THE DIRECTIVE ON MINIMUM STANDARDS FOR THE QUALIFICATION AS REFUGEES OR AS PERSONS IN NEED OF INTERNATIONAL PROTECTION AND ON THE CONTENT OF THE PROTECTION GRANTED

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Until 1990 the 1951 Geneva Convention on the status of refugees (hereafter: the Convention) was in Europe the only international instrument relating to refugees and asylum. This began to change gradually during the 1990's inside what was then the EC. In 1990 the Schengen Implementary Convention of June 19, 1990, an inter – State convention between certain Member States of the EC, to which other Member States acceded since (with the exception of the UK and Ireland) affirmed the principle according to which a single State should be responsible for processing asylum applications and laid down criteria. In the same year the Dublin Convention, concluded between the States Parties to the Schengen Convention, replaced Chapter 7 of the latter. It entered into force in 1997.

The Maastricht treaty (1992) contained a clause making asylum policy a "question of common interest". This led to the adoption by meetings of Ministers responsible for immigration of a series of resolutions and conclusions which, although non binding legally, were influential on policy-making. They mentioned such notions as manifestly unfounded applications, safe countries of origin and safe third countries.

The turning point was the Amsterdam Treaty (1997). Under its Protocol n° 2 the Schengen "*acquis*" was integrated into the framework of the EU. The Treaty "communitarised" immigration and asylum policy, as stated in Title IV ECT, "Visas, asylum ,immigration and other policies related to the free movement of persons" (Art. 61-9). Under Art. 63:

"The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Amsterdam Treaty, adopt:
Measures on asylum, in accordance with the Geneva Convention of July 28, 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:

Criteria and mechanisms for determining which member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States.
Minimum standards on the reception of asylum seekers in member States.
Minimum standards with respect to the qualification of nationals of third countries as refugees;
Minimum standards on procedures in member States for granting or withdrawing refugee status;
Measures on refugees and displaced persons within the following areas:
minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection;
promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons."

The following texts on asylum have been adopted so far:

-Temporary protection

Directive 2001/55/EC, of 20 July 2001 (OJ 2001 L 212/12).

- Reception conditions.

Directive 2003/9/EC, of 27 January 2003 (OJ 2003 L 31/18).

Determination of the State responsible for considering asylum applications

Council Regulation 343/03 (Dublin II) 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 (OJ 2003 L 50/11). In force since September 1, 2003.

Commission Regulation 1560/2003 implementing Dublin II (OJ 2003 L 222/3). In force since September 6, 2003.

Refugee and subsidiary protection: Definition and content

Council Directive 2004/83, 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 2004 L 304/12. Deadline for implementation: October 10, 2006.

Procedures:
Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

Finger- printing of applicants.

Regulation 2725/2000 on Eurodac (OJ 2000 L 316/1). In force since January 15, 2003.

Regulation 407/2002 implementing Eurodac Regulation (OJ 2002 L 62/1).

Financial provisions.

Decision 2000/596/EC on European Refugee Fund (OJ 2000 L 252/12).

Decision on second European Refugee Fund (OJ 2004 L252/12).

I. GENERAL PRINCIPLES

I-1. THE DIRECTIVE AND THE GENEVA CONVENTION

The Convention is and remains the basic international instrument relating to refugee law. This is indeed stated by the ECT itself (See Art. 63-1, quoted supra: Measures taken by the Council must be "in accordance" with the Convention). The Directive reaffirms this principle several times: it mentions "the full and inclusive application of the Geneva Convention" (Recital 2), which "provides" the cornerstone of the international legal regime for the protection of refugees" (Recital 3). The definition of the refugee rests on Art.1 A (2) of the Convention (Recital 8). The aim of minimum standards for the definition and content of refugee status is to guide the competent national bodies of Member States in the application of the Convention (Recitals 16 and 17). Subsidiary protection should be complementary and additional to refugee protection enshrined in the Convention (Recital 24).The content of international protection is without prejudice to the rights laid down in the Convention (Art. 20-1).

For that very reason the UNHCR Executive Committee conclusions on international protection , its Guidelines on certain aspects of the latter and its Annotated Comments on the Directive are useful and relevant tools for the construction and implementation of both the Convention and the Directive. Moreover, under Recital 15, consultation with the UNHCR in the determination of refugee status may provide useful guidance.

I-2. THE DIRECTIVE AND OTHER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

When the Convention was drafted and adopted, there were very few international human rights instruments: The 1948 UN Convention on genocide, the four 1949 Geneva Conventions on humanitarian law; the ECHR has just been signed and was not in force. To-day the situation is different. The protection of human rights is one of the general principles of EU law. Member States are bound by a number of international human rights instruments, both European and universal, such as the ECHR, the UN Covenants, the European and UN Conventions against torture and other cruel, inhuman or degrading treatment or punishment, the UN Conventions on discrimination and on the rights of the child , the two 1977 Additional Protocols to the 1949 Geneva Conventions, and other instruments. Consequently the construction and implementation of the Directive must respect fundamental rights (Recital 10). Member States are bound by obligations under instruments of international law to which they are party (Recital 11).The case law of the European Court of Human Rights is here of paramount importance.

Summing up: four bodies of law must be kept in mind: refugee law, international human rights law, international humanitarian law and international criminal law (See the status of the International Criminal Court and of the International Criminal Tribunals on Yugoslavia and Rwanda).

I-3. MINIMUM STANDARDS

The aim of the Directive is the approximation of rules on the recognition of refugee status (Recital 4). It sets minimum standards (Art.1), which means that Member States may introduce or maintain more favorable provisions in so far as these are "compatible" with the Directive (Art.3). The exact meaning of this word will be determined by the practice and the subsequent case law.

I-4. SCOPE

The Directive applies only to third country nationals (Recitals 8 and 9; Art.2). However, the hierarchy of legal norms means that Protocol n°6 to the Amsterdam Treaty relating to the right of asylum for Member States applies (Recital 13).

I-5. DECLARATORY CHARACTER OF REFUGEE RECOGNITION

The recognition of refugee status is a declaratory act (Recital 14). This means that it has necessarily a retroactive effect. When, in a Member State, a person is recognized as a refugee within the meaning of the Convention, he or she must be considered of having been a refugee since entrance into the country. "He does not become a refugee because of recognition, but is recognized because he is a refugee" (UNHCR Handbook, § 28). This has practical consequences (See infra).

II. ASSSESSMENT OF APPLICATIONS

Art. 4 of the Directive contains a number of provisions relating to the assessment of applications for international protection. One would have expected to find them in the Procedures Directive. Consequently, Art 4 must be read in conjunction with provisions of the Procedures Directive such as Art.2, 3,6,9,11,22 and 29-31.
Several provisions of Art 4 deserve a brief comment:

- Time of application.
- Content.
- General rules on assessment.

II.1 TIME OF APPLICATION

Neither the Convention nor the Directive sets a deadline to submit an application for international protection after entry. Usually applicants apply shortly after entry, if only are able to reside lawfully in the country while their application is being processed. Two clauses of Art 4 deserve a brief comment:

- Under Art 4-1(First sentence):

"Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection".

This is a faculty for the States. Moreover, this provision does not mention the application itself but the elements needed to substantiate it.

- Under Art.4-5:

"When Member States apply the principle according to which it is the duty of the applicant to substantiate the application for international protection and where aspects of the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation, when….d) the applicant has applied for international protection at the earliest possible time, until the applicant can demonstrate good reason for not having done so."

II.2 CONTENT

Art. 4-2 and 3 describe in detail what an application should contain:

- Information on the applicant (identity, nationality, places of residence, previous applications, travel routes).
- Facts on the situation in the country of origin.
- Information on persecution or serious harm.
- Individual position and personal circumstances.

Hence the necessity appears, for judges, to have up to date and reliable country background information on the conditions in the country of origin and on the individual situation of the applicant. The sources are many and they have to be of course evaluated.

II.3 GENERAL RULES ON ASSESSMENT

The central issue is that of the burden of proof. Principles relating to civil or criminal law are of very little use here. Refugee law is *sui generis*. The following rules can be mentioned:

Applicants must of course make every effort, in submitting their application, to substantiate it, in relation both to the general situation in their country of origin and to their personal circumstances.

There are obvious limits to that. Individuals fleeing persecution or armed conflicts do not always have the possibility or the time to collect reliable legal and factual evidence and bring it with them. There may be problems of recollection after arrival, or of translation.

The main issue is that of credibility, of plausibility. Hence Art 4-5, which mentions "a genuine effort to substantiate his application" (i. e. good faith) or the coherence of statements of the applicant. The word "credibility" is used at Art. 4(5 e).

III. PERSECUTION

III-1. ACTORS

The Convention says nothing on actors of persecution and on the origins of the latter. Hence different interpretations when persecution relates to non-State actors. In some countries, only persecution originating in State actors has been taken into account. Others have considered non-State actors when certain conditions were fulfilled. The novelty of Art 6 of the Directive is that it lists, in addition to the State, other actors:

Parties or organizations controlling the State or a substantial part of its territory.

Non-State actors "if it can be demonstrated" that the State and parties or organizations mentioned supra, including international organizations "are unable or unwilling to provide protection against persecution or serious harm as defined in Art. 7"

This is a welcome development. In many parts of the world authorities, whatever their name, *de facto* happen to control substantial parts of the country and persecute persons on varied grounds. Persecution or serious harm may also come from purely private actors. The key concept of the Convention is that of protection against persecution and inability or unwillingness of the State to provide it. *A fortiori* when there is no State at all, but only warring factions.

II-2. ACTS

They are described in Art. 9. Four elements deserve to be mentioned:

Such acts must attain a certain threshold of gravity, by their nature or their repetition.

They must constitute a violation of basic human rights, especially those for which derogation is impossible (Hence the mention of Art. 15 ECHR).This is a clear reference to international human rights instruments.

There is no exhaustive and closed list of acts. This would have proved both impossible and dangerous.

Four items mentioned in Art. 9-2 are of special interest:

Acts of sexual violence (Art. 9-2 a).

The accent on discrimination (Art. 9-2, b, c and d).

The mention of grave crimes committed by armed forces during a conflict (in relation with the refusal to perform military service or desertion).

Acts of gender-specific or of child-specific nature. As to the former, one can mention female genital mutilation, rape, or forced marriage. (See UNHCR, Guidelines on International Protection: Gender-Related Persecution within the Content of Art.1-A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees).

None of this is an invention of the drafters of the Directive. Recent and present internal and international armed conflicts provide ample, graphic and tragic evidence of such treatment.

III-3. REASONS

Art. 10 provides a number of developments on the grounds of persecution states in Art. 1-A (2) of the Convention.

- Race:

This notion is given a wide meaning (Art.10 a).The UNHCR Handbook refers to the "common usage" of the word (?) and adds that race will frequently entail membership of a "specific social group" (§ 68).

- Religion:

It includes, under Art. 10-b "non theistic and atheistic beliefs" and the right to change one's religion, an echo of Art. 9 ECHR (See UNHCR, Guidelines on International Protection: Religion-based refugee claims, 2004).

- Nationality

It is also given a wide acceptation. Here also there may be a connection with the notion of particular social group

- Membership of a particular social group.

Art. 10 (d) reiterates the two basic components of that category: firstly an innate characteristic, a common background, or sharing a fundamental characteristic or belief; and, secondly, a distinct identity in the in the relevant country, because the group is perceived as different. The Directive uses here the words "shall' and "and". This means that the two elements of the definition mentioned above are, in principle, cumulative. The French case law has affirmed the importance of both criteria: See Conseil d'Etat, *O.*, June 23, 1997, p 261 (Algerian transsexual); CRR, *Ozkan*, April 11, 2005, p. 39 (Refusal of forced marriage by a Turkish woman of Kurdish origin),which I commented in *Public Law*.2006.168; CRR, *Mrs Diallo, ép. Bah*, May 27, 2004, p 34 (Refusal of forced marriage by Guinean woman); Conseil d'Etat, *OFPRA*, August 23, 2006, (Lesbian Ukrainian women), also commented in *Public Law*. 2007.164.

In a recent decision of the House of Lords, Lord Bingham summed up its case law on the matter as follows:

" First, the Convention is concerned is concerned not with all cases of persecution but with on persecution which is based on discrimination, the making of distinctions which principles of fundamental human rights regard as inconsistent with the right of every human being…Secondly, to identify a social group pone must first identify the society of which it forms part; a particular social group may be recognizable in as such in one country but not in another…Thirdly, a social group need not be cohesive to be

recognized as such… Fourthly…there can only be a particular social group if it exists independently of the persecution to which it is subject" (At § 13). Coming to the Art 10-1-d of the Directive Lord Bingham added: "I do not doubt that a group should be considered to form a particular social group where, in particular, the criteria in sub- paragraphs (I) and (II) are both satisfied…If, however, this article were interpreted as meaning that a social group should only be recognized as a particular social group for purposes of the Convention if it satisfies the criteria in both sub-paragraphs (I) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority"(§ 16). He then quotes the UNHCR Comments on the Directive, according to which the two criteria mentioned above should be treated as alternatives. (Secretary of State for the Home Department v. K. Fornah v. Secretary of State for the Home Department (2006) UKHL 46.)

Two other provisions of Art.10- 1 d) deserve a comment:

- Sexual orientation.

Under the last paragraph of Art 10-1 d) "depending on the circumstances in the country of origin a social group may include a group based on a common characteristic of sexual orientation". In a number of countries homosexuals and transsexuals have been recognized as refugees on this ground, given the conditions prevailing in their country of origin: See, for the former, France, CRR, Djellal, May 12, 1999, p 46; K., May 23, 2002, p. 35 (Algeria); Gedin, May 23, 2002, p. 35 (Ethiopia); Albu, April 3, 2000,p 46 (Romania). Australia, Appellant S 395/ 2002 and Appellant S 396/2002 v. Minister for Immigration and Multicultural Affairs, 2003 HCA 71; 2003 ALR 112, at § 40. USA, Geovanni Hernandez-Montiel v. INS, 225 F.3rd 1084.

For the latter see France, CRR, Ourbih, July 7, 1995, p 52; Conseil d'Etat, Ourbih, June 23,1997,p 261; CRR,O. May 15, 1998, p 37.

- Gender.

The last sentence of Art. 10-1 d) reads: "Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article". In many countries, the case law has held that in certain circumstances women constitute a particular social group within the meaning of the Convention. See France, CRR, Sallari, ép. Ismani, February 18, 1999,p 33 (Afghan woman); Tsesenbaatar, ép Luusanpuntag, April 19, 2002, p 3O (Muslim Mongolian woman of Kazakh origin married to a Buddhist); Sheikh, May 22, 2000,p 26 (Bangladeshi woman active in a movement for the emancipation of women; Tas, March 15, 2005,p 37;Ozkan, April 11, 2005, p 39 (Turkish women refusing to accept imposed or arranged marriages and exposed to a "crime of honor"); Nazia, October 15, 2004, p 33 (id, Pakistan); UK, House of Lords, R v Immigration Appeal Tribunal, Ex p Shah and Islam (1999)2 AC 629.

IV. PROTECTION

IV-1. ACTORS

The novelty of Art.7-1 of the Directive is the addition to the State of two other actors: parties or organizations, including international organizations, provided that they control the State or a substantial part of its territory.

Parties or organizations are a loose category, which includes any sufficient *de facto* authority. This is a factual issue. As to international organizations, they may include NGOs and international organizations with a UN mandate, general (UNHCR) or local (UNMIK and KFOR in Kosovo). The existence of internal armed conflicts in which several authorities may control parts of the country and the creation of UN sponsored or other international peace-keeping missions or forces explains these new clauses. The practice and case law of a number of countries has applied these categories:

On the notion of State authority or regional organization able to provide protection, see France, CRR, Moussa Traoré, February 16, 2007, (Negative answer for the "Alliance of new forces "in Northern Ivory Coast).

On international organizations see:

- For a negative answer (absence of protection): France, CRR, Mlle Samanga, November 30, 2006 (UN forces in Ituria, in the Democratic Republic of Congo); Saint Phart, June 28, 2005, p 54; Valens, July 6, 2005, p 67; Vil, October 30, 2006 (MINUSTAH in Haiti); Qerimi, September 23,2004, p 51 (KFOR in Kosovo).

- For a positive answer: UK, Dyli v Home Secretary (2000) INLR 372.NB;(2000) Imm AR 652 (Kosovo); France, CRR, Hadzikadri, November 19, 1999,p 71 (UNMIK in Kosovo).

These new provisions may raise, in their application, important factual and legal issues, e g. on how to discern which rebel groups or other de facto authorities control the State or a substantial part of its territory *and* provide sufficient protection (on this notion, see infra). As to international public organizations or missions what about safe havens within a state, or refugee camps under the auspices of the UNHCR ?

IV- 2. CONTENT

The Convention is silent on the notion of protection. Art. 7-2 provides a general definition of protection, which is made of several elements:

The actors must take "reasonable steps" to prevent persecution or serious harm.

How? *Inter alia* (the list is not and cannot be a closed one) by operating an "effective legal system" relating to acts constituting persecution or serious harm. This means able and impartial police forces, state prosecutors and courts. The applicant must have access

to such protection. As the UNHCR aptly remarked in its Comments of the Directive:" Determining the availability of protection requites an assessment of the effectiveness, accessibility and adequacy of available protection in the individual case". The terms "reasonable" and "effective" coexist in the text, probably as the result of a compromise.

IV-3. INTERNAL PROTECTION

May a Member State refuse to extend international protection to an applicant if there is no substantial risk of persecution or serious harm in part of the country? If so, what are the criteria to be used for such a determination? The reply to these questions in Art 8 may be summed up as follows.

States *may* do so.

They must then use the following criteria:

- There is no well-founded fear of being persecuted or no real risk of suffering serious harm in that part of the country.
- In such an examination Member States shall have regard both to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
- The applicant can reasonably be expected to stay in that part of the country.

Art. 8-1 may apply notwithstanding "technical obstacles to return to the country of origin".

The wording of Art 8-1 corresponds to the practice of some European countries and to the doctrine of the UNHCR, as stated in the Handbook (§ 81) and in the Guidelines on Internal protection: Internal flight or relocation alternative. National authorities seem to have a degree of discretion here. It is, however, limited by the case law of the European Court of Human Rights on Art. 3 ECHR. In Hilal v. UK , March 6, 2001,the Court found the UK in breach of Art 3 for having refused refugee recognition to and ordered the subsequent deportation of a Tanzanian national alleging the risk of torture in Tanzania, on the base that he could live safely in other parts of the country, i.e. in continental Tanzania. The Court found that such a risk existed and that the situation in continental Tanzania was far from being a satisfactory one. There was, in addition, a risk of extradition to Zanzibar. The Court held that it was not convinced that the internal flight alternative was a safe guarantee against ill-treatment.

The law and practice of European States has made overall a prudent use of such a clause. In France under Art L.713-3 of the Code on entry and residence of aliens and asylum recognition of refugee status may be refused if the conditions set in Art. 8 of the Directive are fulfilled. The Code adds that the competent authorities must also take into account, at the time of their decision, the author of persecution. When the new statute was referred to the Conseil Constitutionnel the latter underlined that the national

authorities must check that the applicant may safely accede to a substantial part of his country of origin and lead there a normal existence (Conseil Constitutionnel, November 20, 2003, n° 2003. 484 DC, p 438, at 459, § 17).
Here are some recent illustrations from the French case law (CRR):

- In Nacu, March 30, 2006, recognition of refugee status was refused to a Moldavian woman who had been living in Transnistria, where a self-proclaimed "Republic "existed, and alleged persecution as an opponent there. Even if one admitted that the facts alleged were true, the CRR held, the applicant does not establish that she could not have access to protection in Chisinau, the capital of Moldavia, where her parents lived, where she had been several times without meeting difficulties and where, in 2002, Moldavian authorities had issued her a passport and other identity documents.

- In Kasipillai Thalaiyasingam, July 20, 2004, p 54, the same refusal concerned in Sri Lanka, an applicant who had the possibility of settling in Colombo without fear of persecution .

- In Hyrije Bejtullahu, October 26, 2004, p 54, a decision relating to Kosovo, a Serbian national of Albanian origin who had the possibility of leaving North Mitrovica and return to her village of origin, where the majority of the population was Albanian was refused recognition of refugee status.

- For an example of recognition of refugee status in a case where internal flight was not feasible at all, see Boubrima, June 25, 2004, 52:B, an Algerian, who had been meeting in 1990, in his village, young Islamists. From 1995 on intense pressure was used against him to force him to join the Islamist terrorist groups. He refused but had to pay a sum of money and to accept to be an informant on the Algerian army movements in the region. In 1997, he was ordered to join the Islamists ranks and threatened with death if he refused. He left for Algiers where he lived for two years with his sister. In 1999, he went back to his village because the security situation had been improved. However, at the end of the year, he received a letter from the Armed Islamist Groups (GIA) demanding that he paid an important sum of money. A few weeks later, he barely escaped an attempt to kill him. When he went to the police station to have his complaint registered, he was advised to hide and the police was surprised to see that he was not armed. He went back to Algiers and left Algeria for France in 2001. Using the clause of the statute mentioned supra, the CRR held that, in view of the B's situation when he had been living in Algiers, where he could not find work and feared that the police would send him back to his village, it would not be reasonable to think that he could stay in Algiers without a risk of persecution.

V. LIMITATIONS AND RESTRICTIONS

V-1. CESSATION

Art. 11-1 of the Directive repeats Art 1-C of the Convention. There is, however, one difference: Art. 11-1 e) and F) do not include the second para of Art.1-C (5) of the Convention, under which the cessation clause contained in Art. 1-C 5, first para "shall not apply to a refugee (…) who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality". The Commissions initial proposal included this clause, which can make sense today as it did in post-war Europe. An apt illustration is the recent decision of the French CRR in Tabara, April 14, 2006: T, a Rwandan national of Hutu origin, had been forced to leave his country in July 1994 after the murder of members of his family in April. He himself had been gravely wounded by soldiers of the Front Patriotique Rwandais, because his father had been active in a political party and also because he himself had opposed recruitment by the FPR in his school. Having fled to Zaire, he feared for his life there because of the advance of D.Kabila's troops and the advance of Rwanda' Patriotic Army. Therefore, he went to nearby Central African Republic, where the authorities suspected him, in view of origins, to support the former President. Fearing for his life, he went to France. The CRR found that past persecutions had left important physical and psychological marks on him. It then added: The past circumstances alleged by T. do not allow to think that he has a well-founded fear of persecution *no* the exceptional gravity of past persecutions justifies his refusal to return to his country and to avail himself of the protection of the present (Rwandan authorities. T. was thus recognized as a refugee).

Art. 11- 2 is a welcome addition (See UNHCR Handbook, § 131).

V-2. EXCLUSION

Art. 12 of the Directive reproduces provisions of Art. 1- D,E and F of the Convention.

A few comments are in order.

- Art. 12 (a) is the reproduction of Art. 1-D of the Convention. The words "for any reason" must be given their normal, i.e. broadest meaning. This is what the Conseil d'Etat, France's Supreme Court for administrative law, did recently in the OFPRA decision, of November 26:

The applicant, A., was born in Syria in 1966, of Palestinian parents. He entered lawfully France in 1985, as the bearer of a travel document delivered to Palestinian refugees by the Syrian authorities. The French authorities gave him a residence permit. In 1998 he applied to be recognized as a stateless person under the 1954 New York Convention on the status of stateless persons. Art. 1, para 2 of this Convention is the replica of Art. 1-D of the Geneva Convention: Under it the 1954 Convention "shall not apply to persons who arte at present receiving from organs or agencies of the United nations other than the UNHCR protection or assistance. – When such protection or assistance has ceased

for *any reason* (my emphasis), without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the UN, these persons shall ipso facto be entitled to the benefits of this Convention". This means, the Conseil d'Etat held, that a person which is outside the zone where UNRWA operates cannot benefit any more of its protection or assistance. The lower court had thus been right to hold that since A's entrance into France in 1985, he had been residing for a long time outside the zone of activity of UNRWA. For this reason he could not be considered as continuing to benefit from its assistance. Nevertheless, OFPRA, the State Agency in charge of refugee and statelessness determination, alleged that since A had voluntarily given up UNRWA's assistance, he could not be recognized as a stateless person. The Conseil d'Etat rejected this position.

Four years earlier, in the UK, a tribunal had taken a narrower position, construing "ceasing" as meaning the withdrawing by a UN Agency, of its support, and not the fact that the individual had simply decided to leave the territory where he was registered and receiving assistance (Ali and Daray v Secretary of State for the Home Office, 2002, EWCA civ 1103; 2003 1 WLR; 2003 Immigr. AR 179. In its Comments on the Directive, the UNHCR recommends the consultation of its Note on the Applicability of Art.1-D of the Convention to Palestinian Refugees (2002).

Art. 12-1 b) contains a slight addition to Art. 1-E of the Convention, i. e. "rights and obligations equivalent…", which can be read as a minor restriction.

A more serious difficulty may arise due to the wording of Art. 12-2 b):under it a person is excluded from being a refugee where there are serious reasons for considering that he has committed a serious non-political crime outside the country of refuge prior to his admission as a refugee *which means the time of issuing a residence permit based on the granting of refugee status*. This is inconsistent with the principle, mentioned above, according to which the recognition of refugee status is a declaratory act (Recital 14). This means that such recognition is retroactive: the individual must be considered as having been a refugee since he entered the country. Accordingly, a Member State may not use Art 12-2 b) to exclude a refugee because he committed a serious non-political crime outside the country of refuge before he entered it.

The meaning of "serious non-political crime" and of "cruel actions, even if committed with an allegedly objective" (Art. 12-2 b) is contained in the current extradition law on practice of Member States.

The scope of Art 12 -2 is extended by Art.12-3 to persons who instigate or otherwise participate, e.g. as accomplices, to the crimes or acts mentioned above.

V-3. REVOCATION, ENDING OR REFUSAL OF THE RENEWAL OF REFUGEE STATUS

These provisions, contained in Art 14 apply to applications filed after the entry into force of the Directive and which have led to the recognition of refugee status.

Revocation, ending or refusal of renewal refugee status is compulsory (“shall”) in two cases under Art. 14-3: application of the exclusion clauses of Art 12; misrepresentation or omission of facts, use of false documents *when decisive* for the granting of refugee status.

Such decisions are optional (“may”), under Art. 14-4 in two situations:

- There are reasonable grounds for regarding the refugee as a danger for the security of the State.
- The individual has been convicted for a particularly serious crime by a final judgment and constitutes, for that reason, a danger for the community of the State.

In these two situations, Member States may also, under Art. 14-5, refuse to *grant* refugee status. This is an innovation, consisting in an extension of exclusion clauses. Under the Convention such situations area ground for the expulsion of refugees on the grounds of national security and public order (Art. 32-1) or for refusing him the benefit of the non refoulement clause (Art.-2).In both cases the individual does not cease to be a refugee.

Art. 14-6 may be read as a kind of recognition of some unease and of the dangers that may result from an indiscriminate implementation of Art. 14-4 and 5 hence a paradox or a contradiction: individuals who are not refugees will nevertheless enjoy the benefit of a number of rights set out in the Convention or of rights similar to them, including those contained in Art. 31 to 33.

VI. SUBSIDIARY PROTECTION

Subsidiary protection is a novelty in international refugee law. It is a creation of the Directive. Its aim is to provide an international protection other than refugee status to those who need it.

VI-1. SCOPE

The scope of subsidiary protection is dealt with in Art.2 e) and 15 of the Directive. It is the result of the combination of several elements:

The person is a third country national, or a stateless person, who does not qualify as a refugee. He may or may not have applied for refugee status. He is not bound, under the Directive, to apply first for refugee status.

There are substantial grounds to believe that, if returned to his country of origin or of habitual residence, that person would face a real risk of suffering serious harm. While the test for refugee status ("a well -founded fear…") contains both an objective and a subjective element, the test here is an objective one.
The notion of serious harm, which is different from that of fear of persecution, is defined in Art. 15. Several remarks are in order.

There is no link with the classic Convention grounds stated in its Art. 1-A. If such a link existed, refugee status would tend to apply.

The harm must be a "serious" one. Such a notion and threshold can be found elsewhere in the Directive, in relation either to refugee status (see Art. 9-1:" a severe violation of Human rights") or to exclusion clauses (See Art. 12-2 b:" a serious non - political crime" and 14-4 b:" a particularly serious crime").

Serious harm can be any of the three components stated in Art. 15:

Death penalty or execution. The latter includes killings without trial or "crimes of honor" perpetrated against women in certain countries.

Torture or inhuman or degrading treatment. The case law of the European Court of Human Rights on Art. 3 ECHR provides appropriate guidance here.

Art. 15-c) reads: "serious and individual threat to a civilian's life or person by reasons of indiscriminate violence in situations of international or internal armed conflict". The threat to life or person should be both " serious" and " individual". The latter adjective must be interpreted and qualified in relation with the expression "indiscriminate violence" during internal or international armed conflicts. Indiscriminate violence is general by definition and may target whole parts of the population. The person must be a civilian, i.e. someone who does not belong to armed forces

Here are recent illustrations of the application of the notion of "indiscriminate violence" in the case law of the French CRR.

- In Abdul Rahamn Mohamed, October 12, 2006, the applicant was a Sudanese national belonging to the Four ethnic group. He lived in West Darfour. Militias attacked his town in February 2004 and used violence against the population. His younger brother the disappeared. He fled and succeeded in finding his family again in the mountains. His other brother, who had remained in his village, bought a gun and organized its defence, together with the applicant. His brother was arrested after having betrayed by Arab inhabitants. He then fled again to the mountains. In November 2004 his village was attacked again, and this led to many casualties. The applicant was exposed to a grave, direct and individual danger threatening his life because of his involvement in the defence of his village. He fled a situation of generalized violence, an outcome of the armed conflict in Darfour and was granted subsidiary protection.

- In Alazawi, February 17, 2006, the applicant was an Iraqi national, member of the Baas party, and a former accountant in the financial branch of the President's office. He supervised the logistics of a Yugoslav company in charge of preparing the plans of four presidential residences. In 1991, after the invasion of Kuwait by Iraq, he was instructed to list Kuwaiti property to be transferred to Iraq. After the end of the war, he became in charge of reconstruction projects as an accountant and was promoted. He stayed until the American invasion in 2003. In March of that year he was threatened and attacked by opponents to Saddam Hussein's regime. Fearing both the Americans and his compatriots, he left Iraq. There was an arrest warrant against him. Recognition as a refugee was refused to him. The CRR then considered whether the French statutory provisions implementing Art. 15 -c) and 6 (Actors) of the Directive could apply. The general situation prevailing in Iraq was duly taken into consideration. It was characterized, the CRR held, by a climate of generalized violence resulting in a high number of bombings and violence directed against particular groups and originating in the conflict between on the one hand Iraqi security forces and the Coalition ones and, on the other hand, armed groups. The later organized, the CRR went on, in certain parts of the territory continuous and concerted military operations. Such a situation, it was held, should be regarded as a situation of generalized violence resulting from a situation of internal armed conflict. The applicant was exposed to grave actions of reprisals by armed groups or uncontrolled elements. The danger for him was grave, direct and individual, linked to his former activity as a member of the Baas party. His protection could not be provided by the authorities. He was granted subsidiary protection.
- In Kona, same date, the same decision was taken, on identical grounds, for an Iraqi woman, an Assyro-Chaldean Christian. Her religious denomination, her situation as an isolated women and the suspicion arising from her alleged affluence, together with the total absence of protection, led to the refusal of refugee status and the granting of subsidiary protection.

The criteria contained in Art. 15 are much more restrictive than those stated in the initial proposal of the Commission. The latter mentioned a) Torture and other prohibited treatments; b) Violation of a human right sufficiently severe to engage the Member State international obligations; c) A threat to his of her life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict or as a result of systematic or generalized violation of human rights. But again these are minimum standards and Member States may use more liberal ones.

VI-2. CESSATION AND EXCLUSION

As in Art.11 relating to refugees, the "compelling reasons" clause contained in Art. 1-C 5 of the Convention has been omitted.

There are some differences between Art. 17 of the Directive and Art. 1-F and 33-2 of the Convention, especially on the nature of crimes committed by the individual. The main one is in Art. 17-3.

- Art. 19 replicates the corresponding Article relating to refugee status.

VI-3. REVOCATION, ENDING OR REFUSAL TO RENEW SUBSIDIARY PROTECTION STATUS

VII. THE CONTENT OF INTERNATIONAL PROTECTION: RIGHTS AND BENEFITS

This applies both to refugees and to persons eligible for subsidiary protection. The content of international protection is described in Art. 20 to 34 of the Directive. I have chosen not to study in detail all their provisions and to concentrate my comments on the most important clauses.

VII- 1. VULNERABLE PERSONS

Under Art. 20-3 and 4 Member States must take into account, when implementing the Directive chapter on the content of international protection, "the specific situation of vulnerable persons" and their "special needs". The enumeration that follows is not a closed one (hence the words" such as") and cannot be one.

- Minors:

  Art. 20-5 repeats the wording of Art. 3-1 of the 1989 Un Convention on the Rights of the Child, according to which , in all the decisions of public or private institutions the best interest of the child shall be a primary consideration. Unaccompanied minors, a frequent situation in refugee law, are specifically mentioned in Art. 20-3 and 30.

- Disabled people.
- Elderly people.

- Women are mentioned in several capacities, as pregnant, single parents with minor children and victims of sexual violence.
- Persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

VII-2. PROTECTION FROM REFOULEMENT

Member States are reminded of their international obligations (Art. 4), which includes Art. And 33 of the Convention and other such instruments as the ECHR (Art. 3), the UN and European Conventions on Torture and inhuman and degrading penalties or treatments. As in the Convention, protection against *refoulement* is not an absolute one. Art. 21-2 a) and b) repeats Art. 33-2 of the Convention. Art. 21-3 adds a new clause allowing the State to revoke, end or refuse to renew or grant the residence permit of a refugee to whom Art 33-2 applies, which amounts to expulsion.

VII-3. FAMILY UNITY

A definition of the family is to be found in Art. 2 h) of the Directive:

- It must have already existed in the country of origin.
- Its members must be present in the same Member State.

"Family" means:

- The spouse of the beneficiary of international protection, or the unmarried partner in a stable relationship.
- Minor children of the couple or of the beneficiary of international protection, if they are unmarried and dependent, including those adopted or born out of wedlock.

The principle of family unity is not explicitly mentioned in the Convention. Its drafters, however, were aware of family issues and of the law applying to them, as shown by several Articles of the Convention: Art. 4 (religious education of refugees' children), 22 (education) and 1 (family allowances).The Specimen Travel Document annexed to the Convention mentions children accompanying the holder. The Final Act of the UN Conference of Plenipotentiaries which adopted the text of the Convention adopted five recommendations. According to Recommendation B: "The unity of the family (…) is an essential right of the refugee (…). Such unity is constantly threatened". The conference recommended Governments "to take the necessary measures for the protection of the refugee's family" (Text in UNHCR Handbook,pp.-58). Besides the Convention should not be read in isolation from other international human rights instruments such as the ECHR (Art. 8) or the UN Convention on the Rights of the Child.

Under French law it is a general principle of law applying to refugee law, derived from the very definition of a refugee under the Convention that the spouse of the refugee is also entitled to refugee status if he or she is of the same nationality and if the marriage pre-existed to the application. The same applies to their minor children if they were minor when they entered France (Conseil d'Etat, Agyepong, December 2, 1994,p 523, which I commented in(1995) Public Law.182.).

In 2006 the French CRR took a remarkable decision. Miss Gomes Betuncal had entered France in February 2002, aged 17, in order to meet her father, an Angolese national, who had been recognized as a refugee in 1991. A few months later, in September 2002, the father was naturalized, but OFPRA, the State Agency, did not withheld his refugee status from him and did not use the cessation clause, but refused her refugee status. On appeal the CRR held that the father's naturalization led for him to a higher degree of protection. However this could not deprive him of his rights as a refugee. One of them was the protection of his child, a minor when she entered France. Miss Gomes Betuncal was thus recognized as a refugee on the ground of family unity.

States may go further and apply Art. 23 to other close relatives if two conditions are met: they have been living together as part of the family when they left the country of origin and they were dependent on the beneficiary of international protection. In Trin, July 28, 2004, which I commented in (2005) Public Law.410, the French Conseil d'Etat held that the ascendants, who are dependent members of a refugee's family ,were also entitled to recognition as refugees if the situation of dependency existed in the country of origin before their arrival in France , if they are of the same nationality as the refugee and if it has led to a decision in France placing the dependent person under the guardianship of the refugee. The decision mentions ascendants because the case related to them. It does not, in my opinion, close the door to other dependent members of the refugee's family, such as sisters or brothers. The Directive uses the words "other close relatives".

The link between the principle of family unity and Art. 8 ECHR and the relevant case law of the European Court of Human Rights is obvious.

LAST REMARK: Under Art. 23-2 Member States shall ensure that family members of the beneficiary of refugee status or refugee protection status who do not individually qualify for such status are entitled to claim the benefits referred to in Art. 24-34. This relates to residence permits, travel documents, access to employment, education, social welfare, health care, access to accommodation, integration facilities, repatriation. Such benefits, however, may be refused, reduced or withdrawn for reasons of national security or public order.