Challenges to the Protection of Refugees and Stateless Persons – Compliance with International Law

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1. *Elgafaji*, subsidiary protection, Article 15(c) of the Qualification Directive and the (Ir)Relevance of International Humanitarian Law to the Meaning of 'Armed Conflict'

1. Subsidiary protection under the Qualification Directive scheme is required in the case of any person who, if returned to their country, would face a real risk of suffering serious harm as defined in Article 15. Article 15 in turn provides that serious harm consists of (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

2. The question of entitlement under Article 15(c) has already given rise to considerable debate on the meaning and interpretation of the phrase 'international or internal armed conflict', and whether it is appropriate to draw on understandings current in the field of international humanitarian law (IHL), that is, by reference to the 1949 Geneva Conventions, the 1977 Additional Protocols, and the doctrine of the International Committee of the Red Cross (ICRC).

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3. A very good case can be made for *not* adopting an IHL approach to the meaning of 'armed conflict'. First and above all, the Qualification Directive (QD) makes no reference to IHL whatsoever, but locates itself clearly in the context of international refugee law and fundamental human rights. Secondly, the ICRC paper on the interpretation of 'armed conflict',[1] drafted for and within the legal framework of the Geneva Conventions and the Additional Protocols, discloses enough 'inconsistencies' of its own to warrant a different approach to the question of subsidiary protection. When the ICRC says that, 'Legally speaking, no other type of armed conflict exists', its frame of reference is limited, as it admits, to those particular treaties; it is not concerned with possible practice outside that box, and although it occasionally hints at things that may be 'generally accepted', the context remains the interpretation and application of IHL.

4. The notion of 'international armed conflict' is relatively non-controversial, and these remarks therefore focus on non-international armed conflicts (NIACs), in order to highlight the inconsistencies which would result from applying an IHL concept to a human rights concept such as subsidiary protection. Moreover, it is worth recalling that much of the jurisprudence quoted by the ICRC is about the prosecution and punishment of those accused of violating rules, the applicability of which may depend on the nature of the conflict. In criminal proceedings, a relatively tightly drawn concept may therefore be more appropriate than is the case with regard to protection against serious harm, which is the object and purpose of the Qualification Directive scheme of subsidiary protection.

5. According to the ICRC approach, there are several types of NIAC: (1) a Geneva Conventions common Article 3 type; (2) an Additional Protocol II Article 1 type; and (3) an ICTY/ICC Statute Article 8(2)(f) type. Of course, the only 'universally' accepted NIAC context is common Article 3, which helpfully provides no

[1]International Committee of the Red Cross, 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' Opinion Paper, March 2008.

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definition. The ICRC therefore calls in aid Article 1 of (not universally ratified) APII, 'which develops and supplements Article 3... without modifying its existing conditions of application.'

6. The only definitional content in Additional Protocol II is to be found in Article 1(2), which excludes 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'. It is possible that there is general or widespread consensus that these considerations are appropriate in the interpretation of common Article 3. If that is the case, then in any event this approach by differentiation would seem to imply that where acts of violence are 'widespread' and 'common' or 'frequent', then we are on the threshold of a NIAC; and that might be good enough for the QD.

7. But as the ICRC points out, this threshold is not good enough for APII, which requires 'dissident armed forces or other armed groups which, under responsible command, exercise such control over a part of... territory as to enable them to carry out sustained and concerted military operations *and to implement this Protocol*'. This threshold has nothing to do with protecting those who might be at risk of indiscriminate violence, and what IHL fails to do (and is not required to do), is to provide clear guidance as to which conception of NIAC is to apply in the case of those seeking subsidiary protection.

8. Article 15(c) should therefore be read in the light of the object and purpose of the Qualification Directive, including its specifically acknowledged background and overarching legal framework, namely, international refugee law and fundamental human rights. The Directive does not mention international humanitarian law, and neither did the European Court of Justice in *Elgafaji*.[2] At the 'formal' level, therefore, the Geneva Conventions/Additional Protocol

[2] *Elgafaji v Staatssecretaris van Justitie*, Case C-465/07, European Court of Justice, 17 February 2009.

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structure is inapplicable and, given the lack of coherence explained in the ICRC paper, clearly inappropriate.

9. What the Court did in paragraph 7 of its judgment in *Elgafaji*, however, was specifically to invoke Recital (24), which describes subsidiary protection as being 'complementary and additional to' refugee protection; and Recital (25), which affirms that the criteria for subsidiary protection 'should be drawn from international obligations under human rights instruments and practices existing in Member States'.

10. Given the object and purpose of Article 15(c) itself (protection from the risk of indiscriminate violence), the qualifying context ought to be one in which IHL may be illustrative, but cannot be determinative. So, for example, Article 15(c) is not limited to conflicts between States, or to conflicts between the State and one or more non-State entities, or to conflicts between non-State entities. It includes *all* forms of armed conflict, where conflict means, quite simply, 'an encounter with arms... fighting, contending with arms, martial strife...' (*Oxford English Dictionary*, 2nd edition, 1989). Insofar as 'intensity' or the 'protracted' nature of the conflict may be relevant to the application of Article 15(c), then that is a matter going to *risk* but not to the *existence* of relevant armed conflict.[3]

11. Nor is there any support for the view that Article 15(c) is but another way of providing protection against Article 3 ECHR50 harm. On the contrary, the ECJ sees Article 3 protection as squarely provided by Article 15(b).[4] Article 15(c) goes

[3]In its Study on the Qualification Directive, UNHCR makes the useful point of asking, what added value does the reference to 'international or internal armed conflict bring to a legal provision on subsidiary protection – particularly when viable alternative models exist in the OAU Convention, the Cartagena Declaration and the EU's own Temporary Protection Directive: UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, Brussels: UNHCR, 2007, 78.

[4]Article 15(a) protection (against death penalty or execution) is founded in Article 2 ECHR50, now to be read in the light of Protocols Nos. 6 and 13.

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beyond Article 3;[5] and, following the analysis above, it is the general body of fundamental human rights which will provide guidance on the interpretation and application of its other terms, including threat to life or person.

2. Exclusion: Section 72 of the Nationality, Immigration and Asylum Act 2002, the Qualification Directive and Article 1F(b) CSR51

12. Article 1F(b) of the 1951 Convention relating to the Status of Refugees provides that the Convention shall not apply where there are serious reasons for considering that the person concerned 'has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee'.

13. In framing the justification for exclusion and in determining the scope of Article 1F(b), the Secretary of State tends to rely on the terms of section 72 of the Nationality, Immigration and Asylum Act 2002.[6] For the reasons set out below, this approach is (1) incompatible with the United Kingdom's obligations under the 1951 Convention; and, more particularly, (2) incompatible with the 2004 EU Qualification Directive, which acknowledges the primacy of the Convention.

14. United Kingdom legislation does not provide a definition of 'political offence', but employs 'presumptive exclusion' in relation to the denial of protection

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[5]See paragraph 28 of the judgment of the Court in *Elfagaji*: '... while the fundamental right guaranteed under Article 3 of the ECHR forms part of the general principles of Community law, observance of which is ensured by the Court, and while the case-law of the European Court of Human Rights is taken into consideration in interpreting the scope of that right in the Community legal order, it is, however, Article 15(b) of the Directive which corresponds, in essence, to Article 3 of the ECHR. By contrast, Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR.'

[6]See Home Office, *Asylum Policy Instruction: Exclusion*.

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against *refoulement* and, by extension, in the application of Article 1F(b). Section 72 of the Nationality, Immigration and Asylum Act 2002 purports to apply 'for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection)'. It provides that, 'a person shall be presumed to have been convicted by a final judgment of a particularly serious crime *and* to constitute a danger to the community of the United Kingdom' (emphasis supplied), if he or she has been convicted of an offence and sentenced to imprisonment for at least two years.[7]

15. The Home Office's internal instructions indicate that decision-makers are to apply section 72 and the Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004 analogously ('as a general guide') to the interpretation and application of Article 1F(b).[8] Section 55 of the Immigration, Asylum and Nationality Act 2006 empowers the Home Secretary to issue a certificate declaring that the appellant is not entitled to the protection of Article 33(1) of the Convention because one or other exclusion clause applies.

16. As indicated above, this approach is incompatible with the United Kingdom's international obligations, insofar as the statutory description of 'serious crime' is inconsistent with the general practice of States party to the 1951 Convention;[9] more particularly, it is also incompatible with the 2004 EU Qualification

[7]S. 72(2); ss. 72(3) and 72(4) provide for equivalent presumptions in relation to conviction and sentence outside the United Kingdom, and in relation to such other offences as may be specified or certified by the Secretary of State.

[8]Home Office, *Asylum Policy Instruction: Exclusion*, paragraphs 1.4.15, 2.3.

[9]In 2004, the House of Commons/House of Lords Joint Committee on Human Rights concluded, correctly in my view, that section 72 was incompatible with the United Kingdom's obligations under the 1951 Convention, and that the crimes included in the 2004 Order 'go far beyond what can be regarded as "particularly serious crimes" for the purposes of Article 33(2).' See Joint Committee on Human Rights, *The Nationality, Immigration and Asylum Act 2002 (Specification of Particularly Serious Crimes) Order 2004,* HL Paper 190/HC1212, 2004, 11, 14-15.

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Directive, which identifies the 1951 Convention/1967 Protocol and fundamental human rights as the relevant international legal framework. Every characterisation of an offence as either 'serious' or 'non-political' must therefore be closely scrutinised for consistency with the international sense of those terms, in the light of relevant evidence in the jurisprudence of the House of Lords and of the superior courts of other jurisdictions.

17. Moreover, as the Court of Appeal has recently affirmed in *Yasser Al-Sirri v Secretary of State for the Home Department (UNHCR intervening)* [2009] EWCA Civ 222, there is a presumption of innocence in Article 1F proceedings. Until the Secretary of State provides evidence capable of amounting to serious reasons for considering that an individual comes within one of the Article 1F categories, there can be no foundation for denying him or her protection under the Convention.

Serious crime

18. Although the 1951 Convention provides no definition or description of the phrase 'serious crime' (understandably, given the need to find a form of words sufficient to accommodate as many States as possible, notwithstanding differences in national conceptions of crime), the object and purpose of the drafters was to ensure that only the most serious criminals were to be excluded, and that political offenders remained protected.[10]

19. Furthermore, given that the refugee is defined by reference to his or her personal circumstances (having a well-founded fear of persecution for particular reasons), and that he or she may be excluded only by reason of personal conduct ('has committed...'), the arbitrary classification of offences as 'serious' without due regard to context and individual circumstances or to the general practice of

[10]See Goodwin-Gill, G. S. & McAdam, J., *The Refugee in International Law*, Oxford: Oxford University Press, 3rd edn., 2007, 116-23, 172-84.

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States fails to do justice to the words of the Convention or to the intent of the drafters.

Compatibility with the 2004 EU Qualification Directive

20. The EU Qualification Directive requires Member States to 'bring into force the laws, regulations and administrative provisions necessary to comply with' its terms before 10 October 2006. The United Kingdom has enacted 'The Refugee or Person in Need of International Protection (Qualification) Regulations 2006' in partial fulfilment of its obligation of transposition, the 'Explanatory Note' asserting that many parts 'do not require implementation as consistent provision is already made in existing domestic legislation'.

21. With regard to exclusion, article 7 of the Regulations provides in relevant part:

> '(1) A person is not a refugee, if he falls within the scope of Article 1D, 1E or 1F of the Geneva Convention.
>
> (2) In the construction and application of Article 1F(b) of the Geneva Convention:
>
> > (a) the reference to serious non-political crime includes a particularly cruel action, even if it is committed with an allegedly political objective...'

22. The Directive itself, however, recognizes the primacy of the 1951 Convention and the 1967 Protocol; see Recital (2) – 'full and inclusive application'; and Recital (3) – the Convention and the Protocol 'provide the cornerstone of the international legal regime for the protection of refugees'.

23. In its recent judgment in *Elgafaji v. Staatssecretaris van Justitie*,[11] the European Court of Justice recalled:

[11]See above, note 2.

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> '42. According to settled case-law, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 249 EC...'

24. Article 12 of the Directive, which deals with exclusion, contains only one qualification of the concept of 'serious non-political crime', namely, that 'particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes'. In all other respects, therefore, the Directive requires to be interpreted in accordance with the 1951 Convention and with the general principles of Community law, including respect for fundamental human rights as guaranteed also under the European Convention on Human Rights.[12]

25. The Qualification Directive requires that the correct interpretation of the terms 'serious' and 'non-political' be derived from relevant international sources. Insofar as United Kingdom law and practice depart from the ordinary meaning of the terms of the 1951 Convention, considered in context, with due regard to the treaty's object and purpose, and in the light of the general practice of States and UNHCR, the Qualification Directive requires that it be disregarded in favour of the regime laid down in the latter instrument.[13]

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[12]See *Elgafaji*, above note 2, para. 28: '... Article 15(c) of the Directive is a provision, the content of which is different from that of Article 3 of the ECHR, and the interpretation of which must, therefore, be carried out independently, although with due regard for fundamental rights, as they are guaranteed under the ECHR.'

[13]Note also *K v Secretary of State for the Home Department* [2007] 1 AC 412, where the House of Lords so interpreted Article 10 of the Qualification Directive as to ensure its consistency with international law; see Lord Bingham at §16.

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3. Statelessness: The Bases for Protection

26. The 1951 Convention relating to the Status of Refugees clearly accommodates refugees who are stateless and stateless persons who are refugees.[14] United Kingdom law focuses on the protection of refugees in the sense of the Convention and now also on those entitled to subsidiary protection under the Qualification Directive, but no provision is made for those whose claim to protection is based simply on the fact that they are not recognized as citizens under the law of any State, and that in consequence they do not have or may have lost the entitlement to reside in another State.

27. That loss of entitlement to reside may be due to the application of measures amounting to persecution, in which case the Refugee Convention can be called in aid; or it may be clear that in the circumstances of the particular case, the stateless person would face the risk of serious harm, such as to justify subsidiary protection. But it can also arise in essentially non-threatening ways, administratively, through oversight, or through non-compliance with legislative requirements.

28. States have made some provision for stateless persons, and have taken some steps towards promoting the reduction of statelessness. Many of the articles of the 1954 Convention relating to the Status of Stateless Persons are modelled on and sometimes identical with those in the 1951 Convention; but like that instrument also, the 1954 Convention makes no provision for *admission*, and therefore offers no direct path to protection and status.

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[14]The origins of refugee protection in the 1920s lie in the recognition by the international community that refugees did not enjoy the protection of the country of origin and had not found the protection of another nationality – they were either *de jure* or *de facto* stateless.

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29. In former times (the 1970s), the Immigration Rules specifically acknowledged that, in the administration of the system, regard was to be had to the United Kingdom's international obligations towards stateless persons, including the 1954 Convention. That reference has now been lost, however, although the international obligations remain.

30. In these circumstances, the protection of persons must be based on traditional European Convention grounds, particularly where it can be shown that the person concerned is not in fact 'returnable' to any other country.

31. The 1954 Convention provides a rough and ready description of the stateless person, but human rights must be called in aid to protect him or her from the inhuman or degrading treatment that likely flows from a refusal to recognize status and the consignment of stateless persons to administrative limbo, tolerated at best, but denied the opportunity, among others, of employment and family life which the 1954 Convention, like the 1951 Convention, also requires.

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