

ASYLUM IN THE EUROPEAN UNION

A STUDY OF THE IMPLEMENTATION OF THE QUALIFICATION DIRECTIVE



November 2007



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This research was coordinated by Clara Odofin.

The national researchers were Roland Bank and Anna Buellesbach (Germany), Nina Larsaeus (Sweden), Kalliope Migirou (Greece), Véronique Planes-Boissac (France) and Marta Szaboova (Slovak Republic).

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TABLE OF CONTENTS

I. Executive Summary	5
I.1. Aims of the research	8
I.2. Key findings	9
I.2.1. National legislation transposing the Qualification Directive	9
I.2.2. Non-State actors of persecution or serious harm	9
I.2.3. Actors of protection and what constitutes protection in countries of origin	10
I.2.4. Internal protection	10
I.2.5. Qualification for subsidiary protection	11
I.2.6. Interpretation of the refugee definition and qualification for subsidiary protection in situations of generalized violence	12
I.2.7. Exclusion from refugee status and subsidiary protection status	13
I.2.8. Quality of written decisions	13
I.3. Recommendations	14
I.3.1. Proposed amendments to the Qualification Directive	15
I.3.2. Recommendations for the European Commission	15
I.3.3. Recommendations for Member States	16
II. Research Aims and Methods	19
II.1. Introduction	21
II.2. Aims of the research	22
II.3. Scope of the research	22
II.4. Research methods	23
II.4.1. Sampling and analysis of asylum decisions	23
II.4.2. Access to decisions	25
II.4.3. Sample of decisions analysed in each Member State	26
II.4.4. Confidentiality	27
II.4.5. Interviews	27
II.4.6. Desk research	28
II.5. Caveats	28
III. Decision Making and Implementation	29
III.1. Form of decisions	31
III.2. Status of national implementation	35
IV. Assessment of Main Issues and Provisions	39
IV.1. Non-State actors of persecution or serious harm	41
IV.1.1. Introduction	41
IV.1.2. Actors of persecution or serious harm under the Directive	42
IV.1.3. National legislation transposing Article 6	42
IV.1.4. Impact on practice	43
IV.1.5. Conclusion	46
IV.2. Actors of protection in countries of origin	47
IV.2.1. Introduction	47
IV.2.2. Actors of protection under the Directive	47
IV.2.3. National legislation transposing Article 7	47
IV.2.4. Impact on practice - who can provide protection?	48

IV.2.5. Adequacy and effectiveness of protection in countries of origin	50
IV.2.6. Conclusion	52
IV.3. Internal protection	53
IV.3.1. Introduction	53
IV.3.2. Internal protection under the Directive	53
IV.3.3. National legislation transposing Article 8	53
IV.3.4. Impact on practice	55
IV.3.4.1. Individual assessment of internal protection	55
IV.3.4.2. Access to internal protection	55
IV.3.4.3. Risk of persecution or serious harm in other parts of country of origin	57
IV.3.4.4. The protection analysis	57
IV.3.4.5. The reasonableness analysis	59
IV.3.5. Conclusion	64
IV.4. Subsidiary protection	66
IV.4.1. Introduction	66
IV.4.2. Qualification for subsidiary protection under the Directive	67
IV.4.3. National legislation transposing Article 15	67
IV.4.4. Impact on practice	69
IV.4.4.1. Article 15 (a) and (b)	69
IV.4.4.2. Article 15 (c)	71
IV.4.4.2.1. Serious threat to life or person	71
IV.4.4.2.2. Individual threat	71
IV.4.4.2.3. Civilian	75
IV.4.4.2.4. International or internal armed conflict	76
IV.4.5. Risk assessment	79
IV.4.6. Procedural rules	80
IV.4.7. Conclusion	81
IV.5. Refugee status versus subsidiary protection under the Directive: situations of generalized violence	82
IV.6. Exclusion from refugee status or subsidiary protection	90
IV.6.1. Introduction	90
IV.6.2. Exclusion from refugee status under the Directive	92
IV.6.3. National legislation transposing Article 12 (2) and (3) and Article 14 (5)	92
IV.6.4. Exclusion from subsidiary protection under the Directive	95
IV.6.4.1. Article 17	95
IV.6.5. National legislation transposing Article 17	95
IV.6.6. Impact on practice	97
IV.6.6.1. Article 12 (2) (a) and Article 17 (1) (a)	97
IV.6.6.2. Article 12 (2) (b)	98
IV.6.6.3. Article 12 (2) (c) and Article 17 (1) (c)	101
IV.6.6.4. Article 12 (3) and Article 17 (2)	104
IV.6.6.5. Article 17 (1) (b)	105
IV.6.6.6. Article 17 (1) (d)	106
IV.6.7. Conclusion	107
V. Appendix	109
V.1. Text of the Qualification Directive	111
V.2. List of abbreviations	123

SECTION I:

EXECUTIVE SUMMARY

Aims of the research
Key findings
Recommendations

EXECUTIVE SUMMARY

On 29 April 2004, *Council Directive 2004/83/EC 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* was adopted by the Council of the European Union.¹ This Directive sets out two distinct but complementary statuses of international protection, namely refugee status and subsidiary protection. The deadline for EU Member States to comply with this Directive was 10 October 2006.²

The underlying purpose of European Community legislation on asylum is to ensure that international protection is provided to people entitled to it. The Amsterdam Treaty clearly states that all Community measures on asylum must be in accordance with the *1951 Convention Relating to the Status of Refugees and its 1967 Protocol*³ and other relevant treaties. In its Tampere Conclusions of 1999, the European Council also emphasized the strong protection focus of the asylum harmonization process, reaffirming “the

importance the Union and the Member States attach to absolute respect of the right to seek asylum” and that it had “*agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention*”.⁵

The Qualification Directive goes to the heart of UNHCR’s international protection mandate,⁶ and the Directive itself recognizes the value of UNHCR guidance for Member States.⁷ UNHCR welcomed the Qualification Directive, in principle, as an instrument which could contribute to strengthening international protection in the European Union. However, UNHCR expressed reservations about several of the Directive’s provisions.⁸

This research has been undertaken by UNHCR in accordance with its statutory duty to supervise the application of the provisions of the 1951 Convention, and in view of Recital 15 of the Qualification Directive. As it was not possible to study the impact of all provisions of the Directive in all Member States,

1 Official Journal of the European Union, L 304/12, 30 September 2004. This Directive is referred to as the ‘Qualification Directive’ throughout this report.

2 Article 38 of the Qualification Directive.

3 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees (hereinafter ‘1951 Convention’), UNTS No. 2545 and No. 8791.

4 Article 63(1) of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2 October 1997.

5 Presidency Conclusions, European Council at Tampere, Finland, 15-16 October 1999, Council Document SN 200/99.

6 Article 8 of UNHCR’s Statute calls upon the High Commissioner to provide for the international protection of refugees, inter alia, by supervising the application of Conventions, by promoting measures calculated to improve the situation of refugees and reduce the number requiring protection, and by promoting the admission of refugees to the territories of States.

7 Recital 15 of the Qualification Directive notes that “*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.*”

8 See UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, January 2005, at: <http://www.unhcr.org/protect/PROTECTION/43661eee2.pdf>.

with the limited resources and short time available, it was decided to examine the legal impact to date of certain key provisions in selected Member States.

The selection of the Member States examined in the research was based on several factors. First, it was considered important to include Member States representing different geographic areas. Secondly, States were identified which together received close to half of all asylum applications lodged in the European Union in 2006, including significant numbers from groups whose cases were expected to illustrate the issues being examined. For this reason, decisions were examined relating to persons from Afghanistan, Colombia, Iraq, Palestine, Russian Federation (Chechens), Somalia, Sri Lanka, Sudan and Turkey. Finally an effort was made to study practice in Member States with different legal systems and institutional frameworks.

This research would not have been possible without the full engagement of the competent authorities in the Member States concerned. UNHCR is extremely grateful for their cooperation and support.

It is hoped that these findings will contribute constructively to discussions on the implementation of and potential amendments to the Qualification Directive, including to the Commission's formal evaluation of the Directive, expected in 2008.⁹

1.1. Aims of the research

The Qualification Directive seeks “to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection”.¹⁰ Vice-President Franco Frattini, Commissioner for Justice, Freedom and Security, has stressed that the Directive should reduce “the current

great variances in recognition rates between Member States.”¹¹ The challenge is indeed great. Disparities in the legislation and legal practice of EU Member States mean that a refugee's chances of finding protection can vary dramatically from one Member State to another. This has resulted in the refugee protection system in the EU being called an ‘asylum lottery’.¹²

A central objective of this research is to shed some light on the extent to which the Qualification Directive is achieving its aims. The research focused on practice in five Member States (France, Germany, Greece, the Slovak Republic and Sweden) following the 10 October 2006 deadline for implementation of the Directive. In particular, the research seeks to highlight:

- the degree of consistency (or lack of it) in the approach taken by the selected Member States to specific issues;
- good practices; and
- problems, including in terms of compatibility of State legislation and practice with international standards.

For the purposes of the research, six key issues of the Directive were analysed:

- Non-State actors of persecution or serious harm (Article 6);
- Actors of protection (Article 7);
- Internal protection (Article 8);
- Qualification for subsidiary protection (Articles 2, 15 and 18);
- Recognition of refugee status and qualification for subsidiary protection in relation to situations of generalized violence; and
- Exclusion clauses (Articles 12 and 17).

⁹ Article 37 states that “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.”

¹⁰ Recital 6 of the Qualification Directive.

¹¹ Europa press release, IP/06/1345, Brussels, 10 October 2006.

¹² ECRE press release of 4 November 2004: ‘Europe Must End Asylum Lottery.’

The analysis took place between March and July 2007. It was not limited to examination of legislation implementing the Qualification Directive. Its findings are also based on the scrutiny of 1,488 first instance and appeal decisions taken after 10 October 2006,¹³ interviews with adjudicators and staff of the competent asylum authorities, interviews with other stakeholders and a review of case-law, parliamentary reports, government policy guidelines and legal commentaries.

The analysis, conclusions and recommendations of this research are addressed to European Union institutions and to Member States collectively. This study does not propose specific changes in relation to the law or practice of Member States, each of which faces a multiplicity of asylum-related challenges. The aim has been to assess the law and practice in a limited number of Member States, in order to gain a better understanding of issues related to the implementation of the Directive throughout the European Union. Recommendations have therefore been formulated with a view to strengthening the application of the Qualification Directive, in line with its protection objectives.

1.2. Key findings

1.2.1. National legislation transposing the Qualification Directive

- At the time of the research, two of the five selected Member States – France and the Slovak Republic – had completed the legislative transposition of the provisions of the Directive under study. Germany and Sweden had partially transposed these provisions. Greece had not yet transposed the Qualification Directive. In the absence of national legislation implementing the Qualification Directive fully, the provisions of the Directive should apply directly, where they are clear and unconditional.¹⁴ The picture with regard to the direct application of the Directive was not always

evident in the three countries of focus that have yet to complete legislative implementation. In Germany, guidelines from the Ministry of Interior (MOI) of 13 October 2006 state that the prerequisites for the direct application of the provisions of the Qualification Directive were fulfilled. However, in spite of this clarification, some courts, on some specific issues, persisted with an interpretation based on established national practice incompatible with the Directive. In Greece and Sweden, court decisions occasionally referred to the Directive but there was no evident uniform approach by the authorities as to which articles of the Directive, if any, should be applied directly.

1.2.2. Non-State actors of persecution or serious harm

- The Qualification Directive has resulted in much greater conformity of legal interpretation on non-State actors of persecution or serious harm amongst the five Member States studied. The shift to a focus on the availability of protection, rather than the actor of persecution or serious harm, should be commended.
- In France and Germany, the Directive has enlarged the scope of grounds for granting protection and thereby reinforced the protection system. This is illustrated by the increase in decisions by the authorities in Germany granting refugee status to Somalis. However, the provision on non-State actors of serious harm for the purpose of subsidiary protection is yet to be fully reflected in legal practice in Germany. This appears to be due in part to the incomplete transposition of the Directive in Germany at the time of the research.
- This provision has not had the same impact on legal practice in Greece as it has had in France and Germany, and has not resulted in a rise in recognition rates.

¹⁴ ECJ 1970, 1213 ff.

¹³ With the exception of decisions in France, some of which pre-date 10 October 2006 due to the fact that the national implementing legislation in France pre-dates the deadline for transposition.

1.2.3. Actors of protection and what constitutes protection in countries of origin

- The Qualification Directive defines who can provide protection in the country of origin and sets out criteria for assessing capacity to provide protection. The provision on who can provide protection is the subject of divergent interpretation across Member States. For instance, whilst Article 7(1) is considered an exhaustive list by adjudicators in France, the authorities in Sweden interpret the provision as non-exhaustive. Decisions scrutinized in Sweden reflected a readiness to consider, for example, tribes and clans as potential actors of protection.
- The review of decisions revealed some evidence of preparedness on the part of decision makers to consider international organizations as potential actors of protection; however, in all those decisions, the relevant international organization was found to be unable to provide protection. This would appear to underline the inherent limitations of the capacity of international organizations to provide protection.
- With regard to Article 7(2), which sets out criteria indicative of capacity to provide protection, it is difficult to assess the impact of this provision on the legal practice of the five Member States, as the reviewed decisions provided scant evidence of the application of the criteria contained in the Directive. It is not clear whether this reflects an underdeveloped analysis of this issue in the determination of asylum applications or whether the written decisions simply did not fully reflect the analysis that was undertaken.

1.2.4. Internal protection

- The Qualification Directive requires that applications for international protection be assessed on an individual basis. Yet decisions in the Slovak Republic revealed a generic assessment of safety in the country of origin for one group of applicants, without apparent reference to the particular circumstances of each case.
- Article 8 of the Qualification Directive omits what is considered by UNHCR, legal experts and States party to the 1951 Convention to be an essential, and even pre-conditional, requirement of an internal protection alternative, i.e. that the proposed location is practically, safely and legally accessible to the applicant.¹⁵ On the contrary, Article 8(3) provides that internal protection may apply notwithstanding technical obstacles to return to the country of origin. France, the Slovak Republic and Sweden have not transposed Article 8(3) in their legislation, and none of the Member States of focus in this research were found to apply the provision in practice. A Swedish Commission of Inquiry¹⁶ found that Article 8(3) is “*not reasonable and not in accordance with Article 1A of the Geneva Convention*”. In France, a Constitutional Court reservation states that an applicant must be able to access a substantial part of his/her country of origin in safe conditions. Article 8(3) appears incompatible with the purpose of the 1951 Convention and the Qualification Directive. It is at variance with the established jurisprudence of other States party to the 1951 Convention; it is not in line with the recent case-law of the European Court of Human Rights¹⁷ and is contrary to the advice of UNHCR.

¹⁵ 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, 23 July 2003, at: <http://www.unhcr.org/publ/PUBL/3f28d5cd4.pdf>. These followed the Summary Conclusions on internal protection/relocation/flight alternative of an expert roundtable meeting in September 2001 which held a discussion based on the background paper by James Hathaway and Michelle Foster, entitled ‘Internal protection/relocation/flight alternative as an aspect of refugee status determination’.

¹⁶ In 2004, a Commission of Inquiry comprising academics, legal experts and public officials was appointed to advise on how the Directive should be implemented in Sweden. The Inquiry on the Qualification Directive (*Skyddsgrundsutredningen*), henceforth the Inquiry. Terms of reference (dir. 2004:114; dir. 2005:95; dir. 2006:02).

¹⁷ *Salah Sheekh v. the Netherlands*, ECHR, Application No.1948/04, 11 January 2007.

- All five of the Member States of focus utilize the concept of ‘internal protection alternative’. However, the extent to which the concept is applied to deny international protection varies. The research shows that the Qualification Directive is not yet achieving its aim to introduce a common concept of internal protection. The treatment of Chechen applicants is just one example that highlights the divergence. Of the decisions reviewed in France, none applied the concept of internal protection to Chechens. In contrast, in Germany and the Slovak Republic, most parts of the Russian Federation are accepted as possible ‘internal protection alternatives’. The divergence in approach appears to be due in part to vastly differing interpretations of what is ‘reasonable’ under the Directive. These interpretations are not always in line with UNHCR guidance on this issue.
- The potential of Article 15 (c) to provide protection to those who fear serious harm to life or person is undermined by a highly restrictive interpretation of the term ‘individual threat’ in line with Recital 26 of the Directive. This has resulted in authorities requiring that the applicant be at a greater risk of harm than the rest of the population, or sections of it, in his or her country of origin. The research has shown that the impact of this interpretation of ‘individual threat’ is to deny subsidiary protection to persons who risk serious harm on return to their country of origin on the basis that they face the same risk as, for example, other members of their clan or other residents of their town. As such, this interpretation of Recital 26 renders the protection offered by the Qualification Directive illusory for many persons and appears to be incompatible with case-law of the European Court of Human Rights.¹⁸

1.2.5. Qualification for subsidiary protection

- In general terms, the provisions on subsidiary protection have been welcomed. They represent the first supranational legislation in Europe defining qualification for subsidiary protection, and create an obligation to grant this status to those who qualify. In law, the Directive thus has expanded the scope of international protection. However, the research found that, in practice, subsidiary protection is not granted to significant numbers of persons who appear to be in need of international protection. This is due both to the impact of procedural flaws and to a narrow interpretation of the terms of the Directive itself.
- The provisions on subsidiary protection remain unavailable for the overwhelming majority of asylum applicants in Greece due to procedural flaws, which result in the fact that most applications are not assessed with regard to qualification for subsidiary protection. This could constitute a breach of Article 18 of the Qualification Directive.
- The research revealed that the potential of the Qualification Directive to deliver subsidiary protection is further limited by the approach taken by Germany to the assessment of risk. Where the risk of death or other serious harm affects the population generally, Ministry of Interior guidelines require that the risk to life or person must be ‘inevitable’. Requiring ‘near certainty’ of death or severest injury is not in line with the requirement of ‘real risk’ set by the Qualification Directive or with human rights standards.
- The term ‘internal armed conflict’ is a source of divergent interpretation across Member States and within national jurisdictions. There is no agreed definition of ‘internal armed conflict’ in international law, and decisions screened in France, Germany and Sweden highlighted divergences in interpretation and application. As a result, at the time of the research, the situation in parts of Iraq was assessed as an ‘internal armed conflict’ in France, but not in Sweden where it was described as a ‘severe conflict’. Whilst the Swedish authorities

¹⁸ Ibid.

considered the conflict in Chechnya as an ‘internal armed conflict’, the Slovak authorities did not. Moreover, the Swedish authorities did not consider that the situation in Somalia amounted to an ‘internal armed conflict’ although the German authorities did. This term is clearly a source of interpretational differences. However, it is not clear what added value this term brings to a legal provision on subsidiary protection, as persons who face a real risk of serious harm due to indiscriminate violence and widespread human rights violations are in need of international protection regardless of whether the context is classified as an internal armed conflict or not. This is reflected in the Temporary Protection Directive¹⁹ and other regional legislation in Latin America and Africa. The application of this term in the Qualification Directive in at least some Member States would appear to deny subsidiary protection to persons facing a real risk of serious harm in their country of origin.

- It has been difficult to draw conclusions on the application of Article 15(b), which resembles Article 3 of the European Convention on Human Rights on torture, inhuman and degrading treatment and punishment. This is due to the fact that where it was applied, decisions contained little pertinent legal analysis. It is also due to the fact that it was often not applied in some Member States. This could be an indication of insufficient doctrinal guidance on the distinction between ‘inhuman and degrading treatment’ and ‘serious threat to life or person’ contained in Article 15(c). It was hoped that a review of decisions would provide some clarity on which serious threats do not fall within ‘inhuman and degrading treatment’ but do constitute a ‘serious threat to life or person’. However, the review of decisions did not provide this clarity. It may be deduced from the decisions analysed that either decision makers do not necessarily exclude Articles 15(a) and (b) before considering Article 15(c), i.e. the grounds are not considered a hierar-

chy; and/or some authorities apply a restrictive interpretation of Article 15(b), as the review found treatment such as slavery, forced blood donation to captors, and death threats were considered in relation to Article 15(c) rather than Article 15(b).

1.2.6. Interpretation of the refugee definition and qualification for subsidiary protection in situations of generalized violence

- The review of decisions showed that at a procedural level, where an application is made for international protection, adjudicators generally assess the application against the refugee criteria before examining qualification for subsidiary protection. With the exception of Greece, both assessments are undertaken as part of one sequential procedure and the written decisions reflect this sequential assessment.
- Applicants who fulfil the criteria of the refugee definition should be granted refugee status regardless of whether the context of the persecution is one of generalized violence. The research found that, in general, refugee status prevails in France and Germany, and subsidiary protection status is literally ‘subsidiary’ or complementary to refugee status. However, in Sweden, subsidiary protection status appears to be the main status granted. In the Slovak Republic, the analysis of decisions suggests that persons who are compelled to leave their country of origin as a result of fear of persecution or serious harm in the context of generalized violence are not recognized as refugees under the 1951 Convention. In Greece, it was not possible to draw any conclusions as the recognition rate for both refugee status and subsidiary protection combined is less than two per cent.
- Scrutiny of decisions also revealed that adjudicators may reject an application under the refugee

¹⁹ 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 (OJ L212/12, 07.08.2001).

definition on the grounds that there is no nexus to a 1951 Convention ground, or that there are mixed motivations for the persecution, for example, ethnic, religious and criminal. However, in certain such cases applicants were granted subsidiary protection on the grounds that they faced an individual threat of serious harm due to characteristics such as their ethnicity, religion or attributed religion. This legal reasoning does not appear to be in line with Article 2(e) of the Qualification Directive nor with UNHCR guidance, which clarifies that refugee status should only be denied when there is no link with a Convention ground.²⁰

- It is still too early to assess the overall impact of the Qualification Directive on recognition rates. However, striking disparities appeared in the research. For example, with regard to Iraqi applicants, during the first quarter of 2007, the percentage recognized as refugees in Germany at first instance was 16.3 %, and those qualifying for subsidiary protection 1.1 %. In Sweden, 73.2 % of Iraqi applicants were granted subsidiary protection at first instance in the first quarter of 2007 and 1.7 % were recognized as refugees. This contrasts sharply with the recognition rate for Iraqis of 0 % in Greece and 0 % in the Slovak Republic at first instance. It must be a matter of deep concern to the European Union that the practice with regard to one group varies so greatly across just the five Member States studied.

1.2.7. Exclusion from refugee status and subsidiary protection status

- It is also premature to assess the overall impact of the exclusion clauses of the Directive. The review of decisions in France and Sweden revealed very few decisions in which the exclusion clauses were considered, and none in which they were applied, reflecting the exceptional nature of the provisions. However, the use of the exclusion clauses

appeared more prevalent in Germany. The review of decisions in Germany revealed an increasingly expansive use of the exclusion clauses. The standards articulated by UNHCR for application of the exclusion clauses have been eroded, in particular with regard to the exclusion clause on acts contrary to the purposes and principles of the United Nations. The Qualification Directive is not considered to be the genesis of this trend, but it has served as a tool.

- It is of concern that legislation in Germany merges provisions on exclusion with provisions which stem from exceptions to the principle of *non-refoulement*. As such, the legislation has expanded the category of persons who may be excluded from refugee status beyond the exhaustive list contained in the 1951 Convention.

1.2.8. Form of written decisions

- In Greece, 305 first instance decisions taken by the Ministry of Public Order (MPO) were studied. All 305 decisions – relating to applicants from Sudan, Iraq, Afghanistan, Somalia and Sri Lanka – were negative. None of the decisions contained any reference to the facts and none contained any legal reasoning. All contained a standard paragraph stating that the applicant left his/her country to find a job and improve living conditions. A review of second instance decisions by the Ministry of Public Order found that the summary of the facts normally did not exceed two lines, and the negative decision was stated in a few lines in standardized format. As a result, it was not only impossible to deduce the interpretation of the law applied by the Ministry of Public Order, but it was not possible to deduce, from the decisions alone, whether the law was applied at all. With the consent of the Ministry of Public Order, the case files were therefore reviewed. 294 of the first instance case files reviewed did not contain the responses of the

²⁰ See § 23 of UNHCR, The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, 2001, at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=3b20a3914>.

applicants to standard questions posed by interviewing police officers. No other information was contained in these files regarding the applicant's fear of persecution or serious harm. In the overwhelming majority of the reviewed case files, the interviewing police officer registered the reasons for departure from the country of origin as 'economic'. The second instance case files contained the recommendation of the Consultative Asylum Committee, but the recommendation usually consisted of two standardized sentences. Generally, there was no further information relating to the facts or legal reasoning, and there were no recorded minutes of the hearing before the Committee. As a result, the research was not able to discern legal practice in Greece.

1.3. Recommendations

The findings of this report make clear that whilst the Directive has already achieved greater conformity of legal practice on some points of law, such as non-State actors of persecution or serious harm, there are still wide divergences of interpretation on other issues such as 'internal protection alternative', actors of protection and qualification for subsidiary protection. The differences in approach observed among just the five Member States examined may well be reflected more widely across the 27 Member States. More needs to be done if the European Union is to achieve the aim of ensuring consistent identification of persons in need of international protection.

Furthermore, there are early signs that the Directive is not achieving its potential to deliver international protection to those in need. This appears at least in part to be due to restrictive interpretations of both

the refugee and subsidiary protection criteria. There are also questions of compatibility with international refugee and human rights law stemming from either the Directive itself, national implementing legislation or legal interpretation.

What needs to be done? UNHCR submits the following recommendations to the Member States of the European Union, the European Parliament and the European Commission. These encompass only limited suggestions for amendment to the Qualification Directive itself.²¹ These amendments are proposed as the most effective means to address the apparent ambiguities in and present wide scope for divergent interpretations of the Qualification Directive. While some Member States have construed some of the existing provisions in line with international standards and UNHCR's guidance,²² others have found room for significantly different approaches. Amendment of the Directive would be the most direct means to achieve its harmonizing objective, in line with the international protection standards as called for by the Amsterdam Treaty and the Council at Tampere.

More is required, however, than amendments alone. The gap between law and practice is one of the main challenges. To help Member States move towards more coherent application of the Qualification Directive in line with international standards, UNHCR recommends the adoption of guidelines for certain parts of the Qualification Directive. Such guidelines should be based on *UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status*,²³ *Guidelines on International Protection*,²⁴ Comments on EC instruments,²⁵ and other advice. EU guidelines should incorporate relevant jurisprudence of the European Court of Justice and the European

21 Based on this report's analysis of Articles 6, 7, 8, 12, 15 and 17 of the Qualification Directive. This does not preclude the possibility of further amendments that may be required in relation to other articles.

22 Op.cit., footnote 8.

23 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Geneva, January 1992, at: <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf>.

24 UNHCR issues the Guidelines on International Protection pursuant to its mandate as contained in the 1950 Statute of the Office, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees. The Guidelines are complementary to the Handbook and are available at: <http://www.unhcr.org/doclist/publ/3bc17bbc4.html>.

25 Op.cit., footnote 8.

Court of Human Rights. UNHCR would be willing to play an advisory role in the elaboration of such EU Guidelines.²⁶

Training of decision makers and quality control mechanisms with regard to asylum procedures are also essential to addressing this problem.

1.3.1. Proposed amendments to the Qualification Directive

1. Internal protection: Article 8(3) should be deleted, and an amendment be made to Article 8(1) requiring that any proposed area of internal protection be practically, safely and legally accessible to the applicant.

Article 8(3) provides that internal protection may apply, notwithstanding technical obstacles to return to the country of origin. This is contrary to UNHCR Guidelines, which require that an internal protection alternative be practically, safely and legally accessible to the individual.²⁷ It is at variance with case-law of the European Court of Human Rights²⁸ which requires that the person to be expelled must be able to travel to the area concerned, gain admittance and be able to settle there as a pre-condition for reliance on the concept of internal protection. It is also at variance with the established jurisprudence of other States party to the 1951 Convention. An internal protection alternative must be real, not hypothetical.

2. Subsidiary protection and situations of indiscriminate violence: Recital 26 should be deleted, ‘individual’ should be deleted from Article 15(c) and Article 15(c) should be amended so that it is not limited to situations of international or internal armed conflict.

The impact of the application of Recital 26, which states that “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”, is to deny subsidiary protection to persons who risk serious harm in their country of origin, on the ground that they face

the same real risk of serious harm as, for example, other members of their clan or residents of their town. This appears incompatible with recent case-law of the European Court of Human Rights regarding risk assessment²⁹, and is inherently contradictory to Article 15(c) which provides for protection from serious harm caused by ‘indiscriminate violence’.

The term ‘internal armed conflict’ is a source of interpretational divergence across Member States, and a restrictive interpretation can result in the denial of subsidiary protection to persons who face a real risk of serious harm in their country of origin. The terminology of the Temporary Protection Directive may be more appropriate, as it applies to persons who have fled areas of armed conflict or endemic violence and persons at serious risk of systematic or generalized violations of their human rights. Through the Temporary Protection Directive, Member States have acknowledged the need for protection in relation to generalized violence. This would also result in greater coherence between the Temporary Protection Directive and the Qualification Directive.

3. Exclusion: Articles 12 and 14 on exclusion from refugee status should be amended to bring them into conformity with the 1951 Convention. Articles 17 and 19 providing for exclusion from subsidiary protection should be similarly amended to limit their scope of application.

The provisions in the Qualification Directive which provide for exclusion from refugee status extend beyond the exhaustive criteria of Article 1F of the 1951 Convention. Similar provisions excluding applicants from subsidiary protection are also broad in scope and should be amended.

1.3.2. Recommendations for the European Commission

4. Requests for interpretation from European Court of Justice: The European Commission should examine the scope to utilize more actively its possibility to

²⁶ See also Declaration 17 to the Amsterdam Treaty, which requires consultation with UNHCR on matters relating to asylum policy.

²⁷ Op.cit., footnote 15.

²⁸ Op.cit., footnote 17.

²⁹ Ibid.

seek interpretations from the European Court of Justice in relation to key provisions in the Qualification Directive. This would appear to be particularly necessary if amendments to the Directive along the lines proposed above are not adopted. Provisions on which Member States' interpretations and practice vary widely, resulting in very divergent legal outcomes, should be considered as priority subjects for potential questions to the Court, including those highlighted in this research.

5. Quality control and assurance across the EU: The European Commission should propose measures to ensure the development of quality control mechanisms with regard to asylum procedures and decision making as a way to narrow the gap between law and practice, and to reduce divergence in national practice. UNHCR has underlined the need for quality control at EU level, and for quality assurance mechanisms at national level. The positive experience with quality initiatives in some Member States could provide the basis for exploring ways to achieve this.³⁰

6. Training: EU-wide training packages for personnel involved in determination procedures should be developed.³¹

7. Adoption of guidelines: EU-level guidelines should be adopted on key provisions in the Qualification Directive to address, among other things, the interpretation of internal protection; the applicability of refugee status where persecution is due to mixed motivations including 1951 Convention and non-Convention grounds; the scope of Article 15(c), including 'individual' threats to life or person; and non-State actors of protection in countries of origin.

UNHCR should play a formal role in the development of these guidelines, which should be based on

UNHCR's Handbook, Guidelines on International Protection, and other recommendations. The Commission should examine national guidelines for their legal compatibility with the Directive, and convene consultations where necessary to discuss and resolve potential conflicts between EU and national guidelines.

1.3.3. Recommendations for Member States

8. Application of UNHCR guidelines: National authorities should refer to and apply UNHCR's guidelines in the course of interpretation and application of the Qualification Directive including, but not limited to, the issues highlighted in this research.

9. Reference by national courts of key questions to the European Court of Justice for preliminary rulings: Competent courts in EU Member States are encouraged to exercise their power to refer to the European Court of Justice questions on which they seek clarification concerning the Qualification Directive, and other instruments in the asylum acquis.

10. Written reasoning for decisions: The competent authorities in Member States should issue written decisions which provide a summary of the facts and a complete explanation of the grounds for the decision in accordance with the criteria set out in the Qualification Directive. As relevant, written decisions should reflect the sequential assessment of qualification for refugee status and subsidiary protection status.

11. Quality control at national level: Member States should consider implementing projects similar to UNHCR's flagship projects in Austria and the UK aimed at supporting competent authorities to achieve or maintain quality procedures and decision making.

³⁰ UNHCR, Response to the European Commission's Green Paper on the Future Common European Asylum System, September 2007, at: <http://www.unhcr.org/protect/PROTECTION/46e53de52.pdf>, page 33 and footnote 72.

³¹ *Ibid.*, page 35. In this context, the work undertaken on the European Asylum Curriculum project is noted. UNHCR has recommended that this project be developed further into a readily available, high-quality training programme for decision makers in all Member States.

12. Actors of protection: Adjudicators should ensure that they undertake a full analysis of the capacity of a potential actor of protection to afford effective, accessible and durable protection in accordance with the Qualification Directive.

13. Internal protection barred by technical obstacles: Article 8(3) should not be implemented in the national laws of Member States nor in their legal practice, because the effect of this provision is to deny international protection to persons who have no accessible protection alternative. As such, it is not consistent with the 1951 Convention.

14. Internal protection alternative: Member States are reminded that Article 8 is optional, and should be considered with caution, bearing in mind that it affects persons who have a well-founded fear of persecution or who face a real risk of serious harm in their country of origin.

15. Assessment of availability of internal protection: Adjudicators should ensure that any assessment of an internal protection alternative is carried out on an individual basis taking into account the general circumstances prevailing in the relevant part of the country and the personal circumstances of the applicant.

16. Assessment of eligibility for refugee status and subsidiary protection: Member States must ensure that all applications for international protection found not to qualify for refugee status are assessed for qualification for subsidiary protection in accordance with the provisions of the Qualification Directive.

17. 'Real risk' of serious harm: Adjudicators should apply the standard assessment of 'real risk' in determining qualification for subsidiary protection in relation to situations of indiscriminate violence, rather than requiring the applicant to show that he or she is at greater risk than the rest of the population.

18. Mixed motivations: Adjudicators should ensure that refugee status is not denied on the grounds that the persecution is motivated both by reasons related to the grounds set out in the 1951 Convention and other, non-Convention related reasons.

19. Exclusion: Member States should apply the exclusion clauses with caution and should not assimilate the exclusion clauses with grounds for exceptions to the *non-refoulement* principle, nor with grounds for the refusal to recognize refugee status in their domestic legislation.

SECTION II:

**RESEARCH AIMS
AND METHODS**

Introduction
Aims of the research
Scope of the research
Research methods
Caveats

RESEARCH AIMS AND METHODS

II.1. Introduction

On 29 April 2004, *Council Directive 2004/83/EC 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* was adopted by the Council of the European Union.³² For ease, this Directive is referred to as the ‘Qualification Directive’ throughout this report. As its name suggests, the Qualification Directive sets out two separate and complementary statuses of international protection, namely refugee status and subsidiary protection status. Its purpose, as it states in its first article, 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*”.³³

EU Member States were required to bring into force the national laws, regulations and administrative provisions necessary to comply with this Directive before 10 October 2006. However, at the time of writing, national legislative implementation is still incomplete in some Member States, and on 4 July 2007, the European Commission initiated the second stage of the infringement procedure and delivered reasoned opinions to 13 Member States for non-compliance with the requirement to communicate the measures that have been taken to transpose the Directive.³⁴ Notwithstanding the fact that transposi-

tion is incomplete in some Member States, in the absence of domestic law, the Directive is directly applicable since 10 October 2006 to the extent that its provisions are clear and unambiguous.

European Community legislation on asylum must be interpreted first and foremost as instruments aimed at providing international protection for people entitled to it. This underlying aim of the common minimum standards which the Directive seeks to define is expressed in the Amsterdam Treaty, which requires that all Community measures on asylum must be in accordance with the 1951 Convention and its 1967 Protocol and other relevant treaties.³⁵ The European Council also emphasized the strong protection focus of the asylum harmonization process in its Tampere Conclusions of 1999, where it reaffirmed “*the importance the Union and the Member States attach to absolute respect of the right to seek asylum*” and reiterated that it had “*agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention*”.³⁶

The Qualification Directive itself states that one of its main aims is “*to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection*”.³⁷

The challenge is great. The Directive seeks to reduce the striking disparities in the legislation and legal practice of EU Member States. A European Union

³² Op.cit., footnote 1.

³³ Article 1 of the Qualification Directive.

³⁴ Cyprus, Finland, Germany, Greece, Hungary, Italy, Latvia, Malta, the Netherlands, Poland, Portugal, Sweden and the UK.

³⁵ Op.cit., footnote 4.

³⁶ Op.cit., footnote 5.

³⁷ Op.cit., footnote 10.

which has declared itself to be an area of justice, cannot tolerate a situation where a refugee's chances of being granted protection vary dramatically depending on the Member State in which he or she applies for protection. The idea of a Common European Asylum System is premised on the assumption that any individual seeking protection has comparable prospects of finding that protection, no matter where in the EU he or she applies for it. Therefore, as Vice-President Franco Frattini, Commissioner for Justice, Freedom and Security, has said, the Directive aims at reducing “*the current great variances in recognition rates between Member States*”.³⁸

The Qualification Directive goes to the heart of UNHCR's international protection mandate and UNHCR regards it as its statutory obligation to foster an understanding of who qualifies for international protection.³⁹ Indeed, the Qualification Directive itself recognizes the value of UNHCR guidance for Member States.⁴⁰ UNHCR welcomed the Qualification Directive, in principle, as an instrument which could contribute to a more harmonized practice and strengthened protection in the European Union. However, UNHCR expressed reservations about several of the Directive's provisions and their potential impact on refugee protection. Therefore, UNHCR, in accordance with its statutory duty to supervise the application of the provisions of the 1951 Convention and Recital 15 of the Qualification Directive itself, commissioned this research to study the legal impact to date of certain provisions of the Directive in five Member States – France, Germany, Greece, the Slovak Republic and Sweden.

It is hoped that the findings of this research contribute constructively to discussions at EU level on the implementation of and potential amendments to

the Directive, including to the Commission's formal evaluation of the Directive which is expected in 2008.⁴¹

II.2. Aims of the research

The purpose of this research was to examine the implementation of selected provisions of the Qualification Directive in specified Member States, as well as their application in practice to specific groups of asylum applicants. A central objective of the research was to shed some light on the extent to which the Qualification Directive is achieving its aim “*to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection*”.

The research aimed to highlight in particular: (a) the level of consistency in the approach taken by selected Member States to the identified issues; (b) good practices, and (c) perceived problems, including in terms of compatibility of State practice with international law.

II.3. Scope of the research

This analysis took place over a five month period between March and July 2007. It spanned the national law and practice of five EU Member States which together accounted for nearly half of all asylum applications in the EU in 2006, namely France, Germany, Greece, the Slovak Republic and Sweden.⁴²

Six researchers were commissioned (one in each Member State with the exception of Germany where there were two researchers) to undertake the study, which focused on the following specific provisions in the Qualification Directive:

³⁸ Op.cit., footnote 11.

³⁹ Op.cit., footnote 6.

⁴⁰ Op.cit., footnote 7.

⁴¹ Op.cit., footnote 9.

⁴² UNHCR reported 190,224 applications in 26 EU Member States (Italy not included) during 2006; of these, 90,757 or 47.7 % were lodged in the five countries selected for this research.

- Non-State actors of persecution or serious harm (Article 6);
- Actors of protection (Article 7);
- Internal protection (Article 8);
- Qualification for subsidiary protection (Articles 2, 15 and 18);
- Recognition of refugee status and qualification for subsidiary protection in relation to situations of generalized violence; and
- Exclusion (Articles 12 and 17).

Each national researcher submitted a report setting out the findings by 15 August 2007. A research coordinator was responsible for the supervision of the national research, as well as the drafting of this synthesis report.

II.4. Research methods

A number of research methods were employed:

- Analysis of national implementing legislation;
- Sampling and analysis of asylum decisions and case files;
- Interviews with competent authorities, lawyers, academics and NGOs; and
- Desk research to review background information such as legislation, case-law, policy papers, parliamentary reports, legal commentaries etc.

II.4.1. Sampling and analysis of asylum decisions

A central element of this research is the analysis of legal practice through the sampling and study of asylum decisions. Written decisions, if they are well presented, reflect the way in which the law is interpreted and applied in practice.

In the Slovak Republic and Sweden, all decisions (both positive and negative) contain a summary of the facts and a legal motivation for the decision. In France and

Germany, only positive decisions on subsidiary protection and negative decisions on refugee status and subsidiary protection are motivated. Positive decisions on refugee status are not motivated, but the authorities provide a 'file note' on such decisions which contains a summary of the facts and motivation for the decision. As a result, it was decided by national researchers in France, Germany, the Slovak Republic and Sweden that the scrutiny and analysis of decisions would suffice for the purposes of this research and scrutiny of case files was not warranted.

However, due to the fact that decisions are not well motivated in Greece, the research required a review of case files.⁴³

The analysis of decisions (and in the case of Greece, of case files) was limited to those concerning applicants from specific countries of origin, in order to facilitate a comparative analysis of Member States' interpretation of the legal provisions. The countries and groups below were selected on the basis that they were likely to illustrate Member States' interpretation of the above-cited provisions of the Qualification Directive and because statistically they were well-represented in Member States' caseloads:

- Afghanistan
- Colombia
- Iraq
- Palestinians
- Russian Federation (Chechens)
- Somalia
- Sri Lanka
- Sudan
- Turkey

Each national researcher analysed decisions relating to five of the above areas of origin, with the exception of the researcher in the Slovak Republic who analysed decisions relating to four of the countries.⁴⁴ It should be noted that since none of the authorities

⁴³ See the section on 'Form of Decisions' for findings and conclusions on the limited information contained in both case files and asylum decisions in Greece. As a result, it was not possible to utilize either the decisions or case files in order to discern legal practice in Greece.

⁴⁴ France: Colombia, Iraq, Russian Federation (Chechens), Somalia and Sri Lanka. Germany: Colombia, Iraq, Russian Federation (Chechens), Somalia, Sri Lanka and Turkey. Greece: Afghanistan, Iraq, Somalia, Sri Lanka and Sudan. Slovak Republic: Afghanistan, Palestine, Iraq, Russian Federation (Chechnya). Sweden: Afghanistan, Colombia, Iraq, Russian Federation (Chechens) and Somalia.

maintained records of applicants on the basis of their ethnicity, but only by nationality, decisions concerning Chechen applicants had to be filtered from the sample of decisions relating to the Russian Federation.

The researchers accessed and analysed 1,488 decisions taken after 10 October 2006 by both first instance and appeal authorities in the five Member States of focus. As a bench-mark, researchers aimed to analyse at least 60 decisions per nationality caseload where actual numbers of decisions since 10 October 2006 permitted this.⁴⁵ The following represents the numerical breakdown of the decisions sampled:

France - 300
 Germany - 498
 Greece - 350⁴⁶
 Slovak Republic - 79⁴⁷
 Sweden - 261

Researchers sought to ensure that they did not engage or collude in selection methods which could produce misleading results by commission or omission. Therefore, the selection of decisions was random where there were more decisions available than the number to be selected.⁴⁸ However, the selection was guided by the following priorities:

- the sample should contain decisions taken by the first instance authority and decisions on appeal;
- the sample should contain positive and negative decisions reflective of the ratio of positive to negative decisions generally for the period;

- the sample should reflect decisions taken by as many different adjudicators as possible;
- the sample should reflect decisions taken by as many regional offices and jurisdictions as possible;
- decisions taken in the context of both normal and accelerated procedures should be selected.

Decisions that were not taken on the merits of the application were excluded. The analysis of decisions therefore did not include, for example, decisions taken on the basis of the Dublin II Regulation, on safe third country criteria or any other basis unrelated to the substance of the application, such as non-conformity with procedural rules. This had a significant impact on the sampling of decisions in the Slovak Republic. In the Slovak Republic, a high percentage of first instance procedures are terminated and a negative decision is issued on the basis that the applicant has left the territory of the Slovak Republic (67 % in 2006).⁴⁹ Due to the low number of substantive decisions, all asylum decisions from the selected nationality caseloads available through UNHCR were reviewed without any further selection. As a result, the overall sample of decisions analysed was smaller than in the other Member States of focus.

As relevant, researchers also sought to avoid sampling multiple decisions concerning members of the same family.⁵⁰

The researchers only analysed decisions taken since 10 October 2006 which was the deadline for national implementation of the provisions of the Qualification Directive, and the date following which

⁴⁵ For figures see below tables with breakdown of samples analysed by Member State.

⁴⁶ This figure refers to case files.

⁴⁷ See below in this section for an explanation for why the total number of decisions sampled in the Slovak Republic is much lower than in the other Member States.

⁴⁸ However, in Germany, all Federal Office decisions taken in the period between 11 October 2006 and 30 June 2006 which raised the issue of exclusion were analysed. An additional 13 Federal Office decisions adopted between 1 January 2006 and 10 October 2006 were examined. This focused sampling of decisions on exclusion was undertaken in order to have an in-depth understanding of the legal interpretation of the exclusion clauses.

⁴⁹ Source: the official statistics of the Migration Office. § 19 section 1(g) of the Act on Asylum states that “*The Ministry shall terminate the asylum procedure when inter alia the applicant voluntarily left the territory of the Slovak Republic.*”

⁵⁰ For example, in France when family members apply for protection at the same time, their applications are normally given reference numbers in numerical order. Where the total number of decisions allowed, the researcher sought to avoid analysing decisions concerning members of the same family. This was not always possible due to limited number of decisions.

the provisions of the Qualification Directive could be directly applied in the absence of implementing legislation. Most of the decisions analysed were taken in the six month period between 10 October 2006 and 10 April 2007.⁵¹

II.4.2. Access to decisions

All the first and second instance authorities in the selected Member States granted access to decisions for the purposes of this research.

In France and Sweden, the sample of decisions was selected by the researchers from data lists produced by the authorities. Decisions were received as electronic documents (France) and as photocopies of the original (Sweden).

In Germany, the sample was selected by the researchers from decisions which the Federal Office for Migration and Asylum (hereinafter 'FedOff') provides to the UNHCR Liaison Office in Nuremberg on a regular basis as part of continuous monitoring activities. The decisions are provided on CD-Rom. For the countries of Somalia and Sri Lanka, the FedOff was approached to submit some additional decisions to complete the samples. Administrative Court decisions were selected from a specialized database available on the internet,⁵² the database provided by the FedOff,⁵³ through research in relevant law journals or

were sent directly to UNHCR by the courts. Even though these sources do not cover court decisions comprehensively, since they depend on the initiative and willingness of courts to provide their decisions, they reflect a representative sample of German case-law.⁵⁴

In the Slovak Republic, all the decisions were obtained via UNHCR. The Act on Asylum establishes a legal basis for cooperation between the Migration Office and UNHCR, according to which the Migration Office notifies UNHCR of decisions taken in the asylum procedure, provides UNHCR with information concerning these decisions, and also makes statistical data on applicants available to UNHCR.⁵⁵ Problems of access to second and third instance decisions occurred due to the fact that decisions on appeal are provided to UNHCR on an ad hoc basis and are not regularly delivered. In addition, the decisions of the courts are generally not available to the public.

In Greece, the case files were selected by the Ministry of Public Order due to the fact that a random selection by the researcher would have been more time-consuming as many of the case files were not available for administrative purposes and were difficult to track down. The case files were reviewed at the premises of the Athens Aliens' Directorate and the central offices of the Ministry of Public Order.

⁵¹ In Germany, Administrative Court decisions taken between 10 October 2006 and 30 June 2007 were analysed.

⁵² The Informationsverbund Asyl maintains a database of court decisions relevant for asylum and migration issues at www.asylnet.net. The database was last visited on 30 June 2007.

⁵³ www.bamf.de

⁵⁴ Decisions analysed concerned all 52 German Administrative Courts.

⁵⁵ § 20 section 7 and 43 of the Act on Asylum.

II.4.3. Sample of decisions analysed in each Member State

Table 1: Breakdown of sample for France

Nationality	OFPRA ⁵⁶		CRR ⁵⁷		Total number of decisions
	Sample	% of total ⁵⁸	Sample	% of total	
Colombia	32	26.7 %	28	100 %	60
Iraq	30	54.5 %	30	34.9 %	60
Russian Federation (Chechens)	30	3.2 %	30	4.8 %	60
Somalia	36	92.3 %	24	92.3 %	60
Sri Lanka	30	1.88 %	30	3.36 %	60
Total	158		142		300

Table 2: Breakdown of sample for Germany

Nationality	FedOff Decisions ⁵⁹	
	Sample (decisions)	% of total
Colombia	54	37.5 % (160)
Iraq	90	9.2 % (1299)
Russian Federation (Chechens)	65	25.8 % (388)
Somalia	51	69.0 % (87)
Sri Lanka	88	80.6 % (124)
Total	348/440	

Table 3: Breakdown of sample for Greece⁶⁰

Nationality	1 st Instance Decisions MPO		2 nd Instance Decisions MPO		Total number of decisions
	Sample	% of total	Sample	% of total	
Sudan	60	39 %	10	77 %	70
Iraq	70	5 %	0	0	70
Afghanistan	61	7 %	9	60 %	70
Somalia	63	80 %	7	77 %	70
Sri Lanka	51	58 %	19	79 %	70
Total	305		45		350

⁵⁶ Office français de Protection des Réfugiés et Apatrides, hereinafter 'OFPRA'.

⁵⁷ Commission des Recours des Réfugiés, hereinafter 'CRR'.

⁵⁸ Total decisions in the period 10 October 2006-10 April 2007, relating to each nationality.

⁵⁹ The number of Administrative Court decisions in the sample is 150, bringing the total number of the sample (FedOff decisions + Administrative Court decisions) to 498 decisions.

⁶⁰ Since 2003, the Greek authorities had officially suspended the examination of asylum applications relating to Iraq at second instance.

Table 4: Breakdown of sample for Sweden

Nationality	Swedish Migration Board		Migration Courts in Stockholm, Gothenburg & Malmö		Total number of decisions
	Sample	% of total	Sample	% of total	
Colombia	4	100 %	17	100 %	21
Iraq	30	5 %	30	32 %	60
Russian Federation	30	11 %	30	50 %	60
Somalia	39	4 %	21	100 %	60
Afghanistan	30	19 %	30	41 %	60
Total	133		128		261

Table 5: Breakdown of sample for the Slovak Republic

Nationality	Number of 1st instance decisions	Number of 2nd instance decisions	Number of 3rd instance decisions	Total number of decisions
Iraq	18	0	1	19
Russian Federation (Chechens)	26	6	3	35
Afghanistan	8	5	2	15
Palestinians	10	0	0	10
Total	62	11	6	79

II.4.4. Confidentiality

All researchers agreed to maintain the anonymity of applicants for international protection at all times, and took all measures necessary to ensure the confidentiality of all records and to prevent disclosure of confidential information. The information contained in decisions has been used only for the purpose of this research. No names or personal details are disclosed in this report.⁶¹ Similarly, references to details which could, directly or indirectly, lead to the identification of applicants have been avoided. As a means to ensure the anonymity of applicants each decision sampled was assigned a new case number by each researcher for the purpose of referencing.

II.4.5. Interviews

In order to complement and to verify the findings from the review of decisions and case files, researchers undertook interviews with adjudicators and legal staff from first and second instance authorities, other professionals involved in the asylum process, NGOs and lawyers. In subject areas where the number of relevant decisions was limited and/or where case-law was limited, interviews, together with desk research, were sometimes the only available source of information. These interviews were either face to face or carried out over the phone. All interviewees were informed of the purpose and methodology of the research, and all agreed to participate. All interviews were recorded by the researchers in

⁶¹ With the exception of decisions which have been published by the authorities.

notes. The names of interviewees have not been disclosed unless their explicit consent was given.

II.4.6. Desk research

National researchers undertook desk research in order to gather background information on the relevant provisions, and their interpretation and use. This included a review of parliamentary reports, legal commentaries and case-law. The purpose of this research was to equip national researchers with as much background knowledge as possible in order to present the findings in context.

Researchers accessed and referred to case-law (and precedent-setting case-law) where this was necessary to provide a full and objective analysis of the approach taken by the Member State to the issue. Where case-law which preceded the 10 October 2006 deadline was used, researchers verified either through the analysis of decisions post 10 October 2006, or in interviews with the relevant authorities that this interpretation continued in spite of the applicability of the Qualification Directive. However, an exception was made with regard to some of the earlier case-law in France because France transposed the Qualification Directive provisions of focus to this research on 1 January 2004.

The authorities in France, Greece, Slovak Republic and Sweden do not publish policy papers or guidelines on issues or nationality caseloads. However, in Germany, the FedOff produces general policy principles on how adjudicators should approach certain issues of interpretation, policy papers and text modules for the main countries of origin in order to streamline decision practice. Although these are not binding, adjudicators need to submit an explanatory note when their analysis and decision departs from general FedOff policy. The research therefore examined these documents as well as the more general guidelines issued on 13 October 2006 by the Federal Ministry of Interior, which supervises the FedOff.⁶²

II.5. Caveats

The temporal and geographic scope of this research is limited, the sampling of decisions was random and the possibility to derive information on legal practice was dependent in large part on the quality of the written decisions. The research will therefore not necessarily have revealed all the relevant issues of interpretation for each of the five Member States. Despite these important caveats, it is considered that the findings do provide a valid snapshot of the application of certain provisions of the Qualification Directive immediately following the deadline for its implementation in five Member States. As such, the findings are telling and may be indicative of issues which are also relevant for other Member States and/or the European Union as a whole, and reflect emerging legal practice under the Qualification Directive.

In selecting the five Member States of focus, the intention was not to put the spotlight on their practice in particular. Rather, by agreeing to participate in this research, UNHCR considers that these Member States have offered the EU institutions and all Member States, UNHCR and other stakeholders invaluable insight into issues which may be of concern across the Union. The cooperation of these Member States is greatly appreciated.

Finally, it must be noted that certain Member States may be over-represented in the report in terms of, for example, the number of pages dedicated to describing their legal practice or with regard to the citation of case studies. This does not necessarily imply a critique of the legal practice of that State in particular. Instead, this may reflect the simple fact that the asylum decisions of that Member State were more informative.

⁶² These are referred to as the MOI Guidelines in this research. Hinweise des Bundesministeriums des Inneren zur Anwendung der Richtlinie 2004/83/EG des Rates vom 29. April 2004 über Mindestnormen für die Anerkennung und den Status von Drittstaatsangehörigen oder Staatenlosen als Flüchtlinge oder als Personen, die anderweitig internationalen Schutz benötigen, und über den Inhalt des zu gewährenden Schutzes (ABl. EU L 304 vom 30. September 2004, S. 12 ff.) in der Bundesrepublik Deutschland vom 13. Oktober 2006.

SECTION III:

DECISION MAKING AND IMPLEMENTATION

Form of decisions
Status of national implementation

DECISION MAKING AND IMPLEMENTATION

III.1. Form of Decisions

Over a period of four months, the researchers scrutinized 1,488 decisions from both first instance and appeal authorities. It was hoped that the information contained in those decisions would shed some light on how the law was being applied to the facts of applications. The research was, therefore, reliant on good quality, informative written decisions. Indeed any monitoring body which wishes to analyse the application of the law is dependent on the availability of good quality decisions.

In the Slovak Republic and in Sweden, all decisions, both negative and positive are written and motivated.⁶³ In France and Germany, all decisions are motivated with the exception of positive decisions to grant refugee status. With regard to decisions to grant refugee status, the researchers received file notes from the authorities which set out in writing the summary facts of the case and the reasons why refugee status was granted.⁶⁴

By way of an example of the written decisions reviewed, the first instance Swedish Migration Board's decisions usually comprised between four and nine pages (more often seven or eight pages in the case of Afghanistan and four or five pages in the case of Somalia and Iraq). Decisions of the second instance Swedish Migration Courts usually comprised around five to thirteen pages.⁶⁵ Decisions on appeal

include a summary of the claims as well as any new circumstances. Often the original Migration Board decision is attached as an appendix to the judgment; at times the facts of the case and the grounds for the Board's decision are instead provided as a brief summary in the judgment.

Due to the fact that the written decisions (and file notes) in France⁶⁶, Germany, the Slovak Republic and Sweden provided a summary of the facts of the case as well as a motivation for the decision, a full review of the case files was not warranted for the purpose of this research and a review of decisions sufficed.

This was not the case in Greece.

305 first instance written decisions by the Ministry of Public Order in Greece were reviewed. All 305 first instance decisions reviewed - relating to applicants from Afghanistan, Iraq, Somalia, Sri Lanka and Sudan - were negative. None of these decisions contained any reference to the facts and none contained any detailed legal reasoning. All contained the following standard phrase:

“The asylum application is rejected and the asylum applicant is not recognized as a refugee because the subjective and objective elements of the well-founded fear of persecution, necessary elements for the recognition of the refugee status according to article

63 This is required by law in Sweden in accordance with the Aliens Act Chapter 13 Section 10.

64 However, the file notes in France do not contain detailed reasoning.

65 Due to different formatting the length of decisions is not entirely comparable. The decisions of the court in Malmö are single-spaced (as are Migration Board decisions) whereas the other two courts' rulings are 1.5 spaced.

66 The decisions of OFPRA and the CRR are generally about two A4 pages in length, but decisions that are negative because the “facts were not established” tend to be shorter and less well motivated.

1 A 2 of the 1951 Convention, are not met. In particular, the allegations are vague and cannot justify that s/he suffered or will suffer any individual persecution **by the authorities of his country** for reasons of race, religion, ethnic group, social group or political opinion. It is obvious that s/he abandoned his country in order to find a job and improve his living conditions. S/he neither showed nor handed in any national passport or any other travel documents". [Author's emphasis].

Not only was it impossible to deduce the interpretation of the law applied by the Ministry of Public Order from these first instance decisions, but it was impossible to deduce from the decisions alone whether the law was applied at all.

The competent authority to decide on appeals at the second instance in Greece is also the Ministry of Public Order. Second instance decisions in Greece are taken by the Minister of Public Order following a hearing before and non-binding majority recommendation from the Consultative Asylum Committee.⁶⁷ The review of second instance decisions by the Ministry of Public Order found that the summary of the facts normally did not exceed two lines and the standard grounds for a negative decision were stated as follows:

"The applicant could not justify and prove his/her allegations before the Committee that he abandoned his country in fear for his life...these unsubstantiated allegations, having also taken into consideration the prevailing situation in the country of origin, cannot justify individual fear of persecution by the authorities of his country, in case he returns there, for reasons of tribe, religion, ethnic group, social group or political opinion".

The appellant's specific 'allegations' are not stated and no other reasons are given for the negative decision. As a result of this administrative practice, a considerable number of second instance decisions have been annulled by the Council of State on the grounds that the decision was not specifically motivated or the decision did not follow the recommendation of the Consultative Asylum Committee without any justification for the divergence from the recommendation.⁶⁸ In such circumstances, the research could not be based on a review of decisions in Greece.

Therefore, the researcher for Greece requested and was granted access to case files by the Ministry of Public Order. However, 294 of the first instance case files reviewed did not contain the responses of the applicants to standard questions posed by interview-

⁶⁷ See below for the members of this Committee.

⁶⁸ The Council of State has suspended many deportation orders on the grounds that decisions were not substantiated. Council of State 1292/2006 (Suspensive Committee), the allegations of a Mauritanian asylum applicant that he left because of the civil war between Christians and Muslims and because in 1989 his father was assassinated by the police were not addressed either by the Committee or the Minister of Public Order. Other Council of State decisions suspending the deportation orders of rejected asylum seekers: 241/2007 (Citizen of Bangladesh, member of the Awami League in fear of persecution by the government authorities; neither the Committee nor the MPO refer to the prevailing situation in Bangladesh as regards the possibility of the applicant's persecution by the government authorities); 255/2007 (Iranian citizens in fear of persecution by the authorities on religious grounds; neither in the second instance decision nor in the opinion of the Committee there is any reference to country of origin information concerning the situation of religious minorities in Iran). Other indicative decisions of Council of State are 3335/2005, 3336/2005, 3337/2005, 3339/2005, 3340/2005, 4382/2005, 822/2006, 823/2006, 2635/2006, 2666/2006, 957/2003, 242/2007 (Suspensive Committee).

ing police officers.⁶⁹ Only 11 files contained two to three brief lines stating facts.⁷⁰ No other information was contained in these files regarding the applicant's fear of persecution or serious harm, nor any other relevant information. Although in some cases the applicants belonged to ethnic groups who have experienced extensive persecution for 1951 Convention reasons or were from regions experiencing violence and human rights violations, none were found to require international protection.⁷¹ In the overwhelming majority of the reviewed case files, the interviewing police officer registered that the reasons for departure from the country of origin were 'economic' and the standard decision, as stated above, was issued.

The second instance case files contained the majority recommendation of the Consultative Asylum Committee.⁷² The Consultative Asylum Committee consists of the Legal Counsellor of the Ministry of Public Order as a chairperson, a Legal Counsellor of the Foreign Ministry, an officer of the Foreign Ministry diplomatic corps, an officer of the Greek Police Force, a representative of the Athens Bar Association and the Legal Officer of the UNHCR office in Greece as well as their alternates. Most majority recommendations had the following standard wording:

"...it was not proven that the applicant faced or is at risk of facing any individual persecution by the authorities of his country for reasons of tribe, religion, ethnic group, social group or political opinion. It is obvious that s/he abandoned his country in order to find a job and improve his living conditions".

Generally, there was no further information relating to the facts or legal reasoning, and there were no recorded minutes of the hearing.⁷³ This is in breach of the Greek Code of Administrative Procedure⁷⁴ and the Council of State case-law which requires a full recorded evaluation of the appellant's case, and recorded minutes of the hearing before the Consultative Asylum Committee.⁷⁵ Only 12 of the 45 second instance case files reviewed contained a brief analysis of the Committee's legal reasoning.

As a result of the considerable deficiencies in the recording of decisions, interviews and the gathering of information related to applications in Greece, the research was not able to utilize either decisions or case files in order to discern legal practice in Greece. Indeed, it was not possible to verify from the case files whether Greek legislation was being applied at all, let alone the provisions of the Qualification Directive.

⁶⁹ Interviews are conducted by police officers (Article 2.3 of the Presidential Decree 61/1999).

⁷⁰ MPO1R27 (Iraqi Chaldean receiving threats by Muslims because of his religion); MPO1R69 (Iraqi national, who is in fear of persecution by non-State actors); MPO1R70 (Iraqi police officer cooperating with the American forces); MPO1A30 (Afghan minor who left in fear of persecution by the Taliban, who killed his family); MPO1A41, MPO1A42, MPO1A43 (Afghan nationals belonging to the Tadjik ethnic group in fear of persecution by other ethnic groups); MPO1SU9, MPO1SU7, MPO1SU51 (Sudanese nationals who left because of the civil war); MPO1SU43 (Sudanese national in fear of persecution because he belongs to an opposition party and was imprisoned).

⁷¹ MPO1AF31, MPO1AF32, MPO1AF34, MPO1AF36, MPO1AF 37, MPO1AF39, MPO1AF40, MPO1AF 41, MPO1AF59 (Afghani nationals belonging to the Hazara ethnic group); MPO1SU1, MPO1SU 2, MPO1SU 6, MPO1SU 17, MPO1SU 21, MPO1SU 22, MPO1SU 26, MPO1SU 34, MPO1SU 40, MPO1SU 42, MPO1SU 53, MPO1SU 63 (Sudanese nationals from Darfur); MPO1SL22, MPO1SL37, MPO1SL53 (nationals of Sri-Lanka of Tamil ethnic origin).

⁷² It will also contain the minority dissenting opinion if it was given in written format. However, dissenting opinions are not issued with the decision of the MPO.

⁷³ MPO2A8 (Afghan national of Hazara ethnic origin in fear of persecution by members of Hezb-i-Waghdad), MPO2AF9 (Afghan/Pashtun ethnic group, in fear of persecution by other ethnic groups after the invasion of the American forces), MPO2SL9 (national of Sri-Lanka, of Tamil origin, member of LTTE, in 2005 his father was killed and the army was harassing him), MPO2SL11 (national of Sri-Lanka/Tamil, members of his family were killed by LTTE), MPO2SL14 (national of Sri-Lanka, draft evader and his father a member of the opposition party J.V.P.), MPO2SL1 (national of Sri Lanka, she left because of political conflicts).

⁷⁴ Article 20 Law 2690/1999 (Code of Administrative Procedure) stipulates that the relevant opinion of the Committee should be "*written, justified and updated.*"

⁷⁵ 2659/2004, 1292/2006, 1628/2007.

Any findings in this report with regard to Greece therefore tend to relate to the status of legislative transposition, the impact of deficiencies in procedures on the availability of international protection, and/or are based on interviews with representatives of the Ministry of Public Order or other members of the Consultative Asylum Committee.

The purpose of this research was not to make recommendations regarding the procedural aspects of the asylum system. However, the research in Greece highlights the very real need to ensure minimum standards in the quality of written decisions throughout the European Union, in line with best practice. Without this, it will be extremely difficult to monitor the implementation of the Qualification Directive in practice, and to ensure the long-term harmonization of legal practice regarding qualification for international protection throughout the Union.

Moreover, one of the stated aims of the Qualification Directive as stated by the Commissioner for Justice, Freedom and Security, Vice-President Franco Frattini, is to reduce the current vast variances in recognition rates between Member States. The overall recognition rate for both refugee status and subsidiary protection in Greece was 1.22 % in 2006.⁷⁶ This is extremely low as compared to other EU Member States, thus contributing to this variance. Given the overwhelming majority of standardized negative decisions in Greece, if the EU is to ensure that the same criteria are applied to identify persons in need of international protection throughout the EU, and

achieve its aim to reduce the vast disparities in recognition rates, then further measures relating to the monitoring of asylum procedures and the quality of decision making will clearly be required.

The EU is urged to take measures to ensure the development of quality control mechanisms, with regard to asylum procedures and decision making, capable of narrowing the gap between law and practice, and reducing divergence in national practice. This could be achieved by means of both a quality control mechanism at the EU level and systematic and mandatory quality assurance mechanisms at the national level in Member States.⁷⁷ With regard to the national level, UNHCR would be prepared to contribute to the development of systems which could draw inspiration from the 'Quality Initiative' projects implemented in the United Kingdom and Austria, as well as from activities in other Member States.⁷⁸

Asylum decision making requires qualified personnel at all stages of the process. Labour market conditions and civil service culture vary, but UNHCR considers that a more uniform set of qualifications required of asylum personnel is important for future common standards. This could be supported by a common EU training package for asylum personnel involved in determination procedures,⁷⁹ including guidelines relating to the assessment of asylum applications based on UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status as well as UNHCR's Guidelines on International Protection and other positions.

⁷⁶ 0.62 % in 2003; 0.88 % in 2004; 1.90 % in 2005.

⁷⁷ Op.cit., footnote 30.

⁷⁸ In the UK, UNHCR undertook an innovative project known as the 'Quality Initiative' in 2004-2005 at the request and with the support of the Home Office. UNHCR representatives worked in Home Office premises on a daily basis with asylum decision-making personnel. The project involved monitoring and one-to-one feedback to asylum caseworkers, as well as discussions with management on how quality could be improved. Factors examined included interview techniques, drafting of decisions, cultural sensitivity and training, workloads, working environment, stress and risks of 'burn-out'. UNHCR's recommendations were received positively by the Home Office, which extended the initial project and instituted changes on the basis of its findings. More information is available at: <http://www.ind.homeoffice.gov.uk/aboutus/reports/unhcr>. A similar, more limited project was undertaken in Austria in 2007, also with positive outcomes. UNHCR is now planning a regional project encompassing seven Eastern Member States, seeking to lift the quality of decision making throughout the region.

⁷⁹ Op.cit., footnote 31. In this regard, the work undertaken on the European Asylum Curriculum project should be noted. UNHCR has recommended that this project be developed further into a readily available, high-quality training programme for decision makers in all Member States.

III.2. Status of national implementation

According to Article 38 of the Qualification Directive, Member States were under an obligation to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 10 October 2006. The Qualification Directive can be implemented by existing legislation insofar as it is compliant with the Directive or by new legislation, regulations or administrative provisions as appropriate. The Directive expressly allows Member States to apply standards more favourable to the applicant than the minimum provided in the Directive, in so far as they are compatible with the Directive.⁸⁰

Member States are required to communicate to the European Commission the text of the provisions of national law which implement the Directive.⁸¹ As of 10 October 2006, the European Commission had reportedly only received six of the expected 24 instruments of transposition.⁸² If a Member State fails to implement the Directive or part of it, or if it implements the Directive incorrectly, given the direct effect of EC law, individuals may derive rights from the Directive, as the provisions of the Directive must be applied directly by decision makers provided the provisions of the Directive are clear.⁸³

Of the five Member States of focus in this research only two – France and the Slovak Republic – had fully transposed the provisions of the Directive of focus to the study by the time the research began in April 2007. These provisions had been partially transposed by Germany and Sweden; however, further

national legislation was required in order to complete implementation. Greece had not implemented the Directive in national legislation.

France transposed the Qualification Directive in advance not only of the entry into force of the Qualification Directive itself, but also in advance of adoption of the Directive. The Qualification Directive was transposed by the Asylum Law adopted on 10 December 2003, which entered into force on 1 January 2004⁸⁴. The act of legislating in advance of the adoption of the Qualification Directive was the subject of much debate within France at the time, as the Asylum Law was drafted on the basis of a Proposal from the European Commission which at the time had only received the political agreement of most EU Member States. Nevertheless, although some provisions of the Directive as finally adopted were not transposed by the Asylum Law⁸⁵, all the provisions of focus to this research were transposed by that law. The Asylum Law is not a literal translation of the Qualification Directive, but the wording of the Directive is closely reflected. Optional articles are not necessarily transposed.

The Qualification Directive has been transposed in the Slovak Republic through an amendment to the Act on Asylum⁸⁶, which came into force on 1 January 2007. With regard to the issues of focus in the research, the amendment to the Act on Asylum introduced:

- subsidiary protection for persons in need of international protection who do not meet the refugee criteria in the 1951 Convention;
- definitions of terms, for instance actors of persecution, serious harm;

⁸⁰ Article 3 states that “Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, in so far as those standards are compatible with this Directive.”

⁸¹ Article 38(2).

⁸² See footnote 11.

⁸³ Case 9/70 Grad [1970] ECR 825, § 5 as noted by Dr. Maria Teresa Gil-Bazo, *Refugee Status and Subsidiary Protection under EC Law*, London, May 2005.

⁸⁴ Loi n° 2003-1176, 10 décembre 2003, JO, 11 décembre 2003, hereinafter ‘Asylum Law’.

⁸⁵ In particular, Articles 5, 9 and 10 of the Qualification Directive.

⁸⁶ No. 692/2006 Coll. of laws.

- new grounds for denial of refugee status or subsidiary protection, and new grounds for the withdrawal and cessation of refugee status or subsidiary protection; and
- new rules for the assessment of claims for international protection.

Although the Swedish asylum procedure has recently undergone a major reform introducing a new appeal procedure and a new Aliens Act⁸⁷, both of which came into force on 31 March 2006, the 2005 Aliens Act did not formally transpose the Qualification Directive and the Directive is still not fully implemented. In 2004, a Commission of Inquiry comprising academics, legal experts and public officials was appointed to advise on how the Directive should be implemented in Sweden.⁸⁸ The report setting out their conclusions was published in the Swedish Government Official Reports series⁸⁹ in January 2006. According to the Inquiry most of the articles of the Directive are already implemented in Swedish law, though some require changes to the Aliens Act⁹⁰ or the Aliens Ordinance⁹¹ in order for the Directive to take full effect. The Inquiry found that while the Directive often displays a greater degree of regulatory detail at national level, than the Aliens Act, it is not necessary, and in some cases not appropriate, to introduce the same degree of regulatory detail as long as the provisions are “*entrenched in well established case-law*”.⁹²

In some cases, most notably concerning the rights and responsibilities relating to subsidiary protection, the Inquiry found that the Swedish Aliens Act did not correspond to the Qualification Directive, and has

proposed amendments to the Swedish legislation. With regard to the provisions of focus to this research, some are considered to be implemented by the existing Swedish legislation, but others require further implementation, in particular, provisions relating to qualification for subsidiary protection, the explicit extension to subsidiary protection of provisions on non-State actors and the exclusion clauses.

In November 2006, the European Commission issued a letter of formal notice according to the infringement procedures in Article 226 EC. In its reply the Swedish Government stated its intention to refer a legislative proposal to the Council on Legislation (Lagrådet) and to the Swedish Parliament in autumn 2007, although, at the time of writing, it appears that this time frame may not be realistic.⁹³ The legislative proposal is currently under preparation at the Ministry of Justice and will not be public before its referral to the Council on Legislation. The Government has declared its intention to implement the legislative amendments together with the amendments flowing from the Asylum Procedures Directive,⁹⁴ for which a Commission of Inquiry report was presented in June 2006.⁹⁵

In the interim, there is no uniform approach to the application of the Qualification Directive by the relevant Swedish authorities. In the reviewed court decisions, references to the Directive were relatively common, whereas the Migration Board did not refer to the Directive at all. The Migration Court of Appeal has not pronounced itself on the application of the Directive but has referred to it in general terms in some cases.⁹⁶

87 *Utlänningslagen* 2005:716.

88 See footnote 16.

89 *Statens Offentliga Utredningar*, hereinafter SOU.

90 Swedish Code of Statutes no 2005:716, issued 29 September 2005, entry into force 31 March 2006.

91 *Utlänningsförförordningen*, Swedish Code of Statutes no 2006:97, issued 23 February 2006, entry into force 31 March 2006, henceforth the Aliens Ordinance.

92 SOU 2006:6 page 32.

93 *Svar på formell underrättelse om genomförande av direktiv (KOM:s ref SG-Greffe(2006)D/207152, ärendenummer 2006/0900-0901)*.

94 Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, henceforth the Asylum Procedures Directive.

95 SOU 2006:61, *Genomförande av asylprocedurdirektivet i svensk rätt*.

96 See for instance MIG 2007:20.

At the time of this research, Germany had only transposed certain aspects of the Qualification Directive in its Immigration Act 2004.⁹⁷ In particular, the provision on actors of persecution was introduced with regard to refugee status, but not with regard to subsidiary protection. An explicit reference to the 1951 Convention was also inserted in the central provision on protection for refugees. Moreover, gender-based persecution was designated as persecution for reasons of membership in a particular social group. These amendments were intended to bring German practice fully in line with the 1951 Convention. Nonetheless, the interpretation of the refugee definition both by the authorities and a majority of the courts remains in some aspects at variance with the standards of the 1951 Convention and the criteria as set out in the Qualification Directive.

A bill transposing 11 EU Directives on asylum and migration into German law was adopted by the Federal Parliament on 14 June 2007 and subsequently approved by the Chamber of the Länder (*Bundesrat*).⁹⁸ The Transposition Act entered into force on 28 August 2007 following the period of the research.⁹⁹ The provisions of the Qualification Directive relating to the criteria for refugee status, in as far as they are relevant for this research, have either already been laid down in German law by the Immigration Act 2004 (non-State actors of persecution), or earlier legislation (exclusion clauses), or are transposed literally into German law by way of a reference to certain articles of the Qualification Directive in the Transposition Act 2007. Technically, the mode

of reference to the Qualification Directive may give rise to problems since it only requires that the Articles of the Qualification Directive be applied ‘complementarily’ to the provisions of the German law.

Pending the entry into force of the Transposition Act, the provisions of the Qualification Directive have been applied since 11 October 2006 both by the Federal Office for Migration and Refugees as well as by a number of courts. Even though some of the courts still do not apply the provisions of the Directive, its application by others has resulted in case-law revealing interpretations of the Directive.

Greece has not yet transposed the Qualification Directive. A Presidential Decree is currently under preparation which will transpose the Reception Directive, the Procedures Directive, the Qualification Directive and some provisions of the Family Reunification Directive. The draft Presidential Decree, entitled *The reception of persons requesting international protection, procedures for examination, recognition and withdrawal of the status of international protection and deportation. Rights and obligations. Family reunification of refugees*, is expected to enter into force in mid-2008.¹⁰⁰ The Presidential Decree will abrogate the current Greek legislation¹⁰¹ which determines the asylum procedure in Greece. The Presidential Decree will not have to be adopted by the Parliament but its legality will be reviewed by the Council of State, the Supreme Administrative Court of Greece.

⁹⁷ The Immigration Act 2004 consists of the Residence Act, the Act on the General Freedom of Movement for EU Citizens, and amendments to additional other legislation, Federal Law Gazette 2004 I, page 1950. The Residence Act (30 July 2004) was last amended by the Act Amending the Residence Act and other acts of 14 March 2005 (Federal Law Gazette 2005 I, page 721).

⁹⁸ *Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union*, Draft to be found in *Bundestagsdrucksache 16/5065*. Law on the Transposition of EU Directives on Immigration and Asylum, subsequently referred to throughout this research paper as the Transposition Act 2007.

⁹⁹ Federal Law Gazette I 2007, 1970.

¹⁰⁰ The draft of the Presidential Decree (P.D.) was shared with a variety of actors involved in refugee protection in Greece (UNHCR, Ombudsman, National Commission for Human Rights, Athens Bar Association, NGOs, etc.) for comments and feedback. As of 15 June 2007 the second draft of the P.D. had not yet been published. All provisions of the P.D. and relevant comments as outlined in this report are based on the first draft as of June 15, 2007.

¹⁰¹ The main legal instruments on the asylum procedure and qualification for refugee status and subsidiary protection is the Aliens Law of 1991 (Law 1975/1991, articles 24 and 25) as amended by Law 2452/1996 and a presidential decree specifying the details of the asylum procedure (PD 61/1999). These instruments do not establish the requirements that have to be met in order to recognize the refugee status. Instead, they make direct reference to the 1951 Convention and the refugee definition contained in Article 1A of that Convention.

In the interim, the picture with regard to the direct application of the Qualification Directive in Greece is unclear. Due to the fact that most written decisions by the Ministry of Public Order (MPO) are devoid of legal analysis, no evidence could be found in the reviewed asylum decisions of the MPO that the Directive is being applied directly. However, it is clear from the current procedural legislation that, for example, the MPO does not apply the Directive's provisions on subsidiary protection, as in spite of decisions of the Council of State and recommendations of the Ombudsman, applications for protection are not assessed against the criteria for subsidiary protection by the MPO at the first instance. Only a tiny minority of applications, which were processed in the normal procedure, have been assessed on appeal against the criteria for subsidiary protection, following a recommendation by the advisory Consultative Asylum Committee. That Committee mainly bases its advice on the 1951 Convention, but provisions of the Directive are taken into consideration. On the other hand, the Council of State has made clear references to the Directive in its adjudications.

SECTION IV:

ASSESSMENT OF MAIN ISSUES AND PROVISIONS

Non-State actors of persecution or serious harm

Actors of protection in countries of origin

Internal protection

Subsidiary protection

Refugee status versus subsidiary protection under the

Directive: situations of generalized violence

Exclusion from refugee status or subsidiary protection

ASSESSMENT OF MAIN ISSUES AND PROVISIONS

IV.1. Non-State actors of persecution or serious harm

IV.1.1. Introduction

One of the main aims of the Qualification Directive was to reduce the disparities in the legislation and legal practice of Member States. At the time the European Commission proposed the Directive, the issue of who can perpetrate persecution for the purposes of refugee recognition was possibly the clearest example of divergent legal interpretation amongst European Union Member States. All Member States accepted that State and quasi-State or de facto authorities who control the whole or a significant part of the territory, could be agents of persecution. However, whilst most Member States also recognized non-State actors as agents of persecution if the State was unwilling or unable to provide protection, a minority of Member States only accepted persecution by non-State actors where the persecution was instigated, condoned or tolerated by the State, i.e. the State could be shown to be complicit in the persecution and/or unwilling to provide protection.

In other words, a minority of States would deny refugee status where a person risked persecution by non-State actors and the State was simply unable to provide protection, or where no state authorities existed to provide protection.¹⁰² This was not only at variance with the practice of many EU Member States, it was also at variance with the guidance of UNHCR¹⁰³ and the established case-law of the European Court of Human Rights in relation to Article 3 of the European Convention on Human Rights,¹⁰⁴ which held that the decisive issue was not who perpetrates the persecution, but the ability of the individual to access protection. In a world where persecution and human rights abuse by non-State actors, such as militia, clans, political movements, local communities and families, are widespread, this denial of protection by a minority of Member States nonetheless affected significant numbers of refugees. It also contributed to the perception that international protection in the European Union was a 'lottery', as refugees were recognized in some Member States but not in others. Furthermore, this undermined the functioning of the Dublin Convention and its successor Regulation, as the European Court of Human Rights held that a Member State could not rely on

¹⁰² Germany had the most restrictive interpretation. See Klug, A., *50 Jahre Genfer Flüchtlingskonvention - Flüchtlingsrechtliche Relevanz der 'nichtstaatlichen' Verfolgung in Bürgerkriegen - die Rechtsprechung des BVerwG im Vergleich zur Praxis anderer europäischer Staaten. NVwZ-Beilage I* 2001, 67.

¹⁰³ Op. cit., footnote 23. See also: An Overview of Protection Issues in Western Europe: Legislative Trends and Positions Taken by UNHCR, updated 2000. Also, Opinion of UNHCR regarding the question of 'non-State agents of persecution', as discussed with the Committee on Human Rights and Humanitarian Aid of the German Parliament (Lower House) on 29 November 1999.

¹⁰⁴ Ahmed v. Austria (71/1995/577/663), 17 December 1996; H.L.R. v. France (11/1996/630/813), 29 April 1997; D. v. the United Kingdom (146/1996/767/964), 2 May 1997; Ammari v. Sweden, Application No.60959/00, 22 October 2002; Salah Sheekh v. the Netherlands, Application No. 1948/04, 13 January 2007.

the Dublin Convention and implement it automatically, when different approaches to the scope of protection existed in EU Member States.¹⁰⁵ The five countries of focus in the research exemplified this divergence. Germany, and to a certain extent, France and Greece, all adhered to the minority ‘accountability’ approach requiring state complicity; whilst Sweden and the Slovak Republic adhered to the majority ‘protection’ approach.

The Qualification Directive, therefore, sought to ensure a common concept of the sources of persecution and serious harm.¹⁰⁶ In line with the jurisprudence of the European Court of Human Rights and the guidance of UNHCR, the Qualification Directive clarifies that actors of persecution or serious harm include non-State actors if it can be demonstrated that the State is either unable or unwilling to provide protection. However, the wording of the Qualification Directive also states that it must be demonstrated that international organizations or parties controlling the State or a substantial part of the territory of the State are unable or unwilling to provide protection.¹⁰⁷ It is positive that the Qualification Directive seeks to ensure that all States concentrate not on the actor of persecution or serious harm, but on the availability of protection against persecution or serious harm.

The States of focus in this research illustrated the problem which previously existed with regard to this divergence in interpretation and now provide evidence of the impact of the Qualification Directive in seeking to achieve a common understanding throughout the Union.

IV.1.2. Actors of persecution or serious harm under the Directive

Article 6

Actors of persecution or serious harm include:

- (a) the State;*
- (b) parties or organizations 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 organizations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7. [Those actors, according to Art. 7 are the State or parties controlling the State or a substantial part of the territory of the State]*

IV.1.3. National legislation transposing Article 6

Of the States that previously employed a restrictive interpretation of non-State actors of persecution, at the time of the research, only France had fully transposed Article 6 in its domestic law.¹⁰⁸

When the research was undertaken, Germany had transposed Article 6 with regard to non-State actors of persecution for the purpose of recognition of refugee status.¹⁰⁹ However, the extension of the definition to non-State actors of serious harm for the purpose of subsidiary protection was to be achieved by means of the Transposition Act which entered into force on 28 August 2007. In the interim period, and in line with the direct applicability of the

¹⁰⁵ T.I. v. UK (43844/98), 7 March 2000.

¹⁰⁶ Recital 18 of the Qualification Directive.

¹⁰⁷ UNHCR is of the opinion that an administrative authority cannot normally substitute for the extensive measures of protection normally attributed to the exercise of State sovereignty. See the section on ‘Actors of protection’ for further consideration of this issue.

¹⁰⁸ In France, Article 6 of the Qualification Directive has been transposed by the Asylum Law, in the CESEDA Article L.713-2 § 1: “*The persecution which is taken into account for the recognition of refugee status and the serious threats which may lead to the benefit of subsidiary protection may originate from the State authorities, parties or organizations controlling the State or a substantial part of the territory of the State, or from non-State actors if the authorities defined below [Article L.713-2 § 2] refuse or are unable to provide protection.*”.

¹⁰⁹ In Germany, the Qualification Directive definition of non-State actors of persecution (Article 6(b) and (c)) has been transposed literally in Section 60(1) 4 Residence Act 2004 by virtue of the Immigration Act 2004 which entered into force on 1 January 2005.

Qualification Directive since 11 October 2006, MOI Guidelines as well as relevant FedOff policy papers confirmed the recognition of non-State actors of serious harm for the purpose of subsidiary protection.

Current Greek legislation contains no provisions relating to actors of persecution or serious harm. However, the first draft of the Presidential Decree intended to transpose the Qualification Directive contains a literal translation of Article 6. In the interim, the Council of State has clearly stated that persecution by non-State actors constitutes persecution for the purposes of the 1951 Convention and has referred to Article 6 of the Qualification Directive.¹¹⁰ Furthermore, the Council of State has suspended administrative decisions to deport individuals on the basis that non-State actors of persecution should have been recognized.¹¹¹

Prior to the entry into force of the Qualification Directive, Sweden already recognized non-State actors of persecution and serious harm. In Sweden, the Qualification Directive definition of non-State actors of persecution for the purpose of refugee recognition is covered, although not literally, by the Aliens Act (2005:716) Chapter 4, Section 1. However, there is no similar legal provision transposing the definition with regard to non-State actors of serious harm for the purposes of subsidiary protection, although, in practice – and this is confirmed by the decisions that were screened in the context of this research – non-State actors of serious harm are recognized for the purposes of subsidiary protection.

Nevertheless, the Inquiry on the Qualification Directive (*Skyddsgrundsutredningen*) has recommended a legislative amendment similar to that on non-State actors of persecution.

In the Slovak Republic, Article 6 has been transposed by the Asylum Act 2006 with some significant differences.¹¹³ The Slovak Asylum Act narrows the scope of Article 6(b) by adding the adjective ‘political’, thus only parties that have or seek to attain political power and which control the State or a substantial part of the territory of a State qualify as actors of persecution. Furthermore, the Slovak Asylum Act does not explicitly include international organizations as potential actors of protection.

IV.1.4. Impact on practice

The Qualification Directive has clearly had a significant impact on the legal interpretation of non-State actors of persecution and serious harm in France and Germany, and therefore has gone some way to ensuring its aim of achieving greater uniformity of interpretation between Member States. For example, in Germany the review of positive FedOff decisions found that, amongst others, the following non-State actors of persecution were accepted: clans,¹¹⁴ criminals, mafia and bandits,¹¹⁵ family and extended family members,¹¹⁶ paramilitaries,¹¹⁷ religious extremists and ‘terrorists’.¹¹⁸ In a considerable number of cases, the actor of persecution was not mentioned (for instance with regard to female genital mutilation).¹¹⁹ It is also worth noting that FedOff guidelines issued

¹¹⁰ Judgment 2232/2005.

¹¹¹ Suspensive Committee of the Council of State: 733/2005 (Afghan national of Muslim faith in fear of persecution by populace belonging to Sunni and Shia dogma); 929/2004 (Afghan national of Hazara origin who fears persecution by both Taleban and members of the Hazara ethnic group); 229/2004 (Afghan national who fears persecution by State and non-State actors because of his father’s position in the former Nadjibullah regime); 815/2005 (Sudanese national from Darfur in fear of persecution by populace belonging to Arab tribes); 167/2007 (Nigerian citizen who fears persecution by family member).

¹¹² This states that the refugee criteria apply “irrespective of whether it is the authorities of the country that are responsible for the alien being subjected to persecution or these authorities cannot be assumed to offer protection against persecution by private individuals”. [Official translation].

¹¹³ Act on Asylum (No. 692/2006 Coll. of Laws): “(2) *political parties or political movements or organizations controlling the State or a substantial part of the territory of the State;* (3) *non-State actors, if it could be demonstrated that subjects under points 1 and 2 are unable or unwilling to provide protection against persecution or serious harm*”.

¹¹⁴ SomR1; SomR2; SomR3; SomR4; SomR26.

¹¹⁵ SomR17; SomR18; SomR19; SomR20.

¹¹⁶ SomR28; IrqR30.

¹¹⁷ RusR1.

¹¹⁸ IrqR10; IrqR8; IrqR35; IrqR29; IrqR37; IrqR46; IrqR22.

¹¹⁹ SomR6; SomR7; SomR8; SomR9; SomR10; SomR11; SomR12; SomR13; SomR14; SomR15; SomR16; SomR27.

in 2004 underlined that non-State actors of persecution include private persons such as family members. In 2005, the FedOff's quality management unit monitored decision making on gender-related persecution prior to the release of decisions. This resulted in an increase in the quality of the decisions as they related to non-State actors, and also an increase in positive decisions.¹²⁰

The review of decisions taken by OFPRA and CRR in France reflected findings similar to those in Germany. Again, it was apparent from the decisions screened that sometimes the actor of persecution or serious harm is not even mentioned¹²¹ or that the non-State actors are not clearly identified, for example, "*armed groups or uncontrolled members of the population*"¹²² and "*Kurd combatants*"¹²³.

The decisions of OFPRA and CRR in France and the FedOff in Germany now generally mirror, for example, the decisions taken by the Migration Board and Courts in Sweden, where the review of decisions showed that non-State actors accepted as such include clans;¹²⁴ guerrillas and paramilitaries;¹²⁵ warlords;¹²⁶ criminals, mafia and bandits;¹²⁷ members of political parties or movements and their support-

ers;¹²⁸ family and extended family members;¹²⁹ and members of the local community.¹³⁰ Again, in a large number of cases, the actor of persecution or serious harm is not clearly defined; it may be any member of the general public.¹³¹ In interviews with Court and Migration Board officials, this interpretation found uniform support. The stated focus is on availability of protection rather than on the agent of persecution or serious harm. Similarly in the Slovak Republic, militia groups, armed insurgents,¹³² Islamic extremists,¹³³ unknown Shi'a militants,¹³⁴ persons fighting against the presence of foreign troops,¹³⁵ family/tribe members in the case of honour killings, groups intimidating and threatening the applicant with expulsion from her house/area of residence,¹³⁶ Chechen rebels, "*masked armed men dressed in military uniforms speaking Russian*",¹³⁷ masked men from the Russian federal troops,¹³⁸ Kurdish attackers, and group of extremists kidnappers demanding ransom¹³⁹ have all been considered as potential non-State actors of persecution or serious harm in the reviewed decisions.

The review of decisions and case files in Greece did not provide evidence of a similar impact of the Qualification Directive on legal interpretation, because the case files and decisions do not contain

120 In 2005, 65 persons (from various countries of origin) were recognized as refugees in cases involving non-State agents of persecution; among these decisions, 33 were based on gender-related persecution. In 2006 the number increased to 179 positive decisions; 100 of them were based on gender-related persecution.

121 Particularly in some OFPRA decisions relating to Iraq.

122 Sampled Case CRR, AMAC, 12/12/2006, 420101; Sampled Case CRR, ORA, 17/10/2006, 555259; Sampled Case CRR, RAR, 17/10/2006, 472439; Sampled Case CRR, NS, 18/12/2006, 412125; Sampled Case CRR, MS, 22/01/2007, 460632; Sampled Case CRR, IGM, 18/10/2006, 510072.

123 Sampled Case CRR, SG, 10/11/2006, 566101.

124 MD3IQ7, MD3IQ10, MD2AF6, MIBSOM2.

125 MD1COL1, MD1COL7, MD1COL5, MD1COL4, MD1COL12, MD2AF4, MIBCOL1.

126 MD2AF5, MD1AF2, MD1AF8, MIBIQ18, MIBIQ27, MIBAF11.

127 MD1COL14, MD1AF6, MD2SOM1, MIBIQ2, MIBIQ14.

128 MIBAF7, MIBAF9, MIBAF25, MIBAF20, MIBAF26, MD2IQ4.

129 MD1IQ1, MD1IQ6, MD1Q8, MD2IQ3, MIBAF13, MD1AF10, MIBAF5, MIBAF8, MIBAF10, MIBAF12, MIBAF16.

130 MD3IQ 4, MD2IQ7, MD2IQ9, MD2IQ8, MIBIQ15, MIBRU8, MIBAF14, MD1COL3, MD2AF8.

131 MD3IQ1, MD1IQ9, MD3IQ3, MD2AF3, MD2IQ5, MIBIQ19, MIBIQ20, MIBIQ21, MIBIQ22, MIBIQ23, MIBIQ24, MIBIQ25, MIBIQ28, MIBIQ30, MIBSOM1.

132 MU-198/PO-_/2007.

133 MU-2516-23/PO-_/2006.

134 MU-2074-22/2006.

135 MU-1914-PO/PO-_/2006.

136 MU-288/PO-_/2007.

137 MU-2008-40/PO-_/2006, MU-380/PO-_/2007.

138 MU-1743-9/PO-_/2006.

139 MU-46/PO-_/2007.

sufficient information with regard to the legal reasoning applied. Indeed, in spite of the entry into force and direct applicability of the Qualification Directive, and rulings of the Council of State, the review of decisions found that, at first instance, negative decisions contained the following standard statement: “...there has been no proof that s/he suffered or will suffer any persecution **by the authorities of his country...**” [emphasis added]. This standard phraseology was used in decisions where the fear of persecution was due to tribal¹⁴⁰ or family differences¹⁴¹ or fear of persecution by gangs¹⁴² or the populace in general.¹⁴³ On the face of it, this would appear to reflect a legal interpretation which does not recognize persecution by non-State actors. However, the Head of the MPO Asylum Unit stated that this is not the position of the MPO and that, in future, the written decisions will reflect the facts of the application, and the law. The case file review did reveal a few cases on appeal, all involving unaccompanied minors, where non-State actors were accepted as such: family members,¹⁴⁴ members of another tribe,¹⁴⁵ and members of local community.¹⁴⁶ In all these cases, the representative of the MPO on the Consultative Asylum Committee expressed a minority opinion and recommended humanitarian status believing that this type of asylum claim (involving family members) does not justify recognition of refugee status.

The review of decisions also highlighted that in this early period following the transposition deadline, some decision makers have been slow to make the adjustment to the new legal framework and interpretation. For example, in Germany, some of the decisions screened reflected an interpretation at variance with the Qualification Directive, FedOff policy papers and indeed a decision by the Federal Administrative Court.¹⁴⁷ Some German courts had argued that only non-State actors comparable to the state should qualify under Section 60(1) 4 Residence Act 2004.¹⁴⁸ However, in its judgment of 18 July 2006, the Federal Administrative Court left no doubt that no particular characteristics or criteria should apply to non-State agents. Moreover, the Court confirmed and clarified that a single individual could be an actor of persecution.¹⁴⁹ Despite the decision of the Federal Administrative Court, some court decisions dealing with gender-related persecution did not accept individuals as actors of persecution but insisted that a certain degree of group organization was required to qualify as an actor of persecution.¹⁵⁰ However, such cases remained the exception.

The situation is quite different with regard to court decisions in Germany on non-State actors of serious harm for the purpose of subsidiary protection. Many courts have persisted in applying the former German

¹⁴⁰ MPO1A12 (member of Hazara tribe in fear of persecution by other tribes).

¹⁴¹ MPO1A21 (vendetta with another family for property reasons).

¹⁴² MPO1A65, MPO1R66 (fear of gangs in Iraq).

¹⁴³ MPO1R70, MPO1R27.

¹⁴⁴ MPO2A2 (Afghan unaccompanied minor whose family had a vendetta with the family of his uncle), MPO2A6.

¹⁴⁵ MPO2A3 (Afghani unaccompanied minor of Pashtun ethnic origin persecuted by another tribe).

¹⁴⁶ MPO2A5 (Afghani unaccompanied minor).

¹⁴⁷ With regard to Somalia, in some single cases the adjudicators argued that the clan affiliation was not a reason for persecution and based their decision on a statement of a scientific researcher, Dr. Aves, to the Administrative Court (AC) in Dusseldorf on 17 December 2001 who had argued that conflicts along clan lines had decreased in Somalia during the last few years (SomN7; SomN9). There were also decisions relating to Iraq where the adjudicators held that threats from a family could not be regarded as persecutory measures but rather as private problems (IrqN9; IrqN31). These views, however, do not reflect the general approach taken in the FedOff's policy.

¹⁴⁸ It should be noted that at the beginning of the reporting period this argument could still be found sporadically in court decisions. (See for instance Munich AC, M 3 K 06.50550 of 26 October 2006).

¹⁴⁹ Federal Administrative Court (BVerwG), 1 C 15.05 of 18 July 2006, § 23 on Section 60 (1) 4 lit. c) Residence Act.

¹⁵⁰ See for instance Munich AC, M 3 K 06.50550 of 24 October 2006. In this case, the AC argued that a single individual was not capable of exercising ‘political’ persecution. The term ‘political persecution’ goes back to the former concept applied in the German system focusing exclusively on persecution by the State. The court apparently did not see that the Immigration Act 2004 has abandoned this concept, not least by deleting the words ‘political persecution’ from the legal provision on refugee protection.

concept and have held that subsidiary protection can only be granted if the danger emanates from a State or organization similar to a State.¹⁵¹ It is hoped that the entry into force of the Transposition Act 2007, and training, will correct this erroneous legal interpretation.

In one case reviewed in Greece,¹⁵² the Consultative Asylum Committee did not accept unanimously that fear of persecution by a former husband could justify recognition of refugee status and instead recommended humanitarian status on the grounds of the fragile situation in Afghanistan.¹⁵³ This, together with the fact that, as mentioned above, the Council of State has had to suspend deportation decisions on the grounds of an incorrect application of the law with regard to non-State actors of persecution and the minority view of the MPO representative mentioned above, may indicate a need for training of decision makers on this point of law, as well as the need for national legislation.

IV.1.5. Conclusion

The research shows that Article 6 of the Qualification Directive has brought about greater conformity of legal interpretation. This is reflected in the decisions screened in France, Germany, Sweden and the Slovak Republic. It has also resulted in the recognition of more refugees, in accordance with the 1951 Convention, in France and Germany.

In France, the concept of non-State actors of persecution has broadened and reinforced refugee protection. Similarly, in Germany, the introduction of the

concept of non-State actors of persecution has enlarged the scope of protection, as reflected in the sharp rise in decisions by the authorities granting refugee status to Somalis since this provision has entered into force under German law.

One might have expected a similar impact in Greece from the introduction of the concept of non-State actors. However, this is not yet apparent. The overall recognition rate for both refugee status and subsidiary protection in Greece has been very low over the last few years, and it remains low in spite of the entry into force of the Qualification Directive, the jurisprudence of the Council of State and the affirmation by the MPO that non-State actors of persecution and serious harm are recognized. Unlike Germany where there has been a consequent rise in the recognition rate, in Greece, during the first quarter of 2007, of the 1,915 decisions that were taken regarding applicants from Afghanistan, Iraq, Somalia, Sri Lanka and Sudan, no-one was recognized as a refugee or considered as in need of subsidiary protection.

Quite clearly, the introduction of the non-State actors concept in relation to subsidiary protection as prescribed by the Directive is not yet reflected in practice. Not only in Greece, but also in Germany some decision makers persist in applying the former legal concept, in spite of the direct effect of the Qualification Directive. This appears to be due in part to the incomplete transposition of the law in Germany at the time of the research and the lack of transposition of the law in Greece. It may also reflect a need for further training.

¹⁵¹ See for instance Aachen, AC 4 K 2204/05.A of 08 March 2007.

¹⁵² MPO2A7.

¹⁵³ This recommendation was adopted by MPO.

IV.2. Actors of protection in countries of origin

IV.2.1. Introduction

As the Qualification Directive, in Article 6, confirms non-State actors as potential perpetrators of persecution or serious harm, a significant issue in the determination of refugee status and qualification for subsidiary protection is whether there is an actor that is able to afford protection and, where there is, whether the protection provided is adequate. These two issues are addressed in Article 7, which is inextricably linked to Article 6(c).

IV.2.2. Actors of protection under the Directive

Article 7

1. Protection can be provided by:
 - (a) the State; or
 - (b) parties or organizations, including international organizations, 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 organization 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.

IV.2.3. National legislation transposing Article 7

Of the five countries studied, only France and the Slovak Republic had, at the time of writing, transposed Article 7 into their national legislation. However, both pieces of national legislation differ from the text of the Qualification Directive.

France has transposed Article 7(1) with some differences in language. Article L. 713-2 al. 2 CESEDA, codifying the Asylum Law provides that “*The authorities which may provide protection can be the State authorities and international and regional organizations.*”¹⁵⁴ So, whilst the Qualification Directive refers broadly to ‘parties or organizations’ but limits the scope by requiring that such parties or organizations control the State or a substantial part of the territory¹⁵⁵ of the State, the French legislation instead limits the actors to ‘international and regional organizations’ but does not require that they control a substantial part of the territory. France has not transposed Article 7(2) and (3) in its legislation, so there is no legislative provision clarifying the criteria to be applied in assessing the adequacy and effectiveness of protection or the definition of an ‘international organization’.

¹⁵⁴ Original wording of Article L. 713-2 al. 2 : “*Les autorités susceptibles d’offrir une protection peuvent être les autorités de l’Etat et des organisations internationales et régionales.*”

¹⁵⁵ Amendment adopted by the Parliament in the process of adoption of the law.

The Slovak Republic has transposed Articles 7(1) and (2) in domestic legislation, but not Article 7(3).¹⁵⁶ Again there are differences in the wording of the legislation as compared to the Qualification Directive, as in the Slovak legislation the reference to ‘parties’ is limited to ‘political parties or political movements’.

Neither Germany nor Greece had transposed Article 7 at the time of the research. However, in Germany the Transposition Act 2007 makes an explicit reference to Article 7 and by doing so, the provision is now part of German law. Similarly, the first draft of the Presidential Decree in Greece contains a literal transposition of Article 7.

Sweden has not transposed Article 7 in its domestic legislation. According to the Commission of Inquiry on the Qualification Directive, the provisions of Article 7 are reflected in Swedish case-law. However, this finding is challenged by the review of decisions which finds the Swedish legal practice to be incompatible with the Directive with regard to who can provide protection, and underdeveloped with regard to the criteria for assessing the effectiveness of protection.

IV.2.4. Impact on practice - who can provide protection?

The State, as an actor of protection, is clearly established in international law. The extent to which non-State entities, including international organizations, controlling the State or a substantial part of the territory of the State can provide effective and adequate protection is more controversial.¹⁵⁷ The German MOI Guidelines explain that the inclusion of international organizations in the Qualification Directive was motivated by the aim to include international peace-keeping missions in the concept of potential actors of protection.

It must be borne in mind that, in accordance with the Directive, ‘parties or organizations, including international organizations’ also have to meet the requirements of Article 7(2) by, for example, operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant must have access to that protection.

In its commentary on Article 7(1) (b), UNHCR stated that “*refugee status should not be denied on the basis of an assumption that the threatened individual could be protected by parties or organizations, including international organizations, if there is no opportunity to challenge that assumption. It would, in UNHCR’s view, be inappropriate to equate national protection provided by States with the exercise of a certain administrative authority and control over territory by international organizations on a transitional or temporary basis. Under international law, international organizations do not have the attributes of a State. In practice, this has generally meant that their ability to enforce the rule of law is limited.*”¹⁵⁸

The review of decisions in the five countries of focus underlines the inherent limitations on the ability of international organizations to provide protection. Whilst the review of decisions in France, Germany, Greece and Sweden revealed some evidence of a preparedness on the part of decision makers to consider international organizations as potential actors of protection, in all those decisions, the relevant international organization was found to be unable to provide protection.¹⁵⁹ Two decisions from France highlight this. With regard to Haiti, the CRR considered in the case of an applicant to whom political opinions were attributed, that “*the applicant has a well-founded fear of persecution in case of return to his/her*

¹⁵⁶ §19(a) section 6 of the Act on Asylum 2006: “*When assessing an application for asylum, the Ministry shall start from the fact that protection against persecution or serious harm is usually provided in the country of origin when **the State, political parties or political movements, or organizations controlling the State or a substantial part of its territory, take reasonable steps to prevent the persecution or suffering of serious harm, in particular, by means of 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.***” [emphasis by the author].

¹⁵⁷ Article 7(1) (b) of the Qualification Directive.

¹⁵⁸ Op. cit., footnote 8.

¹⁵⁹ For example, in Sweden, cases MIBAF20 and MIBAF24 in relation to Afghanistan. In Greece, case MPO1A5 in relation to NATO forces in Afghanistan.

country without being able to avail him/herself of the protection of the State authorities or of the protection of the United Nations Mission for the Stabilization of Haiti (MINUSTAH) which are exposed to increasing insecurity in Haiti”.¹⁶⁰ Similarly, in another decision regarding the Democratic Republic of Congo, the CRR considered in the case of an applicant who suffered serious abuse by the army in Ituri that “neither the authorities nor the special missions of the United Nations put in place in Ituri are able to provide protection to him/her in this region”.¹⁶¹ However, it should be noted that in France, prior to the entry into force of the 2003 Asylum Law, UNMIK/KFOR was, in certain cases, considered as capable of providing protection in Kosovo.

In Germany, FedOff policy papers on Iraq consider the multinational troops as unable to provide protection. This is similar to decisions reviewed in France where OFPRA and CRR do not refer to the multinational troops as potential actors of protection.

The French case-law provides some insight as to how the Asylum Law has been applied. In the leading case¹⁶², the CRR considered that “the protection mentioned in Article L.713.3 must emanate from the authorities of the State, international or regional organizations which have the will and the ability to take the necessary measures to prevent, in the relevant part of the territory, any persecution or serious threat to the human person [...]”. In this context, the CRR considered that “the Ivorian governmental authorities are no longer able to exercise their mission of protection [in the Northern part of the territory]” and that “the Alliance of the New Forces could not be considered as a State authority or a regional

organization able to provide a protection in the meaning of Article L. 713.3 CESEDA”. The CRR recognized that the Northern part of the territory is militarily controlled by the Alliance of the New Forces, but that “even though, in the framework of the negotiations undertaken between the fighting parties, several members of the Alliance are taking part in the government located in Abidjan, the replacement of the former administrative, military and judiciary authorities in the Northern part of the country by the coalition of war leaders who make up this alliance and the very embryonic nature of the administrative and judiciary framework that it is trying to put in place, do not allow the Alliance of the New Forces to be considered as a State authority or a regional organization able to provide the protection required by Article L.713.3 CESEDA”.

None of the decisions reviewed shed any light on the specific requirement that parties or organizations control a substantial part of the territory of the State.¹⁶³ The German MOI Guidelines take the view that this does not contain a quantitative requirement in the sense that a majority of the state territory must be under the control of the party or organization in question. Rather, effective control over a certain region is considered sufficient.¹⁶⁴ In France, the notion of ‘regional organizations’ has not been expanded upon.¹⁶⁵

The review of decisions in Sweden revealed a further issue of concern with regard to the issue of actors of protection. Article 7 of the Qualification Directive is explicit in stating that protection can be provided by either the State or parties or organizations controlling the State or a substantial part of the territory of

¹⁶⁰ CRR, SFO, 28/02/2006, 555071.

¹⁶¹ CRR, YS, 30/11/2006, 535001 (in this case subsidiary protection was granted).

¹⁶² CRR, SR, 16/02/2007, Traore, 573815.

¹⁶³ It is worth noting that in the assessment of whether a conflict is to be regarded as an ‘armed conflict’, Swedish authorities have required that the warring parties are in control of certain territory, thereby excluding Iraq from the widest application of Chapter 4, Section 2, first paragraph, point 2 of the Aliens Act. Presumably, the requirement of territorial control in both regulations has the objective of ensuring that the relevant parties are in a position to uphold international standards (of protection and laws of war respectively).

¹⁶⁴ Op.cit., footnote 62, page 5. This view was echoed in an interview with MFA and MPO representatives in Greece who emphasized that the decisive criterion is not the size of the area under control but the ability to control the area effectively.

¹⁶⁵ So far, it has just been referred to in one case relating to Northern Iraq (see CRR, SR, 17/02/2006, M.O, 406325) where the CRR considered that the applicant had returned to “the autonomous territory of Kurdistan, today called autonomous region of Kurdistan” and that thus this return should be “considered as a voluntary reinstatement in his/her country of origin”.

the State. These are the only potential actors of protection provided for by the Directive. Recital 19 confirms that “*protection can be provided not only by the State but also by parties or organizations, including international organizations, meeting the conditions of this Directive, which control a region or a larger area within the territory of the State.*” No other potential actors of protection are provided for.

However, the Commission of Inquiry on the Qualification Directive in Sweden interpreted Article 7(1) as non-exhaustive, whilst noting that it is primarily measures undertaken by the State or institutions for which the State is otherwise directly or indirectly responsible that should be considered.¹⁶⁶ It is of concern that the review of decisions found many examples of other actors that have been accepted as potential actors of protection, such as tribes¹⁶⁷ and clans.¹⁶⁸ This would appear to be an erroneous interpretation of Article 7(1) of the Qualification Directive, and the decisions are not explicit as to the extent to which such actors control a substantial part of the territory of the State nor the extent to which they meet the criteria of Article 7(2).

It is UNHCR’s view that a ‘party or organization’ will generally not be able to provide effective protection. Only in exceptional cases, where the party or organization is comparable to a State can it be considered an actor of protection. This needs to be evaluated individually for each case, taking into account all relevant factors and attributes, including their status, degree of control of territory and others.

IV.2.5. Adequacy and effectiveness of protection in the country of origin

At the time of the research, only the Slovak Republic has transposed Article 7(2) in its national legislation. Neither France nor Sweden have transposed Article 7(2). Germany transposed Article 7(2) in August 2007 with the entry into force of the Transposition Act.¹⁶⁹ Greece will transpose Article 7(2) in forthcoming legislation (Presidential Decree).

UNHCR has commented that “*determining the availability of protection requires an assessment of the effectiveness, accessibility and adequacy of available protection in the individual case. Possible guarantors of such protection or the existence of a legal system in a given country may be elements of this examination. However, the assessment to be made is whether the applicant’s fear of persecution continues to be well-founded, regardless of the steps taken to prevent persecution or serious harm.*”¹⁷⁰

Most of the decisions reviewed in France, Germany, Greece, the Slovak Republic and Sweden did not spell out any established or specific criteria relating to the adequacy or effectiveness of protection along the lines of Article 7(2). There was no reference to the content of Article 7(2) in terms of what constitutes ‘reasonable steps to prevent persecution or serious harm’, and rarely any analysis of whether actors of protection operated an ‘effective legal system’ as provided for in the Qualification Directive. In Germany, neither the MOI Guidelines nor the FedOff policy papers include detailed information on how to

¹⁶⁶ SOU 2006:6 page 160.

¹⁶⁷ MD2IQ7, MD2IQ8.

¹⁶⁸ MD3SOM2, MD1SOM 2, MD2SOM3, MD2SOM5, MIBSOM1.

¹⁶⁹ It should be mentioned that the German translation of Article 7(2) is not a literal translation of the English version in that it requires that “*appropriate steps are initiated*” (“*geeignete Schritte einleiten*”) as opposed to “*take reasonable steps*”.

¹⁷⁰ Op. cit., footnote 8.

interpret ‘reasonable steps’ or ‘effective legal system’. The wording of Article 7(2) is mostly reiterated without additional explanation. Exceptionally, in a number of cases reviewed in Sweden, the Migration Board noted in its assessment of the situation in Iraq that “*the Iraqi justice system lacks personnel, training and equipment and people tasked with the enforcement of justice are subjected to threats and attacks, at the same time as there are reports of sweeping arrests and violence by police and security forces. According to the available information the legal process shows deficiencies.*”¹⁷¹ However, in general, the decisions screened provided scant evidence of assessment of the adequacy and effectiveness of protection.

Decisions tended, at best, to reflect the conclusion arrived at with regard to ability to protect, rather than provide evidence of the criteria employed or an assessment of the quality of the protection provided. This may be highlighted by some of the decisions screened in France. For example, in relation to Somalia, the CRR concluded that the “*Somali government, so-called Transitional Federal Government, established in October 2004, is today unable to exercise effectively an organized power on the Somali territory and, under those circumstances, to provide protection to [the applicant]*” and that “*no other authority as defined in Article L.713.2 CESEDA is able to provide a protection to him/her*”.¹⁷² In other decisions relating to Colombia, the CRR simply mentions that the “*Colombian authorities are unable to provide an effective protection to him/her*”¹⁷³ or “*although the Colombian authorities intervened in order to punish the authors of the [reprehensible]*

facts denounced by the applicant, they were not able to protect him/her effectively from their measures of retaliation”.¹⁷⁴

In Germany, even though the criterion of whether the actors of protection have taken “*reasonable steps to prevent persecution or suffering of serious harm*” is sometimes taken up in case-law, only few criteria have evolved so far further specifying the interpretation. For instance, protection against non-State actors of persecution was considered inefficient with a view to so called ‘honour crimes’ in Turkey or female genital mutilation in the Ivory Coast.¹⁷⁶ In both cases, the courts emphasized in their rulings that the State had not encouraged or tolerated the incriminated practices. However, in the absence of an effective suppression of the phenomenon, the courts ruled that protection was not available.

Article 7(2) also notes that the applicant must have access to protection. In Germany, the requirement that “*the applicant has access to such protection*” has been interpreted somewhat ambiguously in the MOI Guidelines. Even though the criterion of access to protection is explicitly mentioned, this is qualified in the following manner: “*However, an absolute guarantee of protection against any danger is not required; the actors of protection only need to be able and willing in principle to grant necessary protection.*”¹⁷⁷ This appears misleading, since an ‘in principle’ ability and willingness to grant protection is insufficient, if no protection is provided in reality, or if the individual in question does not have access to this protection.

171 MIBIQ4, MIBIQ2, MIBIQ8, MIBIQ12, MIBIQ14, MIBIQ20, MIBIQ21, MIBIQ22, MIBIQ23, MIBIQ24, MIBIQ25, MIBIQ28.

172 Sampled Case CRR, CF, 16/03/2007, 543999; Sampled Case CRR, HME, 2/03/2007, 550529; Sampled Case CRR, KMM, 27/10/2006, 565551; Sampled Case CRR DF, 1/12/2006, 548135; Sampled Case CRR, SC, 1/12/2006, 485501; Sampled Case CRR, NC, 1/12/2006, 492809.

173 Sampled Case CRR, OOG, 2/11/2006, 463647; Sampled Case CRR, ISV, 2/11/2006, 463646.

174 Sampled Case CRR, CHAT, 9/02/2007, 590978.

175 Stuttgart AC, A 4 K 1877/06 of 29 January 2007.

176 Aachen AC, 7 K 1621/05.A of 10 January 2007.

177 Op. cit., footnote 62, page 5.

On the basis of decisions screened and interviews with the relevant authorities, it appears clear that decision makers do not necessarily require applicants to have sought protection where there is no actor of protection or where it is overwhelmingly clear to the decision maker that the State or other authorities are unable to provide protection. However, decision makers' assessment of the ability of an actor to provide effective protection is dependent on the individual circumstances of each case. As a result they may require that the applicant present facts or circumstances demonstrating that he or she addressed himself or herself to the authorities, to no avail.¹⁷⁸ In a number of decisions which were reviewed, the fact that the applicant had not reported to the authorities previous persecution or serious harm, or threats of such harm, impacted negatively on the application¹⁷⁹ or impacted on the applicant's credibility. This is highlighted by an extract from a decision screened in the Slovak Republic which stated, *"If the applicant truly faced these problems in Iraq, he could have resorted to the State authorities in his country of origin first and utilized all accessible resources that the legal system of his country allows."*¹⁸⁰

IV.2.6. Conclusion

Based on the scrutiny of decisions, it would appear that the Qualification Directive is not achieving its aim of approximation of practice regarding who can provide protection. For example, the list of actors of protection provided in Article 7(1) is considered an exhaustive list by adjudicators in France. However, the authorities in Sweden interpret the use of the word 'can' in Article 7(1) as indication that the list is not exhaustive. As a result, decisions in Sweden indicated a readiness to consider tribes and clans as potential actors of protection. These decisions did

not reflect an explicit assessment of the control exercised over the territory or the adequacy of the protection considered to be afforded.

Adjudicators may require further guidance in order to resolve this divergence of interpretation. It is UNHCR's view that *"it is inappropriate to find that the claimant will be protected by a local clan or militia in an area where they are not the recognized authority in that territory and/or where their control over the area may only be temporary. Protection must be effective and of a durable nature. It must be provided by an organised and stable authority exercising full control over the territory and population in question."*¹⁸¹

It is difficult to assess the impact of Article 7(2) of the Qualification Directive on the basis of the decisions reviewed. The written decisions often did not set out explicit criteria against which the adequacy of protection was measured. This may be indicative of the fact that this analysis was not undertaken or it may be that the written decisions simply did not reflect the detailed assessment and analysis that was undertaken. As a result, the case-law on Article 7(2) is undeveloped as yet. However, particularly in the context of the assessment of an internal protection alternative, it was found that the decision practice of the German FedOff and Slovak Migration Office displays a lack of critical review of the potential actors of protection with respect to the Russian Federation. With regard to Chechens, most parts of the Russian Federation are accepted as possible areas of internal protection. The decisions do not demonstrate any analysis as to how far the Russian authorities can be considered as potential actors of protection, even though they may at the same time be considered as perpetrators of persecution or serious harm.¹⁸²

¹⁷⁸ In Germany, Aachen AC, 7 K 1621/05.A of 10 January 2007.

¹⁷⁹ In Sweden, this was apparent in the following decisions: MD1COL11, MD3IQ4, MD2IQ7, MD2IQ8, MD2IQ9, MIBAF10, MIBAF28, where the fact that the applicant had not sought protection was mentioned along with other factors resulting in the denial of international protection.

¹⁸⁰ MU-151/PO-/2007.

¹⁸¹ Op. cit, footnote 15.

¹⁸² For further information, see the section on 'Internal Protection'.

IV.3. Internal protection

IV.3.1. Introduction

Prior to the entry into force of the Qualification Directive, the concepts of ‘internal protection’¹⁸³ or ‘internal flight alternative’ were employed by a number of European States to deny refugee status and, to a certain extent subsidiary protection, when it was considered that the applicant could avail him- or herself of protection in a certain part of the country of origin. However, there was no consistent approach to this concept and divergent practices emerged both within and across national jurisdictions.¹⁸⁴ With this in mind, following in-depth consultations with governments, the judiciary and legal experts, in 2003, UNHCR issued Guidelines on this issue which are intended to provide legal guidance for governments, legal practitioners, decision makers and the judiciary.¹⁸⁵ Articles 8(1) and (2) of the Qualification Directive on internal protection broadly reflect UNHCR’s Guidelines.¹⁸⁶ This research used the Guidelines as a measure against which to assess the Directive and Member State practice.

It is important to stress that the Qualification Directive provision on ‘internal protection’ is optional. Member States are not required to utilize the concept of ‘internal protection’ in the determination of refugee status or the need for subsidiary protection. The text is explicit in stating that “*Member States may determine that an applicant is not in need of international protection*” [emphasis by author] on the ground of internal protection. The Directive does not seek to achieve uniformity in terms of whether Member States utilize the concept or not.

However, if Member States do opt to utilize the concept, then Article 8(1) and Article 8(2) are applicable,

and aim to bring about harmonization in Member States’ application of the concept. Recital 18 of the Qualification Directive states that it is necessary to introduce a common concept of internal protection. Article 8(3), on the other hand, is optional. This research not only shows that Member States which apply the concept of ‘internal protection’ have not necessarily opted to use or transpose Article 8(3); it also concludes that Article 8(3) is contrary to the purposes of the 1951 Convention and the Qualification Directive.

IV.3.2. Internal Protection under the Directive

Article 8

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.*

IV.3.3. National legislation transposing Article 8

Of the five countries of focus in this research, only the Slovak Republic and France had transposed Article 8 in their national legislation at the time of the study. However, neither State has transposed Article 8(3).

¹⁸³ Also referred to as ‘internal relocation alternative’. This is the term that is used by UNHCR but for the purposes of this research paper, the term used by the Qualification Directive will be used.

¹⁸⁴ See European Legal Network on Asylum (ELENA) research paper: ‘The Application of the Concept of Internal Protection Alternative’, ECRE, updated 2000.

¹⁸⁵ Op. cit., footnote 15.

¹⁸⁶ Note that Article 8(3) is not in line with UNHCR guidance. See section on ‘Access to Internal Protection’ below.

The Slovak legislation differs in two significant respects from the Qualification Directive. Firstly, the provision is not optional but obligatory in the Slovak law; and secondly, Article 8(3) is not transposed.¹⁸⁷ The provision in the French legislation is optional, as in the Qualification Directive. The wording is similar, but differs in two significant respects.¹⁸⁸ It explicitly states that the authorities should have regard to the actor of persecution when considering internal protection; and it requires that the applicant “*should have access to protection*” - in other words, Article 8(3) of the Qualification Directive has not been transposed. In the course of the parliamentary process to adopt the legislation, the issue of internal protection was referred to the Constitutional Court by several members of parliament. In its decision, the Constitutional Court made an important reservation to the legislation, stating that “*the OFPRA, under the supervision of the CCR, can only reject an application under [Article L.713.3] after having ascertained that the applicant can, in safe conditions, have access to a substantial part of his/her country of origin, settle there and lead a normal life*”.¹⁸⁹

Sweden has not transposed Article 8 but it does apply the concept of ‘internal protection’ in the determination of refugee status and subsidiary protection status, and decisions sometimes refer to an extract from the preparatory works¹⁹⁰ which defined internal protection as follows: “*By this is understood that an*

applicant is able to live in a part of the home country and there receive protection and also freedom of movement and the possibility to make a living. A pre-condition must of course be that the applicant can travel to such an area in a safe way. In particular in situations of internal turmoil and environmental catastrophes it is not unusual that not the whole country is affected and therefore that there is an internal flight alternative. In such case, there is of course no need for refuge in Sweden.”¹⁹¹ As such, Sweden does not apply Article 8(3) of the Qualification Directive in practice.

Greece plans to transpose Articles 8(1) and (2) literally and fully by means of a forthcoming Presidential Decree. However, like France, the Slovak Republic and the approach in Sweden, Article 8(3) is not included in the first draft of legislation. With regard to the current legal practice in Greece, whilst both MPO and MFA representatives reported in interviews that the concept of ‘internal protection’ is employed, there was no evidence of the legal analysis applied in either the case files or written decisions reviewed, and the few decisions by the Council of State do not elaborate any criteria for the assessment of an internal protection alternative.

Germany is thus the only State of the five of focus to this research that has transposed Article 8 literally and fully by means of the 2007 Transposition Act,

¹⁸⁷ Act on asylum 480/2002 Coll. - § 13 section 4d and § 13c section 4b.

¹⁸⁸ Article L. 713-3 CESEDA: “*The asylum application of a person who could have access to a protection in one part of the territory of his/her country of origin if this person has no well-founded fear of being persecuted there or of suffering serious harm and if he/she can reasonably be expected to stay in that part of the country may be rejected. [Eligibility authorities] shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the territory, to the personal circumstances of the applicant, as well as to the actor of persecution.*” French official version of Article L. 713-3: “*Peut être rejetée la demande d’asile d’une personne qui aurait accès à une protection sur une partie du territoire de son pays d’origine si cette personne n’a aucune raison de craindre d’y être persécutée ou d’y être exposée à une atteinte grave et s’il est raisonnable d’estimer qu’elle peut rester dans cette partie du pays. Il est tenu compte des conditions générales prévalant dans cette partie du territoire, de la situation personnelle du demandeur ainsi que de l’auteur de la persécution au moment où il est statué sur la demande d’asile.*”

¹⁸⁹ *Décision n° 2003-485 DC du 4 décembre 2003 du Conseil constitutionnel relative à la loi modifiant la loi n°52-893 du 25 juillet 1952 relative au droit d’asile.*

¹⁹⁰ prop. 96/97:25, page 101.

¹⁹¹ Original wording: “*Av särskilt intresse när det gäller nu nämnda kategorier är vidare om det finns ett s.k. inre flyktalternativ. Med det menas om sökanden har möjlighet att leva inom en del av hemlandet och där kan få skydd och även rörelsefrihet och möjlighet till försörjning. En förutsättning måste självfallet vara att sökanden kan ta sig till ett sådant område på ett säkert sätt. Just vid inre oroligheter och miljökatastrofer förekommer det inte sällan att inte hela landet är drabbat och att det därför finns ett inre flyktalternativ. I sådana fall föreligger självfallet inget behov av fristad i Sverige.*”

which entered into force after the research.¹⁹² In the period prior to the entry into force of the Act, MOI Guidelines acknowledged the direct applicability of the Qualification Directive. However, the research did not identify any decisions by the FedOff or courts where Article 8(3) was applied. On the contrary, MOI Guidelines require access to the area of protection.

IV.3.4. Impact on legal practice

IV.3.4.1. Individual assessment of internal protection

Article 4 (3) of the Qualification Directive demands that the assessment of an application for international protection is carried out on an individual basis, and takes into account all the relevant facts. This also applies to any assessment of a potential ‘internal protection alternative’ within the country of origin. In general, the research found that the assessment of ‘internal protection’ was based on the particular circumstances of each individual case.¹⁹³ For example in the decisions reviewed in Sweden, such concerns were at times explicitly mentioned both in relation to the alleged actor of persecution¹⁹⁴ and the nature of the persecution feared.¹⁹⁵

However, decisions in the Slovak Republic revealed a generic assessment of safety in the Russian Federation for Chechens, which appeared to dismiss or disregard alleged risks.¹⁹⁶ This is exemplified by the following Migration Office decision where it was stated: *“By law, all citizens of the Russian Federation have the right to move freely and choose their place of residence. In view of that fact, the applicant as a citizen of the Russian Federation may take advantage*

*of a possibility to settle in any part of the country.”*¹⁹⁷ Member State practice must be in line with Article 4(3) of the Directive, which requires that the assessment of an application for international protection is carried out on an individual basis and takes account of all the relevant facts.

IV.3.4.2. Access to internal protection

The Qualification Directive provides for an individual two-part assessment of any proposed location of internal protection:

1. The decision maker must ensure that there is no well-founded fear of being persecuted or no real risk of suffering serious harm in the alternative location;
2. The decision maker must be satisfied that the applicant can reasonably be expected to stay in the alternative location.

The Directive omits what is considered by UNHCR, the European Court of Human Rights, legal experts and States Party to the 1951 Convention to be an essential, and even pre-conditional, requirement of an internal protection alternative i.e. that the proposed location is practically, safely and legally accessible to the applicant. On the contrary, Article 8(3) of the Qualification Directive provides that internal protection may apply notwithstanding technical obstacles to return to the country of origin. This section therefore begins with an analysis of the Directive and Member State practice on this aspect of the internal protection issue, before considering the two-part assessment set out by the Directive.

¹⁹² The Transposition Act which entered into force on 28 August 2007 creates a new Section 60(1) 5 Residence Act 2004 and refers to the Directive.

¹⁹³ For instance in Germany, Northern Iraq was not considered an internal protection alternative for a woman who was in danger because of her former high-ranking position in a ministry, as the persecutors might be able to enter the Kurdish autonomous region to eliminate her (IqR22).

¹⁹⁴ MD2AF5, MD2AF6, MD1AF6.

¹⁹⁵ MIBSOM9.

¹⁹⁶ For example, ECRE Guidelines on the treatment of Chechen internally displaced persons (IDPs), asylum-seekers and refugees in Europe, revised March 2007, at: http://www.ecre.org/files/chechen_guidelines.pdf.

¹⁹⁷ MU-467-67/PO-_/2005, MU-1515-11/PO-_/2006.

As mentioned above, Article 8(3) is not in line with UNHCR Guidelines on International Protection, which requires that an internal protection alternative be practically, safely and legally accessible to the individual.¹⁹⁸ It is also at variance with the established jurisprudence of other States Party to the 1951 Convention,¹⁹⁹ according to which States should assess the physical risks entailed in travel to the proposed internal protection alternative,²⁰⁰ and should ensure accessibility of the proposed internal protection i.e. the individual must have the legal right to travel there, to enter and to remain. This has been confirmed by a recent judgment of the European Court of Human Rights in the case of *Salah Sheekh v. the Netherlands* which held that “*as a precondition for relying on an internal flight alternative, certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, to gain admittance and be able to settle there*”.²⁰¹

In line with this position, France, the Slovak Republic and Sweden have not transposed Article 8(3) in their legislation and do not apply it in practice.

The Swedish Commission of Inquiry on the Qualification Directive found that it was “*not reasonable and not in accordance with Article 1 A of the Geneva Convention to accept an internal flight alternative if it could not be made use of in safety*”. For this reason the Inquiry proposed that Article 8(3) should not result in any legislative measures. Furthermore, the preparatory works to the Swedish Aliens Act²⁰² explicitly state that a precondition for

the availability of an internal protection alternative is that the applicant “*can travel to such an area in a safe way*”.

In France, the Constitutional Court made a reservation to the Asylum Law stating that “*the OFPRA, under the supervision of the CCR, may only reject an application under [Article L.713.3] after having ascertained that the applicant can, in safe conditions, have access to a substantial part of his/her country of origin, settle there and lead a normal life*”.²⁰³ It should be noted that this reservation not only requires access in safe conditions, but it also requires access to a ‘substantial part’ of the country of origin. The research did not identify any case-law that has so far elaborated these criteria.

The draft Presidential Decree which will transpose Article 8 in Greece does not contain an equivalent to Article 8(3). Therefore, it may be deduced that like France, the Slovak Republic and Sweden, Greece does not currently intend to transpose or apply Article 8(3).

Germany is, therefore, the only State of the five of focus to this research that has now transposed Article 8(3) in its national legislation, but the review of decisions found no evidence of the article being applied. On the contrary, the MOI Guidelines require practical access to the area of protection, without further explanation, as a requirement under paragraph 1 of Article 8. The German FedOff policy papers for Somalia demand direct and safe access to the territory. With regard to the Russian Federation, for Chechens they require that access be examined and

¹⁹⁸ Op. cit., footnote 15.

¹⁹⁹ See, for example, *Randhawa v. Minister for Immigration Local Government and Ethnic Affairs* (1994) 124 ALR 265 where it was stated that “[N]otwithstanding that real protection from persecution may be available elsewhere within the country of nationality ... [internal protection alternative does not apply] if, as a practical matter, the part of the country in which protection is available is not reasonably accessible to that person. In the context of refugee law, the practical realities facing a person who claims to be a refugee must be carefully considered.”

²⁰⁰ In *Dirshe v. Canada* (Minister of Citizenship and Immigration), Federal Court of Canada, 1997, it was stated that in order for an internal protection alternative to be viable “*it must be physically possible for the applicant to get there. This involves an assessment of how the applicant is to get there. If it is dangerous for the applicant to get to the safe area, it cannot be said that the [internal protection alternative] is a practical possibility.*”

²⁰¹ Op. cit., footnote 17.

²⁰² Prop. 1996/97:25 page 101.

²⁰³ Op. cit., footnote 189.

the concrete possibilities have to be carefully taken into consideration. For Sri Lanka, the FedOff policy papers state that access has to be examined in every single case, depending on the latest state of security and supply, and possibilities to travel to the respective region. Also for Iraq, it is explicitly mentioned that access to the internal protection alternative has to be examined. It should be noted, however, that the screening of decisions showed that the question of access to these areas was not individually examined in every case.²⁰⁴ With regard to Article 8(3), the German MOI Guidelines do not shed much light on the interpretation to be given to the provision, apart from a reference to a lack of travel connections. No indications are given as to any potential time-span for which the technical obstacles exception may apply.

In UNHCR's view, Article 8(3) should not be implemented in the national laws of Member States nor in their legal practice, because the effect of this provision is to deny international protection to persons who have no accessible protection alternative. As such, it is not consistent with Article 1 of the 1951 Convention or the purpose of the Qualification Directive and is not in line with the case-law of the European Court of Human Rights.²⁰⁵ An internal protection alternative cannot be hypothetical but must be real. Member States are urged to assess access in accordance with the UNHCR Guidelines as part of their inquiry into internal protection, and explicitly to make this a requirement in implementing legislation. The European Commission is urged to propose to the European Parliament and the Council that Article 8(3) be deleted from the Directive.

IV.3.4.3. Risk of persecution or serious harm in other parts of country of origin

Once practical, safe and legal access to the proposed internal protection alternative is established, the fact finding turns to an assessment of whether effective protection is available in the proposed location. As already mentioned, the Qualification Directive provides for an individual two-part assessment of any proposed location of internal protection. The decision maker must ensure that there is no well-founded fear of being persecuted or no real risk of suffering serious harm in the alternative location and must be satisfied that the applicant can reasonably be expected to stay in the alternative location.

The Directive requires the decision maker to have regard both to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant. Both parts of the assessment must be fulfilled to conclude that an internal protection alternative exists for the claimant. For the purposes of this report, the two parts of this assessment will be referred to as the 'protection analysis' and the 'reasonableness analysis'.

IV.3.4.4. The protection analysis

The first part of the assessment - the protection analysis - should ensure that:

- there is no real risk that the individual will be persecuted or suffer serious harm in the foreseeable future in the proposed area of internal protection; and
- there is no real risk of forced return to the region of origin.

²⁰⁴ See especially IrqN17 (Shiite); SomN12 (elderly woman from Somalia).

²⁰⁵ For further recommendations regarding the issue of forced return, see also Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, September 2005.

A full assessment of the risk in the proposed ‘internal protection’ location can only be properly undertaken if there has already been a full and individual assessment of the nature of the well-founded fear of persecution or risk of serious harm in the applicant’s region of origin. The review of decisions showed that some decision makers indeed only proceeded to an assessment of protection in another region once the risk in the region of origin had been examined.²⁰⁶

However, in Germany, FedOff and court practice showed that this approach is not always adhered to. Some courts take the correct approach and first assess whether a well-founded fear exists in the region of origin, before addressing the possibility of internal protection elsewhere in the country of origin. This sequence of assessment is often chosen when in the court’s view it is unlikely that an internal protection alternative exists for the person concerned.²⁰⁷ Other courts explicitly state that they do not have to decide whether a well-founded fear has been established by the applicant, if according to their view, internal protection in another part of the country of origin is provided anyway.²⁰⁸ This approach raises a significant risk that international protection may be denied following superficial consideration of the relevant circumstances and without proper consideration of the individual circumstances. A clear understanding of the nature of the well-founded fear of persecution or risk of serious harm is at the heart of an assessment of the possibility of internal protection.

A brief mention should be made of the approach of the Slovak authorities to the concept of internal protection, as it appears that they only turn to the issue of whether there is an internal protection alternative when the decision maker has found that the applicant does not have a well-founded fear of persecu-

tion in the country of origin, as evidence that there are no obstacles to expulsion. This appears illogical, since the rationale of the initial decision is that the applicant can safely return to his/her country of origin without any real risk of suffering persecution or serious harm. There is, therefore, no need to assess whether protection is available in another part of the country.

It is precisely because of the complexity of this assessment requiring both a full examination of the nature of the well-founded fear of persecution or risk of serious harm and an in-depth assessment of any potential location of internal protection – taking into account both general circumstances prevailing and personal circumstances of the applicant – that it is necessary that this inquiry is not undertaken in accelerated procedures but normal procedures.²⁰⁹

If the actor of persecution or serious harm is the State, the issue of internal protection should only be relevant where, exceptionally, the power of the State is clearly limited to a specific geographical area of the State. Normally, it should be assumed that the State is entitled and has the capability to act throughout the country and there is, therefore, no internal protection alternative. Furthermore, as stated by UNHCR, where the risk of being persecuted emanates from local or regional government authorities, it will rarely be necessary to consider a potential internal protection alternative, as it can generally be presumed that such local or regional bodies derive their authority from the national government. *“The possibility of relocating internally may be relevant only if there is clear evidence that the persecuting authority has no reach outside its own region and that there are particular circumstances to explain the national government’s failure to counteract the localized harm.”*²¹⁰

²⁰⁶ Decisions sampled in France and Sweden. There was no evidence of this in decisions sampled in Greece, although representatives of the MPO, MFA and Athens Bar Association stated this to be the case.

²⁰⁷ See for example Bremen AC, 6 K 2356/01.A of 14 February 2007.

²⁰⁸ See for example Baden-Wuerttemberg HAC, A 3 S 46/06 of 25 October 2006.

²⁰⁹ See footnote 15.

²¹⁰ Ibid.

However, based on interviews and the review of decisions, it is clear that the concept of ‘internal protection alternative’ is not only applied where the actor of persecution or serious harm is unrelated to State authorities, but also where the actor of persecution or serious harm is the State or where the State instigates, supports, condones or tolerates the actions of the actor of persecution. With the exception of France and at times Sweden, research found that in the other three Member States, there is no particular presumption against finding an internal protection alternative where the actor of persecution or serious harm is a State-actor. In the legislative process leading to the adoption of the Asylum Law in France in 2003, the Parliament inserted a specific reference to the actor of persecution, so that there is an explicit requirement in the law that eligibility authorities take into account ‘the actor of persecution’.²¹¹ In legal practice, there is a resulting presumption against finding an internal protection alternative where the alleged persecution is instigated, condoned or tolerated by the State.²¹²

A careful and thorough assessment of the ability and willingness of the actor of protection to provide protection in the proposed alternative region and a similarly thorough examination of the quality of that protection based on the individual circumstances of the applicant is critical. It is also key in assessing the risk of the applicant being forced back to the region of origin. However, regardless of whether the alleged actor of persecution or serious harm was the State or a non-State actor, with the exception of decisions in France, the review of decisions found that often an evaluation of the potential actor of protection in the proposed alternative region is absent or, at best, scant.

For example, it was found that the decision practice of the German FedOff and Slovak Migration Office

displays a lack of critical review of the potential actors of protection with respect to the Russian Federation. With regard to Chechens, most parts of the Russian Federation are accepted as possible areas of internal protection, yet no examination is carried out as to how far the Russian authorities can be considered as actors of protection, even though they may at the same time be alleged to be perpetrators of persecution or serious harm.

In Sweden, the research revealed some decisions regarding Somalia where the authorities were prepared to consider clans as potential actors of protection.²¹³ The German FedOff requests that the adjudicator examine in every case if the applicant has the possibility to return to Somalia and to settle in a region of his or her own clan and if it is, amongst other things, guaranteed that the clan which persecutes has no access to that region or influence on it, so that the applicant can feel safe there. Even if not explicitly mentioned, it could be concluded that the clan is considered a potential actor of protection. It is UNHCR’s view that *“it is inappropriate to find that the claimant will be protected by a local clan or militia in an area where they are not the recognized authority in that territory and/or where their control over the area may only be temporary. Protection must be effective and of a durable nature. It must be provided by an organized and stable authority exercising full control over the territory and population in question.”*²¹⁴

IV.3.4.5. The reasonableness analysis

Even where it is found that there is no well-founded fear of being persecuted or no real risk of suffering serious harm in another part of the country of origin, the second requirement of ‘reasonableness’ must also be fulfilled. The second part of the assessment relates to whether *“the applicant can reasonably be*

²¹¹ Article L. 713-3 CESEDA.

²¹² This reasoning is based on the presumption that the State authorities control the whole territory. However, the reasoning might be different in a federal or decentralized state.

²¹³ For example MD3SOM2 (finding that the applicant’s clan could not offer protection); MIBSOM1, MIBSOM4, MIBSOM5, MIBSOM6 and MIBSOM13 (stating that in the absence of a functioning State, Somalis usually depend on the protection of a clan).

²¹⁴ Op. cit., footnote 15.

expected to stay in that part of the country". Again, according to Article 8(2), this must be assessed having regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.

The 'reasonableness analysis' has long been practised by a number of jurisdictions²¹⁵ and forms a part of the legal analysis recommended by UNHCR.²¹⁶ The Qualification Directive reflects these facts. However, there appears to be wide divergence across and within jurisdictions with regard to what constitutes 'reasonable stay'.

For example, the German authorities, prior to the entry into force of the Qualification Directive, applied a restrictive assessment of whether the applicant could survive at a basic level of subsistence in the proposed alternative location.²¹⁷ The significance of this test was further limited by the fact that an internal protection alternative would be found to exist, even if a basic level of subsistence could not be attained, if the economic situation in the region of origin was considered worse than that in the proposed alternative region.²¹⁸ As a consequence, many Chechen asylum-seekers were denied refugee status on the grounds that they could live elsewhere in the Russian Federation. Even though it was acknowledged that they might not attain a basic level of subsistence in the alternative region in the Russian Federation, as the economic situation was worse in Chechnya, an internal protection alternative was affirmed.

In contrast and as indicated earlier, the French Constitutional Court made an important reservation to the 2003 Asylum Law, stating that "*the OFPRA, under the supervision of the CCR, may only reject an application under [Article L.713.3] after having ascertained that the applicant can, in safe conditions, have access to a substantial part of his/her country of origin, settle there and lead a normal life*".²¹⁹ 'Lead a normal life' has since been assessed by comparison to the 'general living conditions of the population' in the internal protection area.²²⁰

With the entry into force of the Qualification Directive, the German MOI Guidelines accept that the concept of 'internal protection' no longer allows for a comparison between the alternative region and the region of origin.²²¹ However, there is no indication in the MOI Guidelines that the reasonableness analysis will embrace an assessment which requires more than a minimum level of subsistence. As a result, it remains to be seen whether the Qualification Directive will eventually bridge the differing legal interpretations across jurisdictions.

According to the UNHCR Guidelines, a full reasonableness analysis requires consideration of the following key inter-related factors:

- the safety and security of the applicant;
- respect for the applicant's fundamental human rights;
- the economic survival of the applicant; and
- the applicant's personal circumstances.

The requirement of safety and security in the context

²¹⁵ See footnote 184.

²¹⁶ Op. cit., footnote 15 and op.cit., footnote 23, § 91.

²¹⁷ Only a minor margin of appreciation was afforded to other circumstances: Federal Administrative Court, Informationsbrief Ausländerrecht 2002, 455. An overview is provided by K. Lehmann, Das Konzept der inländischen Fluchtalternative in der deutschen Rechtsprechung und deren Verhältnis zu Art. 8 der Qualifikationsrichtlinie (interner Schutz), Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2007, 508 (514).

²¹⁸ Federal Constitutional Court, decision of 02.07.1980, BVerfGE 54,341f; Federal Administrative Court, decision of 09.09.1997, EZAR 203, Nr.11.

²¹⁹ Op. cit., footnote 189.

²²⁰ Traore, CRR, SR, 16/02/2007, 513815.

²²¹ Op. cit., footnote 62, page 6.

of the ‘reasonableness analysis’ necessarily involves a lower level of risk and/or a lesser degree of harm than in the context of the ‘protection analysis’, where a well-founded fear of persecution or a risk of serious harm (as defined in the Qualification Directive) in the internal protection area would eliminate the possibility of internal protection. In Germany, the ongoing armed conflict in Somalia has been found to negate an internal protection alternative. It should be noted, however, that the review of decisions also yielded four cases where the adjudicators referred to an internal protection alternative within Central and Southern Somalia.²²² In Sweden, only one of the reviewed decisions dealing with internal protection referred to the ongoing armed conflict in Afghanistan.²²³ The following decision by the Migration Office in the Slovak Republic makes no reference to armed conflict in Afghanistan as a threat to the security of the applicant stating: *“Given that freedom of movement is guaranteed by the constitution, everyone who has a well-founded fear of persecution in any part of the country is allowed to relocate to its other parts, where s/he would not be in danger. Travelling is possible almost on the whole territory of Afghanistan; moreover the applicant does not fall under those categories of Afghan citizens who, according to UNHCR, might face potential risks if returned, therefore there is no likelihood that his life or personal security would be threatened, or he could be tortured or subjected to cruel, inhuman or humiliating treatment or punishment if returned to country of origin.”*²²⁴

With the exception of France, an explicit assessment of the extent to which applicants’ civil, political, social, economic and cultural rights will be upheld in the proposed destination of internal protection was

generally not found in the reviewed cases,²²⁵ and interviews with some decision makers revealed uncertainty as to which rights might be relevant. Moreover, some of the decisions reviewed in the Slovak Republic and Germany revealed an alarming tendency to dismiss evidence of the violation of human rights in the proposed internal protection area. For example, in spite of reports of difficulties faced by Chechens in parts of the Russian Federation²²⁶, the following statement was found in decisions by the Migration Office in the Slovak Republic: *“Given that the applicant refuses to return to Chechnya due to personal safety and economic reasons, despite problems with residence registration in large towns, s/he is free to settle in any part of the Russian Federation.”*²²⁷ This follows a precedent-setting judgement of the Regional Court in Bratislava which held that *“the mere occurrence of certain administrative measures imposed on internally relocated persons by local authorities or unstable situation in Chechnya cannot give good reason for prohibition of expulsion or return”*.²²⁸

In Germany, the violation of human rights in the proposed internal protection alternative location may be dismissed, by the FedOff and some courts, as irrelevant as long as the right to life is not violated and basic subsistence can be achieved. In other words, only extreme lack of, for example, food, shelter, or basic health care has been found to negate an internal protection alternative. FedOff policy and decision practice shows that, with regard to Chechen cases, the lack of a legal right to reside or to work in the proposed location does not negate the finding of an internal protection alternative. Recent text modules, which are provided to guide the drafting of deci-

²²² SomN7; SomN9; SomN11; SomN12. The adjudicators partly referred to out-dated country of origin information (for instance newspaper articles from August 2006, according to which for example in a considerable part of Central and Southern Somalia armed hostilities do not take place (SomN7)). An individual assessment was lacking in these particular decisions.

²²³ MD2AF5.

²²⁴ MU-1670-10/PO-/2006 dated 17/10/2006, MU-1812-13/PO-/2006 dated 27/11/2006.

²²⁵ But, with regard to Sweden, see MD3AF8 where the Court assessed whether the applicants could be politically active in the proposed region; and MIBSOM9 where the Migration Board noted that the applicant’s clan is considered by strong clans in Somalia to lack social and legal rights.

²²⁶ See for instance Amnesty International Report 2007, The State of the World’s Human Rights, p.217.

²²⁷ MU-2500-10/PO-/2006, MU-2501/PO-/2006.

²²⁸ Reg. No. 11 Saz 1/05-32 as of 12/11/2005.

sions, refer to a Federal Administrative Court decision according to which a reasonable internal protection alternative does not require legal access to the labour market and housing, to public social benefits and educational institutions.²²⁹ As a consequence, Chechen applicants are expected to settle in other areas of the Russian Federation even without official registration, and dependent on the informal labour market to earn their living.²³⁰ This practice is not in line with UNHCR's Guidelines, which require that the applicant have the legal right to remain in the proposed internal protection alternative.

In contrast to the practice in Germany and the Slovak Republic, the French authorities seek to ensure that the fundamental civil, political, social and economic rights of the applicant will be respected in the internal protection alternative. In the Boubriema case, which concerned an Algerian applicant who feared persecution by religious extremists, the CRR held that the 'reasonableness' part of the assessment had not been satisfied because "*given the living conditions he had to bear, in particular the impossibility to find a job and the constant threat of being submitted to police harassment which could lead to his/her forced removal to his/her region of origin, it would not be reasonable to consider that the applicant could stay in this part of the country*". Another precedent-setting case, Traore, seemed to suggest that the applicant should be able to live in the proposed internal protection location like the rest of the population in

the area, and the CRR assessed the proposed internal protection in the north of the Ivory Coast "*in the light of the general living conditions of the population in this area*."²³¹ The Constitutional Court reservation to the Asylum Law had already required that the applicant must be able to "*lead a normal life*" in the proposed location of internal protection.²³²

Whilst it would be incorrect to portray a uniform approach to the issue of 'reasonableness' in Sweden, there were explicit references to the UNHCR Handbook or the 2003 UNHCR Guidelines on International Protection in the decisions reviewed.²³³ There were also references to the Aliens Act's preparatory works stating that "*by an internal flight alternative is understood that an applicant is able to live in a part of the home country and there receive protection and also freedom of movement and to make a living. A precondition must of course be that the applicant can travel to such an area in a safe way*."²³⁴

As part of the 'protection' and 'reasonableness' assessments, the personal circumstances of the applicant must be taken into account. The review of decisions found that decision makers generally did take personal circumstances into account. German FedOff policy papers stress the need to take personal circumstances into account and this is reflected in both FedOff and court decisions: for instance presence or non-presence of family in the proposed inter-

229 BVerwGE 9 C 43.96 of 9 September 1997.

230 This text module was used in two of the cases reviewed: RusN7; RusN11.

231 CRR, SR, 16/02/2007, Traore, 513815.

232 Op. cit., footnote 189.

233 For instance MD3AF8; MD2AF4; MD1AF6; MD1AF10.

234 Original wording: "*Med det menas om sökanden har möjlighet att leva inom en del av hemlandet och där kan få skydd och även rörelsefrihet och möjlighet till försörjning. En förutsättning måste självfallet vara att sökanden kan ta sig till ett sådant område på ett säkert sätt*."

nal destination,²³⁵ age,²³⁶ sex,²³⁷ health,²³⁸ disability,²³⁹ social or other vulnerabilities,²⁴⁰ ethnic, cultural or religious considerations and ties,²⁴¹ political and social links, language skills,²⁴² educational, professional and work background and opportunities²⁴³ and ability to access accommodation and earn a living²⁴⁴. This is mirrored by decisions of the Migration Board and courts in Sweden where the following circumstances have been taken into account: presence or non-presence of family in the proposed internal destination,²⁴⁵ age,²⁴⁶ sex,²⁴⁷ health,²⁴⁸ social or other vulnerabilities,²⁴⁹ ethnic, cultural or religious considerations and ties,²⁵⁰ educational, professional and work background and opportunities,²⁵¹ ties or connections to the area.²⁵²

References to similar circumstances can be found in some Slovak decisions.²⁵³ However, as mentioned above, decisions regarding Chechens tended to be generic and did not reveal an individual assessment taking into account personal circumstances. In German court decisions regarding Chechnya, even though the general assumption of a protection alter-

native elsewhere in the Russian Federation prevails, the personal potential to survive despite difficult conditions is normally analysed, in particular, by taking age or illnesses into account.²⁵⁴ However, the examination of those individual criteria frequently remains quite superficial, and the assessment of a potential internal protection alternative in Colombia and Sri Lanka was more generic than in other contexts.²⁵⁵

In addition to personal circumstances, the Directive requires decision makers to take into account the ‘general circumstances prevailing’. This should be understood, in accordance with UNHCR guidance and most state practice, to involve a prospective or forward-looking analysis. According to interviewees in Greece and Sweden, the risk assessment must be valid for a foreseeable time. In German court practice, the situation the person would face in an alternative region of internal protection appears to be assessed with regard to a relatively short period of time after return. In cases concerning Chechens²⁵⁶ the courts regularly discuss the option of registration in

235 IrqR29; IrqR37; IrqR39, IrqR46; IrqN19; SomR1; SomR3; SomR4; SomR5; SomR17; SomR18; SomR19; SomR20; SomR22; SomR23; SomR15.

236 IrqR14; SomR25: young single woman; IrqR49: elderly single woman; IrqN18: young man, internal flight alternative affirmed; SomR6; SomR7; SomR8; SomR9; SomR10; SomR11; SomR12; SomR13; SomR14; SomR15; SomR16: young girls who are at risk to be circumcised.

237 IrqR9; IrqR15; IrqR39; IrqR49; see also the Somali cases under Fn 14.

238 Woman with suicidal tendencies, Stuttgart AC, A 4 K 1877/06 of 29 January 2007.

239 Disabled woman: IrqR30.

240 Single women: IrqR9; IrqR15; IrqR39; IrqR49; single woman with baby: RusR2

241 IrqR4 (Arab woman, no internal flight alternative in Kurdish region); IrqR37 (Christians: possible infringements by the Kurdish parties in Northern Iraq); SomR1, SomR2, SomR3, SomR4, SomR5, SomR17, SomR18, SomR19, SomR20, SomR22, SomR23 (clan affiliation).

242 No Kurdish language skills: IrqR4; IrqR10; IrqR49.

243 IrqR4 (low educational level); IrqN19, IrqN17, RusN5, RusN19 (professions in demand, therefore internal flight alternative affirmed. Integration for an almost illiterate woman in Western Turkey impossible without family support, Stuttgart AC, A 4 K 1877/06 of 29 January 2007).

244 IrqR4; IrqR8; IrqR10; IrqR14; IrqR15; IrqR21; IrqR23; IrqR29; IrqR39; IrqR46; SomR1; SomR3; SomR4; SomR5; SomR26.

245 MD3AF8, MD2AF4, MD1AF6, MD1AF8, MIBSOM9 (not clear if in relation to proposed IFA or generally).

246 MD1AF10 (young).

247 MIBAF6 (woman).

248 MD2AF4, MD1AF10 (healthy).

249 MD3AF8, MD1AF10 (without children), MIBSOM9 single mother without social safety-net (not clear if in relation to proposed IFA or generally), MIBAF6 (woman in Afghanistan, referring to the gender power hierarchy).

250 MD3AF8.

251 MD2AF6, MD1AF6.

252 MIBRU14; MIBRU22.

253 MU-1743-9/PO-/2006, MU-1515-11/PO-/2006, MU-1856-9/PO-/2006.

254 A recognition of the criterion of personal circumstances in general terms in a Chechen case was made by Baden-Wuerttemberg HAC, A 3 S 179/07 of 20 March 2007. The possession of a passport by one family member is considered sufficient to secure access to the labour market in the individual case for the husband, Baden-Wuerttemberg HAC, A 3 S 46/06 of 25 October 2006.

255 LkaN54; LkaN66; LkaN71; LkaN87; LkaN88; LkaN90; ColN2; ColN3; RusN3; RusN6; RusN7; RusN8.

256 See for instance Baden-Wuerttemberg, AS 46/06 of 25 October 2006.

the Russian Federation and related questions as well as the probability of finding a job in order to make a living. This assessment refers to the time of return but does not take into account possible future developments. Also in cases pertaining to Iraqi nationals, the assessment of the proposed location of internal protection is conducted with a view to the current situation, but does not contain any future evaluation.

IV.3.5. Conclusion

As mentioned, Article 8 is optional, and Member States do not have to utilize the concept of ‘internal protection’ in their determination of a need for international protection. The research found that all the five States of focus for this research utilize the concept, but the extent to which it is applied varies.

Of the 206 negative decisions reviewed in France, none were based on the internal protection alternative. Since the adoption of the Asylum Law in 2003, the CRR has only denied protection on this ground in three cases. In each of these cases, the applicant had already lived in the proposed internal protection location without a well-founded fear of persecution and without a risk of serious harm.²⁵⁷ There has been no reported decision in France where an applicant has been denied protection in France on the basis that he or she could find protection in another part of their country of origin where the individual had not lived previously. This is apparently not due to the fact that the issue is not raised in the determination

of cases, but that the criteria established by the Asylum Law, as amended by the Constitutional Court, are rarely found to be satisfied.

The application of the concept is more prevalent in Germany, the Slovak Republic and Sweden. As mentioned above, scrutiny of decisions in these Member States found that an evaluation of the potential actor of protection in the proposed alternative location is often absent or, at best, scant. Moreover, many decisions either did not reveal any assessment of the protection of human rights in the proposed alternative location or, in the case of decisions in Germany and the Slovak Republic, the standard applied was so low that an internal protection alternative was found viable even when the applicant could not legally reside or work in the proposed location.

An overview of the application of the concept to particular nationality caseloads suggests that there are divergent interpretations of the concept across national jurisdictions concerning applicants from the same countries and similar situations. This would indicate that the Qualification Directive has not yet achieved its aim, as stated in Recital 18, of introducing a common concept of internal protection, when it is utilized.

For example, in France, the concept of internal protection was not applied in any of the decisions reviewed concerning Colombians. Decisions in France generally consider that there is no internal protection alternative for those who have a well-founded fear of

²⁵⁷ Decision CRR, M.T., 20/07/2004, 448586 concerned a Tamil from Sri Lanka who originated from the north of the country where he/she had some problems with the authorities and who later settled for three years in Colombo where he/she had no problem. The CRR found that it “seemed reasonable to consider that the applicant could settle in Colombo [i.e. a substantial part of his/her country of origin] without any fear of persecution and under normal living conditions”.

Decision CRR, M.T., 7/04/2005, 501034 concerned an applicant from Ecuador who was threatened by Colombian militias settled in Ecuador near the border with Colombia where it was established that the Ecuadorian authorities can not provide an effective protection to the local population. The CRR found that “it seems reasonable to consider that the applicant can settle in a durable and peaceful way in Quito or any other substantial part of the territory far from the Colombian border without any fear of persecution and lead a normal life there, in particular thanks to the protection of the Ecuadorian authorities in those regions”.

Decision CRR, M.N., 30/03/2006, 542469 concerned a Moldavan who used to live in the region of Transdnistria, where she/he had problems with the local authorities because of her/his activities in an opposition party and who fled to Chisinau where she/he could live with her/his parents without any problem. The CRR found that “if we consider that the facts are established, the applicant does not prove that she/he could not have access to a protection in Chisinau, capital city of Moldavia, where her/his parents reside and where she/he could stay several times without having any problems and where the authorities issued her/him a passport and other documents without any difficulty”.

persecution or risk of serious harm by the State of Colombia; and that the State is unable to provide protection to the victims of FARC. Yet in Germany, of the 60 Colombian decisions screened, in 38 the adjudicator referred to an internal protection alternative in Colombia. The applicants were generally found to be able to seek refuge in one of Colombia's bigger cities and their surrounding areas, thus only denominating the protection area, but not the actor of protection. It is assumed that it is the State.

The treatment of the Chechen caseload also highlights a divergent approach. In France and Sweden, the concept of internal protection was not applied in any of the decisions reviewed concerning Chechens²⁵⁸. In contrast, according to the German FedOff policy, most parts of the Russian Federation are accepted as possible internal protection alternatives. An exception is made with regard to applicants who are considered to be known to Federal Russian forces due to their (imputed) commitment to the Chechen cause, or where the personal circumstances of the applicant are such that a minimum level of subsistence cannot be achieved. A lack of a legal right to reside or work in the proposed location is not considered a bar to finding that there is an internal protection alternative, if the FedOff considers that the applicant could survive in the Chechen "diaspora".

In 15 out of 41 negative decisions screened in Germany, the adjudicator referred to an internal protection alternative in the Russian Federation using text modules prepared by the FedOff headquarters.

However, in most of the cases, an internal protection alternative was used as an additional ground upon which to deny protection together with credibility grounds. In only five cases, was credibility not an issue.²⁵⁹ It should be noted that, in recent years, the decision practice of the administrative courts has been especially inconsistent with regard to the assessment of an internal protection alternative for Chechens in the Russian Federation. In the past, some courts have considered that, in the prevailing circumstances, an internal protection alternative did not exist in particular areas of the Russian Federation or for persons without a valid in-country passport,²⁶⁰ but a strong tendency in the judgments of the administrative courts was to generally assume an internal protection alternative for all Chechens who were not considered especially targeted.²⁶¹ In this regard the judgments of the Bavarian Higher Administrative Court of 31 January 2005 (11 B 02.31597) and 19 June 2006 (11 B 02.31598) were particularly influential in widening the scope of application of the internal protection alternative in the FedOff decision practice.²⁶²

It is difficult on the basis of this limited research to pinpoint all the reasons for the degree of divergence in State practice. In part, it may be due to the fact that decision makers need further guidance as to the benchmarks for the 'reasonableness analysis'. It may also be due to a failure by some authorities to assess fully all the relevant issues such as the ability and willingness of the actor of protection to provide protection, the human rights situation in the alternative region of protection and the personal circumstances of the applicant. It may also be a result

²⁵⁸ Op. cit., footnote 226.

²⁵⁹ Two decisions pertained to children of rejected asylum seekers where the application was initiated by the local aliens authority (RusN16; RusN25), one decision pertained to a woman with three children (two, four and five years old) with a husband of Georgian nationality (RusN19), one to a young single man aged 19 (RusN20), one to a man aged 55 (RusN31).

²⁶⁰ For example Hesse Higher Administrative Court judgments of 2 February 2006 (3 UE 3021/03.A) and 18 May 2006 (3 UE 177/04.A); Higher Administrative Court of Saxony-Anhalt of 31 March 2006 (2 L 40/06); left open by Higher Administrative Court of Bremen, judgment of 15 June 2006 (2 A 112/06.A).

²⁶¹ For example Higher Administrative Court of Lower Saxony, decision of 24 January 2006 (13 LA 398/05); Higher Administrative Court of Baden-Württemberg, judgment of 25 October 2006 (A 3 S 46/06).

²⁶² This interpretation has persisted in the recent jurisprudence of some administrative courts, for example: Lower Saxony HAC, 13 LA 22/07, dec. of 27.04.2007 and 13 LA 67/06, dec. of 16.01.2007; Bavarian HAC, 11 B 03.30133, dec. of 20.03.2007; Baden-Wuerttemberg HAC, A 3 S 179/07, dec. of 20.03.2007; Gelsenkirchen AC, 6a K 5349/01.A, dec. of 21.02.2007; Bremen AC, 6 K 2356/01.A, dec. of 14.02.2007.

of procedural issues such as the quality or timeliness of country of origin information, or the impact of procedural constraints.

The fact that the Qualification Directive has provided an initial framework for the assessment of internal protection is considered positive for those countries that previously had no framework for analysis. A missing element in that framework is the requirement that an internal protection alternative be practically, safely and legally accessible. National legislation and legal practice should reflect this requirement, and Article 8(3), which is contrary to the purposes of the 1951 Convention and Qualification Directive, should be removed from the Directive.

IV.4. Subsidiary protection²⁶³

IV.4.1. Introduction

The Qualification Directive is the first supranational piece of legislation in Europe to define qualification for subsidiary protection and to create an entitlement to a status for those who qualify. Many EU Member States had already developed national statuses complementary to refugee status. These were referred to by many names, and their scope and the rights attached to the status were disparate. The Qualification Directive sets minimum standards for the definition and content of subsidiary protection status. As is the case for other provisions of the Qualification Directive, Member States may maintain or introduce standards more favourable to the applicant, as long as these are compatible with the Directive.

The Directive makes clear that its provisions on qualification for subsidiary protection should be complementary and additional to the refugee protection enshrined in the 1951 Convention.²⁶⁴ UNHCR supports this affirmation and stresses that it is vital that the Directive's terms are interpreted so as to ensure that individuals who fulfil the criteria of the 1951 Convention are granted refugee status, rather than being accorded subsidiary protection. The Directive's provisions on subsidiary protection should serve to strengthen, not undermine, the existing global refugee protection regime.²⁶⁵

The Directive's provisions on qualification for subsidiary protection are inspired by international human rights instruments²⁶⁶ and the practice of Member States. On the adoption of the Qualification Directive, UNHCR welcomed the fact that the Directive provided a legal basis for subsidiary protection in the European Union, and that Member States are now bound to grant subsidiary protection status to those who qualify. In particular, UNHCR welcomed the recognition given in the Qualification Directive to the fact that persons fleeing the indiscriminate effects of violence associated with armed conflicts, but who do not fulfil the criteria of the 1951 Convention, nevertheless require international protection.²⁶⁷ UNHCR urged Member States to interpret the provisions on qualification for subsidiary protection in a way which reflects the purpose and spirit of the provision, and cautioned against a restrictive interpretation.

The research focused on the implementation of Article 15, which describes the criteria for qualification for subsidiary protection (as supplemented by

²⁶³ For the purposes of this report, the terminology of the Qualification Directive is used; however, it should be noted that UNHCR prefers to use the term 'complementary protection' to describe this status.

²⁶⁴ Recital 24 of the Qualification Directive.

²⁶⁵ See footnote 8.

²⁶⁶ Particularly, Protocols 6 and 13 to the European Convention on Human Rights; Article 3 of the European Convention on Human Rights and Fundamental Freedoms; Article 3 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment and Article 7 of the International Covenant on Civil and Political Rights.

²⁶⁷ It should be noted that indiscriminate violence and armed conflict do not preclude persecution in the sense of the 1951 Refugee Convention and that applicants who fulfil the criteria of the refugee definition should be granted refugee status regardless of whether the context of the persecution is one of generalized violence.

Article 2(e) which defines who is eligible for subsidiary protection and Article 18 on the obligation to grant subsidiary protection status). It found evidence that some persons in need of international protection are not being granted subsidiary protection either because of the impact of procedural rules or because of a restrictive interpretation of the terms of the Directive.

IV.4.2. Qualification for subsidiary protection under the Directive

Article 2 (e)

‘[P]erson 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.

Article 15

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 18

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 [i.e. Articles 2, 15, 16 on cessation and 17 on exclusion²⁶⁸].

IV.4.3. National legislation transposing Article 15

Article 15 is fully implemented in the national legislation of France, the Slovak Republic and Sweden. Transposition has recently been completed in Germany with the entry into force of the Transposition Act in August 2007. Article 15 has not yet been transposed in Greece.

France has transposed Article 15 by means of Article L.712.1 of the Asylum Law. The wording is very similar to that of the Qualification Directive with the exception that ‘execution’ is not explicitly mentioned in the provision transposing Article 15(a), and the provision transposing Article 15(c) inserts an additional requirement that the threat to a civilian’s life be ‘direct’ as well as ‘serious and ‘individual’. The legislator did not give any guidance on how ‘direct’ should be interpreted.

The Slovak Republic has implemented Article 15 by means of Article 2(f) of the 2006 Act on Asylum. The wording of Article 2(f) differs slightly from Article 15: the term ‘in the country of origin’ is omitted from Article 2(f) (2) (Article 15(b)). Moreover, Article 2(f) (3) is not limited to civilians.²⁶⁹

In Sweden, the provisions of Article 15 are already covered by Chapter 4 Section 2 of the Aliens Act (2005:716), which pre-dates the Qualification Directive. The wording of the Swedish law is different. The scope of the Swedish provision is wider than Article 15(c) insofar as it is not limited to civilians and refers not only to ‘internal armed conflict’, but also ‘other severe conflicts’. However, as will be seen below, in practice, due to a restrictive interpretation

²⁶⁸See the section on exclusion from subsidiary protection for commentary on implementation of Article 17.

²⁶⁹Article 2 f) 3) states “serious and individual threat to life or inviolability of person by reason of arbitrary violence in situations of international or internal armed conflict.”

of ‘internal armed conflict’, the term ‘other severe conflicts’ covers situations that have been assessed as ‘internal armed conflicts’ by other Member States.²⁷⁰

According to the preparatory work to the Swedish legislation, the interpretation of ‘other severe conflict’ is potentially broad – it includes political instability in the home country where the power relations are such that the legal system does not impartially safeguard basic human rights. The conflict may be between different sections of the population, or between the State power and a part of the population. It may, however, also be that a conflict between the State power, or a section of the population, and another State has not reached the level of an ‘armed conflict’.²⁷¹

The Swedish law refers to ‘serious abuses’ rather than ‘serious threat’. The scope of ‘serious abuses’ may also be broader than the Qualification Directive insofar as it is not explicitly restricted to a threat to life or person.²⁷² The Commission of Inquiry has proposed a re-wording of the legislation along the lines of the Qualification Directive for the sake of clarity but has advised against limiting the scope of the Aliens Act. There is only one clear exception. The Aliens Act does provide for the grant of subsidiary protection if the person “*is unable to return to the country of origin because of an environmental disaster*”. The Inquiry found this provision to be incompatible with the Qualification Directive and proposed that this provision be moved to another chapter of the Aliens Act and would provide for the possible grant of a residence permit rather than subsidiary protection status.

In Germany, Article 15 is partially covered by Sections 60(2), (3), (5) and (7) of the Residence Act 2004 which pre-dates the Qualification Directive. The 2007 Transposition Act completes the implementation. A reference to ‘execution’ is added to the existing reference to the death penalty; and a reference to ‘inhuman or degrading treatment or punishment’ is added to the existing reference to ‘torture’. In this respect the ambit of the previous German legislation is broadened, particularly in consideration of the fact that Article 6 of the Qualification Directive, recognizing non-State actors of serious harm, applies.²⁷³ Previously, the German authorities did not recognize harm which emanated from non-State actors. Section 60 (7) which is intended to transpose Article 15 (c) is limited to ‘civilians’ and includes the requirement of ‘international or internal armed conflict’. There is no reference to ‘indiscriminate violence’ in Section 60 (7). However, it should be noted that this provision, to a certain extent, reflects Recital 26 of the Qualification Directive, and the legislator refers to Recital 26 of the Qualification Directive in the Explanatory Report of the Transposition Act 2007.²⁷⁴ Section 60 (7) Sentence 2 Residence Act 2004 stipulates that dangers generally threatening the entire population of a country or a specific group to which the alien belongs, will only be considered under Section 60a Residence Act 2004 (*Temporary suspension of deportation*).²⁷⁵ According to Section 60a, the supreme authority of each Land (Federal state) has the power to suspend the deportation of particular nationality groups. Application of this clause is rare and results in a toleration permit (*Duldung*) only.²⁷⁶ Consequently, even if protection against deportation is granted, the rights accorded to persons with subsidiary protection by the Qualification Directive are not.

²⁷⁰ Only the situation in Chechnya is considered to constitute ‘an internal armed conflict’. The situations in Iraq and Somalia are not, at the time of writing, considered to constitute ‘an internal armed conflict’. Instead, parts of Iraq and Somalia are considered as areas of ‘other severe conflicts’.

²⁷¹ Prop. 2004/05:170, page 178.

²⁷² The preparatory work names as examples of ‘serious abuse’ for instance disproportionate punishment, arbitrary incarceration, physical abuse and assaults, sexual abuse, social rejection and other severe harassments.

²⁷³ See section on non-State actors of persecution or serious harm, where the research found that in practice not all courts are applying Article 6 with reference to qualification for subsidiary protection.

²⁷⁴ Bt-Drs 16/5065, page 341.

²⁷⁵ Note that the German clause on general dangers does not copy the wording of Recital 26 of the Directive. In particular, there is no reference to the fact that general dangers ‘normally’ and ‘in themselves’ do not constitute serious harm.

²⁷⁶ The Federal Administrative Court, therefore, decided on 17 October 1995, by applying a so-called ‘interpretation in conformity with the German Constitution’, that the FedOff is obliged to examine individual cases under Section 60(7) of the Residence Act 2004 in the absence of a temporary suspension of deportation by the Land. For further information see section on ‘individual threat’ above.

Greece has not yet transposed Article 15. This will be transposed by the forthcoming Presidential Decree. The first draft of the Presidential Decree generally reflects the wording of the Qualification Directive with some significant exceptions. Firstly, Article 2, which defines subsidiary protection, expands the scope by adding that a person is eligible for subsidiary protection if his or her “*return is not feasible for objective reasons that this person cannot control or who, for these reasons, does not wish to avail himself of the protection of that country*”. Secondly, whilst the Qualification Directive sets out an exhaustive list of three types of harm for the purposes of subsidiary protection, the first draft of the Presidential Decree states these as a non-exhaustive list in its definition in Article 2. Yet Article 52, which describes the grounds for qualification for subsidiary protection, sets out an exhaustive list as does the Qualification Directive. It is also worth noting that Article 52(c), which equates to Article 15 (c), simply requires that the serious harm be “*due to indiscriminate violence, including in situations of international or internal armed conflict*”. [emphasis by author] It is, therefore, not limited to situations of international or internal armed conflict.

IV.4.4. Impact on practice

IV.4.4.1. Article 15 (a) and (b)

Article 15(a) states that the death penalty or execution constitute ‘serious harm’. Article 15(b) provides that “*torture or inhuman or degrading treatment or punishment of an applicant in the country of origin*” also constitute serious harm. These articles closely reflect provisions of the European Convention on Human Rights,²⁷⁷ the only essential difference being the addition of the requirement that the applicant risks such harm ‘in the country of origin’. However, the review of decisions in the Member States did not

reveal any specific interpretation of ‘serious harm’.

In France, the interpretation of ‘serious harm’ is relatively new for OFPRA and the CRR. It is the administrative courts that have the experience of interpreting the European Convention on Human Rights in the context of legal challenges against removal to the country of origin. As a consequence, there have been occasions when an applicant has been denied protection under Article L.712.1 b) of the Asylum Law (Article 15(b)), but has not been removed following a judgment by the administrative court that this would violate Article 3 of the European Convention on Human Rights. The CRR has acknowledged the need to ensure that its interpretation of Article 15(b) is in line with the case-law of the European Court of Human Rights, and the need to cooperate more closely with the administrative courts.

In Germany, the Qualification Directive has broadened the scope of protection insofar as the provision on non-State actors also applies to subsidiary protection. However, this major change does not appear to have influenced decision practice so far, and the provision has played only a marginal role. This may be due to the fact that transposition of this provision into national legislation was incomplete at the time of the research, and some courts may not have adapted to the fact that non-State actors are included.

One might in any case expect the role of Article 15(b), as compared to the refugee definition, to be marginal on the grounds that it will only be applicable when the actor of serious harm perpetrates the harm for reasons not related to the 1951 Convention, for instance for criminal reasons. Torture, inhuman or degrading treatment or punishment would normally fall under the refugee definition. The statistics provided, and sometimes the decisions themselves,

²⁷⁷ Article 15(a) reflects Article 1 of Protocol 6 to the European Convention on Human Rights on the abolition of the death penalty, 28 April 1983; and also Protocol 13 to the European Convention on Human Rights concerning the abolition of the death penalty in all circumstances, 3 May 2002. Article 15(b) reflects Article 3 of the European Convention on Human Rights.

generally did not specify the ground upon which subsidiary protection was granted. It is, therefore, not possible to gauge the relative significance of Articles 15(a) and (b) as a proportion of subsidiary protection grants for all the countries of focus. However, in France, it is estimated that 90 % of the subsidiary protection granted by both OFPRA and the CRR fall under Article 15(b).²⁷⁸ In Sweden, with regard to the five nationality caseloads studied, only approximately 28 % of subsidiary protection was granted based on Chapter 4 Section 2, first point (corresponding to Articles 15(a) and (b) of the Directive).²⁷⁹ The review of decisions revealed that there was little or no explicit consideration of the Swedish provision equivalent to Article 15 (b), with 15(c) being relied upon frequently. A couple of cases may highlight the point.

Case 1: A female member of a certain (minority) clan reported that members of her family had been killed by members of another clan who wanted the family land. The applicant was taken hostage and held as slave for a year, during which she was beaten, sexually abused, and forced to donate blood to wounded soldiers; eventually she managed to escape. The Swedish Migration Board found that the ‘harassment’ to which the applicant had been subjected was due to ‘other severe conflicts’ as stated in Aliens Act, Chapter 4 Section 2 point 2 (equates to Article 15(c)), and granted the applicant subsidiary protection on this basis.²⁸⁰ The applicability of point 1 (which equates to Article 15(b)) was not mentioned.

Case 2: An applicant from Iraq reported that his brother, a former military person, had been killed; an attempt had been made to kill the applicant and a second brother; the applicant’s shop had been burned down; and he had been threatened by an unknown group due to the dead brother’s military background. The Swedish Migration Board found that the applicant had “*not reported any persecution in the meaning of the Aliens Act*” and the application was therefore found not to fulfil the refugee criteria. The Migration Board, however, found that “*the authorities of the home country are unable to protect [the applicant] and considering the developments in Iraq, where violent attacks are frequent, it is likely that [the applicant] risks being killed on return*”.²⁸¹ The applicant was granted subsidiary protection based on the provision equating to Article 15(c), without any discussion of the relevance of the provision equating to Article 15(b).

The point might appear pedantic, given that subsidiary protection was granted in both cases. Yet it is important, given that Article 15(b) only requires that the risk of serious harm is established, whereas Article 15(c) is limited to ‘civilians’ (although not currently in Sweden) and also requires that the threat of serious harm be ‘individual’ and due to “*indiscriminate violence in situations of international or internal armed conflict*.” The lack of attention to Article 15(b) could be a matter of expediency or it could be an issue of insufficient doctrinal guidance on the application of (and distinction between) ‘inhuman and

²⁷⁸ During the period since the entry into force of the 2003 Asylum Law in January 2004. There has only been one case that was decided under paragraph a.

²⁷⁹ In the period from 2004 and including the first quarter of 2007. Since the relevant Section of the Aliens Act includes both Article 15 (a) and (b) statistics on the individual grounds is not available. The statistics for the studied nationality caseloads may not be representative for all nationalities. As a comparison, in 2006, the last year for which there is complete data, 31.5 % of all grants of subsidiary protection were based on the equivalent to Article 15(a) and (b), see *Migrationsverket, Statistik 2007-01-31, Tabell 4 2006*, available at http://www.migrationsverket.se/pdf/verket/statistik/statistik_4_2006.pdf. In the same year 21.5 % of subsidiary protection regarding the five nationality caseloads were granted on this basis.

²⁸⁰ MIBSOM21.

²⁸¹ MIBIQ10.

degrading treatment’ and ‘serious threat to life or person’. Before denying protection on the basis of Article 15(c), it is important for the authorities to ensure that the risk of serious harm does not in any case fall under Article 15(b) in accordance with the case-law of the European Court of Human Rights.²⁸²

IV.4.4.2. Article 15 (c)

Unlike Articles 15(a) and (b), Article 15(c) sets out numerous criteria that must be fulfilled beyond the threat of serious harm:

- there must be a serious threat to life or person, and
- the threat must be individual, and
- the person must be a civilian, and
- the threat must be due to indiscriminate violence in a situation of international or internal armed conflict.

IV.4.4.2.1. SERIOUS THREAT TO LIFE OR PERSON

Given that Article 15(a) relates to the death penalty and execution, and Article 15(b) relates to torture, inhuman and degrading treatment and punishment, it was expected that the review of decisions would provide some clarity on which serious threats to life or person fall outside (a) and (b), but within (c). In other words, it was expected that decision makers would only address Article 15(c) once it was clear that the alleged threat did not constitute treatment under (a) or (b). However, the review of decisions did not provide this clarity. It may be deduced from the decisions analysed that either decision makers do not necessarily exclude Articles 15(a) and (b) before considering Article 15(c) i.e. the grounds are not con-

sidered a hierarchy; and/or that some authorities apply a restrictive interpretation of Article 15(b) which may not be in line with the case-law of the European Court of Human Rights.

For example, in Sweden, in decisions granting subsidiary protection to Somali applicants on the basis of the provision equivalent to Article 15(c), most applicants had typically already lost at least one of their family members and had been subjected to repeated abuse, including slavery, forced blood donation to their captors, and threats against their life.²⁸³ In France, two decisions were reviewed which contained similar facts and related to the same part of the country of origin. One resulted in the grant of subsidiary protection on the basis of Article L.712.1 b) (Article 15(b)), and the other on the basis of Article L.712.1 c) (Article 15(c)). The reason for this difference could not be clarified on the basis of the information contained in the decisions.²⁸⁴ As mentioned above, there may be insufficient doctrinal guidance for authorities on the distinction between ‘inhuman or degrading treatment’ and ‘serious threat to life or person’.

IV.4.4.2.2. INDIVIDUAL THREAT

The review of decisions has revealed that the term ‘individual’, taken together with Recital 26 of the Qualification Directive, results in denial of subsidiary protection to persons who clearly risk serious harm in their country of origin. Recital 26 states that “*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.*”

²⁸² According to the case-law of the European Court of Human Rights, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the European Convention on Human Rights, on which Article 15(b) of the Qualification Directive is based. The assessment of this minimum is relative and depends on the circumstances of the case – Cruz Varas v. Sweden of 20 March 1991. See also section on ‘Refugee status versus subsidiary protection under the Directive: situations of generalized violence’.

²⁸³ Family members killed, family attacked and applicant held as a slave for one year during which she was abused (MIBSOM21); family members killed by members of certain clan, continuous harassments and several attempts to kill the applicant (MIBSOM25); held as a slave for three years (MIBSOM30); accused of killing a person and now risking revenge (MIBSOM32); family member killed, house occupied, robbed on many occasions, beaten, threatened with death in relation to ownership of the house (MIBSOM34); family member killed, extortion (MIBSOM36); family members killed, robbed, threatened (MIBSOM38).

²⁸⁴ See KLT, 27/03/2007, 585995 and TT, 1/02/2007, 580896.

The impact of this interpretation of ‘individual threat’ is to deny subsidiary protection to persons who undeniably risk serious harm on return to their country of origin, on the ground that they face the same real risk as, for example, other members of their clan or other residents of their town. This approach is applied by authorities in France, Germany, and Sweden; but it was not evident in files reviewed in Greece.²⁸⁵

Although the Swedish Aliens Act 2005 does not contain an explicit requirement that the threat of serious abuse be ‘individual’, a criterion requiring ‘a concrete and individual’ risk is often applied in case-law. The interpretation given to the term ‘individual’ is set out in a guiding decision relating to Iraq of 5 July 2007. The Swedish Migration Board held that it must be established that the applicant is ‘personally at risk’ and there must be some ‘particular circumstance’ which demonstrates this. In this decision, which concerns a male from Baghdad whose application was based on the indiscriminate violence and conflict in Baghdad, the Board found that:

“It has not been established that he belongs to any particular risk group that is adversely affected by the ongoing violence. The security situation in his housing area has been good. The risks that [applicant’s name omitted] runs in Baghdad are not greater or less than for people who find themselves in a similar situation as he does himself. There is no particular circumstance that makes it probable that he is

personally at risk of being subjected to serious abuse should he return. The requirement for there being a causal connection is therefore not satisfied and the Migration Board considers that [applicant’s name omitted] is not a person otherwise in need of protection as referred to in item 2.”²⁸⁶

In a second decision on the same day, a Christian man, formerly a Baath party member living in Baghdad, was granted subsidiary protection. The Board concluded that:

“[a]gainst the background of what has been presented above about the situation in Baghdad, the Migration Board finds that there are severe conflicts in large parts of Baghdad. The Migration Board further notes that former members of the Baath party are a particularly exposed group, that, in a higher degree than other people, risks being subjected to attacks and acts of vengeance. In addition to this [applicant’s name omitted] has, with his account, established that he has been subjected to death threats and risks being subjected to further harassments should he return.”²⁸⁷

In the positive decisions analysed (prior to the above-mentioned Migration Board decisions), the applicants had connections to the American forces or American companies in Iraq,²⁸⁸ or connections to existing or previous Government authorities, including the army.²⁸⁹ The decisions screened in France similarly referred to the following individual characteris-

²⁸⁵ Due to procedural rules, only a limited number of applications are assessed against subsidiary protection criteria in Greece. However, in those limited cases, the assessment is focused on the objective situation prevailing in the country of origin so that general anarchy, civil war and massive violation of human rights constitute grounds for subsidiary protection (as in cases MPO MPO2SO5 (single Somali mother who left because of the conflicts between Christian and Muslims); MOP2SO6 (Somali citizen); MPO2SO7 (Somali citizen); MPO2A1 (Afghan applicant); MPO2SU10). However, some applicants from Somalia were denied subsidiary protection without any further reasoning on the grounds.

²⁸⁶ Lifos dokumentnr 16852, beslut 5 juli 2007 (2). The decision has been published in an official English version, available at <http://www.migrationsverket.se/include/lifos/dokument/www/07070582.pdf>, last accessed on 17 July 2007.

²⁸⁷ Lifos dokumentnr 16852, beslut 5 juli 2007 (1). The application was rejected on refugee grounds because the Migration Board did not find a clear connection between the different events of the applicant’s account (threats from militant groups and former Baath party members, three car robberies, the demolition of his shop, two occasions of burglary); the applicant stated that four of his former comrades in the Party and their families have been killed and that the threats and harassments had accelerated). The Board found that those of the threats that could be put in connection with his former membership in the Baath Party had not been of the kind or the extent (“art eller omfattning”) that amounted to persecution in the meaning of the Aliens Act.

²⁸⁸ MIBIQ9; MIBIQ18.

²⁸⁹ MIBIQ19; MIBIQ20; MIBIQ24; MIBIQ27, MIBIQ28.

tics deemed to create a heightened risk for the applicant: professional activities,²⁹⁰ membership of religious community,²⁹¹ and financial wealth.²⁹²

The impact of this interpretation of ‘individual threat’ on the Somali caseload in Sweden has been to deny international protection because a ‘concrete and individual’ risk is not established. By way of example, an applicant whose family members were kidnapped and killed, whose house was burned down and was subjected to threats and harassment was denied protection on the grounds that the abuse experienced was simply a result of stronger clans exerting power against weaker clans and the applicant had not established “*a concrete and individual risk of persecution or serious abuse*”.²⁹³

The German authorities have also required applicants to demonstrate a greater risk than the rest of the population or a part of it. Indeed, Article 15(c) and Recital 26 are reflected in German national legislation. Section 60(7) Residence Act 2004 states²⁹⁴: “*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 in this state 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.*” As a result, dangers generally threatening the entire population of a country or a specific group to which the alien belongs fall instead under Section 60(a) Residence

Act 2004 which bestows the supreme authority of each Land with the power to declare a ‘Temporary suspension of deportation’ for a particular nationality caseload. Only a few Länder have instituted general deportation bans in recent years. The Federal Administrative Court, therefore decided²⁹⁵, by applying an ‘interpretation in conformity with the German Constitution’, that the FedOff is obliged to examine individual cases under Section 60(7) Residence Act 2004 in the absence of a temporary suspension of deportation by the Land. However, prohibition of deportation under Section 60(7) is only granted if there is sufficient evidence that the individual alien would face “*certain death or severest injuries*” upon return. This extremely high risk threshold has increasingly led to a denial of protection.²⁹⁶

The interpretation given by the German authorities remains unchanged by the direct effect of the Qualification Directive. Recital 26 serves as a justification for the continued denial of subsidiary protection where the threat affects not just the entire population but also parts of it. The interpretation given is highlighted by the Kassel Administrative Court (AC) in a case involving a Sri Lankan national²⁹⁷ when it ruled that ‘individual’ refers to a danger which is caused by an international or internal conflict and does not exist at all or not to the same extent for the rest of the persons affected by the conflict. According to the court’s approach, Article 15(c) has to be limited to ‘especially individual’ threats (no further clarification is given) in order to prevent an unlimited

²⁹⁰ JECB, 4/12/2006, 490601.

²⁹¹ GKY 03-01-01735, 17/10/2006.

²⁹² JECB, 4/12/2006, 490601.

²⁹³ MIBSOM33. Many other decisions demonstrated this: Family members killed, several kidnap attempts (MIBSOM4); family member killed, sexually assaulted, kidnapped and sexually assaulted (MIBSOM6); family member killed 2004 (MIBSOM11); family member killed, applicant threatened (MIBSOM13); family members killed 1991, held as a slave for many years, abused (MIBSOM18); extortion and threats (MIBSOM26).

²⁹⁴ Translation by the Federal Ministry of Interior available at:

http://www.bmi.bund.de/cln_028/nn_174390/Internet/Content/Common/Anlagen/Themen/Auslaender__Fluechtlinge__Asyl/DatenundFakten/Residence_Act,templateId=raw,property=publicationFile.pdf/Residence_Act.pdf.

²⁹⁵ On 17 October 1995, 9 C 9.95, on 27 April 1998, 9 C 13.97 and on 8 December 1998, 9 C 4.98.

²⁹⁶ See section on ‘Individual threat’ within the chapter ‘Subsidiary protection’ for further comment on this issue.

²⁹⁷ Kassel AC, 1 E 1213/05 of 23 November 2006.

expansion of its application.²⁹⁸ As a result, subsidiary protection is very rarely granted on the basis of Article 15(c).²⁹⁹

The effect of this interpretation of ‘individual’ based on Recital 26 is to render protection offered under the Qualification Directive illusory for many persons in need of international protection. This interpretation creates an additional requirement that the applicant is at greater risk than other people similarly situated and may be flawed in international refugee and human rights law.³⁰⁰ It is not in line with a recent decision of the European Court of Human Rights in *Salah Sheekh v The Netherlands*.³⁰¹ In this case of a member of a Somali minority who had faced treatment contrary to Article 3 of the European Convention on Human Rights, the Court held:

*“It cannot be required of the applicant that he establishes that further distinguishing features, concerning him personally, exist in order to show that he was, and continues to be, personally at risk ... it might render the protection offered by that provision illusory if, in addition to the fact that he belongs to the Ashraf ...the applicant be required to show the existence of further special distinguishing features.”*³⁰²

Recital 26 and Article 15(c) are also inherently contradictory. Article 15 (c) requires the serious harm to be caused by ‘indiscriminate violence’. ‘Indiscriminate’,

being the opposite of ‘discriminate’, means not “to single out a particular person or group”.³⁰³

Recital 26 should be deleted and give way to the intended purpose of subsidiary protection. It appears contrary to international refugee and human rights law, and therefore contradictory with Recital 25 which states that “*It is necessary to introduce criteria on the basis of which applicants for international protection are to be recognized as eligible for subsidiary protection. Those criteria should be drawn from international obligations under human rights instruments and practices existing in Member States.*”³⁰⁴ [emphasis by author].

To require an applicant to be at a higher or greater risk than the rest of the population or sections of it, also raises an issue of the interpretation of the refugee definition. Subsidiary protection should only be considered once it has been established that the applicant does not fulfil the criteria of the 1951 Convention refugee definition.³⁰⁵ In decisions reviewed, subsidiary protection was often considered when a nexus with a Convention ground was found by the authorities not to have been established. However, in determining that there was a ‘particular circumstance’ which created a higher degree of risk as compared to the rest of the population, authorities often referred to factors which could be considered to fall within the refugee definition. For exam-

²⁹⁸ A dissenting view is held by the Stuttgart AC, which has stated that Recital 26 does not limit the application of Article 15 (c) but has to be understood as ‘reminder’ not to jump to the conclusion that a risk already exists because of the general fact that a country is affected by a conflict, before assessing the danger in the individual case – 4K2563/07 of 21 May 2007.

²⁹⁹ This is also a result of the high risk threshold established by the German authorities with regard to Article 15 generally (see above).

³⁰⁰ See Hathaway, J. (1991), *The Law of Refugee Status*, p. 97 on ‘well-founded fear’ in the context of refugee status (“*In sum, while modern refugee law is concerned to recognize the protection needs of particular claimants, the best evidence that an individual faces a serious chance of persecution is usually the treatment afforded similarly situated persons in the country of origin. In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status*”).

³⁰¹ 1948/04, 11 January 2007.

³⁰² See footnote 17.

³⁰³ Collins English language dictionary.

³⁰⁴ Article 6(2) of the Treaty on European Union [2002] OJ C/325/5 states that “[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the protection of Human Rights and Fundamental Freedoms ... as general principles of Community law” and Recital 10 of the Qualification Directive states that “*This Directive respects the fundamental rights and observes the principles recognized in particular by the Charter of Fundamental Rights of the European Union.*”

³⁰⁵ Article 2(e) of the Qualification Directive states that a “*person eligible for subsidiary protection means a third country national or a stateless person who does not qualify as a refugee*”.

ple, connections to existing or previous Government authorities,³⁰⁶ imputed connections to the LTTE,³⁰⁷ and membership of a religious community³⁰⁸ could fall within the '(imputed) political opinion', or 'religion' grounds of the refugee definition.³⁰⁹

This is highlighted by a CRR decision in France relating to Iraq which found *"it was not established that the circumstances which caused her to flee Iraq were linked to any of the Geneva Convention grounds, in particular to her religion or to imputed political opinion"*. However, the *"risks emanating from armed groups or uncontrolled members of the population and to which the applicant [a woman, member of the Assyro-Chaldean community, who lived by herself and belonged to a quite rich family] [...] was exposed should be considered as originating from the climate of generalized violence resulting from the situation of internal armed conflict prevailing in Iraq"* and that *"these risks constitute serious, direct and individual threats, taking into account her membership of the Christian Assyro-Chaldean community, her situation as an isolated woman and her alleged comfortable financial situation"*. The applicant was granted subsidiary protection under Article L.712.1 c) of the Asylum Law (Article 15(c)).

According to Article 2 of the Qualification Directive a person is only eligible for subsidiary protection if he or she does not qualify for refugee status. Where a risk of persecution has been established, decision makers should only consider the subsidiary protection provisions when it is absolutely clear that there is no link to a refugee definition ground. As clearly

stated by UNHCR, *"the Convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause."*³¹⁰ This is particularly important as most civil wars and internal armed conflicts are rooted in ethnic, racial, religious or political differences and rivalries. Indiscriminate violence and international and internal armed conflict do not preclude persecution in the sense of the 1951 Convention and, therefore, the Qualification Directive. It is important that, notwithstanding the provisions on subsidiary protection, decision makers ensure that the refugee definition is fully, inclusively and progressively interpreted also to take into account changing forms of persecution. The provisions on subsidiary protection are intended to strengthen and not undermine the 1951 Convention and the global refugee protection regime which rests upon it.³¹¹

IV.4.4.2.3. CIVILIAN

The research did not provide insight into the interpretation given to the term 'civilian'. In the Slovak Republic, the term 'person' rather than 'civilian' is used in the Act on Asylum. This appears to be due to the fact that the word 'civilian' is also not used in the official Slovak language version of the Qualification Directive. Similarly, the equivalent provision in the Swedish Aliens Act, and in the Swedish language version of the Directive, do not use the term 'civilian'. In France, OFPRA and the CRR have not yet had the opportunity to interpret this term. None of the German decisions reviewed shed light on the meaning to be given to the term.

³⁰⁶ In Sweden, Lifos dokumentnr 16852, beslut 5 juli 2007 (1), regarding a former Baath Party member.

³⁰⁷ In France, TT, 1 February 2007, 580896.

³⁰⁸ In France, GKY 03-01-01735, 17 October 2006.

³⁰⁹ See Article 10(2) of the Qualification Directive which states that "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."

³¹⁰ Paragraph 23, page 7 of UNHCR, The International Protection of Refugees: Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, April 2001.

³¹¹ Recital 24 of the Qualification Directive states that "[s]ubsidary protection should be complementary and additional to the refugee protection enshrined in the Geneva Convention."

IV.4.4.2.4. INTERNATIONAL OR INTERNAL ARMED CONFLICT

Article 15(c) is only applicable if the violence occurs in a situation of international or internal armed conflict. This requires decision makers to assess situations in countries of origin and determine whether they constitute an ‘international or internal armed conflict’. The Qualification Directive itself does not define ‘international or internal armed conflict’ and no explicit reference is made to any other source providing a definition. A number of different definitions exist in international law, including the 1949 Geneva Conventions and 1977 Additional Protocol II to the Geneva Conventions which provide a definition,³¹² and the International Criminal Tribunal for Yugoslavia has also defined ‘armed conflict’;³¹³ however, there is no one agreed definition.

No interpretation of the terms ‘international or internal armed conflict’, nor assessment of the existence of an ‘armed conflict’ was observed in the decisions and case files screened in Greece and the Slovak Republic. However, the decisions screened in France, Germany and Sweden highlighted divergences in interpretation and application with regard to the term ‘internal armed conflict’.

Decisions relating to Iraq clearly highlight the divergence. The review of decisions revealed that, at the time of the research, the French authorities assessed the ongoing situation in Iraq as an internal armed conflict. However, the research also revealed that, during the same period, the Swedish authorities did not consider that the situation in Iraq amounted to ‘internal armed conflict’.

The research also revealed that not only is there divergence on this issue across jurisdictions, but there is also divergence within jurisdictions. In Germany, whilst the FedOff and some courts consider that the situation in Iraq constitutes an internal armed conflict, this is not a view shared by all courts.

In a decision of February 2006, the French CRR stated for the first time that “*the situation prevailing in Iraq is characterised by generalized violence, which is characterised in particular by the perpetration of attacks, extortion and threats targeting certain groups. This situation results from the conflict between the Iraqi security forces, the Coalition forces and some armed groups, which conduct continuous and concerted military operations in certain parts of the territory. Therefore, this situation should be considered as a situation of generalized violence resulting from a situation of internal armed conflict as defined by Article L.712.1 c) CESEDA*”.³¹⁴ This finding, that the situation in Iraq constitutes internal armed conflict, was reflected in the decisions reviewed for this research.³¹⁵

In line with the position taken by the authorities in France, the German FedOff policy paper characterises the situation in Iraq as an internal armed conflict in the sense of Article 15(c) of the Qualification Directive, with the regions of Baghdad, Anbar, Salahaddin, Diyala, as well as the cities of Kirkuk, Mosul, Tal Afar and Basra being the most affected ones.³¹⁶ Some courts in Germany agree, emphasizing that a fully fledged civil war is not a necessary criterion for an ‘armed conflict’ in the sense of the Qualification Directive as the Directive also refers to

³¹² Article 1(1) of Protocol II 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]”.

³¹³ Jurisdiction Prosecutor v. Dusko Tadic, 2 October 2005, Appeal Chamber.

³¹⁴ CRR, SR, M. Alazawi 17/02/2006, 497089 and CRR, SR, Mlle Kona, 17/02/2006, 419162.

³¹⁵ Sampled cases IGM, 18/10/2006, 5110072; MS, 22/01/2007, 460632; NS, 18/12/2006, 412125.

³¹⁶ However, note that the FedOff argues that in line with the “German interpretation” of Art. 15(c) QD, the human rights situation in Iraq has not reached the high threshold of an “extreme danger” for every single person. Only if this precondition is fulfilled the FedOff applies Section 60(7) Residence Act in cases of general violence, as long as the German Laender fail to institute a deportation ban – which is the case with regard to Iraq. As a result, protection under Article 15(c) QD was not granted to Iraqi nationals.

‘indiscriminate violence’, and the conflict only needs to be of unpredictable duration and of an intensity which leads to an individual threat to life or limb.³¹⁷ However, at variance with this view, the Bavarian higher administrative court has repeatedly held that an internal armed conflict under Article 15(c) must be comparable to a civil war, and considers that the situation in Iraq does not fulfil this requirement as the conflict is not ‘countrywide’ and some parts of Iraq may provide an internal protection alternative.³¹⁸ There is, therefore, divergence within Germany on this issue in spite of MOI Guidelines which state that only conflicts of a certain intensity and duration, such as civil wars or guerrilla fighting, constitute internal armed conflict.³¹⁹

In contrast with the position taken by the authorities in France, in February 2007 the Swedish Migration Court of Appeal established that the situation in Iraq did not constitute an internal armed conflict.³²⁰ In its decision, the Court based itself on general references to ‘public international law’ (presumably drawing on the 1977 Additional Protocol II to the 1949 Geneva Conventions) and to the Swedish preparatory works to the Aliens Act.³²¹ It held:

“Regarding a protection need due to the situation in Iraq, it can be established that the security situation is very serious. In the terms of public international law, an internal armed conflict is characterised by

fighting between a State’s armed forces and other organised armed groups. The conflicts must be of such a character that they go beyond what can be termed internal disturbances or sporadic or isolated acts of violence. Furthermore, the armed groups must have some level of territorial control that allows them to carry out military operations. A significant factor for the interpretation of the term is also how the civilian population is affected – the conflict must be so intense that a removal to the asylum seeker’s part of the country seems unthinkable and a possibility to send the applicant to another part of the country does not exist (cf. prop. 1996/97:25, page 99, and the Government’s guiding decision of 19th February 2004, reg. 99-04). Against this background, the Migration Court of Appeal determines that there is in Iraq currently not an armed conflict as referred to in Chapter 4, Section 2, first paragraph, point 2 of the Aliens Act.”³²²

The Migration Court of Appeal does not state on what grounds the situation in Iraq was found not to meet its criteria of an internal armed conflict, nor does it include in its findings an account of the situation in Iraq from which this could be inferred.³²³ While the Migration Court of Appeal applies the same criteria for ‘internal armed conflict’ as did the Swedish Government in the case of Chechnya, its decision does not provide a basis for determining

317 See for instance, Stuttgart AC, 4 K 2563/07 of 21 May 2007; Hesse HAC, 3 UE 3238/03 of 9 September 2006; and Schleswig AC, 6 A 372/05 of 30 November 2006.

318 See German position on internal protection in Iraq in section ‘Internal protection’.

319 Op. cit., footnote 62, p. 16.

320 The Swedish authorities have found that the situation, at least in parts of the country, is considered as ‘severe conflicts’ under Chapter 4, Section 2, first paragraph, point 2 of the Swedish Aliens Act.

321 (1996/97:25 page 99, see paragraph beginning “a significant factor...”). Protocol II to the Geneva Conventions, 8 June 1977 in its Article 1(1) provides 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 organized 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 I”.

322 Migration Court of Appeal 2007:9 (UM 23-06), original wording: “Vad gäller skyddsbehov på grund av situationen i Irak kan konstateras att säkerhetsläget är mycket allvarligt. I folkrättslig mening kännetecknas en intern väpnad konflikt av stridigheter mellan en stats väpnade styrkor och andra organiserade väpnade grupper. Dessa stridigheter måste vara av sådan karaktär att de går utöver vad som kan klassas som inre oroligheter eller som endast utgör sporadiska eller isolerade våldshandlingar. Vidare måste de väpnade grupperna ha ett visst mått av territoriell kontroll vilket tillåter dem att utföra militära operationer. En avgörande faktor för tolkningen av begreppet är även hur civilbefolkningen drabbas - konflikten måste vara så intensiv att ett återsändande till den asylsökandes del av landet framstår som otänkbart, samtidigt som möjlighet saknas att sända sökanden till en annan landsdel (jfr prop. 1996/97:25 s. 99 samt regeringens vägledande beslut av den 19 februari 2004, reg. 99-04). Mot bakgrund av det anförda bedömer Migrationsöverdomstolen att det i Irak för närvarande inte råder en sådan väpnad konflikt som avses i 4 kap. 2 § första stycket 2 utlänningslagen.”

323 In an interview, the Migration Board has declared that its position on the same effect is based on a finding that dissident armed forces do not exercise territorial control and that the situation is not such that it would be ‘unthinkable’ to return the applicant to Iraq.

why Chechnya is considered an internal armed conflict while Iraq is not.³²⁴ As a result, on no occasion has the Migration Board found the situation in Iraq to constitute an ‘external or internal armed conflict’.³²⁵ Instead, the Migration Board found that “there are severe conflicts between ethnic and religious groups and that the Iraqi authorities, apart from in Kurdish-governed areas, lack the possibility to provide the citizens with protection.”³²⁶ The Swedish Aliens Act refers to both ‘internal armed conflict’ and ‘other severe conflicts’ in its criteria for subsidiary protection. The term, ‘other severe conflicts’, was introduced to close the protection gap created by the narrow interpretation of ‘internal armed conflict’. The situation in parts of Iraq is currently considered to constitute a ‘severe conflict’ and subsidiary protection may be granted on this basis if the other criteria are also fulfilled. This position on Iraq was confirmed in the case review.

The divergence between and within Member States as to what situations constitute internal armed conflict in the sense of the Qualification Directive is not only exemplified by cases concerning Iraq. The Swedish authorities consider that the situation in Chechnya amounts to an internal armed conflict, whilst the Slovak authorities do not. The issue has not been relevant in French legal practice as many Chechen applicants are held to fulfil the definition of a refugee. Sweden does not consider that the situation in Somalia amounts to an ‘internal armed conflict’ but instead a ‘severe conflict’ under Swedish

law; whilst the German FedOff characterizes the conflict between the provisional government and the Islamic insurgents in Central and Southern Somalia as ‘an internal armed conflict’. The only area of agreement evident in the research was the view shared by Germany and France that there is an internal armed conflict in certain areas of Sri Lanka.

It is unsurprising that there is divergence as to whether situations of conflict in third countries constitute ‘internal armed conflict’. There is no agreed definition of the term; and the assessments of situations may differ also. However, before concluding that there is a need to clarify the definition of ‘international and internal armed conflict’ for the purposes of the Directive, it is worth asking what added value this term brings to a legal provision on subsidiary protection? Persons who face a real risk of serious harm due to indiscriminate violence and widespread human rights violations are in need of international protection regardless of whether the context is classified as an international or internal armed conflict. This is reflected in the Temporary Protection Directive³²⁷ which ensures that Member States protect the following persons in the event of a mass influx:

- (i) *“persons who have fled areas of armed conflict or endemic violence;*
- (ii) *persons at serious risk of, or who have been the victims of, systematic or generalized violations of their human rights.”* [emphasis added by author]

³²⁴ After this first precedent setting decision, the Migration Court of Appeal has ruled in two more Iraqi cases, one concerning (as did the first) a Yezidi man from North Iraq (UM 837-06) and one concerning a man from Baghdad, sentenced by the general courts to two and a half years imprisonment and deportation following a serious crime (UM 1140-06). In both cases, the Court referred to the precedent setting decision, finding no reason to take a different position. The position that Chechnya constitutes an ‘internal armed conflict’ was upheld in 2006. Migrationsverket vägledande beslut 2006-06-22.

³²⁵ At the end of the reviewed period, on 26 February 2007, this position was upheld in the precedent setting case in the Migration Court of Appeal, MIG 2007:9 (UM 23-06).

³²⁶ MIBIQ7, the same wording was used in a large number of decisions.

³²⁷ Article 2(c) of the Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof, OJ L212/12.

Given that such persons would benefit from ‘temporary protection status’ in situations of mass influx, it would appear logical and consistent to make subsidiary protection available to those persons if they do not qualify for refugee status, when there is not a situation of mass influx. It would seem inconsistent to deny subsidiary protection to a person who would qualify for temporary protection if s/he entered in the context of a mass influx, on the grounds that the situation he or she fled is not considered an ‘internal armed conflict’ under Article 15(c).

Moreover, other regional legislation on refugees in Africa and Latin America have a broader definition of a refugee which comprises an array of situations affecting the security of a person. For example, the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa complements the 1951 Convention by providing that: *“The term ‘refugee’ shall also apply to 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.”* Similarly, the 1984 Cartagena Declaration considers as refugees *“persons who have fled their country because their lives, security or liberty have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order”*.

The European Council and European Parliament are urged to consider the deletion of the term ‘internal or international armed conflict’. It is a source of interpretational divergence both within Member States and across Member States, and its application may

result in the denial of subsidiary protection to persons who are in need of international protection.

IV.4.5. Risk assessment

The research also revealed that the potential of the Qualification Directive’s provisions on subsidiary protection to provide international protection has been further limited by the approach taken by Germany to the assessment of risk.

In Germany, the impact of Article 15(c) is very limited, not only due to the restrictive interpretation given to the term ‘individual’, but also due to the extremely high risk threshold set by the FedOff and most courts with regard to risks affecting the whole population of a country or a section of the population. Only in very few decisions has protection been granted by the courts on the basis of Article 15(c) in situations of risks affecting a population generally. The MOI underlines in its guidelines that in order to grant protection under Article 15(c) of the Directive in situations where the risks affect the population generally, the violation of life or person must be almost inevitable (*‘gleichsam unausweichlich’*).³²⁸ By applying this standard, the MOI seeks to avoid any enlargement of the scope of protection as compared to the German legal practice prior to the entry into force of the Qualification Directive. As a result, although according to the FedOff, the conflict in Iraq is characterized as an internal armed conflict according to Article 15(c), the FedOff concludes that according to the ‘German interpretation’ of Article 15(c), there is no extreme danger which would necessitate the granting of subsidiary protection under Article 15(c). The German approach of requiring ‘near certainty’ of death or severest injury is not in line with the requirement of ‘real risk’ set by the Qualification Directive itself. Article 2 of the Qualification Directive states that a person is eligible for subsidiary protec-

³²⁸ Op. cit., footnote 62, p. 16.

tion if he or she “*would face a real risk of suffering serious harm*” as defined by Article 15. Moreover, this approach is not in line with the standard of ‘real risk’ set by the European Court of Human Rights.³²⁹ The UN Committee on Torture has consistently held that the threat of torture does not have to be ‘highly probable’ or ‘highly likely to occur’.³³⁰

Moreover, Article 4 (4) of the Qualification Directive states that “*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 real risk of suffering serious harm, unless there are good reasons to consider that such ... serious harm will not be repeated.*” The review of country-specific guidelines and decisions in Germany revealed that Article 4(4) was not applied by the authorities in spite of MOI guidelines confirming its applicability with regard to subsidiary protection. For instance, in two cases pertaining to Tamils from Sri Lanka, who both had mentioned that they had been arrested several times,³³¹ this fact was not taken into consideration when assessing the risk of suffering serious harm if returned to their country of origin.

IV.4.6. Procedural rules

In 2006, in Greece, of the 3,248 decisions taken by the MPO regarding Sudan, Iraq, Afghanistan, Somalia and Sri Lanka, there were only 20 decisions to grant subsidiary protection.³³² This equates to 0.6 %. This extremely low recognition rate for subsidiary protection is not a consequence of a higher recognition rate for refugee status. Only 19 decisions (just under 0.6 %) recognized the applicant’s refugee status. With regard to the 1,756 decisions regarding Iraq,

none resulted in refugee status or subsidiary protection.

According to Article 18 of the Qualification Directive, Greece must grant subsidiary protection status to third country nationals or stateless persons who meet the criteria set out by the Directive. However, Greece may be in breach of Article 18 of the Directive due to the impact of its national procedural rules, as a result of which the overwhelming majority of asylum applications are not assessed with regard to qualification for subsidiary protection.

In Greece, most applications are examined in the accelerated procedure, in which qualification for subsidiary protection is not assessed and cannot be granted. A small minority of applications are processed in the normal procedure, but according to the current Greek law, qualification for subsidiary protection is not assessed in the first instance in the normal procedure. Applications processed in the normal procedure may only be assessed against the subsidiary protection criteria if and when a final decision to deny refugee status has been taken on appeal. In some cases, it has been alleged that the Ministry of Public Order failed to forward the case to the competent authority, the Minister of Public Order, in order to assess qualification for subsidiary protection. Moreover, the review of case files also revealed that, on appeal, the recommendations of the Consultative Asylum Committee and the decision itself do not always include an assessment of qualification for subsidiary protection, and in those cases where there is a reference, the grounds for denying subsidiary protection are not specified.³³³ Furthermore, from 2003 until 2 July 2007, the assessment at appeal level of applications from Iraqis was suspend-

³²⁹ Ammari v. Sweden, Application No. 60959/00 of 22 October 2002.

³³⁰ For example, see EA v. Switzerland (Comm. No. 28/1995) UN Doc CAT/C/19/D/28/1995, 10 November 1997 and consistently repeated in its decisions since then. The risk must be foreseeable, real and personal.

³³¹ LkaN87; LkaN88.

³³² MPO statistics 2006.

³³³ MPO2SL10 (national of Sri Lanka of Tamil ethnic origin with affiliation to L.T.T.E who has a brother recognized as a refugee in the UK): Subsidiary protection not granted in spite of the Committee recommending subsidiary protection unanimously; MPO2SL9, MPO2SL11 (nationals of Sri Lanka, of Tamil ethnic origin with some affiliation to L.T.T.E): Subsidiary protection was denied despite recommendation of the minority (2 members) of Committee to grant subsidiary protection.

ed and therefore their need for subsidiary protection was not assessed during that period. In addition, since 2002, no independent applications for subsidiary protection, following a final negative decision on refugee status, have been examined in substance, in spite of the jurisprudence of the Council of State and recommendations of the Ombudsman which state that an alien may lodge such an application. These procedural flaws render the protection provided by the provisions on subsidiary protection illusory for the overwhelming majority of asylum applicants in Greece, and appears to constitute a breach of Article 18 of the Qualification Directive.

IV.4.7. Conclusion

The provisions on qualification for subsidiary protection replaced the discretionary status of ‘asile territorial’ and, taken together with Article 6, expanded the scope of protection. Still, of the positive decisions contained in the sample, only a minority granted subsidiary protection (out of 300 decisions sampled only 15 decisions granted subsidiary protection) – this figure is considered fairly representative of national statistics. The majority of positive decisions in the sample granted refugee status. The percentage of decisions granting subsidiary protection as compared to refugee status appears nonetheless to be on the rise.

The provisions on subsidiary protection remain unavailable for the overwhelming majority of asylum applicants in Greece, due to procedural flaws which result in the fact that most applications are not assessed with regard to qualification for subsidiary protection. This appears to constitute a breach of Article 18 of the Qualification Directive.

The Qualification Directive does not appear to have resulted yet in any changes in the way that qualification for other forms of protection apart from refugee status is assessed by the authorities and the majority of the courts in Germany. Notwithstanding

the fact that Article 15(a) and 15(b) together with Article 6 have expanded the scope and content of subsidiary protection in Germany, this major change is not yet reflected in decisions, as some courts continue to disregard Article 15(b) in favour of national provisions and past interpretation. In practice, the impact of Article 15(c) is limited due to a restrictive interpretation of ‘individual’ in line with Recital 26; and an extremely high threshold of risk, potentially in breach of the Directive itself. Moreover, the terms of Article 15(c) of the Qualification Directive have resulted in differing interpretations by the administrative courts.

Sweden has a long tradition of granting subsidiary protection, often in high numbers.³³⁴ As a percentage of positive decisions, subsidiary protection prevails. For example, in 2006, with regard to Iraqis, the Migration Board’s recognition rate for refugee status was 3.9 % whereas for subsidiary protection it was 51.1 %. In the reviewed decisions, all ethnic Chechens who had come directly from Chechnya and lacked ties to other parts of the Russian Federation were granted subsidiary protection under the Swedish legislative provision equivalent to Article 15(c). The entry into force of the Directive does not appear to have prompted any change in the authorities’ interpretation of the existing national legislation.

The transposition of the Qualification Directive has resulted in a subsidiary protection status for the first time in the Slovak Republic. The Directive has thus expanded the scope of protection in the Slovak Republic. Nevertheless, a rigid and restrictive interpretation of the term ‘individual’ in line with Recital 26 has limited the impact of the subsidiary protection provisions.

Whilst the Qualification Directive has undoubtedly initiated an approximation of criteria for the recognition of subsidiary protection status, divergences of

³³⁴ Its recognition rate for refugee status has for a long period of time been considerably lower than the European Union average.

interpretation persist. With regard to the sample of decisions, these centred on the interpretation to be given to the terms ‘internal armed conflict’ and the risk assessment with regard to Article 15(c).

Moreover, the review indicated that a restrictive interpretation of the term ‘individual threat’, taken together with Recital 26 of the Qualification Directive, is being used to deny subsidiary protection to persons who clearly risk serious harm in their country of origin. This standard of risk does not appear to be in line with European human rights standards. A restrictive interpretation of the term ‘internal armed conflict’ narrows the ambit of this provision still further.

The aim of the provisions on subsidiary protection was to provide a status to those persons not covered by the 1951 Convention but who are nonetheless in need of international protection.³³⁵ The Qualification Directive, as currently interpreted, fails to fully achieve this aim.

IV. 5. Refugee Status versus subsidiary protection under the Directive: situations of generalized violence

Whilst the establishment in the Qualification Directive of an EU legal framework for subsidiary protection has been welcomed by both Member States and UNHCR, it is essential to emphasize the continued relevance of the refugee definition in the 1951 Convention, including in situations of generalized violence. Most armed conflicts are rooted in ethnic, racial, religious or political differences and rivalries.

Therefore, indiscriminate violence and armed conflict do not preclude persecution in the sense of the 1951 Convention and of the Qualification Directive. Applicants fulfilling the criteria of the refugee definition should be recognized as refugees regardless of whether the context of the persecution is one of generalized violence. UNHCR has stated that “*the nexus with a Convention ground is very relevant in situations of systematic or generalized violations of human rights. It is only in situations where such violations have **no link** to a Convention ground that subsidiary forms of protection are required*” [emphasis added by author].³³⁶ In the review of decisions, the research therefore looked at whether refugee status was being considered and granted to persons fleeing situations of generalized violence, or whether there were signs that the relevance of the 1951 Convention was not being recognized appropriately.

Firstly, the review of decisions showed that where an application is made for international protection, the authorities at all levels generally assess the application against the refugee criteria before qualification for subsidiary protection.³³⁷ With the exception of Greece, both assessments are undertaken as part of one sequential procedure. Again, except for Greece, the written decisions generally reflect this sequential assessment.³³⁸ The written decisions contained an assessment of the application against the refugee definition if unsatisfied, and a separate assessment of qualification for subsidiary protection. However, where the application was rejected on both grounds it was not uncommon in some Member States that this was stated briefly in a way which may not satisfactorily reflect the sequential nature of decision making.³³⁹

³³⁵ It was agreed at the Tampere European Council that refugee status should be complemented by “measures on subsidiary forms of protection offering an appropriate status to any person in need of such protection.”

³³⁶ Op. cit., footnote 8.

³³⁷ However, see section ‘Procedural Rules’ under the chapter ‘Subsidiary Protection’ which describes the fact that in Greece the overwhelming majority of applications are not assessed against the criteria for subsidiary protection. In Sweden, technically, the authorities assess whether the applicant fulfils the refugee criteria (and therefore has a right to residence according to Chapter 5 Section 1). A declaration of refugee status will only be given if the refugee so requests. The Inquiry on the Qualification Directive has proposed that this be changed so that it is mandatory.

³³⁸ However, see some earlier *Sections réunies CRR decisions* where the analysis began with an analysis of the armed conflict as the source of the threat (CRR, SR, M. Alazawi 17/02/2006, 497089 and CRR, SR, Mlle Kona, 17/02/2006, 419162)

³³⁹ Some decisions of OFPRA in France and the Migration Board in Sweden.

The research found that, in general, refugee status prevails in France and Germany, and subsidiary protection status is literally ‘subsidiary’ or complementary to refugee status. However, in Sweden subsidiary protection is the main protection status granted, and refugee status plays a minor role. In the Slovak Republic, the analysis of decisions suggests that persons who are compelled to leave their country of origin as a result of threats posed in the context of generalized violence are not recognized as refugees under the 1951 Convention.

The review of decisions revealed that adjudicators may reject an application under the refugee definition on the grounds that there is no nexus to a Convention ground or that there are mixed motivations for the persecution, for example, ethnic, religious and criminal. However, these applicants may be granted subsidiary protection on the grounds that they face an individual threat due to characteristics which include, for example, ethnicity, religion and attributed political opinion. This interpretation does not appear to be in line with UNHCR guidance, which clarifies that refugee status should only be denied when there is no link with a Convention ground. A Convention ground must be a relevant contributing factor, but it need not be shown to be the sole, or dominant, cause.³⁴⁰

The findings are perhaps most clearly illustrated by the Iraqi, Somali and Chechen cases that were studied.

At the time of the research, the *UNHCR Return Advisory and Position on International Protection Needs of Iraqis outside Iraq* described the situation

in Iraq “as one of generalized violence and one in which massive targeted violations of human rights are prevalent.”³⁴¹ It described extreme violence rooted in ethnic, religious, political and criminal grounds. In light of this, UNHCR recommended that “*Iraqi asylum seekers from Southern and Central Iraq should be favourably considered as refugees under the 1951 Convention relating to the Status of Refugees, given the high prevalence of serious human rights violations related to the grounds in the 1951 Convention.*” It cautioned against denying protection on grounds of an internal protection alternative, stating that there is no internal protection alternative in southern and central regions and it would be unreasonable to expect an Iraqi from the southern or central regions to relocate to the three Northern Governorates. For those falling outside a full and inclusive interpretation of the refugee definition, subsidiary protection is recommended.

The authorities in all the Member States of focus may not agree that there is an ‘internal armed conflict’ in Iraq,³⁴² but most agree that Iraq represents a situation of generalized violence.³⁴³

In Germany, FedOff decisions demonstrated that adjudicators do not automatically resort to subsidiary protection with regard to applicants from Iraq. In 2006, 9.3 % of Iraqis were recognized as refugees, whilst 1.6 % were granted subsidiary protection. In the last quarter of 2006, the percentage recognized as refugees rose to 12.3 %, while the percentage qualifying for subsidiary protection fell to 1.4 %. This trend continued in the first quarter of 2007 with the percentage of those recognized according to the refugee definition rising to 16.3 %, and those quali-

³⁴⁰ Op. cit., footnote 20, paragraph 23, page 7.

³⁴¹ Revised version of 18 December 2006. It should be noted that since this research was undertaken, UNHCR has published UNHCR’s Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers, August 2007.

³⁴² See section on ‘Subsidiary protection’ for the interpretation of ‘internal armed conflict’ by States.

³⁴³ In France, both OFPRA and the CRR have described the situation in Iraq as “*generalized violence resulting from a situation of armed conflict.*” The Migration Board in Sweden has established that “*there are severe conflicts between ethnic and religious groups and that the Iraqi authorities, apart from in Kurdish-governed areas, lack the possibility to provide the citizens with protection.*” German FedOff guidelines characterize Iraq as an internal armed conflict. From the reviewed files in Greece, there was no mention in the decisions of the situation prevailing in Iraq.

fying for subsidiary protection falling to 1.1 %. With regard to the decisions reviewed, there was only one decision where the adjudicator denied a link to a Convention ground on the basis that the applicant had fled general violence in an armed conflict.³⁴⁴ No examples were identified in the courts' practice indicating that refugee status was not taken into consideration because of the situation of generalized violence.

In France, in 2006, of the 151 decisions taken by OFPRA regarding applicants from Iraq, 31 (20.5 %) were recognized as refugees and 17 (11.3 %) were granted subsidiary protection status. This is indicative that the French authorities do assess applications against the criteria of the refugee definition and do not automatically resort to subsidiary protection. However, as mentioned in the section on subsidiary protection, some of the decisions to grant subsidiary protection status demonstrate the difficulty that the authorities have encountered in distinguishing between the criteria attached to refugee recognition and subsidiary protection qualification. This is the case particularly with regard to establishing a nexus with a Convention ground or identifying a characteristic which renders the threat 'individual' under subsidiary protection.

In the case of M. A, the CRR considered that an accountant working in the Cabinet of Saddam Hussein, who was a former member of the Baath party, did not fall under the scope of the 1951 Convention. However, the CRR found that the serious acts of reprisals to which he was exposed by armed groups or uncontrolled members of the population constituted "*serious, direct and individual threats, in so far as they were linked to his function as civil ser-*

vant in the former regime and member of the Baath party" and that "*they originate from the climate of generalized violence resulting from the situation of internal armed conflict prevailing [...]*".³⁴⁵ The applicant was granted subsidiary protection.

In another sampled decision, the CRR considered that the applicant did not establish that he "*has been or would be the target of a group of persons who could be identified and who could attribute to him/her opinions contrary to theirs*" and that "*the serious acts of reprisals by armed groups or uncontrolled members of the population constitute serious, direct and individual threats, as far as they are linked to the past activities of his father in favour of the Baath party*" and that they "*originate from the climate of generalized violence resulting from the situation of internal armed conflict prevailing in Iraq [...]*". It seems in this case that no link to a Convention ground (even attributed political opinion) could be established by the adjudicators.

In Sweden in 2006, the Migration Board granted international protection in 55 % of decisions concerning Iraqi applicants.³⁴⁶ During the first quarter of 2007, this rose to 74.9 %. However, the overwhelming majority of those recognized were not granted refugee status, but subsidiary protection. In 2006, 51.1 % of positive decisions conferred subsidiary protection, rising to 73.2 % in the first quarter of 2007. In the decisions examined, none of the applicants were found by the Migration Board to meet the refugee criteria. In many decisions, it appeared that the Migration Board did not find a nexus to a Convention ground. Two cases may serve as an example:

³⁴⁴ IrqN.18.

³⁴⁵ CRR, SR, M. A 17/02/2006, 497089. In its assessment, the CRR took into account the fact that the applicant had chosen his/her job because of the prestige and material advantages linked to this function. This seems to imply that if the applicant had had higher hierarchical rank, imputed political opinions might have been taken into consideration.

³⁴⁶ Of 4,664 first decisions made by the Migration Board in 2006, subsidiary protection was granted in 2,382 decisions. According to the official annual statistics for all instances the following permanent residence permits were issued to Iraqi applicants in 2006: refugee status: 201 permits; subsidiary protection (see Article 15 a-c): 2,424 permits; "exceptionally distressing circumstances" (Chapter 5 Section 6) 1,516 permits; temporary law: 3,025 permits. Total: 7,166 permanent residence permits. *Migrationsverket statistik 2007-01-31, Tabell 4 2006*, Available at: http://www.migrationsverket.se/pdf/inter/statistik/statistik_4_2006.pdf.

Case 1: During the course of one year, a family from Central Iraq turned to the American forces on several occasions to receive assistance with regard to a particular matter. According to the applicants, their visits to the American base were perceived as a political stand and members of the public turned against the family. In the end, militant groups started attacking the family by shooting at their house on several occasions; once a bomb was discovered at the family's front door. Two relatives who engaged in the family's affair were killed shortly after. The Migration Board did not question that the family had been subjected to threats and harassments, but found that it was not "of the kind and extent" to constitute persecution according to the Aliens Act. It also found that the family had not demonstrated satisfactorily that they risked being subjected to torture or other such treatment as referred to in Chapter 4 Section 2, first paragraph, point 1 (which equates to Article 15 (b)). The family was granted subsidiary protection on point 2 (which equates to Article 15 (c)), with the motivation that based on the harassment and abuse, they had a well-founded fear of being subjected to severe abuse in a situation of "other severe conflicts".³⁴⁷

Case 2: A Christian family from Central Iraq claimed to be at risk of persecution due to connections to the American forces. One family member (A.) had been working for the Americans for three months but stopped after adverse reactions from the local community. One and a half years later, A. and his brothers were attacked. A. was called an infidel and told never to work for the Americans again. Later his brother was kidnapped. The kidnappers called the family infidels who worked for the Americans. The brother was later found dead. The family moved to a Christian area but did not feel safe and left the coun-

try. The Migration Board did not question the family's account but found that based on the limited role, short period of involvement and the long time that had passed since A.'s work for the American forces, it was not likely that the family would risk persecution for this reason. For the same reason it was considered less likely that the brother would have been kidnapped and murdered on this ground. Regarding the threats and religious insults, the Board acknowledged that the situation for non-Muslim groups had deteriorated since 2003 but noted (citing the UK Home Office) that members of the Christian community are often perceived as economically well-off and that it was therefore difficult to separate politically motivated from purely criminal acts. All things considered, the Board found it more likely that criminal groups had been behind the attacks and that what the family had been subjected to or would risk on return was not persecution for reasons of religion or political opinion. The Board found that the family had been subjected to serious abuse and could not rule out that it could happen again. Subsidiary protection was granted on the basis of Section 2, point 2 "other severe conflicts" (which equates to Article 15(c)).³⁴⁸

Of the 19 decisions concerning Iraqis reviewed in the Slovak Republic, there were no decisions to grant refugee status and six decisions to grant subsidiary protection status. The adjudicators did not find a nexus between the risk of persecution and a Convention ground in any of the cases. This is illustrated by a decision of the Migration Office which granted subsidiary protection to an applicant from Baghdad:

"The treatment the applicant was subjected to was not motivated by any of the five Convention grounds, i.e. race, religion, nationality, membership of a par-

³⁴⁷ MIBIQ18 – summary of facts and circumstances.

³⁴⁸ MIBIQ2 – summary of facts and circumstances. Also, In MIBIQ14 a Christian (Mandean) man reported that armed men had come to the family home and demanded that the family give them gold; they were called infidels and given a deadline to leave the country. Finding that "the possibility to get gold seems to have been decisive, not the religion" the Swedish Migration Board rejected the claim on refugee grounds. It found, however, that the family had been subjected to threats, violence and extortion and granted subsidiary protection based on Chapter 4 Section 2 point 2.

tical social group or political opinion, but was a result of a generally unfavourable situation in his country of origin and it does not bear any signs of persecution. The ongoing armed conflict has a negative impact on the development of a situation in the whole country and affects all citizens of this region, not only the applicant. This situation by itself does not constitute persecution for the above-mentioned reasons.”³⁴⁹

From the files reviewed in Greece, it was not possible to draw any conclusions about the authorities’ assessment of applications against the refugee criteria, because the decisions lacked any elaboration of the reasoning applied. However, all the reviewed decisions by the MPO relating to Iraq were negative. Indeed, MPO statistics for Iraq in 2006 show that of the 1,756 decisions taken none recognized refugee status and none granted subsidiary protection.³⁵⁰ In the first instance case files, the interviewing officer stated that the vast majority of applications by Iraqis were lodged for economic reasons, with no further analysis.

It must be a matter of grave concern to the European Union that the recognition rate with regard to Iraqis varies so widely across just the five Member States of focus in the research. In overall terms, international protection status was granted in 55 % of decisions at the first instance in Sweden, and in 0 % of decisions at the first instance in Greece. Moreover, it must be of concern, given UNHCR’s position that applicants from Central and Southern Iraq should be favourably considered as refugees under the 1951 Convention, that adjudicators in Greece and the Slovak Republic are not recognizing refugees from Iraq.

Whilst it is highly commendable that Sweden has provided international protection to significant num-

bers of Iraqis, the prevalence of decisions to grant subsidiary protection as opposed to refugee status should be scrutinized.

The Chechen caseload also clearly reflects a divergence in approach across four of the Member States of focus with regard to the grant of refugee status and subsidiary protection.

In France, of the 2,114 decisions taken by OFPRA in 2006 concerning Russian applicants 370 (17.5 %) were granted refugee status, and 17 (0.8 %) were granted subsidiary protection.³⁵¹ In the same year, the second instance CRR took 1,124 decisions of which 336 (29.9 %) granted refugee status and 32 (2.8 %) granted subsidiary protection. Of the 60 decisions by both OFPRA and CRR which were reviewed, refugee status was granted in 17 and subsidiary protection was not granted in any case. In France, subsidiary protection is not normally applied to Chechen applicants. When all the relevant facts are established, Chechens are recognized under the 1951 Convention as they are considered to be at risk of persecution on political and/or ethnic grounds.

Generally, in Germany, in the first quarter of 2007, 43.3 % of Chechens were granted refugee status (24 % was the figure for Russian applicants as a whole), and 3.3 % of Chechens were granted subsidiary protection (1.5 % for Russians as a whole).

The Swedish Migration Board’s tendency to grant subsidiary protection status rather than refugee status contrasts sharply with the approach taken in France and Germany. In February 2004, the situation in Chechnya was declared by the Swedish government to be an ‘internal armed conflict.’³⁵² This was followed by four guiding Migration Board decisions in June 2006 in which the Board found that, despite some progress, the situation in Chechnya should still

³⁴⁹ MU-2291-14/PO-_/2006.

³⁵⁰ See section ‘Procedural rules’ under the chapter ‘Subsidiary Protection’ for the procedural flaws which have meant that applications by Iraqis have not been assessed against the criteria for subsidiary protection.

³⁵¹ Note that Chechens represent about 75 % of the Russian caseload.

³⁵² See Reg. 99-04.

be considered as an internal armed conflict according to Swedish law.³⁵³ In the reviewed cases in Sweden, all ethnic Chechens who had come directly from Chechnya and lacked ties to other parts of the Russian Federation were granted subsidiary protection under the Swedish legislative provision equivalent to Article 15 (c). None of the applicants received refugee status. Generally, in the first quarter of 2007, 31.1 % of Russian applicants were granted subsidiary protection by the Migration Board at first instance. None were granted refugee status. In the last quarter of 2006, 23.9 % were granted subsidiary protection as compared to 2.6 % granted refugee status by the Migration Board.

In the Slovak Republic, there were no grants of refugee status or subsidiary protection to applicants from the Russian Federation in 2006 and in the first quarter of 2007. Of the 35 decisions reviewed concerning Chechens, none granted refugee status or subsidiary protection status. The following reasoning was frequently found in decisions:

“The term persecution is considered to cover infliction of serious harm or discrimination on the grounds of race, religion, nationality, political opin-

*ion or membership of a particular social group, sufficiently serious by its nature or repetition or on cumulative grounds as to constitute a significant risk to the applicant’s life, freedom or security or to preclude the applicant from living in his or her country of origin. The applicant has neither presented any facts that would substantiate the well-foundedness of his claim, nor has he provided any individual reasons for which he could be considered to be persecuted. The generally unfavourable situation in his country of origin is not considered to be sufficient ground for granting asylum. International protection can be provided to the applicant only if state protection has been denied. Asylum is not a universal tool for providing protection against injustice afflicting individuals or groups. At present there is no internal nor international armed conflict in Chechnya.”*³⁵⁴

The statistics below relating to the Slovak Republic highlight the non-application of refugee status, not only to Chechens, but also in relation to applicants from Afghanistan, Iraq and Palestine.³⁵⁵

Again, it must be a matter of concern to the European Union that just amongst the five Member States of focus, the recognition rate for international

Table 6: Slovak Republic decisions for selected nationalities, 2006

Nationality	2006			
	Asylum granted	Application inadmissible	Asylum not granted	Terminated procedures
Afghanistan	0	2	24	25
Iraq	0	7	55	115
Palestinians	0	1	7	21
Russian Federation (Chechens)	0	21	85	367

Note to table: The columns 'asylum granted' and 'asylum not granted' refer to recognitions and rejections either regarding refugee status or 'for humanitarian reasons'.

³⁵³ Migrationsverket vägledande beslut 2006-06-22.

³⁵⁴ MU-2686-15/PO-_/2006, MU-2687-11/PO-_/2006.

³⁵⁵ These are the official statistics of the Migration Office, publicly available on <http://www.minv.sk/mumvsvr/STAT/statistika.htm>. Figures relate to persons and not decisions.

protection³⁵⁶ with regard to Chechens varied from 0 % in the Slovak Republic to 46.6 % in Germany in the first quarter of 2007. The fact that no Chechens have received international protection in the Slovak Republic during 2006 and the first quarter of 2007 raises questions about the interpretation of both the refugee definition and the criteria for qualification of subsidiary protection.

The example of the Somali caseload demonstrates in a positive way that the German FedOff does not automatically resort to the subsidiary protection category with regard to applicants who come from countries where the situation is categorized as one of “generalized violence”. To highlight this, prior to 2005, the refugee recognition rate for Somali nationals had been nil for years, as according to the higher court jurisprudence Somalia was seen as a failed state with no existing State or quasi-State authorities. With the implementation of the Residence Act

in 2005, the preconditions were set for the recognition of persecution emanating from non-State actors. The refugee recognition rate of 43.2 % in the fourth quarter of 2006 and of 38.0 % in the first quarter of 2007 confirms that even in cases of generalized violence, the FedOff reviews and frequently recognizes links to one of the five Convention grounds.

The analysis of decisions showed that subsidiary protection was only granted in cases where no concrete persecutory measures were claimed³⁵⁷ or where claims of persecution were not considered credible.³⁵⁸ However, in the latter cases the adjudicators decided to grant subsidiary protection on the basis that the applicants, as single women from a minority clan, would be in special need of protection. The argument that they could represent members ‘of a particular social group’ under the 1951 Convention was not discussed.

Table 7: German Federal Office decision practice on Somalia*

Year	2004	2005	2006	Oct-Dec 2006	Jan-March 2007
Decisions (including cases otherwise closed)	261	204	159	37	50
Recognition /Convention status	-	9	24	16	19
Recognition rate (including cases otherwise closed)	-	4.4 %	15.1 %	43.2 %	38 %
Recognition rate (excluding cases otherwise closed)	-	5.9 %	19.7 %	51.6 %	43 %
Subsidiary protection	53	47	14	1	10
Subsidiary protection rate (including cases otherwise closed)	18.8 %	23 %	8.8 %	2.7 %	20 %
Subsidiary protection rate (excluding cases otherwise closed)	26.4 %	30.7 %	11.5 %	3.2 %	22.7 %

* with regard to first and repeat applications

³⁵⁶ Both refugee status and subsidiary protection.

³⁵⁷ Cases of children born in Germany: SomS5; SomS6; SomS7; SomS8.

³⁵⁸ SomS1; SomS2; SomS3; SomS4.

Two approaches regarding Somali applicants could be identified among the reviewed court cases in Germany. In one case decided by the Duesseldorf AC, subsidiary protection was granted due to the extreme danger affecting anybody returning to the country after the ouster of the government of the Union of Islamic Courts. According to the Court, membership of a particular clan did not create a danger of ethnic persecution. This conclusion was based on expert opinions submitted in 2001.³⁵⁹ On the other hand, the Munich AC recognized Somali applicants as refugees in a number of cases.³⁶⁰

The analysed decisions regarding Somali applicants demonstrate that the Swedish authorities do not automatically resort to subsidiary protection in situations of generalized violence. The authorities addressed the question of refugee status in all of the cases, and refugee status was granted in some cases where the Board found that there was a risk of female genital mutilation. However, the decisions on the Somali caseload in Sweden may point to an erroneous assessment of applications against the refugee criteria in situations of generalized violence. The Migration Board, in a significant number of decisions, rejected the protection needs of applicants on the basis that the feared persecution was intrinsic to the Somali clan system, where “*stronger clans or groups [exert] power over weaker clans or groups through criminal acts*”³⁶¹, and therefore not a basis for either refugee status or subsidiary protection. The decisions do not make clear whether refugee status was refused because the applicant was not consid-

ered to have a ‘well-founded fear’ or whether the Board did not find a nexus to one of the five Convention grounds. One interviewee explained that in a situation of generalized violence, anyone can be attacked who appears weak enough for the attacker to handle. Individuals, therefore, are not considered to be primarily targeted for reasons of their membership of a particular social group (the clan) but because they appear weak, a characteristic which they may share with other members of the clan, although members of strong clans are sometimes also attacked.³⁶² Yet, the fact that the Board repeatedly found the accounts of abuse were part of a pattern “where stronger clans exert power over weaker clans and groups” must suggest that the Board viewed the applicant’s membership of a weaker clan as a central reason for the abuse. It remains unclear why, in that case, no nexus to the Convention ground ‘membership of a particular social ground’ was found.

The analysis of decisions on Iraqi, Chechen and Somali claims indicate that guidelines on the applicability of refugee status where persecution is due to mixed motivations, including both Convention and non-Convention grounds, might assist adjudicators in their determinations.

From the review of decisions in Greece, it was not possible to determine how the authorities have interpreted the refugee definition in the context of generalized violence, given that the overwhelming majority of applications were not assessed against the cri-

³⁵⁹ Dusseldorf AC, 13 K 372/07.A of 2 March 2007.

³⁶⁰ For instance, Munich AC, M 11 K 06.51033 and M 11 K 06.50824 of 5 April 2007.

³⁶¹ MIBSOM4, see also MIBSOM6, MIBSOM8, MIBSOM10, MIBSOM14, MIBSOM11, MIBSOM13, MIBSOM21, MIBSOM31, MIBSOM16.

³⁶² However, the interviewee also underlined that with regard to very weak groups or clans as the Reer Hamar and the Bajunis, persecution on Convention grounds was often established.

teria for subsidiary protection. The low recognition rate for both refugee status and subsidiary protection,³⁶³ combined with the absence of articulated legal reasoning, provided few relevant cases which could be analysed. From the reviewed files, all decisions were negative regarding applicants from Iraq and Sri Lanka.³⁶⁴ In one decision relating to a female applicant from Somalia who was granted subsidiary protection, it could not be concluded whether the criteria for refugee status recognition were examined first, because the facts were not detailed in the file³⁶⁵ and the decision itself did not elaborate the reasoning for rejecting refugee status.³⁶⁶

IV. 6. Exclusion from refugee status or subsidiary protection

IV.6.1. Introduction

Article 1 F of the 1951 Convention sets out the circumstances in which States may deny refugee status to those who would otherwise be recognized as refugees, and is commonly referred to as an ‘exclusion clause’. The rationale for exclusion is that certain acts are so heinous as to render their perpetrators undeserving of the status of refugee. The exclusion criteria under Article 1 F are exhaustive. Thus,

Table 8: Greece – MPO first and second instance 2006³⁶⁷

Country	Decisions	Refugee recognition	Subsidiary protection
Sudan	204	2	5
Iraq	1756	0	0
Afghanistan	1027	10	8
Somalia	168	7	7
Sri-Lanka	93	0	0

³⁶³ The overall recognition rate for both refugee status and subsidiary protection is 0.62 % for 2003, 0.88 % for 2004, 1.90 % for 2005 and 1.53 % for 2006 until June, UNHCR Statistics.

³⁶⁴ MPO2SL10: This case was determined negatively by MPO, although the Committee recommended subsidiary protection and not refugee status, without specifying the reasons (National of Sri-Lanka, of Tamil origin, a member of LTTE in fear of persecution by both LTTE and the government; his brother, also a member of LTTE was killed in 1997 and the applicant himself was arrested. The applicant's eldest brother is a recognized refugee in the UK).

³⁶⁵ MPO2SO5: the applicant left because of conflicts between Christians and Muslims. Her husband had left earlier because he was an army officer and was facing problems. The case file did not specify further what kind of problems were faced and the possible repercussions on the applicant.

³⁶⁶ This was the same for a decision granting subsidiary protection to a Sudanese applicant in case MPO2SU10. In the case of an applicant from Afghanistan, who was granted subsidiary protection, there were no detailed facts nor elaborated reasoning by either the Committee or the MPO on the rejection of refugee status: MPO2A10 (Afghan national of the Hazara ethnic group, alleged a fear of persecution because he was an army officer in the former regime).

³⁶⁷ The number of decisions taken in one year do not necessarily correspond to the number of applications lodged in that year because MPO also take decisions on asylum applications lodged in previous years.

whilst they may be subject to interpretation, they cannot be expanded in the absence of an agreement by all States Party. UNHCR, in accordance with its mandate to supervise the application of the provisions of the 1951 Convention, has provided guidance for governments, decision makers and the judiciary on the interpretation of the exclusion clause. These are contained in the *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1 F of the 1951 Convention relating to the Status of Refugees*³⁶⁸ which supplement the UNHCR Handbook.³⁶⁹

The research focused on the implementation of Article 12(2) and (3) of the Qualification Directive. The Qualification Directive creates an obligation to exclude persons from refugee status when the clauses set out in Article 12(2) apply. The Qualification Directive, in its Article 12(2) and (3), restates the exclusion criteria of Article 1 F of the 1951 Convention, but in addition offers a partial interpretation of two of the criteria. These additional elements should be construed in a way which is consistent with the UNHCR Guidelines.

Beyond these provisions, the Directive has added an additional exclusion clause in Article 14(5). UNHCR's concern that Article 14(5) runs the risk of introducing substantive modifications to the exclusion clauses of the 1951 Convention would appear to be justified following the review of national implementing legislation in Germany and the Slovak Republic.

The Qualification Directive also sets out the circumstances in which a person must be excluded from subsidiary protection status. These provisions, whilst

reflective in some respects of the exclusion clauses of the 1951 Convention, are more expansive in scope and contain an additional ground.

The review of decisions in France, Greece and Sweden revealed very few in which the exclusion clauses were considered, and none in which they were applied, reflecting the exceptional nature of the provisions. Of the 206 negative decisions analysed in France, none were based on exclusion. Similarly, in the sample of 183 decisions analysed in Sweden, the issue of exclusion was referred to only marginally in three decisions, but was not applied to reject any claim.

However, the review of decisions in Germany found that the use of the exclusion clauses was more prevalent. In Germany, between 10 October 2006 and 30 June 2007, 39 decisions invoking exclusion clauses were issued by the FedOff. The research reviewed these and an additional 13 decisions, issued prior to 10 October 2006, which were sampled because of their significance for the application of the exclusion clause in the context of this study.³⁷¹ In addition, 39 court decisions were reviewed.³⁷² In total, 91 decisions which raised the exclusion clauses were reviewed.³⁷³

As a result of the more numerous decisions applying the exclusion clauses in Germany and reviewed in the research, and the limited case-law in some of the other countries of focus, the interpretation given by adjudicators in Germany dominates the findings in this section. It is possible, however, that similar issues and concerns on exclusion arise in other Member States.

³⁶⁸ Guidelines issued on 4 September 2003. These Guidelines summarize the Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, which forms an integral part of UNHCR's position on this issue.

³⁶⁹ Op. cit., footnote 23.

³⁷⁰ The total number of FedOff decisions under Article 60 (8) Residence Act 2004 from 1 January 2006 to 30 June 2007 was 88.

³⁷¹ Consequently, a total of 52 FedOff exclusion decisions were reviewed for the purpose of the study. These related to the following countries of origin: Algeria: 3; Iran: 13; Iraq: 4; Russian Federation (Chechens): 1; Sri Lanka: 1; Turkey: 5 and others: 5.

³⁷² 35 cases related to Turkey, 3 to Iran and 1 to Algeria.

³⁷³ Note that these decisions relate to nationalities beyond the caseloads selected for this research.

IV.6.2. Exclusion from refugee status under the Directive

Article 12 (2) and (3)

....

2. A third country national or 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.

Recital 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’.”

Article 14 (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.”

[Paragraph 4 states the following situations: “(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 judgment of a particularly serious crime, constitutes a danger to the community of that Member State.”]

IV.6.3. National legislation transposing Article 12(2) and (3) and Article 14(5)

The provisions of Article 12(2) and (3) of the Directive have been implemented in national legislation in France and the Slovak Republic. The provisions are already covered by existing legislation in Germany and Sweden. However, the Inquiry on the Qualification Directive in Sweden proposed new legislation reflecting the wording of the Qualification Directive more closely. Article 12 has not yet been implemented in national legislation in Greece and there is no existing legislation implementing the equivalent provisions of the 1951 Convention as, in the past, the provisions of the Convention were applied directly.

In France, the Asylum Law implements Article 12 by stating that the provisions of the 1951 Convention are applicable. Article L.711.1 states “these persons [1951 Convention refugees] are governed by the relevant provisions under the Geneva Convention”.³⁷⁴ As such, the interpretative clauses of the Directive have not been transposed.

The Slovak Republic has implemented the exclusion clause relating to refugee status by means of the Act on Asylum,³⁷⁵ but with a narrower temporal scope. Unlike Article 12(2) (b) of the Qualification Directive,

³⁷⁴ In the French official version: “Ces personnes [réfugiés] sont régies par les dispositions applicables aux réfugiés en vertu de la convention de Genève [susmentionnée]”.

³⁷⁵ Paragraph 13 Sections 2), 3), 4) and 5) 480/2002 Coll. Act on Asylum 2006.

Paragraph 13 section 2 b) provides for exclusion where an applicant “*has committed a serious non-political crime outside the territory of the Slovak Republic prior to applying for asylum or subsidiary protection*” [emphasis added].

Greece at present applies the provisions of Article 1F of the 1951 Convention directly. However, the first draft of the forthcoming Presidential Decree will transpose Article 12(2) and (3) almost literally, but without the phrase “*which means the time of issuing a residence permit based on the granting of refugee status*” from Article 12(2) (b).

Article 12(2) and (3) of the Directive have not been transposed literally into Swedish legislation, and the Swedish Aliens Act follows a different structure than the Directive or the 1951 Convention. Most notably, the application of the exclusion clauses does not deny refugee status but may result in denial of the right to residence in Sweden. According to the Aliens Act Chapter 5, Section 1, point 1, a refugee *may* be refused a residence permit if “*there are exceptional grounds for not granting a residence permit in view of what is known about the alien’s previous activities or with regard to national security*”. The provision covers both national security considerations and exclusion from refugee status following Article 1 F of the 1951 Convention.³⁷⁶ It should be read in conjunction with Chapter 12, Section 1 of the Aliens Act, which provides an absolute prohibition against expelling a person to a country if there is “*fair reason to assume that the alien would be in danger*

there of suffering the death penalty or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment or the alien is not protected ... from being sent on to a country in which the alien would be in such danger.” It is also qualified by Chapter 12 Section 2, reflecting Article 33 of the 1951 Convention.³⁷⁷

To achieve greater consistency between the Aliens Act and both the Qualification Directive and the 1951 Convention, the Swedish Inquiry on the Qualification Directive has suggested that the Aliens Act be amended to incorporate a provision based on Article 12 of the Directive. The Inquiry has opted for a minimalist approach, not recommending adoption of the interpretative rules contained in the second and third clauses of Article 12(2) (b). While these changes would not alter the scope of the exclusion clauses under Swedish law, denial of residence on their basis would become mandatory, rather than discretionary.

In Germany, the provisions of Article 12(2) and (3) are covered by Section 60(8) Residence Act 2004. The Residence Act does not contain the interpretative clauses of Article 12(2) (b), but according to MOI internal guidelines, it is to be interpreted along the lines of Article 12(2) and (3).³⁷⁸ It is of concern that Section 60(8) also incorporates the provisions of Article 14(4) of the Directive and, thereby merges provisions on exclusion with provisions which stem from exceptions to the principle of *non-refoulement*. It reads “*Sub-section 1 [i.e. the inclusion criteria] shall not apply if, for serious reasons, the foreigner is to*

³⁷⁶ See Wikrén and Sandesjö, page 168 with references.

³⁷⁷ Chapter 12 Section 2: The refusal of entry and expulsion of an alien may not be enforced to a country

- if the alien risks being subjected to persecution in that country or

- if the alien is not protected in the country from being sent on to a country in which the alien would be at such risk.

An alien may, however, be sent to such a country, if it is not possible to enforce the refusal of entry or expulsion to any other country and the alien has shown by committing an exceptionally gross offence that public order and security would be seriously endangered by allowing him or her to remain in Sweden. This is, however, not applicable if the persecution threatening the alien in the other country entails danger for the life of the alien or is otherwise of a particularly severe nature. An alien may also be sent to such a country if the alien has conducted activities that have endangered national security and there is reason to assume that the alien would continue to conduct these activities in the country and it is not possible to send the alien to any other country.

³⁷⁸ Internal Guidelines, page 8.

be regarded as a risk to the security of the Federal Republic of Germany or constitutes a risk to the general public because he or she has been unappealably sentenced to a prison term of at least three years for a crime or a particularly serious offence.” This is legally problematic as it adds an additional reason for exclusion to the exhaustive list of Article 1F of the 1951 Convention, and as such, it is incompatible with the 1951 Convention.³⁷⁹

Germany has added grounds derived from Article 33(2) of the 1951 Convention (exceptions to the *non-refoulement* principle) as a basis for exclusion from refugee status. In effect, and this is reflected in decisions reviewed, this has expanded the grounds for exclusion beyond the exhaustive list of grounds set out in the 1951 Convention. UNHCR had cautioned that Article 14(4) and (5) of the Directive run the risk of introducing substantive modifications to the exclusion clauses of the 1951 Convention, and explained that the exclusion clauses and the *non-refoulement* exception serve different purposes. The rationale of Article 1F is that certain acts are so grave that they render their perpetrators undeserving of refugee protection and the rights that adhere to refugee status. By contrast, Article 33(2) deals with the treatment of those who have been determined to be refugees and defines the circumstances under which they could nonetheless be refouled under the 1951 Convention.³⁸⁰ “It aims at protecting the safety of the country of refuge or of the community. The provision hinges on the assessment that the refugee in question is a danger to the national security of the country or, having been convicted by a final judgment of

a particularly serious crime, poses a danger to the community. Article 33(2) was not, however, conceived as a ground for terminating refugee status. Assimilating the exceptions to the *non-refoulement* principle permitted under Article 33 (2) to the exclusion clauses of Article 1F would therefore be incompatible with the 1951 Convention.”³⁸¹

The review of decisions in Germany demonstrates that as a result of the assimilation of the *non-refoulement* exception and exclusion grounds in the national legislation, the grounds upon which persons may be excluded from refugee status have been expanded as compared to Article 1F of the 1951 Convention. For instance, in eight decisions reviewed, refugee status was denied to persons accused of low-level support to alleged ‘terrorist’ organizations in Germany based on a conflation of Article 14(4) (4) and an extremely broad interpretation of the grounds of Article 12(2) (c) extending to conduct which could not be seen as reaching the level of actions ‘contrary to the principles and purposes of the United Nations’.³⁸²

UNHCR has consistently stressed that refugee status is declaratory, not constitutive. Therefore, UNHCR has recommended that the word ‘status’ in Article 14(5) - which provides that Member States may decide not to grant *status* to a refugee on national security grounds - should be understood by Member States to refer to the protection extended by the State, rather than to refugee status in the sense of Article 1A (2) of the 1951 Convention.³⁸³

379 See UNHCR comments: Stellungnahme des UNHCR zum Gesetz zur Umsetzung aufenthalts- und asylrechtlicher Richtlinien der Europäischen Union, Januar 2006, page 7 et seq., http://www.unhcr.de/fileadmin/unhcr_data/pdfs/rechtsinformationen/4.2._D-Stellungnahmen/20060131_-_Richtlinienumsetzung.pdf.

380 Obligations under the European Convention on Human Rights may nevertheless prohibit *refoulement*.

381 Op. cit., footnote 8.

382 TurE1; TurE3; TurE5; TurE7; IrqE1; IrqE2; AlgE1; OTE1.

383 See footnote 368.

IV.6.4. Exclusion from subsidiary protection under the Directive

Article 17

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.*

IV.6.5. National legislation transposing Article 17

France has implemented Article 17 by means of the 2003 Asylum Law.³⁸⁴ However, the scope of the French law is more limited than the Qualification Directive. In the provision which equates to Article 17(b), the French law inserts the word ‘non-political’ so that it reads “*he or she has committed a serious non-political crime*”. As a result, the scope of crimes covered by this provision is limited in line with the 1951 Convention and the exclusion clause relating to refugee status in the Directive. Furthermore, the provision which equates to Article 17(d) requires that the danger to the community or the security of the State must be ‘serious’, and given the fact that the mere presence of a person on the territory was considered insufficient to pose a serious danger, the provision requires that “*his or her activity on the territory constitutes a serious danger*”. Article 17(2) and the optional Article 17(3) have not been transposed. The Constitutional Court upheld the legislation as constitutional.

Article 17(1) and (2) have not been transposed into national law in Germany and will not be transposed by the Transposition Act 2007. The German legislator saw no explicit need to transpose Article 17 since exclusion from subsidiary protection is anchored in the refusal of a residence permit for persons fulfilling the conditions of Article 17. As a consequence of this, the applicant does not benefit from the rights afforded to subsidiary protection beneficiaries in Articles 20 to 34 of the Qualification Directive with the exception of *non-refoulement*. Therefore, no change to the

³⁸⁴ Article L. 712-2 and Article 712-3 al. 2.

³⁸⁵ Op. cit., footnote 189.

German Residence Act 2004 is foreseen as it already contains an obligatory provision to deny the issuance of a residence permit on, inter alia, grounds which reflect Article 17.

Section 25 (3) Residence Act 2004:

A foreigner should be granted a residence permit if the conditions for suspension of deportation are fulfilled in accordance with Section 60 (2), (3), (5) or (7) [inter alia applicable if the persons “face a real risk of suffering serious harm as defined in Article 15”]. 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) has 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) has 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.

In the view of the Hamburg administrative court, the German law is in line with the Qualification Directive.³⁸⁶ The optional Article 17(3) is not transposed.

Greece has not transposed Article 17 of the Qualification Directive. The draft of the forthcoming Presidential Decree would transpose Article 17 fully and literally.

The Slovak Republic has transposed Article 17, including the optional Article 17(3), by means of the Asylum Law with some small differences in wording, and the insertion of the minimum prison sentence required under Article 17(3):

Table 9: Comparison of wording of Qualification Directive and Slovak Act on Asylum

QD Art. 17 (1) (b)	Slovak Act on Asylum 13c) section 2b)
he or she has committed a serious crime	has committed a particularly serious crime
QD Art. 17 (3)	Slovak Act on Asylum 13c) section 4c)
prior to his or her admission to the Member State	prior to entering the territory of the Slovak Republic
has committed	is suspected, on well-founded grounds, that he/she 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	an act outside the scope of paragraph 2, which according to a separate regulation (the Slovak Criminal code) constitutes an offence, which would be punishable by imprisonment of at least 5 years
left his or her country of origin solely in order to avoid sanctions resulting from these crimes	left the country of origin only in order to avoid criminal prosecution

³⁸⁶Hamburg AC, 15 A 1731/04 of 22 January 2007.

Sweden has not transposed Article 17(1) and (2). According to the Inquiry on the Qualification Directive, the exclusion grounds of Article 17 are applied even though this is not explicitly stated in the Aliens Act.³⁸⁷ Regrettably, the Inquiry does not give further reasons for this statement. Due to the small sample of available cases on exclusion issues, it was not possible to verify the statement through this research.³⁸⁸ The Inquiry has proposed the following wording, to follow on the proposed Chapter 4 Section 2 a §:

“If with regard to an alien in Section 2 [subsidiary protection] there are exceptional grounds for considering that he or she has committed acts referred to in first paragraph, point 1 or 3, or has otherwise committed a serious crime or constitutes a danger to public order or national security, the alien shall not be considered a person in need of alternative protection”.

According to the Inquiry, the proposed suggested wording above encompasses Article 17(3).³⁸⁹

IV.6.6. Impact on practice

IV.6.6.1. Article 12 (2) (a) and Article 17 (1) (a)

Article 12(2) (a) appears to be applied rarely in the case-law of the five countries of focus. The review of decisions found only three decisions - two in France and one in Germany - in which Article 12(2) (a) was raised.

The FedOff decision in Germany related to Rwanda.³⁹⁰ The applicant was mentioned on the list of the United Nations General Assembly of 1 November 2005 (under Resolution 1596/2005) and was placed there on the grounds that he is the “*President of [x organisation], exercising influence over policies, and maintaining command and control over the activities of [x organisation...] forces, one of the armed groups and militias referred to in paragraph 20 of Res. 1493 (2003), involved in trafficking of arms, in violation of the arms embargo.*” The acts committed by the group under his control were qualified by the Federal Office as ‘war crimes’ under Article 8(2) (c) and (e) and as ‘crimes against humanity’ under Article 7 of the Statute of the International Criminal Court (ICC). The personal responsibility of the person was derived from Article 28(b) of the Statute of the ICC. Reference was also made to Article 1 F (a) of the 1951

³⁸⁷SOU 2006:6 page 182. See above for the wording on Chapter 5 Section 1 point 2 regulating when a person otherwise in need of protection may be denied residence permit.

³⁸⁸In UN 442-03 (guiding decision), the Aliens Appeals Board noted that it would be reasonable to reject a person's application for residence permit based on family connections (i.e. not subsidiary protection) if the applicant had for instance committed crimes against humanity.

³⁸⁹SOU 2006:6, page 184.

³⁹⁰RwaE1.

Convention and to the UNHCR Guidelines on International Protection³⁹¹ (paragraph 19 was cited in the decision). The German Criminal Code provides for the incorporation of the Rome Statute of the International Criminal Court into German law. Its provisions were also cited in the decision. In addition, the Federal Office made reference to Article 2 and 3 of the 1949 Geneva Conventions in order to define the notions of ‘international armed conflict’ and of ‘grave breaches’.

The case-law in France also refers for guidance to various international instruments such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the 1945 Charter of the International Military Tribunal (the London Charter) and the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda.³⁹²

IV.6.6.2. Article 12 (2) (b)

According to UNHCR guidance on the interpretation to be given to ‘serious non-political crime’, international rather than local standards are relevant. It advises that “*the following factors should be taken into account: the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether*

most jurisdictions would consider it a serious crime. Thus, for example, murder, rape and armed robbery would undoubtedly qualify as serious offences, whereas petty theft would obviously not.”³⁹³ There was one decision by the Slovak Republic which denied refugee status on the basis of the equivalent provision to Article 12(2) (b). The case concerned a Chechen applicant who was accused of murder in the Russian Federation on the grounds that he was a suspected member of an armed group which had committed indiscriminate killings.

None of the decisions sampled and analysed in France and Sweden invoked Article 12(2) (b). The Swedish Inquiry on the Qualification Directive concluded that the Swedish case-law corresponds to Article 1 F (b) of the 1951 Convention and that the interpretative rules of the Directive are in line with established Swedish and international practice.³⁹⁴

In the German case-law, the interpretation of ‘serious non-political crime’ has predominantly related to ‘terrorist’ acts and/or participation in what are deemed to be ‘terrorist’ organizations. ‘Serious’ has been interpreted by reference to the German Criminal Code, which suggests that a criminal offence punishable by a prison sentence of a minimum of one year constitutes a ‘serious’ crime.³⁹⁵ This is not compatible

³⁹¹ Op. cit., footnote 368, paragraph 19.

³⁹² For example, in the case CRR, SR, M. 19/06/1996, 280634 concerning an applicant involved in the Rwandan genocide, the CRR refers to the 1948 Genocide Convention. The CRR also considers that this clause is applicable to persons who have indirectly taken part in the crime of genocide. In the case CRR, K., 18/05/2006, 548090, concerning a member of the former army of the Federal Republic of Yugoslavia whose acts have been qualified as crimes against humanity and war crimes according to Articles 3, 4 and 5 of the Statute of the International Criminal Tribunal for former Yugoslavia, the CRR referred to the international laws relating to war and to Article 6b) of the London Charter. In this particular case however the CRR considered that given that the applicant had been recruited by force he/she could not fall under Article 1F(a) of the 1951 Refugee Convention and Article L.712.2a) of the Asylum Law but that the acts he/she committed once recruited could be considered as serious non-political crimes under Article 1Fb) of the Geneva Convention and Article L.712.2b) CESEDA. In the case CRR, N., 12/10/2006, 558295, concerning a former Rwandan minister who supported the acts of genocide committed by the interim government, the CRR considered that there were serious reasons for considering that he/she was personally guilty of a crime as defined in Article 1Fa) of the Geneva Convention, in particular a crime against humanity as defined in the international instruments. The same reasoning was applied in the case CRR, Mme K, 15/02/2007, 564776.

³⁹³ Op. cit., footnote 368.

³⁹⁴ SOU 2006:6 page 130.

³⁹⁵ This wording will be changed to ‘Straftat’ (punishable offense) in the new Act, with no bottom line drawn as to the seriousness of the crime.

with UNHCR guidance, which states that the term ‘serious’ should be interpreted by reference to international jurisprudence, and is but one element to be taken into account. This is the case in France where the length of imprisonment applicable to a particular crime in national legislation is not the determining factor.³⁹⁶ The reference period of one year in Germany also contrasts sharply with the Slovak Republic where, according to the Slovak Penal Code, a ‘serious crime’ is defined by a length of imprisonment of at least 10 years.³⁹⁷ As a result, in Germany, membership of a terrorist organization alone, in the sense of the German Criminal Code, has been considered justification for the application of the exclusion clause by the FedOff. It is not considered necessary that the applicant has committed a criminal offence in terms of a violent act.³⁹⁸ The provision has been applied not only applied to fighters associated with relevant organizations,³⁹⁹ but also to persons who had stated that they were not involved in fighting but helped with the logistics of the organization’s activities, through the provision of food and other necessary goods.⁴⁰⁰ The question of whether the applicant is a current member has been considered irrelevant as long as the acts committed in the past have fulfilled the prerequisites of the exclusion clause.⁴⁰¹ The issue of mere membership of a terrorist organization has arisen occasionally before the courts, but member-

ship without more was not held to constitute a ‘serious non-political crime’.⁴⁰² The Hamburg AC left open whether ‘military activity alone’ may be sufficient to constitute a ‘serious crime’ and therefore to exclude a person, but in the particular case that the person had given significant support to a ‘terrorist’ organization (active fighter in the armed wing of the organization, logistical support, delegate to its congress, participation in congresses of women members of the organization) and, therefore, was considered to have committed a serious non-political crime.⁴⁰³ Similarly, in France, the CRR assesses the applicant’s degree of involvement.⁴⁰⁴

As regards the interpretation of ‘non-political’, UNHCR has stated that a serious crime should be considered non-political when motives such as personal gain are the predominant feature, or when there is no clear link between the crime and its alleged political objective or when the act is disproportionate to the alleged political objective.⁴⁰⁵ This is reflected in a French State Council (Conseil d’Etat) decision that “*in order to apply Article 1F (b) [Article 12 (2)(b) of the Qualification Directive], ... account should be taken not only of the seriousness of the acts, but also of the objectives pursued by their authors and of the degree of legitimacy of the violence they used*”.⁴⁰⁶

³⁹⁶ See CRR S, 15/06/1991.

³⁹⁷ Paragraph 11 Sec. 3.

³⁹⁸ TurE6; TurE10; TurE11; TurE17; TurE19; TurE24; TurE25.

³⁹⁹ TurE11; TurE24.

⁴⁰⁰ TurE6; TurE17; TurE19.

⁴⁰¹ TurE11, former PKK fighter.

⁴⁰² Hesse HAC, 4 UZ 679/06.A of 22 May 2007.

⁴⁰³ Hamburg AC, 15 A 1731/04 of 22 January 2007.

⁴⁰⁴ In the case CRR, SR, 9/01/2003, Riza Altun (important member of the PKK), the CRR considered that at least until 1999, the PKK applied terrorist methods, for example bomb attacks on civilians, and that those acts could not justify the political objectives pursued and could thus be considered as serious non-political crimes. The CRR had serious reasons for considering that the applicant took necessarily part in the decisions which led to those acts and never dissociated him/herself from them. This decision was confirmed by the State Council (CE, 9/11/2005, Altun). A more recent decision from the CRR (CRR, U., 11/05/2006) considered that the PKK was registered under the list of persons, groups and entities elaborated by the Council of the EU in order to combat terrorism and that its acts resulting from the use of terrorist methods to attack civilians could not justify the political objectives pursued by this party, and were thus considered as serious non-political crimes.

⁴⁰⁵ Op. cit., footnote 368.

⁴⁰⁶ CE, SID, 28 February 2001, 195356. This reasoning was recently applied in a decision CRR, MKS, 25 January 2007, 552944 to rebut the exclusion clause applied by the OFPRA to a Chechen who had taken part in the first conflict.

On the issue of proportionality, UNHCR has elaborated that “*egregious acts of violence, such as acts commonly considered to be of a ‘terrorist’ nature, will almost certainly fail the predominance test, being wholly disproportionate to any political objective.*”⁴⁰⁷ This is reflected in the Directive itself which says that “*particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes.*” However, the German FedOff applies a more expansive interpretation whereby any acts deemed ‘terrorist’ and any support for such acts are always considered disproportionate to the alleged political aims and, therefore, are always designated as ‘non-political crimes’.⁴⁰⁸ In the period under review in Germany, no court cases based solely on Article 12(2) (b) of the Qualification Directive were found in the research. It would seem that this provision is currently applied very rarely, as the courts mostly refer to Article 12(2) (c) of the Qualification Directive when considering ‘terrorist’ activities. The Migration Office in the Slovak Republic holds the view that “*criminal acts, which can be characterised as terrorist activities or those committed by armed groups can be considered as non-political criminal crimes.*”⁴⁰⁹

The review of decisions in the five countries of focus did not find any decisions which contained a specific interpretation of ‘particularly cruel actions’.

Whilst the sample of decisions raising issues under the exclusion clauses overall was relatively small, there was some evidence that approaches may diverge with regard to the extent to which decision makers assess the legal system in the country to which the applicant may be returned. In one Chechen

case in the Slovak Republic⁴¹⁰, the legal representative of the applicant contested the adequacy and credibility of the Russian State prosecutor’s guarantees that the death penalty would not be imposed on the applicant if extradited, and that due process of law would be safeguarded; and provided further evidence supporting the applicant’s allegations and his fear of being tortured. In its negative decision, the Migration Office stated that “*Questioning the credibility of the information provided by the State prosecutor of the Russian Federation and doubting his assurances given to the Minister of Justice of the Slovak Republic falls outside the Migration Office’s competence.*” An assurance from the Government of the country of origin that it would uphold the European Convention on Human Rights was considered sufficient.⁴¹¹

Consideration of whether due process of law will be respected in the country of origin has produced different outcomes at the FedOff and the courts in Germany. In four decisions regarding alleged supporters of terrorism, the FedOff relied on country of origin information stating that alleged terrorists do not (normally) face a serious risk of being exposed to torture or inhuman or degrading treatment during prosecution proceedings in Turkey; and it is “*just and reasonable for the applicant to face – with the aid of a lawyer – criminal proceedings in Turkey.*”⁴¹² Some high court decisions based on the direct application of the Qualification Directive came to the same conclusion and found no real risk of persecution in Turkey for persons with a “low level” involvement in a particular organization’s activities.⁴¹³ However, most courts take a different view and therefore grant refugee status or subsidiary protection to such per-

407 Op. cit., footnote 368.

408 TurE6; TurE10; TurE11; TurE17; TurE19; TurE24.

409 5Saz/20/2006.

410 5Saz/20/2006-206, MU-222/PO-_/2006.

411 See UNHCR Note on Diplomatic Assurances and International Refugee Protection, August 2006, at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=44dc81164>.

412 TurE13; TurE15; TurE20; TurE22.

413 For instance Lower Saxony HAC, 11 LB 4/06 of 25 January 2007; Berlin Brandenburg HAC, 10 B 2/05 and 10 B 4.05 of 16 November 2006; Hamburg HAC, 4 B Bf 4/95.A of 2 November 2006 and Rhineland Palatinate HAC, 10 A 10887/06.OVG of 1 December 2006.

sons suspected of supporting terrorist activities in their country of origin. In numerous cases, revocation decisions based alleged terrorist activities have been lifted by the courts.⁴¹⁴

Finally, in relation to Article 12(2) (b), UNHCR has commented that it would not be correct to interpret the phrase “*prior to admission ... as a refugee*” as referring to the time preceding the issuing of a residence permit, as recognition of refugee status is declaratory rather than constitutive. In UNHCR’s view, it should be interpreted as referring to the time preceding the person’s physical presence in the country of refuge.⁴¹⁵

IV.6.6.3. Article 12 (2) (c) and Article 17 (1) (c)

The research did not find any decisions in either Greece or Sweden applying Article 12(2) (c), suggesting that this Article is rarely applied. This appears consistent with UNHCR’s guidance which advises that this particular article is to be interpreted narrowly, and states that Article 1 F (c) of the 1951 Convention (reflected in Article 12(2) (c) of the Qualification Directive) “*is only triggered in extreme circumstances by activity which attacks the very basis of the international community’s coexistence.*” However, the decision practice in Germany contrasts sharply with the practice in Greece and Sweden, and also with the guidance of UNHCR. The application of Article 12(2) (c) is common in Germany and the interpretation is far broader than that recommended by UNHCR.

With regard to Article 12(2) (c) and Recital 22, UNHCR has commented that the purposes and principles of the Charter of the United Nations relate to international peace and security, and peaceful relations between States. “*Given that States must uphold these in their mutual relations, in principle, only persons who have been in a position of power in their countries or in State-like entities would appear capable of violating these provisions.*”⁴¹⁶ In France, the CRR has mainly applied this provision to representatives of the public authority of the countries where acts contrary to the purposes and principles of the United Nations are occurring. For example, the CRR considered that serious violations of human rights and fundamental freedoms in Haiti under the presidency of Jean-Claude Duvalier could be considered as acts contrary to the purposes and principles of the United Nations.⁴¹⁷ The CRR held that, given his authority and function as Head of State, Jean-Claude Duvalier was responsible for acts contrary to the purposes and principles of the United Nations and was excluded.

In relation to Recital 22, UNHCR cautions that “*only those acts within the scope of United Nations Resolutions relating to measures combating terrorism which impinge upon the international plane in terms of their gravity, international impact, and implications for international peace and security, should give rise to exclusion under [Article 12(2) (c)].*”⁴¹⁸ Any assessment under the exclusion clauses must focus on the actual act committed, its nature

⁴¹⁴ The following decisions found insufficient changes in Turkey for instance Berlin AC, 36 X 67.06 of 13 October 2006, Cologne AC, 3 K 2516/04 of 22 November 2006, Düsseldorf AC, 20 K 4697/05.A of 24 January 2007 and 4 K 172/07.A of 22 March 2007; Lueneburg AC, 5 A 34/06 of 6 December 2006; Weimar AC, 2 K 20064/05 We of 16 November 2006; Koblenz AC, 1 K 419/06.KO of 17 November 2006; Muenster AC, 3 K 2492/05.A of 8 March 2007; Ansbach AC, decision of 6 March 2007 (unknown file number); Saxony HAC, A 3 B 372/05 of 23 March 2007 and North Rhine Westphalia HAC, 8 A 2771/06.A of 17 April 2007.

⁴¹⁵ Op. cit., footnote 8.

⁴¹⁶ Ibid.

⁴¹⁷ CRR, Duvalier, 18/07/1986.

⁴¹⁸ Paragraphs 46-49 of UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, 4 September 2003, at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f5857d24>.

and gravity, and its impact on international peace and security in order to determine whether it falls within the material scope of Article 1F (c) and, therefore, Article 12(2) (c) of the Directive.

In Germany, 34 FedOff decisions which were based on the German provision equating to Article 12(2) (c) alone or in conjunction with another ground were reviewed. Whenever Article 12(2) (a) and/or (b) or Article 33(2) of the 1951 Convention (Article 14(5) of the Directive) were invoked, it was always accompanied by the finding that the applicant had perpetrated acts contrary to the purposes and principles of the United Nations. In ten decisions, Article 12(2) (c) was the only provision invoked. Article 12(2) (c) was mainly applied to persons accused of supporting international terrorism. In this regard it is interesting to note that persons not actively involved in terrorist acts but alleged to have given support in some other way are regularly excluded from refugee status under Section 60(8) 2 3rd alternative Residence Act 2004 (reflecting Section 12(2) (c) of the Qualification Directive). In the decision practice, it is stated that “it is not necessary that proof is given in the sense that may be necessary in criminal proceedings, because it is apparent that the provision is aimed at the preventative fight against terrorism.”⁴¹⁹

The FedOff interprets Article 12(2) (c) of the Qualification Directive with reference to three United Nations Security Council Resolutions (UNSCR), notably UNSCR 1373, 1377 and 1624 in line with a landmark decision of the Higher Administrative Court of Rhineland-Palatinate. This decision stated that:

“To Section 51 (3) Aliens Act – now: Section 60 (8) sentence 1 Residence Act 2004 – a Sentence 2 was

added in order to implement particularly UNSCR 1373 (2001) of 28 September 2001. In this resolution it is explicitly clarified 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. In particular states are called upon to prevent and suppress the financing of terrorist acts, as well as to criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts; and to prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.

*In a subsequent resolution – 1377 (2001) of 12 November 2001 – the Security Council of the United Nations stressed that acts of international terrorism are contrary to the purposes and principles of the Charter of the United Nations, and that the financing, planning and preparation of **as well as any other form of support** (emphasis added) for acts of international terrorism are similarly contrary to the purposes and principles of the Charter of the United Nations. At last the Security Council of the United Nations in its resolution 1624 (2005) of 14 September 2005 also recalled that the protections afforded by the Refugees Convention and its Protocol shall not extend to any person with respect to whom there are serious reasons for considering that he or she has been guilty of acts contrary to the purposes and principles of the United Nations and that all States must cooperate fully in the fight against terrorism in order to find and deny safe haven to any person who inter alia facilitates the preparation of terrorist acts.*

⁴¹⁹ TurE9; TurE14; TurE16; lrnE2; lrnE3; lrnE6.

*The Security Council of the United Nations – which has according to Article 24 of the Charter of the United Nations the primary responsibility for inter alia the maintenance of international security and which in discharging these duties acts in accordance with the purposes and principles of the United Nations – has clarified through its resolution that not only individuals in position of powers within their state may act contrary to the purpose of the United Nations to counter international terrorism and to the principles governing in this regard [...] but also individuals may act in conflict with these purposes and principles, if they are according to No. 5 [of the resolution 1373 (2001)] involved in terrorism”.*⁴²⁰

The interpretation of which types of support of terrorism fall under Article 12(2) (c) differs to some extent. In France, an applicant who had delivered false documents to persons who committed particularly serious terrorist acts was held to be acting contrary to the purposes and principles of the United Nations in the meaning of the UNSCR 1373.⁴²¹

In a singular but significant case in Germany, a refugee lost her refugee status with reference to Article 12(2) (c) because, although she was not a formal member of the People’s Mujaheddin of Iran (PMOI), she was collecting money for an association supporting the PMOI. This continuing (low level) support and the fact that she was a sympathizer of the PMOI were found decisive in the decision to exclude her from refugee status. The FedOff considered that in order to be effective in working against terrorism, activities which may not be relevant in criminal proceedings may qualify as support to terrorism as part

of counter-terrorism measures. The FedOff derives this point of view from UNSCR 1373 and 1624.⁴²²

It is worth noting that the standards applied in the application of Section 60 (8) 2 of the Residence Act (which relates to Article 12(2) (c)) are lower than those required for exclusion based on Section 60(8) 1 of the Residence Act (which permits exclusion on grounds of national security).⁴²³ Whereas the latter demands that a person must have been sentenced to a minimum term of three years imprisonment, without further right of appeal, in practice the former has sometimes been applied to persons punished with a small fine. This represents an erosion of standards as compared to legal practice prior to the transposition of the 1951 Convention exclusion clauses in German legislation in 2002. Although participation in terrorist acts could result in the denial of protection, the courts at that time emphasized that acts such as donations, distribution of leaflets or newspapers or participation in demonstrations were not sufficient to constitute actions supporting an environment of terrorism.⁴²⁴

With regard to the German court practice, the Qualification Directive has not yet significantly influenced the case-law on exclusion from refugee status under Article 12(2) (c). But there has been a recent detailed decision by the North Rhine-Westphalia Higher Administrative Court (hereinafter ‘HAC’) which rejected a widened scope of application based on the Qualification Directive and explicitly maintained, in its interpretation of the Directive, the approach applied by some German courts according to which exclusion is only possible if the applicant constitutes a danger at present.⁴²⁵

⁴²⁰ Higher Administrative Court Rhineland-Palatinate, judgment of 6 December 2002 – 10 A 10089.

⁴²¹ CRR, T., 17/10/2006, 585731.

⁴²² lrnE1.

⁴²³ See above for concerns that as a result of the assimilation of the *non-refoulement* exception with exclusion grounds in the national legislation, the grounds upon which persons may be excluded from refugee status have been expanded as compared to Article 1F of the 1951 Convention.

⁴²⁴ German Federal Administrative Court, 30 March 1999 (printed in *Die öffentliche Verwaltung* 1999, 876). See also the following cases regarding the denial of protection on grounds of participation in terrorist acts: German Federal Constitutional Court, Official Collection BVerfGE 80, 315 (339) and German Federal Constitutional Court, Official Collection BVerfGE 81, 142 (152).

⁴²⁵ NRW HAC, 8 A 4728/05.A of 27 March 2007.

This view was shared by some other courts referring to the constitutional guarantee of asylum and the wording and purpose of the provision on exclusion of refugee protection (Section 60(8) 2 Residence Act 2004).⁴²⁶

On the other hand, the Ansbach Administrative Court has stated that the UNHCR Guidelines on Article 1 F (c) are too narrow in scope. The Court reasoned that given UNSCR 1269 (1999) and 1373 (2001) give a wide scope to the concept of “*purposes and principles of the United Nations*”, granting refugee status to persons “*financing, planning, supporting, facilitating or committing terrorist acts*” would significantly limit the implementation and effectiveness of the UNSCRs 1269 (1999), 1373 (2001) and 1377 (2001). The requirement that the person must pose a current risk to security was rejected as well.⁴²⁷ This view is shared by other courts.⁴²⁸ As a consequence, the North Rhine Westphalia HAC has granted leave to appeal to the Federal Administrative Court regarding this specific question.⁴²⁹

The FedOff has not defined ‘terrorism’. However, measures taken by the UN and the EU to designate groups or individuals as ‘terrorist’ are used as a basis for exclusion from refugee status. In this regard, in one decision the FedOff excluded a person whose name was on the ‘consolidated list’ according to UNSCR 1267(1999). This decision also referred to UNSCRs 1333 (2000), 1390 (2002) and 1455 (2003) as well as Regulation (EC) No. 881/ 2002. It was stated that the inclusion of the individual on the list

meant “*there are serious reasons for considering that he has been guilty of acts contrary to the purposes and principles of the United Nations.*”⁴³⁰ Therefore, the FedOff defines ‘terrorism’ with reference to the broader framework of UN counter-terrorism measures. UNHCR guidelines state that the fact that an individual is designated on a national or international list of terrorist suspects (or associated with a designated terrorist organization) should trigger consideration of the exclusion clauses, but will not in itself generally constitute sufficient evidence to justify exclusion. No definition of ‘terrorism’ was found in court decisions. The courts rely on references to groups subject to EU counter-terrorism measures⁴³¹ or to “*developments in international law in the area of counter-terrorism measures*”.⁴³²

IV.6.6.4. Article 12 (3) and Article 17 (2)

Article 12(3) and Article 17 (2) are quite vague in stating that “*persons who instigate or otherwise participate in the commission of the crimes or acts*” specified by Article 12(2) are excluded from refugee status and subsidiary protection. UNHCR advises that “*exclusion should not be based on membership of a particular organization alone, although a presumption of individual responsibility may arise where the organization is commonly known as notoriously violent and membership is voluntary. In such cases, it is necessary to examine the individual’s role and position in the organization, his or her own activities, as well as related issues ...*”⁴³³

⁴²⁶ Darmstadt AC, 7 E 1844/05.A(1) of 31 May 2007, Aachen AC (6 K 1713/05.A of 23 January 2007), Lower Saxony HAC, 11 LA 367/05 and 11 LA 368/05 of 2 May 2007 as well as Hesse HAC, 4 UZ 679/06.A of 22 May 2007.

⁴²⁷ Ansbach AC, AN 1 K 06.30883 of 14 December 2006 and AN 1 K 06.30018 of 6 March 2007.

⁴²⁸ For instance Hamburg AC, 7 A 653/06 of 8 November 2006; Schleswig AC, 2 A 221/05 of 19 October 2006 and 8 A 287/05 of 21 February 2007.

⁴²⁹ NRW HAC, 8 A 479/07.A of 4 June 2007.

⁴³⁰ TunE1.

⁴³¹ Ansbach AC, AN 1 K 06.30018 of 6 March 2007.

⁴³² Schleswig AC, 2 A 221/05 of 19 October 2006 and 8 A 287/05 of 21 February 2007.

⁴³³ Op. cit., footnote 368.

In Sweden, mere membership of an organization has been found sufficient to deny a residence permit according to the old Aliens Act (1989:529).⁴³⁴ In UN 442-03 the Aliens Appeals Board found that “*the responsibility for crimes in Article 1 F (a) is always individual*” and members of organizations known to commit such crimes cannot be held responsible if they have not had knowledge of the criminal intent of the organization or if they were forced to become members.⁴³⁵ It noted though, that some groups, notably some terrorist groups, are characterized by such a level of violence that willing participation in the organization cannot be separated from participation in terrorist activities.

In Germany, ‘knowing participation’ in the commission of a crime is - in the view of the FedOff - not necessary. It is stated that “*the elements of the notion ‘support of terrorism’ are fulfilled by any action, that directly helps the internal organization or the cohesion of the criminal organization, facilitates - not necessarily in a decisive way - the realisation of the criminal offences planned by the organization or has any other positive effects on the capacity to act and the criminal intentions of the organization and, therefore, contributes to the imminent danger of the organization.*” Therefore any act deemed as being “*supportive to international terrorism*” may be sufficient to exclude the relevant persons from refugee status.⁴³⁶ Actual membership in a terrorist organization is not a pre-requisite for exclusion on the ground of “*supporting international terrorism*” contrary to the purposes and principles of the United Nations.⁴³⁷ In court practice, the prerequisites are to some extent more restrictive. For example, the Lower

Saxony HAC stated that “*the support has to be active and substantial*” and must contribute to the activities of the terrorist organization.⁴³⁸

IV.6.6.5. Article 17 (1) (b)

Article 17(1) (b) provides for exclusion from subsidiary protection status where there are serious reasons for considering that the person “*has committed a serious crime*”. The provision is wider in ambit than the equivalent exclusion clause relating to refugee status in Article 12(2) in that there is no geographic limitation, and any serious crimes qualifies including those with a political objective.

The review of decisions found no negative decisions based on Article 17(1) (b). Case-law will develop over time, however, and it might be expected that some of the jurisprudence relating to exclusion from refugee status under Article 12(2) (b) will be applied.

In Germany, according to the explanatory memorandum to the Residence Act 2004, the term ‘serious crime’ is to be defined along the lines of Section 60(8) 1 Residence Act 2004 with a view to preventing such persons from obtaining a residence permit.⁴³⁹ A serious crime in this regard is a crime for which the relevant person was sentenced to a prison term of a minimum period of three years.

According to paragraph 11 sec. 3 of the Slovak Penal Code, a ‘serious crime’ is one punishable by imprisonment of at least 10 years, regardless of where it was perpetrated.⁴⁴⁰

434 See Utlänningsärenden, praxis. Utlänningsnämndens och regeringens beslut 1995 års utgåva. Urval av Sandesjö och Björk. Fritzes Förlag, Göteborg 1995. Reg. 2 and UN 33.

435 UN 442-03, the Aliens Appeals Board refers for instance to UNHCR, ‘The Exclusion Clauses: Guidelines on their Application’, Geneva, December 1996, § 38, and 47), and to the Lisbon Expert Roundtable, Global Consultations on International Protection, 3-4 May 2001, § 18.

436 TurE6; TurE9; TurE10; TurE11; TurE14; TurE16; TurE17; TurE18; TurE19; TurE24; RusE1; IrnE1; IrnE2; IrnE3; IrnE6; IrnE9.

437 TurE6; TurE9; TurE10; TurE11; TurE14; TurE16; TurE17; TurE18; TurE19; TurE24; TunE1; RusE1; IrnE1; IrnE2; IrnE3; IrnE6; IrnE9.

438 Lower Saxony HAC, 4 LA 31/07 of 14 February 2007.

439 See Explanatory Report (Bt- Drs. 15/420 of 7 February 2003), page 91.

440 § 13c section 2 b) of the Act on Asylum.

IV.6.6.6. Article 17 (1) (d)

Article 17(1) (d) provides that a person must be excluded from subsidiary protection where there are serious reasons for considering that “*he or she constitutes a danger to the community or to the security of the Member State in which he or she is present.*” Recital 28 notes that the “*notion of national security and public order also covers cases in which a third country national belongs to an association which supports international terrorism or supports such an association*”. The review of decisions found that the case-law on this provision is yet to be developed.

This provision has been applied only once by the CRR in France in the case of an Algerian applicant who alleged a serious threat of harm by extremists in the country of origin. However, the CRR considered that the person posed a serious danger to public order and security as the person had been sentenced twice in France and once in Switzerland for sexual assaults. The applicant was excluded from subsidiary protection. In another case, the CRR considered that the applicant, who had been forced to participate in a prostitution network, had been sentenced and who had testified against people responsible for a prostitution network, could not be considered to pose a

serious danger to public order and security. The applicant was thus granted subsidiary protection.⁴⁴¹

As the German legislation incorporates an exclusion clause relating to refugee status which expands exclusion grounds to people regarded as ‘a danger to security’, most of the case-law relates to exclusion from refugee status on security grounds. In general, the same approach is likely to be applicable to cases which could be eligible for subsidiary protection. The practice of the FedOff suggests that persons involved in the leadership of organizations included on UN or EU lists of terrorist organizations would be subject to this provision. In this regard, a high probability must be shown that the individual will continue his/her activities in the future.⁴⁴²

It could be expected that in future applications of this provision, EC laws setting out limitations on entry or residence of foreign nationals on public policy and public security grounds in the EU may be examined as sources of guidance. Furthermore, the principle of proportionality will be applicable and require Member States to balance the interests of the individual with those of the State, and to ensure that measures taken are proportional to the objective pursued.

⁴⁴¹ CRR, OI, 1/02/2006, 533907.

⁴⁴² TurE1; TurE2; TurE3; TurE4; TurE5; TurE7; TurE8; TurE12; TurE21; TurE 23; IrqE1; IrqE2; IrqE3; IrqE4; IrnE4; IrnE5; IrnE7; IrnE8; IrnE10; IrnE11; IrnE12; IrnE13; LkaE1; OTE1; OTE2; OTE3; AlgE1; AlgE2; AlgE3.

IV.6.7. Conclusion

It is premature to assess the impact of the exclusion clauses in most of the countries of focus. The exclusion clauses are not applied widely in France, Greece, the Slovak Republic and Sweden, and therefore the case-law, particularly with regard to subsidiary protection, is undeveloped.

However, in Germany, the entry into force of the Directive has resulted in national legislation containing an exclusion clause going beyond the exhaustive list of clauses contained in the 1951 Convention.

Furthermore, the review of decisions in Germany has revealed an increasingly expansive use of the exclusion clauses as an anti-terrorism measure. The standards based on the 1951 Convention and the recommendations of UNHCR for the application of the exclusion clauses have not been followed, in particular, with regard to the exclusion clause on acts contrary to the purposes and principles of the United Nations. In certain cases, this provision has been applied to persons with a minor role in an organization deemed supportive of terrorism, and the requirements for proof of individual responsibility have been reduced. The Qualification Directive is not considered to be the genesis of this trend, but it has served as a tool.⁴⁴³

⁴⁴³ See Internal Guidelines, page 11, stating that Article 12 (3) QD is 'clarifying' the scope of application of Section 60 (8) 2 Residence and has in that regard to be taken into consideration for the interpretation of Article 12 (2) QD.

SECTION V:

APPENDIX

Text of the Qualification Directive
List of abbreviations

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,

appropriate status to any person in need of such protection.

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

- (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 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

List of abbreviations

CRR	Refugee Appeals Board (<i>Commission des Recours des Réfugiés</i>), France
ECJ	European Court of Justice
FedOff	Federal Office for Migration and Refugees, Nuremberg, Germany
MFA	Ministry of Foreign Affairs
MOI	Ministry of Interior
MPO	Ministry of Public Order (Greece)
OFPRA	Office for the Protection of Refugees and Stateless Persons (<i>Office français de Protection des Réfugiés et Apatrides</i>), France
UNHCR	United Nations High Commissioner for Refugees

**United Nations
High Commissioner for Refugees**

Post Box 2500
1211 Geneva 2
Switzerland

Rue Van Eyck 11B
1050 Brussels
Belgium

www.unhcr.org

