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**Salah Sheekh is a Refugee**  
New insights into Primary and Subsidiary  
Forms of Protection

Jean-François Durieux  
Departmental Lecturer in International Human Rights & Refugee Law

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Refugee Studies Centre  
Oxford Department of International Development  
University of Oxford

## Working Paper Series

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# 1 Introduction

This paper<sup>1</sup> explores the limits of 'subsidiary' or 'complementary' protection, with particular emphasis on how the concept is applied within the European Communities [EC] legal order. Seeking light in obscure places, it argues that recent developments in EC law, as well as the evolving jurisprudence of the European Court of Human Rights, can be construed positively as dispelling confusion between differently motivated claims to international protection. Should ambiguity prevail, however, these developments may well signal the emergence of a regional 'asylum law'<sup>2</sup>, calling into question the continuing relevance of the universal legal framework enshrined in the 1951 Convention and its 1967 Protocol.

It is trite knowledge that, since the Convention Relating to the Status of Refugees was adopted in 1951, the protection afforded by this instrument has been supplemented by a number of 'additional' human rights treaties. These include the International Covenant on Civil and Political Rights of 1966 (ICCPR); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT); and the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (ECHR)<sup>3</sup>. Nowadays these three instruments, in particular, are as recognisable landmarks in the asylum 'landscape' as the 1951 Convention itself, if one judges by the mass of scholarly writings and commentaries, policy statements and – critically – domestic and international case law referring to their 'asylum' provisions.

It is worth recalling, however, that none of these treaties actually deals with asylum, if the latter concept is construed to mean the sum total of protection afforded by a State to refugees on its territory or under its jurisdiction. To be sure, contracting States were careful not to include in any of these treaties a *right* to asylum from persecution – although an early (1954) draft to the ICCPR did briefly contain such a right.<sup>4</sup> It is rather through their 'supplementation' of the *non-refoulement* principle, as expressed in Article 33 of the 1951 Convention<sup>5</sup>, that the ICCPR, CAT and ECHR have contributed to the

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<sup>1</sup> The views expressed are the author's and do not necessarily reflect the position of UNHCR or the United Nations. I am indebted to Rene Bruin for giving me the idea of the title, and to Hemme Battjes and Gregor Noll for commenting on a draft of this paper.

<sup>2</sup> On this point, this paper builds upon the writings of A. Klug, 'Harmonisation of Asylum in the European Union – Emergence of an EU Refugee System?' (2004) 47 *German Yearbook of International Law*: 594-628; and E. Guild, 'The Europeanisation of Europe's Asylum Policy' (2006) 18 *IJRL*: 630-651.

<sup>3</sup> The reader will immediately notice that the 1950 ECHR predates the Geneva Convention. As we shall see, however, it is not until the late 1980s that the European Commission and Court of Human Rights started developing a non-refoulement jurisprudence based on Article 3 of ECHR.

<sup>4</sup> D. Stevens, *UK Asylum Law and Policy: Historical and Contemporary Perspectives*, London: Sweet & Maxwell (2004), p.141. The European Court of Human Rights has also consistently emphasised that the right to political asylum is not contained in either the ECHR or its Protocols.

<sup>5</sup> Article 33 reads as follows: "(1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

development of 'asylum law'. This is no small contribution, obviously, given that the principle of *non-refoulement* is correctly presented as the cornerstone of the international refugee protection regime. Advocates are also right to stress that the *non-refoulement* provisions of human rights treaties have offered much needed protection to a large number of individuals threatened with persecution in the event of return to their countries of origin.<sup>6</sup> It is important to bear in mind, nonetheless, that the so-called asylum provisions of ECHR, CAT and ICCPR were not drafted with the plight of refugees in mind.

The only *explicit* prohibition of return to a risk of serious human rights violation is contained in Article 3(1) of CAT, which reads:

No State party shall expel, return (refouler) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

This prohibition, unlike Article 33 of the 1951 Convention, suffers no exceptions, and the Committee against Torture, the body entrusted with supervising State performance under the CAT, is authorised to receive petitions from individuals claiming the protection of Article 3. Since the mid-1990s, many of these individual petitioners have been 'unsuccessful asylum seekers', i.e., persons whose claims to refugee status under the 1951 Convention have been turned down by the State presently threatening them with deportation.

Article 7 of the ICCPR contains a general prohibition against torture, to which it adds 'cruel, inhuman or degrading treatment or punishment'. The Human Rights Committee – the ICCPR equivalent of the Committee against Torture for CAT – has interpreted this to include an expulsion to face such treatment:

States parties must not expose individuals to the danger of torture or cruel or inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement. States parties should indicate in their reports what measures they have adopted to that end.<sup>7</sup>

Whether and to what extent other Articles of the ICCPR are equally susceptible of 'extra-territorial application', and thus are vested with a *non-refoulement* potential, is the subject of an ongoing debate, which is beyond the scope of this paper.<sup>8</sup> The Human Rights Committee's *non-refoulement* jurisprudence is, in any event, less comprehensive than that of the Committee against Torture. As Goodwin-Gill and McAdam have observed,

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<sup>6</sup> See, e.g., R. Plender QC and N. Mole, 'Beyond the Geneva Convention: constructing a *de facto* right of asylum from international human rights instruments', in F. Nicholson and P. Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes*, Cambridge University Press, 1999; Brian Gorlick, 'Human rights and refugees: enhancing protection through international human rights law' (2000), *New Issues in Refugee Research*, UNHCR Working Paper No.30.

<sup>7</sup> Human Rights Committee, General Comment No. 20 (10 March 1992)

<sup>8</sup> But see, e.g., J. McAdam, *Complementary Protection in International Refugee Law* (2006), OUP: 136-137; G.Noll, *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, M. Nijhoff (2000): 453-474.

individuals complaining against a European State are more likely to seek protection under the ECHR, which gives rise to binding judgments by the European Court of Human Rights rather than a non-enforceable 'view' by the Human Rights Committee.<sup>9</sup>

## 2 Emergence of a European 'Asylum Law'

In Europe, therefore, it is undoubtedly Article 3 of ECHR which has become the most effective tool 'supplementing' Article 33 of the 1951 Convention. This provision states, in simple and absolute<sup>10</sup> terms:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Since the late 1980s, more precisely since the landmark *Soering* decision of the European Court of Human Rights<sup>11</sup>, the ECHR organs [the Commission, now defunct, and the Court] have consistently read into this provision an obligation not to extradite or expel an individual to a country where s/he would face a risk of being subjected to torture or inhuman or degrading treatment or punishment. In the wake of the *Soering* judgment, *Cruz Varas* was the first of a long series of unsuccessful asylum seekers to secure from the European Court a restraining order against his impending *refoulement*.

European asylum law is, in the words of one commentator, 'no more about just refugee hood, but also about Article 3 of ECHR'.<sup>12</sup> Nuala Mole's seminal handbook on *Asylum and the European Convention on Human Rights* opens with the following statement:

[...] at least in the 27<sup>13</sup> of the 47 Council of Europe member states which are now also members of the European Union, there exist four simultaneous and, often, overlapping key legal regimes for the international protection of asylum seekers and refugees. These are:

- the 1951 Convention [...] and its 1967 Protocol;
- the law of the European Union (EU law);
- the 1984 United Nations Convention against Torture [...]; and
- the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols.<sup>14</sup>

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<sup>9</sup> G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (2007), OUP: 306.

<sup>10</sup> The jurisprudence of the Court on this point, though regularly challenged, remains constant: *Chahal v. UK* (1996) 23 EHRR 413; *Saadi v. Italy*, Application 37201/06, judgment 28/02/2008. See also the various submissions made in the case of *Ramzy v. The Netherlands*, Application No. 25424/05.

<sup>11</sup> *Soering v. United Kingdom*, Application No. 14038/88, judgment of 7 July 1989.

<sup>12</sup> T.S. Spijkerboer, *Noot* under decision AB 2008/106, Dutch Council of State, Administrative Law Division, LJN BB5779 [free translation].

<sup>13</sup> In fact, 26: Denmark has opted out of the Qualification Directive.

<sup>14</sup> Nuala Mole, *Asylum and the European Convention on Human Rights* (4th edition 2007), Council of Europe Publishing: 9. Footnotes omitted. Emphasis added.

She acknowledges that 'there are many individuals whose situation falls outside the scope' of the Geneva Convention, of the CAT and of EU law, but who are protected by the ECHR – including its Article 3. In sum, she paints a complex legal landscape within which protection systems in part supplement each other, and in part overlap. In its *Soering* decision, mentioned above, the European Court of Human Rights took notice of other international instruments of potential application to *non-refoulement* cases, but nevertheless found – in keeping with its specific mandate – that the application of ECHR was not excluded by the existence of these other treaties. Impeccable as this finding may be, it begs an important question: *how supplementary* is the protection afforded by Article 3 of ECHR, over and above that afforded to refugees by the 1951 Convention?

A short *détour* through the territory of EC law is in order at this stage. It will give us an opportunity to engage in semantic finessing, and to weigh the respective merits of the adjectives *complementary* and *subsidiary* in describing what thus far I have called the 'supplementary' protection offered by Article 3 of ECHR.

In April 2004, following a protracted and at times bitter debate, the European Union Council adopted a directive on 'minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection, and the content of the protection granted'.<sup>15</sup> The stated purpose of this instrument, hereinafter referred to as the Qualification Directive<sup>16</sup>, is 'to ensure that Member States apply common criteria for the identification of persons genuinely in need of international protection'.<sup>17</sup> The reference to persons other than refugees being in need of international protection, the first of its kind in any legal instrument binding more than one State, is testimony to the impressive penetration of human rights law, in particular ECHR, into the European asylum discourse. Its legal manifestation in the Qualification Directive is a novel 'subsidiary protection' status, which is meant to consolidate and, where necessary, clarify the practice of Member States.<sup>18</sup>

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<sup>15</sup> EU Council Directive 2004/83/EC of 29 April 2004, Official Journal of the European Union 30.09.2004 L 304/12

<sup>16</sup> Scholarly commentaries on, and evaluations of, the Qualification Directive include: UNHCR, 'Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004', January 2005; UNHCR, *Asylum in the European Union: A Study on the Implementation of the Qualification Directive*, November 2007; G. Gilbert, 'Is Europe Living Up to its Obligations to Refugees?', 15 *EJIL* 980; S. Peers, 'Human Rights, Asylum and European Community Law' (2005) 24 *RSQ* 24; N. Blake QC, 'The Impact of the Minimum Standards Directive 2004/83/EC on National Case Law' in *The Asylum Process and the Rule of Law* (Netherlands, IARLJ, 2006); H. Battjes, *European Asylum Law And International Law* (Leiden/Boston: Nijhoff Publishers, 2006), in particular: 219-274; M. T. Gil-Bazo, 'Refugee status, subsidiary protection and the right to be granted asylum under EC law' (2006), *New Issues in Refugee Research, UNHCR Working Paper No. 136*; H. Lambert, 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law' (2006) 55 *ICLQ* 161-192; G. Noll, 'Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive' (2006) 12 *European Public Law* 295; K. Zwaan (ed.), *The Qualification Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Nijmegen, 2007); H. Storey, 'The EU Refugee Qualification Directive: a Brave New World?' (2008), *IJRL* 20(1).

<sup>17</sup> Recital 6.

<sup>18</sup> It must be borne in mind, however, that the Directive sets only minimum standards: see Articles 1 and 3.

Pursuant to Articles 2(e) and 15 of the Directive, a person eligible for subsidiary protection in the EU is a third-country national who is *not a 1951 Convention 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, [defined as]

- death penalty or execution; or
- torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- serious and individual threat to a civilian's life or person by reason of
- indiscriminate violence in situations of international or internal armed conflict.

A cursory reading of this definition suggests that it covers [under (b)] those individuals whose return is prohibited by Article 3 of ECHR. It also alludes, albeit in a rather awkward fashion [under(c)], to 'war refugees' of concern to UNHCR, i.e., those fleeing the indiscriminately harmful effects of armed conflict. These clauses will be discussed at length further down. Suffice to note, at this juncture, that 'serious harm' generally is distinct from 'persecution' in the sense of the 1951 Convention, and that Article 15 ostensibly posits three different types of serious harm as grounds for subsidiary protection.

As noted, the notion of a 'person eligible for subsidiary protection' has no precedent in either international or domestic law. Does the phrase, and in particular the adjective 'subsidiary', adequately reflect the intent of the Qualification Directive, and does it do justice to its legal sources? During the negotiations leading to the adoption of the directive, UNHCR indicated a preference for the use of 'complementary', rather than 'subsidiary' protection, on the grounds that the 1951 Convention provides adequate protection to refugees as defined therein; and that other legal instruments aim at addressing distinct and different protection needs, rather than 'filling the gaps' of the Convention regime.

To some extent, the same line of argument might equally well vindicate the use of 'subsidiary protection', which denotes some deference to the 'primary' 1951 Convention. In the understanding of EU Member States, however, 'subsidiary' carries another, more debatable connotation: to be eligible for subsidiary protection, an applicant must first face a denial of his or her refugee claim. UNHCR is concerned that Member States may, as it were, rush into this 'opportunity' to reject a claim, to the paradoxical effect that subsidiary protection will become the rule and refugee status the exception. Admittedly, the temptation to favour 'human rights-based' or 'humanitarian' protection over refugee status was greater *before* the Qualification Directive codified the former, for those human rights grounds then entailed no legal obligations for Member States beyond *non-refoulement*. Pursuant to the Directive, Member States are now obliged to grant a legal status to persons eligible for subsidiary protection – however, this status is of lesser quality and shorter duration than refugee status.

Through this semantic discussion, UNHCR has been pursuing two objectives: globally, to preserve the specificity of the 1951 Convention, and indeed its supremacy as far as refugee protection is concerned; and, in the adjudication of individual cases, to ensure that refugees are recognised as such, and not 'just' protected against *refoulement* or relegated to an inferior status. These concerns were voiced by the organisation's Director of International Protection in May 2000, on occasion of a colloquy hosted by the Council of Europe in Strasbourg:

As an individual remedy, the European Court's interpretation of Article 3, together with its useful procedure for injunctive interim relief, will ensure that a 'safety net' exists for those cases that slip, for whatever reason, through a national asylum system. Court decisions will also have a normalizing effect on national legislation and practice. However, from UNHCR's perspective, the frequency of recourse to Strasbourg may also have a downside. Although Article 3 can be helpful in individual cases, it has to be of concern where resort to it is symptomatic of a more deep-rooted but unaddressed problem in national asylum systems in the region. Furthermore, although Article 3 may provide an absolute prohibition on removal (*refoulement*), the right of people allowed to remain usually are inferior to those of recognized refugees. It would be worrying if states were tempted to use Article 3 more frequently so as to avoid their broader obligations to genuine refugees under the Refugee Convention.<sup>19</sup>

There can be no question that Article 3 of ECHR, as interpreted by the Strasbourg Court, can protect against *refoulement* individuals who are not Convention refugees – in this sense it offers a true *complement* to refugee protection. In view of its absolute character, Article 3 also provides a 'safety net' for individuals who fall under one of the exclusion clauses in Article 1 of the 1951 Convention or to whom the exception in Article 33(2) applies. This may be seen as *subsidiary* protection. Neither modality seems to threaten the specificity of the 1951 Convention regime.

At the same time, nothing guarantees that these neat legal 'boxes' remain water-tight and immune from mutual infiltration. To be sure, in applying Article 3 of ECHR in expulsion cases, the European Court is under no obligation – better said, it is not authorised – to scrutinise whether the State concerned has properly applied the 1951 Convention refugee definition to the applicant. This, notwithstanding the fact that rejection of the refugee claim is almost invariably what triggers a recourse to the Strasbourg Court in this type of cases. This is, understandably, the main worry of UNHCR. The UN refugee agency has become very apt at utilising the provisions of human rights treaties on behalf of asylum seekers, but it can adduce 1951 Convention arguments only obliquely, or by analogy, where it intervenes in ECHR or CAT cases.

Thus, 'asylum' cases continue to be heard in Strasbourg – and to be adjudicated on ECHR grounds in domestic jurisdictions – in *de facto* appeals against denials of Convention refugee claims, but without reference, let alone deference, to Convention refugee criteria.

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<sup>19</sup> Erika Feller, Opening Statement in 'Second Colloquy on the European Convention on Human Rights and the Protection of Refugees, Asylum-Seekers and Displaced Persons: Proceedings', Council of Europe Publishing (2000), p.16.

The picture is, admittedly, more nuanced. Refugee protection and that provided by Article 3 of ECHR or CAT, responding to proximate, if not identical, needs, are bound to resort to proximate concepts. As a result, human rights norms have helped clarify the meaning of persecution as well as other key elements of the refugee definition. To a lesser extent, refugee law principles have assisted the interpretation of ECHR. However, this relative inter-penetration has not resulted in a clearer *delineation* of the respective scopes of refugee and 'complementary' protection. Furthermore, in at least one significant issue-area, the coexistence of the two systems appears to have *aggravated the restrictive tendencies of both* – in other words, competition between the two systems has resulted in constraining the protection opportunities of asylum seekers, instead of amplifying them, as it should. This is discussed in the next section.

### 3 Groups and Persons at Risk

The anomaly I am referring to concerns one important aspect of a 'need for international protection', namely: the *characterisation of the risk* faced by the applicant upon return. According to Article 1 A(2) of the 1951 Convention, a person claiming to be a refugee must establish that s/he has a 'well-founded fear' of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. These five 'reasons' for persecution will be referred to, in the following, as 'Convention reasons' or 'Convention grounds'. It is now generally acknowledged that the correct standard of proof required in Convention-based claims is that proffered by the UK House of Lords in its 1998 *Sivakumaran* decision, namely: 'a reasonable degree of likelihood that [the claimant] will be persecuted for a Convention reason if returned to his own country'.<sup>20</sup>

In contrast, for Article 3 of ECHR to be engaged, it must be shown that the applicant faces a 'real risk' of torture or inhuman or degrading treatment upon return. In its famous *Vilvarajah* judgment of 1991, the European Court stressed that its examination of the existence of such a risk 'must necessarily be a rigorous one in view of the absolute character of this provision and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe'. Another, less explicit justification for a relatively high standard of proof in Article 3 cases may be that the Court is, as N. Mole puts it, 'silently conscious of the fact that the Strasbourg system of supervision needs to retain the fullest possible support and compliance of the contracting parties if it is to be at all effective.'<sup>21</sup> By 1991, the Strasbourg organs were also acutely aware of the risk of a full-scale 'migration' of asylum cases towards the ECHR system, threatening to overwhelm their processing capacity.

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<sup>20</sup> [1998] Imm AR 147, at 152. See also UNHCR, 'Note on Standard and Burden of Proof in Refugee Claims', 16/12/1998.

<sup>21</sup> N.Mole (2007): 32.

How does one define a 'real risk', though? In the same *Vilvarajah* case, which involved several young male members of the Tamil community in Sri Lanka, the UK government argued that 'the consequences of finding a breach of Article 3 in the present case would be that all persons in similar situations facing random risks on account of civil turmoil [...] would be entitled not to be removed, thereby permitting the entry of a potentially very large class of people with the attendant serious social and economic consequences'. This expression of anxiety on the part of the Member State is revealing of the reasons – essentially the same – why the refugee claims of *Vilvarajah* and others had failed in the first place. Swayed by this argument, in any event, the European Court acknowledged that the applicants' position was not worse than the generality of other young male Tamils in Sri Lanka, and it ruled that

*A mere possibility of ill-treatment [...] in such circumstances is not in itself sufficient to give rise to a breach of Article 3.*<sup>22</sup>

What would have been considered sufficient, and indeed necessary, by the Court was the existence of 'special distinguishing features' setting the applicants apart from the 'generality' of their ethnic and age group – *something* that would make them, as individuals, not just likely but indeed likelier targets of ill-treatment. The *Vilvarajah* jurisprudence, which the Court reaffirmed in subsequent decisions, made the personal nature of the risk a constitutive element of a 'real risk' of prohibited treatment upon return. Surely, this interpretation is not easy to reconcile with the absolute nature of the protection offered by Article 3 of ECHR. Yet, an argument could be made that the 'singling out' or 'special distinguishing features' requirement makes *more sense* within the context of Article 3 than where refugee status under the 1951 definition is at issue. It is so, because the real risk of torture or inhuman or degrading treatment as per Article 3 is not connected to any 'Convention ground' – i.e., the applicant's membership of a protected category [race, religion, nationality, etc.] is not a determining factor in the assessment of risk.

This argument was not tested in *Vilvarajah* or in any subsequent ECHR case, for two plain reasons. One, which we have discussed already, is the compartmentalisation of protection systems, which bars the European Court from interpreting, even for comparative purposes, the provisions of a treaty which it is not empowered to supervise. The other is that the reasoning suggested above leads to a conclusion that is clearly offensive to the contracting State involved, namely, that the refugee claims of the applicants should have been granted (which, incidentally, would have alleviated the workload of the European Court...). *Vilvarajah*, in other words, did not need exhibit any 'special distinguishing features', and certainly not any special *individual* features, in order to be recognised as a Convention refugee.

This is a thought, which few States Parties to the 1951 Convention are willing to entertain – surely if one judges by the practice of European States since the 1951 Convention has been in force. T.S. Spijkerboer points out that even liberal commentators of refugee law, such as G.S. Goodwin-Gill, have held that the refugee criteria in the 1951 Convention are

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<sup>22</sup> *Vilvarajah v. UK* (1991), 14 EHRR 248, at 111.

highly individualistic.<sup>23</sup> The UNHCR Handbook itself is at best ambivalent about the weight to be attached to the individual circumstances of the asylum seeker<sup>24</sup>, and most European States have borrowed authority from the Handbook, as well as from each other, to develop their own doctrines around the notion of 'individualised persecution'. This resilient dogma, requiring the refugee claimant to establish that s/he has been, or would be, 'singled out' for persecution, is fundamentally an incorrect interpretation of Article 1 A (2) of the 1951 Convention.<sup>25</sup> Indeed, the plain language of Article 1 A(2) suggests that individuals fear persecution as a result of their membership of a group, and if the entire group is persecuted, then every member of the group has a well-founded fear of being persecuted. There is (regrettably not enough) case law confirming this reading of the refugee definition, and administrative instructions have been issued that clearly speak against any 'singling out' requirement.<sup>26</sup> Nonetheless, State practice, in Europe at least, seems to have remained largely impervious to these calls on reason.

The Netherlands is an interesting case in point, in that the jurisprudence of the Dutch Council of State regarding the standard of proof, both under the 1951 Convention and [after 1989] under Article 3 of ECHR, has on several occasions let the singling-out requirement 'slip away', only to affirm it with renewed strength a short time later. This see-saw phenomenon has been well documented by Spijkerboer, Vermeulen and Bem.<sup>27</sup> It should come as no surprise, therefore, that one of the more promising developments in the European Court's 'asylum' discourse was triggered by a person seeking protection in The Netherlands.

A citizen of Somalia, Salah Sheekh was born in 1986 in Mogadishu, but as early as in 1991 the whole family moved to a village twenty-five kilometres away in order to escape the civil war raging in the capital city. Because they belong to the Ashraf minority, Salah's family (as well as the only three other Ashraf families in the village) suffered constant harassment from members of the Abgal clan, who controlled the area. At first they 'only' had to endure extortion and intimidation, but things got worse: by the time Salah managed to flee in 2003, his father and brother had been shot dead by the Abgal militia, his sister had been raped twice by the same, he himself had been beaten several times, and his mother's appeals to the (Abgal) village elders for protection had invariably fallen on deaf ears.

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<sup>23</sup> T.S. Spijkerboer, 'Subsidiarity in Asylum Law', in D.Bouteillet-Paquet (ed.), *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?*, Brussels, Bruylant/ULB (2002).

<sup>24</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (1979, re-edited 1992): compare paragraphs 37 and 40 with 42-44.

<sup>25</sup> T.S. Spijkerboer (2002); I.C. Jackson, *The Refugee Concept in Group Situations*, The Hague: M.Nijhoff (1999): 26-39; Goodwin-Gill and McAdam (2007): 128-129; J.C. Hathaway, *The Law of Refugee Status*, Toronto: Butterworths (1991): 89-97.

<sup>26</sup> Notably the US Asylum Regulations of 1990, which deem it sufficient that the applicant show 'a pattern of practice...of persecution of a group of persons similarly situated' to him or her, and his or her 'own inclusion in, and identification with, such group of persons such that his or her fear of persecution upon return is reasonable': 8 CFR § 208.13(b)(2)(iii); § 208.16(b)92.

<sup>27</sup> T.S. Spijkerboer and B.P. Vermeulen, *Vluchtelingenrecht*, Nijmegen, Ars Aequi Libri, 2005; K. Bem, *Defining the refugee: American and Dutch asylum case-law 1975-2005*, Amsterdam, Vrije Universiteit, 2007.

His asylum claim in the Netherlands was turned down in first instance, then again on appeal, essentially on three grounds: (i) the Minister considered that he had lied about his age, and following an age assessment attributed to him the date of birth of 1 January 1983; (ii) the problems he had experienced did not stem from systematic major acts of discrimination, but rather from the general unstable situation in Somalia, where criminal gangs carry out frequent but arbitrary intimidation and abuse; and (iii) he could and indeed should have relocated to one of the relatively safe areas of Somaliland or Puntland. What is of particular interest for our analysis is that both the Minister's [first instance] and the Regional Court's [appeal] conclusions of non-eligibility were explicitly based on ECHR: they found that Salah Sheekh would not, upon return, face a real risk of being subjected to treatment in breach of Article 3. Neither instance made a serious effort to assess the validity of the claim against the 1951 Convention, beyond the Minister's observation that Salah could not be a refugee since he had not made himself known as an opponent to local rulers, nor had he been politically active.

The European Court's judgment in *Salah Sheekh v. The Netherlands*<sup>28</sup> is significant, in that it seems to signal a departure from the *Vilvarajah* approach, described above. Finding, as had the Dutch authorities, that the applicant and his family belonged to an ethnic minority, the Court differed in its qualification of the abuse his family had been suffering. Such treatment, the Court noted, can be classified as inhuman in the sense of Article 3. Furthermore, it cannot be regarded as arbitrary, as it is well documented that members of the Ashraf minority are particularly vulnerable in view of their lack of clan protection, making them 'easy prey' to serious and repeated abuse. Significantly, the Court concluded:

It cannot be required from the applicant that he establishes that further special distinguishing features, concerning him personally, exist in order to show that he was, and continues to be, personally at risk. [...] it might render the protection offered [by Article 3] illusory if, in addition to the fact that he belongs to the Ashraf ... the applicant be required to show the existence of further distinguishing features.<sup>29</sup>

In passing, the Court attempted to dispel the impression that it might be revisiting its *Vilvarajah* doctrine on this point. With all due respect, it did not do a very convincing job of it. If, however, it did so mainly in order to reassure the Dutch judiciary, it met with [predictable] success: less than a year after its jurisprudence was politely rebuked over *Salah Sheekh*, the Dutch Council of State went on the record to show that it was not impressed by the so-called departure from the *Vilvarajah* doctrine; and that it was standing firm in its exclusion of 'collective risk' from the ambit of Article 3 of ECHR. The case at hand concerned an asylum seeker from Liberia, belonging to the Mandingo minority which- according to a UNHCR report received as credible by the Council of State – was then faced with harassment and persecution in that country. This circumstance was, however, not deemed sufficient to engage the responsibility of The Netherlands under Article 3, as the applicant failed to adduce 'further facts and circumstances concerning him personally' that would point to the existence of a 'real risk' upon return.<sup>30</sup>

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<sup>28</sup> *Salah Sheekh v. The Netherlands*, Application 1948/04, judgment of 11 January 2007.

<sup>29</sup> *Salah Sheekh v. The Netherlands*, at 148.

<sup>30</sup> AB 2008/106, 12 October 2007 (200701023/1, LJN BB5779) paragraph 2.3.5 [free translation]. It is worth

In the detailed note he wrote on this uncompromising decision, T.S. Spijkerboer cannot but conclude that national as well as supra-national judges are as hard to read as ever regarding the circumstances under which collective risk can or must be a ground for asylum. 'The dilemma facing the judges is real', he writes.

Be that as it may, the thought was that judges apply rules of law [...] If a critical element of the rule is not made explicit, then one may wonder what it is that the judges actually apply.<sup>31</sup>

This is a valid question, indeed. Asylum seekers, advocates and judges are justified in seeking greater clarity from the European Court on the characterisation of the 'real risk' in Article 3 of ECHR. Hopefully, this clarification will take the form of a true departure from *Vilvarajah*, and a reaffirmation of the novel wisdom found in *Salah Sheekh*.

To refugee lawyers, however, it must be clear that there exists another way out of the European Court's dilemma. It consists in exposing the impropriety of addressing what are essentially refugee definition matters in the ECHR forum. For what do we make of *Salah Sheekh's* story, in the final analysis? Here we have a person who faces treatment amounting to persecution in Somalia, for no more but no less reason than his belonging to an ethnic minority. The conclusion springs to mind: *Salah Sheekh* is a refugee. It would be a good thing, in my opinion, if UNHCR and refugee advocacy groups in Europe would make this statement heard loud and clear.

## 4 The Search for Integrity and Specificity

Obviously, there is no point in aiming this message at the Strasbourg Court – though it would, in all likelihood, receive it with relief. The practice of States in applying the 1951 Convention, as well as Article 3 of ECHR, has created the double bind in which asylum seekers find themselves caught. It is for States, therefore, to take a critical look at their eligibility practices; and, in the process, to restore the integrity of both refugee protection and other forms of protection.

The mutual complementarity of the various protection 'strands' is what will ensure the integrity of each. As seen above, one objective of EU Member States in drafting the Qualification Directive was to produce a coherent synthesis of their asylum obligations, which could be achieved by spelling out a number of distinct, alternative conditions for the grant of international protection. This may be the time, then, to take another look at the relevant Directive provisions. This time our inquiry will focus on whether the definitions contained in the Directive carry the potential of resolving the dilemma, which the *Salah Sheekh* case has brought to light. What needs to be clarified, the reader will

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noting, however, that in a subsequent decision (3 July 2008, LJN BD7532), the Council of State added that “depending on the facts and circumstances of the case, membership of the group concerned may be decisive” [free translation].

<sup>31</sup> T.S. Spijkerboer, *Noot* : see fn. 12, above. Free translation.

recall, is the relationship between, on the one hand, the individual or collective nature of the risk; and, on the other hand, the available modality of international protection.

Read together, Article 2 and 15 of the Directive posit 'international protection' as a response to:

- a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group; or
- a real risk of serious harm, defined as
  - (a) death penalty or execution;
  - (b) torture or inhuman or degrading treatment or punishment; or
  - (c) a threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict.

Let us now try and sort these various threats or risks according to their degree of *discrimination or, conversely, indiscriminate*.

The risk of death penalty, execution, torture or inhuman treatment – *without reference to any 'grounds'* – is a highly **individual** one: Soering did not face inhuman treatment for reason of belonging to any discriminated group, but because of the very personal circumstance that he had committed murder.

At the other extreme, **indiscriminate** violence is likely to affect everybody within a given conflict area. The prevalence of armed conflict in Sri Lanka may have influenced the thinking of the European Court in *Vilvarajah*, although within ethnic conflict violence is seldom, if ever, indiscriminate. What is sure is that the existence of armed conflict triggers a special regime of protection – namely, international humanitarian law – while the exercise of many human rights may be curtailed.

The 1951 Convention definition sits comfortably in the middle, with persecution being **neither** indiscriminate **nor** individualised: rather, it affects persons sharing common characteristics and/or opinions, which their State of origin or other authority finds offensive and seeks to suppress.<sup>32</sup>

I must hasten to point out that, logical as it may look, the above classification cannot be easily reconciled with the actual wording of the Qualification Directive. As a matter of fact, the drafting history of the Directive does not reveal a strong interest, on the part of Member States, in neat delineations between the different categories of protected persons. The original proposal, submitted by the European Commission, showed a genuine concern for internal coherence, as well as for consistency with the earlier directive on temporary protection.<sup>33</sup> This concern dwindled away, however, as the negotiation

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<sup>32</sup> While in theory all persons belonging to the discriminated group are equally at risk, one must accept that the particular position of individuals within the group may be relevant, as it may determine the level of repression expected from the authority [i.e., the threshold between discrimination and persecution]. Whether the individual's position in the group may also affect the likelihood of persecution, i.e., the well-foundedness of the fear, is more debatable.

<sup>33</sup> See: Explanatory Memorandum to the Commission Proposal for a Council Directive on Minimum

proceeded in Council. Clearly, the overriding preoccupation of Member States was to avoid any new or additional obligations in respect of asylum. There was, therefore, a fair amount of resistance against the notion, advanced by the Commission, of incorporating 'best domestic practices' into a binding EC instrument. Especially with regard to the qualification of persons fleeing situations of armed conflict and indiscriminate violence, those States with more restrictive tendencies were not prepared to let the more generous practice of others be interpreted as a form of regional custom. With few exceptions, the consensus jelled around a lower, rather than a higher, common denominator.

Much has been written about the genesis of the Qualification Directive, including how the four 'definitions' came about. In the version that was eventually adopted, the legal bases for these alternative yet possibly overlapping grounds for international protection are not always explicit. Where necessary, however, sufficient evidence can be found in the Commission's original proposal and the *travaux préparatoires* in Council to support the following summary:

- the refugee definition is imported directly from Article 1 of the 1951 Convention, with only one significant amendment.<sup>34</sup> Furthermore, refugee protection is given primacy over any other [subsidiary] form of international protection;
- subsidiary protection under Article 15(a) is derived from the 6<sup>th</sup> Protocol to ECHR, which outlaws the death penalty. Storey has argued, with reason, that while in peace time the death penalty is also prohibited by Article 3 of ECHR, the separate protection ground of 15(a) is still justified in order to cover situations arising in times of war;<sup>35</sup>
- subsidiary protection under 15(b) is directly inspired from Article 3 ECHR, and it is abundantly clear from the legislative history that it must be read in the light of the *non-refoulement* jurisprudence of the Strasbourg Court based on that Article. Thus, on the question of standard of proof, Member States were, at the time of adopting the Directive, prepared to endorse the above mentioned *Vilvarajah* doctrine;
- the legal origins of subsidiary protection under 15(c) are less straightforward, and it is still a subject of bitter dispute whether the serious harm covered by this provision is, or is not, broader in scope than that set out in 15(b). Throughout the negotiation process, UNHCR stressed the need to provide systematic protection to persons fleeing situations of armed conflict or generalised violence who are of concern to the High Commissioner, even though they fall outside the scope of the 1951 Convention. The Commission, in its original proposal, referred to 'general principles of international humanitarian law' as a valuable source of complementary protection

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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.

<sup>34</sup> This relates to the personal scope of the Directive, which excludes nationals of EU Member states. UNHCR, among others, has expressed grave concern over this *de facto* reservation to Article 1 of the 1951 Convention: UNHCR, Annotated Comments, fn. 16 above, p.10.

<sup>35</sup> H. Storey (2008), fn. 16 above, p.14: the European Court of Human Rights in *Ocalan v. Turkey* (2003) warned that until such time as the 13th Protocol to ECHR was widely ratified, it may be prevented from regarding the death penalty as contrary to Article 3 in times of war.

regimes. By and large, though, these 'other' legal references were ignored by Member States. The addition, in the final stages of the drafting process, of the adjective 'individual' to qualify the serious threat resulting from indiscriminate violence has been the source of much confusion. UNHCR has called for the adjective to be removed, arguing that it renders the provision self-contradicting.<sup>36</sup> Meanwhile, the more conservative Member States rely on the same adjective to contend that 15(c) was never meant to offer a protection additional to Article 3 of ECHR – thereby confirming the latter's status as 'cornerstone' of the entire edifice of subsidiary protection. In October 2007, the Dutch Council of State requested a preliminary ruling from the European Court of Justice regarding the scope of Article 15(c) of the Directive, specifically whether it applies exclusively to situations that are also covered by Article 3 of ECHR, as interpreted by the European Court of Human Rights.<sup>37</sup> In addition to UNHCR<sup>38</sup> and the European Commission, several Member States took it upon themselves to present written observations to the ECJ in this case. These observations, offering as they do a wide gamut of interpretations, are not likely to help the ECJ much. If anything, they confirm that the convoluted and ambiguous wording of 15(c) made it possible for individual Member States to effectively read into its provisions whatever they deemed consonant with their respective interests and concerns.

Whether the three forms of 'serious harm' listed in Article 15 overlap, to what extent, and for what purpose, are important questions. The efficacy or *effet utile* of legislation, which is a general principle of EU law, seems to require that different provisions – such as Article 15(a), (b) and (c) – be based on meaningful distinctions of substance. As noted by Storey, if Article 15(b) encompasses what is specifically spelt out in Article 15(c), the latter would be otiose.<sup>39</sup> However, the ambiguous definitions contained in the Qualification Directive carry an even greater danger, namely: that the refugee definition itself becomes somewhat redundant, putting the *subsidiarity* of subsidiary protection into serious question. Does taking the subsidiarity of subsidiary protection seriously requires that it only be considered once the level of harm falls below persecution, as some have argued?<sup>40</sup> This argument is hard to sustain, in the face of the Directive's own description of what may constitute persecution: acts of persecution within the meaning of the 1951 Convention must be 'sufficiently serious as to constitute a serious violation of basic human rights, in particular those from which derogation cannot be made under Article 15 of ECHR' (Article 9). A serious violation of Article 3 ECHR, which is non-derogable, will therefore always be an act of persecution – but this does not mean that a less serious breach of the same or another protected right would necessarily fall outside the scope of the 1951 Convention.

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<sup>36</sup> UNHCR, *Asylum in the European Union* (2007), fn.16 above, Recommendation 1.3.1, p.15.

<sup>37</sup> Case C-465/07 *M.Elgafaji & N.Elgafaji v. Staatssecretaris van Justitie*. As this paper was being written (9 September 2008) the ECJ's Advocate-General delivered his Opinion in this case.

<sup>38</sup> UNHCR Statement: 'Subsidiary protection under the EC Qualification Directive for people threatened by indiscriminate violence', January 2008, available on [www.unhcr.org](http://www.unhcr.org).

<sup>39</sup> H. Storey (2008), p.33.

<sup>40</sup> See reference in H. Storey (2008), p.32.

On the other hand, even a very serious breach may not activate refugee protection because it is not related to any of the five 'Convention grounds'. A better view must be, therefore, that what actually distinguishes refugee protection from any other form of protection is the *discriminatory* element that is inherent in the 1951 Convention's concept of persecution. This view helps in drawing logical lines between the various protection grounds listed in the Qualification Directive – as suggested by the classification proposed above in this paper. This classification is not, however, a mere exercise in *ex-post facto* rationalisation. Independently from any EC legal framework, Goodwin-Gill and McAdam have rightly stressed the non-discrimination roots of refugee protection. Describing the interests which the 1951 Convention seeks to protect, they note:

The references to 'race, religion, nationality, membership of a particular social group, or political opinion' illustrate briefly the characteristics of individuals and groups which are considered worthy of special protection. These same factors have figured in the development of the fundamental principle of non-discrimination in general international law, and have contributed to the formulation of other fundamental human rights.<sup>41</sup>

That *non-refoulement* obligations also arise in other contexts, and for the protection of equally worthy interests, should not make us lose sight of the specificity of refugee protection. The references to 'race, religion, nationality, membership of a particular social group, or political opinion' are not there in order to place an additional burden of proof on the asylum-seeker, but rather in order to clarify what characteristics justify the status of refugees as 'privileged aliens' in our midst. Put differently, the refugee definition is not intended to describe those aliens whom we cannot deport, but, positively, those aliens whom we want to protect. I cannot find any good reason why refugee protection should be considered primary – and other *non-refoulement* obligations subsidiary-, but for this one: the refugee definition represents the consensus over a positive and collective commitment to protect specific categories of persons, and to resolve the problems caused by their exodus and exile. This positive inclination, which significantly extends to solutions as well as protection, sets refugees – however they may be defined at the present time – apart from those other persons who also, subsidiarily, need protection against forcible return to (personal or collective) danger.

## 5 The 1951 Convention's Primacy: Rhetoric or Reality?

Is there truly a risk that this specificity be lost on Member States implementing the Qualification Directive? At first sight, there appears to be no cause for alarm: the Directive does affirm, in emphatic terms, the primacy of refugee protection under the 1951 Convention, the 'full and inclusive application' of which is a stated goal of asylum law harmonisation within the EU.<sup>42</sup> In this sense, it is true that the Directive 'leaves the

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<sup>41</sup> G. Goodwin-Gill and J. McAdam (2007): 92-93, footnote omitted.

<sup>42</sup> The Treaty of Amsterdam (1997) provided the legal basis for a package of EU legislation on asylum, that had

Refugee Convention intact as the governing international treaty on asylum law'.<sup>43</sup> Furthermore, the Directive provides one important mechanism to make the Convention's primacy work in practice: the definitional criterion, according to which a 'person eligible for subsidiary protection' is a person who '*does not qualify* as a refugee', in effect requires a sequencing of assessments, i.e., that eligibility against refugee criteria be assessed before any grounds for subsidiary protection.<sup>44</sup> It seems, however, that Member States still find it difficult to respect this order of priority.<sup>45</sup> The lofty rhetoric notwithstanding, to prioritise the refugee definition in the assessment of international protection claims under the Qualification Directive may not come naturally to EU Member States. One must acknowledge that it is easier said than done, as at least three obstacles stand in the way:

- (a) Article 15(b) can easily be interpreted as all-encompassing, since – as noted above – most forms of persecution can be subsumed under 'inhuman or degrading treatment or punishment', with the added advantage that the latter notion does not require the type of nexus (with a reason or ground for ill-treatment) found in the refugee definition. Furthermore, the Directive contains a number of 'common standards', i.e., provisions meant to regulate the assessment of applications for international protection, regardless of whether such applications are based on the 1951 Convention or on subsidiary protection grounds<sup>46</sup>. As a result, asylum officers and judges may simply forego the niceties of the 1951 Convention definition, the specificity of which is increasingly lost in favour of the apparent synthesis of international protection needs contained in Article 15(b). A synthesis of refugee and subsidiary protection is in essence what the Dutch first and second instances did when considering the asylum application of Salah Sheekh.
- (b) Somewhat paradoxically, the fact that a specific clause of the Directive – Article 15(c) – grants subsidiary protection to persons whose life or physical integrity is threatened by indiscriminate violence arising within a context of armed conflict may be used as an argument to deny refugee status to *anyone* fleeing a country at war. All it takes is to ignore that persecution on ethnic, religious or other grounds takes place *also* within situations of armed conflict. Such an interpretation would be inconsistent with

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to be 'in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 1967'. In the Tampere Conclusions of October 1999 the European Council agreed to establish a Common European Asylum System based on the 'full and inclusive application of the Geneva Convention': SN 200/99 of 16 October 1999. This language is repeated in Recital 2 of the Qualification Directive.

<sup>43</sup> H. Storey (2008), p. 7.

<sup>44</sup> Likewise, any application for international protection is presumed to be an application for asylum (under the 1951 Convention) unless the person concerned explicitly requests another kind of protection. EU Council Directive 2005/85/EC, Article 2 (b).

<sup>45</sup> UNHCR, *Asylum in the European Union* (2007), pp. 12-13.

<sup>46</sup> Article 4 (assessment of facts and circumstances); 5 (international protection needs arising *sur place*); 6 (actors of persecution or serious harm); 7 (actors of protection); and 8 (internal protection). Within the context of the *Egafaji* case – see fn. 38 above – one government has leant on these common standards to submit that serious harm must in all cases be personal and individual, *as is the case for persecution* within the context of the refugee definition. According to this reasoning, the internal coherence of the Directive would require that the 'singling out' requirement be imported from the 1951 Convention definition into all subsidiary protection grounds. This is a perfectly circular argument, for Member States are just as likely to borrow the 'individual risk' standard from *Vilvarajah* in order to justify a stricter standard of proof under the 1951 Convention.

authoritative case law on the refugee definition, as well as with EC law itself, since the 2001 Directive on Temporary Protection recognises that among 'persons who have fled areas of armed conflict or endemic violence' there are some 'who may fall within the scope of Article 1A of the Geneva Convention'.<sup>47</sup> Nonetheless, as we have already observed, the circumstance of armed conflict and the 'general unstable situation' it generates have often been construed as excluding a risk of persecution within the meaning of the 1951 Convention. Not least in view of the ambiguous language of Article 15(c) of the Directive, Member States may be tempted to systematically relegate all conflict-based claims to subsidiary protection, if not to consider them squarely outside the Directive framework wherever domestic, discretionary forms of group-based protection are available.<sup>48</sup>

- (c) The third obstacle against an effective primacy of the 1951 Convention in asylum determinations is not to be found in either the letter or the architecture of the Qualification Directive. Rather, it is the sub-text of the whole exercise of – in the words of Gregor Noll – 'negotiating asylum' in the EU. Why do Member States tend to attach greater importance to their *non-refoulement* obligations stemming from ECHR than to a full and inclusive application of the 1951 Convention? Why is the Strasbourg jurisprudence on Article 3, at the end of the day, the only legal yardstick that matters? Possibly, in part, because ECHR expresses values that are central to European identity and the Court articulates the legal *lingua franca* of European nations more clearly than any instrument of universal scope. However true this may be, a more straightforward explanation can be found in the asymmetrical enforcement mechanisms of the two treaties: whereas European States are genuinely wary of being found in breach of their ECHR obligations by the binding decision of a supra-national Court, they know that no such outcome is likely to result from an erroneous interpretation or restrictive application of the 1951 Convention. It seems natural that States should fight legal battles more energetically wherever the stakes are higher. Of course, nothing prevents European States from applying both treaties in good faith, and with full respect for both their differences and their points of convergence. There can be no question, however, that the 'threat' of a reprimand in Strasbourg is bound to focus their attention very much on ECHR standards.

For all these reasons, the 1951 Convention seriously risks being displaced from the 'primary' role ostensibly assigned to it by the Directive. In order to fend this risk off, it would certainly help to strengthen the sequencing of assessments, described above, e.g., by obliging adjudicators to document their analysis of *all* aspects of the refugee definition. There is little hope, however, that such mechanical devices will suffice, lacking a clear understanding of the substantive specificity of refugee protection – including its specific purpose.

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<sup>47</sup> EU Council Directive 2001/55/EC, Article 2(c).

<sup>48</sup> This is the case in The Netherlands under Article 29(d) of the *Vreemdelingenwet 2000*. This so-called 'categorical protection' (*categoriale bescherming*) is contingent upon the Minister determining that return to a particular country or area would be, for the time being, unduly harsh on account of the general situation there.

## 6 Tentative Conclusions

In this paper I have argued that:

- it is possible, and indeed desirable, to 'rank' the various threats or risks that trigger 'international protection' according to their degree of *discrimination or, conversely, indiscrimination*;
- the specificity of refugee protection stems from its non-discrimination roots;
- hence, persecution within the meaning of the 1951 Convention is neither indiscriminate, nor 'highly individualised'; and
- subsidiary protection grounds can usefully address situations on either side of persecution, i.e., where the risk is either very personal or affects populations indiscriminately.

Within this logical framework, *if* Member States are indeed serious about the subsidiarity of subsidiary protection, they will make sure to put the first question first. The first element to consider, whenever a person seeks asylum in the EU, should be whether s/he belongs to a group that is seriously discriminated against in the country of origin; and, if s/he does, whether this discrimination is likely to amount to persecution, either for the entire group or for the individual claimant in view of her/his special circumstances. Only if this determination fails on either account should there be a need to consider subsidiary grounds for protection – i.e., to explore both the more individualised and the more indiscriminate circumstances of the claimant's personal history.

While the Qualification Directive, in its current form, does not rule this approach out entirely, it does not encourage it either. And it may take more political courage, and greater harmony, than is currently available in the EU Council to bring about the necessary legislative changes. Until such changes occur, however, domestic as well as supra-national courts will in all likelihood adopt a rather conservative attitude in the face of legal ambiguity. In other words, they will 'strive for continuity and apply a principle of convergence' with pre-Directive case law.<sup>49</sup> This does not bode well for the many Salah Sheeks in Europe who seek, and indeed deserve, the protection of the 1951 Convention. As a matter of fact, it does not bode well for the Convention itself.

In its stead, the *non-refoulement* obligations corresponding to non-derogable rights under ECHR, in particular Article 3, may well become the pivot around which a new regional system of asylum gets slowly but surely articulated.

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<sup>49</sup> H. Storey (2008), p. 43.