# VULNERABLE CATEGORIES AND SUBSIDIARY PROTECTION: THE TRENDS TOWARD HARMONIZATION AND CONSOLIDATION

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Among the most significant current trends in the law of international protection is the proposal and adoption of schemes of "subsidiary protection" for claimants who lie outside the scope of the 1951 Refugee Convention. The proposed "Council Directive" of the European Union, which seeks to establish a common asylum system throughout the EU by April 2004, includes prominent reference to subsidiary protection. Canada, through its recently effective Immigration and Refugee Protection Act, has adopted "consolidated grounds" of protection in which claims for protection from torture and from cruel and unusual punishment or treatment share near-equal status with claims under the Refugee Convention. The United States includes claims under the Convention against Torture in its scheme of asylum adjudication, but does not recognize claims for non-refoulement based on cruel, inhuman, and degrading treatment.

These developments, especially when considered with current efforts to give, in the words of the UNHCR, a "full and inclusive" application to the 1951 Convention, portend a period of continued ferment in the law of international

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protection. While much progress has been made, substantial differences of interpretation still exist regarding issues such as non-state agents as persecutors, and the scope of the "particular social group" ground for recognizing refugee status. Introducing grounds outside the 1951 Convention to refugee adjudication procedures raises several pertinent questions:

(1) How will the scope of subsidiary protection be defined? (This can be considered both in terms of who should receive protection, and whether the protection afforded should be equivalent to, or distinct from, that awarded to successful claimants under the Refugee Convention.)

(2) Will the primacy of the Convention be preserved?

(3) Will adjudicators decline further expansion of protection under the Convention (or, put another way, "full application" of the Convention) if near-equivalent relief is available on non-Convention grounds?

(4) Should such claims be adjudicated in pari materia with claims under the 1951 Convention?

(5) In the absence of universal human rights instruments bearing specific non-refoulement obligations, can subsidiary protection be harmonized? In the long term, will such harmonization require the establishment of a new "constitution" for international protection that effectively replaces the 1951 Convention?

The foregoing questions can serve as the basis for discussion when the "Vulnerable Categories/Subsidiary Protection" Working Party meets in Wellington. They are more extensively analyzed in the outline paper. This summary paper will highlight some key issues to be considered during the Wellington conference and beyond.

## *I SCOPE OF SUBSIDIARY PROTECTION*

"Subsidiary protection" may be defined broadly as a form of enduring protection against expulsion to one's country of nationality (or last habitual residence) that is based on a fear of harm in that country, but which lies outside the scope of grounds stated in the 1951 Refugee Convention. While such protection may include ad hoc, nationality-based restrictions on deportation (such as to areas of severe civil conflict), the trend is to distinguish and classify such forms of protection as "temporary humanitarian protection". The class of "subsidiary" protection is thereby limited to duly-constituted obligations of non-

refoulement, whether based on international or domestic law, that are justiciable on an individual basis. Thus, the description of such protection as "enduring."

The most universally-adopted potential source of such protection is the Convention against Torture, particularly the non-refoulement obligation of Article 3. Otherwise, sources chiefly lie in regional instruments, such as the European Convention on Human Rights (EU), the Cartagena Declaration (Latin America), and the 1975 Convention of the Organization of African Unity.

A key question in defining the future scope of subsidiary protection is whether obligations of non-refoulement can be inferred from certain human rights instruments. The argument in favor of such an approach is that, in order for the most fundamental human rights enshrined in such instruments to be protected, no State should be able to expel a person (recognized exclusion clauses as an exception) to a country where the person would face a clear danger of infringement of such rights. A countervailing argument may be illustrated by the "hierarchy" of protections in the Convention against Torture: the non-refoulement obligation of Article 3 attaches only to a threat of likely "torture" as defined in Article 1 of the CAT; that obligation expressly does not extend to threats of "cruel, inhuman, and degrading" treatment as defined in Article 16. To later "infer" an international obligation of non-refoulement based on Article 16 would seem to amend the CAT in ways expressly excluded by the drafters and ratifying nations.

Turning to specific current trends, the following can be noted. There is a clear trend in the EU and elsewhere to develop objective standards for subsidiary protection that can be adjudicated in para materia with claims under the 1951 Convention. The most clearly-defined, and narrowest, scope of such protection is in the United States, where subsidiary protection is limited to claims under the CAT. Canada's new immigration legislation provides for a somewhat broader scope of claims, but is also drafted so as to be strictly construed. However, benefits for those granted subsidiary protection are equivalent to those recognized as refugees, in contrast to both US law and the proposed EU Directive. The proposed EU Directive extends subsidiary protection to potentially broader classes, including those at risk of generalised violence in areas of civil conflict, or of regimes in which there exists systematic and generalised violations of human rights.

Despite these differences in scope, all of these developments share certain common characteristics: The scope of subsidiary protection is to be tied to objective, existing norms in international and domestic law. As such, subsidiary

protection does not extend to purely "compassionate" or "humanitarian" grounds for protection against removal, although such avenues for relief may exist in domestic law (such as Extended Leave to Remain in the UK). Subsidiary protection also is clearly distinguished from "temporary protection," which would remain a tool for executive and political branches of government to respond to humanitarian migration emergencies. A chief example of this is Temporary Protected Status in the United States. In the systems discussed here, those granted such temporary protection within the borders of a receiving state would remain eligible to apply for refugee status and available forms of subsidiary protection.

Among the unresolved questions regarding the scope of subsidiary protection is whether it will be recognized in cases of specific violation of international humanitarian law as well as international human rights law. A chief example of the former is the Geneva Convention Relating to the Protection of Civilians in Time of War. The relation of the Refugee Convention to international humanitarian law was a topic at the 2000 convention of the IARLJ.

## *II LEVEL OF PROTECTION AFFORDED*

The decision regarding the level of protection afforded to those granted subsidiary protection is among the most difficult that will face the European Union and other jurisdictions. Canada's decision to consolidate grounds of protection represents a choice to place its narrow subsidiary grounds of subsidiary protection on a par with claims under the 1951 Convention. Under this scheme, the Convention is not necessarily "primary," and those who gain relief based on fear of torture or of cruel and unusual punishment or treatment are accorded the same level of protection, leading to permanent residency, as those recognized as Convention refugees. In the US, relief granted under the Convention against Torture is more limited in scope, and does lead to permanent residency. The Proposed EU Directive seems to take a position in the middle: Protection outside the Convention is not equivalent to that granted "refugees," but the differences are those of degree, not kind. Clearly, to the extent that subsidiary protection mimics that offered to Convention refugees, the differences between these forms of protection cease to have any practical basis. For this reason, some commentators insist that clear distinctions be maintained between the immigration benefits granted to refugees and those granted under subsidiary protection. This may not be sufficient reason, however, to overcome the practical difficulties of maintaining such a clear distinction.

Consider, for example, the cases of two claimants, one a victim of targeted violence on account of political opinion, and the other, a victim of gross violations of the Geneva Convention reference above. If the latter claim is recognized as a claim for subsidiary protection, how likely is it that such protection will be lifted, even if country conditions change? Any more likely than the lifting of refugee protection in light of changed country conditions?

## *III PRIMACY OF THE CONVENTION*

Both the UNHCR, and commentators on the proposed EU directive, have expressed concern that the formalization of standards for subsidiary protection not lead to either of two potential developments: (1) A diminution of the primacy of the Refugee Convention; or (2) A distraction from efforts to give "full and inclusive application" of the Convention on a more uniform basis. At this point, no one suggests anything less than a primary role for the Convention; the sheer weight of history, coupled with the near-universal recognition of the Convention, at least in theory, are tough hurdles for any argument to the contrary.

Yet, these concerns are realistic, particularly for nations and regions that are more aggressive in pursuing the expansion, codification, and harmonization of standards for subsidiary protection. An example is Europe, which, in the pursuit of a common asylum system, is undertaking both to expand common interpretation of the Convention, and to establish common grounds for subsidiary protection. All agree that the agenda is ambitious; not all agree that, despite assurances stated in the draft EU directive, this trio of objectives (common adjudication standards, common Convention interpretation, common scope of subsidiary protection) can be attained. In defence of the project, one can note that Europe's own particular obligations and approaches to human rights protection have already determined the agenda, making the attempted task of implementation somewhat inevitable.

## *IV WILL THE AVAILABILITY OF SUBSIDIARY PROTECTION RESTRICT EXPANSIVE INTERPRETATIONS OF THE CONVENTION?*

Related to these "wholesale" questions of relating subsidiary protection to the Refugee Convention, there is the "retail" question: Adjudicators may genuinely be faced with the dilemma whether to grant protection based on an "extended" (or "fuller") interpretation of the Convention advanced in a particular case, or to resort to a grant under "subsidiary" grounds if eligibility thereunder is more clearly available. In countries such as the United States, where justiciable

subsidiary protection is limited to the Convention against Torture, and even Canada, where grounds based on "cruel and unusual treatment" are clearly and narrowly defined, the Refugee Convention will, merely due to the lack of viable alternatives, retain its primacy. (Also a factor is that Canada, and to a somewhat lesser degree, the United States, are recognized for fairly expansive administrative and judicial interpretations of the Refugee Convention.) In the proposed common asylum system in the EU, this may be more of a dilemma.

Looking to the future for all countries, however, a "correct" answer to this dilemma is not clear. In one sense, seeking "full and inclusive" application of the Convention, while simultaneously advocating a scheme of subsidiary protection who fall outside even a generous interpretation of the Convention, could be seen as wanting to "have it both ways." More importantly, such a programme may brush up against political realities, chiefly the understanding in individual countries that the scope of protection agreed upon when acceding to the Refugee Convention is being bent beyond recognition. On the other hand, this dilemma may be said to merely reflect the changing nature of persecution throughout the world. An international protection scheme premised on a matrix of global ideological and political conflict may not be sufficient to meet contemporary needs for protection arising out of protracted civil conflicts and other circumstances that give rise to profound violations of international human rights (and humanitarian) law. Perhaps the better way to address these realities is through schemes of subsidiary protection. Perhaps, eventually, they will need to be addressed by re-considering the entire foundation of the law of international protection, including the 1951 Convention.

## *V JUSTICIABILITY OF SUBSIDIARY PROTECTION CLAIMS*

One clear measure of whether subsidiary protection is granted according to duly-constituted, country-neutral standards of non-refoulement is whether claims for such protection are determined on an individual basis, akin to that accorded claims for status under the Refugee Convention. The clear trend, discussed in greater detail in the Outline Paper, is for such claims not only to be given such procedural status, but to be heard in concert with Convention-based claims.

Substantial procedural advantages attend the creation of a single procedure for protection claims, including maintaining the integrity of the system, preventing seriatim claims by those applicants seeking delay for improper purposes, and enhancing both the stature and uniformity in application of subsidiary protection. Concerns regarding the continued primacy of the Refugee Convention in a "single" system may be addressed by directives requiring Convention-based

claims to be taken first in sequence, and to be given full consideration (including to novel interpretations of the Convention) before proceeding to consideration of subsidiary protection. However, it is impractical, and undesirable, to attempt to "micro-manage," through the imposition of international standards, the way in which different legal cultures address these issues. Part of the price both expanding grounds for protection to include those outside the Convention, and of ensuring "judicial independence" in joint consideration of claims under the Convention along with claims based on instruments such as the CAT and the ECHR, will be some variance in the relative priority given to such claims.

## *VI HARMONIZATION OF SUBSIDIARY PROTECTION STANDARDS*

The IARLJ and others have traditionally advocated the interpretation of the Refugee Convention through the lens of international human rights law. The emergence of standards for subsidiary protection, however, is predicated upon many of the same human rights instruments, such as the Universal Declaration of Human Rights, the European Convention, and others.

Part of the problem for international, or universal, harmonization, of subsidiary protection standards is that the newly-adopted sources of non-refoulement obligations are themselves regional in nature. This raises the spectre, specific to the proposed EU Directive, of a "Euro-Centric" approach. (This point attributed to Dr Hugo Storey). Europe seems close to an approach that will infer non-refoulement from human rights instruments that contain no positive obligations in this regard. The United States and, to a lesser extent, Canada, have not adopted such an approach; nor does this approach seem likely to emerge at this point in New Zealand and Australia.

Two questions can be posed, therefore: Is it a bad thing for harmonization on these issues to take place primarily at the regional level? Many would strongly argue that it is, because despite the existence of regional human rights instruments as sources of law, primacy remains with the Refugee Convention and other such universal instruments as the Convention against Torture, the UN Declaration of Human Rights, and the various Geneva Conventions (international humanitarian law). A counter-argument might be that, at this point, this is the best that we can do. Practically speaking, there exist no mechanisms that can enforce common understandings and interpretations of even the most universal human rights instruments. The "Committee Against Torture" could be seen as one example of such a body, but not all countries accede to its jurisdiction, and its decisions are not issued in a "precedent" or "rule-making" format.

Which leads to the second question: Will the ferment described herein eventually lead to consideration of a new foundation or "constitution" for the law of international protection? As venerable a document as the 1951 Convention has become, will it eventually require amendment or re-drafting to meet contemporary protection needs? Part of the answer to this question may lie in world events and what forms persecution, assuming its persistence, shall take in the future. Part of the answer may also lie in how successful – substantively, politically, and practically – the emerging schemes of subsidiary protection are in addressing compelling claims for international protection that lie outside the scope of the Refugee Convention. However, it seems clear that any serious international effort to create binding and harmonized standards for protection outside the scope of the 1951 Convention will require a process of discussion and negotiation that at least leaves open the possibility of substantive amendment to, or replacement of, the Convention.