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Directorate-General Internal Policies

Policy Department C

Citizens Rights and Constitutional Affairs

EUROPEAN PROTECTION IN CASES OF GROUP PERSECUTION

BRIEFING PAPER

Summary:
From the theme envisaged by the LIBE committee, "Main policy directions and any potential issues arising concerning asylum in particular in Austria, France, Germany, Italy, the Netherlands, Poland, Spain, Sweden and the United Kingdom with regard to the following four aspects: reception (open and closed reception centres), qualification and processing of the applications, procedures", this briefing note addresses protection offered in Europe to asylum seekers because of the general situation in their country of origin, as opposed to their personal circumstances. It analyses European legislation and state practice in Europe and recommends clarification and eventual extension of protection to people who need it because of general threats.

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"BRIEFING NOTE ON EUROPEAN PROTECTION IN CASES OF GROUP PERSECUTION"

This Briefing Paper addresses protection offered in Europe to asylum seekers because of the general situation in their country of origin, as opposed to their personal circumstances. Eligibility for protection is usually determined by two basic elements: the type of harm that the asylum seeker would suffer if he or she were to be expelled to his or her country of origin and the risk that this harm would occur. Risk standards can be defined by means of reference to the applicant's personal situation or the general situation prevailing in his or her country of origin. The classic case of risk due to an applicant's personal situation is that of the politician who is threatened with death or torture or other suffering by the government of his or her country of origin. The classic case of risk due to the general situation prevailing in an asylum seeker's country of origin would be a Vietnamese applicant threatened with genocide by Pol Pot's Kampuchea or an asylum seeker fleeing a full-fledged war. For asylum law and practice, the relevance of the general situation for the assessment of applications for protection is very great, as it is often difficult for asylum seekers to substantiate personal or individualised risk.

This study begins by addressing the relevance of the general situation in assessments of eligibility for protection under the Refugee Convention and the European Convention of Human Rights. It then explores schemes under the national laws of a number of Member States that are designed to offer protection in cases of general threats. Subsequently, it looks at the role of general threats under European asylum law, the way that Member States implement the relevant parts of Community, and the role of the European Court of Justice (ECJ). It ends with some recommendations as to how the Community could better respond to applicants who face general threats.

1. GENERAL THREATS UNDER INTERNATIONAL LAW

Is an applicant entitled to protection if his or her country of origin has a very high level of general violence, or should he or she have to show that he or she in particular runs a high risk of being harmed? The answer to this question under international law is somewhat ambiguous. The Refugee Convention defines people in need of protection, or refugees, as those who "have well-founded fear" of being persecuted. The Convention does not define or otherwise make clear whether or not the "well-founded fear" criterion requires an individualised threat or also extends to general threats. The history of refugee protection and the drafting negotiations, however, suggest that the phrase was intended to cover general threats.[1] The UNHCR Handbook also notes that people qualify for refugee protection in case of "group persecution".[2] This concept applies if there are grounds for considering that a certain group or category of the population is exposed to persecution. Every member of that group would then qualify for refugee protection unless it is shown that particular members of that group do not face persecution. In recent decades, however, most European states have extended protection only to applicants who could show an individualised risk (the so-called "singling out" doctrine).[3]

Something similar applies to subsidiary forms of protection under Article 3 of the ECHR. According to the jurisprudence of the European Court of Human Rights (ECtHR), this provision prevents expulsion when an alien shows that there are substantial grounds for believing that he or she would run a "real risk" of being subjected to ill-treatment. The ECtHR

[1] See e.g. T.P. Spijkerboer, 'Subsidiarity in Asylum Law. The Personal Scope of International Protection', in: D. Bouteillet-Pacquet (ed.), *Subsidiary protection of refugees in the European Union: complementing the Geneva Convention?*, Brussels: Bruylant 2002, pp. 19-42.

[2] Cf. *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva: UNHCR 1992, available at http://www.unhcr.org, paras. 44, 70, 73, 74, 76 and 79.

[3] D. Vanheule, 'A comparison of the judicial interpretations of the notion refugee', in: J.H. Carlier & D. Vanheule (eds.), *Europe and Refugees: A Challenge?*, The Hague: Kluwer Law International 1997, pp. 91-105.

has never exhaustively defined the meaning of this phrase. It has indicated that both individual circumstances and the general situation should be taken into account[4] and that at least in certain situations, "special distinguishing features" are required, thus implying a fair degree of "singling out".[5] It is as yet unclear, however, whether the "special distinguishing features" requirement applies in all situations. The ECtHR has always, even when not mentioning "special distinguishing features", taken into account the personal circumstances of the applicant. It does not necessarily follow that Article 3 of the ECHR does not apply in cases of general threats alone because cases where "real risk" stems from mere general threats, hence personal circumstances being absent, have never been brought before the ECtHR, primarily because states do not in practice consider expulsion in such situations (see below).
International law instruments on asylum may cover cases of a general threat of persecution or ill-treatment, but it is not clear whether they actually do.

2. CATEGORIZED PROTECTION IN EU MEMBER STATES

The International Centre for Migration Policy Development recently issued its "Comparative Study on the Existence and Application of Categorized Protection in Selected European Countries".[6] This study reveals that the selected states offer some form of protection based on the general situation in the country of origin, regardless of an applicant's individual circumstances. The forms of protection offered vary. Some states postpone the examination of the asylum application, the determination of refugee status, thus extending the applicant's asylum seeker status.[7] Postponement of removal may also be offered after it has been determined that the asylum seeker does not have an individualised risk.[8] States also grant full-fledged protection status, including residence rights, to asylum seekers from certain territories.[9] In these cases, the government usually has discretionary power to decide whether or not this protection should be granted to people from specific states or parts of states. Although the criteria used for applications that rest on a showing of the general situation in the country of origin differ, many of the selected states did offer some form of categorized protection to applicants from Afghanistan, (central) Iraq, and Somalia between 2001 and 2005.[10]
Extension of the conclusions of this study to all Member States allows one to cautiously conclude that *state practice in Europe converges as to the need to offer protection in cases of general threats, but it appears that the criteria that Member States use, as well as the forms of protection offered, vary.*

3. COMMUNITY LAW AND GENERAL THREATS

European legislation on asylum recognizes three forms of protection: refugee protection, subsidiary protection, and temporary protection. The standards for qualification for refugee status and temporary protection are quite clear about general threats. The standards for qualification for subsidiary protection, on the other hand, are rather ambiguous and are addressed in some detail below.

3.1. Refugee Protection

The Qualification Directive (QD) defines the requirements to qualify for refugee protection, which is based on the Refugee Convention. Article 4(3) stipulates that "[t]he assessment of an application for international protection is to be carried out on an *individual* basis and includes taking into account […] (c) the *individual* position and *personal* circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on

[4] Cf. ECtHR, 5 July 2005, *Said v. the Netherlands*, appl. no. 2345/02, para. 54.
[5] Cf. ECtHR, 21 October 1991, *Vilvarajah v. the United Kingdom*, appl. no. 13163/87, paras. 11-112 and ECtHR, 26 July 2006, *N v. Finland*, appl. no. 39481/98, para. 163.
[6] Study ordered by the Adviescommisie Vreemdelingenzaken (Advisory Committee on Aliens Affairs of the Dutch Minister of Aliens Affairs and Integration), available at http://www.acvz.com.
[7] Switzerland (see ICMPD report, footnote 6, pp. 39-40); The Netherlands, Article 43 Aliens Act 2000.
[8] Denmark, France and Germany (see ICMPD report, footnote 6, pp. 34-35 and ACVZ, *Categoriaal beschermingsbeleeid, een 'nood'zaak*, The Hague: June 2006, available at http://www.acvz.com, p. 35).
[9] Austria, Denmark and Finland (see ICMPD report, footnote 6, pp. 26. 35, 36 and 38).
[10] See ACVZ 2006 (see footnote 8), p. 43.

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 [emphasis added].” The Directive does not necessarily preclude consideration of group persecution, but it does not explicitly offer protection to persons who have a well-founded fear of persecution because of threats to the group to which they belong. This was a deliberate choice by the Commission and the Council when they adopted the Directive because Article 2 of the 1996 Joint Position did explicitly address group persecution.[11]
The Qualification Directive does not explicitly offer protection to people whose fear is due to group persecution.

3.2. Temporary Protection

Temporary protection, on the other hand, explicitly addresses general threats, and it does so on purpose. This type of protection applies to persons who “have had to leave their country or region of origin”, “are unable to return in safe and durable conditions because of the situation prevailing in that country”, and who may fall within the scope of Article 1A of the Refugee Convention or other international or national instruments that give international protection, particularly persons who have fled areas of armed conflict or endemic violence and persons at serious risk of, or who have been victims of, systematic or generalised violations of their human rights”.[12] It follows from this that persons who have fled their country of origin because of a general threat of armed conflict or endemic violence may be eligible for temporary protection.

Temporary protection is offered only in cases of “mass influx”,[13] that is, when the flow of displaced persons into the EU is so large that immigration services are unable to process all protection applications in due time.[14] The Council decides when this form of protection applies, and to which groups this form of protection may apply.[15] The Council has yet to invoke the temporary protection regime. Because refugee crises that occur close to the EU are more likely to produce “mass influxes” than crises that happen further away, the latter crises are less likely to trigger temporary protection, this being the case even though the persons concerned fulfil the requirements of “displaced persons”.
European temporary protection provides protection in cases of general threats, but it applies only when the Council determines that it applies. It is unlikely that the Council will extend temporary protection in cases of crises far from the borders of Europe.

3.3. Subsidiary Protection

3.3.1 Article 15(c) of the Qualification Directive and the Risk Standard

Subsidiary protection applies to people who do not qualify for refugee protection and who run a “real risk of suffering serious harm as defined in Article 15”.[16] Article 4(3) of the QD, the provision discussed in paragraph 3.1 above, also applies to assessments of applications for subsidiary protection. It follows that the QD does not address “real risk” from general threats in an asylum seeker’s country of origin, although Article 15’s definition of “serious harm” suggests otherwise.

Article 15 of the QD stipulates that “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”. The meaning

[11] Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term 'refugee' in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees, OJ [1996] L63/2, Article 2: “*In practice it may be that a whole group of people are exposed to persecution. In such cases, too, applications will be examined individually, although in specific cases this examination may be limited to determining whether the individual belongs to the group in question.*”
[12] Article 2(c) Temporary Protection Directive.
[13] Articles 1, 2(a) and 5(1) Temporary Protection Directive.
[14] Article 2(b) Temporary Protection Directive.
[15] Article 5 Temporary Protection Directive.
[16] Article 2(e) Qualification Directive.

of Article 15(a) and (b) is quite clear. Article 15(a) applies when Article 2 of the European Convention of Human Rights prohibits expulsion, namely when expulsion would expose the asylum seeker to real risk of the death penalty or execution.[17] Article 15(b) applies when Article 3 of the ECHR applies, namely in cases in which expulsion would result in torture or inhuman or degrading treatment or punishment.[18] Although it is at first sight unclear the cases to which Article 15(c) applies, if Article 15(c) is meant to cover cases that are not covered by Article 15(a) and (b), then it necessarily addresses other aspects of prohibited expulsion. That the term "threat" is used in Article 15(c) suggests that it is the risk criterion that is addressed by the provision.[19]

The text and context of Article 15(c) of the QD suggest a modified risk standard.

3.3.2. Article 15(c) and General Threats

Assuming that Article 15(c) addresses the risk criterion, then one must identify what exactly it describes. The wording of the provision is definitely ambiguous in this respect. On the one hand, it speaks of "indiscriminate violence in situations of international or internal armed conflict", thus suggesting that harm of a general nature would suffice. However, the provision also speaks of a "serious and *individual* threat to *a* civilian's life or person", which wording would seem to preclude general threats. Preamble Recital (26) is tainted with a similar ambiguity, as it 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". Thus, one can conclude that although general threats do not create an individual threat, that is, "normally" and not "in themselves", they may create an individual threat under exceptional circumstances, such as when violence is very brutal or very widespread. As to the term "in themselves", it is likely that some degree of individualised showing of threat is still required to qualify for protection under Article 15(c). In order to give this provision meaning alongside Article 15(b), it seems reasonable to assume that a lesser degree of individualised showing would be required than is usually the case under Article 3 of the ECHR. A plausible reading of Article 15(c) could be that it allows for situations of group persecution as discussed above under 2 but that this could be rebutted upon a showing that the particular applicant is not at risk. Thus, the risk would be due to the general situation, but the assumption of eligibility for protection could be rebutted in case it turns out that the concerned individual is not at risk (for example, because he belongs to a militia or has otherwise connections or power). In this sense, it could be said that risk under Article 15(c) is individualised but that it differs from the type of risk run by persons eligible for temporary protection because situations of temporary protection do not allow for rebuttal.

This reading of Article 15(c), one may object, is at odds with the term "individual" in Article 15(c) and the wording of Preamble Recital (26). However, this objection fails to appreciate that applying the same degree of individualisation to Article 15(c) as to Article 15(b) is at odds with the term "indiscriminate" and would deprive Article 15(c) of all meaning next to Article 15(b). Furthermore, the reading proposed here fits in well with the object and purpose of subsidiary protection: "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* [emphasis added]."[20] As with Article 15(b), those practices include protection in cases of risk due to general threats in the country of origin.

The text, context, and object and purpose of Article 15(c) of the QD suggest that it

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[17] Cf. ECtHR, 8 November 2005, *Bader v. Sweden*, appl. no. 13284/04.

[18] Cf. *Vilvarajah* (see footnote 5). Article 15(b) does not cover all cases addressed by Article 3 of the ECHR: the so-called "humanitarian" cases, as laid out in ECtHR, 2 May 1997, *D v. UK*, appl. no. 30240/96, fall outside its scope due to the "in the country of origin" wording. Because humanitarian cases cannot possibly fall within the scope of Article 15(c), they are of no relevance for the point made here.

[19] For a more extensive argument as to why Article 15(c) of the QD addresses the risk criterion, see H. Battjes, *European Asylum Law and International Law*, Martinus Nijhoff Publishers: Leiden/Boston 2006, pp. 237-241; J.-Y. Carlier, 'Réfugiés: Identification et statut des personnes à protéger, la directive "qualification"', in: F. Julien-Laferrierè, H. Labayle nd Ö. Edström (eds.), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty*, Bruylant: Brussels 2005, pp. 297f; ACVZ 2006 (see footnote 8), pp. 27-31.

[20] Preamble Recital Qualification Directive (25).

permits less individualised assessments of risk in cases of armed conflict.

4. ARTICLE 15(C) OF THE QUALIFICATION DIRECTIVE AND STATE PRACTICE

Because Member States have until 10 October 2006 to implement the Qualification Directive, it is somewhat premature to draw definitive conclusions as to the way in which Member States read and apply Article 15(c). Nevertheless, the ICMPD report offers some insights.

A number of states are of the view that their national laws do not need to be adapted because they already provide sufficient protection in cases covered by Article 15(c). These states apparently regard forms of leave to remain issued by the government on a discretionary basis as relevant. Other states, however, have inserted the text of Article 15(c) into their domestic laws. Apparently, these states believe that it is ultimately up to the judiciary to decide whether or not Article 15(c) of the QD applies in individual cases.

As regards the degree of individualised showing required, the United Kingdom and Austria argue that Article 15(c) of the QD only applies in cases where harm of an individualised nature is shown, thus not in cases of group persecution.[21] France seems to hold the same position.[22] Belgium, on the other hand, has inserted the text of Article 15(c) into its domestic law, deleting the term "individual".[23] Sweden has included the full text of Article 15(c) in its domestic law.[24] Thus, states differ as to the degree of individualisation required under Article 15(c).

To date, the way in which Member States read Article 15(c) of the QD varies as to the degree of discretion left to the administration as regards implementation and as to the degree of individualised showing required.

5. INTERPRETATION OF ARTICLE 15(C) OF THE QUALIFICATION DIRECTIVE BY THE EUROPEAN COURT OF JUSTICE

The lack of harmonisation by Member States as to Article 15(c) of the QD runs counter to the objectives of European asylum law and, therefore, is undesirable. Clarification on the meaning of this provision by the ECJ would, of course, provide a great degree of guidance, but it will be a considerable amount of time before the ECJ can address the matter. To begin with, direct appeal to the ECJ by aliens is not possible because the provision affects them only indirectly.[25] Only courts whose judgements are not open to review by a domestic court can raise preliminary questions on asylum issues.[26] These "highest" courts may be very reluctant to do so when the provision at issue is understood to leave a considerable amount of discretion to states and when they interpret Article 15(c) as applying to cases of individualised harm only. When other states apply the provision also in cases of general threats, it may not be possible to raise a preliminary question because Article 63(2)(a) of the TEC and Article 3 of the QD refer only to "minimum standards", meaning that Member States are left free to apply more lenient domestic standards and that the application of these more lenient standards, precisely because they are more lenient, are not reviewable. Those states who grant protection to people in case of general threats do so because they want to set more lenient standards, so one could argue. And in states, finally, where Article 15(c) of the QD is read by legislator and administration as if it applies to general threats, there would be no need to ask the ECJ the question whether the provision applies to general threats.

For these reasons, preliminary questions as to Article 15(c) cannot be expected soon from domestic courts, thus meaning that Member State practice may diverge on this for a considerable amount of time. This could tempt a considerable number of people to try and elude the Dublin system by stating a (repeated) request with Member States that apply the

[21] ICMPD report (see footnote 6), pp. 28 and 51.
[22] CRR 25 June 2004, *Contentieux des réfugiés* 2-2004, pp. 24-25.
[23] ACVZ 2006, p. 40.
[24] ACVZ 2006, p. 38.
[25] Article 230 TEC; Battjes 2006 (see footnote 19), p. 579.
[26] Article 68(1) TEC.

provision in case of general threats, exactly the type of secondary migration that European asylum law seeks to discourage.
For a number of reasons, it is unlikely that the ECJ will soon be able to shed light on the meaning of Article 15(c) of the QD. This could lead to disharmony in that provision's application for a considerable amount of time.

6. PROVIDING FOR EUROPEAN PROTECTION IN CASES OF GROUP PERSECUTION: CONCLUSIONS AND RECOMMENDATIONS

It seems reasonable to conclude that European asylum law provides for protection in cases of general threats but that it does so in an incomplete and unclear way. The QD does not address group persecution under the Refugee Convention. If European asylum law is to provide protection in these cases, then the QD must be amended, for example, by inserting Article 2 of the 1996 Joint Position (see footnote 11).
If European asylum law is to provide protection in cases of group persecution, then the QD must be amended.
This amendment should be a matter for the second phase of the creation of the Common European Asylum System, after the application of the present Directive has been evaluated. This evaluation is scheduled for 2007, and the adoption of amendments or new legislation is due before the end of 2010.[27]
The Temporary Protection Directive applies in cases of general threats, but it only applies to those threats that lead to a mass influx into the European Union. The requirement of mass influxes sets a high standard and makes the instrument less relevant for those needing protection who are further away from Europe. *If temporary protection is to apply to crises that do not involve mass influxes into the European Union, then the temporary protection Directive should be amended.*
Amendment of the temporary protection Directive would again be a matter for the second phase of the creation of the Common European Asylum System.
Subsidiary protection pursuant to Article 15(c) of the QD could be relevant for protection in cases of less individualised threats, as the text, context, and object and purpose of the provision suggest. At present, it seems likely that Member State practice will continue to considerably differ as regards application of the provision. Of course, one way to solve this disharmony would be to amend the provision.
Article 15(c) of the QD should be amended to make clear that it does not require a showing of individualised risk.
As it stands, Article 15(c) bears the marks of a compromise, wrought with difficulty, and thus, it would be difficult for Member States to easily reach a compromise over a clearer text in the short term. To repeat, amendment of the provision would seem to be a matter for the second stage of the Common European Asylum System, after the evaluation in 2007.

Article 68(3) of the TEC may provide a mechanism for clarification. According to that provision, the ECJ can issue a judgment on the interpretation of the QD upon request of the Commission, the Council or a Member State. The European Parliament could request one of these EU organs to raise such a question with the ECJ. In this way, the European Parliament could assist in clarifying, at least in the short term, the legal position of people who need protection because of general threats.
For a number of reasons, it is unlikely that the ECJ will soon be able to shed light on the meaning of Article 15(c) of the QD. This could lead to disharmony in application of that provision for a considerable amount of time. A ruling on the meaning of that provision can be requested by the Commission, the Council or a Member State pursuant to Article 68(3) of the TEC, and the European Parliament can ask one of the organs to petition the ECJ for such a ruling.

7. SUMMARY OF RECOMMENDATIONS

1. International law instruments on asylum may cover cases of a general threat of

[27] "*The Hague Programme – Strengthening Freedom. Security and Justice in the European Union*", Annex I to the Presidency Conclusions of the Council of Brussels of 4/5 November 2004, doc. nr. 14192/1/04, at pp. 17 and 18.

persecution or ill-treatment, but it is not clear whether they actually do.

2. *State practice in Europe converges on the need to offer protection in cases of general threats, but there is considerable disagreement as to the criteria to be applied and the forms of protection to be offered.*

3.1 *The QD does not ensure that people who fear group persecution will be protected.*

3.2 *The European temporary protection regime provides protection in cases of general threats, but it applies only when the Council decides that it does. It is unlikely that the Council would extend temporary protection to cases of crises far from the borders of Europe.*

3.3.1 *The text and context of Article 15(c) of the QD suggest that this provision modifies the risk standard.*

3.3.2 *The text, context, and object and purpose of Article 15(c) of the QD suggest that a less individualised risk criterion applies in cases of armed conflict.*

4. *To date, the way in which Member States read Article 15(c) of the QD varies as to the degree of discretion left to the administration as regards implementation and as to the degree of individualised showing required.*

5. *For a number of reasons, it is unlikely that the ECJ will soon be able to shed light on the meaning of Article 15(c) of the QD. This could lead to disharmony in the application of this provision for a considerable amount of time.*

6. *If European asylum law is to provide for protection in cases of group persecution, then the QD should be amended.*

If temporary protection is to apply to crises with a less direct impact on the inflow of numbers into Europe, then the temporary protection Directive should be amended.

Article 15(c) of the QD could be amended to make clear that it does not require a (fully) individualised risk standard.

A ruling on the meaning of the provision can be requested by the Commission, the Council or a Member State pursuant to Article 68(3) of the TEC, and the European Parliament can ask one of those organs to ask the ECJ for such a ruling.