

Permanente commissie
van deskundigen in
internationaal vreemdelingen-,
vluchtelingen- en strafrecht

Secretariaat
postbus 201, 3500 AE Utrecht/Nederland
telefoon 31 (30) 297 42 14/43 28
telefax 31 (30) 296 00 50
e-mail cie.meijers@forum.nl

Comments on 'Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or as persons who otherwise need international protection (COM (2001) 510)'

By the Standing Committee of Experts on International Immigration, Refugee and Criminal Law

CM02-02

To the members of the European Parliament

The Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (LIBE)

Rapporteur: LAMBERT, Jean

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General remarks

1. The Standing Committee on European refugee, migration and criminal law compliments the Commission with its well balanced 'Proposal for a Council Directive laying down minimum standards for the qualification and status of third country nationals and stateless persons as refugees, in accordance with the 1951 Convention relating to the status of refugees and the 1967 protocol, or as persons who otherwise need international protection' (COM (2001) 510), hereafter shortly referred to as "the directive".

The Standing Committee welcomes the inclusion of the main articles of the Geneva Convention in the directive and the references made therein to this Convention as well as the implicit compliance with UNHCR's interpretation of the Convention in its Handbook on procedures and criteria for determining refugee status (in short: UNHCR Handbook).

With reference to article 35 of the Refugee Convention, the Standing Committee stresses that the UNHCR should play a major role with regard to the implementation of the directive by Member States in their national laws and regulations as well as the member states' compliance with the Geneva Convention, the Conclusions on the international protection of Refugees, Adopted by the Executive Committee of the UNHCR Programme, and the UNHCR Handbook.

In this respect the tasks and competences of the European Contact Standing Committee as proposed under 5.2 of the Legislative Financial Statement, an attachment to the directive, are insufficiently clear. The Standing Committee especially has doubts as to whether this Contact Committee should be assigned the task of facilitating a uniform interpretation among the Member States. It should be stressed that in virtue of international law the competence to interpret the refugee definition is exclusively reserved to Member States under supervision of UNHCR (art. 35 RC). Therefore, the Contact Committee could at the most be assigned the task – under the supervision of and in cooperation with the UNHCR – of promoting a European interpretation which is in conformity with international refugee law. This should be done in a transparent manner.

Proposal 1:

The Standing Committee proposes that, in due consideration of article 35 of the Refugee Convention, the following new article 35 be included in the directive: "The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Directive."

2. The limitation of the scope of the directive in article 3 "to all third country nationals and stateless persons who make an application for international protection at the border of the territory of a

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Member State and to their accompanying family members and to all those who receive such protection" is based on article 63 EC Treaty. It is the view of the Standing Committee that the directive cannot seek to withhold from Member States nationals the possibility to apply for, or to be granted asylum or subsidiary protection. Withholding the right to apply for asylum is in violation with article 1 (A) Refugee Convention as well as the non discrimination principle laid down in article 3 of the Refugee Convention. The right to apply for asylum or subsidiary protection for Member States nationals should be mentioned in the preamble to this directive.

Proposal 2:

The Standing Committee proposes to add in point (9) of the Preamble the following: *'This in no way may lead to a derogation from the obligations that derive from the 1951 Geneva Convention and the 1967 New York Protocol relating to the status of refugees.'*

3. It is insufficiently clear how the proposed directive relates to some of the other directives proposed under article 63 EC Treaty. This is especially the case with regard to the directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM (2000) 578). Some articles in the different proposals require a cross-reference. This cross reference should at least be made in the preamble of the Directives by adding the following sentence: *'This directive should be read in conjunction with ...'*

For example it should be made clear that an asylum application cannot be rejected as manifestly unfounded by virtue of article 28 of the directive on minimum standards on procedures in Member States for granting and withdrawing refugee status if, on the basis of the directive on the refugee definition, a residence permit has to be granted.

With regard to the Council Directive 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 (2000/C 311/ E 18), and its relation to the directive on the refugee definition, the following example can be given: the directive on the refugee definition does not make clear when a mass influx should lead to prima facie recognition as a refugee in the sense of par. 44 of the UNHCR-Handbook and article 12 (1, 3 or 4) of the directive on the refugee definition, or when such an event should lead to granting subsidiary protection in accordance with article 15 (c) of the directive on the refugee definition.

Proposal 3:

The Standing Committee proposes to add to the Preambles of this directive, respectively the directive 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 (2000/C 311/ E 18), and the directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM (2000) 578) a cross reference by adding the following sentence: *'This directive should be read in conjunction with ...'*

With regard to the content

Chapter II, provisions on qualification for international protection

Article 5

Article 5 paragraph 2 gives a definition of subsidiary protection. One of the elements which has to be fulfilled according to the article is that the person concerned has been forced to flee due to “a well-founded fear of suffering serious and unjustified harm”. The same terminology in the context of subsidiary protection is used in article 7 introduction and paragraph 3, article 8, article 9 and article 15 paragraph 1.

The Standing Committee holds the view that the word “unjustified” should be deleted. Firstly this terminology is not in accordance with the refugee definition of article 1 (A) Refugee Convention nor with article 3 ECHR which take precedence over the definitions of the directive. These articles assume serious harm to be unjustified. To include the word unjustified may lead to an unduly restrictive interpretation and application of the directive.

Proposal 4:

Delete in the text of the articles 5 (2), 11(1)(a) and 15 (1) the word: 'unjustified'.

Article 7

Article 7 mentions – as a minimum - facts, circumstances and information that have to be taken into account in assessing the applicant’s fear of being persecuted.

The Standing Committee suggests replacing the wordings in the article “shall take into account, as a minimum” by: “shall as a minimum base their decisions on”. This would make clear that decisions have to be based on all relevant facts and that the elements mentioned in the article form the minimum basis for the decision.

Furthermore the Standing Committee holds the view that the article is incomplete.

- Firstly, the article does not mention the facts put forward by the asylum seeker. As paragraph 195 UNHCR Handbook states, the relevant facts of the individual case will have to be furnished in the first place by the applicant himself.

Therefore the Standing Committee proposes to insert the following paragraph before paragraph (1): “all relevant facts which have been furnished by the asylum applicant.”

- Secondly, the Standing Committee with reference to article 3 CAT suggests to insert in paragraph (1) after the words “taking a decision on the application” the following phrase: “including the existence of a consistent pattern of gross, flagrant or mass violations of human rights” (article 3 paragraph 2 CAT).

- Thirdly, the Standing Committee is of the view that in case of contradictory statements due to traumatic experiences the asylum seeker should be given the benefit of the doubt. In this respect, the Standing Committee refers to international case law such as: European Commission on Human Rights, 23 April 1998, in Hatami vs Sweden (Appl. Nr. 32448/96), Committee Against Torture, 8 May 1996, in Alan vs Switzerland (CAT /C/16/D/21/1995) and Committee Against Torture, 12 November 1998, in Ayas vs Sweden (CAT/C/21/D/97/1997).

The Standing Committee therefore proposes to insert the following paragraph (5) behind paragraph (4): “whether contradictory statements made by the asylum seeker are the result of traumatic experiences which are related to the reasons of his flight from the country where he fears for persecution”.

Proposal 5:

The Standing Committee suggests to:

- **Replace in article 7 the wordings “shall take into account, as a minimum” by: “shall as a minimum base their decisions on”.**
- **Insert in article 7 before paragraph (1) the following paragraph: “all relevant facts which have been furnished by the asylum applicant.”**

- Insert in article 7 paragraph (1) after the words “*taking a decision on the application*” the following phrase: “*including the existence of a consistent pattern of gross, flagrant or mass violations of human rights*” (article 3 paragraph 2 CAT).
- Insert in article 7 behind paragraph 4 the following paragraph (5): “*whether contradictory statements made by the asylum seeker are the result of traumatic experiences which are related to the reasons of his flight from the country where he fears for persecution*”.

Article 9, paragraph 1, sources of persecution

Article 9 paragraph 1 enumerates the sources of persecution and harm. By virtue of this article persecution or harm may emanate from a) the State, b) parties or organisations controlling the State and c) non-state actors where the State is unable or unwilling to provide effective protection.

1. The Standing Committee considers it an important omission that the article does not provide for the situation where the state has ceased to exist. In international refugee law the existence of a functioning State apparatus is not a prerequisite for recognizing someone as a refugee. The main issue is whether or not a person fears persecution or serious harm as prescribed in the different human rights treaties. (The Standing Committee is aware that according to international law strict criteria have to be fulfilled before a State has ceased to exist and that the absence of a State is exceptional.) This, of course, may never be a reason not to provide the protection required by the Refugee Convention and other human rights instruments to refugees fleeing from a situation where there is no State.

The Standing Committee therefore proposes to insert behind the word 'protection' in article 9-1(c): "where there is no State".

2. According to the Standing Committee it is insufficiently clear what is meant in article 9-1b by 'parties or organisations controlling the State' or in what manner this article refers to a situation which is not already covered by article 9 (a) and (c). In the view of the Standing Committee article 9 (a) and (c) if changed as proposed above cover sufficiently all situations of persecution where no protection against persecution is available. Therefore article 9-1(b) can be deleted.

Proposal 6:

Delete article 9-1b.

Insert behind the word 'protection' in article 9-1(c): "where there is no State".

Article 9 paragraph 2, effectiveness of State protection

Article 9 paragraph 2 deals with the issue of effective protection. The Standing Committee is of the opinion that the present text insufficiently emphasises that effective protection must be accessible in the individual circumstances of the case.

Proposal 7:

With reference to paragraph 92 UNHCR Handbook, the Standing Committee proposes to replace the text of article 9 paragraph 2 by the following:

In evaluating the effectiveness of State protection which has to be provided for by virtue of article 9 paragraph 2 and article 10 paragraph 1, Member States shall consider whether the State takes adequate and effective steps to prevent the occurrence of persecution or harm, and whether the applicant has effective access to such protection. There must be in place an effective system of domestic protection and machinery for the detection, prosecution and punishment of actions, which constitute persecution or other serious harm to which the applicant has access. Where effective and accessible protection is available, such fear of being persecuted or otherwise suffering serious harm shall be considered to be not well founded unless under all circumstances it would not have been reasonable to expect the asylum seeker to seek this protection.

Article 9, paragraph 3, sources of protection

According to the Standing Committee article 9 paragraph 3 wrongfully states that international organisations can be sources of protection. Protection by international organisations cannot be considered as 'protection of that country' in the sense of article 1(A) Refugee Convention.

Furthermore protection by international organisations must in its nature be considered as temporary and thus cannot fulfil the requirement of durability.

Proposal 8:

Delete in article 9 paragraph 3 the words ‘international organisations and’.

Article 10, internal protection alternative

Article 10 paragraph 2 mentions the circumstances that have to be taken into account in considering whether an applicant can be reasonably returned to another part of the country. However, no reference is made to the necessity of effectiveness and accessibility of protection as required by article 1(A) of the Refugee Convention.

Proposal 9:

The Standing Committee proposes to amend article 10 paragraph 2 as follows: ‘In a decision whether an applicant can be reasonably returned to another part of the country in accordance with paragraph 1 the following criteria must be fulfilled:

- a. There must be effective and accessible protection as prescribed by article 9 paragraph 2;**
- b. The security, political, social, economic and human rights situation must be acceptable, stable and durable;**
- c. The personal circumstances of the applicant, including age, sex, health, family situation and ethnic, cultural and social links must allow the relocation.’**

Article 11 (1) (d) military service

The Standing Committee welcomes the present text. With regard to article 11-paragraph (1) (d) and under reference to the explanatory memorandum page 23 the Standing Committee advises to bring the text in conformity with paragraph 172 of the UNHCR Handbook.

According to the Standing Committee someone who refuses to participate in a military action condemned by the international community and who has a well-founded fear of being persecuted must be protected. According to paragraph 171 of the UNHCR Handbook in these situations no valid reasons of conscience are required.

Proposal 10:

The Standing Committee suggests to add the following separate ground (iii) to article 11 (1) (d) :“in case of participation in military activities which are condemned by the international community”.

Article 11 (2) (a)

This article mentions the same sources of persecution and serious harm as does article 9 paragraph 1.

Proposal 11:

With reference to what has been said with regard to article 9 paragraph 1 the Standing Committee proposes to add after the words “effective protection”: “or where there is no State which is willing and able to provide effective protection.”

Article 13 (1) (e), cessation of refugee status

This article deals with the cessation of the refugee status. The grounds in virtue of which a refugee will cease to be a refugee are nearly completely derived from article 1C Refugee Convention. Nonetheless, the Standing Committee notes that the second rule of both article 1 C (5) and (6) Refugee Convention are missing in article 13 (1) (e), which are considered common practise in the Member States. The Standing Committee therefore considers article 13 (1) (e) to be inconsistent with article 1 C (5) and (6) and the interpretation of these articles in paragraph 136 of the UNHCR Handbook. The Standing Committee would like to stress that any new international refugee instrument should comply in all its aspects with the Refugee Convention.

Proposal 12:

The Standing Committee suggests to insert into article 13 (1) (e) the missing text of article 1 C (5) Refugee Convention: *“Provided that this paragraph shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.”*

Article 15 Subsidiary protection

This article describes the beneficiaries of subsidiary protection. Article 15(c) provides for the granting of subsidiary protection in case of a threat to life, safety or freedom as a result of indiscriminate violence arising in situations of armed conflict, or as a result of systematic or generalised violations of human rights.

The Standing Committee is of the opinion that in case of systematic violations of human rights, in most situations the victims have to be considered as refugees under the Refugee Convention as the word "systematic" refers to discriminatory violence. These persons therefore fall within the scope of article 5(1) of this directive.

Proposal 13:

Delete in article 15 the words 'systematic or'.

Article 18 Content of international protection

The first sentence of this article refers to the Geneva Convention. To ensure that no exceptions shall be made to any of the non-refoulement provisions whatsoever reference should in the view of the Standing Committee also be made to the European Convention of Human rights and the Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment.

Proposal 14:

Add to Article 18 paragraph 1 after the words ‘Geneva Convention’: *‘the European Convention of Human rights and the Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment.’*

Overview of the proposals

1. Include, in due consideration of article 35 of the Refugee Convention, the following new article 35 in the directive: *"The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Directive."*

2. Add to the preamble of the directive to point (9) the wording: *'This in no way may lead to a derogation from the obligations that derive from the 1951 Geneva Convention and the 1967 New York Protocol relating to the status of refugees.'*

3. Add to the preambles this directive, respectively the directive 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 (2000/C 311/ E 18), and the Directives on minimum standards on procedures in Member States for granting and withdrawing refugee status (COM (2000) 578) a cross reference by adding the following sentence: *'This directive should be read in conjunction with ...'*

4. Delete in the text of article 5 (2) the word: 'unjustified'.

5. Replace in article 7 the wordings "shall take into account, as a minimum" by: "shall as a minimum base their decisions on".

Insert in article 7 before paragraph (1) the following paragraph: *"all relevant facts which have been furnished by the asylum applicant."*

Insert in article 7 paragraph (1) after the words *"taking a decision on the application"* the following phrase: *"including the existence of a consistent pattern of gross, flagrant or mass violations of human rights"* (article 3 paragraph 2 CAT).

Insert in article 7 behind paragraph 4 the following paragraph (5): *"whether contradictory statements made by the asylum seeker are the result of traumatic experiences which are related to the reasons of his flight from the country where he fears for persecution"*.

6. Delete article 9-1b.

Insert behind the word 'protection' in article 9-1(c): *"where there is no State"*.

7. Replace the text of article 9 paragraph 2 by the following:

In evaluating the effectiveness of State protection which has to be provided for by virtue of the article 9 paragraph 2 and 10 paragraph 1, Member States shall consider whether the State takes adequate and effective steps to prevent the occurrence of persecution or harm, and whether the applicant has effective access to such protection. There must be in place an effective system of domestic protection and machinery for the detection, prosecution and punishment of actions, which constitute persecution or other serious harm to which the applicant has access. Where effective and accessible protection is available, such fear of being persecuted or otherwise suffering serious harm shall be considered to be not well founded unless under all circumstances it would not have been reasonable to expect the asylum seeker to seek this protection."

8. Delete in article 9 paragraph 3 the words 'international organisations and'.

9. Change article 10 paragraph 2 as follows: *'A decision whether an applicant can be reasonably returned to another part of the country in accordance with paragraph 1 must fulfil the following criteria:*

- a. *There must be effective and accessible protection as prescribed by article 9 paragraph 2;*
- b. *The security, political, social, economic and human rights situation must be acceptable, stable and durable.*

The personal circumstances of the applicant, including age, sex, health, family situation and ethnic, cultural and social links must allow the relocation.'

10. Add the following separate ground (iii) to article 11 (1) (d):*"in case of participation in military activities which are condemned by the international community"*.

11. Add to Article 11 (2) (a) after the words "effective protection": *"or where there is no State which is willing and able to provide affective protection."*

12. Insert into article 13 (1) (e) the missing text of article 1 C (5) Refugee Convention: *"Provided that this paragraph shall not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality."*

13. Delete in article 15 the words 'systematic or'.

14. Add to Article 18 paragraph 1 after the words 'Geneva Convention': *'the European Convention of Human rights and the Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment.'*