

New Developments in International Protection Outside the Scope of the Refugees Convention

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Introduction

Modern international refugee law has its provenance in Geneva. The 1951 Convention Relating to the Status of Refugees was adopted there. The Office of the United Nations High Commissioner for Refugees is located there. But for all the initiatives coming out of Geneva, including recently the Global Consultations, Agenda for Protection and Convention Plus, contemporary refugee law, at least in Europe, is as much Brussels-driven as Geneva driven. But there are ramifications for States worldwide

The point of this paper is to identify some important recent developments in refugee law which have their provenance not in initiatives deriving from the UNHCR but rather from the EU. That is not to say that the UNHCR has played no role: on the contrary, it has been very active. Nevertheless it is fair to say that some of the initiative has rested with Brussels rather than Geneva in recent years. Moreover the real influence has been wielded by the EU Member States rather than the institutions.

The European Union agreed at Tampere in 1999 to work towards the establishment of a Common European Asylum System, “based on the full and inclusive application of the Geneva Convention”. This was to include, crucially and at the core of the policy, approximation of rules on the recognition and content of refugee status. This was so important because State practice now recognizes that there are many people who do not qualify as refugees under the 1951 Convention but to whom States nevertheless have international protection obligations.

Such protection obligations are founded on the fundamental principle of refugee law, that of *non-refoulement*: the duty not to return a person to a territory where he or she will suffer some serious harm, usually but not necessarily at the hands of the governmental authorities there. Because the Geneva Convention adopted a relatively narrow concept of refugee, it does not cover significant numbers of people who may legitimately fear serious breaches of their human rights in their home countries. It is with regard to such persons that the notion of subsidiary protection (EU parlance) or complementary protection (UNHCR parlance) has emerged in State practice.

This talk considers the notion of subsidiary protection as it has emerged in the EU context but suggests that it has application worldwide because of the fundamental human rights it seeks to protect, which have been recognized by most States through their acceptance of the International Covenant on Civil and Political Rights, the Convention Against Torture and other instruments.

The law

Geneva Convention,

Article 1A.(2):

A refugee is anyone who:

...owing to a well-founded fear of **being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion**, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;...

Proposed 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, 19 June 2003; 10576/03; ASILE 40

Article 2(e)

“Person eligible for subsidiary protection” means a third country national...who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin...would face a real risk of suffering serious harm as defined in article 15...and is unable, or owing to such risk, is unwilling to avail himself or herself of the protection of that country;...

Article 15

Serious harm consists of:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment in his or her country of origin, or in the case of a stateless person, his or her country of former habitual residence; 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.

Note: Article 15 was originally wider. It included as serious harm:

- violation of a human right, sufficiently severe to engage Member States’ international obligations
- a threat to the individual’s life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalized violations of their human rights.

Issues

To what extent does the Proposed Directive:

- reflect existing law?
- develop existing law?
- fail to meet the international standard of care?

Relevant instruments

International Covenant on Civil and Political Rights

Article 6 - right to life

Article 7 - prohibition on torture or cruel, inhuman and degrading treatment or punishment)

Article 8 (1-2) - prohibition on slavery and servitude

These are all non-derogable human rights.

Convention Against Torture and other Cruel, Inhuman or Degrading Treatment

Article 3 – prohibition of return of a person to a territory where there are substantial grounds for believing they will be subjected to torture