THE EU ASYLUM QUALIFICATION DIRECTIVE, ITS IMPACT ON THE JURISPRUDENCE OF THE UNITED KINGDOM AND INTERNATIONAL LAW[1]

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I. INTRODUCTION

The new legal order in European asylum is being shaped by a key document: the Directive on minimum standards for the qualification and status of third-country nationals as refugees and persons otherwise in need of international protection and the content of the protection granted (hereinafter the Qualification Directive). The Qualification Directive was adopted by the Council of the European Union on 29 April 2004.[2] It entered into force on 20 October 2004, that is 20 days after its publication in the Official Journal.[3] The Member States have until 10 October 2006 to implement its provisions into national legislation.[4] Meanwhile, they have a duty not to adopt measures contrary to it.[5] For those countries that have already implemented the Qualification Directive, such as France,[6] the judiciary will need to ensure compliance with it.[7]

From the perspective of international law, the Qualification Directive is 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 (hereinafter the Refugee Convention).[8] As its name indicates, the Refugee Convention is about defining who is a refugee (Article

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[2] Council Directive 2004/83/EC of 29 Apr 2004, OJ 30 Sept 2004, L 304/12–23.

[3] Art 39 of the Directive.

[4] Art 38 of the Directive.

[5] Art 10, EC Treaty and Case C-106/89, *Marleasing* [1990] ECR I-4135.

[6] Law of 10 Dec 2003.

[7] For a full discussion of the principle of consistent interpretation, see G Betlem and A Nollkaemper 'Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation' (2003) 14(3) European Journal of International Law 569–89.

[8] (189 UNTS 150). The Refugee Convention was updated by the 1967 Protocol Relating to the Status of Refugees (606 UNTS 267).

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1) and the rights and benefits which persons recognized as refugees are entitled to, including the guarantee against *refoulement* (Articles 2–34). Over the years, the scope of beneficiaries of asylum has been expanded to include other persons in need of international protection under human rights law, in particular, the European Convention on Human Rights and the UN Convention Against Torture.[9] The content of this 'subsidiary protection' nonetheless has remained at the discretion of the Member States. The Qualification Directive promises to combine these two forms of protection (ie refugee protection and subsidiary protection) under one umbrella, to institutionalize a common European Union (EU) definition of persons in genuine need of international protection and to provide a status for these persons.[10] This is the most ambitious attempt to combine refugee law and human rights law in this way to date.

Issues of procedures (ie how to make a decision on qualification) remain outside the scope of the Qualification Directive. But these were never directly a matter of international law,[11] and they are being covered in a separate (draft) Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter the Procedure Directive).[12] Mark Ockelton has argued that this Procedure Directive is 'an inevitable outcome of how the world has moved on'.[13] Unlike in 1951, when everyone knew who a

[9] Art 3 of the European Convention on Human Rights includes a guarantee against *refoulement* akin to that provided in refugee law. The European Court of Human Rights held that 'protection afforded by Article 3 is . . . wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees': *Chahal v United Kingdom*, Reports of Judgments and Decisions 1996-V, para 80. See, generally, H Lambert 'Protection against *Refoulement* from Europe: Human Rights Law Comes to the Rescue' (1999) 48 ICLQ 515–44. See also H Lambert 'The European Convention on Human Rights and the Protection of Refugees: Limits and Opportunities' (2005) 24(2) Refugee Survey Quarterly 39–55, and J Doerfel 'The Convention Against Torture and the Protection of Refugees' (2005) 24(2) Refugee Survey Quarterly 83–97.

[10] Subsidiary protection has therefore become an entitlement for third-country nationals under EU law and a status is to be provided, so long as the person in question is not excluded from protection on the basis of what she has done (Arts 15, 18, and 17 of the Qualification Directive). See R Piotrowizc and C van Eck 'Subsidiary Protection and Primary Rights' (2004) 53 ICLQ 107–38, J McAdam 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 17 International Journal of Refugee Law 461–516, and 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 *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002) 57–78.

[11] The principle of good faith in international law nonetheless requires that States provide fair and efficient asylum procedures in their compliance with the Refugee Convention. See G Goodwin-Gill *The Refugee in International Law* (Clarendon Press Oxford 1996) 234–41. In the United Kingdom the House of Lords enunciated the fundamental principle that 'The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny', as per Lord Bridge of Harwich in *R v Secretary of State for the Home Department, ex p Bugdaycay* [1987] AC 514 at 531F.

[12] COM(2000) 578.

[13] M Ockelton Deputy President of the Immigration Appeal Tribunal, Comments to the International Association of Refugee Law Judges (European Chapter), Edinburgh, 13 Nov 2004.

refugee was and the focus was on what refugees were to get in terms of rights, today no one knows anymore who these people are, and 'this ignorance is to some extent filled by the Procedure Directive'.[14]

Thus, the definition of a refugee (and of other persons in need of international protection, ie subsidiary protection) and the content of refugee protection is and has always been a matter of international law, ie the Refugee Convention and the European Convention on Human Rights. Until now, the national authorities competent to decide on refugee and related human rights issues have applied international law norms on the subject. This state of affairs is turned upside down by the Qualification Directive which introduces new EU norms which for the most part are of a mandatory character (with the potential of becoming directly effective).[15] As pointed out by Elspeth Guild, 'implementing measures at the EU level come into a field where there are substantial engagements of the Member States already in international law'.[16]

This article looks at the likely impact of the Qualification Directive on the jurisprudence of the Member States relating to asylum.[17] For the purpose of this article-length study, I focus on one Member State in particular, the United Kingdom.[18] Article 1 of the Qualification Directive provides that 'The purpose of this Directive is to lay down *minimum standards* for the qualification of third country nationals . . . and the content of the protection granted' (my emphasis).[19] The 'minimum' in question must be reasonable and must respect the fundamental principles of EU law as well as international law, which are relevant to the norm. But the 'standard' could either be a mere minimum, leaving the Member States free to introduce or maintain higher standards, or an obligatory minimum for Member States to follow. The Directive is not entirely clear on this point. According to Recital (8), Member States are allowed to maintain more favourable provisions under international law.[20] However, Article 3 of the Directive clearly states that 'Member States *may*

[14] ibid.

[15] Much of the provisions in the Qualification are drafted in mandatory terms and it is likely that these will be found to have direct effect by the European Court of Justice (eg Arts 24, 25, and 26). The doctrine of direct effect was created by the European Court of Justice in its judgment in *Van Gend en Loos* (Case 26/62 [1963] ECR 1). According to this doctrine, for a provision to be directly effective, it must be clear and unambiguous, it must be unconditional, and its operation must not depend on further action taken by the Community's institutions or the Member States.

[16] E Guild 'Seeking Asylum: storm clouds between international commitments and EU legislative measures' (2004) 29 European Law Review 198–218 at 205.

[17] Note that in the absence of a dispute having been decided by the International Court of Justice relating to the interpretation of the Refugee Convention, the interpretation provided by the highest domestic courts prevails as far as the Member States are concerned.

[18] Despite its 'opt-out' of Title IV of the EC Treaty, the United Kingdom has been actively involved in the discussions on the measures proposed in this area, and indeed 'quite successful in influencing their content'. It has so far opted in to all the adopted measures under Title IV. See the report for the United Kingdom by Bernard Ryan in *Migration and Asylum Law and Policy in the European Union*, FIDE 2004 National Reports (I Higgins and K Hailbronner (eds)) (CUP Cambridge 2004) 431–54 at 447.

[19] See also Recital (16) of the Directive, and Art 63(1)c, EC Treaty.

[20] Note that provisions in the Preamble are non-standard setting.

introduce or retain more favourable standards for determining who qualifies as a refugee or as a person eligible for subsidiary protection, and for determining the content of international protection, *in so far as those standards are compatible with the Directive*' (my emphasis). This wording is problematic because strictly speaking, 'compatible' could be taken to mean consistency with the provisions contained in the Directive—in which case Member States with less restrictive provisions would have to adopt the more restrictive Directive versions. Only if 'compatible' is interpreted loosely, to mean matching or exceeding the minimum standards contained in the Directive provisions, may Member States that have them keep less restrictive provisions.[21] In the absence of any ruling on this issue, the possibility of 'compatible' to mean 'consistent' must not therefore be dismissed outright.

It follows that the impact of the Directive on the United Kingdom must be considered in light of each individual provision. In this respect, the Directive is a mixed bag of 'may'/'can' and 'must'/'shall' minimum standards. In the case of the former, a Member State implementing the 'may/can' provision will need to comply with its international obligations under treaty law. Should it fail to do this, the national courts will be competent to deal with matters of non-compliance and will be expected to look at international law. The European Court of Justice will be competent to hear cases brought by individuals against a Member State for failure to implement the Directive properly (action for damages).[22] However, it is unlikely that any other challenge brought by individuals will succeed before the European Court of Justice because of the lack of direct effect of 'may/can' provisions. In the case of the latter ('must'/'shall'), then a Member State may decide to use the Directive as an instrument to lower its existing standards. If this lowering entails the violation of an international treaty (eg the Refugee Convention), then the European Court of Justice will be required to examine the legality of the Directive (and of national implementation measures) in light of international law.[23] This possibility opens up the question of the relationship between the Qualification Directive and international law.[24] In particular, it raises the question: Are the

[21] The latter reading is supported by the dictionary definition allowing for compatible to mean both consistent and able to coexist (*Concise Oxford Dictionary*). Jane McAdam further argues that 'through the use of the conditional 'may', the provision permits States currently providing a higher level of protection to beneficiaries of subsidiary protection to lower their standards' in J McAdam 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime' (2005) 17 International Journal of Refugee Law 461–516 at 515.

[22] *Francovich v Italian State* (Cases 6/90 and 9/90) [1991] ECR I-5357.

[23] On the procedural context in which such actions can be brought, for example directly before the European Court of Justice or indirectly via the national courts and to the European Court of Justice by way of a preliminary reference, see Arts 68 and 220–45, EC Treaty. See also S Peers *EU Justice and Home Affairs* (Longman London 2000) 44–5, and House of Lords, European Union Committee 'The Future Role of the European Court of Justice', Report with Evidence, 6th Report of Session 2003–4, 15 Mar 2004.

[24] See also R Piotrowicz and C van Eck 'Subsidiary Protection and Protection Rights' (2004) 53 ICLQ 107–38, in which the authors consider aspects of this relationship but solely in the context of Art 15 of the Qualification Directive and international human rights law.

national courts and the European Court of Justice obliged to apply the Refugee Convention in cases of conflict between it and the Qualification Directive?

This article proceeds as follows. Section I discusses key provisions in the Directive which may require the United Kingdom to raise its standards to meet EU minimum standards. It identifies five such key provisions: the provisions on internal protection; the treatment following refusal to perform military service; reasons for persecution; best interests of the child; and exclusion from refugee status on ground of protection by a United Nations (UN) agency or organ other than the United Nations High Commissioner for Refugees (UNHCR). Section II discusses key provisions in the Directive which could result in the United Kingdom lowering its standards to the level required in the Directive. It identifies five such key provisions: the provisions on international protection needs arising *sur place*, actors of protection; exclusion from refugee protection on grounds of crime; cessation of refugee status on ground of change in circumstances; and content of international protection.[25] Section three identifies some important deviations from the norms of international law in the Qualification Directive. The Qualification Directive provides for common criteria and minimum standards that are on the whole in conformity with principles of international refugee law and international human rights law. However, in some places, the Directive provides less in terms of protection than the Refugee Convention (or the European Convention on Human Rights) itself. In other places it goes further than international law. This leads us to examine the relationship between EU law and international law in a fourth section. This article concludes by exploring the function of the Refugee Convention following the entry into force of the Qualification Directive.

II. PROVISIONS IN THE DIRECTIVE WHICH MAY REQUIRE THE UNITED KINGDOM TO RAISE ITS STANDARDS

There are quite a few provisions in the Qualification Directive which may require the United Kingdom to raise its existing standards. These provisions range from the application of the concept of 'internal relocation' to the specific principle of the best interests of the child. Some of these provisions are more mandatory in nature (through the use of 'shall' or 'must') than others

[25] It is relevant to note at this stage that in a few instances the Directive will have no impact on the jurisprudence of the United Kingdom because it simply reflects the existing interpretation of international norms by the domestic courts. For instance, the Directive recognizes the principle that family members are particularly vulnerable to acts of persecution due to their family relation to the refugee (Recital 27). This principle closely reflects the judgment of the United Kingdom Court of Appeal in *Katrinak v Secretary of State for the Home Department* [2001] EWCA Civ 832, at para 23: 'It is possible to persecute a husband or a member of a family by what you do to other members of his immediate family. The essential task for the decision taker in these sorts of circumstances is to consider what is reasonably likely to happen to the wife and whether that is reasonably likely to affect the husband in such a way as to amount to persecution of him.'

(drafted in terms of 'may' or 'can') in terms of requiring actions by Member States. They all have in common that they stipulate standards generally in conformity with international law. I take five examples to illustrate this point.

A. Internal protection

According to Article 8(1) of the Qualification Directive, Member States 'may' refuse protection to an applicant if they consider that there is a part of the country of origin where the applicant would not be subjected to persecution or serious harm and the applicant 'can be reasonably expected to stay' in that area. This situation is often referred as 'internal relocation or internal flight' (a terminology preferred by the United High Commissioner for Refugees (UNHCR)[26] and the House of Lords)[27] or 'internal protection' (a terminology preferred in the Qualification Directive). So, there are two requirements for 'internal protection' to be considered an option under EU law: 'safety from persecution or serious harm' and 'reasonableness'. These requirements are modelled on existing State practice. They also exist in UNHCR Guidelines and in the case law of the European Court of Human Rights. More specifically, a general consensus exists that these requirements may best be examined through a four-step approach: (1) genuine accessibility to domestic protection; (2) safety from persecution; (3) safety from serious harm; (4) provision of basic human rights.[28] The Directive does not elaborate on the issue of how to apply these requirements. It simply requires that it must be reasonable to expect the applicant to stay in that part of the country, in the light of the general circumstances prevailing in that part of the country and of the personal circumstances of the applicant.[29] Thus, the national authorities continue to enjoy considerable discretion in the implementation of the concept of 'internal protection' and one can only presume that they will take into account the interpretation of UNHCR and of the European Court of Human Rights when taking decisions.[30]

Looking at UNHCR Guidelines,[31] 'safety from persecution or serious harm' means that an applicant who cannot demonstrate a well-founded fear of persecution on Refugee Convention grounds, may still be protected against 'internal relocation' on grounds of serious harm, irrespective of whether or not there is a link to one of the Refugee Convention grounds.

[26] UNHCR Guidelines on 'Internal Flight or Relocation Alternative within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', HCR/GIP/03/04, 23 July 2003.

[27] *R v Secretary of State for the Home Department, ex p Thangarasa and R v Secretary of State for the Home Department, ex p Yogathas*, 17 Oct 2002 [2002] UKHL 36.

[28] See R Marx 'The Criteria of Applying the 'Internal Flight Alternative' Test in National Refugee Status Determination' (2002) 14 International Journal of Refugee Law at 185.

[29] Art 8(1)(2).

[30] A Klug 'Harmonization of Asylum in the European Union—Emergence of an EU Refugee System' (2005) German Yearbook of International Law 594–628 at 607.

[31] 'Internal Flight or Relocation Alternative within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees', HCR/GIP/03/04, 23 July 2003.

'Reasonableness' means that protection in the suggested area must be meaningful, ie adequate. In addition to safety aspects, this requirement suggests the guarantee of some basic rights (civil, political and socio-economic). UNHCR Guidelines require that the applicant be able to lead a relatively normal life without facing 'undue hardship'. Considerations of personal circumstances, past persecution, safety and security, respect for human rights and economic survival are relevant to assess whether this will be the case. The European Court of Human Rights uses similar criteria in the context of human rights applications without, however, specifically referring to the concept of 'undue hardship' in this context.[32] In *Hilal v United Kingdom*,[33] the Strasbourg Court was satisfied that a 'long-term, endemic situation of human rights problems' in mainland Tanzania could not make the 'internal flight' option a reliable guarantee against the risk of ill-treatment.[34] And in *Venkadajalasarma v The Netherlands*,[35] it considered that 'stability and certainty' were factors to be taken into account in the Court's assessment of the situation in the receiving country. But so too were the individual circumstances of the applicant in the light of the current general situation, in particular whether or not he was someone with a very high profile.[36]

In the United Kingdom, until quite recently, assessment of the reasonableness of 'internal relocation' in cases of refugee status was made by reference to the 'unduly harsh' test, ie internal protection must meet basic norms of civil, political and socio-economic human rights, in particular concerning physical access to the area, travel to the area, living there, etc.[37] This test was also extended in practice to include factors which were not relevant to refugee status, but which were relevant to whether humanitarian protection or discretionary leave should be granted, having regard to human rights or other humanitarian considerations, eg

[32] The Strasbourg Court has used the 'undue hardship' test in the context of Art 8 of the European Convention on Human Rights (ie when balancing competing interests) in *X, Y and Z v United Kingdom*, Reports of Judgments and Decisions 1997-II.

[33] Reports of Judgments and Decisions 2001-II.

[34] In particular, it considered that the ill-treatment and beating of detainees by the police, the inhuman and degrading conditions in prisons, the police institutional links with the perpetrators of human rights violations, and the possibility of extradition between the original place of residence (Zanzibar) and the area of relocation (mainland Tanzania) were all determinant factors in rejecting the 'internal flight' option.

[35] (2004).

[36] *Chahal v United Kingdom*, Reports of Judgments and Decisions 1996-V.

[37] *R v Secretary of State for the Home Department, ex p Robinson*, CA [1997] Imm AR 658. This test involves comparing the conditions (and circumstances) in the previous home of the asylum seeker and those in the suggested place of internal relocation. If that comparison suggested that it would be unreasonable, or unduly harsh, to expect him to relocate in order to escape the risk of persecution, his refugee status was established. See also *Dyli v Secretary of State for the Home Department* [2000] Imm AR 652, where the IAT recognized that the applicant must be able to reach the safe area in safety and that the safe area must be 'one in which it would [not] be unreasonable or unduly harsh to expect him to live' (para 33). For a discussion of the criticism of the reasonableness test in the *Michigan Guidelines on the Internal Protection Alternative*, see R Marx 'The Criteria of Applying the "Internal Flight Alternative" Test in National Refugee Status Determination Procedures' (2002) 14 International Journal of Refugee Law at 202–6.

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a terminal illness or suffering from post-traumatic stress disorder. This was the situation as decided by the Court of Appeal in *R v Secretary of State for the Home Department, ex parte Robinson*.[38] However, in the recent case of *AE and FE v Secretary of States for the Home Department*,[39] the Court of Appeal introduced a clear distinction between refugee law cases and human rights law cases based around discriminatory treatment. It held that considerations of undue hardship were not relevant to refugee law cases. What was relevant for the Court was whether there existed an area where there *would be no discriminatory denial of human rights*. Any consideration of the harshness or not of relocation was held to be beyond the scope of the Refugee Convention. This interpretation appears more restrictive than that in the Directive and it may well be that the Directive will require the British courts to revert to the higher standard established in *Robinson*, ie the standard of 'reasonableness' that takes into account the criteria of 'undue hardship' or 'reasonableness' developed and applied under the Refugee Convention and Article 3 of the European Convention on Human Rights.

B. Treatment following refusal to perform military service

The Directive embraces the general interpretation that 'Prosecution or punishment for refusal to perform military service in a conflict' may not normally amount to persecution.[40] It offers three general exceptions to this interpretation. The first exception is where the individual in question is required to engage in acts contrary to international law (eg war crimes or crimes against humanity).[41] The second exception is where the punishment is found to be disproportionately harsh or severe.[42] The third is where the conditions of military service are themselves so harsh as to amount to persecution on the facts.[43]

Looking at the jurisprudence in the United Kingdom on this issue, the House of Lords in *Sepet and Bulbul v Secretary of State for the Home Department* adopted a restrictive position on the matter.[44] The applicants, Turkish citizens and members of the Kurdish minority, objected to serving in the Turkish military. They lost their appeal on three separate (and highly demanding) grounds from the exceptions mentioned above: the lack of 'causation' between the treatment and their belief, the lack of a 'core human right'

[38] CA [1997] Imm AR 568. Note that in *R (Hoxha) v Special Adjudicator*, [2002] EWCA Civ 1403, albeit not a case about internal protection but about Art 1C(5), Keene LJ embraced a clear human rights reading of the requirement of 'reasonableness' to include 'conditions in which [the applicant] can live reasonably with dignity and with respect for his core human rights, even though he no longer has a well-founded fear of persecution for a Convention reason' (at para 34).

[39] [2003] EWCA Civ 1032 (16 July 2003), para 67 (currently on appeal to the House of Lords).

[40] Art 9(2)(e).

[41] ibid. Unfortunately the Directive offers no rational basis as to why it distinguishes this instance of conscientious refusal from other instances of conscientious refusal. In fact, looking at Art 12(2) and Art 9(2)(e), it may even be said that the Directive contradicts itself on this point.

[42] Art 9(2)(c).

[43] Art 9(2)(a).

[44] [2003] 1 WLR 856.

called conscientious objection to military service, and Lord Hoffmann's view that 'freedom of conscience ends where manifestation of conscience begins'.[45] In this regard, the standard set in the Directive may be said to be higher than in the jurisprudence of the United Kingdom.[46]

C. Reasons for persecution

The reasons for persecution include the five grounds provided in Article 1A(2) of the Refugee Convention, including the controversial concept of 'membership of a particular social group'. The latter is defined in the Directive as 'the members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it' and 'that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society'.[47] A particular group might also, in certain circumstances, be constituted by 'a common characteristic of sexual orientation' or by 'gender related aspects'. This is a widely inclusive definition of membership of a particular social group: it includes both the 'protected characteristics' approach and the 'social perception' approach developed in common law jurisdictions.[48] This definition (which is drafted in mandatory terms) will most likely force the domestic courts to reconsider their interpretation of 'membership of a particular social group', in particular in civil law jurisdictions, where the particular social group seems to be less well developed.

In the United Kingdom, the House of Lords in *Shah and Islam*[49] held that women in Pakistan constituted a particular social group based on gender and non-protection from the State (Lord Steyn). Discrimination by itself was found not to be enough, but the distinguishing feature of this case was the particular evidence as to the position in Pakistan of the two women (Lord Hoffmann). Thus, women in Pakistan formed a social group because they were women *and* they were discriminated against. According to the House of Lords, the

[45] See G Goodwin-Gill 'Refugees and their Human Rights' RSC Working Paper No 17 (at 11–16). Text available at <http://www.rsc.ox.ac.uk/PDFs/workingpaper17.pdf>.

[46] See also *Krotov v Secretary of State for the Home Department* [2004] EWCA Civ 69 (referring to *Sepet and Bulbul v Secretary of State for the Home Department* [2001] EWCA Civ 681), and *BE v Secretary of State for the Home Department*, Iran [2004] UKIAT 00183 (8 July 2004).

[47] Art 10(1)(d) and Recital 21.

[48] See UNHCR Guidelines on International Protection: 'Membership of a particular social group' within the context of Art 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/02, 7 May 2002. UNHCR advocates a reconciliation of these two approaches, however it uses the words 'or' instead of 'and'. So the use of the word 'and' in the Directive suggests that there might still be gaps remaining in the protection of social groups. See also Recommendation (2004) 9 of the Committee of Ministers (Council of Europe) on the concept of 'membership of a particular social group'. For a critical discussion of this particular issue, see A Klug 'Harmonization of Asylum in the European Union—Emergence of an EU Refugee System?' (2005) German Yearbook of International Law at 610.

[49] [1999] 2 AC 629, [1999] 2 All ER 545.

discrimination in question must be widespread and intense in nature, ie it must include legislative, judicial and police discrimination, and the lack of State protection is an inherent element of discrimination. On the basis of this interpretation, women in Iran were not found to constitute a social group.[50] The interpretation of the British courts appears more stringent than the definition in the Directive which simply refers to the fact that the group must be 'perceived as being different by the surrounding society'. In other words, institutionalized discrimination by agencies of the State is not included in the definition of the Directive.

D. Best interests of the child

The Directive establishes that the 'best interests of the child' should be *a* primary consideration of Member States when implementing the Directive.[51] Thus, any decision to remove a parent from an EU Member State must have to take into account the best interests of the child under EU law. The European Court of Human Rights already recognizes such consideration in immigration cases. In *Sen v The Netherlands*,[52] the Court found a violation of Article 8 of the European Convention on Human Rights by the Netherlands for refusing to grant a residence permit to a nine-year old who wanted to join her parents and her two younger siblings in the Netherlands. Not allowing this to happen would have meant that the whole family would have had to relocate to Turkey. The Court found the fact that the two younger children had always lived in the Netherlands and had no links with Turkey, combined with the fact that both parents (of Turkish origin) were fully settled in the Netherlands and that they had lived there legally for many years, constituted an obstacle to the family relocating to Turkey. Thus, the best interests of the two younger children were a primary consideration, alongside the parents' situation.

In the United Kingdom, the approach taken by the Court of Appeal in *Gangadeen* could be said to be in conflict with the Directive.[53] In this case, the mother who had been declared an illegal immigrant was allowed to be removed to India with her child even though it was clear that the child would no longer be able to see his father (and his father's relatives) with whom he had maintained regular and frequent contact following the break-up of the relationship between his mother and father.

[50] ZH (Women as Particular Social Group) Iran CG [2003] UKIAT 00207.

[51] Art 20(5) and Recital 12. This element is required by Art 3 of the 1989 Convention on the Rights of the Child.

[52] (2001).

[53] *R v Secretary of State for the Home Department, ex p Gangadeen* [1998] Imm AR 106, 21 Nov 1997.

E. Exclusion from refugee status on ground of protection by a UN agency or organ other than UNHCR

Article 12 of the Qualification Directive provides two obligatory grounds for exclusion from being a refugee. First, is protection by a UN agency (except UNHCR) or by a country of residence. Secondly is the person in question has committed a crime against peace, a war crime or a crime against humanity, a serious non-political crime prior to being recognized as a refugee, or is guilty of an act contrary to the purposes and principles of the UN. The first ground is directly based on Article 1D and 1E of the Refugee Convention and is discussed here. The second ground is based on Article 1F of the Refugee Convention and is dealt with in the next section.[54] The Directive then provides that should protection by a UN agency (other than UNHCR) cease 'for any reason', the person concerned 'shall ipso facto be entitled to the benefits of this Directive'. The defined scope of Article 1D of the Refugee Convention as set out in Article 12(1)(a) of the Directive ('when such protection has ceased *for any reason*', my emphasis) would appear wider than that established by the United Kingdom Court of Appeal in *El-Ali and Daraz v Secretary of State for the Home Department*.[55]

The Court of Appeal in this case argued that the words 'when such protection has ceased *for any reason*' (my emphasis) should be interpreted restrictively to mean the happening of an overall event (eg where the UN decides to withdraw the support of its agencies). It rejected the interpretation that these words could refer to the happening of individual or particular events, such as in the case of *El-Ali and Daraz* (eg where an individual Palestinian leaves the territory where he is registered with the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and/or receiving assistance from UNRWA).[56]

In sum, the five instances discussed above highlight some possible inconsistencies between the standard currently applied by the British courts and the standard provided in the Directive. For the purpose of implementing the Qualification Directive, the British judiciary may be required to adjust its interpretation to meet the EU 'minimum standard' set in mandatory terms (ie 'shall'/'is' as provided in three of the five instances).

III. PROVISIONS IN THE DIRECTIVE WHICH COULD RESULT IN THE UNITED KINGDOM LOWERING ITS STANDARDS

Overall, the Qualification Directive provides relatively few instances of standards that are set below the current standards existing in the Member States

[54] Section 2.3.
[55] [2002] EWCA Civ 1103, [2003] 1 WLR 95, [2003] Imm AR 179.
[56] Paras 24–7.

(particularly the United Kingdom), and possibly also in international law. These instances are significant for the future of refugee protection, and more generally asylum, in Europe, particularly when they set an obligatory minimum standard for the Member States to follow. Below I examine five instances where the Directive may be setting lower standards than those existing in the United Kingdom.

A. International protection needs arising sur place

The common concept of 'international protection needs arising *sur place*' offers an example where the Directive may be setting a lower standard of protection than that currently being provided in the United Kingdom. The Directive recognizes that a person can ('may') be in need of international protection on the basis of events or activities which have taken place since she left her country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.[57] It also allows Member States ('may') to refuse refugee status to an applicant who has manufactured her own fear in the context of a subsequent application and to reduce unilaterally the benefits granted under the Directive to persons recognized as refugees as well as to persons recognized subsidiary protection.[58] Thus, the provisions in the Directive regarding refugees *sur place* are drafted as merely minimum standards; they do not require the Member States to follow such standards. That said, it must be pointed out that the Directive appears to fall short of UNHCR guidelines and international law more generally in two respects. First, it does not specifically require that in cases of refugees *sur place* States undertake a careful examination of the circumstances, in particular, of whether the activities in question have come to the notice of the authorities in the country of origin and how they are likely to view such activities.[59] Furthermore, a reduction of the rights provided in the Refugee Convention to a person who acted in bad faith but who nonetheless was recognized as a refugee under that Convention is difficult to reconcile with the fact that there exists no obligation on individuals to act in good faith under international law.

In the United Kingdom, the Court of Appeal has had to deal with manufactured asylum claims in two different situations. The first situation is where an asylum seeker manufactured his asylum claim and has no well-founded fear

[57] Art 5(1)(2) and Art 4(3)(d). See also, *UNHCR Handbook*, paras 94–6.

[58] Art 5(3) and Art 20(6), respectively. Thus, the compromise reached in the Directive is that it creates a presumption against manufactured asylum claims in the case of subsequent applications only. However, the Directive provides that subsidiary protection would not be refused on this ground (Art 5(3) and Art 20(7)). Such interpretation is in conformity with the absolute and unconditional protection against ill-treatment under Art 3 of the European Convention on Human Rights, even if the Convention allows States to restrict the political activities of aliens present in their territory.

[59] *UNHCR Handbook*, para 96.

of persecution. The Court of Appeal held that such cases did not fall within the terms of the Refugee Convention.[60] The second situation is where an asylum seeker (or refugee *sur place*) acted in bad faith but genuinely feared persecution if returned to his country of origin. The Court of Appeal found that such applications may nevertheless fall within the terms of the Refugee Convention, although the credibility of the applicant will be low and his claim must be rigorously scrutinized.[61] It can be argued that this interpretation is less restrictive than that provided in the Directive.

B. Actors of protection

It is generally recognized that international protection may only be sought by individuals who cannot seek and obtain protection from their own State. International protection is only 'substitute protection';[62] it comes into play when the state of origin of the individual fails in its duty to protect its nationals. The Qualification Directive acknowledges this interpretation. However, it goes further by recognising that de facto entities 'can' ('may') also provide protection, not just States. Thus, 'parties or organizations, including international organizations, controlling the State or a substantial part of the territory of the State', are recognized in the Qualification Directive as actors of protection.[63] In many countries, the Directive simply formalizes existing practice.[64] For instance, this interpretation is already prevailing in England at the Immigration Appeal Tribunal (although not in Scotland). In the case *Dyli v Secretary of State for the Home Department*,[65] the Tribunal considered that a person who is protected in his own country has no basis for fear of persecution and how protection 'is achieved, whether directly by the authorities of the country, or by others, is irrelevant'.[66] Thus protection afforded by or through the UN Mission in Kosovo or the Nato Kosovo Force was found to be capable of amounting to the protection of his own country for a resident of Kosovo.[67]

Even though the Qualification Directive has made the debate about de facto

[60] *Gilgham* [1995] Imm AR 129, and *B* [1989] Imm AR 166.

[61] *Danian v Secretary of State for the Home Department* [2000] Imm AR 96 (CA).

[62] J Hathaway *The Law of Refugee Status* (Butterworths London 1991) at 124, referring to the words of J Patrnogic.

[63] Art 7(1).

[64] H Storey Vice President, Immigration Appeal Tribunal (UK) 'From Nowhere to Somewhere': An Evaluation of the UNHCR 2nd Track Global Consultation on International Protection: San Remo 8–10 Sept 2001 Expert Roundtable on the Internal Protection/ Relocation/Flight Alternative, 2002 at para 81.

[65] [2000] Imm AR 652.

[66] ibid para 13.

[67] The Tribunal based its arguments on a literal interpretation of the phrase 'protection of the country' in Art 1A(2) Refugee Convention, which does not refer to 'state' or 'authorities'. Whether or not the protection in question is adequate is a separate question, it is a matter of fact that must be decided on the evidence in each individual case (ibid, para 14).

States' entities redundant, the academic arguments are nonetheless a useful reminder of the fragility of some of the Directive's provisions in international law. Thus, Guy Goodwin-Gill and Agnès Hurvitz have strongly criticized this interpretation for being in breach of international law on the grounds that administrations or international organizations are generally not parties to international human rights treaties and are therefore left largely unaccountable for their actions.[68] James Hathaway and Michelle Foster see a similar problem with regard to the lack of accountability under international law of 'ethnic leaders in Liberia, clans in Somalia, or embryonic local authorities in portions of northern Iraq' as possible providers of protection.[69]

C. Exclusion from refugee protection on grounds of crime

Article 12(2) of the Qualification Directive excludes from refugee status individuals who have committed crimes of such a serious nature that they do not deserve protection. This provision is clearly based on Article 1F of the Refugee Convention and is drafted in mandatory terms for the Member States to apply. The serious crimes in question are crimes against peace,[70] war crimes, crimes against humanity, serious non-political crime and acts contrary to the purposes and principles of the UN.[71] UNHCR has advocated the use of a balancing test or proportionality test when dealing with Article 1F, in particular Article 1F(b), ie the seriousness of the non-political crime is weighted against the consequences of the expulsion.[72] There is some support for this

[68] G Goodwin-Gill and A Hurwitz, Submission to the House of Lords on the Draft Council Directive on minimum standards for the qualification and the status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, Apr 2002.

[69] J Hathaway and M Foster 'Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination', Sept 2001 (San Remo Roundtable Paper), at 46.

[70] Note that the concept of 'crime against peace' is defined in the Nuremberg Principles ('planning, preparation, initiation of a war of aggression, or a war in violation of international treaties, agreements or assurances . . .'). In contrast, the Rome Statute of the International Criminal Court (ICC) states that the ICC will exercise jurisdiction over the crime of aggression—but only when the crime has been defined and the conditions for the exercise of such jurisdiction are set out (Art 5). In *R v Jones* [2004] EWCA Crim 1981 (21 July 2004), the Court of Appeal said that 'international law has moved on from the position immediately following the Second World War . . .' and that there was 'no firmly established rule of international law which establishes a crime of aggression which can be translated into domestic law as a crime in domestic law'. This would suggest that the part relating to crimes against peace may not be applied in practice, whether under international law—Art 1F(a) of the Refugee Convention—or European law—Art 12(2)(a) of the Qualification Directive. In contrast with the Court of Appeal judgment, Attorney General Lord Goldsmith in his advice opinion on Iraq: Resolution 1441 (7 Mar 2003, text available at <http://www.lslo.gov.uk/foi/Iraq_Resolution_1441.pdf>) was of the view that 'Aggression is a crime under customary international law which automatically forms part of domestic law. It might therefore be argued that international aggression is a crime recognized by the common law which can be prosecuted in the UK courts.'

[71] The Directive also acknowledges that 'particularly cruel actions, even if committed with an allegedly political objective, may bet classified as serious non-political crimes' (Art 12(2)(b)). This interpretation is in line with UNHCR's guidelines.

[72] With support to be found in the *travaux préparatoires*.

position in the EU Council Directive on Temporary Protection (adopted pre-9/11) which expressly provides that all decisions on exclusion should be based on the principle of proportionality.[73] But nothing in the Qualification Directive suggests that this test has become standard. In fact, the only reference to the principle of proportionality in the Directive is found in Recital 37, in the context of the principle of subsidiarity and Article 5 of the Treaty of the EU. In the United Kingdom, the Court of Appeal rejected the proportionality test in *T v Secretary of State for the Home Department*.[74] In fact, this test is generally not used in common law jurisdictions or in some civil law jurisdictions.[75]

Finally, Recital 22 of the Directive also explicitly endorses the interpretation embodied in UN Security Council Resolutions that acts of terrorism are contrary to the purposes and principles of the UN (and so are knowingly financing, planning, and inciting terrorist acts).[76] This interpretation was recently accepted by the Immigration Appeal Tribunal in *KK v Secretary of State for the Home Department*.[77] However, UNHCR does not agree with this interpretation and has recommended a more restrictive approach to Article 1F(c). For UNHCR, Article 1F(c) should be restricted to an act that 'impinges on the international plane—in terms of its gravity, international impact, and implications for international peace and security'.[78]

D. Cessation of refugee status on ground of change in circumstances

The grounds for ceasing to be a refugee in the Qualification Directive are almost identical to the grounds provided in the Refugee Convention, with one exception to be found in Article 11(1)(e)(f) of the Directive. This provision fails to refer to the situation covered by Article 1C(5) (and (6)) of the Refugee Convention whereby a refugee 'is able to invoke compelling reasons arising out of previous persecution for refusing to return' to her country of origin.[79] This omission indicates a departure from the original proposal for a qualification

[73] Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L212, 7 Aug 2001, Art 28(2) and Art 28(1)(a)(ii).

[74] [1995] Imm AR 142. See also *Gurung v Secretary of State for the Home Department*, [2002] UKIAT 04870, and s 34 of the Anti-terrorism, Crime and Security Act 2001.

[75] ELENA *International Course on the Application of Article 1C and Article 1F of the 1951 Convention Relating to the Status of Refugees* (2003) at 20.

[76] Recital 22. See, in particular, UN Security Council Resolution 1373 (2001) of 28 Sept 2001. This endorsement raises a couple of wider questions. First, the extent to which the Security Council is able to lay down an interpretation of the terms of a treaty, and secondly, the extent to which, if at all, any such interpretation is binding on the Member States. A further problem relates to the fact that there is no internationally agreed definition of 'terrorism'.

[77] [2004] UKIAT 00101, 7 May 2004.

[78] ibid, paras 35–7.

[79] Note that the cessation clause which until now has been largely unused in the Member States, including the United Kingdom, may well be given a new lease of life through the enforcement role of the European Court of Justice.

Directive put forward by the European Commission.[80] According to the Explanatory Memorandum, this proposal was not only incorporating a reference to 'compelling reasons', it was also accepting that that provision should apply to all refugees, and not just statutory refugees, thereby embracing State practice in countries such as France, Belgium, Canada, and the United States of America,[81] but not in the United Kingdom.[82] The restrictive wording of Article 11(1)(e)(f) therefore must be seen as a step back from international practice and may have implications in the domestic courts, not least in France and Belgium. It may also concern the European Court of Justice since Article 11 sets an obligatory standard for the Member States to follow (see Section IV).

E. Content of international protection

The Qualification Directive guarantees a minimum level of rights and benefits to beneficiaries of subsidiary protection that is considerably lower than the level of rights guaranteed to refugees.[83] For instance, refugees 'shall' be issued with a residence permit that is valid for at least three years and is renewable whereas beneficiaries of subsidiary protection 'shall' be issued with a residence permit valid for at least one year, that is renewable. Also, refugees 'shall' be granted Refugee Convention Travel Documents, whereas beneficiaries of subsidiary protection 'shall' only be provided with documents enabling them to travel when 'serious humanitarian reasons arise that require their presence in another State'.[84] Furthermore, access to the labour market, social welfare or health care is more restricted for persons entitled to subsidiary protection status than for refugees,[85] and the Member States have the option to limit the benefits for beneficiaries of subsidiary protection to core benefits only, ie minimum income support, assistance in case of illness, pregnancy and parental assistance, and to deny even such benefits to persons excluded under Article 17 of the Qualification Directive. Finally, access to integration facili-

[80] 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, Explanatory Memorandum, Art 13(1)(e).

[81] Reference in *R v Special Adjudicator, ex p Hoxha* [2005] UKHL 19 at para 79. See also UNHCR Guidelines on International Protection 'Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees', HCR/GIP/03/03, 10 Feb 2003.

[82] See in particular, *R v Special Adjudicator, ex p Hoxha* [2005] UKHL 19. The House of Lords rejected the argument that the 'compelling reasons' provision should be interpreted generously to concern all refugees and not only statutory ones (at paras 70 and 82).

[83] This situation is exacerbated by the fact that the Reception Directive (Council Directive 2003/9 on the minimum standards for the reception of asylum seekers, OJ 2003 L 31/ 18) only provides for adequate minimum standards of reception to persons applying for asylum under the Refugee Convention. In addition, the Family Reunification Directive (Council Directive on the Right of Family Reunification, OJ 2003 L 251/ 12) does not apply to persons with a subsidiary form of protection.

[84] Art 25. Thus, beneficiaries of subsidiary protection are not recognized as enjoying freedom of movement within the EU.

[85] Arts 26, 28, and 29.

ties is in principle limited to refugees.[86] On the other hand, refugees and persons entitled to subsidiary protection have equal access to accommodation; they also have the same freedom of movement within the Member State in which they are present. However, in countries such as the Netherlands, which has implemented a uniform residence permit with the same level of rights and benefits attached to it for all persons granted protection, the Qualification Directive falls short of these standards. By providing a different status for refugees and beneficiaries of subsidiary protection, the Directive may also fall short of the requirements established by the principle of equality (non-discrimination) under international law and EU law.[87] It is also likely that any measures adopted to transpose that part of the Directive into the domestic laws of the Member States will raise issues of constitutionality in countries where the principle of equality is safeguarded in the Constitution.

In sum, the discussion above highlights instances where the Qualification Directive does not reflect the United Kingdom's interpretation of its obligations under international law or does so but in the most restrictive way. This process of identifying the differences and similarities between national jurisprudence and EU law has already started in the 25 Member States; it will continue during the next 12 months. More broadly and at a more fundamental level, the Directive may conflict with international law. Accordingly, my next section identifies the most important deviations from international law in the Qualification Directive.

IV. DEVIATIONS FROM INTERNATIONAL LAW IN THE QUALIFICATION DIRECTIVE

The Qualification Directive contains a number of inconsistencies with international law. Some of these inconsistencies may be the result of the Directive not embracing the exact wording of the Refugee Convention. Others may also be the result of the Directive adopting an interpretation that differs from UNHCR Guidelines or the jurisprudence of the European Court of Human Rights. There again, because the Directive is not directly applicable in the Member States but requires implementation, the impact of these deviations will depend on whether the provisions in question are framed in obligatory terms or not. This section identifies six of the most important deviations from international law in the Directive.

[86] Art 33.

[87] eg Art 14 of the European Convention on Human Rights, Protocol 12 to the European Convention on Human Rights, Art 6 of the Treaty on European Union, and Art II-21 of the Charter on Fundamental Rights. The UNHCR has rejected the two arguments put forward by the European Commission in support of a difference between the two statuses, ie to preserve the primacy of the Refugee Convention and to meet the need for subsidiary protection which is only temporary in nature. See UNHCR 'Towards a Common European Asylum System' in *The Emergence of a European Asylum Policy* (CDU de Sousa and P de Bruycker (eds)) (Bruylant Brussels 2004) at 249–50.

A. Deviations from international law resulting from a difference in wording

First, the Qualification Directive applies only to third-country nationals and excludes from its scope EU nationals, whereas the Refugee Convention applies to anyone outside their country of origin. The mandatory limitation in the Directive therefore contravenes both the principle of non-discrimination on grounds of country of origin enshrined in Article 3 of the Refugee Convention[88] and Article 42 of the Refugee Convention prohibiting reservations to Article 1 of the Refugee Convention.[89]

Secondly, Article 11(1)(e)(f) offers a reading different from that of the cessation clause in international law. This is also the case concerning Article 12(1)(b) which does not offer the same reading as Article 1E of the Refugee Convention, and which adds to it the possibility of excluding the benefit of refugee status to a person who is recognized as enjoying 'the rights and obligations equivalent to those attached to the nationality'. Both provisions are drafted in mandatory terms.

Thirdly, Article 14(4)(5) allows the Member States to refuse refugee status, or if refugee status is already granted, to revoke, end or refuse to renew refugee status, to someone whom there are reasonable grounds to believe has become a danger to the security or the community of the country in which he or she is present. This possibility, which is drafted in non-mandatory terms and is therefore left to the discretion of the Member States, is contrary to the Refugee Convention because it is based on a misreading of the purpose of Article 33(2) in the Refugee Convention. Article 33(2) provides that a refugee whom there are reasonable grounds for regarding as a danger to the security or the community of the country in which he or she took refuge may not claim the benefit of the principle of *non-refoulement*; it does not provide that such a person may not benefit from the provisions of the Refugee Convention at large. Article 33(2) is not an exclusion clause.

Fourthly, the status of refugee guaranteed under the Directive (and drafted mostly in mandatory terms) is not equivalent to that in the Refugee Convention. In this respect, it is striking that not one sentence from the Refugee Convention on the issue of the content of international protection has been reproduced in the Directive. For example, the Directive is mostly silent on the freedom to practise religion and the freedom as regards religious educa-

[88] Note that Recital (11) in the Preamble of the Directive limits the benefit of the principle of non-discrimination to persons covered by the Directive. See also, the discussion on Protocol 6 on asylum for nationals of EU Member States or 'Aznar' Protocol in J-Y Carlier 'Le développement d'une politique commune en matière d'asile' in *The Emergence of a European Asylum Policy* (CDU de Sousa and P de Bruycker (eds) (Bruylant Brussels 2004) at 6–7, and I Boccardi *Europe and Refugees. Towards an EU Asylum Policy* (Kluwer Law International Deventer 2002) at 140–3.

[89] As argued by Anja Klug in A Klug 'Harmonization of Asylum in the European Union—Emergence of an EU Refugee System?' (2005) German Yearbook of International Law at 600.

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tion of the children of refugees[90] as well as on the rights attached to juridical status which are guaranteed in the Refugee Convention.[91] Also the provision on naturalization in Article 34 of the Refugee Convention has been translated into a general obligation on facilitating the integration of refugees into society, with no reference to naturalization.[92] The UNHCR has generally stated that, since Article 20(1) of the Directive recognizes the primacy of the rights laid down in the Refugee Convention, 'It is unthinkable that the Member States of the European Union would deny refugees the exercise of these Convention rights simply by reason of their express non-incorporation into Community rule. Still, there is a drafting problem that needs to be remedied'.[93]

Fifthly, as previously mentioned in Section II.E, the Qualification Directive allows for a difference in status between refugees and beneficiaries of subsidiary protection.[94] This difference has been criticized by UNHCR on the ground that it lacks objective justification.[95] This difference will most likely raise issues under international law and EU law, including the general principles of law to be found in the Constitutions of the Member States, depending on the level of discretion left to the Member States in implementing these provisions.[96]

Finally, Article 8(3) of the Directive allows the possibility of return to a designated area in the country of origin 'notwithstanding technical obstacles'. This possibility, albeit worded in non-mandatory terms, does not exist anywhere in international law.

Whereas the examples above show deviations from international law in the Directive in favour of a lower standard, I found one example of provision in the Directive which in fact goes further than international law: Article 9(2)(f) which adds 'acts of a gender-specific or child-specific nature' in its definition of persecution, independently from the category of 'member of a particular social group'. This provision is drafted in non-obligatory terms.[97]

B. Deviations resulting from a difference in interpretation

Deviations from norms of international law in the Qualification Directive may also result from the Directive adopting an interpretation of a concept that

[90] Art 4, Refugee Convention.
[91] Art 12-16, Refugee Convention.
[92] Art 33, Qualification Directive.
[93] UNHCR 'Towards a Common European Asylum System' in *The Emergence of a European Asylum Policy* (CDU de Sousa and P de Bruycker (eds)) (Bruylant Brussels 2004) at 246.
[94] ibid at 249. Note that Recital (10) and Recital (11) of the Directive explicitly refer to 'fundamental rights' and to norms of international law prohibiting discrimination.
[95] ibid at 249–50.
[96] eg Art 29(2): 'By exception to the general rule laid down in paragraph 1, Member States *may* limit health care granted to beneficiaries of subsidiary protection to core benefits [. . .]' (my emphasis).
[97] Art 9(2)(f): 'Acts of persecution . . . *can*, inter alia, take the form of: acts of gender-specific or child-specific nature' (my emphasis).

differs from a previous interpretation by an authoritative international organ, such as the European Court of Human Rights. The Directive provides at least two such instances. One relates to the concept of 'sufficiency of protection', the other relates to the concept of 'family'.

The Qualification Directive deals with the issue of sufficiency of protection in Article 7(2) on actors of protection.[98] The minimum standard required by the Directive to assess whether protection by the country of origin is sufficient, is based on the existence of 'an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to it'. This minimum standard applies to cases under both the Refugee Convention and the European Convention on Human Rights. It is not clear from a reading of Article 7(2) of the Directive where this interpretation comes from. Both the Refugee Convention and UNHCR Handbook are silent on what constitute sufficient protection.

The Refugee Convention generally requires a lack of State's protection in order to be recognized as a refugee. The UNHCR Handbook simply provides that 'Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection'.[99]

Turning to the European Convention on Human Rights, the Strasbourg Court recognizes that in cases of serious harm by non-state agents, the applicant must show 'that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection'.[100] This is so even where the source of the ill-treatment in the receiving country 'stems from factors which cannot engage either directly or indirectly the responsibility of the public authorities'.[101] This requirement must nevertheless be set against the duty of States to take positive action to ensure that individuals are not subjected to violations of their rights under Article 3 at the hands of public authorities or private individuals.[102] The European Court of Human Rights found that in the context of Article 2 of the European Convention on Human Rights, such duty implies 'a positive obligation on the authorities to take *preventive* operational measures to protect an individual whose life is at risk from the criminal acts of another individual' (my emphasis),[103] albeit in a reasonable way, that is 'in a way which does not impose an impossible or disproportionate burden on the authorities'.[104] And the Court concluded that when faced with an alleged violation of a positive obligation, 'it is sufficient

[98] See also Art 6(c), Directive, on actors of persecution or serious harm, referring to Art 7.
[99] Para 65.
[100] *HLR v France*, Reports of Judgments and Decisions 1997-III, para 40.
[101] *D v United Kingdom*, Reports of Judgments and Decisions 1997-III, para 49.
[102] *A v United Kingdom* (1998), para 24, *Pretty v United Kingdom*, Report of Judgments and Decisions 2002-III, paras 50–1.
[103] *Osman v United Kingdom*, Reports of Judgments and Decisions 1998-VIII, para 115.
[104] ibid, para 116.

for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge'.[105] Thus, the test for sufficiency of protection applied by the European Court of Human Rights requires: '(a) creating effective criminal law measures, (b) providing policing and criminal justice systems to enforce these measures and (c) taking reasonable operational measures where there is a "real and immediate" risk to the life of a particular individual from the criminal acts of another person'.[106] This test appears to provide a higher standard of sufficiency of protection than the one provided in the Qualification Directive. It is a test which rests on the duty that states owe to protect their nationals. And, although it is not aimed at eliminating all risk of harm, it is clearly aimed at reducing the level of risk to below that of real risk. This issue will most likely be brought to the attention of the European Court of Justice or of the European Court of Human Rights in future.[107]

The concept of 'family' in the Qualification Directive applies to family members of persons with recognized refugee status or subsidiary protection status. However, 'family' is limited to (1) the spouse or unmarried partner in a stable relationship, provided the legislation or practice of the Member States concerned treats unmarried couples in the same way as married couples and, (2) the minor children of the couple who are unmarried and dependent.[108] No agreement was reached between the Member States concerning other relatives. So it is up to each Member State to decide whether to extend the principle of family unity to 'other close [and dependent] relatives who lived together as part of the family at the time of leaving the country of origin and who were wholly or mainly dependent on the beneficiary of refugee or subsidiary protection status at that time'.[109] And yet, the European Court of Human Rights in

[105] ibid. The European Court of Human Rights, drawing on its case law under Art 2, has since argued that the fundamental character of Art 3 read together with Art 1 created such obligations in the context of Art 3 as well, eg *Assenov and Others v Bulgaria*, Reports of Judgments and Decisions 1998-VIII, para 102. See, also, the notion of effective remedy under Art 13 of the European Convention on Human Rights and interpreted by the Strasbourg Court in *Conka v Belgium*, Reports of Judgments and Decisions 2002-I, to mean that 'the remedy may prevent the execution of measures that are contrary to the Convention and whose effects are potentially irreversible' (para 79).

[106] A Mowbray *Cases and Materials on the European Convention on Human Rights* (Butterworths London 2001) at 62. See also 'Duties of investigation under the European Convention on Human Rights' (2002) 51 ICLQ 437–48.

[107] Note that in the United Kingdom, the House of Lords held that sufficient protection meant that there existed in the country of origin a system of criminal law which makes violent attacks by the persecutors punishable and a reasonable willingness to enforce that law on the part of the State. See *Horvath v Secretary of State for the Home Department* (the sufficiency of protection test), [2000] INLR 239. This test is similar to that provided in the Directive and it appears to fall short of the European Court of Human Rights requirements. This test was expanded by the courts to human rights law cases so that broadly the same test should be used. See, *Dhima v Immigration Appeal Tribunal* (QB), 6 Feb 2002 and *R (on the application of Bagdanavicius) v Secretary of State for the Home Department*, CA, 11 Nov 2003, [2004] 1 WLR 1207 (currently on appeal to the House of Lords).

[108] Art 2(h).

[109] Art 23(5).

Strasbourg clearly recognizes the 'broader' family unit. The Court recognized family life between divorced parents and their child 'even if the parents are not living together'.[110] The Court also found that 'family life includes at least the ties between near relatives, for instance those between grandparents and grandchildren, since such relatives may play a considerable part in family life'.[111] This broad definition of family has been endorsed by the Committee of Ministers of the Council of Europe in Recommendation (99) 23 on family reunion for refugees and other persons in need of international protection and by UNHCR.[112] Again, this is likely to be an issue for the European Court of Justice or the European Court of Human Rights to decide upon in future.

In sum, almost all deviations from international law in the Directive have in common that they set standards under the Qualification Directive at a lower level than under international refugee law or human rights law.[113] Thus, a person could be excluded from refugee status under the Directive by a Member State which would be applying the Directive correctly, and yet this person would be a refugee under international law. Furthermore, I could find only one example where the Directive does in fact provide more than the Refugee Convention or the European Convention on Human Rights. I mentioned above Article 9(2)(f) relating to acts of gender-specific or child specific persecution. It is unclear from this reference whether the Directive is simply inviting an interpretation of 'persecution' which would include 'child- specific' measures[114] or whether it is adding a 'new' ground from those to be found in the Refugee Convention. If the latter, then the implications for international law are that a Member State could be granting refugee status to someone who is not necessarily regarded as a refugee under international law. These deviations open up the question of the relationship in practice between the Qualification Directive and international law, particularly the Refugee Convention.

V. THE RELATIONSHIP BETWEEN THE QUALIFICATION DIRECTIVE AND INTERNATIONAL LAW

The Qualification Directive confirms the position of the Refugee Convention as the 'cornerstone of the international legal regime for the protection of

[110] *Berrehab v The Netherlands*, 1998, Series A no 138.
[111] *Marckx v Belgium*, 1979, Series A no 31.
[112] UNHCR, Division of International Protection, *Resettlement Handbook* (Geneva 1997) 4.6. See generally H Lambert 'The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Reunion' (1999) 11 International Journal of Refugee Law 427–50.
[113] In the context of refugee law, see also the conclusions reached by Anja Klug in 'Harmonization of Asylum in the European Union—Emergence of an EU Refugee System?' (2005) German Yearbook of International Law 594–628. In the context of human rights law, see also R Piotrowicz and C. van Eck 'Subsidiary Protection and Primary Rights'(2004) 53 ICLQ 107–38.
[114] Within a context in which children or some children may be considered to be members of a particular social group, or identifiable by reference to their race, religion, etc.

refugees'.[115] However, EU law requires that Member States implement the norms of protection as they exist in the Directive. What will be the legal relationship in practice between the Qualification Directive and international law in situations where the EU law norm is not the same as the international law norm? This is a pertinent question because it has been noted above that, in several instances, the Directive in fact provides less in terms of standards of protection than the Member States themselves (ie the United Kingdom), and perhaps even the Refugee Convention or the jurisprudence of the European Court of Human Rights. This section discusses the status of international treaties in the European legal order. Much has been written about the legal effect of the European Convention on Human Rights in EU law,[116] so this section focuses primarily on the Refugee Convention. A brief summary of some of the essential features of the relationship between EU law and the European Convention on Human Rights is nonetheless required.

A. Status of the European Convention on Human Rights in EU law

The European Court of Justice regards the European Convention on Human Rights as a source of general principles of law, and 'respect for human rights is a condition of the lawfulness of Community acts'.[117] Thus, the European Court of Justice is required to examine the legality of acts of the Community institutions (such as Directives) with the provisions of the European Convention on Human Rights (including the case law of the European Court of Human Rights). It is also under an obligation to interpret acts of the Community institutions in a manner consistent with fundamental rights (ie the European Convention on Human Rights and its case law as well as the constitutional principles common to the Member States). The European Court of Justice is also competent to review the compatibility of the Member States' legislation with the fundamental rights protected in the EU on the basis of Article 220 EC Treaty,[118] provided its jurisdiction is not excluded on the basis of, for example, Article 62(1) and Article 68(2) EC Treaty. In exchange for this compliance with the European Convention on Human Rights and its case law, the European Court of Human Rights has agreed not to interfere with the protection of human rights in the Community as long as fundamental rights

[115] Recital (3).

[116] See, in particular, I Canor '*Primus inter pares*. Who is the ultimate guardian of fundamental rights in Europe?' (2000) 25 European Law Review 25 (2000) 3–21; K Lenaerts 'Fundamental rights in the European Union' (2000) 25 European Law Review 575–600; A Riley 'The ECHR Implications of the Investigation Provisions of the Draft Competition Regulation' (2002) 51 ICLQ 55–89 (particularly 77–87); and E Guild 'Seeking Asylum: storm clouds between international commitments and EU legislative measures' (2004) 29 European Law Review 198–218.

[117] Opinion 2/94 [1996] 2 CMLR 265. See also Art 6 of the Treaty on European Union and Arts II-18, 19, and 47 of the Treaty Establishing a Constitution for Europe.

[118] eg when such legislation implements Community norms. Case 5/88 *Wachauf* [1989] ECR 2609.

receive an equivalent protection.[119] Finally, the European Community/Union cannot be held directly responsible for an act of its institutions by the European Court of Human Rights because the Community/Union is not a Contracting Party to the European Convention on Human Rights.[120] However, should the Member States decide to ratify the Treaty Establishing a Constitution for Europe, the Charter of Fundamental Rights of the Union would become treaty law and the EU would accede to the European Convention on Human Rights.[121] This means that both the Charter and the European Convention on Human Rights would have higher priority than EC secondary law and would be able to confer direct effect.[122] Should the Treaty Establishing a Constitution for Europe fail to be adopted, accession of the EU to the European Convention on Human Rights may nonetheless be possible via Protocol 14 to the European Convention on Human Rights.[123]

B. The status of the Refugee Convention in the European legal order (and its implications for the Member States, individuals and the EU)

EU law, including the case law of the European Court of Justice, distinguishes between (a) treaties concluded by the European Community/Union with third States, and (b) treaties concluded by the Member States with third States prior to the establishment of the E(E)C (1 January 1958), or in the case of new Member States, prior to their accession to the European Community/Union.[124] The Refugee Convention clearly falls into category (b);[125] it was concluded by the Member States with third States on 28 July 1951 and it entered into force on 22 April 1954 (in the case of all new States, it was ratified before accession).

Under Article 307(1) of the EC Treaty (also known as the conflict clause), the Member States are supposed to give priority to commitments embedded in treaties concluded before the establishment of the E(E)C (1 January 1958) *in*

[119] The case of *Matthews v United Kingdom*, Reports of Judgments and Decisions 1999-I, nevertheless shows that primary Community law (ie the Treaties) is now subject to the jurisdiction of the European Court of Human Rights.

[120] Opinion 2/94 [1996] 2 CMLR 265.

[121] Art I-7(2) provides that 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.'

[122] Joint Submissions to Working Group X ('Freedom, Security and Justice') of the Convention on the Future of Europe, D Curtin and S Peers (eds) at 7 and 11.

[123] Art 17 of Protocol 14 provides: 'The European Union may accede to this Convention.'

[124] For an excellent review of both categories, see K Lenaerts and E de Smitjer 'The European Union as an Actor of International Law' (1999–2000) 19 Yearbook of European Law 95–138. The related issue of the status of customary international law in the European legal order is not discussed in the context of this article, but see ibid at 122–6, and J Klabbers 'International Law in Community Law: The Law and Politics of Direct Effect' (2002) 21 Yearbook of European Law at 288–92.

[125] Or at least this is the case until such time as the European Community/Union may decide to accede to the Refugee Convention, a possibility that is not entirely excluded from the European Court of Justice's Opinion 2/94 [1996] 2 CMLR 265. See Joint Submission to the Working Group X ('Freedom, Security and Justice'), D Curtin and S Peers (eds) at 7.

their relationships with third countries.[126] Nonetheless, the Member States are under a general duty to do whatever they can to eliminate any conflict with their EU law obligations (Article 307(2)). It follows from Article 307 that, should a conflict arise, the domestic courts are obliged to apply the provisions of national law which, although contrary to EU law, are necessary to enable the Member States to fulfil their obligations *vis-à-vis third countries* under the prior treaty. It also follows from Article 307 that *in the relations between EC Member States*, the EC treaty takes precedence over international treaties concluded before 1958.[127] However, this primacy is not unlimited: Member States are only allowed to derogate amongst themselves from obligations (in the prior treaty) where such derogation would not make the prior treaty ineffective.[128] As far as the Refugee Convention is concerned, no international court has ever pronounced on this issue.[129] Nonetheless, the Refugee Convention clearly states in its Article 42 that no reservations can be made in respect of Articles 1 (refugee definition); 3 (non-discrimination); 4 (religion); 16(1) (free access to the courts of law), 33 (*non-refoulement*); and 36–46 (executory and transitory provisions and final clauses). Given the importance of these provisions for the achievement of the object and purpose of the Refugee Convention, the Member States are not permitted to modify their obligations under these provisions in EU law. As pointed out by Koen Lenaerts and Eddy de Smijter, 'It follows that, on the basis of Article 307 EC, the Member States are still bound by their prior obligations under the Convention relating to the Status of Refugees when dealing with an application for asylum of a national of another Member State of the EU.'[130]

Having established that the Member States remain bound by their obligations under the Refugee Convention (even if, in their relations with other EU Member States, primarily those provided in non-derogatory terms), we need to examine the scope of application of Article 307 EC Treaty for individuals. In

[126] Art 307(1) EC Treaty: 'The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.'

[127] This would be consistent with Art 30(4)(a) of the Vienna Convention on the Law of Treaties.

[128] Arts 30(5) and 41(1)(b) of the Vienna Convention on the Law of Treaties. And G Fitzmaurice has argued, in the context of Art 30(4), that a later treaty would be null and void in the case of conflict with a human rights treaty. In I Canor '*Primus inter pares*. Who is the ultimate guardian of fundamental rights in Europe?' (2000) 25 European Law Review at 10 (referring to G Fitzmaurice's report).

[129] The International Court of Justice is theoretically competent to deal with an inter-state dispute relating to the interpretation or application of the Refugee Convention (Art 38, Refugee Convention), but in practice this has never happened. Note that in the context of the European Convention on Human Rights, the European Court of Human Rights is satisfied that the Member States remain responsible under the European Convention on Human Rights for all actions of their domestic organs irrespective of whether the violation in question is a consequence of a domestic law or of a necessity to comply with a subsequent international obligation (eg *TI v United Kingdom* (2001) referring to *Waite and Kennedy v Germany* (1999), para 67).

[130] K Lenaerts and E de Smijter 'The European Union as an Actor under International Law' (1999–2000) 19 Yearbook of European Law at 117.

particular, we need to discuss whether or not Article 307 permits an individual to rely on the provisions of a prior international treaty (ie the Refugee Convention) in order to set aside a conflicting obligation under EU law (ie the Qualification Directive). The European Court of Justice held that Article 307 did allow such actions, provided the provision of the treaty relied upon confers rights or imposes obligations on individuals (the doctrine of direct effect).[131] In support of the application of the doctrine of direct effect to the Refugee Convention, the UNHCR has argued that under both Articles 1 (refugee definition) and 33 (*non-refoulement*) of the Refugee Convention the treaty obligation is as much towards the State as 'towards the refugee, whose fundamental human rights are the subject of the Convention'.[132] Furthermore, it is generally recognized that the Refugee Convention was adopted amongst other reasons 'to assure refugees the widest possible exercise of the fundamental rights and freedoms affirmed by the Universal Declaration of Human Rights of 1948'.[133] If, however, direct effect is not accepted, then Article 307 may only be used to set aside a national law implementing the international treaty (not EU law).[134] In sum, as far as individuals are concerned, the European Court of Justice regards international law as part of the European legal order (through the doctrine of direct effect). This is not quite the same as regarding EU law as part of international law.[135]

Finally, we need to examine the legal relationship between the Community and its institutions, and prior international treaties. The general rule is that the Community is not bound by a prior international treaty concluded between its Member States and third States. This means that challenges to the legality of a Community act on the ground that it is incompatible with a prior treaty are excluded. The Community is nevertheless under a duty 'not to impede the performance of the obligations of the Member States which stem from a prior agreement'.[136] In addition, the European Court of Justice will interpret prior treaties in order to guarantee that they can be applied in a way which is in conformity with EU law. One exception exists to this general rule: Substitution. This is where the Community considers itself bound by a prior treaty because it substituted itself for the Member States (ie a full transfer of powers between the Member States

[131] Case 812/79 *Burgoa* [1980] ECR 2787.

[132] UNHCR 'Towards a Common European Asylum System' in *The Emergence of a European Asylum Policy* (CDU de Sousa and P de Bruycker (eds)) (Bruylant Brussels 2004) at 236.

[133] House of Lords, *R v Secretary of State for the Home Department, ex p Thangarasa* and *R v Secretary of State for the Home Department, ex p Yogathas*, judgment of 17 Oct 2002 [2002] UKHL 36, at para 22.

[134] Note also that the European Court of Justice does not require that the rights of third States be invoked but merely that there exist treaty obligations between the Member State in question and third States (and possibly even individuals). Case 812/79 *Burgoa* [1980] ECR 2787 and Case C-158/91, *Levy* [1993] ECR I-4287. See also J Klabbers 'Moribund on the fourth of July? The Court of Justice on prior agreements of the Member States' (2001) 26 European Law Review 187–97 at 193.

[135] R Higgins 'The ICJ, the ECJ, and the Integrity of International Law' (2003) 52 ICLQ 1–20.

[136] Case 812/79, *Burgoa* [1980] ECR 2787.

and the Community occurred). According to Koen Lenaerts and Eddy de Smijter, substitution only occurs 'when *all* Member States are contracting parties to the prior international agreement' and when 'the competence to deal with the subject-matter covered by the prior international agreement has been *completely* transferred to the Community'.[137] In cases where substitution has taken place (eg GATT/WTO), the Community is considered to have concluded the treaty and Article 300(7) EC treaty shall thus apply.[138] This means that challenges to the legality of a Community act on the ground that it is incompatible with the prior treaty become possible. However, here also the European Court of Justice has approached this issue as a matter of direct effect.

Advocate-General Mayras, in his opinion to the European Court of Justice in *International Fruit Company*, described the situation as follows:

> There is no doubt that just as the Court has constantly asserted the precedence of Community Law over the national laws of the Member States it cannot but recognize the superiority of the Community's international agreement over measures adopted by its institutions. It is inconceivable to apply two different systems of reasoning according to whether it is a question of relation between the systems within the Community or relations governed by Community law and external international law.[139]

But curiously the Advocate-General then went on to add that, in the context of preliminary ruling proceedings, the provisions of an international treaty which are said to be in conflict with a Community measure must be directly effective, thereby allowing the Community courts to become the ultimate judges of legality under international law.[140] In *Germany v Council*, the European Court of Justice found that it was prevented from considering whether a Community measure was in conformity with GATT law on the ground that GATT law generally lacked direct effect.[141] Yet, Advocate-General Gulmann, in this case, suggested a conceptual distinction between legality and direct effect.[142] Similarly, Advocate-General Saggio, in *Portugal v Council*, pointed out to the Court that the Community is bound by the rules of GATT, and so are the

[137] Substitution can take place in cases of exclusive Community powers as well as non-exclusive powers of the Community. See further K Lenaerts and E. de Smijter 'The European Union as an Actor of International Law' (1999–2000) 19 Yearbook of International Law at 120–1.

[138] Art 300(7) EC Treaty: 'Agreements concluded under the conditions set out in this Article [ie by the Community] shall be binding on the institutions of the Community and on Member States.'

[139] Joined Cases 21–24/72, *International Fruit Company* [1972] ECR 1219 at 1233–4 (quoted in J Klabbers 'International Law in Community Law: The Law and Politics of Direct Effect' (2002) 21 European Law Yearbook 263–98 at 292).

[140] For a full discussion, see ibid at 292–7.

[141] Case C-280/93, *Germany v Council* [1994] ECR I-4973. This was the first time the European Court of Justice was considering a request by a Member State to review the legality of secondary Community law in light of an international agreement. All other cases had been initiated by companies or traders and had reached the Court via a national court following a request for a preliminary ruling. This judgment was confirmed in Case C-149/96, *Portugal v Council* [1999] ECR I-8395. See also Joined Cases 21-24/72, *International Fruit Company* [1972] ECR 1219.

[142] Case C-280/93, *Germany v Council* [1994] ECR I-4973, para 137.

Community institutions by virtue of Article 300(7) EC Treaty; thus, the question of legality of a Community measure is different from the question of direct effect.[143] But the European Court of Justice remained unconvinced and persevered in requiring direct effect. Jan Klabbers has identified Article 300(7) EC Treaty as 'the heart of the problem: the Community's founding fathers have kept silence about the effects of international law in the Community legal order. There is no provision in the EC treaty on how international law should enter the Community legal order, and there is no specific provision either on possible review of legality in light of international law'.[144]

In only two cases involving the GATT, has the European Court of Justice been willing to look at the effect of international law on the Community legal order without relying on direct effect. In *Fediol (III)*, the European Court of Justice recognized that GATT provisions 'have an independent meaning which, for the purposes of their application in specific cases, is to be determined by way of interpretation'. Using the technique of *renvoi*, it held that when a Regulation expressly refers to specific provisions of an international treaty (in this case GATT), individuals 'are entitled to request the Court to exercise its powers of review over the legality of the Commission's decision applying those provisions'.[145] In *Nakajima*, the European Court of Justice found that the Community was under an obligation to ensure compliance with its international commitments (ie the GATT Anti-Dumping Code). The European Court thus accepted Nakajima's plea of illegality against the EC Regulation on the ground that the Regulation had been adopted so as to give effect to the Anti-Dumping Code. The European Court of Justice therefore was allowed to investigate whether or not the Council, in enacting it, had gone 'beyond the legal framework thus laid down'.[146] It follows from *Fediol III* and *Nakajima* that the question of the legality of a Community measure in light of international law does not necessarily require that the norm of international law be directly effective, if it is the case that the Community measure has been adopted to implement the norm of international law.

In the light of this discussion, what is to be the 'fate' of the Refugee Convention before the European Court of Justice when the latter is called to investigate the compatibility of an EU measure with the Refugee Convention? As already mentioned, the Refugee Convention is not a treaty that was concluded by the Community; it was concluded by the Member States prior to accession to the E(E)C. The European Court of Justice has therefore two

[143] Case C-149/96, *Portugal v Council* [1999] ECR I-8395.

[144] J Klabbers 'International Law in Community Law: The Law and Politics of Direct Effect' (2002) 21 Yearbook of European Law 263–98 at 271. See also GA Zonnekeyn 'The status of WTO law in the Community legal order: some comments in the light of the *Portuguese Textiles* case' (2000) 25 European Law Review 293–302, and P Eeckhout 'Judicial Enforcement of WTO Law in the European Union—Some Further Reflections' (2002) 1(5) Journal of International Economic Law 91–110.

[145] Case 70/87, *Fediol v Commission (Fediol III)* [1989] ECR 1825.

[146] Case C-69/89, *Nakajima All Precision Co Ltd v Council* [1991] ECR I-2069.

options.[147] It can confirm that the Member States alone are bound by the Refugee Convention, not the Community nor its institutions. Article 307 EC Treaty therefore will be applicable in cases of conflict. Or it can decide (like in the case of GATT) that substitution has occurred because the 25 Member States of the EU were all parties to the Refugee Convention prior to their accession to the Community and because the subject-matter covered by the Refugee Convention has been *completely* transferred to the Community. In support of this view, it is interesting to note that the last paragraph of Article 63 EC Treaty (read *a contrario*) suggests that measures adopted by the Council of the EU under points (1) and (2) (the Qualification Directive was adopted under point (1)c) shall prevent the Member States from maintaining or introducing national provisions in the areas concerned.[148] If substitution were accepted, Article 300(7) EC Treaty would then be applicable in cases of conflict and possibilities of challenge before the European Court of Justice would depend on provisions of the Refugee Convention being recognized as having direct effect. As alternative routes to the doctrine of direct effect, the European Court of Justice could choose to follow its approach in *Fediol III* (if the Community act expressly refers to specific provisions of the international treaty). But this is unlikely because the Qualification Directive does not expressly refer to any specific provisions of the Refugee Convention, except in two places.[149] Or it could choose to follow its approach in *Nakajima* (if the Community intended to implement a particular obligation entered into within the framework of an international treaty). This case could indeed be relevant since Recital (2) of the Qualification Directive acknowledges the 'full and inclusive application of the Geneva Convention relating to the Status of Refugees' in establishing a Common European Asylum System. Recital (3) also recognizes the Refugee Convention as 'the cornerstone of the international legal regime for the protection of refugees'. And Recital (16) explains that the minimum standards contained in the Directive 'should be laid down to guide the competent national bodies of Member States in the application of the Geneva [Refugee] Convention'.

In sum, the European Court of Justice may decide to use the Refugee Convention as a yardstick to review the legality of (provisions of) the Qualification Directive or of any measures adopted to implement the Directive. Not only is the Refugee Convention part of the European legal order; it is also superior to Community law. However, as highlighted above

[147] As mentioned above at n 125, it is conceivable that the Community/Union may also simply decide to accede to the Refugee Convention.

[148] Art 63 reads: 'The Council, acting . . . shall . . . adopt: (1) . . . (2) . . . (3) . . . (4). Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.'

[149] Art 12(1) of the Directive refers to Art 1 D of the Refugee Convention and Art 14(6) of the Directive refers to Arts 3, 4, 16, 22, 31, 32, and 33 of the Refugee Convention.

this is not necessarily a sufficient basis for reviewing the legality of Community law in light of international law.

VI. CONCLUSION

It is likely that many of the core concepts in the Directive will affect the way Member States interpret the provisions of the Refugee Convention and the European Convention on Human Rights. Focusing on the United Kingdom, I have found that the commonly agreed concepts of 'internal protection', 'particular social group' and 'best interests of the child' should help raise the standards currently existing in the United Kingdom. Equally the current interpretation by the British courts of the treatment following the refusal to perform military service and of the exclusion clause from refugee status on ground of protection by a UN agency or organ other than UNHCR may be said to be more restrictive than in the Directive. The opposite conclusion has been reached concerning the commonly agreed interpretations in a number of areas: 'international protection needs arising *sur place*', 'actors of protection', the exclusion clause on grounds of crime and of change in circumstances in refugee cases, and the content of international protection. These show that the standards set in the Directive regarding these concepts are either lower than in the existing jurisprudence of the United Kingdom, or that they are set at the lowest possible level of interpretation, perhaps even in breach of international law. The implications for the Member States, individuals, and the Community and its institutions have been considered where these standards deviate from the norm in the Refugee Convention *and* are set in obligatory terms for the Member States to follow.

As far as the 25 Member States are concerned, they will remain bound by the Refugee Convention in their relations with third countries but also between themselves, after the entry into force of the Qualification Directive (Article 307 EC Treaty). Indeed, it is not in their power (nor in the power of the Community institutions) to change, misinterpret, or lower the standards of protection provided by international law to refugees and other persons in need of international protection.[150] Should they wish to do so (with effect between themselves only), these new European standards would still need to meet the requirements of the Refugee Convention, in particular the standards set in the

[150] Art 31(3)(b) of the Vienna Convention on the Law of Treaties makes it clear that for re-interpretation to occur there must be 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. In the United Kingdom, the House of Lords recognized that the UNHCR Handbook constituted good evidence of such 'subsequent practice'; *Adan v Secretary of State for the Home Department* [1999] 1 AC 293. In the words of Gregor Noll, 'Community law cannot alter international obligations', in G Noll 'International Protection Obligations and the Definition of Subsidiary Protection in the Qualification Directive' in *The Emergence of a European Asylum Policy* (CDU de Sousa and P de Bruycker (eds)) (Bruylant Brussels 2004), at 194.

non-derogatory provisions.[151] The only possible way these new standards could 'escape' international law (ie the Refugee Convention) would be for the 25 Member States to withdraw collectively from their treaty obligations under the Refugee Convention.[152] But even then, the Member States would remain bound by EU law (including the European Convention on Human Rights and the principles common to the Constitutions of the Member States) as well as by the provisions in the Refugee Convention that have become customary international law.

As far as the position of individuals is concerned, the situation is less straightforward. On the one hand, it is generally accepted that Community law derives its validity from international law. This means that in cases of contradictory provisions between international law and Community law, these contradictions must be resolved in favour of international law. On the other hand, there exists a distinct trend amongst academics but also more importantly the European Court of Justice that increasingly subordinates international law to EU law.[153] This view is based in particular on the doctrine of direct effect and the central role that it plays in the jurisdiction of the European Court of Justice, ie EC law is *sui generis*.[154] It follows that in cases of conflict between the Qualification Directive (or its implementing measure) and the Refugee Convention, individuals may only be able to rely upon the Refugee Convention before the European Court of Justice if the provision in question is directly effective.

As for the Community and its institutions, they are not bound by the Refugee Convention unless the European Court of Justice finds that substitution has taken place (a possible scenario). But even then challenges to the legality of the Qualification Directive on the ground that it is incompatible with the Refugee Convention will be restricted by the doctrine of direct effect, unless the *Fediol III* or *Nakajima* doctrine can apply.

One final point needs to be addressed: the function of the Refugee Convention following the entry into force of the Qualification Directive. Will the Refugee Convention continue to be used by judges as a benchmark for interpreting the Qualification Directive? Or will the Qualification Directive be taken at face value in effect replacing the Refugee Convention? At the level of the Member States, national judges will no doubt continue to use the Refugee Convention as a benchmark for interpreting the Qualification Directive because in cases of conflict the Refugee Convention takes precedence over the

[151] Art 41, Vienna Convention on the Law of Treaties.

[152] Arts 54 and 56, Vienna Convention on the Law of Treaties.

[153] In A Marschik 'Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System' (1998) 9 European Journal of International Law at 231, referring to LA BarnHoorn and KC Wellens (eds) *Diversity in Secondary Rules and the Unity of International Law* (Nijhoff The Hague 1995) at 297–8. See also J Weiler 'The Transformation of Europe' (1991) 100 Yale Law Journal at 2422.

[154] eg T Hartley 'International Law and the Law of the European Union—A Reassessment' *British Yearbook of International Law* (OUP Oxford 2001) 14–17.

Directive. However, the function of the Refugee Convention at the EU level is less clear. By creating the doctrine of direct effect, the European Court of Justice has secured that national courts will give effect to EU law (eg the Qualification Directive). However, it is itself reluctant to give effect to international treaties (eg GATT/WTO). But is it such a bad thing? Piet Eeckhout has argued that the recognition of direct effect comes at a price: The European Court of Justice gains the authority to verify compliance.[155] In the case of the Refugee Convention, this means that the European Court of Justice would be competent to hear hundreds of cases brought by third-country nationals who would be able to invoke the Refugee Convention against the Qualification Directive or against acts of the Member States implementing the Directive.[156] The European Court of Justice would therefore become the interpreter and enforcer of international refugee law with little or no guarantee that its rulings on interpretation actually amount to a 'correct interpretation' of the Refugee Convention,[157] or to an interpretation agreeable to the Member States. The risk of this happening would be quite real because of the lack of an international court competent (in practice) to deal with refugees and upon which the European Court of Justice could rely on. But more importantly, how would such a role for the European Court of Justice sit with the fact that in the rest of the world no such processes are taking place? As held by Lord Steyn in *R v Secretary of State, ex parte Aitseguer*:

> It is necessary to determine the autonomous meaning of the relevant treaty provision. This principle is part of the very alphabet of customary international law . . . the Refugee Convention must be given an independent meaning derivable from the sources mentioned in Articles 31 and 32 [Vienna Convention on the Law of Treaties] and without taking colour from distinctive features of the legal system of any individual contracting state. In principle therefore there can only be one true interpretation of a treaty.[158]

Direct effect may not therefore constitute the best way of giving effect to the Refugee Convention. A better option may indeed lie in the doctrine of consistent interpretation (according to which EU legislation is to be interpreted in light of and in accordance with the EU international obligations) because it encourages cooperation between the two legal orders.[159] In case of conflict between a provision of EU law and a provision of the Refugee Convention, the doctrines of implementation (created in *Fediol III* and *Nakajima*) would also facilitate dialogue between the European and international legal orders.

[155] This is a forceful argument made by Piet Eeckhout with regard to WTO law in 'Judicial Enforcement of WTO Law in the European Union—Some Further Reflections' (2002) 1(5) Journal of International Economic Law 91–110.

[156] Subject to the limitations in Art 68 EC Treaty.

[157] As per Lord Steyn in *Islam v Secretary of State for the Home Department, R v Immigration Appeal Tribunal and Another ex p Shah* [1999] 2 AC 629.

[158] [2001] 2 WLR 143.

[159] P Eeckhout 'Judicial Enforcement of WTO Law in the European Union—Some Further Reflections' (2002) 1(5) Journal of International Economic Law 91–110.