¹

³⁷⁵ In the KH case, the court referred to the fact that an IHL approach had been taken by a number of courts and tribunals in other EU member states including, the Dutch Council of State judgment, Raad van Staat, 20-07-2007, 200608939/1 LJM BB0917; the Swedish Migration Court of Appeal 2007.9 decision (UM 23-06); and the Higher Administrative Court of Schleswig-Holstein of 21 November 2002, 2LB 38/07.

³⁷⁶ QD and AH v SSHD [2009] EWCA Civ 620.

³⁷⁷ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 89.

³⁷⁸ FAC, decision of 27 April 2010, BVerwG 10C 4.09 – VGH 8 A 611/08.A, paragraph 23.

³⁷⁹ FAC, decision of 24 June 2008, BVerwG 10 C 43.07 – VGH 13a B 05.30833, paragraph 22; and FAC, decision of 27 April 2010, BVerwG 10C 4.09 – VGH 8 A 611/08.A, paragraph 23.

³⁸⁰ FAC, decision of 27 April 2010, BVerwG 10C 4.09 – VGH 8 A 611/08.A, paragraph 24.

³⁸¹ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 90.

This may be indicative of a developing consensus in at least two Member States on the relevance of IHL as providing guidance on the lower parameters of armed conflict.

With respect to the interpretation of “*international or internal armed conflict*”, the Migration Court of Appeal in Sweden initially applied the definition set out in Article 1 (1) of Protocol II Additional to the 1949 Geneva Conventions in the context of the national legislation transposing Article 15 (c).³⁸² The strict application of this definition resulted in the Migration Court of Appeal determining that the situation in Iraq in 2007 could not be characterized as an internal armed conflict in the terms of Chapter 4, Section 2, point 2 of the Aliens Act, contrary to the assessment of other Member States at that time.³⁸³ The case law of the Swedish Migration Court of Appeal has since evolved and it, as well as other national courts in a number of the Member States of focus, now also takes into account definitions in ICL.³⁸⁴ Thus, there appears to be a consensus that there should be no requirement that state armed forces are a party to the conflict.³⁸⁵

Some national jurisdictions have discarded some other previous IHL-based requirements, for instance:

- The requirement that the parties to the conflict have achieved the level of organization necessary to implement IHL treaties;³⁸⁶
- The requirement that the parties to the conflict exercise territorial control;³⁸⁷
- The requirement that the armed conflict extends nationwide.³⁸⁸

³⁸² Article 1 (1) of Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts states that internal armed conflicts “*must take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [Protocol II]*”.

³⁸³ Migration Court of Appeal MIG 2007:9 of 26 February 2007. Although the Court acknowledged that the security situation in Iraq was very serious, it stated, *inter alia*, that: “*An internal armed conflict in the meaning of public international law is characterized by disputes between the armed forces of one state and other organized armed groups. These disputes must be of such character as to exceed what can be classified as internal disturbances or sporadic or isolated acts of violence. Further the armed groups must exercise a certain amount of territorial control which allows them to carry out military operations.*” UM 6696-07 of October 2007 in which the Migration Court of Appeal upheld its judgment in previous cases. See UNHCR, Asylum in the European Union. A Study of the Implementation of the Qualification Directive, November 2007, at: <http://www.unhcr.org/refworld/docid/473050632.html>, for the position of other Member States at that time.

³⁸⁴ Belgium: see for instance, CALL 22 January 2009, no 21.757; CALL 23 February 2010, no 39198, CALL 22 November 2010, no 51369. France: see for instance CNDA, decision 09014706, 7 July 2010; CNDA, decision 1013192, 1 March 2011; CNDA, decision 10018212, 23 December 2010; CNDA, decision 10012894, 23 December 2010; CNDA, decision 08008198, 23 December 2010. Germany: FAC, decision of 27 April 2010, BVerwG 10C 4.09 – VGH 8 A 611/08.A, paragraph 23. See also FAC, decision of 24 June 2008, BVerwG 10 C 43.07 – VGH 13a B 05.30833, paragraph 23, which stated that “*[f]urther bases for the interpretation of the concept of internal armed conflict may be derived from international criminal law, particularly from the decisions of the International Criminal Courts.*” Sweden: Migration Court of Appeal, UM 334-09, UM 8628-08, UM 133-09 of 6 October 2009.

³⁸⁵ France: see for example, CNDA, decision 09014706, 7 July 2010. Netherlands: Council of State, 3 April 2008, 200701108/1 Sweden: see UM 334-09, UM 8628-08, UM 133-09 on 6 October 2009 in which the Migration Court of Appeal stated that “*it is not necessary for government forces to be involved in the conflict for it to be classified as an internal armed conflict. If the opposite had been the case, it would mean that people from a country where the government had collapsed enjoyed fewer rights to seek international protection from domestic armed force than others.*”

³⁸⁶ Germany: FAC, decision of 27 April 2010, BVerwG 10C 4.09 – VGH 8 A 611/08.A, paragraph 23.

³⁸⁷ *Ibid.* For Sweden: see UM 334-09, UM 8628-08, UM 133-09 on 6 October 2009 in which the Migration Court of Appeal stated that “*it is not possible to conclude that an internal armed conflict does not exist in a country solely on the basis that the requirement of territorial control in Additional Protocol II to the 1949 Geneva Conventions was not met and that therefore the Protocol does not apply.*”

³⁸⁸ FAC, decision of 14 July 2009, BVerwG 10 C 9.08 – VGH A 2 S 863/06, paragraph 17.

However, the German Federal Administrative Court has stated that some of the above characteristics may nonetheless be of significance as an indicator of the intensity and constancy of the conflict.³⁸⁹

Nevertheless, some jurisdictions continue to apply criteria drawn mainly from IHL and ICL:

- The conflict must be between governmental armed forces and the forces of one or more armed groups, or between such groups;³⁹⁰
- The conflict must be sustained, concerted and ongoing;³⁹¹
- The conflict must be more than an internal disturbance or tension, such as riots, isolated and sporadic acts of violence and other acts of a similar nature; it should reach a minimum level of intensity;³⁹²
- Armed groups must be under responsible command and exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations;³⁹³
- Situation is acknowledged as an armed conflict by an authoritative body such as NATO, the UN, etc.³⁹⁴

As mentioned above, the Swedish Migration Court of Appeal has additionally incorporated the CJEU ruling in the *Elgafaji v. Staatssecretaris van Justitie* case as an indicator of an international or internal armed conflict:

*[T]he violence stemming from the conflict is indiscriminate and of such severity that there is a founded reason to presume that a civilian would by his/her mere presence run a real risk of being subjected to a serious and personal threat against his/her life and limb.*³⁹⁵

³⁸⁹ FAC, decision of 27 April 2010, BVerwG 10C 4.09 – VGH 8 A 611/08.A, paragraph 23.

³⁹⁰ Belgium: CALL 22 January 2009, no 21.757; CALL 23 February 2010, no 39198, CALL 22 November 2010, no 51369. France: Interview with the CNDA, 1 March 2011. Sweden: see UM 334-09, UM 8628-08, UM 133-09 on 6 October 2009 and UM 10061-09 of 24 February 2011.

³⁹¹ Belgium: see for instance CALL 9 November 2010, no 50977 and CALL 20 April 2010, no 41960. France: see for instance CNDA, decision 09014706, 7 July 2010; CNDA, decision 1013192, 1 March 2011; CNDA, decision 10018212, 23 December 2010; CNDA, decision 10012894, 23 December 2010; CNDA, decision 08008198, 23 December 2010. Germany: FAC, decision of 27 April 2010, BVerwG 10C 4.09 – VGH 8 A 611/08.A, paragraph 23. Sweden: see UM 334-09, UM 8628-08, UM 133-09 on 6 October 2009 and UM 10061-09 of 24 February 2011.

³⁹² Belgium: see for instance CALL 9 November 2010, no 50977 and CALL 20 April 2010, no 41960. France: interview with CNDA on 1 March 2011, and see for instance CNDA, decision 10003084, 11 October 2010; CNDA, decision 09019720, 17 November 2010. Germany: FAC, decision of 27 April 2010, BVerwG 10C 4.09 – VGH 8 A 611/08.A, paragraph 23. Sweden: see UM 334-09, UM 8628-08, UM 133-09 on 6 October 2009 and UM 10061-09 of 24 February 2011.

³⁹³ France: interview with the CNDA on 1 March 2011 and see for instance CNDA, decision 09014706, 7 July 2010; CNDA, decision 1013192, 1 March 2011; CNDA, decision 10018212, 23 December 2010; CNDA, decision 10012894, 23 December 2010; CNDA, decision 08008198, 23 December 2010.

³⁹⁴ France: interview with CNDA on 1 March 2011.

³⁹⁵ Migration Court of Appeal, UM 10061-09 of 24 February 2011. See also UM 334-09, UM 8628-08, UM 133-09 on 6 October 2009.

The absence of just one of these criteria may result in a situation being declared not to constitute an internal armed conflict and therefore subsidiary protection may be denied. For example, UNHCR observed a decision of the appeal body, CALL, in Belgium in which it was acknowledged that the Balkh province of Afghanistan experienced kidnappings, killings, occasional attacks by anti-government elements and explosions of homemade bombs, but it was held that this did not qualify as an internal armed conflict as the violence did not constitute sustained and concerted operations.³⁹⁶ In France, the CNDA considers that there is not currently an internal armed conflict in Iraq because it is deemed in particular that non-state armed groups do not have the degree of organization required.³⁹⁷

5.4.6. International or internal armed conflict and specific country situations

With the caveats referred to above, there is considerable divergence across and within Member States with regard to whether specific countries, regions, and districts are experiencing an international or internal armed conflict.

Afghanistan

None of the six Member States reviewed deny that there is an armed conflict in certain provinces or districts of Afghanistan. However, it is not clear to what extent there is agreement with regard to which provinces and districts.

³⁹⁶ CALL 9 November 2010, no 50977.

³⁹⁷ CNDA, decision n° 613430/07016562, 11 March 2010: *“this situation of unrest cannot be qualified as an internal armed conflict; in particular the acts of the rebels [...] do not have the degree of organisation required; therefore the situation prevailing in Mosul – as well as the situation in the rest of the Iraqi territory – could no longer be qualified as an internal armed conflict within the meaning of Article L. 712-1 c) Ceseda [...]”*.

The following table sets out some of the provinces and districts considered to be experiencing armed conflicts at the time of writing:

Belgium ³⁹⁸	Takhar*, Kunduz, Baghlan (whole province except for few districts), ³⁹⁹ Balkh*, Jawzjan*, Faryab*, Kapisa*, Parwan*, Kabul*, Logar, Wardak, Daykundi*, Nuristan, Kunar, Laghman, Nangarhar, ⁴⁰⁰ Herat, Farah, Ghor, Badghis (the whole province, except for few districts), Nimroz, Helmand, Kandahar, Uruzgan, Zabul, Ghazni, Paktika, Paktya, Khost. * = certain districts only.
France ⁴⁰¹	Kabul, Nangarhar; Kandahar or Tagab, Ghazni province; Wardak, Helmand, Logar, Parwan, Kapisa, Baghlan and Sar-e-Pol.
Germany ⁴⁰²	Helmand, Kandahar, Uruzgan, Zabul, Paktika, Khost, Paktya, Kunar, Laghman, Nuristan, large parts of Nangarhar, Farah, Nimroz, Badghis, Ghor and part of Heart, Ghazni, Maidan-Wardak, Logar and some districts of: Kapisa, Parwan, Daikundi and Kabul.
Sweden ⁴⁰³	Farah, Ghazni, Kandahar, Khost, Kunar, Helmand, Oruzgan, Paktia, Paktika, and Zabul.

The determining authorities in the Netherlands and the UK have not explicitly stated whether there is an internal armed conflict in Afghanistan for the reasons stated above.

³⁹⁸ CGRS Policy with regard to asylum claims of Afghan asylum seekers – Regions of Subsidiary Protection, September 2010, 11 October 2010.

³⁹⁹ In the context of the revised CGRS policy extending regions entitled to subsidiary protection under Art. 15 c) QD, the CALL recently overturned several decisions of the CGRS, granting subsidiary protection to Afghan nationals from the province of Baghlan, arguing that the security situation in this province has worsened. See for instance; CALL 19 October 2010, no 49746, CALL 28 October 2010, no 50.512.

⁴⁰⁰ In the context of the revised CGRS policy extending regions entitled to subsidiary protection under Art. 15 c) QD, the CALL recently overturned several decisions of the CGRS, granting subsidiary protection to Afghan nationals from the province of Nangarhar, arguing that the security situation in this province has worsened. See for instance; CALL 30 November 2010, no 52 161, CALL 22 November 2010, no 51401.

⁴⁰¹ The CNDA considers that there is an armed conflict or a situation comparable (“assimilable”) to an armed conflict in most provinces of Afghanistan, and the determining authority OFPRA informed UNHCR that it agrees with the CNDA’s assessment: interview with the OFPRA, 2 March 2011. See: CNDA, decision n° 08013573, 27 July 2011; CNDA, decision ° 09014706, 7 July 2010; CNDA, decision n° 09022447, 23 September 2010; CNDA, decision n° 10012894, 23 December 2010; CNDA, decision n° 09024256, 2 December 2010; CNDA, decision n° 09022050, 21 June 2010; CNDA, decision n°09024785, 4 October 2010; CNDA, decision n° 09023376, 1 September 2010; CNDA, decision n° 09006682, 1 September 2010; CNDA, decision n° 09016998, 19 November 2010; CNDA, decision n° 08008076, 4 October 2010; CNDA, decision n° 10001532, 23 December 2010; CNDA, decision n° 10004794, 15 December 2010; CNDA, decision n° 10011107, 15 December 2010; CNDA, decision n° 10000587, 23 September 2010; CNDA, decision n° 08008198, 23 December 2010.

⁴⁰² BAMF informed UNHCR that it cannot be excluded that there is an internal armed conflict in certain regions and districts of Afghanistan: interview with BAMF on 1 December 2010. Furthermore, there are a limited number of German court decisions which have acknowledged the existence of an internal armed conflict in, for example, Paktia, Logar, and Kabul. See judgment of the FAC, 27 April 2010, BVerwG 10 C 4.09, paragraph 25, with reference to the ruling of the Higher Administrative Court of Hesse, 11 December 2008. See also Higher Administrative Court Hesse, decision dated 25 January 2010, 8 A 303/09.A: “A domestic armed conflict in the form of civil war hostilities and guerrilla war between the Afghan government army/ISAF/NATO on one side and Taliban and other opposition forces on the other side is currently raging in his native region, Logar province. [...]” See as well Administrative Court Giessen, decision 26 August 2010 - Kabul 2 K 1754/10.GI.A: Based on these findings, the adjudicating court arrives at the conclusion that the armed actions, attacks and violent excesses in Kabul are an expression of the same armed conflict as is apparently being waged in the South and Southeast, has expanded in towards the West and North and is ultimately being continued in Kabul. Due to this indiscriminate violence in the context of the conflict, dangers arise in any case for such persons as are directly affected by it. In the court’s opinion, the demonstrated domestic armed conflict in Afghanistan also causes a significant individual danger to life and limb for the petitioner as a member of the civilian population in terms of Sec. 60 “ 7 Sentence 2 Residence Act.” Indeed, the Administrative Court of Regensburg has held that an internal armed conflict exists throughout Afghanistan: Administrative Court Regensburg, decision 15 April 2010, RN 9 K 10.30049.

⁴⁰³ Interview with the SMB on 29 November 2010. The SMB further considers that the rest of Afghanistan, with the exception of Badakhshan, Balkh, and Takhar, is experiencing a “severe conflict”. As such, persons from these provinces may qualify for the national protection status as “a person otherwise in need of protection” if they are able to demonstrate particular individual risk enhancing factors and there is no internal protection alternative.

Iraq

Decisions relating to Iraq highlight both divergences and ambiguities in state practice.

The UK case law acknowledges that there is an internal armed conflict in Iraq,⁴⁰⁴ and in Belgium, the determining authority CGRS considers that there is an armed conflict in the five central governorates of Baghdad, Diyala, Kirkuk, Ninewa and Salah Al-Din.⁴⁰⁵

In contrast, a recent decision of the CNDA in France has held that the situation in Mosul in particular and in Iraq in general cannot be considered an armed conflict in the sense of Article L. 712-1 c) Ceseda.⁴⁰⁶

Whilst the German determining authority, the BAMF, informed UNHCR that it cannot be excluded that there is an armed conflict in Baghdad, Ninewa, Diyala and Tameem,⁴⁰⁷ court practice has not been consistent with regard to the determination. Some courts deny the existence of an armed conflict on the grounds that *“the violence is significantly below the threshold of a civil war, and also does not reach the degree of intensity and permanence required by the FAC in its decision of 24 June 2008.”*⁴⁰⁸ Some decisions negate the existence of an armed conflict on the basis that the number of security incidents has significantly decreased since mid-2007 even though the MFA report still qualifies the security situation as disastrous.⁴⁰⁹ However, other courts have avoided the determination of whether there is an armed conflict on the grounds that even if it were to be assumed that there is an armed conflict, the intensity of violence is not so high as to engage Section 60 (7) sentence 2 Residence Act unless the applicant has particular individual factors which increase the risk.⁴¹⁰

The Swedish Migration Board (SMB) informed UNHCR that the violence arising in Iraq does not constitute an internal armed conflict.⁴¹¹ Instead, the SMB considers that there is a *“severe conflict”* in Baghdad, Diyala, Ninewa and Tameem.⁴¹² Therefore, applicants from these areas who can demonstrate an individual risk based on a personal circumstance would qualify for the national protection status as a person otherwise in need of protection if it is considered that there is no internal protection alternative.⁴¹³ The Migration Court of Appeal has concluded that *“severe conflicts”*, in the sense of Chapter 4 Section 2 of the Aliens Act (2005:716) (now Chapter 4 Section 2a as amended), refers to *“political instability in the country of origin*

⁴⁰⁴ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC) 22 September 2010, paragraph 107: *“One obvious feature of the current situation in Iraq and its susceptibility to continuing violence is that there remains an ongoing internal armed conflict involving a number of parties, principally foreign troops, Iraqi government forces and various insurgent groups.”*

⁴⁰⁵ Interview with the CGRS on 4 March 2011.

⁴⁰⁶ CNDA, decision 613430/07016562, 11 March 2010: *“[...] In particular, the situation of generalised insecurity prevailing in the region of Mosul and the protectorate of Ninewa which is characterised by attacks against minorities, in particular the Christian minority, this situation of internal troubles and tensions can not be defined as a situation of internal armed conflict; in particular the attacks emanating from the extremist Sunni and radical Kurdish rebels do not satisfy the degree of organisation or objectives required by the definition [of armed conflict].”*

⁴⁰⁷ Interview with the BAMF of 1 December 2010.

⁴⁰⁸ Administrative Court of Ansbach, decision dated February 4, 2010, AN 14 K 09.30354.

⁴⁰⁹ See for example Administrative Court of Weimar, decision dated April 28, 2010, 5 K 20098/09 We.

⁴¹⁰ Higher Administrative Court Baden-Wuerttemberg, decision 12 August 2010, A 2 p. 1134/10.

⁴¹¹ Interview with the SMB on 29 November 2010. The SMB considered that insurgent groups do not control areas of territory from which to launch attacks. Although this is of secondary interest with regard to the criteria for an internal armed conflict, it was considered indicative of the nature of the violence in Iraq.

⁴¹² Interview with the SMB on 29 November 2010.

⁴¹³ See section 8 below on national protection statuses.

where the power structures are such that the legal system does not impartially protect civilians' fundamental rights." Concerning the parties to the conflict:

*it may involve a conflict between different groups of the population, between a group of the population in one part of the country and the government, or between on the one hand the government or a civilian group in the country and on the other side another government, which however does not reach the level of an internal armed conflict.*⁴¹⁴

Somalia

Belgium,⁴¹⁵ France,⁴¹⁶ Sweden⁴¹⁷ and the UK⁴¹⁸ concur that there is an internal armed conflict in Mogadishu and the whole of southern and central Somalia.

The BAMF in Germany informed UNHCR that it considers that there is an internal armed conflict in Mogadishu, but no explicit position has been taken by the BAMF with regard to the existence of an armed conflict in regions outside Mogadishu.⁴¹⁹

The Dutch government has recently amended its policy with regard to Somalia and whilst the amendment describes the general security situation as bad, refers to the levels of indiscriminate violence in Mogadishu as so high as to constitute an exceptional situation engaging Article 15 (c), and the security situation in southern and central Somalia as critical; it does not state explicitly that there is an armed conflict in Somalia.⁴²⁰ The reasons for this have been explained earlier.

⁴¹⁴ Stockholm Migration Court, Judgement of 18 October 2007, (UM6696-07), p.24 f. Statement by UNHCR in cases UM 8628-08, UM 334-09, UM 133-09 p. 5 referring to MCA 2007:9 and Prop. 2004/05:170 s. 274.

⁴¹⁵ Interview with CGRS Supervisors for Somalia on 4 March 2011.

⁴¹⁶ Interview with OFPRA, 2 March 2011.

⁴¹⁷ UM 10061-09 of 24 February 2011.

⁴¹⁸ OGN Somalia v.20 July 2010. See also AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 0009, paragraph 6 (j).

⁴¹⁹ Interview with the BAMF on 1 December 2010.

⁴²⁰ Paragraphs 4 and 4.1 of Decree of the Minister for Immigration and Asylum of 9 December 2010, WBV 2010/19 amending the Aliens Circular 2000.

6. CREDIBILITY IN THE CONTEXT OF ARTICLE 15 (C)



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Some interviewees identified credibility assessment as a significant problem, both with regard to refugee status determination, and in the context of Article 15 (c). With regard to Article 15 (c), the credibility assessment should be mostly confined to an appraisal of whether the applicant is from the country of origin or region claimed, and if relevant, the veracity of any personal factors or circumstances asserted to enhance the risk of serious harm.

Some interviewees alleged that the credibility assessment can dominate the examination of an application, so that applicants are requested to respond at length to questions relating to the geography, culture and political events in their country of origin in order to prove their origins. Too often, the credibility assessments fail to make allowance for the social status, education, personal circumstances, gender and age of

applicants. As a result, applicants may be denied international protection. For example, the Belgian appeal body, CALL, stated:

*The Council also found that, from a reading of the administrative record and specifically from the hearing reports, the Commissioner General has not sufficiently taken into account the applicant's profile. In this case, the applicant was an Afghan housewife who stayed mostly indoors, in order to run the household and to take care of her daughter. Taking into account this profile, it cannot reasonably be expected that the applicant should be able to demonstrate clear political knowledge of her country.*⁴²¹

Interviewees in Belgium also raised concerns regarding the application of a concept known as “recent stay”. The determining authority, CGRS, and the appeal body, CALL, require applicants to evidence their last place of residence in the country of origin and demonstrate that they resided there shortly before applying for asylum in Belgium. Failure to evidence “recent stay” (in the last place of residence) in the country of origin results in the denial of international protection. The application of this concept is exemplified in the following decision of CALL:

*The CALL emphasizes that it is not sufficient for the person who applies for subsidiary protection status to refer to the general situation in the country of origin with regard to the question whether, upon return to the home country, s/he runs a real risk of serious harm within the meaning of Article 48 / 4, § 2, c of the Aliens Act, but s/he has to make any connection with his/her person plausible even though no evidence of an individual threat is required (Council of State 26 May 2009, no. 193.523). The applicant makes the evidence of such a connection with her person impossible by making non-credible statements regarding her alleged stay in Afghanistan, so that there is no clarity about her actual origin and nationality. **Demonstrating the last place(s) of residence within the country of origin is indeed essential to rule out that the applicant either comes from a region where there is no risk, or following a stay in a third country before applying for asylum pursuant to Article 49 / 3 of the Aliens Act, already enjoyed a form of humanitarian protection there or meanwhile even has been granted citizenship.** Indeed, in case of a stay of many years abroad it cannot be excluded that the applicant has obtained citizenship in a third country whereby the right to subsidiary protection in Belgium would not be necessary anymore (Council of State 25 March 2010, no. 202.357; Council of State 29 March 2010, no. 202.487). In the absence of elements relating to the origin of an asylum-seeker, subsidiary protection status can not be granted (Council of State 15 October 2008, decree no. 3.412).*⁴²² [Emphasis added].

A standard clause observed in CALL decisions states “because there is no clarity with regard to the recent stay of the asylum-seeker, the need for protection cannot be established.” The assumption appears to be that if an applicant cannot prove his/her recent place of residence in the country of origin, the credibility of the applicant with regard to his/her origins is undermined; and/or doubts are raised as to whether the applicant already enjoyed protection within the country of origin, or citizenship in a third country, or protection in a “first country of asylum” or a “safe third country”. It is noted however that Belgium has not to

⁴²¹ CALL 18 September 2008, no 16056.

⁴²² CALL 24 March 2011, no. 58 542. See also CALL 25 April 2010, no. 41584; and CALL 11 August 2010, no. 47. 186. It should be noted that the CALL in other judgments has repealed the decision of the CGRS that the applicant had no recent stay in the country of origin. See also Westerveen, G. “recent verblijf” in *Asielbeslissingen*, September 2009, at: <http://www.cbar-bchv.be/JuridischeInformatie/JuridischeNota's/RecentVerblijf.pdf>.

date transposed in domestic law the provisions of the Asylum Procedures Directive on the concept of first country of asylum or the safe third country concept.⁴²³

The application of this concept has been criticized as the Qualification Directive does not require an applicant to have recently stayed in his/her country of origin as a condition for qualification for subsidiary protection status.⁴²⁴ Decision-makers are required to assess the risk of serious harm to the applicant if s/he is returned to the country of origin; and may consider the relevance and reasonableness of internal protection in accordance with the minimum standards of the Qualification Directive and with UNHCR's Guidelines on "*Internal Flight or Relocation Alternative*."⁴²⁵

⁴²³ This was acknowledged by the CALL (General Assembly) in a judgment of 24 June 2010, no. 45397. However, the CALL has introduced a new concept of "*habitual residence*" whereby if an asylum-seeker has been living for some time in a third country, qualification for refugee status and subsidiary protection status is assessed with regard to the country of "*habitual residence*".

⁴²⁴ Neither is this a requirement under the 1951 Convention for recognition as a refugee.

⁴²⁵ UNHCR, *Asylum in the European Union. A Study of the Implementation of the Qualification Directive*, November 2007, for the position of other Member States at that time.

7. INTERNAL PROTECTION ALTERNATIVE IN THE CONTEXT OF ARTICLE 15 (C)⁴²⁶



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All the Member States reviewed for this research have either transposed Article 8 (1) and (2) QD on “*internal protection*” in domestic legislation or apply these provisions in case law, both with regard to refugee status and subsidiary protection.⁴²⁷

⁴²⁶ The term “*internal protection*” is used for the purposes of this report because this is the term used in Article 8 of the Qualification Directive. Other UNHCR documents use the terms “*internal flight alternative*” or “*internal relocation alternative*” to describe this concept. A detailed analytical framework for assessing the availability of internal protection is contained in: UNHCR, *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees* (UNHCR Guidelines on International Protection No. 4: IFA), 23 July 2003, HCR/GIP/03/04, at: <http://www.unhcr.org/refworld/docid/3f2791a44.html>.

⁴²⁷ Belgium: Article 48/5§3 Aliens Law. France: Article L. 713-3 *Ceseda*. Germany: Section 60 (1) Residence Act provides that, *inter alia*, Article 8 QD shall be applied in establishing whether an applicant qualifies as a refugee; and Section 60 (11) Residence Act provides that, *inter alia*, Article 8 QD shall apply in establishing whether bans on deportation apply pursuant to the subsidiary protection grounds of Section 60 (2), (3) and (7) sentence 2 Residence Act. See also, FAC, decision of 14 July 2009, BVerwG 10 C 9.08 – VGH A 2 S 863/06, paragraph 18 referring to the FAC’s decision of 29 May 2008, BVerwG 10 C 11.07 and the Elgafaji judgment of the ECJ of 17 February 2009. The Netherlands: C4/2.3 Aliens Circular. Sweden: Internal protection is not regulated

Article 8 (1) QD states that as part of the assessment of the application for international protection:

Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.

As such, even if an applicant is able to substantiate that s/he would be at real risk of serious harm by reason of indiscriminate violence in one part of, for example, Afghanistan, Iraq or Somalia, Member States may nevertheless deny refugee status or subsidiary protection if they can demonstrate that there is another part of the country which is safe for the applicant, which s/he can access safely and in which s/he can reasonably reside.

In accordance with general principles of the law of evidence, the burden of proof lies with the Member State to demonstrate that there is an internal protection alternative in conformity with the requirements of Article 8 (1) and (2) QD. However, the Dutch Government has recently proposed an amendment to the Qualification Directive to shift the burden of proof from the Member State, and to place a burden on the applicant to demonstrate the absence of a location of internal protection in the country of origin.⁴²⁸ The Dutch Government has stated that such a measure:

*will remove the need for Member States to demonstrate each time they assess an asylum application that the applicant can find protection elsewhere in his country of origin. If the threat is only present in a particular region of the country of origin, it is in principle sufficient to ascertain that the asylum seeker can settle elsewhere in his country of origin. This may be the case if the threat of violence is generalised rather than directed at the alien as an individual. In those cases the need for protection will be met if the alien in question moves from one region in his country of origin to another where there is no violence.*⁴²⁹

The manner in which the provisions of the Qualification Directive on internal protection are applied may be another reason why in some Member States subsidiary protection in accordance with Article 15 (c) is hardly granted, if at all. The assessment of the applicability of the internal protection alternative is an individual one that requires an analysis of its relevance and reasonableness, taking into account both general circumstances prevailing in the country and the personal circumstances of the applicant.⁴³⁰ A comparative analysis of Member States' interpretation of what constitutes "reasonable stay" falls beyond the scope of this research, although this issue has been addressed by UNHCR previously and revealed wide divergence across and within jurisdictions.⁴³¹ However, the country-specific examples of Iraq and Somalia below high-

in Swedish legislation. However, it is referred to in the *travaux préparatoires*: Government proposition 2009/10:31 p. 136 and in Migration Court of Appeal judgments MIG 2007:33 and 2009:4. UK: Paragraph 339O of the Immigration Rules. Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence, September 2010, paragraph D.2 provides that paragraph 339O applies with regard to consideration of a grant of Humanitarian Protection (subsidiary protection).

⁴²⁸ Position paper – the Dutch Standpoint on EU Migration Policy, Ministry of the Interior and Kingdom Relations, March 2011, p. 4.

⁴²⁹ Ibid.

⁴³⁰ UNHCR Guidelines on International Protection No. 4: IFA.

⁴³¹ UNHCR, *Asylum in the European Union: A Study of the implementation of the Qualification Directive*, November 2007.

light persistent divergences with regard to the general relevance of “*internal protection*” which may contribute to the stark variations in international protection rates described earlier in this report.⁴³²

7.1. IRAQ

UNHCR’s analysis of the relevance and reasonableness of internal protection in the context of Iraq distinguishes between the situation in the Central Governorates, the Southern Governorates, and the three Northern Governorates, as well as the place of origin of the asylum-seeker. UNHCR’s analysis is too detailed to reproduce here, but in light of the overall situation in the Central and Southern Governorates, UNHCR considers that, on the whole and in general terms, internal protection in these two regions is unlikely to be relevant or reasonable, given, in particular, the continued violence, prevalent human rights violations and the serious difficulties faced in accessing basic services and ensuring economic survival in a situation of displacement.⁴³³

There is a clear divergence between the Member States of focus with regard to the application of the internal protection concept in the context of Iraq.

On the one hand, in Belgium, France and Germany, the concept is either not applied or is applied exceptionally. According to the determining authority, OFPRA, in France, the concept of internal protection alternative is not applied with regard to Iraq.⁴³⁴ In general terms, the Belgian determining authority, CGRS, considers that there is no internal protection alternative available for applicants in the Central and Southern Governorates.⁴³⁵ Similarly, the BAMF in Germany informed UNHCR that the availability of internal protection in Iraq is only considered exceptionally.⁴³⁶

On the other hand, the Swedish determining authority deems that there is considerable scope to apply the concept with respect to Iraq.⁴³⁷ And, with the possible exception of Ninewa/Mosul, the rest of Iraq is considered as a potential internal protection alternative by the UK.⁴³⁸

⁴³² Some divergence in the application of the internal protection alternative concept with regards to Afghanistan was also revealed by this research. In interviews with the determining authority, OFPRA, and the appeal court, CNDA, in France on 2 and 3 March 2011 respectively, UNHCR was informed that the concept of internal protection alternative is not applied with regard to Afghanistan. Whereas, the determining authorities in Belgium, Germany, Sweden and the UK considered that the city of Kabul may offer an internal protection alternative for those from other regions if certain conditions are fulfilled relating to the individual circumstances of the applicant. These conditions primarily related to the existence of family and/or social support networks. At the time this research was conducted, the determining authority of the Netherlands did not consider that Article 15 (c) applied with regard to the situation in Afghanistan, and therefore, the application of the concept of internal protection did not arise in that context. However, it considered that no internal protection alternative exists in Afghanistan for any person who has a well-founded fear of persecution or a real risk of ill-treatment in violation of Article 3 ECHR.

⁴³³ UNHCR Iraq Eligibility Guidelines.

⁴³⁴ Interview with the OFPRA, 2 March 2011.

⁴³⁵ Interview with CEDOCA Researchers for Iraq on 1 March 2011, and interview with CGRS on 4 March 2011. The CGRS judges that there may be a potential internal protection alternative in the Northern Governorates for persons who can rely on an extensive family network already living there. See for example, Decision dd. 23 April 2010, confirmed by CALL no 48669, 28 September 2010.

⁴³⁶ Interview with the BAMF on 1 December 2010. According to the German case law, the Northern Governorates may be a potential internal protection alternative if the requirements of Article 8 QD are satisfied in the individual case. As such the courts have considered that a livelihood can only be ensured if the person has access to a family network or other personal relationships in the region. See for example AC Freiburg, decision of 1 September 2010, A 2 K 1400/09.

⁴³⁷ Interview with the SMB on 2 December 2010.

⁴³⁸ HM and Others (Article 15 (c)) Iraq CG [2010] UKUT 331 (IAC), paragraphs 278 (iii) and 295.

The Dutch determining authority, IND, considers that no internal protection alternative exists in Iraq for any person who has a well-founded fear of persecution or who faces a real risk of ill-treatment in violation of Article 3 ECHR.⁴³⁹ The IND does not consider that Article 15 (c) applies to Iraq and, therefore, the application of the concept of internal protection does not arise in that context.

7.2. SOMALIA

UNHCR's detailed analysis of the potential for internal protection in Somalia is set out in its Eligibility Guidelines on the country.⁴⁴⁰ In summary, UNHCR considers that there is no internal protection alternative in any part of southern and central Somalia, on account of:

- The general unavailability of protection from the State and the fact that the State has lost effective control over large parts of territory;
- The fact that customary law systems cannot be considered as sources of effective and durable protection;
- The risks to safety and security from ongoing armed conflict, shifting armed fronts and ongoing widespread human rights violations;
- The massive displacement from Mogadishu and economic collapse which has drained absorption capacity of host communities;
- Evidence of daily abuse faced by members of clans which are not considered to “*originate*” from the area in which they find themselves displaced.

The authorities of Belgium, France, Germany, and Sweden concur with UNHCR that in general terms there is no internal protection alternative within southern and central Somalia.⁴⁴¹ As mentioned earlier in this report, the Governments of Belgium and Sweden, in agreement with UNHCR, consider that the levels of indiscriminate violence in southern and central Somalia are sufficiently high as to pose a real risk of serious harm to civilians merely on account of their presence on the territory.⁴⁴² Furthermore, OFPRA informed UNHCR that it considers that the level of violence is “*extraordinarily high in most parts of southern and central Somalia.*”⁴⁴³

In contrast, it is the position of the determining authorities in the Netherlands and the UK that for persons fleeing indiscriminate violence in Mogadishu, in general terms there may be an internal protection alternative in the rest of southern and central Somalia.

⁴³⁹ WBV 2009/26, November 2009, C24/11 Aliens Circular.

⁴⁴⁰ UNHCR Somalia Eligibility Guidelines.

⁴⁴¹ Belgium: Interview with CGRS Supervisors for Somalia, 4 March 2011; France: interview with OFPRA, 2 March 2011; interview with the CNDA, 1 March 2011; interview with honorary member of the Council of State, 3 March 2010. Germany: interview with the BAMF on 1 December 2010. Sweden: Migration Court of Appeal, UM 10061-09 of 24 February 2011.

⁴⁴² Belgium: interview with CGRS on 4 March 2011. Sweden: Migration Court of Appeal, UM 10061-09 of 24 February 2011.

⁴⁴³ Interview with OFPRA of 2 March 2011.

The Dutch IND has a differentiated approach to the internal protection concept. On 19 November 2010, the Minister for Immigration and Asylum indicated, in response to questions in Parliament, that there would be two different assessments of the applicability of the concept of internal protection alternative. One would apply to applicants who substantiate a fear of persecution or serious harm based on individual grounds or factors; the other policy would apply to those from Mogadishu who cannot return there solely on account of the threat posed to all civilians by the indiscriminate violence.⁴⁴⁴ The main difference lies in the fact that with regard to the former category, it is assumed that in general terms there is no internal protection alternative in southern and central Somalia;⁴⁴⁵ but with regard to the latter, with the exception of specifically defined groups, there is an assumption that there is an internal protection alternative in southern and central Somalia.⁴⁴⁶ The groups that are exempted from this policy are:

- Non-Somali minorities (Bantus, Reer Hamar, Ashraf, Bajuni);
- Professional castes Gaboye (Midgan, Tumul and Yibir);
- Single women (with no parental family i.e. father);
- Unaccompanied minors.

The application of the policy is nevertheless subject to the requirements of safety and reasonableness, however the burden of proof appears to be on the applicant as the Decree explicitly states that:

[t]his means that if the asylum seeker can demonstrate that travelling to and/or accessing an area outside Mogadishu is not a possibility, or if s/he cannot reasonably be expected to reside in an area outside Mogadishu, the asylum seeker may qualify for a permit on the basis of Article 29 (1) (b) of the Dutch Aliens Act.⁴⁴⁷

Similarly, it is the position of the UK determining authority, UKBA, that for those whose home area is Mogadishu, internal protection may be viable in other areas:⁴⁴⁸

An individual may be able to enlist the support of family or clan or otherwise survive economically in areas other than Mogadishu provided he would be of no adverse interest to al-Shabaab, or whichever group is in control of the proposed area of relocation.⁴⁴⁹

⁴⁴⁴ "The collective nature of the threat in the case of a situation referred to in Article 15 (c) of the QD leads to a different assessment of the existence of an alternative location than the assessment when there is an individual threat.": Minister of Justice response to the House of Representatives member Spekman (Labour Party) received 19 November 2010.

⁴⁴⁵ Decree of the Minister for Immigration and Asylum of 9 December 2010, number WBV 2010/19, amending the Aliens Circular 2000 Paragraph 7.2.1: If the applicant has a well-founded fear of persecution or serious harm on individual grounds, it is considered that there is no internal protection alternative unless the applicant has lived for at least six months in reasonable conditions in accordance with local standards in: Puntland, (excluding north Galkayo) in the period since 1991; Somaliland since 1997; Sool; or Sanaag. Moreover, the alien in the proposed alternative region of internal protection must be able to receive protection from his/her clan. Stay in an IDP camp is not considered to constitute reasonable conditions in accordance with local standards. Elsewhere in the Decree, it is also stated that with regard to girls and women who have not been circumcised, in principle, "there is no possibility of internal relocation in Somalia to escape genital mutilation". Moreover, at paragraph 3.4.3, for "women who are victims of (sexual) violence there is no possibility of internal relocation in Somalia".

⁴⁴⁶ Decree of the Minister for Immigration and Asylum of 9 December 2010, number WBV 2010/19, amending the Aliens Circular 2000.

⁴⁴⁷ C4/2.3 Aliens Circular, Paragraph 7.2.2.

⁴⁴⁸ AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 0009, paragraph 6 (iv): "As regards internal relocation, whether those whose home area is Mogadishu (or any other part of central and southern Somalia) will be able to relocate in safety and without undue hardship will depend on the evidence as to the general circumstances in the relevant parts of central and southern Somalia and the personal circumstances of the applicant."

⁴⁴⁹ OGN Somalia v.20 July 2010 at 3.6.16.

The case law states that “[w]hether or not it is likely that relocation will mean that they have to live for a substantial period in an IDP camp will be an important but not necessarily a decisive factor.”⁴⁵⁰

The position of UKBA has been criticized.⁴⁵¹ Advocacy groups have stated that the assumption that if a person is from a majority clan, s/he can relocate to an area where his or her clan is present is not a sufficient basis alone to be satisfied that there is an internal protection alternative. Moreover, it considers that the extent of internal displacement is significantly understated in UKBA guidance and that the evidence shows that the human rights and humanitarian situation has deteriorated significantly and materially so that “such a positive assessment could not properly be made now.”⁴⁵²

With regard to Article 3 ECHR, and consequently Article 15 (b) of the Qualification Directive, the European Court of Human Rights has recently indicated, in a case concerning adult male applicants, that internal protection in southern and central Somalia is only applicable if the returning State establishes that the individual can safely reach the proposed area, and would not be exposed to a real risk of ill-treatment upon settling there. The Court further held that this is not possible in practice without close family connections in the area concerned. However:

*if the returnee’s family connections are in a region which is under the control of al-Shabaab, or if it could not be accessed except through an al-Shabaab controlled area, the Court does not consider that he could relocate to this region without being exposed to a risk of ill-treatment unless it could be demonstrated that he had recent experience of living in Somalia and could therefore avoid coming to the attention of al-Shabaab.*⁴⁵³

As mentioned above, the Court considered that where it is reasonably likely that the returnee would have to stay in an IDP camp, such as those in the Afgooye Corridor, there would be a real risk that he would be exposed treatment in breach of Article 3 on account of the dire humanitarian conditions there.

7.3. ACCESSIBILITY OF THE PROSPECTIVE LOCATION OF INTERNAL PROTECTION

Any prospective location of internal protection has to be practically, safely and legally accessible.⁴⁵⁴

When assessing the relevance of internal protection for persons who have fled a situation of indiscriminate violence and armed conflict, it is of particular importance to consider the prospects for the applicant safely accessing the proposed location of internal protection. Indeed, consideration of the safety of the internal

⁴⁵⁰ AM & AM (armed conflict: risk categories) Somalia CG [2008] UKAIT 0009, paragraph 6 (iv).

⁴⁵¹ Still Human Still Here – Comments on the OGN on Somalia (March 2009), 23 March 2010.

⁴⁵² Ibid., p.11.

⁴⁵³ *Sufi and Elmi v. the United Kingdom*.

⁴⁵⁴ UNHCR Guidelines on International Protection No. 4: IFA.

route is equally important for persons who originate from and may be returned to a region other than one experiencing indiscriminate violence.⁴⁵⁵

Dutch law requires that any proposed area of internal protection in southern and central Somalia is practically, safely and legally accessible.⁴⁵⁶ However, the Dutch Government considers that persons can be returned to southern and central Somalia via Mogadishu's Aden Adde international airport, notwithstanding its own assessment that Mogadishu is experiencing such high levels of indiscriminate violence that all civilians are at risk of serious harm merely on account of their presence there. In a recent case, a detainee challenged his/her continued detention in the Netherlands pending removal on the grounds that there was no real prospect of return to Somalia. The Council of State held that the international airport of Mogadishu is approximately 20 kilometres outside the city of Mogadishu and under the control of the Transitional Federal Government (TFG).⁴⁵⁷ The Council of State concluded that there was no impediment to travel from the airport to an internal protection alternative without entering Mogadishu city; and therefore there was no reason to end the detention pending removal.⁴⁵⁸ In several recent cases, the district courts considered that the determining authority had not sufficiently established how southern and central Somalia could be safely accessed from Mogadishu's international airport. The courts requested to know which roads from the airport providing access southern and central Somalia were protected by the African Union Mission in Somalia (AMISOM); and to what extent the protection provided by AMISOM was effective.⁴⁵⁹

With regard to the safety of internal routes, the latest Operational Guidance Note on Somalia by the UK determining authority to its decision-makers states that:

*[t]here are several checkpoints on the route from Mogadishu towards the Central Regions and some precautions may be necessary particularly during militia fighting. During overland trips clan protection is not required unless ongoing animosities between two rival clans are involved. **The transporter is most of the time the guarantor of the safety of the passengers because he is familiar with the route, militias and all the checkpoints.***⁴⁶⁰ [Emphasis added]

*[...]There may be some security incidents whilst travelling in Somalia and, although individuals will not generally need an escort, if they consider an escort necessary, it is feasible for them to arrange one either before or after arrival.*⁴⁶¹

⁴⁵⁵ The UK Court of Appeal in *HH and others (Somalia) v SSHD* [2010] EWCA Civ 426, paragraph 58: "in any case in which it can be shown either directly or by implication what route and method of return is envisaged, the AIT is required by law to consider and determine any challenge to the safety of that route or method." Also paragraph 82: "We also consider that it is the intention of the Qualification Directive that all matters relating to safety on return should form part of the decision on entitlement" to international protection. Paragraph 84: "In conclusion, our provisional view is that the Directives [Qualification and Procedures] read together require that the issues of safety during return (as opposed to technical obstacles to return) should be considered as part of the decision on entitlement" to protection.

⁴⁵⁶ Aliens Circular, C4/2.3.2. See also, decisions of the District Court of Gravenhage, 25 October 2010, 10/34337 and 14 October 2010, 09/45943.

⁴⁵⁷ One advocacy group has argued that the tribunal in the UK country guidance case *AM and AM on Somalia* mistakenly believed Mogadishu international airport to be outside the city of Mogadishu when it is in the city district of Mogadishu called Waaberi: *Still Human Still Here, Comments on the Operational Guidance Note on Somalia* (March 2009), 23 March 2010. Reference is made here to the judgment in *AM & AM (armed conflict: risk categories) Somalia CG* [2008] UKAIT 03444. At the time of writing, a judgment by the Upper Tribunal on a new country guidance case on Somalia is pending.

⁴⁵⁸ Council of State, 28 December 2010, 20100950/1/V3. Following this judgment, the Court of Den Bosch, on 18 January 2011, also determined that deportation to Mogadishu international airport is possible: *Awb 10/44852*.

⁴⁵⁹ See Court of Amsterdam, 11 February 2011, *Awb 10/26023*; and Court of Arnhem, 14 April 2011, *Awb 10/26220*.

⁴⁶⁰ OGN Somalia v.20 July 2010, paragraph 3.6.19.

⁴⁶¹ *Ibid.*, paragraph 3.6.20.

UKBA concludes that given the:

*generally lower levels of fighting and the relative ease of travel within many areas of Somalia [...] It will be feasible for many to return to their home areas from Mogadishu airport as most areas are more accessible than previously. [...] Asylum claims are unlikely to succeed unless the applicant can demonstrate why they are unable to return to their home areas.*⁴⁶²

Recently, with regard to Article 3 ECHR, the European Court of Human Rights seemed prepared to accept, in a case concerning adult male applicants, that it might be possible for a returnee to travel from Mogadishu international airport to another part of southern and central Somalia without being exposed to a real risk of treatment proscribed by Article 3 solely on account of the situation of general violence.⁴⁶³ However, this would very much depend upon where the returnee's home area is and would, therefore, need to be assessed on a case by case basis.⁴⁶⁴ The Court did not exclude that a situation of extreme violence which is sufficiently severe might be found elsewhere in southern or central Somalia. Moreover:

*even if a returnee could travel to and settle in his home area without being exposed to a real risk of ill-treatment on account of the situation of general violence, he might still be exposed to a real risk of ill-treatment on account of the human rights situation.*⁴⁶⁵

The Court considered that if the returnee had to travel through an al-Shabaab controlled area, the returnee would not be able to access the proposed location of internal protection without being exposed to a risk of ill-treatment, unless it could be demonstrated that *"he had recent experience of living in Somalia and could therefore avoid coming to the attention of al-Shabaab."*⁴⁶⁶

⁴⁶² OGN Somali v 20.0 July 2010 paragraph 3.7.16. See also the Upper Tribunal decision in AM (Evidence – route of return) Somalia [2011] UKUT 54 (IAC).

⁴⁶³ *Sufi and Elmi v. the United Kingdom*.

⁴⁶⁴ *Ibid.*, paragraph 271.

⁴⁶⁵ *Ibid.*, paragraph 272.

⁴⁶⁶ *Ibid.*, paragraph 296.

8. USE OF NATIONAL FORMS OF COMPLEMENTARY PROTECTION WITHIN THE ASYLUM PROCEDURE



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With the exception of Belgium and France, the other four Member States have national complementary protection statuses which do not derive from the Qualification Directive, but whose applicability is examined within the asylum procedure and which may provide a form of protection to significant numbers of persons fleeing indiscriminate violence.⁴⁶⁷

These national statuses are not easily comparable.⁴⁶⁸ Some are based on explicit and specific grounds that differ across the four Member States. Others allow the determining authorities a degree of discretion and

⁴⁶⁷ For further and more detailed information, see European Migration Network, *The different national practices concerning granting of non-EU harmonised protection statuses*, December 2010.

⁴⁶⁸ Germany: Section 60 (5) and (7) sentence 1 Residence Act. Netherlands: Article 29 (1) (d) Aliens Act. Sweden: Chapter 4 Section 2a paragraph 1 of the Act amending the Aliens Act (2005:716) 30 December 2009. In the UK, the status of Discretionary Leave does provide scope for the determining authority to grant protection on the grounds of a risk of harm due to violence in the country of origin although this is not currently an explicit criterion set out in policy guidance – see Asylum Policy Instruction (API) on Discretionary Leave at www.ukba.homeoffice.gov.uk.

may be more broadly based on compelling humanitarian grounds. Some of the Member States reviewed have national protection statuses that may provide protection on the grounds of a risk of harm due to conflict and violence in the country of origin. Other grounds for national forms of complementary protection include:

- Trauma and mental health problems of the applicant as a result of experiences in the country of origin;
- Applicant's need for treatment of a very serious medical condition or disability if adequate treatment is not available in the country of origin;
- Severe humanitarian conditions and a risk that the applicant will be unable to achieve a minimum level of subsistence in the country of origin;
- Cases where return to the country of origin would result in the flagrant denial of a human right protected by the ECHR.

In some Member States, the determining authority may grant a national protection status on medical grounds within the asylum procedure. In Belgium, however, it was expressly decided that the determining authority does not have the required medical expertise to make a judgment with regard to the medical condition of an applicant nor assess the medical facilities in the country of origin. A specific procedure has therefore been instituted for this purpose.⁴⁶⁹ Moreover, Belgium and some other Member States have specific procedures and legal statuses outside the asylum procedure for victims of human trafficking and aggravated forms of human smuggling;⁴⁷⁰ and for unaccompanied non-EU minors who do not seek asylum.⁴⁷¹

There may be further legislative grounds in some Member States that prevent the enforcement of expulsion orders or grant permission to stay. A full review of such grounds fell outside the scope of this research, and is, therefore, not included in this report.⁴⁷²

Nonetheless, it was considered important to assess the extent to which national protection statuses have been accorded within the asylum procedure to applicants from Afghanistan, Iraq and Somalia. As can be seen from the information below, in some of the Member States reviewed, national protection statuses are very significant protection tools for applicants from these three countries.

For example, in Germany, in 2010, 30.2 percent of first instance decisions taken with regard to Afghanistan were grants of complementary protection in accordance with Section 60 (7) sentence 1 Residence Act, which is almost twice the proportion of decisions - 17.8 percent - which were grants of international protection. Similarly, in the UK in 2010, at first instance, 26.8 percent of decisions taken with regard to Afghanistan were grants of the national protection status Discretionary Leave, which is close to three times the international protection rate of 9.7 percent.

In Sweden, with regard to the three nationalities of focus, grants of national forms of complementary protection at first instance were significantly less than grants of international protection. Nevertheless, significant numbers of applicants received national forms of complementary protection as persons "*otherwise in need of protection*" on account of armed conflict or "*severe conflicts*" in the country of origin.

⁴⁶⁹ Art. 9ter Aliens Law. See also: Exposé des motifs, Projet de loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers, Doc. Parl, Chambre, 2006, no 2478/001, p. 9-10.

⁴⁷⁰ Art. 61/1-61/5 Aliens Law. See also the Ministerial circular of 26 September 2008 regarding the introduction of a multidisciplinary cooperation towards victims of human trafficking and/or aggravating forms of human trafficking, M.B. 31 October 2008. The Netherlands also has a specific procedure to grant protection to victims of trafficking: Aliens Circular Vc B/9.

⁴⁷¹ Ministerial Circular of 15 September 2005 concerning the residence status of non-accompanied minors. On 23 June 2011, the Chamber of Representatives accepted a legislative proposal to enact the provisions of this circular as a binding law.

⁴⁷² Belgium: see Art. 49/2§5, and Art. 55§3 Aliens Law. France: Article L 513-2 *Ceseda*. Germany: Section 60a (1) sentence 1 Residence Act. Sweden: see Chapter 12 Section 1 and 3 of the Aliens Act; and Chapter 22 of the Aliens Act.

However, national protection statuses were of less significance in the Netherlands in 2010 as explained in section 8.2 below.

The grounds for national protection statuses differ and are summarized below on a country-by-country basis.

8.1. GERMANY

In Germany, there are two national legislative grounds which if fulfilled could prevent deportation and could result in the granting of a residence permit to a person who has fled indiscriminate violence.⁴⁷³ These provisions do not flow from the Qualification Directive and constitute national forms of complementary protection. They are assessed by the BAMF within the asylum procedure:⁴⁷⁴

- Section 60 (5) Residence Act which provides that “[a] foreigner may not be deported if deportation is inadmissible under the terms of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (Federal Law Gazette 1952 II, p. 685)”;
- Section 60 (7) sentence 1 and sentence 3 Residence Act which states “[a] foreigner should not be deported to another state in which a substantial concrete danger to his or her life and limb or liberty applies. [...] Dangers pursuant to sentence 1 ... to which the population or the segment of the population to which the foreigner belongs are generally exposed shall receive due consideration in decisions pursuant to Section 60a (1), sentence 1.”⁴⁷⁵

With regard to Section 60 (5) Residence Act, its application is limited by the fact that the actor of serious harm must be the State or quasi-state authorities or it must be demonstrated that the threatened harm is tolerated by the State. In practice, this provision is of limited relevance. According to statistics provided by the BAMF, no grants of protection were made on this basis to Afghans, Iraqis or Somalis in 2009 and 2010.

With regard to Section 60 (7) sentence 1 Residence Act, the criteria are set out in the legislation in a very broad manner (concrete danger to life and limb or liberty). In practice, this provision has been applied in cases where the applicant has a serious or life-threatening medical condition which cannot be properly treated in the country of origin and in cases where it is considered that if returned to the country of origin, the applicant will not attain a minimum subsistence level.

In accordance with Section 25 (3) Residence Act, if a person qualifies under Section 60 (5) or (7) sentence 1, s/he “should be granted a residence permit” in the absence of reasons for refusing such a permit on

⁴⁷³ In addition, it should be noted that according to Article 16a of the Constitution an applicant may be granted ‘political asylum’.

⁴⁷⁴ At the time of writing, the translations used here of Section 60 Residence Act - provided by the Federal Ministry of the Interior - were available on the following website: http://www.migrationsrecht.net/cat_view/364-english-documents/450-german-immigration-law.html.

⁴⁷⁵ Section 60a (1) on temporary suspension of deportation states in sentence 1 “For reasons of international law or on humanitarian grounds or to safeguard the political interests of the Federal Republic of Germany, the supreme Land authority may order the deportation of foreigners from specific states or of categories of foreigners defined by any other means to be suspended in general or with regard to deportation to specific states for a maximum of six months.” Section 60a (2) 1st sentence Residence Act states that “The deportation of a foreigner shall be suspended for as long as deportation is impossible in fact or in law and no residence permit is granted.” This does not constitute a ground for international or national protection. It is not a positive status but rather a temporary suspension of deportation.

grounds listed under Section 25 (3) sentence 2 Residence Act.⁴⁷⁶ However, even if it is found that there are no reasons under Section 25 (3) sentence 2 to deny the granting of a residence permit, the Aliens' Authority retains a discretionary power, albeit limited to atypical cases.⁴⁷⁷ As a rule, a residence permit is valid for one year renewable.

In the asylum procedure, the BAMF not only examines applications with a view to qualification for refugee status and subsidiary protection but also with a view to national complementary protection. The Federal Administrative Court has explicitly stated that qualification for international protection in accordance with the Qualification Directive must be given priority over qualification for national complementary protection.⁴⁷⁸

However, there is some concern that at the level of first instance decision-making this may not always be heeded in practice. For example, the statistics of the BAMF show that in 2010, of the 5,007 decisions taken concerning applicants from Afghanistan, 567 were grants of refugee status,⁴⁷⁹ 245 were grants of subsidiary protection (Section 60 (2), (3) and (7) sentence 2), and 1,383 were grants of national forms of complementary protection. This may be due in part to the fact that decision-makers were more familiar with the application of the grounds for national forms of complementary protection than the grounds for subsidiary protection which were more recently transposed in national law and entered into force on 28 August 2007. It may also be due in part to the fact that, as a result of the case law of the Federal Administrative Court regarding the interpretation of Section 60 (7) sentence 2, (Article 15 (c) QD) it is considered that the latter provision is not applicable with regard to Afghanistan without the existence of individual factors increasing the risk.

Table 14. Germany: first instance decisions, 2010, all statuses

	Total decisions	Total decisions on merits	Constitutional asylum	Refugee status	Subsidiary Protection Sect. 60 (2) Residence Act (Art. 15 (b))	Subsidiary Protection Sect. 60 (3) Residence Act (Art. 15 (a))	Subsidiary Protection Sect. 60 (7) sentence 2 Residence Act (Art. 15 (c))	National Complementary Protection Sect. 60 (5) Residence Act	National Complementary Protection Section 60(7) sentence 1 Residence Act
Afghanistan	5007	4577	18	549	229	3	13	—	1383
% of total decisions on merits			0.4 %	12 %	5 %	0.1 %	0.3 %	—	30.2 %
Iraq	6564	5920	27	3278	19	—	6	—	103
% of total decisions on merits			0.4 %	55.4 %	0.3 %	—	0.1 %	—	1.7 %
Somalia	914	509	—	378	17	—	60	—	9
% of total decisions on merits			—	74.3 %	3.3 %	—	11.8 %	—	1.8 %

⁴⁷⁶ Section 25 (3) Residence Act: "The residence permit shall not be granted if departure for subsequent admission to another state is possible and reasonable, the foreigner has repeatedly or grossly breached duties to cooperate or serious grounds warrant the assumption that the foreigner a) committed a crime against peace, a war crime or a crime against humanity within the meaning of the international instruments which have been drawn up for the purpose of establishing provisions regarding such crimes, b) committed an offence of considerable severity, c) is guilty of acts contrary to the objectives and principles of the United Nations, as enshrined in the Preamble and Articles 1 and 2 of the Charter of the United Nations, or d) represents a risk to the general public or a risk to the security of the Federal Republic of Germany."

⁴⁷⁷ FAC, decision of 24 June 2008, BVerwG 10 C 43.07 – VGH 13a B 05.30833, paragraph 13.

⁴⁷⁸ See, FAC, decision of 24 June 2008, BVerwG 10 C 43.07 – VGH 13a B 05.30833, paragraph 13.

⁴⁷⁹ This figure includes 18 grants of constitutional asylum.

8.2. NETHERLANDS

There are two national forms of complementary protection which are of relevance: humanitarian protection based on Article 29 (1) (c) Aliens Act and group-based (also called “*categorical*”) protection in accordance with Article 29 (1) (d) Aliens Act.⁴⁸⁰ It should be noted that a residence permit granted on the basis of Article 29 (1) (c) or (d) confers the same rights and entitlements as a residence permit granted on the basis of Article 29 (1) (a) (refugee status) and (b) (subsidiary protection status). However, a residence permit granted under Article 29 (1) (d) can more easily be revoked or not renewed.

In accordance with Article 29 (1) (c) Aliens Act, an asylum residence permit may be granted to foreign nationals who cannot reasonably be expected to return to their country of origin based on compelling humanitarian grounds relating to the reasons for their departure from the country of origin. This may be applied to those who have been traumatized by experiences in the country of origin, those with other special individual compelling humanitarian grounds and to specific groups.⁴⁸¹ The policy is explained in detail in the Aliens Circular which, *inter alia*, contains an exhaustive list of experiences that can be considered to be traumatic.⁴⁸² With regard to specific groups, to date, this policy has been applied to two groups: single Afghan women⁴⁸³ and Iranian homosexuals, bisexuals and transsexuals.⁴⁸⁴

Article 29 (1) (d) Aliens Act offers group-based protection and can be applied to persons from a particular country of origin or part of that country; or to specifically designated groups of persons. An asylum residence permit can be granted to foreign nationals for whom repatriation to the country of origin would be particularly harsh in view of the general situation there. It should be noted that group protection on this ground is not confined to situations in which there is armed conflict, and the concept of internal protection alternative remains applicable. Article 3.106 of the Aliens Decree 2000 provides the indicators which have to be taken into consideration in the assessment of whether a situation, as referred to in Article 29 (1) (d) of the Aliens Act, exists. These indicators are:

- The nature of violence in the country of origin, in particular the gravity of human rights violations and international humanitarian law, the degree of indiscriminate violence, the extent to which the violence occurs and the geographical scope of the violence;
- The activities of international organizations as regards the country of origin and the extent to which these activities reflect the position taken by the international community in relation to the country of origin; and
- The policies of other EU Member States.

⁴⁸⁰ In addition, Article 29 (1) (e) and (f) Aliens Act provide that an applicant may qualify for an asylum residence permit on family reunion grounds. In 2010, excluding refugee status, there were 617 (Afghanistan), 1,091 (Iraq) and 3,391 (Somalia) grants of a protection status based on Article 29 (1) (b) – (f) Aliens Act inclusive. See UNHCR, *Global Trends 2010*. Based on Article 14 Aliens Act, a temporary residence permit may be granted to an unaccompanied minor who has exhausted all legal remedies; or a foreign national who is unable to leave the Netherlands through no fault of his own; or who cannot leave for medical reasons. See B14/3.2.2. of the Aliens Implementation Guidelines.

⁴⁸¹ C2/4 Aliens Circular.

⁴⁸² The violent death of near family members or housemates; the violent death of other relatives or friends if the applicant can plausibly show that there was a close bond between him/herself and the deceased; substantial non-criminal detention; torture, severe mistreatment or rape of the applicant; witnessing torture, severe mistreatment or rape of near family members or housemates; witnessing torture, severe mistreatment or rape of other relatives or friends if applicant can show that there was a close bond between him/herself and the person concerned.

⁴⁸³ Decision of the Minister for Immigration and Integration of 2 June 2006, number 2006/22, amending the Aliens Act Implementation Guidelines 2000. Dutch Government Gazette 2006 n.119, p10.

⁴⁸⁴ Decision of the Minister for Immigration and Integration of 17 November 2006, nr. 2006/38, amending the Aliens Act Implementation Guidelines 2000. Dutch Government Gazette 27 November 2006, nr. 231, p19.

On 11 December 2009, the (then) State Secretary expressed her intention to abolish the group-based protection status in its entirety since its purpose was considered safeguarded by subsidiary protection.⁴⁸⁵

In the past, group-based or “*categorical*” protection has been an important form of protection for certain nationality groups such as persons from the DRC, Iraq, Ivory Coast, Somalia and Sudan. However, one by one, the group-based protection policy has been terminated with regard to these countries and the only remaining group to whom group-based protection is still applied are non-Arab population groups from Darfur.⁴⁸⁶

The group-based protection which had been applicable to asylum-seekers from central Iraq as of 2 April 2007 was ended on 22 November 2008.⁴⁸⁷ The Aliens Circular states that:

*[a]sylum seekers from Iraq are, under Article 29, paragraph d, Aliens Act, ineligible for an asylum residence permit (see c2/5). The description of the general security situation in the official Country Report of the Ministry of Foreign Affairs leads to the conclusion that the trend of an improving security situation in Iraq has continued. Also related to the conduct of our neighbouring countries, particularly the United Kingdom, Denmark, Germany and Sweden, these countries have no special policy for Iraqi asylum seekers.*⁴⁸⁸

All forms of group-based protection for Somalis were ended in July 2009.⁴⁸⁹ This was considered by some interviewees to have created a protection gap as from that time until November 2010, the situation in Mogadishu was not considered to constitute an exceptional situation of indiscriminate violence in the sense of Article 15 (c) QD; and at the time of writing the Government continues to maintain that the situation in the rest of southern and central Somalia does not engage Article 15 (c).

In view of the current process of abolition of categorical protection, and an interpretation of Article 15 (c) which equates it exclusively with the case law of the ECtHR on Article 3 ECHR, lawyers and NGOs are worried that there is a lack of adequate protection for persons fleeing situations of indiscriminate violence.⁴⁹⁰

The effect of the abolition of group-based protection (Article 29 (1) (d)) in mid-2009 for Somalis is reflected in the statistics of first instance decisions. In 2009, with regard to Somalia, two percent of decisions taken were grants of refugee status, 19 percent were grants of subsidiary protection and 32 percent were grants of group-based protection – a total of 53 percent. In 2010, with regard to Somalia, 1.8 percent of decisions taken were grants of refugee status, 32.5 percent were grants of subsidiary protection and just 1.6 percent

⁴⁸⁵ Parliamentary documents II 2009/10, 19 637, no. 1314. It should be noted that the Government has reiterated its intention to abolish categorical protection.

⁴⁸⁶ See C24/23 Aliens Circular.

⁴⁸⁷ Decision of the State Secretary of Justice of 10 November 2008, n. 2008/28, containing an amendment to the Aliens Act Implementation Guidelines 2000, Dutch Government Gazette 771.

⁴⁸⁸ Amendments to the Aliens Circular, 2009/11/10, WBV 2009/26.

⁴⁸⁹ Decision of the State Secretary of Justice of 2 July 2009, n. 2009/16, containing an amendment to the Aliens Act Implementation Guidelines 2000, Dutch Government Gazette 2009, 11449.

⁴⁹⁰ See Advisory Committee on Migration Affairs (ACVZ), letter to the State Secretary of Justice, 6 May 2009, ACVZ/ADV/2009/006: “According to empirical research, the improper use of this particular ground for asylum has so far not occurred. In addition, a fine-tuned policy can prevent abuse: the discretionary nature of the power to provide categorical protection makes it possible to limit the policy to situations that truly require it. Removing this provision shall in any case involve the risk that its safety net function shall cease to exist, whereas the ACVZ deems this function extremely important.”

were grants of categorical protection⁴⁹¹ – a total of 36 percent. Therefore, while the proportion of grants of subsidiary protection to Somalis increased in 2010 as compared to 2009, following the abolition of group-based protection, the overall protection rate on these grounds decreased as compared to 2009.

Table 15. Netherlands: first instance decisions 2010, all statuses

	Total decisions	Refugee status	Subsidiary protection Art. 29 (1) (b)	National complementary protection Art. 29 (1) (c)	National complementary protection Art. 29 (1) (d)
Afghanistan	1907	49	418	50	5
% of decisions		2.6 %	21.9 %	2.6 %	0.3 %
Iraq	2253	132	741	19	2
% of decisions		5.9 %	32.9 %	0.8 %	0.09 %
Somalia	5329	97	1.732	52	83
% of decisions		1.8 %	32.5 %	1 %	1.6 %

8.3. SWEDEN

In Sweden, a person who has fled a situation of indiscriminate violence but has not been considered to qualify for refugee status or subsidiary protection deriving from the Qualification Directive, may nevertheless qualify for a protection status as a “*person otherwise in need of protection*” in accordance with Chapter 4 Section 2a of the Aliens Act. Chapter 4 Section 2a states:

In this Act, a “person otherwise in need of protection” is an alien who in cases other than those referred to in Sections 1 [refugee status] and 2 [subsidiary protection] is outside the country of the alien’s nationality, because he or she

- 1. needs protection because of an external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses, or**
- 2. is unable to return to the country of origin because of an environmental disaster.*

The first paragraph, point 1 applies irrespective of whether it is the authorities of the country that are responsible for the alien running such a risk as is referred to there or whether these authorities cannot be assumed to offer protection against the alien being subjected to such a risk through the actions of private individuals. [...] [Emphasis added].

This status is not subsidiary protection according to the text of the legislation itself. Moreover, the Government website states that the declaration of status as a person eligible for subsidiary protection (Chapter 4 Section 2 Aliens Act) is an international status declaration based on the provisions in the Qualification

⁴⁹¹ Applicants from Somalia who applied for international protection after 19 May 2009 are not eligible for an asylum residence permit on the basis of Article 29 (1) (d) of the Dutch Aliens Act. Those who applied before 19 May 2009 are, in principle, eligible for categorical protection regardless of the date of the decision: Paragraph 6 of the Decree of the Minister for Immigration and Asylum of 9 December 2010, number WBV 2010/19, amending the Aliens Circular 2000. It is therefore assumed that those persons granted categorical protection in 2010 applied for protection before 19 May 2009.

Directive, whereas declaration as a person otherwise in need of protection (Chapter 4 Section 2a Aliens Act) is a Swedish status which only applies in Sweden. As such the provisions of the Qualification Directive on qualification and the content of international protection do not apply with regard to Chapter 4 Section 2a Aliens Act.⁴⁹²

Chapter 4 Section 2a paragraph 1 reflects the previous provision of the Aliens Act, which formerly was considered broadly to transpose Article 15 (c). It is made up of two clauses, each providing grounds for protection from violence. The first sentence provides protection to those in need because of an external or internal armed conflict. It differs from Section 2 paragraph 1 which gives effect to Article 15 (c) in domestic law in that:

- It is not limited to “*civilians*”;
- It does not require a nexus with “*indiscriminate violence*” but with external or internal armed conflict;
- It refers to those who need protection rather than stipulating the type of harm or threat.

According to the *travaux préparatoires*, the scope of Article 15 (c) of the Qualification Directive is narrower than Chapter 4 Section 2a paragraph 1 first sentence.⁴⁹³

The second sentence offers another ground for protection because of “*severe conflicts*” in the country of origin. It differs from Article 15 (c) of the Qualification Directive in that:

- It is not limited to “*civilians*”;
- It refers to “*other severe conflicts in the country of origin*”, instead of “international or internal armed conflict”;
- It refers to “*serious abuses*” rather than “*serious harm*”;⁴⁹⁴
- It does not refer to “*indiscriminate violence*”;
- It does not refer to the need for an “*individual threat*” but refers to a “*well-founded fear of being subjected to*”.

The Ministry of Justice informed UNHCR that, notwithstanding the *Elgafaji v. Staatssecretaris van Justitie* judgment, it was not absolutely certain that the scope of Article 15 (c) equated to the scope of the previous Swedish legislation (Chapter 4 Section 2 of the old Aliens Act). It was considered that there was a possibility that the scope of the Swedish law was broader than Article 15 (c) and, therefore, because it was not the Government’s intention to narrow the scope of protection offered by Sweden through the transposition of Article 15 (c), it was decided to transpose Article 15 (c) (Chapter 4 Section 2 Aliens Act) but also retain the previous legislation (in a new Chapter 4 Section 2a Aliens Act). It was the Government’s intention that Chapter 4 Section 2 of the Act amending the Aliens Act should fully transpose Article 15 (c) as interpreted by the CJEU in the *Elgafaji v. Staatssecretaris van Justitie* judgment.⁴⁹⁵ In time and through legal practice it would then become clear whether Chapter 4 Section 2a was broader in scope or superfluous.

However, the Swedish Migration Board (SMB) informed UNHCR that, in practice, it considers that both Chapter 4 Section 2 paragraph 1 and Section 2a paragraph 1 transpose Article 15 (c).⁴⁹⁶ Chapter 4 Section 2 paragraph 1 is applied by the SMB when the degree of indiscriminate violence characterizing the armed

⁴⁹² www.migrationsverket.se/info/443_en.html.

⁴⁹³ Preparatory Works: *Lagrådsremiss “Genomförande av skyddsgrundsdirektivet och asylprocedurdirektivet”*, 10 July 2009, p. 116.

⁴⁹⁴ According to the preparatory work to the Swedish legislation, examples of “*serious abuse*” include disproportionate punishment, arbitrary incarceration, physical abuse and assaults, sexual abuse, social rejection and other severe harassments.

⁴⁹⁵ Information provided by the Ministry of Justice on 3 December 2010.

⁴⁹⁶ Interview with SMB on 29 November 2010.

conflict reaches such a high level that substantial grounds are shown for believing that a civilian returned to that country or region would solely on account of presence in that country or region face a real risk of harm. Chapter 4, Section 2a, paragraph 1, sentence 2, is applied when the degree of violence arising from a conflict is not as high as required for Section 2 (Article 15 (c)) but the applicant can demonstrate a risk of serious abuse due to factors particular to his/her personal circumstances.

As the law establishing the grounds for qualification for subsidiary protection and as a person otherwise in need of protection entered into force on 1 January 2010, the Migration Court of Appeal has had limited opportunity to explore the interpretation to be given to Chapter 4, Section 2 of the Act amending the Aliens Act.⁴⁹⁷ This also means that the scope of Chapter 4, Section 2 relative to the scope of Chapter 4, Section 2a, paragraph 1 has not yet been explored by the Migration Court of Appeal. Therefore, it is not yet clear what impact the new Section 2 will have on the interpretation of Section 2a, paragraph 1, sentences 1 and 2.⁴⁹⁸ Interviewees reported that at present there is some confusion amongst stakeholders as to the relative ambits of Section 2 and Section 2a, paragraph 1 Aliens Act.

An applicant, who has not qualified for refugee status, subsidiary protection status or as a person otherwise in need of protection, may qualify for humanitarian protection. However, this status is not granted on grounds related to harm arising from situations of indiscriminate violence and/or conflict in the country of origin or residence. Instead, it is generally granted on compassionate grounds to persons with a serious medical condition, those who risk exclusion or trauma if returned to their country of origin, and children.⁴⁹⁹

As can be seen from the table below, significant numbers of applicants from Afghanistan, Iraq and Somalia were granted status as a person otherwise in need of protection at first instance in 2010.

Table 16. Sweden: first instance decisions 2010, all statuses

	Total decisions	Total decisions on the merits	Refugee status	Subsidiary protection Ch. 4 Section 2	National complementary protection status: Otherwise in need of protection Ch 4 Section 2a
Afghanistan	1510	1459	162	631	105
% of total decisions			11.1 %	43.2 %	7.2 %
Iraq	1846	1667	569	85	148
% of total decisions			34.1 %	5.1 %	8.9 %
Somalia	5357	4964	464	3532	548
% of total decisions			9.3 %	71.2 %	11 %

⁴⁹⁷ Interview with judge at the Migration Court of Appeal on 1 December 2010.

⁴⁹⁸ Interview with judge at the Migration Court of Appeal on 1 December 2010.

⁴⁹⁹ Chapter 5 Section 6 of the Aliens Act (2005:716) provides that: "If a residence permit cannot be awarded on other grounds, a permit may be granted to an alien if on an overall assessment of the alien's situation there are found to be such exceptionally distressing circumstances that he or she should be allowed to stay in Sweden. In making this assessment, particular attention shall be paid to the alien's state of health, his or her adaptation to Sweden and his or her situation in the country of origin. Children may be granted residence permits under this Section even if the circumstances that come to light do not have the same seriousness and weight that is required for a permit to be granted to adults." The travaux préparatoires state that "the clause can be used to protect, for example; aliens with fatal illnesses or severe disabilities whose condition may be improved in Sweden if adequate care is unobtainable in the country of origin; aliens who risk social exclusion or traumatisation if forced to return to their country of origin (victims of torture, victims of trafficking, etc., no longer at risk of persecution or abuse in the country of origin etc.) and children whose development will be gravely endangered after a removal order." For further information see The Practices in Sweden Concerning the Granting of Non-EU Harmonized Protection Statutes, European Migration Network, February 2010, p. 11 referring to the Preparatory Report 2004/05:170, p. 189-195.

8.4. UNITED KINGDOM

If the determining authority, UKBA, establishes that an applicant does not qualify for international protection, it must consider whether the applicant qualifies for Discretionary Leave.⁵⁰⁰ There are limited criteria for qualification for Discretionary Leave, although there is scope for discretion:⁵⁰¹

- Cases where return would breach Article 8 ECHR;
- Cases where return would breach Article 3 ECHR but subsidiary protection is not applicable e.g. where a person's medical condition or severe humanitarian conditions in the country of return would make return contrary to Article 3 ECHR;
- Other cases where return would breach the ECHR e.g. a flagrant denial of another human right;
- Unaccompanied asylum seeking children where there are inadequate reception arrangements available in the country of return;
- Other compelling cases;
- Applicants excluded from refugee status, and subsidiary protection may be granted Discretionary Leave for six months.

As can be seen from the table below which sets out first instance decisions in 2010, 26.8 percent of decisions regarding applicants from Afghanistan resulted in the grant of Discretionary Leave, which is significantly higher than the international protection rate (9.7 percent). Some interviewees expressed the concern that Discretionary Leave may be granted to unaccompanied and separated children from Afghanistan with international protection needs which should qualify them for refugee status or subsidiary protection status. With regard to both Iraq and Somalia, decisions to grant Discretionary Leave were fewer than decisions to grant international protection.

Table 17. UK: first instance decisions 2010, all statuses

	Total decisions	Total decisions on the merits	Refugee status	Subsidiary protection ⁵⁰²	National complementary protection status: Discretionary leave
Afghanistan	2985	2275	215	5	610
% of total decisions on the merits			9.5 %	0.2 %	26.8 %
Iraq	1020	865	80	15	75
% of total decisions on the merits			9.2 %	1.7 %	8.7 %
Somalia	1090	965	440	30	70
% of total decisions on the merits			45.6 %	3.1 %	7.3 %

⁵⁰⁰ Discretionary Leave is granted under the provisions of the 1971 Immigration Act which allows the Secretary of State to grant leave to a person for a reason not covered by the Immigration Rules. Discretionary Leave is granted for three years where this is on the ground of a risk of a breach of the ECHR. For unaccompanied and separated children, Discretionary Leave is granted until they are 17.5 or for three years (less with regard to some countries) depending on which is shorter. However, where the reasons preventing return are predicted to be short-lived, the grant of Discretionary Leave may be for shorter periods. Where it is considered that return may be possible within six months of the date of the decision, Discretionary Leave may be denied and an undertaking given to defer removal until such time as it is appropriate.

⁵⁰¹ See Asylum Policy Instruction (API) on Discretionary Leave at www.ukba.homeoffice.gov.uk.

⁵⁰² This equates to the UK status 'Humanitarian Protection' in accordance with paragraph 339C of the Immigration Rules which transposes Article 15 QD.

9. SITUATION OF PERSONS REFUSED PROTECTION



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A significant number of asylum-seekers have been held not to be entitled to protection but remain on the territory of EU States without a legal status. These persons include Afghans, Iraqis from central Iraq and Somalis from southern and central Somalia who consider that their lives will be at risk if returned to their countries of origin and therefore do not wish to return “*voluntarily*.” The view of asylum-seekers and some stakeholders that the implementation of the international legal framework in some EU States has failed to recognize their international protection needs is perhaps reflected in the significant number of cases currently pending before the ECtHR regarding the compatibility of forced returns with Article 3 ECHR.

Whilst none of the Member States of focus in this research reported that they had implemented policies of non-return to Afghanistan, Iraq or Somalia; in practice, return is often not enforced and persons from these countries who are refused protection remain on the territory of EU Member States in a legal limbo.

In 2010, some of the Member States reviewed enforced the return of people to Afghanistan after rejecting their international protection claims.⁵⁰³ Others have not.⁵⁰⁴ Belgium did not enforce returns to central Iraq.⁵⁰⁵ According to governmental sources, Germany enforced the return of 31 persons to Iraq, but, at the time of writing, it is not known whether any of these were returned to central Iraq.⁵⁰⁶ In contrast, the Netherlands,⁵⁰⁷ Sweden⁵⁰⁸ and the UK⁵⁰⁹ forcibly returned hundreds of Iraqis to Iraq, including persons originating from the central governorates. Many of these returns were effectuated using joint charter flights. The ECtHR is currently considering a number of cases concerning the compatibility of forced returns to Iraq via Baghdad with Article 3 ECHR. In some cases, the ECtHR has applied interim measures under Rule 39 of the Rules of the Court and consequently the return of the relevant individuals has been suspended pending a decision on their cases, but many requests for such interim measures have been denied.

At the time of writing, to UNHCR's knowledge, three of the Member States of focus did not enforce returns to southern and central Somalia (Belgium,⁵¹⁰ Germany⁵¹¹ and Sweden⁵¹²). Two did not preclude the enforced return of unsuccessful asylum-seekers to southern and central Somalia, i.e. the Netherlands and the UK, although enforced return to Somalia was very seldom carried out in practice in 2010.⁵¹³ In a letter dated 13 January 2011, the Dutch Minister for Immigration and Asylum halted all deportations to southern and central Somalia following a motivated Rule 39 interim measure by the ECtHR in two Somali cases on 7 January 2011, as it was determined that their cases had implications for all forced returns to southern and central Somalia via Mogadishu airport.

⁵⁰³ Germany: According to governmental sources, 16 persons were forcibly returned to Afghanistan: Deutscher Bundestag, Drucksache 17/5460 (12.04.2011). There is no information regarding their gender or the exact final destination. The Netherlands: approximately 15 persons were forcibly returned to Afghanistan in 2010: figures received from the Repatriation and Departure Service (R&DS) of the Ministry of Interior on 8 March 2011. Sweden: the SMB informed that in the first half of 2010, 12 Afghans were forcibly returned to Afghanistan and that there are 152 Afghans in Sweden who have been refused a protection status having exhausted all legal remedies and await forcible removal – interview with the SMB on 2 December 2010. UK: according to UKBA, approximately 440 (figure is rounded and provisional) Afghans were returned to Afghanistan during the first six months of 2010 alone: information provided 9 December 2010. UNHCR was informed that although the UK determining authority, UKBA, considers that it is appropriate to return all unsuccessful asylum-seekers to Afghanistan, during 2010 only the return of adult single males were enforced.

⁵⁰⁴ For example, in Belgium, since April 2010, no enforced returns to Afghanistan have been executed, which was decided “given the recommendations of UNHCR of 6 October 2008 (last update). This text can be found on UNHCR website (“Afghanistan Security Update Relating to Complementary Forms of Protection”). In this document is mentioned which regions are unsafe. The Aliens Office has always strictly followed these recommendations. If an Afghan was originating from a city or region mentioned on this list, no enforced return took place”: This was the official declaration of the Aliens Office following an official question posed in the Belgian Parliament, 28 October 28 2010, at: <http://www.dekamer.be/kvvcr/showpage.cfm?section=qrva&language=nl&cfm=qrva.Xml.cfm?legislat=53&dossierID=53-Bxxx-619-0043-0000201000399.xml>.

⁵⁰⁵ Newsletter Return Policies, December 2010, at: www.vluchtelingenwerk.be.

⁵⁰⁶ Deutscher Bundestag, Drucksache 17/5460 (12.04.2011).

⁵⁰⁷ Approximately, 115 persons were forcibly removed to Baghdad in 2010: figures received from the Repatriation and Departure Service (R&DS) of the Ministry of Interior on 8 March 2011. According to the R&DS, there are no available statistics regarding the number of Iraqis who have exhausted all legal remedies and remain in the Netherlands pending return: information provided on 8 March 2011.

⁵⁰⁸ In the first half of 2010 (Jan-June) 232 Iraqis were forcibly returned to Iraq: figures provided by the SMB on 2 December 2010. The SMB informed, at the time of writing, that there are 1,342 Iraqis who have been refused a protection status, exhausted legal remedies and await return to Iraq: interview with the SMB on 29 November 2010.

⁵⁰⁹ In the first half of 2010 (Jan-June), approximately 110 (figures are rounded and provisional) persons were forcibly removed to Iraq, including central Iraq, according to UKBA. UKBA informed UNHCR that although it considers that it is appropriate to return all unsuccessful asylum-seekers and irregular migrants to Iraq, only the return of adult males with limited links to the UK was enforced during 2010.

⁵¹⁰ Newsletter Return Policies, December 2010, at: www.vluchtelingenwerk.be.

⁵¹¹ Information provided by the BAMF on 23 December 2010.

⁵¹² According to the SMB, with the exception of Puntland and Somaliland, it cannot enforce returns to Somalia as the authorities there refuse entry to those who do not wish to return, and Sweden does not have an agreement or memorandum of understanding with the Somali authorities or de facto authorities with regard to return: interview with the SMB of 29 November 2010.

⁵¹³ According to the Dutch Repatriation and Departure Service (R&DS) of the Ministry of Interior only one person was forcibly removed to Somalia in 2010: information provided on 8 March 2011. According to the R&DS, there are no available statistics regarding the number of Somalis who have exhausted all legal remedies and remain in the Netherlands pending forcible or voluntary return: information provided on 8 March 2011. According to UKBA just one or two persons were forcibly returned to Somalia in the first six months of 2010: information provided by UKBA on 1 December 2010.

Although the exact figures are not known, many Afghans, Iraqis and Somalis remain in the EU without a legal status after having received a final rejection of their application for international protection. This situation is considered by some stakeholders as indicative of a protection gap. Equally, the enforced return of persons to central Iraq and southern and central Somalia, contrary to UNHCR advice, was considered by stakeholders to be indicative of a protection gap.

10. CONCLUSIONS AND RECOMMENDATIONS: HAS THE QUALIFICATION DIRECTIVE ACHIEVED ITS PURPOSE? WHAT MORE NEEDS TO BE DONE?



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The broad objective of this research was to assess the extent to which implementation of the EU Qualification Directive delivers international protection to persons fleeing indiscriminate violence, and to ascertain whether a protection gap exists.

The primary focus of this research was the application by EU Member States of Article 15 (c) of the Qualification Directive. However, the research also revealed some state practice that appears inappropriately to deny recognition of refugee status to persons fleeing situations of conflict.

Despite its limited scope, the research has clearly demonstrated that the asylum authorities of the six Member States studied do not take a consistent approach to the implementation of Article 15(c), nor indeed to the other applicable international and EU norms, when faced with asylum applications from

persons who have fled situations of indiscriminate violence. Indeed, in some Member States, Article 15(c) appears to be an empty shell, only very rarely delivering international protection to persons fleeing indiscriminate violence.

In other words, the Qualification Directive has not achieved its objective of ensuring that Member States apply common criteria for the identification of persons in need of international protection.⁵¹⁴

This is clearly evidenced by the variations in grants of international protection at first instance to Afghan, Iraqi and Somali asylum-seekers. These fluctuated widely in 2010 across the six Member States covered in this research. In 2010, decisions to grant international protection to Afghans ranged from a low of 9.7 percent in the UK to a high of 62.4 percent in Belgium. With regard to first instance decisions relating to Iraq, just 10.9 percent of decisions delivered international protection in the UK whereas this figure was 78.5 percent in Belgium. With regard to Somalia, 34.3 percent of decisions granted international protection in the Netherlands whilst this figure was 89.4 percent in Germany.

While the evidence that the Qualification Directive is not applied in a consistent manner is irrefutable, the situation with respect to the existence of protection gaps is less clear. Not surprisingly, all the determining authorities interviewed for this study were of the view that there is no protection gap with respect to persons fleeing situations of indiscriminate violence. UNHCR and many non-governmental stakeholders disagree, for reasons explained further below.

Although all persons interviewed for this study were of the view that the current international and EU normative framework is broadly satisfactory and is capable of delivering international protection to all those who need it, in reality protection gaps do emerge from the inconsistent application of the Qualification Directive. In some instances, these gaps are filled by national forms of complementary protection, but in others they are not filled at all.

It is ironic that Article 15 (c) was, *inter alia*, intended to provide EU-wide codification of the best of Member States' prior national practices with respect to persons fleeing indiscriminate violence.⁵¹⁵ In Belgium, for example, which had no previous national complementary protection status, implementation of the Qualification Directive has strengthened the national normative framework and delivered international protection to greater numbers of persons in need. In other Member States, however, it appears that some applicants are now denied subsidiary protection under Article 15 (c) when they would have qualified for protection in the past in accordance with national legislation that inspired the adoption of Article 15 (c).

⁵¹⁴ Qualification Directive, Recital 6.

⁵¹⁵ European Commission, COM (2001) 510 final.

UNHCR sets out below nine recommendations, which, if followed, could help to address the inconsistent practice documented in this research.

RECOMMENDATION 1: REAFFIRM THE PRIMACY OF THE 1951 CONVENTION

The research revealed wide divergence in rates of recognition (at first instance) of refugee status under the 1951 Convention in the six countries studied. For Afghans, this ranged from 5.9 percent to 35.6 percent; for Iraqis from 5.9 percent to 55.8 percent; and for Somalis from 1.8 percent to 74.3 percent. UNHCR is concerned that there are persons who meet the 1951 Convention criteria but who, because of restrictive interpretations as well as inappropriate evidentiary requirements, are not recognized by States as refugees under the 1951 Convention. The protection of many persons fleeing conflict situations can and should be assured through proper application of the 1951 Convention and the 1967 Protocol, particularly if it is recalled that the 1951 Convention ground must be a relevant contributing factor to the well-founded fear of persecution, but need not be shown to be the sole or dominant cause.⁵¹⁶

There are many personal factors or circumstances that would render an applicant eligible for refugee status under the 1951 Convention, when there is a causal nexus between the personal factor or circumstance and the risk of persecution. International and internal armed conflict is frequently rooted in ethnic, religious or political differences, and violence is often used as an instrument of persecution. Personal factors or circumstances related to race, religion, nationality, political opinion or particular social group are grounds for recognition of refugee status and should only be considered in the context of Article 15 (a), (b) or (c) of the Qualification Directive if the applicant has been determined not to qualify for refugee status.⁵¹⁷

UNHCR urges Member States to interpret the terms of the 1951 Convention inclusively, taking into account the changing nature of armed conflict, evolving international human rights norms,⁵¹⁸ and, in particular, evolving approaches to the concept of “*particular social group*” contained Article 1 A 2 of the 1951 Convention. In this connection, it is important to recall that the criteria for “*particular social group*” as set out in Article 10 (1) (d) QD are not exhaustive, and, if protection gaps are to be avoided, should not be applied cumulatively.⁵¹⁹

For the protection of persons fleeing conflict situations, it is relevant to highlight the fact that persons exercising a particular occupation may indeed be considered members of a “*particular social group*.” Similarly, women may properly fall within the ambit of a “*particular social group*” as a social subset defined by innate and immutable characteristics.⁵²⁰ At the same time, it is important to be aware that in many gender-related claims, the persecution feared could be for one, or more, of the 1951 Convention grounds. Furthermore,

⁵¹⁶ UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, p.7.

⁵¹⁷ This view was shared by Member States in drafting the Qualification Directive as indicated by Recital 24 which states that subsidiary protection should be complementary and additional to the refugee protection enshrined in the 1951 Refugee Convention.

⁵¹⁸ UNHCR, *Guidelines on International Protection: Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, at: <http://www.unhcr.org/refworld/docid/3d36f23f4.html>.

⁵¹⁹ UNHCR, *UNHCR comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)* (UNHCR Comments on the Recast of the Qualification Directive), 29 July 2010, at: <http://www.unhcr.org/refworld/docid/4c503db52.html>.

⁵²⁰ UNHCR Guidelines on International Protection No. 1: Gender.

members of a particular social group may be subject to persecution for either real or ascribed characteristics.⁵²¹

In assessing the applicability of the 1951 Convention definition, it must be assessed whether state actors are both willing and able to provide accessible, effective and durable protection.⁵²² This is particularly important in the context of conflict situations. It is UNHCR's position that non-state actors should not be considered as actors of protection for the purpose of the 1951 Convention. Clans, armed groups and (international) organizations do not have the attributes of a state and do not have the same obligations under international law. In practice, this means that their ability to enforce the rule of law and provide effective protection is limited.⁵²³

RECOMMENDATION 2: ENSURE THAT ARTICLE 15 (C) IS ACCORDED A DISTINCT SCOPE OF PROTECTION BEYOND ARTICLE 3 ECHR

While there may be linkages between the situations to which they may apply, UNHCR considers that Article 15(c) should not be used to address risks which are covered by Article 15 (a) or (b). This was not the intention of the drafters and would undermine the *effet utile* of this article. The added value of Article 15 (c) lies in its ability to provide protection from serious risks which are situational.⁵²⁴ Article 15 (c) should therefore extend to risks which potentially affect groups of people. In the application of Article 15 (c), personal factors or circumstances which heighten the risk of being exposed to or impacted by indiscriminate violence should be taken into account. Examples might include persons who live or work in or near specific locations, who may be at heightened risk of the indiscriminate effects of targeted attacks; or children, the elderly, women, or persons with disability may be at increased risk in a situation of indiscriminate violence.

It seems clear that more guidance will be needed from the CJEU on the relevance of individual factors and circumstances in the interpretation of Article 15 (c), and the meaning of the term “*exceptional*” as used by that Court.

RECOMMENDATION 3: INTERPRET THE TERMS OF ARTICLE 15 (C) IN LINE WITH THE OBJECT AND PURPOSE OF THIS PROVISION

The research revealed that the terms of Article 15 (c) were frequently interpreted in a restrictive and extremely technical manner. One of the reasons for this appears to be that States fear creating a “*pull factor*”. The result, however, is that the same people the international community seeks to protect and assist when they flee to countries in their region of origin are regularly found not to be in need of protection when they

⁵²¹ UNHCR, Guidelines on International Protection: Membership of a particular social group.

⁵²² This reflects CJEU case law, placing emphasis on the durability of protection and that “*factors which formed the basis of the refugee’s fear of persecution may be regarded as having been permanently eradicated.*” See *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Union: European Court of Justice, 2 March 2010, at: <http://www.unhcr.org/refworld/docid/4b8e6ea22.html>.

⁵²³ UNHCR Comments on the Recast of the Qualification Directive.

⁵²⁴ UNHCR Statement on Subsidiary Protection. See also, Submissions by UNHCR to UK Court of Appeal in *QD (Iraq) v Secretary of State for the Home Department*, 27 May 2009, paragraph 31.

reach Europe. UNHCR reiterates the need for States to take a humanitarian and protection-oriented approach to the interpretation of Article 15 (c), in line with its object and purpose.

It is UNHCR's position that the term "*civilian*" should not serve to exclude former combatants who can demonstrate that they have renounced military activities. The fact that an individual was a combatant in the past does not necessarily exclude him or her from international protection if he or she has genuinely and permanently renounced military activities.⁵²⁵ The criteria for exclusion from refugee status or complementary forms of protection speak to the nature of acts committed by the individual and his or her responsibility for such acts.

UNHCR understands the term "*indiscriminate*" to encompass acts of violence not targeted at a specific object or individual, as well as acts of violence which are targeted at a specific object or individual but the effects of which may harm others.

States should recognize that, for the purposes of Article 15 (c), indiscriminate violence need not be perpetrated by parties to the conflict. Where armed conflict leads to a breakdown in law and order, individuals may be entitled to protection under Article 15 (c) because the threat to their life or person arises by reason of indiscriminate violence, irrespective of whether active hostilities are taking place in that precise area at that precise time.⁵²⁶ From the perspective of the individual, and following the object and purpose of subsidiary protection, it does not matter whether the risk of serious harm arises from acts of the state, insurgents or others.⁵²⁷ It would be contrary to the object and purpose of Article 15 (c) to deny protection with reference to the motives of the actors committing the violence.⁵²⁸

UNHCR considers that the term "*international or internal armed conflict*" in Article 15 (c) must be given a broad autonomous meaning, reflecting the object and purpose of Article 15 (c) and the subsidiary protection regime generally, to protect persons from a risk of serious harm if returned to their country of origin or residence.⁵²⁹ It is therefore important that the requirements for an "*international or internal armed conflict*" are not set too high.⁵³⁰ Persons may face a real risk of serious harm due to indiscriminate violence regardless of whether the context is classified as "*armed conflict*."⁵³¹

It is worth recalling that the Temporary Protection Directive applies to persons who have fled "*armed conflict or endemic violence*" and persons at serious risk of "*systemic and generalised violations*" of their human rights.⁵³² The Qualification Directive was intended to provide protection to persons fleeing situations similar to those covered by the Temporary Protection Directive, but on an individual basis.⁵³³ UNHCR considers that a persistent violent conflict or insurgency which is of unpredictable duration and is of an intensity which gives rise to a real risk of a threat of serious harm should fall within the scope of Article 15 (c).⁵³⁴

⁵²⁵ UNHCR Statement on Subsidiary Protection.

⁵²⁶ Submission by UNHCR to the UK Upper Tribunal in *HM and Others (Article 15 (c)) Iraq CG* [2010] UKUT 331 (IAC) 22 September 2010.

⁵²⁷ UNHCR, *QD (Iraq) v. Secretary of State for the Home Department - Submissions by UNHCR*, 31 May 2009, paragraph 45.5, at: <http://www.unhcr.org/refworld/docid/4a6464e72.html>.

⁵²⁸ *Ibid.*, paragraph 45.7.

⁵²⁹ See, for example, UNHCR Annotated Comments on the Qualification Directive, p.33: "*Persons fleeing indiscriminate violence and gross human rights violations more generally would, however, similarly be in need of international protection. [UNHCR therefore] hopes that States will recognize the need to grant protection broadly in transposing and applying this provision.*"

⁵³⁰ UNHCR, *QD (Iraq) v. Secretary of State for the Home Department - Submissions by UNHCR*, 31 May 2009, paragraph 37.2.

⁵³¹ *Ibid.*, paragraph 37.1.

⁵³² Temporary Protection Directive, Article 2 (c) (i).

⁵³³ European Commission, COM (2001) 510 final, p. 26.

⁵³⁴ UNHCR, *QD (Iraq) v. Secretary of State for the Home Department - Submissions by UNHCR*, 31 May 2009, paragraph 39.

UNHCR urges caution in drawing upon international humanitarian law and international criminal law to interpret the scope of Article 15 (c).⁵³⁵ IHL and ICL constitute separate and different spheres of law with their own object and purpose. The Qualification Directive has its own object and purpose and therefore it is not surprising that the same or similar terms should be given a different meaning under Article 15 (c) than in IHL or ICL.⁵³⁶ Moreover, it is recognized that there is no single authoritative definition of international or internal armed conflict in international law. International humanitarian law⁵³⁷ and international criminal law⁵³⁸ offer a variety of definitions for their own objects and purposes. UNHCR urges that “*international or internal armed conflict*” be interpreted broadly, in order to achieve the objective of securing protection to persons in need of international protection who do not meet the criteria of the 1951 Convention.⁵³⁹

RECOMMENDATION 4: ADDRESS THE DIFFERENT APPROACHES TAKEN BY STATES TO THE LEVEL OF VIOLENCE REQUIRED TO TRIGGER APPLICATION OF ARTICLE 15 (C)

Overall, the research revealed that the bar for the application of Article 15 (c) is set very high with regard to whether the level of violence in the country of origin is such as to trigger application of Article 15 (c). It is fair to ask whether these demands are undermining the object and purpose of Article 15 (c).

States should conduct a pragmatic, holistic and forward-looking assessment of the violence in the country of origin, including both quantitative and qualitative elements. The assessment of the level of violence and of individual risk cannot be reduced to a mathematical calculation of probability. The assessment needs to encompass not only the number of security incidents and casualties – which include, in addition to deaths and injuries, other threats to the person - but also the general security environment in the country, population displacement and the impact of the violence on the overall humanitarian situation.⁵⁴⁰

⁵³⁵ Ibid., paragraph 18.

⁵³⁶ Ibid., paragraph 20.3.

⁵³⁷ IHL offers definitions of international and non-international armed conflicts. With regard to the latter, see, for example, Common Article 3 of the 1949 Geneva Conventions and Article 1 (1) of Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts states that internal armed conflicts “*must take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [Protocol II]*” The ICRC has proposed the following definition as reflecting strong prevailing legal opinion: “*1. International armed conflicts exist whenever there is resort to armed force between two or more States. 2. Non-international armed conflicts are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups arising on the territory of a State [party to the Geneva Conventions]. The armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organisation.*” See ‘How is the Term ‘Armed Conflict’ Defined in International Humanitarian Law? Opinion Paper of the International Committee of the Red Cross (ICRC), March 2008.

⁵³⁸ See, for example, the deliberations of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the case of Tadic (IT-94-1) in which the ICTY determined the existence of a non-international armed conflict “*whenever there is [...] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State*”.

⁵³⁹ UNHCR, QD (*Iraq*) v. *Secretary of State for the Home Department - Submissions by UNHCR*, 31 May 2009, paragraph 21.1.

⁵⁴⁰ Ibid., paragraph 58. See, also for example, UNHCR Afghanistan Eligibility Guidelines. See also UNHCR Statement on Subsidiary Protection.

In the absence of post-return monitoring, UNHCR cautions against using the execution of enforced returns by another State or States as an indicator that the level of violence is not high enough to pose a risk in the sense of Article 15(c).⁵⁴¹ Similarly, UNHCR's facilitation or promotion of voluntary return of internally displaced persons or refugees will not necessarily be indicative of assurance of safety generally from persecution or harm.

RECOMMENDATION 5: ADDRESS THE DIFFERENT APPROACHES TAKEN BY STATES TO THE INTERPRETATION OF WHAT CONSTITUTES A “REAL RISK” OF SERIOUS HARM

The Directive requires a “*real risk*” of serious harm. The notion of “*real risk*” is taken from the case law on Article 3 of the ECHR and should not be interpreted as imposing any higher test or burden on individuals claiming subsidiary protection status under Article 15 QD.⁵⁴² The requirement that the risk of harm must be “*real*” simply makes clear that the responsibility of Member States will not be engaged by risks that are fanciful or implausible or so remote as to be unreal.⁵⁴³ The risk of serious harm does not have to meet the threshold of being highly probable.⁵⁴⁴

RECOMMENDATION 6: ENSURE PROPER APPLICATION OF THE CONCEPT OF “INTERNAL PROTECTION”⁵⁴⁵

Divergent assessments of whether an “*internal protection alternative*” is available are frequently at the root of different outcomes of applications for international protection in the Member States studied. UNHCR recalls that the need for an assessment of internal protection arises only when the fear of persecution or serious harm is clearly limited to a specific part of the country, outside of which the feared harm cannot materialize. This will normally exclude its application in cases where the feared harm emanates from the State or State agents. It is however not enough to assess the absence of a risk of persecution or serious harm, though that is a crucial element. The proposed location must also be practically, legally and safely accessible for the individual, and it must be reasonable to expect him or her to stay there. The assessment of accessibility and of reasonableness is particularly important in the context of conflict situations. More careful attention to the proper application of the “*internal protection*” concept could help to limit the divergent outcomes observed in the course of this research.

⁵⁴¹ Of interest is a decision of the Belgian appeal instance CALL 23 October 2008, no 17522 in which it considered that the return of Burundi refugees from Tanzania to Burundi was taking place in a context of coercion and that “*the repatriation of refugees in such a context, cannot, as such, lead to conclude that there is an absence of indiscriminate violence in the country [Burundi].*”

⁵⁴² UNHCR, *QD (Iraq) v. Secretary of State for the Home Department - Submissions by UNHCR*, 31 May 2009.

⁵⁴³ See, for example, *F. v. The United Kingdom*, 17341/03, Council of Europe: European Court of Human Rights, 22 June 2004, at: <http://www.unhcr.org/refworld/docid/414d874b4.html>, in which the ECtHR has spoken of “*tenuous*” risks of ill-treatment as insufficient to satisfy the test.

⁵⁴⁴ It is also relevant to note that UNCAT has said that under Article 3 of the Convention against Torture, “*the risk of torture must be assessed on grounds that go beyond mere theory and suspicion. However, the risk does not have to meet the test of being highly probable*”: Germany – CAT/C/32/D/214/2002 [2004] UNCAT 7 (17 May 2004). Noted in UNHCR, *QD (Iraq) v. Secretary of State for the Home Department - Submissions by UNHCR*, 31 May 2009.

⁵⁴⁵ A detailed analytical framework for assessing the availability of an internal protection alternative is contained in UNHCR Guidelines on International Protection No. 4: IFA, paragraphs 33-35.

RECOMMENDATION 7: ENSURE THAT PROTECTION IS NOT DENIED BECAUSE OF FLAWED CREDIBILITY ASSESSMENTS

At numerous points in the course of the research, it became evident that the assessment of credibility is a particular challenge, and that lack of credibility is frequently cited as the reason for denying that the individual has a well-founded fear of persecution or faces a real risk of serious harm.

Credibility is established when the applicant presents a claim that is generally coherent and plausible. Once the decision-maker is satisfied with the applicant's general credibility, the latter should be given the benefit of the doubt as regards those statements for which evidentiary proof is lacking.⁵⁴⁶

It is clear that persons fleeing armed conflict and situations of indiscriminate violence are very likely to encounter significant obstacles in obtaining corroborative evidence and providing evidence themselves. Moreover, any credibility assessment should make allowance for the age, gender, social status, education and individual circumstances of the applicant. Inability to remember all dates or details, minor inconsistencies, insubstantial vagueness or incorrect statements which are not material to the determinative issues, should not be seen as decisive factors in determining credibility.⁵⁴⁷

RECOMMENDATION 8: GIVE MORE ATTENTION TO THE APPROPRIATE USE OF COUNTRY OF ORIGIN INFORMATION

A thorough analysis of the use of country of origin information was beyond the scope of this research, although it highlighted clearly the importance of reliable, objective, up-to-date and accessible country of origin information.⁵⁴⁸ Beyond that, however, UNHCR observed the need for more consistency in the interpretation of the available information, and in the conclusions drawn from it. The research revealed that determining authorities reach quite different conclusions based on the same sources of information. This has correctly been identified as a priority area for the European Asylum Support Office to address.

⁵⁴⁶ UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, p.3. See also, UNHCR, Note on Burden and Standard of Proof in Refugee Claims, 16 December 1998, at: <http://www.unhcr.org/refworld/docid/3ae6b3338.html>, for an overview of UNHCR's position generally.

⁵⁴⁷ UNHCR, *The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, p.3.

⁵⁴⁸ UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Detailed Research on Key Asylum Procedures Directive Provisions*, March 2010, at: <http://www.unhcr.org/refworld/docid/4c63e52d2.html>.

RECOMMENDATION 9: STRENGTHEN TRAINING OF ASYLUM DECISION-MAKERS, IN PARTICULAR ON SUBSIDIARY PROTECTION

Although training of decision-makers was beyond the scope of this research, it is highlighted here because many interviewees pointed to shortcomings in training and guidance for decision-makers. UNHCR encourages the competent authorities and the newly established European Asylum Support Office to devote reinforced attention to training in general and to guidance with respect to subsidiary protection specifically, including its constituent legal elements.⁵⁴⁹

CLOSING REMARKS

In UNHCR's view, Article 15(c) of the Qualification Directive offers scope to ensure that people fleeing a real risk of serious harm in situations of indiscriminate violence, who do not qualify for recognition as refugees in the sense of the 1951 Convention, receive protection. The terms of Article 15(c) should be interpreted in a broader and less restrictive fashion than currently observed in some Member States, to ensure it does not become an empty shell. A number of steps can be taken to improve and strengthen practice in its application, as set out in the nine recommendations above, to ensure it fulfils its object and purpose. This would enable the EU, in line with its commitment in the Charter of Fundamental Rights of the European Union⁵⁵⁰ and in the Treaty on the Functioning of the European Union, to continue to set a positive example, consistent with its tradition of human rights and refugee protection. It would also help to fill a significant protection gap remaining in the European asylum framework.

⁵⁴⁹ See, for example, the UKBA Interim Asylum Instruction on Humanitarian Protection: Indiscriminate Violence, September 2010, paragraph D.8. which lists personal factors that might enhance the risk of serious harm in situations of indiscriminate violence but explicitly warns decision-makers that “[c]are should be taken with such groups in case refugee status is more appropriate than humanitarian protection [the UK subsidiary protection status]”.

⁵⁵⁰ European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

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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

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular points 1(c), 2(a) and 3(a) of Article 63 thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinion of the European Parliament ⁽²⁾,

Having regard to the opinion of the European Economic and Social Committee ⁽³⁾,

Having regard to the opinion of the Committee of the Regions ⁽⁴⁾,

Whereas:

- (1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.
- (2) The European Council at its special meeting in Tampere on 15 and 16 October 1999 agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention relating to the Status of Refugees of 28 July 1951 (Geneva Convention), as supplemented by the New York Protocol of 31 January 1967 (Protocol), thus affirming the principle of non-refoulement and ensuring that nobody is sent back to persecution.
- (3) The Geneva Convention and Protocol provide the cornerstone of the international legal regime for the protection of refugees.
- (4) The Tampere conclusions provide that a Common European Asylum System should include, in the short term, the approximation of rules on the recognition of refugees and the content of refugee status.
- (5) The Tampere conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an

appropriate status to any person in need of such protection.

- (6) 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.
- (7) The approximation of rules on the recognition and content of refugee and subsidiary protection status should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks.
- (8) It is in the very nature of minimum standards that Member States should have the power to introduce or maintain more favourable provisions for third country nationals or stateless persons who request international protection from a Member State, where such a request is understood to be on the grounds that the person concerned is either a refugee within the meaning of Article 1(A) of the Geneva Convention, or a person who otherwise needs international protection.
- (9) Those third country nationals or stateless persons, who are allowed to remain in the territories of the Member States for reasons not due to a need for international protection but on a discretionary basis on compassionate or humanitarian grounds, fall outside the scope of this Directive.
- (10) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular this Directive seeks to ensure full respect for human dignity and the right to asylum of applicants for asylum and their accompanying family members.
- (11) With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party and which prohibit discrimination.

⁽¹⁾ OJ C 51 E, 26.2.2002, p. 325.

⁽²⁾ OJ C 300 E, 11.12.2003, p. 25.

⁽³⁾ OJ C 221, 17.9.2002, p. 43.

⁽⁴⁾ OJ C 278, 14.11.2002, p. 44.

- (12) The 'best interests of the child' should be a primary consideration of Member States when implementing this Directive.
- (13) This Directive is without prejudice to the Protocol on asylum for nationals of Member States of the European Union as annexed to the Treaty Establishing the European Community.
- (14) The recognition of refugee status is a declaratory act.
- (15) Consultations with the United Nations High Commissioner for Refugees may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention.
- (16) Minimum standards for the definition and content of refugee status should be laid down to guide the competent national bodies of Member States in the application of the Geneva Convention.
- (17) It is necessary to introduce common criteria for recognising applicants for asylum as refugees within the meaning of Article 1 of the Geneva Convention.
- (18) In particular, it is necessary to introduce common concepts of protection needs arising *sur place*; sources of harm and protection; internal protection; and persecution, including the reasons for persecution.
- (19) Protection can be provided not only by the State but also by parties or organisations, including international organisations, meeting the conditions of this Directive, which control a region or a larger area within the territory of the State.
- (20) It is necessary, when assessing applications from minors for international protection, that Member States should have regard to child-specific forms of persecution.
- (21) It is equally necessary to introduce a common concept of the persecution ground 'membership of a particular social group'.
- (22) Acts contrary to the purposes and principles of the United Nations are set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations and are, amongst others, embodied in the United Nations Resolutions relating to measures combating terrorism, which declare that 'acts, methods and practices of terrorism are contrary to the purposes and principles of the United Nations' and that 'knowingly financing, planning and inciting terrorist acts are also contrary to the purposes and principles of the United Nations'.
- (23) As referred to in Article 14, 'status' can also include refugee status.
- (24) Minimum standards for the definition and content of subsidiary protection status should also be laid down. Subsidiary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention.
- (25) It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognised as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.
- (26) Risks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.
- (27) Family members, merely due to their relation to the refugee, will normally be vulnerable to acts of persecution in such a manner that could be the basis for refugee status.
- (28) The notion of national security and public order also covers cases in which a third country national belongs to an association which supports international terrorism or supports such an association.
- (29) While the benefits provided to family members of beneficiaries of subsidiary protection status do not necessarily have to be the same as those provided to the qualifying beneficiary, they need to be fair in comparison to those enjoyed by beneficiaries of subsidiary protection status.
- (30) Within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, health care and access to integration facilities requires the prior issue of a residence permit.
- (31) This Directive does not apply to financial benefits from the Member States which are granted to promote education and training.
- (32) The practical difficulties encountered by beneficiaries of refugee or subsidiary protection status concerning the authentication of their foreign diplomas, certificates or other evidence of formal qualification should be taken into account.
- (33) Especially to avoid social hardship, it is appropriate, for beneficiaries of refugee or subsidiary protection status, to provide without discrimination in the context of social assistance the adequate social welfare and means of subsistence.

(34) With regard to social assistance and health care, the modalities and detail of the provision of core benefits to beneficiaries of subsidiary protection status should be determined by national law. The possibility of limiting the benefits for beneficiaries of subsidiary protection status to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy and parental assistance, in so far as they are granted to nationals according to the legislation of the Member State concerned.

(35) Access to health care, including both physical and mental health care, should be ensured to beneficiaries of refugee or subsidiary protection status.

(36) The implementation of this Directive should be evaluated at regular intervals, taking into consideration in particular the evolution of the international obligations of Member States regarding non-refoulement, the evolution of the labour markets in the Member States as well as the development of common basic principles for integration.

(37) Since the objectives of the proposed Directive, namely to establish minimum standards for the granting of international protection to third country nationals and stateless persons by Member States and the content of the protection granted, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the Directive, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(38) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom has notified, by letter of 28 January 2002, its wish to take part in the adoption and application of this Directive.

(39) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified, by letter of 13 February 2002, its wish to take part in the adoption and application of this Directive.

(40) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the

adoption of this Directive and is not bound by it or subject to its application,

HAS ADOPTED THIS DIRECTIVE,

CHAPTER I

GENERAL PROVISIONS

Article 1

Subject matter and scope

The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

Article 2

Definitions

For the purposes of this Directive:

- (a) 'international protection' means the refugee and subsidiary protection status as defined in (d) and (f);
- (b) 'Geneva Convention' means the Convention relating to the status of refugees done at Geneva on 28 July 1951, as amended by the New York Protocol of 31 January 1967;
- (c) 'refugee' means 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;
- (d) 'refugee status' means the recognition by a Member State of a third country national or a stateless person as a refugee;
- (e) 'person eligible for subsidiary protection' means 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;

- (f) '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;
- (g) 'application for international protection' means a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status, and who does not explicitly request another kind of protection, outside the scope of this Directive, that can be applied for separately;
- (h) 'family members' means, insofar as the family already existed in the country of origin, the following members of the family of the beneficiary of refugee or subsidiary protection status who are present in the same Member State in relation to the application for international protection:
- the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens,
 - the minor children of the couple referred to in the first indent or of the beneficiary of refugee or subsidiary protection status, on condition that they are unmarried and dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;
- (i) 'unaccompanied minors' means third-country nationals or stateless persons below the age of 18, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States;
- (j) 'residence permit' means any permit or authorisation issued by the authorities of a Member State, in the form provided for under that State's legislation, allowing a third country national or stateless person to reside on its territory;
- (k) 'country of origin' means the country or countries of nationality or, for stateless persons, of former habitual residence.

Article 3

More favourable standards

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.

CHAPTER II

ASSESSMENT OF APPLICATIONS FOR INTERNATIONAL PROTECTION

Article 4

Assessment of facts and circumstances

1. Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.
2. The elements referred to in of paragraph 1 consist of the applicant's statements and all documentation at the applicants disposal regarding the applicant's age, background, including that of relevant relatives, identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes, identity and travel documents and the reasons for applying for international protection.
3. The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account:
 - (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied;
 - (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;
 - (c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;
 - (d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country;
 - (e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.

4. The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

5. Where Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when the following conditions are met:

- (a) the applicant has made a genuine effort to substantiate his application;
- (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
- (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case;
- (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate good reason for not having done so; and
- (e) the general credibility of the applicant has been established.

Article 5

International protection needs arising *sur place*

1. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.
2. A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.
3. Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin.

Article 6

Actors of persecution or serious harm

Actors of persecution or serious harm include:

- (a) the State;
- (b) parties or organisations controlling the State or a substantial part of the territory of the State;
- (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

Article 7

Actors of protection

1. Protection can be provided by:
 - (a) the State; or
 - (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State.
2. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection.
3. When assessing whether an international organisation controls a State or a substantial part of its territory and provides protection as described in paragraph 2, Member States shall take into account any guidance which may be provided in relevant Council acts.

Article 8

Internal protection

1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.
2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.

CHAPTER III

QUALIFICATION FOR BEING A REFUGEE

Article 9

Acts of persecution

1. Acts of persecution within the meaning of article 1 A of the Geneva Convention must:
 - (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).
2. Acts of persecution as qualified in paragraph 1, can, *inter alia*, take the form of:
- (a) acts of physical or mental violence, including acts of sexual violence;
- (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
- (c) prosecution or punishment, which is disproportionate or discriminatory;
- (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
- (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2);
- (f) acts of a gender-specific or child-specific nature.
3. In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.

Article 10

Reasons for persecution

1. Member States shall take the following elements into account when assessing the reasons for persecution:
- (a) the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group;
- (b) the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;
- (c) the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;
- (d) a group shall be considered to form a particular social group where in particular:
- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

— that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article;

- (e) the concept of political opinion shall in particular include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

2. When assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution.

Article 11

Cessation

1. A third country national or a stateless person shall cease to be a refugee, if he or she:
- (a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or
- (b) having lost his or her nationality, has voluntarily re-acquired it; or
- (c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or
- (d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or
- (e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality;
- (f) being a stateless person with no nationality, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence.
2. In considering points (e) and (f) of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded.

Article 12

Exclusion

1. A third country national or a stateless person is excluded from being a refugee, if:

- (a) he or she falls within the scope of Article 1 D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive;
- (b) he or she is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or rights and obligations equivalent to those.

2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

- (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;
- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations.

3. Paragraph 2 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

CHAPTER IV

REFUGEE STATUS

Article 13

Granting of refugee status

Member States shall grant refugee status to a third country national or a stateless person, who qualifies as a refugee in accordance with Chapters II and III.

Article 14

Revocation of, ending of or refusal to renew refugee status

1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be a refugee in accordance with Article 11.

2. Without prejudice to the duty of the refugee in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted refugee status, shall on an individual basis demonstrate that the person concerned has ceased to be or has never been a refugee in accordance with paragraph 1 of this Article.

3. Member States shall revoke, end or refuse to renew the refugee status of a third country national or a stateless person, if, after he or she has been granted refugee status, it is established by the Member State concerned that:

- (a) he or she should have been or is excluded from being a refugee in accordance with Article 12;
- (b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of refugee status.

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.

6. Persons to whom paragraphs 4 or 5 apply are entitled to rights set out in or similar to those set out in Articles 3, 4, 16, 22, 31 and 32 and 33 of the Geneva Convention in so far as they are present in the Member State.

CHAPTER V

QUALIFICATION FOR SUBSIDIARY PROTECTION*Article 15***Serious harm**

Serious harm consists of:

- (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.

*Article 16***Cessation**

1. A third country national or a stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required.

2. In applying paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm.

*Article 17***Exclusion**

1. A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:

- (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- (b) he or she has committed a serious crime;
- (c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;
- (d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.

2. Paragraph 1 applies to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

3. Member States may exclude a third country national or a stateless person from being eligible for subsidiary protection, if he or she prior to his or her admission to the Member State has committed one or more crimes, outside the scope of paragraph 1, which would be punishable by imprisonment, had they been committed in the Member State concerned, and if he or she left his or her country of origin solely in order to avoid sanctions resulting from these crimes.

CHAPTER VI

SUBSIDIARY PROTECTION STATUS*Article 18***Granting of subsidiary protection status**

Member States shall grant subsidiary protection status to a third country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V.

*Article 19***Revocation of, ending of or refusal to renew subsidiary protection status**

1. Concerning applications for international protection filed after the entry into force of this Directive, Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if he or she has ceased to be eligible for subsidiary protection in accordance with Article 16.

2. Member States may revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person granted by a governmental, administrative, judicial or quasi-judicial body, if after having been granted subsidiary protection status, he or she should have been excluded from being eligible for subsidiary protection in accordance with Article 17(3).

3. Member States shall revoke, end or refuse to renew the subsidiary protection status of a third country national or a stateless person, if:

- (a) he or she, after having been granted subsidiary protection status, should have been or is excluded from being eligible for subsidiary protection in accordance with Article 17(1) and (2);
- (b) his or her misrepresentation or omission of facts, including the use of false documents, were decisive for the granting of subsidiary protection status.

4. Without prejudice to the duty of the third country national or stateless person in accordance with Article 4(1) to disclose all relevant facts and provide all relevant documentation at his/her disposal, the Member State, which has granted the subsidiary protection status, shall on an individual basis demonstrate that the person concerned has ceased to be or is not eligible for subsidiary protection in accordance with paragraphs 1, 2 and 3 of this Article.

CHAPTER VII

CONTENT OF INTERNATIONAL PROTECTION

Article 20

General rules

1. This Chapter shall be without prejudice to the rights laid down in the Geneva Convention.
2. This Chapter shall apply both to refugees and persons eligible for subsidiary protection unless otherwise indicated.
3. When implementing this Chapter, Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.
4. Paragraph 3 shall apply only to persons found to have special needs after an individual evaluation of their situation.
5. The best interest of the child shall be a primary consideration for Member States when implementing the provisions of this Chapter that involve minors.
6. Within the limits set out by the Geneva Convention, Member States may reduce the benefits of this Chapter, granted to a refugee whose refugee status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a refugee.
7. Within the limits set out by international obligations of Member States, Member States may reduce the benefits of this Chapter, granted to a person eligible for subsidiary protection, whose subsidiary protection status has been obtained on the basis of activities engaged in for the sole or main purpose of creating the necessary conditions for being recognised as a person eligible for subsidiary protection.

Article 21

Protection from refoulement

1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.

2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refuse 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.

3. Member States may revoke, end or refuse to renew or to grant the residence permit of (or to) a refugee to whom paragraph 2 applies.

Article 22

Information

Member States shall provide persons recognised as being in need of international protection, as soon as possible after the respective protection status has been granted, with access to information, in a language likely to be understood by them, on the rights and obligations relating to that status.

Article 23

Maintaining family unity

1. Member States shall ensure that family unity can be maintained.
2. Member States shall ensure that family members of the beneficiary of refugee or subsidiary protection status, who do not individually qualify for such status, are entitled to claim the benefits referred to in Articles 24 to 34, in accordance with national procedures and as far as it is compatible with the personal legal status of the family member.

In so far as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits.

In these cases, Member States shall ensure that any benefits provided guarantee an adequate standard of living.

3. Paragraphs 1 and 2 are not applicable where the family member is or would be excluded from refugee or subsidiary protection status pursuant to Chapters III and V.

4. Notwithstanding paragraphs 1 and 2, Member States may refuse, reduce or withdraw the benefits referred therein for reasons of national security or public order.

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

Article 24

Residence permits

1. As soon as possible after their status has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require, and without prejudice to Article 21(3).

Without prejudice to Article 23(1), the residence permit to be issued to the family members of the beneficiaries of refugee status may be valid for less than three years and renewable.

2. As soon as possible after the status has been granted, Member States shall issue to beneficiaries of subsidiary protection status a residence permit which must be valid for at least one year and renewable, unless compelling reasons of national security or public order otherwise require.

Article 25

Travel document

1. Member States shall issue to beneficiaries of refugee status travel documents in the form set out in the Schedule to the Geneva Convention, for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require.

2. Member States shall issue to beneficiaries of subsidiary protection status who are unable to obtain a national passport, documents which enable them to travel, at least when serious humanitarian reasons arise that require their presence in another State, unless compelling reasons of national security or public order otherwise require.

Article 26

Access to employment

1. Member States shall authorise beneficiaries of refugee status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after the refugee status has been granted.

2. Member States shall ensure that activities such as employment-related education opportunities for adults, vocational training and practical workplace experience are offered to bene-

ficiaries of refugee status, under equivalent conditions as nationals.

3. Member States shall authorise beneficiaries of subsidiary protection status to engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service immediately after the subsidiary protection status has been granted. The situation of the labour market in the Member States may be taken into account, including for possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law. Member States shall ensure that the beneficiary of subsidiary protection status has access to a post for which the beneficiary has received an offer in accordance with national rules on prioritisation in the labour market.

4. Member States shall ensure that beneficiaries of subsidiary protection status have access to activities such as employment-related education opportunities for adults, vocational training and practical workplace experience, under conditions to be decided by the Member States.

5. The law in force in the Member States applicable to remuneration, access to social security systems relating to employed or self-employed activities and other conditions of employment shall apply.

Article 27

Access to education

1. Member States shall grant full access to the education system to all minors granted refugee or subsidiary protection status, under the same conditions as nationals.

2. Member States shall allow adults granted refugee or subsidiary protection status access to the general education system, further training or retraining, under the same conditions as third country nationals legally resident.

3. Member States shall ensure equal treatment between beneficiaries of refugee or subsidiary protection status and nationals in the context of the existing recognition procedures for foreign diplomas, certificates and other evidence of formal qualifications.

Article 28

Social welfare

1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status receive, in the Member State that has granted such statuses, the necessary social assistance, as provided to nationals of that Member State.

2. By exception to the general rule laid down in paragraph 1, Member States may limit social assistance granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals.

Article 29

Health care

1. Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to health care under the same eligibility conditions as nationals of the Member State that has granted such statuses.

2. By exception to the general rule laid down in paragraph 1, Member States may limit health care granted to beneficiaries of subsidiary protection to core benefits which will then be provided at the same levels and under the same eligibility conditions as nationals.

3. Member States shall provide, under the same eligibility conditions as nationals of the Member State that has granted the status, adequate health care to beneficiaries of refugee or subsidiary protection status who have special needs, such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict.

Article 30

Unaccompanied minors

1. As soon as possible after the granting of refugee or subsidiary protection status Member States shall take the necessary measures, to ensure the representation of unaccompanied minors by legal guardianship or, where necessary, by an organisation responsible for the care and well-being of minors, or by any other appropriate representation including that based on legislation or Court order.

2. Member States shall ensure that the minor's needs are duly met in the implementation of this Directive by the appointed guardian or representative. The appropriate authorities shall make regular assessments.

3. Member States shall ensure that unaccompanied minors are placed either:

- (a) with adult relatives; or
- (b) with a foster family; or
- (c) in centres specialised in accommodation for minors; or
- (d) in other accommodation suitable for minors.

In this context, the views of the child shall be taken into account in accordance with his or her age and degree of maturity.

4. As far as possible, siblings shall be kept together, taking into account the best interests of the minor concerned and, in particular, his or her age and degree of maturity. Changes of residence of unaccompanied minors shall be limited to a minimum.

5. Member States, protecting the unaccompanied minor's best interests, shall endeavour to trace the members of the minor's family as soon as possible. In cases where there may be a threat to the life or integrity of the minor or his or her close relatives, particularly if they have remained in the country of origin, care must be taken to ensure that the collection, processing and circulation of information concerning those persons is undertaken on a confidential basis.

6. Those working with unaccompanied minors shall have had or receive appropriate training concerning their needs.

Article 31

Access to accommodation

The Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to accommodation under equivalent conditions as other third country nationals legally resident in their territories.

Article 32

Freedom of movement within the Member State

Member States shall allow freedom of movement within their territory to beneficiaries of refugee or subsidiary protection status, under the same conditions and restrictions as those provided for other third country nationals legally resident in their territories.

Article 33

Access to integration facilities

1. In order to facilitate the integration of refugees into society, Member States shall make provision for integration programmes which they consider to be appropriate or create pre-conditions which guarantee access to such programmes.

2. Where it is considered appropriate by Member States, beneficiaries of subsidiary protection status shall be granted access to integration programmes.

Article 34

Repatriation

Member States may provide assistance to beneficiaries of refugee or subsidiary protection status who wish to repatriate.

CHAPTER VIII

ADMINISTRATIVE COOPERATION*Article 35***Cooperation**

Member States shall each appoint a national contact point, whose address they shall communicate to the Commission, which shall communicate it to the other Member States.

Member States shall, in liaison with the Commission, take all appropriate measures to establish direct cooperation and an exchange of information between the competent authorities.

*Article 36***Staff**

Member States shall ensure that authorities and other organisations implementing this Directive have received the necessary training and shall be bound by the confidentiality principle, as defined in the national law, in relation to any information they obtain in the course of their work.

CHAPTER IX

FINAL PROVISIONS*Article 37***Reports**

1. 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. Member States shall send the Commission all the information that is appropriate for drawing up that report by 10 October 2007.

2. After presenting the report, the Commission shall report to the European Parliament and the Council on the application of this Directive at least every five years.

*Article 38***Transposition**

1. The Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 10 October 2006. They shall forthwith inform the Commission thereof.

When the Member States adopt those measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

*Article 39***Entry into force**

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 40***Addressees**

This Directive is addressed to the Member States in accordance with the Treaty establishing the European Community.

Done at Luxembourg, 29 April 2004.

For the Council

The President

M. McDOWELL

ANNEX 2: LIST OF ACRONYMS

AVRP	Assisted Voluntary Return Programme
BAMF	Federal Office for Migration and Refugees, (<i>Bundesamt für Migration and Flüchtlinge</i>), Germany
CALL	Council for Aliens' Law Litigation, Belgium
CEDOCA	Documentation Centre of the CGRS, Belgium
Ceseda	Code of entry and residence of Foreigners and of Asylum (<i>Code de l'entrée et du séjour des étrangers et du droit d'asile</i>), France
CGRS	Office of the Commissioner General for Refugees and Stateless Persons, Belgium
CJEU	Court of Justice of the European Union
CNDA	Asylum Appeal Court (<i>Cour nationale du droit d'asile</i>), France
DRC	Democratic Republic of Congo
EASO	European Asylum Support Office
EC	European Community
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ELR	Exceptional Leave to Remain
EU	European Union
FAC	Federal Administrative Court, Germany
FCO	Foreign Commonwealth Office, UK
ICL	International Criminal Law
ICRC	International Committee of the Red Cross

IDP	Internally displaced person
IHL	International Humanitarian Law
IND	Immigration and Naturalisation Service, the Netherlands
IPA	Internal Protection Alternative
KRG	Kurdistan Regional Government, Iraq
MCA	Migration Court of Appeal, Sweden
MFA	Ministry of Foreign Affairs
MOI	Ministry of Interior
MOU	Memorandum of Understanding
NGO	Non Governmental Organization
OAU	Organization of African Unity (today, African Union or AU)
OFPRA	Office for the Protection of Refugees and Stateless Persons, France
OGNs	Operational Guidance Notes, UK
QD	Qualification Directive
SMB	Swedish Migration Board
TFG	Transitional Federal Government, Somalia
UKBA	UK Border Agency
UKAIT	UK Asylum and Immigration Tribunal
UNHCR	United Nations High Commissioner for Refugees

ANNEX 3: NATIONAL LEGISLATIVE PROVISIONS TRANSPOSING ARTICLE 15 QUALIFICATION DIRECTIVE

BELGIUM

Article 48/4 of the Law of 15 December 1980 on access to the territory, residence, establishment and expulsion of aliens (Aliens Law), as amended by the Law of 15 September 2006, provides that subsidiary protection is granted to a foreign national:

- (i) who is not eligible for refugee status;*
- (ii) who cannot benefit from a residence permit for medical reasons;*
- (iii) for whom there are serious grounds to assume that if he would return to his country of origin (or in the case of a stateless person, the country of habitual residence) he would run a real risk of suffering serious harm*
- (iv) and cannot or will not avail him/herself from the protection of that country, because of that risk;*
- (v) and who does not fall under the exclusion grounds as set out in art. 55/4.*

Serious harm consists of:

- (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 threat to a civilian's life or person for reason of indiscriminate violence in situations of international or internal armed conflict.*

FRANCE

Article L.712.1 Ceseda:

Subject to the provisions of Article L. 712.2 [exclusion], subsidiary protection is granted to any person who does not qualify for refugee status under the criteria defined in Article L. 711.1 and who establishes that she/he is exposed to one of the following serious threats in her/his country:

- a) death penalty;*
- b) torture or inhuman or degrading treatment or punishment ;*

c) serious, direct and individual threat to a civilian's life or person by reason of generalised violence resulting from a situation of internal or international armed conflict.

GERMANY

Act on Implementation of Residence and Asylum-Related Directives of the European Union of 19 August 2007 (Federal Law Gazette I, p. 1970) which amended the Residence Act of 30 July 2004 (Federal Law Gazette I, p. 1950). Section 60 (3) transposes Article 15 (a) QD; Section 60 (2) transposes Article 15 (b) QD; and Section 60 (7) sentence 2 transposes Article 15 (c) QD.

Section 60 (2): *“A foreigner may not be deported to a state in which a concrete danger exists of the said foreigner being subjected to torture or inhumane or degrading treatment or punishment.”*

Section 60 (3): *“A foreigner may not be deported to a state in which he or she is wanted for an offence and a danger of imposition or enforcement of the death penalty exists. In such cases, the provisions on deportation shall be applied accordingly.”*

Section 60 (7) sentence 2 and 3: *“A foreigner shall not be deported to another state in which he or she will be exposed, as a member of the civilian population, to a substantial individual danger to life or limb as a result of an international or internal armed conflict. Dangers pursuant to sentence 2 to which the population or the segment of the population to which the foreigner belongs are generally exposed shall receive due consideration in decisions pursuant to Section 60a (1), sentence 1.”⁵⁵¹*

NETHERLANDS

Article 29 (1) (b) Aliens Act 2000 applies to an alien:

Who has plausibly shown that he has well-founded reasons to assume that upon expulsion, he will face a real risk of being subjected to:

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

⁵⁵¹ Section 60a (1) on temporary suspension of deportation states in sentence 1: *“For reasons of international law or on humanitarian grounds or to safeguard the political interests of the Federal Republic of Germany, the supreme Land authority may order the deportation of foreigners from specific states or of categories of foreigners defined by any other means to be suspended in general or with regard to deportation to specific states for a maximum of six months.”* This does not constitute a ground for international or national protection but is instead a national provision which provides grounds for the temporary suspension of deportation.

SWEDEN

Aliens Act, Chapter 4, “Refugees and persons otherwise in need of protection”, Section 2 (Official translation):

In this Act, a ‘person eligible for subsidiary protection’ is an alien who in cases other than those referred to in Section 1 [refugee status] is outside the country of the alien’s nationality, because

- 1. there are substantial grounds for assuming that the alien, upon return to the country of origin, would run a risk of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment or as a civilian would run a serious and personal risk of being harmed by reason of indiscriminate violence resulting from an external or internal armed conflict, and*
- 2. the alien is unable or, because of a risk referred to in point 1, unwilling to avail himself or herself of the protection of the country of origin. The first paragraph, point 1 applies irrespective of whether it is the authorities of the country that are responsible for the alien running such a risk as is referred to there or whether these authorities cannot be assumed to offer protection against the alien being subjected to such a risk through the actions of private individuals. [...]*

Chapter 4 Section 2a:

In this Act, a ‘person otherwise in need of protection’ is an alien who in cases other than those referred to in Sections 1 [refugee status] and 2 [subsidiary protection] is outside the country of the alien’s nationality, because he or she (1) needs protection because of an external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuses.

UNITED KINGDOM

Paragraph 339C of the Immigration Rules provides:

A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

- (i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom;
- (ii) he does not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;
- (iii) substantial grounds have been shown for believing that the person concerned, if he returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail himself of the protection of that country; and
- (iv) he is not excluded from a grant of humanitarian protection.

Serious harm consists of:

- (i) the death penalty or execution;
- (ii) unlawful killing;
- (iii) torture or inhuman or degrading treatment or punishment of a person in the country of return;
or
- (iv) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

SAFE AT LAST?



**United Nations High Commissioner for Refugees
Brussels, July 2011**

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