INDIVIDUAL RISK, ARMED CONFLICT AND THE STANDARD OF PROOF IN COMPLIMENTARY PROTECTION CLAIMS: THE EUROPEAN UNION AND CANADA COMPARED

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James Simeon (ed), *Critical Issues in International Refugee Law: Strategies toward Interpretive Harmony* (Cambridge University Press, 2010) 59

[2016] *UNSWLRS* 63

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Critical Issues in International Refugee Law

Strategies Toward Interpretative Harmony

Edited by
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UNIVERSITY PRESS

CHAPTER 2

Individual risk, armed conflict and the standard of proof in complementary protection claims: the European Union and Canada compared

Jane McAdam

INTRODUCTION

Though the title of this chapter implies a technical and comparative legal analysis of the standard of proof in complementary protection claims vis-à-vis Convention refugee claims, this is only part of its substance. Indeed, while the standard of proof has become a central distinguishing feature in the Canadian context between attaining protection as a 'refugee' or as a 'person in need of protection',[1] this debate has been largely absent from the EU arena. Nevertheless, high evidentiary burdens, combined with a haphazard consideration of the three possible grounds for subsidiary protection in the EU, mean that as in Canada, subsidiary protection status is not simply a residual status for people who would be Convention refugees but for the absence of a nexus with one of the five Convention grounds.[2] Accordingly, this chapter focuses on the legal impediments to obtaining subsidiary protection in the EU that have manifested themselves since the Qualification Directive entered into force for

The law is current as at July 2009.

[1] Similarly, in the United States, the standard of proof – 'more likely than not' – is higher than the 'reasonable possibility' standard in asylum claims: 8 CFR §§ 208.16(c)(2), 208.13(b)(2).

[2] In Canada, both a 'refugee' and a 'person in need of protection' receive the same domestic legal status, whereas in the EU, beneficiaries of subsidiary protection receive a lesser status than Convention refugees: see Qualification Directive, arts. 19–34. The issue of status is not examined here, but has been dealt with comprehensively in J. McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press, 2007), pp. 90–110; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn. (Oxford University Press, 2007), pp. 330–35.

the EU Member States in October 2006.[3] Its particular focus is article 15(c), which extends protection to civilians facing 'a serious and individual threat to their life or person by reason of indiscriminate violence in situations of international or internal armed conflict'. This provision has been poorly understood, inconsistently applied across the Member States, and in some jurisdictions is the only subsidiary protection category given full consideration when a Convention claim fails. Its recent examination by the European Court of Justice ('ECJ') in *Elgafaji* has highlighted the interpretative difficulties that national courts have had in applying the provision, such as whether the standard of proof in article 15(c) is identical to article 15(b) – requiring the applicant to demonstrate specific individual exposure to the risk of harm – or whether, as the court held, it covers a more general risk of harm that does not require the applicant to show that he or she is specifically targeted by reason of factors particular to his or her personal circumstances.[4] That finding is also important for considering the evidentiary relationship between the subsidiary protection categories and Convention refugee status. This chapter examines how article 15(c) has been interpreted in the jurisprudence of a number of EU Member States and demonstrates why it is not presently functioning as a complementary form of protection. The chapter concludes by comparing the EU position with Canada.

BACKGROUND

On April 29, 2004, the Member States of the European Union adopted the Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, known as the Qualification

[3] Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L.304/12 ('Qualification Directive').

[4] *Elgafaji* v. *Staatssecretaris van Justitie*, Case C-465/07, Judgment of the European Court of Justice (Grand Chamber), 17 February 2009. The Netherlands sought a preliminary ruling from the European Court of Justice to clarify the meaning and purpose of article 15(c): see OJ C. 8/5 of January 12, 2008; Decision 200702174/1 (12 October 2007) of Dutch Council of State; *Elgafaji* v. *Staatssecretaris van Justitie*, Case C-465/07, Opinion of Advocate General Poiares Madura, 9 September 2008.

Directive. This Directive represented the fourth building block in the first phase of the Common European Asylum System,[5] intended to harmonize and streamline legal standards relating to asylum in the Member States of the EU.[6]

Described as 'unquestionably the most important instrument in the new legal order in European asylum because it goes to the heart of the 1951 Convention Relating to the Status of Refugees',[7] the Directive sought to clarify the constitutive elements of the Convention refugee definition and the rights flowing from refugee status, and establish a harmonized approach towards people with an international protection need falling outside the scope of the Refugee Convention, known as 'beneficiaries of subsidiary protection'. The Directive therefore has two components: clarifying the eligibility criteria for international protection, and setting out the resultant status for those who qualify. It is the first supranational instrument to elaborate a separate and distinct status for people who are not Convention refugees but are otherwise in need of protection.[8]

[5] The other instruments were: Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving Such Persons and Bearing the Consequences thereof [2001] OJ L.212/12 (Temporary Protection Directive); Council Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers [2003] OJ L.31/18; Council Regulation (EC) No 343/2003 of 18 February 2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National [2003] OJ L.50/1; Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L.326/13. For the second phase of the Common European Asylum System, see the Hague Programme (adopted 5 November 2004).

[6] Under the Protocol on the Position of the United Kingdom and Ireland, and the Protocol on the Position of Denmark, annexed to the Treaty on European Union [2002] OJ C.325/5, those countries may elect not to adopt the asylum Directives. The UK and Ireland have, however, elected to adopt the Qualification Directive.

[7] H. Lambert, 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law', *International and Comparative Law Quarterly*, 55 (2006), p.161, referring to the Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, read in conjunction with the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

[8] Note that the regional OAU Convention and the Cartagena Declaration apply Convention refugee status rather than a separate status: Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45; Cartagena Declaration on Refugees (November 22, 1984) in Annual Report of the Inter-American Commission on Human Rights OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev.1, 190–93 (1984–85).

It is important to recall that the Qualification Directive was based on pre-existing Member State practice, and aimed simply to harmonize existing concepts by drawing on the 'best' elements of the Member States' national systems.[9] It was therefore not intended as a comprehensive overhaul of protection, but rather as a partial codification of existing State practice that sought to balance the divergent political views of the various Member States.

Each Member State was supposed to have transposed the Qualification Directive into national law by October 10, 2006,[10] although as of August 2007, twelve Member States had still not transposed it in full, four had only partially transposed it,[11] and Greece had not transposed it at all.[12] Although an absence of implementing legislation should mean that the Directive's provisions apply directly where they are clear and unconditional,[13] there remain striking inconsistencies in whether, and how, the Directive is actually being applied (not least because some key provisions are not 'clear').[14] This necessarily undermines the process of harmonization that the Directive was intended to bring about.

Between March and July 2007, UNHCR undertook a comprehensive study of the implementation of the Qualification Directive in five Member States – France, Germany, Greece, the Slovak Republic and Sweden – which were selected as a geographical cross-section of

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

[10] Qualification Directive, art. 38. In accordance with articles 1 and 2 of the Protocol on the Position of Denmark annexed to the Treaty on European Union [2002] OJ C.325/5 and the Treaty establishing the European Community [2002] OJ C.325/33, the Qualification Directive does not apply to Denmark (see Qualification Directive, recital 40).

[11] 'Non-Transposition of two Directives in the Field of Immigration and Asylum: Commission Delivers Reasoned Opinions,' Press release, IP/07/1015, Brussels, 7 July 2007, p. 2.

[12] UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, (UNHCR, Brussels, 2007), p. 9 ('UNHCR Study'). Greece did so in July 2008: Presidential Decree 96/2008, Official Gazette A 152, 30 July 2008. See also European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), 'The Impact of the EU Qualification Directive on International Protection', October 2008, pp. 48–49 ('ECRE Study').

[13] *Internationale Handelsgesellschaft* [1970] ECR 1125, pp. 1213ff.

[14] See OJ C.8/5 of 12 January 2008; see also Decision 200702174/1 (12 October 2007) of the Dutch Council of State.

the EU, with a variety of legal systems and institutional frameworks, and which together received almost half of all asylum applications lodged in the EU in 2006.[15] The study's purpose was to highlight whether the Member States were adopting a consistent approach to interpreting the Directive, whether national law and practice was consistent with international standards, and whether good practices could be identified.[16] Its release in November 2007 coincided with the one-year anniversary of the deadline for transposition and the lead-up to the Commission's report to the European Parliament and the Council (by April 10, 2008) as to whether any amendments to the Directive were required.[17] Of particular relevance to the present chapter is UNHCR's analysis of the application of article 15 on subsidiary protection, and whether the threshold for establishing a need for subsidiary protection differs in substance to claims for Convention refugee status. In October 2008, the European Council on Refugees and Exiles released a study to complement that of UNHCR, which extended the focus of the inquiry to twenty EU Member States. Results of that study are also incorporated where relevant.

ARTICLE 15: MEMBER STATE PRACTICE PRE-*ELGAFAJI*

In legal terms, the inclusion of article 15 in the Qualification Directive expanded the scope of protection formally offered throughout the EU. In practice, however, narrow interpretations and procedural flaws mean that subsidiary protection is not, on the whole, increasing the numbers of people receiving protection in the Member States.[18] In Greece, for example, accelerated asylum procedures mean that subsidiary protection is not being systematically considered for asylum applicants, by contrast to France, Germany, Sweden and the UK, where a single procedure requires decision-makers first to assess an applicant's claim in accordance with the Convention grounds,

[15] UNHCR Study, p. 8. [16] *Ibid.*

[17] Qualification Directive, art. 37. See 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum', (Brussels, June 2008).

[18] UNHCR Study, p. 11. Although Sweden grants subsidiary protection to very large numbers of people, this has not greatly affected numbers overall, given that this continues Sweden's historical practice of favouring subsidiary protection categories over Convention status, and Sweden's recognition rate for Convention refugees remains comparatively very low: p. 81.

before turning to the subsidiary protection criteria if that person is found not to be a Convention refugee.[19]

Perhaps the more fundamental problem, however, is the divergent interpretations being employed across the Member States in the assessment of refugee and subsidiary protection status. On the one hand, these interpretations reflect long-standing idiosyncracies of particular States; on the other, they highlight the problems created by poorly drafted, hastily adopted and decontextualized subsidiary protection provisions in the Qualification Directive. In the Member States' wily attempts to confine the categories of people to whom protection should be extended, they have in fact created a new area for divergence and inconsistency which undermines the very harmonization process.[20]

As anticipated by a number of commentators prior to the Directive's entry into force,[21] the particular problem is article 15(c). This provision extends subsidiary protection to civilians who face a 'real risk'[22] of a 'serious and individual threat' to their 'life or person by reason of indiscriminate violence in situations of international or internal armed conflict'.[23] Recital 26 provides further that: 'Risks

[19] UNHCR Study, pp. 80, 82. According to the ECRE Study, a single procedure is used in all Member States examined there: pp. 200–01.

[20] On the drafting history, see McAdam, *Complementary Protection in International Refugee Law*, ch. 2.

[21] See e.g. J. McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime,' *International Journal of Refugee Law*, 17 (2005), 461; UNHCR, 'UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)', January 2005, p. 32; A. Klug, 'Harmonization of Asylum in the European Union – Emergence of an EU Refugee System?', *German Yearbook of International Law*, 47 (2004), p. 616–19; see also M.-T. Gil-Bazo, 'Refugee Status and Subsidiary Protection under EC Law: The Qualification Directive and the Right to be Granted Asylum' in A. Baldaccini, E. Guild and H. Toner, (eds.) *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy* (Oxford: Hart Publishing, 2007), pp. 229–64; K. Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Nijmegen: Wolf Legal Publishers, 2007), especially M. Garlick, 'UNHCR and the Implementation of 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 (The EC "Qualification Directive"),' pp. 62–64. For the drafting history of the provision, see McAdam, *Complementary Protection*, ch. 2.

[22] Qualification Directive, art. 2(e).

[23] The standard is 'substantial grounds for believing': art. 2(e).

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.'

Member States' independent analysis of article 15(c), frequently without regard to the interpretations being adopted in other Member States, the jurisprudential trends in the European Court of Human Rights,[24] or the guidance of UNHCR,[25] has led to vastly different recognition rates across the EU of people fleeing violence in Iraq, Chechnya and Somalia,[26] and has created legal uncertainty about the meaning of a provision that is supposed to give rise to a uniform approach.[27]

The provision has caused difficulties in three main ways. First, does it provide protection only when article 3 of the European Convention on Human Rights ('ECHR') 'also has a bearing', or does it instead offer 'supplementary or other protection'?[28] If the latter, what criteria should be applied 'for determining whether a person ... runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15(c)'?[29] Thirdly, how is the existence of an 'international or internal armed conflict' to be interpreted? Seeking clarification of the first two questions, the Dutch Council of State sought a preliminary ruling from the ECJ which was handed down in February 2009.[30] The third question has not been considered at a supranational level, but some guidance may be sought from national jurisprudence. Before examining these decisions, however,

[24] e g *Salah Sheekh* v. *The Netherlands* App. No. 1948/04 (January 11, 2007).

[25] UNHCR Study, p. 14 (referring, for example, to UNHCR's Annotated Comments of January 2005).

[26] For example, the percentage of Iraqi asylum applicants granted Convention refugee status at first instance in the first quarter of 2007 was as follows: 16.3 per cent (Germany), 1.7 per cent (Sweden), 0 per cent (Greece, Slovak Republic). The percentage granted subsidiary protection status was: 1.1 per cent (Germany), 73.2 per cent (Sweden), 0 per cent (Greece, Slovak Republic). See UNHCR Study, p. 13.

[27] See one suggestion for an international judicial commission: A. M. North and J. Chia, 'Towards Convergence in the Interpretation of the Refugee Convention: A Proposal for the Establishment of an International Judicial Commission for Refugees', in J. McAdam (ed.), *Forced Migration, Human Rights and Security* (Hart Publishing, Oxford, 2008).

[28] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (4 November 1950).

[29] OJ C.8/5 of January 12, 2008; see also Decision 200702174/1 (12 October 2007) of the Dutch Council of State; and *Elgafaji* (Advocate General's opinion).

[30] See *Elgafaji* (Grand Chamber).

it is helpful first to set out the inconsistencies that had emerged in Member State practice.

First, article 15(c) has not been transposed in a uniform manner in the national law of the five Member States examined in the UNHCR study, and of the remaining Member States, at least six have adapted wording which differs from article 15(c).[31] France has added a requirement that the threat to the civilian is 'direct', and in the Slovak Republic and Sweden, the provision is not limited to 'civilians'. The Swedish provision initially appears broader than article 15(c) because it extends to people fearing harm in 'other severe conflicts', but Sweden's restrictive interpretation of 'internal armed conflict' means that 'other severe conflicts' is used to cover situations which, in other Member States, would be encapsulated by 'internal armed conflict'.[32] Furthermore, Swedish law requires applicants to demonstrate 'serious abuses' (which could include disproportionate punishment, arbitrary incarceration, physical abuse and assault, sexual abuse, social rejection, severe harassment, etc) rather than a 'serious threat' to life or person.[33] German law does not transpose the reference to 'indiscriminate violence' (although UNHCR notes that this reflects recital 26).[34]

Secondly, and related to the absence of a harmonized approach, the elements of article 15(c) – 'serious and individual threat' due to 'indiscriminate violence' in 'situations of international or internal armed conflict' – are creating higher evidentiary burdens for applicants compared to articles 15(a) and (b) and Convention-based claims. Even though the standard of proof – 'substantial grounds … for believing'

[31] Law on the Legal Status of Aliens (29 April 2004) No. IX-2206 (Official Gazette No. 73–2539, 3 April 2004) art. 87 (Lithuania); *Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* (September 15, 2006) art. 26 (Belgium), which omits the 'individual' requirement. The ECRE Study also points to different wording in Germany (p. 51), Slovenia (p. 52), Hungary (p. 55), the UK (p. 58) and Sweden (p. 207).

[32] UNHCR Study, pp. 67–68. This is despite drafting records which suggested that 'other severe conflicts' would extend to political instability in the home State and a consequent lack of safeguards for basic human rights, including where the State is not a party to the conflict.

[33] See *Ibid.*, p. 68.

[34] *Ibid.* Under the draft Greek law, protection from indiscriminate violence was not restricted to situations of 'international or internal armed conflict,' but in the final text it is limited to such situations: see UNCHR Study, p. 69, referring to the then draft Presidential Decree, art. 52(c); see now Presidential Decree 96/2008, Official Gazette A 152, 30 July 2008, art. 15.

that the applicant faces a 'real risk' of serious harm if removed[35] – is identical for articles 15(a), (b) and (c), and is supposed to be comparable to the 'well-founded fear of persecution' standard for Convention claims, in real terms it will generally be harder to for a applicant to establish the requisite elements of article 15(c).

The pre-*Elgafaji* position has been compounded by the fact that in a number of jurisdictions, articles 15(a) and (b) have not been given any (meaningful) consideration by decision-makers, with article 15(c) seemingly becoming the residual category for subsidiary protection claims.[36] UNHCR has queried whether the infrequent examination of article 15(b) in Swedish case law is simply 'a matter of expediency,' or a more fundamental problem of confusion about the distinction between 'inhuman and degrading treatment' and 'serious threat to life or person'.[37] If, indeed, an absence of clear doctrinal guidance is leading decision-makers to favour article 15(c),[38] then there is a risk that applicants who would otherwise fall within article 15(b), assessed in accordance with the jurisprudence of the European Court of Human Rights, which does not require singling out,[39] will have to prove their claims at a higher standard. The result is that subsidiary protection claims may not be properly assessed, and that far from being a fallback status for people with a need for international protection but who do not satisfy the Convention definition, it is a more difficult status to obtain.[40]

(a) The requirements of article 15(c): individual threat

As anticipated prior to the Qualification Directive's entry into force,[41] the 'individual' requirement in article 15(c), read in conjunction with recital 26,[42] has been used in some Member States to deny

[35] Qualification Directive, art. 2(e).

[36] UNHCR Study, pp. 12, 70 (Swedish practice). This is somewhat surprising, given the extensive (pre-existing and continuing) jurisprudence of the European Court of Human Rights on article 3 of the ECHR, which parallels article 15(b) of the Qualification Directive and which provides a rich basis for interpretation of cases under that head.

[37] UNHCR Study, pp. 70–71.

[38] *Ibid.*, pp. 12, 70–71.

[39] *Salah Sheekh* v. *The Netherlands*.

[40] There are parallels with the Canadian position (see analysis below).

[41] J. McAdam, 'The European Union Qualification Directive', p. 481.

[42] UNHCR has recommended the deletion of recital 26: UNHCR Study, p. 74. The ECJ (at para. 37) made the important point that while 'the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions

protection to people who are at risk of serious harm but cannot show that they are being singled out.[43] In an article published prior to the Directive's transposition,[44] I argued that the language of article 15(c) could support a restrictive interpretation that a person in an area of indiscriminate violence would need to show at least that he or she were *personally* at risk – a very problematic requirement, since indiscriminate violence is, by definition, random and haphazard. I noted that if it were interpreted even more strictly, it might require individuals to be singled out, which would establish a higher threshold than is required for either Convention-based protection or temporary protection.

These concerns have been borne out in state practice. The Swedish Migration Board requires applicants to show that they are 'personally at risk' because of a 'particular circumstance'.[45] In France, applicants have to show that a personal characteristic, such as their profession, religion or wealth, is putting them at particular risk.[46] In Germany, applicants have to show that they are at greater risk than the general population or a part thereof.[47] In Austria, applicants have to show that they are personally targeted.[48] In the UK, the Asylum and Immigration Tribunal ('AIT') recently observed that the word 'individual' requires the applicant to demonstrate a personal risk 'relating

set out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows – by the use of the word "normally" – for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question.'

[43] UNHCR Study, p. 71ff, citing the approach of authorities in France, Germany and Sweden. The vast majority of Member States supported the requirement on the grounds that it would avoid 'an undesired opening of the scope of this subparagraph:' 12382/02 ASILE 47 (30 September 2002) para. 4. Lithuania, Belgium, Finland, Austria, the Czech Republic and Hungary do not have an 'individual' requirement: see respectively Law on the Legal Status of Aliens (29 April 2004) No. IX-2206 (Official Gazette No 73–2539, 3 April 2004) art. 87 (Lithuania); *Loi modifiant la loi du 15 décembre 1980 sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers* (15 September 2006) art. 26 (Belgium); Aliens Act 2004, section 89 ; ECRE Study, pp. 27, 218.

[44] J. McAdam, 'The European Union Qualification Directive', pp. 480–81.

[45] See Lifos dokumentnr 16852, beslut 5 juli 2007 (2) (English version available at www.migrationsverket.se/include/lifos/dokument/www/07070582.pdf), as referred to in UNHCR Study, p. 72.

[46] See decisions referred to in UNHCR Study, p. 73.

[47] *Ibid.* This is due to the way recital 26 has been combined with art 15(c) in section 60(7) of the Residence Act 2004.

[48] ECRE Study, p. 217.

to the person's specific characteristics or profile or circumstances', despite a previous ruling from the same body that held: 'It would be ridiculous to suggest that if there were a real risk of serious harm to members of the civilian population in general by reason of indiscriminate violence that an individual Appellant would have to show a risk to himself over and above that general risk.'[49]

As Hathaway has observed, to demand a 'singling out' of an applicant 'confuses the requirement to assess risk on the basis of the applicant's particular circumstances with some erroneous notion that refugee status must be based on a completely personalized set of facts'.[50]

> In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm in her country, and if that risk is grounded in their civil or political status, then in the absence of effective national protection she is properly considered to be a Convention refugee.[51]

Similarly, as Goodwin-Gill and I have argued, where large groups are seriously affected 'by the outbreak of uncontrolled communal violence, it would appear wrong in principle to limit the concept of persecution to measures immediately identifiable as direct and individual'.[52] The US Asylum Regulations dispensed with the singling out requirement in 1990, instead requiring only that a applicant show 'a pattern or practice ... of persecution of a group of persons *similarly situated* to the applicant', and his or her 'own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable'.[53]

[49] *Lukman Hameed Mohamed* v. *Secretary of State for the Home Department* AA/14710/2006 (unreported, 16 August 2007), cited in UNHCR, 'UNHCR Statement: Subsidiary Protection under the EC Qualification Directive for People Threatened by Indiscriminate Violence' (January 2008), p. 6 ('UNHCR Statement'). See also ECRE Study, pp. 26–29.

[50] J.C. Hathaway, *The Law of Refugee Status* (Butterworths, Toronto, 1991), pp. 91–92 (citations omitted).

[51] *Ibid.*, p. 97 (citations omitted).

[52] Goodwin-Gill and McAdam, *The Refugee in International Law*, p. 129. See the reference there in fn 364 to *R* v. *Secretary of State for the Home Department, ex parte Jeyakumaran* (No. CO/290/84, QBD, unreported, 28 June 1985).

[53] 8 CFR §208.13(b)(2)(iii) – asylum (emphasis supplied); §208.16(b)(2) – withholding.

The relevant question, therefore, should be whether the applicant faces a reasonable chance of persecution or (in the case of subsidiary protection) serious harm. Over-emphasis of the word 'individual' in article 15(c) of the Qualification Directive places a burden on applicants which goes beyond that required under the Refugee Convention, and undermines the notion of subsidiary protection as a complementary form of human rights protection.[54] As the European Court of Human Rights has observed in the context of article 3 of the ECHR, the effect of such a stringent individual requirement 'might render the protection offered by that provision illusory if ... the applicant were required to show the existence of further special distinguishing features'.[55] This has been echoed by UNHCR in the specific context of the Qualification Directive.[56] It is not in line with comparable jurisprudence of the European Court of Human Rights on article 3 of the ECHR, where the court has expressly stated that to demonstrate a 'real risk' of inhuman or degrading treatment or punishment, a person does not have to establish 'further special distinguishing features concerning him personally in order to show that he was, and continues to be, personally at risk'.[57]

Clarification by the European Court of Justice: Elgafaji

The ECJ has now clarified that article 15(c) does not require an applicant to 'adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances',[58] tacitly endorsing UNHCR's view that article 15(c) provides 'added value' to articles 15(a) and (b) by offering protection from serious risks which are *situational*, rather than *individually* focused.[59]

[54] UNHCR has stressed the importance of a full and inclusive interpretation of the refugee definition in the Convention, including recognizing its applicability in situations of generalized violence and armed conflict where a nexus to at least one of the five Convention grounds can be demonstrated: UNHCR Study, p. 99; see also UNHCR Statement, p. 5.

[55] *Salah Sheekh* v. *The Netherlands*, para. 148.

[56] UNHCR Study, p. 74.

[57] *Salah Sheekh* v. *The Netherlands*, para. 148.

[58] *Elgafaji* (Grand Chamber), para. 45.

[59] UNHCR Statement, 5. UNHCR argued that the use of the word 'individual' simply indicates that a person must face a real, rather than a remote, risk, and accordingly should 'not lead to a higher threshold and heavier burden of proof' being imposed (at p. 6). See also the discussion of this standard of proof in Amnesty International (German section) and others, 'Joint Opinion on the Legislation to Implement EU Directives on Residence and Asylum Law' (August 2007) www.proasyl.de/fileadmin/proasyl/fm_redakteure/Englisch/Joint_Opinion_Eu_directives.pdf (2 April 2008).

In his opinion of September 9, 2008, the Advocate General similarly found that article 15(c) is supplementary to articles 15(a) and (b).[60] The test under article 15(c) is met where the indiscriminate violence feared 'is so serious that it cannot fail to represent a likely and serious threat to that person'.[61] In terms of the standard of proof, the individual nature of the threat 'does not have to be established to such a high standard under Article 15(c) of the Directive as under Article 15(a) and (b) thereof,' but 'the seriousness of the violence will have to be clearly established so that no doubt remains as to both the indiscriminate and the serious nature of the violence of which the applicant for subsidiary protection is the target'.[62] The Advocate General stated:

> the more the person is individually affected (for example, by reason of his membership of a given social group), the less it will be necessary to show that he faces indiscriminate violence in his country or a part of the territory which is so serious that there is a serious risk that he will be a victim of it himself. Likewise, the less the person is able to show that he is individually affected, the more the violence must be serious and indiscriminate for him to be eligible for the subsidiary protection claimed.[63]

In its reasoning, the ECJ explained that the word 'individual':

> must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterising the armed conflict taking place – assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred – reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.[64]

Accordingly, 'the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal

[60] *Elgafaji* (Advocate General's opinion), para. 32. The Advocate General's role is to provide a detailed analysis of the legal aspects of the case and present an impartial and independent opinion on the appropriate response.

[61] *Ibid.*, para. 42. [62] *Ibid.* See also para. 36.

[63] *Ibid.*, para. 37. See also the approach in *AM & AM (Armed Conflict: Risk Categories) Somalia CG* [2008] UKAIT 00091, para. 110.

[64] *Elgafaji* (Grand Chamber), para. 35.

circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection'.[65]

The UK AIT criticized the Advocate General's opinion for failing to explain the meaning of article 15(c) as a whole,[66] stating that its focus on two aspects of article 15(c) in relative isolation ('serious and individual [threat]' and 'indiscriminate violence') left unclear the scope of other key terms, such as 'threat,' 'civilian's life or person', 'international or internal armed conflict', and 'by reason of indiscriminate violence'. The ECJ similarly avoided any extensive discussion of these additional terms, although it did observe that a 'threat' was something inherent in the general situation of armed conflict and did not require evidence of 'specific acts of violence', and that 'indiscriminate violence' implies violence that 'may extend to people irrespective of their personal circumstances'.[67] On the nature of an 'international or internal armed conflict', the court simply stated that it was to be 'assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred',[68] avoiding any discussion about whether such determination ought to be made in accordance with international humanitarian law or other standards. Thus, while the decision in *Elgafaji* addressed some aspects of article 15(c), it did not resolve all the interpretative difficulties raised by that provision.

(b) International or internal armed conflict

Given the considerable divergence in interpretation among Member States on the meaning of 'international or internal armed conflict', it is regrettable, although understandable given its terms of reference, that the ECJ did not provide guidance on this point. The main debate is whether the phrase should be interpreted in accordance with international humanitarian law, and whether this imposes a further layer of analysis that could, if interpreted too rigidly, divert the focus from the key inquiry, namely the risk to the applicant and his or her need for protection. Alternatively, the objective of subsidiary

[65] *Ibid.*, para. 39. [66] *AM & AM*, para. 113.
[67] *Elgafaji* (Grand Chamber), para. 34. [68] *Ibid.*, para. 35.

protection might be better realized by leaving aside the peculiarities of international humanitarian law and focusing on the risk to fundamental human rights occasioned by indiscriminate violence in situations of conflict.

The approach in Sweden, Germany and Belgium is that the phrase must be understood according to its meaning under international humanitarian law.[69] The Supreme Administrative Court of the Czech Republic has taken a slightly broader view by holding that an internal armed conflict exists if article 1(1) of Additional Protocol II is met (provided that the exclusionary conditions in article 1(2) are not satisfied), or if a conflict satisfies the criteria set out by the International Criminal Tribunal for the Former Yugoslavia in *Tadić* (protracted armed violence and organized armed groups).[70] At first blush, an international humanitarian law approach seems to inject a degree of harmony into the provision's interpretation since it requires evaluation of a particular conflict against accepted international standards and seems to embrace a holistic approach to international law. However, neither the Qualification Directive itself nor the records of its drafting reveal an intention to interpret 'international or internal armed conflict' in its international humanitarian law sense. Moreover, there is a risk that unless the analysis of the nature of the conflict remains secondary to the assessment of harm faced by the applicant – the key protection issue – this evidentiary threshold may lead to a protection gap. Since there is no single meaning of 'international or internal armed conflict' in international humanitarian law,[71] determining whether or not one exists for the purposes of a determination under article 15(c) may impose a layer of analysis which is neither straightforward nor clear-cut. The specialist nature of international humanitarian law means

[69] UNHCR Study, p. 77; BVerwG 10 C 43.07, VGH 13a B 05.30833 (June 24, 2008) (unofficial translation released by the court), paras. 19, 22, 37; ECRE Study, p. 221. See also *KH (Article 15(c) Qualification Directive) Iraq CG* [2008] UKAIT 00023, para. 60, now overturned by *QD (Iraq)* v. *Secretary of State for the Home Department* [2009] EWCA Civ 620, paras. 18, 34–36.

[70] Judgment of the Supreme Administrative Court of the Czech Republic, 13 March 2009, No. 5 Azs 28/2008, www.nssoud.cz. For the content of the *Tadić* criteria, see *Prosecutor* v. *Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Trial Chamber, 3 April 2008, paras. 49, 60; *Prosecutor* v. *Ljube Boškoski and Johan Tarčulovski*, Case No. IT-04-82-T, Trial Chamber, 10 July 2008, paras. 177–78, 199–203.

[71] See e.g. International Committee of the Red Cross, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (Opinion Paper, March 2008).

that considerations of 'armed conflict' in that context are necessarily confined to a construction within the framework of the Geneva Conventions and their Additional Protocols. The lack of clarity in this regime as to when an 'internal armed conflict' exists highlights the difficulty of a taking an international humanitarian law approach to article 15(c).[72] A strict insistence on that approach takes us no closer to a definitive 'answer' than if it were dispensed with altogether.[73] It both adds a complexity to the deliberation and confines the circumstances to which article 15(c) applies.[74] The English Court of Appeal has described it as an 'unarticulated gloss of a fundamental kind',[75] stating that the phrase 'situations of international or internal armed conflict' in article 15(c) 'has an autonomous meaning broad enough to capture any situation of indiscriminate violence, whether caused by one or more armed factions or by a state, which reaches the level described by the ECJ in *Elgafaji*'.[76]

Accordingly, there is an argument that in observing the object and purpose of the Qualification Directive, the focus is on the protection needs of the individual claimant, whereas the purpose for tightly construing the notion of 'armed conflict' in the international humanitarian law context is to determine prosecution and punishment of those accused of violating rules that may or may not apply, depending on

[72] In *Ibid.*, the International Committee of the Red Cross identifies three types of non-international armed conflicts: (a) those within the meaning of common article 3 of the 1949 Geneva Conventions (not formally defined); (b) those within the meaning of article 1 of Additional Protocol II; and (c) those encompassed by article 8(2)(f) of the Rome Statute, based on the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia in *The Prosecutor* v. *Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, October 2, 1995, para. 70. Which meaning is to apply in an assessment of an individual's protection need under article 15(c) of the Qualification Directive?

[73] Hugo Storey, an immigration judge in the *KH* decision of 2008, previously argued that a disadvantage of taking an international humanitarian law approach was that 'strictly applied, it would only cover armed conflicts that were conducted in violation of international humanitarian law norms': H. Storey and others, 'Complementary Protection: Should There Be a Common Approach to Providing Protection to Persons Who Are Not Covered by the 1951 Geneva Convention?' (Joint ILPA/IARLJ Symposium, December 6, 1999) (copy with author), p. 15. However, in *KH* he stated: 'Once one adopts a purposive approach, the reasons for giving as far as possible an IHL meaning to key terms in Article 15(c) are overwhelming' (para. 33), and: 'An IHL approach provides an objective framework for interpreting Article 15(c) – in the form of an identifiable set of legal rules which exist and are applied both EU-wide and internationally' (para. 39).

[74] There must be a minimum level of intensity, 'parties to the conflict' must have a certain command structure, etc.

[75] *QD (Iraq)*, para. 18. [76] *Ibid.*, para. 35.

the characterization of the conflict. In the same way that the international crime of 'persecution' in the Rome Statute embodies a more exacting test than 'persecution' in international refugee law, there is scope for different meanings in different international law contexts.

Given the object and purpose of article 15(c) – protecting individuals from the risk of indiscriminate violence – and the overall object and purpose of the Qualification Directive, framed by the express legal background of international refugee and human rights law, the focus for qualification should be the protection needs of the applicant in light of the human rights violations of which he or she is at risk. Indeed, it is in respect of individual risk that the intensity or duration of a conflict is relevant, rather than as indicia of the conflict's nature. As the ECJ stressed in *Elgafaji*, subsidiary protection is 'complementary and additional to' refugee protection, and 'should be drawn from international obligations under human rights instruments and practices existing in Member States'.[77] International humanitarian law is not mentioned in the Directive, and while it may be illustrative in understanding article 15(c), it cannot be determinative. Article 15(c) thus incorporates all forms of armed conflict.

The concerns raised above have been borne out in State practice. In France, Germany and Sweden, differing interpretations have resulted in particular conflicts being characterized as within the scope of 'international or internal armed conflict' in some of those Member States, but not in others. For example, the French, Bulgarian and Czech authorities regard the situation in Iraq as an 'internal armed conflict', while the Swedish and Romanian authorities do not, and within Germany, there is inconsistency across the various state jurisdictions.[78] Whereas some German courts have stated that an armed conflict only needs to be of an unpredictable duration and intensity that threatens life or limb,[79] others have required the conflict to be comparable to a country-wide civil war.[80] The upshot of these varied views is that applicants from Iraq, Chechnya and Somalia cannot be

[77] *Elgafaji* (Grand Chamber), para. 7, referring to Qualification Directive, recitals 24 and 25 respectively.

[78] UNHCR Study, p. 76; ECRE Study, p. 215.

[79] UNHCR Study, see p. 77, fn 317.

[80] *Ibid.*, cited, p. 77, fn 318.

assured a consistent assessment of their situation across the Member States.[81]

Although UNHCR has acknowledged that the interpretation of 'international or internal armed conflict' should be *informed by* international humanitarian law, it has also emphasized that '[i]nternational protection needs arising from indiscriminate violence are not limited to situations of declared war or internationally recognized conflicts', and that '[n]o formal determination by a State or an organization regarding the existence of an "international or internal armed conflict" should be required'.[82] This is the approach taken in the regional refugee instruments which extend protection to situations of generalized violence, such as the OAU Convention's extension of protection to people fleeing 'external aggression, occupation, foreign domination or events seriously disturbing the public order in either part or the whole' of their country, and the Cartagena Declaration's application to people whose 'lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts' and so on.[83]

International humanitarian law is not irrelevant to the interpretation of article 15(c), but its use must be sensitive to the primary purpose of that provision – assessing a person's need for international protection, within the particular legal framework of the Qualification Directive. While ignoring international humanitarian law in interpreting terms that stem directly from it could lead to even greater inconsistency in the interpretation of article 15(c), as different Member States independently seek to define the meaning of terms within that provision,[84] there is also a risk that interpreting the 'armed conflict' too strictly may undermine the protection of fundamental human rights which subsidiary protection is intended to safeguard. The European Council on Refugees and Exiles recommends that Member States take 'a cautious approach' in determining whether or not an international or internal armed conflict exists, 'declaring when in doubt that such

[81] *Ibid.*, p. 78. [82] UNHCR Statement, p. 6. [83] UNHCR Study, p. 79.

[84] See Skeleton Argument on behalf of the Applicant in *Hamed* v. *Secretary of State for the Home Department*, AIT, January 25, 2008 (R. Husain and S. Knights), paras. 52–53 (copy on file with author). Storey, for example, describes international humanitarian law as 'a ready made international framework of reference for defining key terms': H. Storey, 'EU Refugee Qualification Directive: A Brave New World?' *International Journal of Refugee Law*, 20 (2008), p. 36.

a situation exists, and that people fleeing from it merit protection'.[85] The excellent international humanitarian law analysis of article 15(c) in the appellant's Skeleton Argument in *Hamed* v. *Secretary of State for the Home Department* shows how those principles can help to achieve a unified approach to article 15(c), provided that they are applied with regard to contemporary jurisprudence, guidance from the International Committee of the Red Cross and, most importantly, the object and purpose of the Qualification Directive. The key issue, as intimated by UNHCR,[86] is that they need to be understood within the protection context of the Qualification Directive and not to be construed in such a way as to create protection gaps.

It therefore seems more appropriate to turn to other refugee law tools that protect people fleeing armed conflict, such as the OAU Convention, the Cartagena Declaration and the Temporary Protection Directive, to ascertain the kinds of situations in which protection is forthcoming.

In the EU context, the Temporary Protection Directive is of particular relevance. This instrument, which in the event of a mass influx extends protection inter alia to people 'who have fled areas of armed conflict or endemic violence',[87] does not require the existence of an 'international or internal armed conflict' to be triggered. As I have argued previously, for legal and logical consistency, article 15(c) ought to protect people fleeing individually or in small groups from situations which, in a mass influx, would result in protection – especially since article 15(c) was originally intended to protect those who, but for the fact that they arrived individually rather than as part of a mass influx, would fall within the scope of the Temporary Protection Directive.[88] Indeed, the rationale behind the Temporary Protection Directive is that the *size* of the influx makes it inefficient or impossible to process claims in the normal way,[89] *not* that the nature of the threat is unique to mass influxes. To limit subsidiary protection in this way therefore seems both illogical and

[85] ECRE and ELENA, 'The Impact of the EU Qualification Directive on International Protection', p. 29.

[86] UNHCR Statement, p. 6.

[87] Temporary Protection Directive, art. 2(c).

[88] See Explanatory Memorandum; see also Skeleton Argument in *Hamed*, paras. 26–29; McAdam, *Complementary Protection in International Refugee Law*, p. 74; Goodwin-Gill and McAdam, *The Refugee in International Law*, p. 296, fn. 76.

[89] Temporary Protection Directive, art. 2(a).

inconsistent.[90] UNHCR has accordingly recommended the deletion of 'international or internal armed conflict' from article 15(c).[91]

As a postscript, it should be noted that in its first review of the Qualification Directive, the European Commission stated that despite stakeholders stressing the need for clarification of article 15(c),[92] 'in view of the interpretative guidance provided by this judgment [*Elgafaji*] and of the fact that the relevant provisions were found to be compatible with the ECHR, an amendment of Article 15(c) is not considered necessary'.[93]

STANDARD OF PROOF: ARTICLE 2(E)

The standard of proof for subsidiary protection is that 'substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin ... would face a real risk of suffering serious harm as defined in Article 15'.[94] The reference to 'substantial grounds' stems from the case law of the European Court of Human Rights on article 3 of the ECHR and the Committee against Torture on article 3 of the Convention against Torture,[95] and was deliberately selected in order to avoid divergence between international practice and that of the Member States themselves.[96] The Committee against Torture has consistently held that 'substantial

[90] As a comment by the French delegation during the drafting process shows, there is a deep-seated fear that whole populations will flee on the basis of generalized violence if subsidiary protection status does not require individual harm to be demonstrated. It was stated that the expression 'international or internal armed conflict' 'risks opening the possibility of obtaining subsidiary protection to the entire population of countries involved in conflicts': 12199/02 ASILE 45 (September 25, 2002), p. 20, fn 8.

[91] UNHCR Study, p. 79.

[92] Commission of the European Communities, 'Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Person a Beneficiaries of International Protection and the Content of the Protection Granted (Recast)' Brussels, COM(2009) 551 final/2, 2009/0164 (COD), p. 5.

[93] *Ibid.*, p. 6 (emphasis in the original).

[94] Qualification Directive, art. 2(e).

[95] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 ('CAT').

[96] Council of the European Union Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum on September 25, 2002, Doc. 12148/02 ASILE 43 (20 September 2002) p. 5. The Netherlands supported Sweden's argument that wording from decisions of the Committee against Torture should be taken into account to avoid different rulings from different courts of bodies concerning similar situations: 12199/02 ASILE 45 (25 September 2002), p. 3, fn. 3. See also *Kacaj* [2001] INLR 354.

grounds' involve a 'foreseeable, real and personal risk' of torture.[97] They are to be assessed on grounds that go 'beyond mere theory or suspicion' or 'a mere possibility of torture',[98] but the threat of torture does not have to be 'highly probable'[99] or 'highly likely to occur'.[100] The European Court of Human Rights has said that the relevant test is a 'real risk' of torture or inhuman or degrading treatment.[101] The UK AIT has interpreted this as simply meaning that the risk 'must be more than a mere possibility' – a standard which 'may be a relatively low one'.[102]

The UK takes the view that the 'substantial grounds' test in article 2(e) of the Qualification Directive is intended to replicate the 'well-founded fear' standard under the Refugee Convention. In *Sivakumaran*, the House of Lords said that that standard implies 'a reasonable degree of likelihood',[103] which generally falls somewhere lower than the 'balance of probabilities'.[104] As the AIT stated in *Kacaj*:

> The link with the Refugee Convention is obvious. Persecution will normally involve the violation of a person's human rights and a finding that

[97] See e.g. *EA* v. *Switzerland* (Comm. No. 28/1995) UN Doc. CAT/C/19/D/28/1995 (November 10, 1997) para. 11.5; *X, Y and Z* v. *Sweden* (Comm. No. 61/1996) UN Doc. CAT/C/20/D/61/1996 (May 6, 1998) para. 11.5; *IAO* v. *Sweden* (Comm. No. 65/1997) UN Doc. CAT/C/20/D/65/1997 (May 6, 1998) para. 14.5; *KN* v. *Switzerland* (Comm. No. 94/1997) UN Doc. CAT/C/20/D/94/1997 (May 19, 1998) para. 10.5; *ALN* v. *Switzerland* (Comm. No. 90/1997) UN Doc. CAT/C/20/D/90/1997 (May 19, 1998) para. 8.7; *JUA* v. *Switzerland* (Comm. No. 100/1997) UN Doc. CAT/C/21/D/100/1997 (November 10, 1998) para. 6.6; *SMR and MMR* v. *Sweden* (Comm. No. 103/1998) UN Doc. CAT/C/22/D/103/1998 (May 5, 1999) para. 9.7; *MBB* v. *Sweden* (Comm. No. 104/1998) UN Doc. CAT/C/22/D/104/1998 (May 5, 1999) para. 6.8; *KT* v. *Switzerland* (Comm. No. 118/1998) UN Doc. CAT/C/23/D/118/1998 (November 19, 1999) para. 6.5; *NM* v. *Switzerland* (Comm. No. 116/1998) UN Doc. CAT/C/24/D/116/1998 (May 9, 2000) para. 6.7; *SC* v. *Denmark* (Comm. No. 143/1999) UN Doc. CAT/C/24/D/143/1999 (May 10, 2000) para. 6.6; *HAD* v. *Switzerland* (Comm. No. 126/1999) UN Doc. CAT/C/24/D/126/1999 (May 10, 2000) para. 4.10; *US* v. *Finland* (Comm. No. 197/2002) UN Doc. CAT/C/30/D/197/2002 (May 1, 2003) para. 7.8.

[98] *EA* v. *Switzerland*, para. 11.3.

[99] *Report of the Committee against Torture*, UN GAOR, 53rd Session, Supp. No. 44, UN Doc. A/53/44 (1998), Annex IX.

[100] *EA* v. *Switzerland*, para. 11.3.

[101] See *Cruz Varas* v. *Sweden* (1991) 14 EHRR 1; *Vilvarajah* v. *United Kingdom* (1991) 14 EHRR 248.

[102] *Kacaj*, para. 12. This threshold has also been used in Canada with respect to 'well-founded fear' in Convention refugee claims: *Ponniah* v. *Canada (Minister of Employment and Immigration)* (1991) 13 Imm. L.R. (2d) 241 (FCA), p. 245.

[103] *R* v. *Secretary of State for the Home Department, ex parte Sivakumaran* [1988] AC 958 (HL), p. 994 (Lord Keith); p. 996 (Lord Bridge, Lord Templeman); p. 997 (Lord Griffiths); p. 1000 (Lord Goff).

[104] Article 7(b) of the original proposal for the Qualification Directive stated that well-founded fear was to be 'objectively established' by considering whether there was 'a reasonable

there is real risk of persecution would be likely to involve a finding that there is a real risk of a breach of the European Convention on Human Rights. It would therefore be strange if different standards of proof applied ... Since the concern under each Convention is whether the risk of future ill-treatment will amount to a breach of an individual's human rights, a difference of approach would be surprising. If an adjudicator were persuaded that there was a well-founded fear of persecution but not for a reason which engaged the protection of the Refugee Convention, he would ... be required to reject a human rights claim if he was not satisfied that the underlying facts had been proved beyond reasonable doubt. Apart from the undesirable result of such a difference of approach when the effect on the individual who resists return is the same and may involve inhuman treatment or torture or even death, an adjudicator and the tribunal would need to indulge in mental gymnastics. Their task is difficult enough without such refinements.[105]

In that case, the AIT rejected the government's submission that a higher standard of proof was applicable to claims under article 3 of the ECHR on the basis that:

There is nothing in the jurisprudence of the human rights' Court or Commission which requires us to adopt a different approach to the standard applicable to the Refugee Convention; indeed, in our view, there is every reason why the same approach should be applied. Different standards would produce confusion and be likely to result in inconsistent decisions. We therefore reject the argument of the Secretary of State on this issue.[106]

While the AIT's reasoning highlights the substantial merits of this approach, both from a procedural and a protection perspective, it should be noted that the UK interpretation of the standard of proof does not automatically follow from the wording of the Qualification Directive itself.[107] Indeed, Battjes, Carlier and Piotrowicz and van

possibility that the applicant [would] be persecuted'. The Explanatory Memorandum (at p. 15) noted that a 'fear of being persecuted ... may be well-founded even if there is not a clear probability that the individual will be persecuted or suffer such harm but the mere chance or remote possibility of it is an insufficient basis for the recognition of the need for international protection'.

[105] *Kacaj*, para. 10. [106] *Ibid.*, para. 15.

[107] See my earlier discussion of this point: McAdam, *Complementary Protection in International Refugee Law*, pp. 61–64. While the AIT (at para. 143 of *KH*) criticized my assessment of this on the grounds that the standard of proof issue had been resolved by *Kacaj*, that decision does not bind other Member States, and the wording of the Directive (and its drafting history) leave room for alternative interpretations.

Eck have observed that the 'substantial grounds' threshold could be interpreted as setting a higher standard of proof than 'well-founded fear', as is the case in Canada and the US.[108] Indeed, during the drafting process, Sweden sought to replace 'substantial grounds' with 'well-founded fear' (as per an earlier draft) to ensure that the same proof entitlements were established for beneficiaries of subsidiary protection as for refugees. At the time, Germany also observed that the 'substantial grounds' terminology might create problems of proof assessment, although argued that these could be resolved by article 4.[109] These concerns are not merely academic. In Portugal, it is presently the case that the Aliens and Border Service requires applicants to prove 'beyond any doubt' that flight from a general situation of insecurity is caused by individual reasons directly linked to flight.[110]

In Canada, the expression 'substantial grounds for believing' has been interpreted as imposing a higher standard than 'well-founded fear'. In 2003, the Canadian Federal Court held that 'substantial grounds for believing' meant that the degree of risk for complementary protection claims under section 97 of the Immigration and Refugee Protection Act 2001[111] was to be determined 'on the balance

[108] H. Battjes, *European Asylum Law and International Law* (Martinus Nijhoff Publishers, Leiden, 2006), p. 225, referring also to J.-Y. Carlier, 'Réfugiés: Identification et statut des personnes à protéger. La direction "qualification"', in F. Julien-Laferrière, H. Labayle and Ö. Edström (eds.), *The European Immigration and Asylum Policy: Critical Assessment Five Years after the Amsterdam Treaty* (Bruylant, Brussels, 2005), text to fn. 34; R. Piotrowicz and C. van Eck, 'Subsidiary Protection and Primary Rights,' *International and Comparative Law Quarterly*, 53 (2004), p. 113. Battjes also suggests that the level of risk might be higher than under the Convention against Torture (p. 225; see also Carlier at p. 18(2)), and that the test applied by the UN Human Rights Committee is stricter than that of the European Court of Human Rights.

[109] 12199/02 ASILE 45 (25 September 2002), p. 3, fn. 3. See further McAdam, *Complementary Protection in International Refugee Law*, pp. 62–63.

[110] UNHCR Statement, p. 20.

[111] Section 97(1) defines a 'person in need of protection' as someone falling outside the scope of the Refugee Convention who faces a personal danger of being tortured, as defined in article 1 of the CAT, or someone who faces a personal risk to life or a risk of cruel and unusual treatment or punishment where:

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

of probabilities',[112] by contrast to the 'well-founded fear' threshold for Convention refugee claims, meaning a 'reasonable chance or serious possibility'.[113]

This was affirmed by the Canadian Federal Court of Appeal. First, the court observed that section 97(1)(a) uses almost identical language to article 3 of the Convention against Torture, which means that the Committee against Torture's interpretation of article 3 is highly relevant. Accordingly, the court concluded that the relevant standard was 'on the balance of probabilities' or 'more likely than not', noting that 'the use of the word "would" requires a showing of probability'.[114] Secondly, the court indicated that the different nature of claims under section 96 compared to section 97(1)(a), such as the issue of nexus, meant that an identical standard of proof was not necessary (even though it recognized that there was 'no rational sense' in adopting a higher standard for the latter). The court extended the same threshold to section 97(1)(b) in the 'absence of some compelling reason' to the contrary.[115]

It has been suggested that an advantage of this dual-test approach is that it 'should encourage independent and separate analyses of the three different types of claims contained in the consolidated grounds of protection'.[116] While that is certainly important, there is no compelling reason why rigorous interpretation cannot occur even if the same standard of proof is applied. However, it has also been noted that in practice, the higher standard applied to section 97 can work to the advantage of applicants who are found not to

There is no statutory equivalent to article 15(c) of the Qualification Directive, but note the Immigration and Refugee Board Chairperson's Guidelines, 'Guideline 1: Civilian Non-Combatants Fearing Persecution in Civil War Situations', (March 7, 1996).

[112] *Li* v. *Canada (Minister of Citizenship and Immigration)* [2003] FCJ No. 1934; 2003 FC 1514; affirmed in *Li* v. *Canada (Minister of Citizenship and Immigration)* [2005] FCJ No. 1; 2005 FCA 1, paras. 18–28.

[113] This test derives from *Adjei* v. *Minister of Employment and Immigration* [1989] 2 FC 680.

[114] *Li* v. *Canada (Minister of Citizenship and Immigration)* (2005), paras. 18–28. Since this was the interpretation which had been given in *Suresh* v. *Canada (Minister of Citizenship and Immigration)* [2000] FCJ No. 5 (FCA), Justice Rothstein said that Parliament could have enacted a lower test had it desired to depart from that interpretation.

[115] *Li* v. *Canada (Minister of Citizenship and Immigration)* (2005), para. 38.

[116] J. Reekie and C. Layden-Stevenson, 'Complementary Refugee Protection in Canada: The History and Application of section 97 of the Immigration and Refugee Protection Act (IRPA)', in International Association of Refugee Law Judges, *Forced Migration and the Advancement of International Protection* (2008), p. 282.

be credible, since objective factors, such as country of origin conditions, may trump the credibility issue and require that protection be granted.[117]

In the EU, where a single standard of proof means that the ultimate focus is supposed to be whether a real risk of serious harm exists,[118] it is in establishing *that* element that the burden under article 15(c) becomes particularly high. In addition to the requirements discussed above in relation to 'individual' threat and the meaning of an 'international or internal armed conflict,' the German authorities have imposed a very high threshold for risk under article 15(c): 'certain death or severest injuries'.[119] This goes far beyond what is required by article 2(e) – 'a real risk of suffering serious harm' – and is not in line with regional[120] or international interpretations of 'real risk'.[121] It also conflicts with the AIT's approach, namely that 'real risk' simply means that the risk 'must be more than a mere possibility'.[122] Thus, though the German courts have recognized that the situation in Iraq satisfies the 'armed conflict' criterion in article 15(c), they have held that 'there is no extreme danger which would necessitate the granting of subsidiary protection' on an individual basis.[123]

The result is that claims considered under article 15(c) of the Qualification Directive are subjected to additional evidentiary hurdles, making it more onerous for applicants to satisfy the test for subsidiary protection vis-à-vis Convention refugee status. Subsidiary protection is by no means an automatic safety net for people who do not meet the Convention definition of 'refugee' but whose fundamental human rights are at risk.

[117] Observations of Justice Carolyn Layden-Stevenson, Research Workshop on Critical Issues in International Refugee Law, York University, Toronto, May 1–2, 2008.

[118] *Kacaj*, para. 12. [119] UNHCR Study, p. 73.

[120] See *Ammari* v. *Sweden* App. No. 60959/00 (October 22, 2002); see also references in *KH*.

[121] *EA* v. *Switzerland*: risk must be foreseeable, real and personal. See UNHCR Study, p. 80.

[122] *Kacaj*, para. 12.

[123] UNHCR Study, p. 79, paraphrasing the German Federal Ministry of Interior Guidelines: 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.

CONCLUSION

The EU experience of harmonization in the field of asylum has not resulted in the interpretative consistency that some desired. The Qualification Directive is an instrument of compromise, and the political pressure to adopt it before ten new Member States joined the EU on 1 May 2004,[124] bringing with them their own views and legal heritages, partially explains the passage of some poorly drafted provisions and the subsequent confusion about their interpretation. The haste with which the Qualification Directive was ultimately adopted, combined with some Member States' attempts to pare back protection responsibilities to a bare minimum (for example, through the operation of article 15(c) and recital 26), means that far from simplifying the operation of asylum law in the EU, the Qualification Directive has in some areas created further inconsistencies and interpretative obstacles, thereby undermining the harmonization process. It is imperative that supranational instruments like the Qualification Directive are construed in a manner that safeguards the fundamental human rights they are intended to protect, rather than in a way that leads to protection gaps.

[124] J. van Selm and E. Tsolakis, 'The Enlargement of an "Area of Freedom, Security and Justice": Managing Migration in a European Union of 25 Members', Migration Policy Institute Policy Brief, May 2004, p. 2.