CHAPTER 9

Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?

*Céline Bauloz* and *Géraldine Ruiz*

1 Introduction

Since the 2004 Qualification Directive, international protection in the European Union (EU) is of a double nature. It not only relies on the refugee status established by the 1951 Geneva Convention and its 1967 Protocol, but also entails the granting of another form of protection: subsidiary protection. The latter builds on Member States’ non-refoulement obligations under international human rights law – more particularly the 1950 European Convention on Human Rights (ECHR) – and is granted to asylum-seekers not qualifying as refugees but

* PhD, Graduate Institute of International and Development Studies, Geneva; Senior Fellow, Global Migration Centre; Managing Editor, *Refugee Survey Quarterly*, Oxford University Press.

** PhD, Graduate Institute of International and Development Studies, Geneva; Senior Coordinator, Global Migration Centre, Graduate Institute of International and Development Studies, Geneva.


2 See Article 2(c) and (d) of the Recast Qualification Directive taking up the refugee definition of Article 1(A)(2) of the Geneva Convention relating to the Status of Refugees (189 UNTS 150, 28 July 1951 (entry into force 22 April 1954)), as amended by its 1967 Protocol (606 UNTS 267, 31 January 1967 (entry into force 4 October 1967)).

nonetheless in need of protection because of risks of serious harm if sent back to their country of origin.\textsuperscript{4}

However, these two types of international protection have not been conceived on an equal footing. Subsidiary protection has been instituted as complementary to the refugee status, that is, subsidiarily granted when the latter cannot be conferred.\textsuperscript{5} This hierarchy of forms of protection was justified by the EU on the basis of two considerations. First, it was presented as necessary for securing the primacy of the Geneva Convention and its refugee status.\textsuperscript{6} Second, this hierarchy was also warranted by the arguably more temporary nature of subsidiary protection. According to the EU Commission, ‘this status [was] considered, in the majority of Member States, as a temporary one’.\textsuperscript{7}

Combined together, these justifications have had two interrelated consequences: examination of the refugee status has to precede that of subsidiary protection,\textsuperscript{8} while the latter has to confer lesser rights and benefits than the former. This last implication was clearly explained by the EU Commission in its 2001 proposal for a Qualification Directive:

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\textsuperscript{4} See Article 2(f) of the Recast Qualification Directive for the definition of a ‘person eligible for subsidiary protection’ and Article 15 for the serious harms justifying protection which encompass: ‘(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 reasons of indiscriminate violence in situations of international or internal armed conflict’.

\textsuperscript{5} This was how subsidiary protection had been understood since its inception. See for instance, \textit{Note from the Danish Delegation to Migration and Asylum Working Parties, Subsidiary Protection, EU Doc. 6764/97 ASIM 52, 17 March 1997, 6: ‘Subsidiary protection have been defined as particularly those forms of protection that are not included in the Geneva Convention’.


\textsuperscript{7} Ibid 29.

\textsuperscript{8} This was clearly affirmed by the Court of Justice of the European Union. See for instance its recent judgment: Case C-604/12, \textit{HN v Minister for Justice, Equality and Law Reform, Ireland [2014], paras 30–35.}