This report is comprised of three parts. Part I is a brief overview of European Union and Canadian systems of complementary protection, with particular reference to French practice, written by Dr Jane McAdam of the Faculty of Law, University of Sydney. Part II is comprises two related country reports on France, written respectively by Vera Zederman and Laurent Dufour of the Commission des Recours des Réfugiés in France. Part III is a country report on Canada, written by Jessica Reekie, Law Clerk to Madam Justice Carolyn Layden-Stevenson (Federal Court of Canada), under the supervision of Justice Layden-Stevenson.
PART I: OVERVIEW

Jane McAdam

The first report of the Working Party on Convention Status and Subsidiary Protection comes at an opportune time: by 10 October 2006, the participating Member States of the European Union were supposed to have transposed the Qualification Directive\(^1\)—the first supranational instrument containing a definition of and status for ‘beneficiaries of subsidiary protection’—into national law, although as at 9 October, the European Commission had only received six (out of 24) instruments of transposition.\(^2\)

The Qualification Directive was adopted on 29 April 2004, following a two-and-a-half year drafting process, and has been described as ‘unquestionably the most important instrument in the new legal order in European asylum because it goes to the heart of the 1951 Convention Relating to the Status of Refugees’.\(^3\) In addition to ‘clarifying’ the constitutive elements of the Convention refugee definition and ensuing status, it seeks to establish a harmonized approach towards de facto refugees in the Members States of the EU—called ‘beneficiaries of subsidiary protection’—by setting out the eligibility criteria for persons with an international protection need falling outside the scope of the 1951 Refugee Convention, and codifying their resultant status. In doing so, the Qualification Directive is the first supranational instrument to elaborate a distinct status for extra-Convention refugees.\(^4\)

It was propelled by the idea that the creation of a harmonized set of criteria ‘should help to limit the secondary movements of applicants for asylum between Member States, where such movement is purely caused by differences in legal frameworks’.\(^5\) However, while unique in its establishment of a supranational system of complementary protection, the Qualification Directive represents a synthesis of existing EU Member State practice, rather than a radical re-thinking of international protection needs. It has been criticized for ‘equalizing down’ at the refugee’s expense,\(^6\) adopting minimum standards which do not preclude Member States with higher standards in place from reducing them.\(^7\) It did not derive from a systematic, principled analysis of protection obligations under international and regional human

---

rights and humanitarian law, but developed as a pragmatic instrument of compromise, seeking to balance the divergent political views of the various Member States. As such, it may be described as a regionally-specific political manifestation of the broader legal concept of complementary protection.\(^8\)

Although transposition of the Qualification Directive into national law was not required until 10 October 2006, it was given effect in France from 1 January 2004. French decision-makers have therefore been interpreting and applying the Qualification Directive for almost three years, and their experiences provide a useful case study for the EU Member States that are only just beginning to consider subsidiary protection claims in accordance with the Directive for the first time.\(^9\) The second part of this Report examines how the Directive’s provisions on subsidiary protection have been implemented in France, and highlights potential issues of concern for the other Member States currently embarking on this exercise.

An important counterpart to the European system, considered in the third part of this Report, is the Canadian model of complementary protection, which has been operating in its present form since 2002. Extra-Convention protection is conceived of quite differently in Canada. Whereas the EU Qualification Directive establishes a protection hierarchy, according Convention refugees a higher status than beneficiaries of ‘subsidiary’ (secondary) protection,\(^10\) Canadian law provides an identical status for refugees and other persons in need of international protection.\(^11\) This better reflects States’ obligations under human rights law, and avoids additional litigation relating to the ‘upgrading’ of status.\(^12\)

1 Comparative Scope

In the EU, a beneficiary of subsidiary protection is defined in article 2(e) of the Qualification Directive as:

---

\(^8\) On this point, see J McAdam, ‘The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime’ (2005) 17 IJRL 461, 462. During discussions in the EU, Commission Services described subsidiary protection as an asylum issue that was ‘more of a political nature’: Note from Commission Services, ‘Horizontal Issues in the Asylum Proposals’ 13636/01 ASILE 53 (9 November 2001) 2. ‘Complementary protection’ describes protection granted by States on the basis of an international protection need outside the 1951 Convention framework, based on a human rights treaty or on more general humanitarian principles, such as providing assistance to persons fleeing from generalized violence.

\(^9\) Lithuania also implemented the Directive early, but based its law on a draft of the Directive which contained more expansive subsidiary protection provisions: Law on the Legal Status of Aliens (29 April 2004) No IX-2206 (Official Gazette No 73-2539, 3 April 2004). The United Kingdom, had, in effect, already incorporated a number of the Directive’s underlying ideas in a 2002 revision of the law (Nationality, Immigration and Asylum Act 2002), but did not formally implement it until October 2006.

\(^10\) This is clearly reflected in France, where beneficiaries of subsidiary protection are entitled to a one year residence permit, which may or may not be renewed, compared to the ten year ‘carte de résidence’ to which Convention refugees are entitled: Admission and Residency of Aliens and Asylum Code, art L.313-13. Furthermore, subsidiary protection may be withdrawn for national concerns about public order, such as criminal offences, whereas Convention status may not be: art L-712-2(d).

\(^11\) This is also reflected in the terminology: in the Canadian report below, ‘refugee protection’ is used to described the status granted to both categories.

\(^12\) The Netherlands has implemented a uniform residence permit which provides all beneficiaries of international protection with the same rights and benefits: Aliens Act 2000 section 27. See discussion below about criticisms of the Qualification Directive’s hierarchical approach.
a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.\textsuperscript{13}

‘Serious harm’ is defined in article 15 as:

(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.

These categories are based on the various international and regional legal obligations already assumed by the EU Member States, although differ in some significant respects. The most obvious of these is that the Directive applies only to third country nationals rather than universally, a matter that has been particularly criticized in relation to the Directive’s definition of a ‘refugee’ in article 2(c).\textsuperscript{14}

Article 15(a), relating to non-return to the death penalty or execution, was based on Protocol 6 to the European Convention on Human Rights (ECHR), prohibiting the imposition of the death penalty in peace time, which has since been strengthened by the entry into force of Protocol 13, prohibiting the death penalty in all circumstances.\textsuperscript{15} Furthermore, all Member States except France are parties to the

\textsuperscript{13} 7944/04 ASILE 21 (31 March 2004) art 2(e). It was originally article 5, but was moved to the definitions section in art 2 by 11356/02 ASILE 40 (6 September 2002).


Second Optional Protocol of the ICCPR which contains a similar requirement. It is also consistent with the jurisprudence of the European Court of Human Rights and the Human Rights Committee.

In Canada, section 97(1)(b) of the Immigration and Refugee Protection Act (IRPA) provides protection to persons facing ‘a risk to their life or to a risk of cruel and unusual treatment or punishment’. Although there is no express mention of the death penalty or execution, Canadian case law suggests that this would be encompassed by cruel and unusual treatment or punishment.

Article 15(b) of the Qualification Directive reflects Member States’ obligations under article 3 of the ECHR, but with a limitation: it expressly requires that such treatment relate to an applicant ‘in the country of origin’. This may be intended to obviate a claim by an asylum seeker that he or she would face torture in a third country to which return may be contemplated (although in such circumstances, article 3 of the ECHR would prevent removal, but subsidiary protection status would not apply). In Battjes’ view, the reference to harm ‘in the country of origin’ suggests that the Directive regulates only ‘classic’ refoulement cases—where an individual fears the positive infliction of ill treatment in the country of origin—but not ‘humanitarian’ cases, such as illness, where ill treatment stems from the country of origin’s failure to provide adequate resources or care combined with termination of care in the host EU State. The question is whether ill treatment in the country of origin must be constituted by a positive act of harm committed there, or whether it may derive from the deprivation of health care in the host State plus generally inadequate care in the country of origin. Whether or not decision-makers will interpret the ‘country of origin’ requirement so strictly as to exclude combination cases remains to be seen, but given recent jurisprudence on ‘humanitarian’ claims and the very high threshold imposed on applicants, grants of subsidiary protection on this basis seem unlikely.

---

17 Soering v United Kingdom (1989) 11 EHRR 439 [88].
19 The Immigration and Refugee Board states that the test is ‘whether the possible sanction would shock the conscience of Canadians’. It suggests that where the death penalty has been imposed, it must be scrutinized to see whether, in the individual case, it violates international legal standards. Matters to be considered would include the gravity of the offence, the legal safeguards in the country where the penalty has been imposed, and the proposed method of execution: Immigration and Refugee Board, ‘Consolidated Grounds in the Immigration and Refugee Protection Act: Persons in Need of Protection: Risk to Life or Risk of Cruel and Unusual Treatment or Punishment (15 May 2002) 3.1.8. In United States v Burns [2001] 1 SCR 283, the Supreme Court of Canada held that extradition without assurances that the death penalty would not be imposed would violate section 7 of the Canadian Charter of Rights and Freedoms in all but exceptional cases. More recently, the Human Rights Committee, in a case involving Canada, stated that States parties to the ICCPR that have themselves abolished the death penalty ‘may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out’: Judge v Canada, UN Doc CCPR/C/78/D/829/1998 (2003) [10.4].
20 In Bonger v The Netherlands App No 10154/04 (15 September 2005) 14, the European Court of Human Rights held that ‘neither Article 3 nor any other provision of the Convention and its Protocols guarantees, as such, a right to a residence permit’.
21 An example of this type of case is D v UK (1997) 24 EHRR 423.
This interpretation echoes the Canadian approach. Section 97(1)(b) of the IRPA lists four criteria which circumscribe the scope of a risk to ‘life’ or ‘cruel and unusual treatment or punishment’:

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Thus, even though ‘inhuman or degrading treatment or punishment’ under article 15(b) of the Qualification Directive may be substantially similar to ‘cruel and unusual treatment or punishment’ in section 97 of the IRPA, the latter is more tightly circumscribed by legislative caveats. In the absence of European jurisprudence reading in similar restrictions, article 15(b) provides wider protection than section 97(1)(b). However, the precise scope of article 15(b) will depend on the meaning given to ‘inhuman or degrading treatment or punishment’. While the case law of the European Court of Human Rights is expected to be particularly influential in this regard, as has been the case in France, national interpretations may extend the concept in different directions.

Many of the French decisions on this provision have focused on protecting individuals from non-State actors whose conduct the authorities cannot (or will not) proscribe, granting subsidiary protection in cases including domestic violence, threats by an employer, and risks arising from testifying against persons involved in criminal activities. Even though persecution by non-State agents has at times given rise to refugee status in France, in accordance with article 6 of the Qualification Directive which expressly states that agents of persecution (for the purposes of granting refugee status) include non-State actors, it appears that subsidiary protection has almost become the default status for persons at risk of harm by non-State agents.

23 In United States v Burns (n 19), the Supreme Court of Canada equated ‘inhuman or degrading’ in article 3 of the ECHR with ‘cruel and unusual’ in section 12 of the Canadian Charter of Rights and Freedoms.

24 It should be noted that ill-treatment due to underlying social or political chaos, or a lack of resources, will only satisfy the requisite level of severity in exceptional circumstances: eg HLR v France (1997) 26 EHRR 29 [42]; D v UK (n 21); Henao v The Netherlands App No 13669/03 (24 June 2003); BB v France App No 30930/96 (9 March 1998).

25 See below Pt II.


27 CRR M K App No 494377 (21 April 2005) in ibid 52.

28 CRR Mlle Z App No 493983 (8 February 2005) in ibid 51 (a Chinese unaccompanied minor feared retribution for testifying against a ‘mafia gang’ involved running a clandestine emigration network); CRR M C App No 480899 (8 October 2004): an individual in Moldova denounced the participation of his superior in trafficking cigarettes.

29 eg CRR Mejia Suero (17 October 2003).
Furthermore, the nature of ‘serious harm’ has seldom been defined or comprehensively analysed in French subsidiary protection cases, suggesting that it is simply being viewed as a fallback status for individuals who do not easily fit within the Refugee Convention’s qualification criteria. Although Canada has also developed a jurisprudence on ‘victims of crime’ under section 97, it has done so only in cases where it has not been possible, after considerable consideration, to establish a link between the persecution feared and a Convention ground.  

The final criterion for subsidiary protection in the EU is article 15(c) of the Qualification Directive, which extends protection where there is a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.’ This provision reflects the existence of consistent, albeit varied, State practice of granting some form of complementary protection to persons fleeing the indiscriminate effects of armed conflict or generalized violence without a specific link to Convention grounds. During the drafting process, the vast majority of Member States supported the requirement that the threat must be ‘individual’, since it was thought that this would avoid ‘an undesired opening of the scope of this subparagraph.’ The individual requirement is strengthened by recital 26, which provides:

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.

This is reminiscent of section 97(1)(b)(ii) of the IRPA, and severely restricts the ambit of article 15(c). The language of article 15(c) and recital 26 suggests that a person in an area of indiscriminate violence will need to at least show that he or she is personally at risk, rather than simply being able to claim subsidiary protection status by virtue of geographical location. This is problematic, since indiscriminate violence by definition is random and haphazard. If interpreted even more strictly, it might
require individuals to be singled out, which would establish a higher threshold than is required for either Convention-based protection or temporary protection. Indeed, the EU Temporary Protection Directive protects persons fleeing en masse who have had to leave their country or region of origin, or have been evacuated … and are unable to return in safe and durable conditions because of the situation prevailing in that country, who may fall within the scope of Article 1A of the Geneva Convention or other international or national instruments giving international protection, in particular:

(i) persons who have fled areas of armed conflict or endemic violence;

(ii) persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights.  

However, unlike the Qualification Directive, the Temporary Protection Directive is not automatically applicable to anyone satisfying the above definition; rather, it only takes effect if the Council of the EU decides, following a proposal by the Commission, that a mass influx exists. This trigger mechanism, which enables its application to be controlled, may explain its more generous scope.

French jurisprudence on article 15(c) of the Qualification Directive suggests that a decision-maker must first establish the existence of an ‘international or internal armed conflict’, in accordance with the Additional Protocols to the Geneva Conventions, before proceeding to consider the applicant’s substantive claim. This is despite the fact that during the drafting process, a reference to the 1949 Convention relative to the Protection of Civilian Persons in time of War was deleted. One disadvantage of linking subsidiary protection to the Geneva Conventions or their Additional Protocols is that ‘strictly applied, it would only cover armed conflicts that were conducted in violation of international humanitarian law norms’. Accordingly, it would not encompass situations where the intensity of violence falls below the threshold required by an ‘armed conflict’—and thus outside the scope of international humanitarian law—even though individuals might be at risk for similar reasons. For this reason, it may be that article 15(b) comes to be relied upon as a fallback provision in cases where it is difficult to establish the existence of an armed conflict in accordance with international law. Similarly, although Canada does not expressly protect individuals fleeing from generalized violence, section 97(1)(b) may
protect them in certain circumstances. Like article 15(c), that section requires that the risk faced by a claimant is personal and not faced generally by others in the country. The Immigration and Refugee Board suggests, and jurisprudence reflects, that in a situation of civil war, a claimant would have to demonstrate that ‘the risk faced is not an indiscriminate risk faced generally in that country, but linked to a particular characteristic or status.’

This does not preclude members of a large group of people from being recognized as ‘protected persons’, provided that the violence is directed at the group by virtue of its (real or perceived) characteristics, rather than randomly.

2 Standard of Proof

While much of the analysis of and commentary on the Qualification Directive has focused on the qualitative differences between ‘persecution’ (giving rise to refugee status) and ‘serious harm’ (leading to subsidiary protection status), it may be that in some cases—as has been the experience in Canada—procedural thresholds determine the applicability of one type of status over another. As discussed below, the Canadian courts have determined that a lower standard of proof applies to Convention refugee claims (under section 96), than to complementary protection cases (under section 97). In other words, it is easier to meet the well-founded fear of persecution standard applicable in Convention refugee claims (interpreted as meaning a ‘reasonable chance’ or ‘serious possibility’ of persecution), than the standard applied in section 97 claims, requiring the applicant to demonstrate that the risk of ill-harm on removal is ‘more likely than not’.

The standard of proof for subsidiary protection under article 2(e) of the Qualification Directive is ‘substantial grounds … for believing’ that the applicant ‘would face a real risk of suffering serious harm’ if returned. It, too, is a higher threshold than the well-founded fear test for persecution, which generally falls somewhat lower than the ‘balance of probabilities’. The ‘substantial grounds … for believing’ standard derives from the case law of the European Court of Human Rights.

41 Immigration and Refugee Board (n 19) 3.1.7. See also Immigration and Refugee Board (Chairperson’s Guidelines), Civilian Non-Combatants Fearing Persecution in Civil War Situations (7 March 1996).

42 In Re WXY [2003] RPDD No 81, it was held that ‘the risk to his life and the risk of cruel and unusual treatment or punishment feared by the claimant is general to the whole population of Sierra Leone. That risk is linked to the civil war which has been fought in Sierra Leone since 1991, and which, according to the claimant and his counsel, can start again at any moment. However, since the alleged risk is not personal, but faced generally by the whole population, I conclude that the provisions of Section 97(1)(b) do not apply to the claimant.’ See also Re WVZ [2003] RPDD No 106, in relation to a Sri Lankan claimant.

43 Adjei v Canada (Minister of Employment and Immigration) [1989] 2 FC 680, 57 DLR (4th) 153 (CA).

44 Li v Canada (Minister for Citizenship & Immigration) [2005] 3 FCR 239 (FCA) [27]–[29].

45 For example, in the UK, the test for a well-founded fear of persecution is a ‘reasonable likelihood’ of such danger: R v Secretary of State for the Home Dept, ex parte Sivakumaran [1988] AC 958 (HL). Article 7(b) of the original proposal for the Qualification Directive stated that well-founded fear was to be ‘objectively established’ by considering whether there was ‘a reasonable possibility that the applicant [would] be persecuted’. The Explanatory Memorandum noted that a ‘fear of being persecuted … may be well-founded even if there is not a clear probability that the individual will be persecuted or suffer such harm but the mere chance or remote possibility of it is an insufficient basis for the recognition of the need for international protection’: See Commission of the European Communities Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection COM(2001) 510 final (12 September 2001) 15.
Rights (on article 3 of the ECHR), the Torture Committee (on article 3 of the Convention against Torture), and the Human Rights Committee (on the ICCPR), and was deliberately selected in order to avoid divergence between international and Member States’ practice.\textsuperscript{46} The ‘belief’ in the Qualification Directive does not relate to the applicant’s belief (unlike the applicant’s well-founded fear), but rather to the decision-maker’s judgment that substantial grounds (based on objective circumstances) exist for believing that the applicant would face harm. The Torture Committee has consistently held that ‘substantial grounds’ involve a ‘foreseeable, real and personal risk’ of torture. They are to be assessed on grounds that go ‘beyond mere theory or suspicion’ or ‘a mere possibility of torture’,\textsuperscript{47} but the threat of torture does not have to be ‘highly probable’\textsuperscript{48} or ‘highly likely to occur’.\textsuperscript{49} The danger must be ‘personal and present’.\textsuperscript{50} ‘Substantial grounds’ may be based not only on acts committed in the country of origin prior to flight, but also on activities undertaken in the receiving State.\textsuperscript{51} Furthermore, ‘it is not necessary that all the facts invoked by the author [of the claim] should be proved; it is sufficient that the Committee should consider them to be sufficiently substantiated and reliable’.\textsuperscript{52}

Thus, if an applicant can demonstrate a ‘reasonable chance’ of serious harm amounting to persecution, in some cases it may be less onerous for him or her to try to show that the harm relates to a Convention ground, than to instead demonstrate that there are ‘substantial grounds … for believing’ that he or she would be exposed to such harm if removed.

\section*{3 Comparative Statuses}

Importantly, for the first time in a supranational instrument, the Qualification Directive codifies the rights of beneficiaries of subsidiary protection. However, the very name of the status they receive—subsidiary protection—reveals the hierarchical approach to protection that the Directive has entrenched, which is difficult to justify as a matter of law.\textsuperscript{53} Furthermore, distinctions may encourage individuals granted

\textsuperscript{46} Presidency Note to Strategic Committee on Immigration, Frontiers and Asylum on 25 September 2002 Doc 12148/02 ASILE 43 (20 September 2002) 5. The Netherlands supported Sweden’s argument that wording from decisions of the Torture Committee should be taken into account to avoid different rulings from different courts or bodies concerning similar situations: 12199/02 ASILE 45 (25 September 2002) 3 fn 3. See eg \textit{Soering v UK} (n 17) [91]; Human Rights Committee, ‘General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’ CCPR/C/74/CRP.4/Rev.6 (21 April 2004) [12].


\textsuperscript{49} \textit{EA} (n 47) [11.3].

\textsuperscript{50} Report of the Committee against Torture (n 48) Annex IX.

\textsuperscript{51} \textit{Aemei v Switzerland} Comm No 34/1995 (9 May 1997) UN Doc CAT/C/18/D/34/1995 [9.5].

\textsuperscript{52} ibid [9.6].

subsidiary protection to attempt to ‘upgrade’ to Convention status, thereby creating additional litigation.

Although a differentiation between refugee rights and those of beneficiaries of subsidiary protection was always envisaged as part of the Qualification Directive, the latter were considerably reduced as part of a political compromise, rather than for any legal reason. Throughout the negotiations, a key stalemate was Germany’s opposition to recognizing non-State actors as agents of persecution for the purposes of refugee status. As the deadline for finalizing the Directive drew ever closer, Germany finally agreed to capitulate on the issue of non-State agents in exchange for considerably reduced rights for beneficiaries of subsidiary protection. Three meetings in March 2004 ultimately secured agreement on a text which accepted many of the German demands, finalized on 31 March 2004.

Beneficiaries of subsidiary protection are entitled to some of the same rights as refugees, but there are also some significant differences. For example, they receive less extensive entitlements with respect to family unity, access to and length of residence permits, eligibility for travel documents, access to employment, social welfare and health care entitlements, access to integration facilities, and the rights of accompanying family members. The particulars of these differences are set out in Annex I.

By contrast, in Canada all ‘protected persons’—Convention refugees, and those facing a personal risk of torture, or a personal risk to life or cruel and unusual treatment or punishment—are eligible to apply for permanent residence. In other words, they are eligible for an identical status. Accordingly, the Act does not itself set out a list of rights or entitlements.

4 Conclusion

Comparing the EU and Canadian models, it appears that the broader the eligibility criteria, the less extensive the status entitlements. In other words, there is an apparent ‘trade off’ between the extent of beneficiaries’ rights and the class of people who may access them. The Qualification Directive may be wider in scope than the IRPA, but it differentiates between the rights of different types of protected persons. By contrast, the narrower qualification criteria under the IRPA give rise to an identical status.


54 Proposal (n 46).

55 Refugee Council (UK), ‘International Protection Project Update’ (September 2003) 2. Indeed, German commentators noted that the German government would have liked subsidiary protection to be set at the level of Duldung (tolerance), described as ‘a non-status on the level of immigration rights’: Pro Asyl, ‘Council for Justice and Home Affairs in Brussels: Common EU Asylum System in Danger of Falling through because of Germany: Appeal to Chancellor Schroeder and Foreign Minister Fischer to Withdraw the German Reservations’ (8 May 2003) [http://www.proasyl.de/presse03/mai08.htm] (6 September 2003).

56 For a more detailed analysis of eligibility and status, see McAdam (n 8).
Importantly, though, the Qualification Directive does not affect Member States’ pre-existing obligations under international law.\textsuperscript{57} The Directive’s subsidiary protection categories are selective, and do not necessarily encompass the full range of persons to whom Member States may owe protection obligations and thus be precluded from removing.\textsuperscript{58} The function of the Directive, then, is to provide a harmonized status for \textit{certain} persons in need of international protection. It determines who is entitled to a \textit{particular legal status} in Member States, rather than comprehensively mapping the extent of States’ \textit{non-refoulement} obligations.


\textsuperscript{58} For example, under the ECHR, CAT, and ICCPR, the prohibition on return to torture or inhuman or degrading treatment is absolute, no matter how abhorrent a claimant’s conduct: eg \textit{Chahal v United Kingdom} (1996) 23 EHRR 413. The Qualification Directive previously included a provision preventing an applicant’s removal to a risk of a ‘violation of a human right, sufficiently severe to engage the Member State’s international obligations’ (former article 15(b)), suggesting that the protection categories are not closed (on this point, see \textit{Ullah v Secretary of State for the Home Dept} [2004] UKHL 26). The rights of ‘other’ persons with an international protection need remain ill-defined, and, as Vedsted-Hansen notes, they ‘are likely to end up in a kind of \textit{tolerated} situation in the actual Member State that may be prohibited from deporting them’: J Vedsted-Hansen, ‘Assessment of the Proposal for an EC Directive on the Notion of Refugee and Subsidiary Protection from the Perspective of International Law’ in D Bouteillet-Paquet (ed),\textit{ Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?} (Bruylant, Brussels 2002) 76.
## ANNEX I

**Differences between ‘Refugee’ and ‘Subsidiary Protection’ Status in the EU Qualification Directive**

<table>
<thead>
<tr>
<th>Maintaining Family Unity (art 23)</th>
<th>Refugee status</th>
<th>SP status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Family members’ entitled to same substantive rights</td>
<td>Same entitlements, but States can define applicable conditions to such benefits, provided they guarantee ‘an adequate standard of living’.</td>
<td></td>
</tr>
</tbody>
</table>

| Residence Permits (art 24) | • As soon as possible  
• At least 3 years and renewable  
• Family members: less than 3 years and renewable | • As soon as possible  
• At least 1 year and renewable |

| Travel Document (art 25) | • Convention travel document | • Travel docs at least for serious humanitarian reasons  
• Only to those who cannot get national passport |

| Access to Employment (art 26) | May engage in employed or self-employed activities immediately after status granted | May engage in employed or self-employed activities immediately after status granted,  
BUT ‘the situation of the labour market in the Member States may be taken into account, including for possible prioritisation of access to employment for a limited period of time to be determined in accordance with national law.’ |

| Social Welfare (art 28) | Entitled to necessary social assistance on same terms as nationals | Entitled to necessary social assistance on same terms as nationals,  
BUT Member States may limit social assistance granted to beneficiaries of SP to core benefits. |

| Health Care (art 29) | Access to health care under the same conditions as nationals | Access to health care under the same conditions as nationals,  
BUT Member States may limit health care granted to beneficiaries of SP to core benefits |

| Access to Integration Facilities (art 33) | Provision for integration programmes considered to be appropriate to help integration into society | Where Member States consider it appropriate, access shall also be granted to integration programmes |

---

* ‘Family members’ are defined in art 2(h)) as:  
  • spouse or unmarried partner in stable relationship (where the national aliens law/practice treats them in the same way)  
  • minor unmarried and dependent children.  
Art 23(5) permits Member States to grant rights to ‘other close relatives’ who:  
  • lived with the family in the country of origin; and  
  • were wholly or mainly dependent on the beneficiary of refugee/SP status.