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# Fixed definitions or framework legislation? The delimitation of subsidiary protection *ratione personae*

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## Introduction

Drafting the planned Directive on Subsidiary Protection (henceforth "Directive"), imposes a large number of choices on EC institutions, among which the question of the delimitation of its circle of beneficiaries is perhaps one of the more prominent. To be sure, the Dublin Convention and its successor instrument will only function smoothly if Dublin transfers do not undercut protection under international law. This presupposes that member states share a common understanding of protection obligations, and their scope ratione personae. In the end, an overtly vague Directive augments the risk of deviating interpretations and, as a consequence, of Courts objecting to Dublin transfers. Avoiding vagueness means making choices. It is the purpose of this text to outline some of the choices with which the drafters are faced.

How broad or how narrow should the group of persons be defined which are to benefit from the future Directive? One may seek orientation in domestic law, in international law, or in the arrangements provided for in other regions than Europe. Looking at domestic law is helpful only to a limited extent, as Member states display an impressive diversity in this regard.[1]

It might be tempting to aim at an a maximalist approach and to include any group which at least one Member State refrains from removing due to humanitarian considerations. Another markedly progressive approach would be an emulation of the OAU Convention's protective scope, which includes the victims of generalized violence.[2] However, within the given timeframe, it appears unlikely that member states would be prepared to adopt either of the latter approaches in the form of a binding instrument of community law.

To be sure, the discussion on subsidiary protection is posited in an environment of multiple protection mechanisms. The first would be protection provided under the 1951 Refugee Convention, the second subsidiary protection. Third, there would be a residual domestic competency to provide protection to groups neither covered by international or community law, on the basis of what one could properly call compassionate grounds, beyond all obligations of international law.[3] Fourth, there would be the mechanism of temporary protection, possibly overlapping with the other three categories, but strictly limited to situations of mass influx.

In this environment, it appears reasonable to base the concept of subsidiary protection firmly on the ground of international law. This entails two delimitations. First, such protection should take into account international protection obligations other than

[1] Council of the European Union, Compilation of replies received to the Questionnaire on Alternative Forms of protection to refugee status under the 1951 Refugee Convention, Brussels, 12 October 2000, Doc. No. 12261/00.

[2] See *inter alia* ILPA/MPG, The Amsterdam Proposals, Directive 2000/01f, art. 7 (1).

[3] True enough, such a residual competency makes the outcome of asylum applications filed within the Union less predictable than under a completely uniform system of protection categories. However, it has to be kept in mind that art. 63 (1) (c) and (2) (a) TEC speaks of "minimum standards", and that "harmonisation" does not necessarily imply a fully uniform system. With a view to the Dublin Convention and its successor Regulation, differences in the protection offer of member states are only problematic if and where these differences engage protection obligations grounded in international law. Per definition, compassionate grounds for refraining from removal to not engage such obligations.

those provided for in the Refugee Convention. Second, persons whose non-removal and protection would flow from moral considerations ("compassionate grounds") rather than those of international law are left to the domestic law and practice of individual member states.

Basing the concept of subsidiary protection on the ground of international law begs further specification. The following formula is suggested: generally, a directive on subsidiary protection should explicate obligations of international law, universal or regional, which are binding for all present member states. Given the limited timeframe for the drafting and adoption of the directive, it seems unrealistic to go further than that.

Additional support can be drawn from a coherence argument: the planned Directive on a harmonised application of art. 1 A (2) of the Refugee Convention is also limited to explicating provisions of an instrument binding for all member states. Should the drafters of the Directive on Subsidiary Protection take this approach, no attempt would be made to make new ratione personae protection obligations incumbent on Member states. Rather, the Directive would clarify protection obligations already existing under international law, and create a framework under EC law for their implementation.

Finally, one should note that the future Directive is not to be limited to third country nationals. Neither the wording of article 63 (2) (a) ("minimum standards … for persons who otherwise need international protection"), nor the content of the Spanish Protocol suggests that European Union citizens be excluded.[4]

**Relevant international law**

A first step towards delimitation ratione personae would be to single out legal instruments which are relevant in the context of subsidiary protection. Special regard should be had to what extent such obligations overlap.

The only explicit prohibition of refoulement relevant in this context[5] is art. 3 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment:[6]

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

[4] Such an exclusion would entail potential conflicts with prohibitions of discrimination in international law and EC law.

[5] I choose to disregard from the explicit prohibition of refoulement contained in art. 45 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Due to its strong textual linkages to the 1951 Refugee Convention, this provision should ideally inform the drafting of the Directive on the qualification of nationals of third countries of refugees. Whether or not this is in keeping with the mandate of art. 63 (1) (c) TEC cannot be discussed here. Article 45, although theoretically of relevance, shall be regarded as consumed by other prohibitions of refoulement for the purposes of this text.

[6] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85 [hereinafter CAT].

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

Certainly, the lacking ratification of Belgium and Ireland may raise questions as to whether CAT should at all be included in this survey. Strictly speaking, art. 3 CAT is not an obligation binding on all member states at the present time. However, it is suggested that one should take a forward-looking perspective in this regard, and include CAT into our analytical framework.[7]

Beyond art. 3 CAT, we are confronted with a number of norms which contain an implicit prohibition of refoulement. The basic assumption underlying such implicit prohibitions of refoulement is that states are responsible for violations of human rights or humanitarian law by other actors to the extent their own action or omissions contribute to such violations. Notorious provisions are the implicit prohibition of refoulement contained in various prohibitions of torture and other forms of ill-treatment (art. 3 ECHR, art. 7 ICCPR and art. 37 (a) CRC). All of the quoted instruments are binding upon member states.

In particular, the jurisprudence of the European organs under the ECHR has contributed critically to develop and clarify the relevance of extraterritorial threats to Contracting Parties' human rights obligations. The named provisions, the monitoring mechanisms and relevant jurisprudence are well known, and shall not be analysed here.[8]

**Identifying the extent of non-refoulement obligations**

Implicit prohibitions of refoulement confront the drafters of the Directive with two questions. First, it must be asked whether other provisions of the ICCPR, the ECHR and the CRC also imply prohibitions of refoulement. Or, put generally, do all human rights contain ancillary prohibitions of refoulement? Second, how are we to identify the delimitations of such implicit prohibitions of refoulement? Are they co-extensive with the human rights guaranteed in the domestic context?

Let us shed light on the first question by drawing on the ECHR. The jurisprudence of the European organs[9] indicates a preparedness to consider non-refoulement under arts.

[7] Two arguments militate in favour of inclusion. First, already by signing a treaty, a state accepts an obligation not to defeat the object and purpose of that treaty until it has made its intention clear not to become its party (art. 18 (a) VTC). Second, the core content of art. 3 CAT is identical with the implicit prohibition of refoulement to torture contained *inter alia* in art. 3 ECHR.

[8] See *inter alia* B. Gorlick, "The Convention and the Committee against Torture: A Complementary Protection Regime for Refugees" (1999) 11 *IJRL* 479, and G. Noll, *Negotiating Asylum. The EU acquis, Extraterritorial Protection and the Common Market of Deflection* (Martinus Nijhoff Publishers, The Hague, 2000), pp. 364-377. On art. 8 ECHR, see *inter alia* A. Sherlock, "Deportation of Aliens and Article 8 ECHR" (1998) 23, *European Law Review* 62.

[9] For an overview with further references, see Noll 2000, p. 454-458.

2, 6 and 8 ECHR, and art. 1 P6[10]. A close reading of the texts entails the conclusion that there is no hierarchy among the rights guaranteed in Section I ECHR and in the Protocols.[11] So far, it has to be concluded that all human rights in the ECHR may impact the legality of removal. Whether they actually will, depends on other factors, most notably the wording of each specific right.

First, it should be recalled that the ECHR has repeatedly stressed the exceptional character of extraterritorial protection under the Convention. It has underscored that its article 1, ECHR,

> cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention.[12]

Why is that so? The actor ultimately inflicting the harm unto the individual is per definition not the State from which subsidiary protection is sought, but a third party outside State territory. For the latter state to be responsible for the infliction of harm, there must be a sufficient causal link between its actions or omissions and the infliction of harm. Causality is a matter of degree, and the precise degree needed for the triggering of subsidiary protection can only be stated after analysing the precise wording of a relevant human rights provision. This brings us to the next step.

Second, and with a certain degree of generalisation, human rights provisions are a composite of negative and positive obligations.[13] Taking the example of torture under the ECHR, it is clear from the wording of art. 3 ECHR that no one shall "be subjected" to torture, and that Contracting Parties are under an obligation to "secure" that right according to art. 1 ECHR. Art. 3 ECHR is an example of a predominantly negative right, backed up by the positive obligation in art. 1 ECHR. Moving on to art. 8 ECHR, we note that Contracting Parties are obliged to "respect" private and family life – which covers negative as well as positive obligations. Finally, looking at art. 37 (a) CRC, it emerges that Contracting Parties take upon themselves to "ensure" that no child "shall be subjected" to torture, which provides another example for the combining of negative and positive elements in the construction of human rights. Thus, the degree of positive obligations inherent in the formulation of a right determines the existence and reach of an implicit prohibition of refoulement. The more predominant positive obligations are in the formulation of a right, the stronger is a claim for non-refoulement under that right.

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[10] Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of Death Penalty, Strasbourg, 28 April 1983, E.T.S. 114 [henceforth P6].

[11] For a full argumentation, with further references, see Noll 2000, pp. 458-461, and S. Zühlke and J.-C. Pastille, "Extradition and the European Convention - Soering Revisited" (1999) 59 *ZaöRV* 749. Lamentably, art. 7 of the ILPA/MPG directive 2000/01f contains a reference to "fundamental human rights" entailing subsidiary protection. This begs the question which rights are fundamental, and exactly how such a separation is supported by the text of relevant instruments.

[12] ECHR, *Soering vs. the U.K*. Judgment of 7 July 1989, Series A, No. 161 [henceforth Soering], para. 86.

[13] Positive obligations usually come together with considerable restriction options.

Third, the concept of positive obligations is an elusive one, and their precise reach can only be assessed in casu. Thus, it would be impossible to lay down an exhaustive definition of such obligations ratione personae in a future Directive. In assessing whether or not removal is permitted under the ECHR or under other human rights instruments, it has to be determined to what extent the facts of the case fall within the extent of positive obligations. The facts of the case are a composite of two elements. The first relates to the degree to which the invoked right is violated upon return, while the second consists of the degree of predictability that this intrusion will materialise.

**A tool-box of possible solutions**

The drafting of the future Directive could pursue a two-track approach with regard to its applicability ratione personae. One track would consist of specific provisions prohibiting removal. These would draw on those human rights most frequently invoked in the context of subsidiary protection. The second track would offer a framework provision guiding the in casu assessment of the decision-maker with regard to other rights than those catered for in the specific norms.

To be sure, the specific provisions are but concrete manifestations of the framework provision. Therefore, one might think specific provisions to be superfluous. However, it must be underscored that the application of the framework provision will always entail a certain degree of indeterminacy, which can be to the detriment of both claimants and decision-makers. Going to the other extreme by spelling out all conceivable obligations not to refoule in the form of specific norms, would negate the dynamic inherent in the development and application of human rights. Having excluded both extremes, we must face the question exactly which human rights should be catered for in specific provisions, and which should be left to the framework provision.

I would like to propose a number of building blocks, rather than a monolithic solution. Below, I shall set out a number of "modules", which could inform the Directive's delimitation ratione personae. Provided that the framework provision is represented in it, any combination of modules is conceivable and should work without unduly excluding beneficiaries of non-refoulement obligations flowing from human rights instruments. This is so because the framework provision contains the principle informing such obligations, albeit on a rather abstract level. Now, the drafters may choose to what degree they wish to specify this obligation – namely by including one or more specific provisions.

Having said that, I would like to express my preference for a solution which at least contains a specific provision related to torture and other forms of ill-treatment (Module 1), and the framework provision (Module 5). One could then add the modules on the right to life, the right to a fair trial or the right to family life, or any combination of them. Conversely, a solution solely featuring Module 1 is simply too narrow and will remain a half-measure.

*Module 1: Torture and other forms of proscribed ill-treatment*

Capturing the content of art. 3 CAT, art. 3 ECHR, art. 7 ICCPR and art. 37 (a) CRC can be done either in a synthesis provision, or by way of a detailed replication of the content of each provision.

The first alternative would draw on the language of art. 3 CAT, and merely add on the forms of ill-treatment not covered by art. 3 CAT, but addressed in art. 3 ECHR, art. 7 ICCPR and art. 37 (a) CRC. Using a maximum of CAT language appears to be the most reasonable solution, as this language has been explicitly endorsed by state actors, and constitutes the bottom line obligation for a large majority of member states. Consequently, in the remaining modules, CAT language shall also be used where appropriate.

*Alternative A:*

> No member state shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman or degrading treatment or punishment.

The second alternative would be to split this provision into two, which allows for a greater faithfulness to all instruments involved. Paragraph a) would reflect art. 3 CAT, while paragraph b) would merge the content of art. 3 ECHR, art. 7 ICCPR and art. 37 (a) CRC.

*Alternative B:*

a) No member state shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

b) No member state shall remove a person to another State where substantial grounds have been shown for believing that he or she faces a real risk of being subjected to cruel, inhuman or degrading treatment or punishment.

The faithfulness to the original formulations is, however, bought at the price of greater complexity for the decision-maker.

Furthermore, it is doubtful whether or not the different formulation of the requirements of proof and risk in art. 3 CAT and in ECHR jurisprudence on art. 3 ECHR actually reflect material differences. "Substantial grounds", "real risk" and "danger" are concepts which have to be construed by the decision-maker before being applied. It is doubtful whether detailed prescriptions in this regard would really bring about any substantial harmonisation, or whether the general indeterminacy of questions related to proof and risk would prevail. Against this backdrop, Alternative A appears to be the better choice.

*Module 2: The right to life*

This module combines a specific prescription with a residual provision approximating the framework module. Paragraph a) adapts the content of art. 1 P 6 ECHR to the context of refoulement, again using language inspired by art. 3 CAT. Paragraph b) is subsidiary to paragraph a), and shall cover other cases of intentional deprivation of life, thus reflecting art. 2 ECHR and art. 6 ICCPR.

No member state shall expel, return ("refouler") or extradite a person to another state:

a) Where there are substantial grounds for believing that he or she would be in danger of being condemned to the death penalty or of being executed, or,
b) Where such removal would otherwise amount to an intentional deprivation of his or her life.

An alternative to this formulation would be to delete paragraph b) subject to the understanding that the framework provision in Module 5 would cover cases which had otherwise been covered by this paragraph.

*Module 3: The right to a fair trial*

Formulating the impact of the right to a fair trial in a context of non-refoulement must involve a certain degree of abstraction, if lengthy enumerations are to be avoided. Our first alternative draws on the language of the ECHR in Soering. The Court,

> does not exclude that an issue might exceptionally be raised under art. 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country.[14]

This position was reiterated by the Commission in the Kozlov case.[15] The "flagrant denial" language reflects that not any violation of art. 6 ECHR will do, but that the obligations of State Parties to the ECHR are only engaged where such a violation is of a certain magnitude. The term "flagrant" should, on the other hand, not be construed as solely covering very intense violations of the right to a fair trial.

*Alternative A:*

> No member state shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he or she would suffer a flagrant denial of fair trial.

The second alternative would be to avoid the term "flagrant" and to rely on the entitlement to a fair trial in art. 6 ECHR as well as on the positive obligations to "ensure" a fair trial in art. 1 ECHR.

[14] Soering, para. 113.
[15] European Commission for Human Rights, *Kozlov vs Finland*, Decision of 28 May 1991, Appl. No. 16832/1990, Decisions and Reports 69 (1991), para. 332.

*Alternative B:*

> No member state shall expel, return ("refouler") or extradite a person to another State where such removal would engage the Member State's obligations to ensure a fair trial.

The interpretation of both alternative formulations should be informed not only by the detailed provisions of art. 6 ECHR, but also by those in art. 14 ICCPR. Furthermore, the mandatory grounds for refusal of extradition named in art. 3 of the UN Model Treaty on Extradition[16] could also have indicative value in this context.

*Module 4: The right to family life*

The right to family life could be handled in its totality in the Directive, or it could be split into two areas, of which only one would be dealt with in the Directive.

The latter alternative would draw on a formal approach. Strictly speaking, only such disruptions of family life are relevant in the context of subsidiary protection which are caused by extraterritorial factors. Cases where the implementation of removal in itself would separate a family present in the member state fall outside the concept of "international protection" alluded to in art. 63 (2) (a) TEC. Such cases could then be dealt with in other areas of community law, e.g. an instrument dealing with family unity. However, a pragmatic approach would suggest that all disruptions of family life due to removal be dealt with in one and the same framework, and thus within the Directive. I shall proceed on the assumption that this is to be preferred.

Given that a scrutiny of removal decisions under art. 8 ECHR is a process involving multiple steps, a relatively abstract formulation is suggested:

> No member state shall expel, return ("refouler") or extradite a person to another State where such removal would engage the member state's obligations to respect his or her private and family life.

It should be made clear that decision-makers are expected to adopt the methodology elaborated by the European organs in the application of art. 8 ECHR: First, the existence of family life in the sense of art. 8 ECHR is pondered; second, it is asked whether or not there would be an interference with family life; and third, it has to be assessed whether or not such interference would be justified. The ECHR has made explicit reference to the fact that art. 8 ECHR entails positive obligations for

[16] This provision reads as follows: "Extradition shall not be granted in any of the following circumstances: […] (f) […] if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights, article 14; (g) If the judgement of the requesting State has been rendered in absentia, the convicted person has not had sufficient notice of the trial or the opportunity to arrange for his or her defence and he has not had or will not have the opportunity to have the case retried in his or her presence." UN Model Treaty on Extradition, 14 Dec. 1990, UN Doc. No. A/RES/45/116. While not binding as such, this instrument might be of some use when analysing the *opinio juris* with regard to the permissibility of extradition under customary international law. As stated earlier, an analogy can be drawn to removal other than extradition.

Contracting Parties.[17] The weighing process entailed by the assessment of positive obligations takes place within the third step, which addresses the question whether or not an interference is justified.

To be sure, the interpretation of this provision shall also be informed by art. 17 ICCPR and art. 9 (1) CRC.

*Module 5: The framework provision*

The framework provision should consist of two elements. In its first paragraph, it should be made clear that the danger of a human rights violation outside the removing member state is a necessary, but not sufficient condition for the grant of subsidiary protection. Therefore, an additional element must be added, which addresses the positive obligations incumbent on member states in that context. Given that this provision is of considerable abstraction, it is advisable to add a paragraph assisting decision-makers to identify the extent of obligations, and pointing out the most important factors in that process. These are the severity of the risked violation and the probability of its materialisation. The greater a violation, the lesser probability for its materialisation is required to trigger obligations incumbent on a member state.

> No member state shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to a violation of a human right, and that such a violation would engage the member state's obligation to secure that right.
>
> When assessing the extent of the obligation to secure that right, recourse shall be taken, in each case, to the severity of the risked violation and the probability of its materialisation.

As an alternative, the deletion of the second sentence could be considered, subject to the understanding that the first sentence implied the method described in it.

[17] See *e.g.* ECHR, *Ahmut vs. the Netherlands*, Judgment of 28 November 1996, para. 63.