

# **Comparative Study on Categorized Protection**

**Comparative Study on the Existence and Application of Categorized Protection in  
Selected European Countries**

**Prepared by the  
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International Centre for Migration Policy Development (ICMPD)  
Gonzagagasse 1  
A-1010 Vienna  
Austria  
[www.icmpd.org](http://www.icmpd.org)

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## Introduction

In September 2005, the Netherlands Ministry of Justice - Advisory Committee on Aliens Affairs (ACVZ), approached the International Centre for Migration Policy Development (ICMPD) to carry out a comparative study on a protection scheme titled “**Categorical Protection Policies**”, which we will further refer to as “categorized protection” throughout this document.

The study was to target 10 European states and the European Commission, namely: Austria, Belgium, Denmark, Germany, Finland, France, Ireland, Sweden, Switzerland and the United Kingdom, which were to be approached with a questionnaire, jointly prepared by the ACVZ and ICMPD.

The framework of the study is as follows: categorized protection is hereby meant to concern situations where asylum-seekers do not qualify for refugee status, for subsidiary protection status, for humanitarian status nor for compassionate relief, while at the same time the situation in their country of origin is considered too volatile to assume that return would be without risk. In a case like this, it may be warranted to grant protection to persons coming from a particular country of origin even though they cannot be qualified as refugees or as persons meriting subsidiary protection. In such situations, the actual policies of states may vary and may or may not be explicit in national laws, ordinances and regulations.

The study should endeavour to examine policies mentioned above using the examples of how states have dealt with persons seeking protection from Afghanistan, the Democratic Republic of Congo (DRC), Iraq and Somalia.

The report will look at the methodology that was utilized, and will examine the answers provided by the participating states in relation to the questionnaire. In addition, the concepts of subsidiary and complementary protections will be examined through various instruments currently available, and whether they could be used within the concept of categorized protection.

In conclusion, some thoughts will be put ahead with a view to assess how such a scheme could be incorporated in the EU or national legislative corpus of the member states, or whether the current legislative framework could be deemed sufficient to cover the field that the categorized protection wishes to address.

## Methodology

The study was to be carried out during a period of approximately two and a half months, from mid-October until the year's end.

At the end of October, a circular letter was addressed to targeted participants within the 10 countries taking part in the study, in order to inform them of the research, as well as aiming at identifying focal points to ensure the proper administration of the questionnaire and appropriate follow-up. Only two countries replied at this stage, indicating that they would take part in the study and appointing focal persons. The letter and ensuing questionnaire were sent to individuals within the respective Ministry of Interior of their countries (or the equivalent institution responsible for migration, refugee and asylum matters). As a courtesy for the participants, ICMPD prepared both the letter and questionnaire in the English and French languages. The letters are reproduced in the annexes.

The comparative study itself consisted in a questionnaire jointly prepared by the ACVZ and ICMPD. The questionnaire comprised of three parts, one addressed to the ten states selected by the ACVZ for the study, a second part regarding the European Commission, and a third one which ICMPD should address. The last part was not shared with the various participants.

The questionnaire included a long preamble, which was deemed essential, as the concept of categorised protection, as developed and interpreted by the Dutch Ministry of Justice had to be introduced to the participants. The questionnaire was forwarded at the beginning of November, and focal points were kindly asked to send their replies to ICMPD by 9 December 2005. All communications were done via email.

Simultaneously, ICMPD carried out additional research on the subject of complementary and subsidiary protection at the international, European and national levels.

Unfortunately, not all selected participants were in a position to take part in the study. When provided, answers were not always comprehensive. All in all, answers were sent in one form or another by the following entities: Denmark, France, Switzerland and the United Kingdom. Germany notified that it would not answer the questions, while Ireland and Sweden did not altogether acknowledge their participation, as well as the European Commission Directorate for Justice, Freedom and Security.

Answers were received in both English and French. ICMPD has provided a complete translation into English of the French answers. All answers are reproduced at the end of this document, with translation when appropriate, without editing (ICMPD did format the answers for the sake of having a consistent presentation).

# Questionnaire Concerning Categorized Protection Policies

## INTRODUCTION

**Definition of “Categorized Protection”, as understood by the Dutch ACVZ and for the purpose of this study.**

Anyone who fulfils one of the grounds enumerated in Article 29 par.1 of the Dutch Aliens Act 2000 is granted asylum. In addition to the grounds of:

- a) Article 1 of the Geneva Convention,
  - b) the risk of being subjected to torture, or to inhuman or degrading treatment or punishment (Article 3 ECHR, Article 3 CAT, Article 7 ICCPR), or
  - c) the existence of compelling grounds of a humanitarian nature,
- another ground exists:
- d) return to the country of origin would be particularly harsh in view of the prevailing general security and human rights situation. This ground for ‘collective’ protection is referred to as *'categorized protection'*.

Whenever an asylum seeker does not fulfil the grounds for asylum of the Geneva Convention, refoulement, or humanitarian nature, the categorized protection offers another option. Dutch asylum policy allows for such a categorized protection (usually temporary) to be offered to asylum seekers from countries where the overall security and human rights situation justifies such protection. The categorized protection regime is aimed at all persons from a particular country of origin (or part of that country) or at a specifically designated group of persons (e.g. Tutsis from the Democratic Republic of the Congo or Sudanese from South-Sudan).

Whether a regime of categorized protection is to be applied for a particular country or region is left to the discretionary power of the Dutch Minister on Aliens Affairs and Integration. The decision of the Minister will be based on three so-called ‘indicators’: 1) the nature of the violence in the country of origin, in particular the gravity of the violations of human rights and humanitarian law, the extent of arbitrariness, the extent to which the violence does occur and how widespread (in geographical terms) the violence is; 2) the activities of international organisations in respect to the country of origin, if and in as far as these are an indicator of the position of the international community regarding the situation in the country of origin; 3) the policies of other EU member states.

A **contra-indication** for not granting categorized protection is the existence of a collective “internal protection alternative”. For example, no categorized protection regime was instituted for asylum seekers originating from Central Iraq because the Dutch government was of the opinion that a protection alternative existed in Northern Iraq. Within the Dutch legal framework, categorized protection is granted in view of the general situation in the country of origin. A possible internal protection alternative is

defined per category, unlike the “internal flight alternative”, which is regulated by international law, in particular the prohibition from *refoulement*.

When the conflict ceases and the situation allows for return to the country of origin, the categorized protection regime also ceases and the beneficiary must return, unless the beneficiary has been granted a permanent residence permit (after 5 years of legal stay).

In the Netherlands, over the last five years, categorized protection status has been granted to certain groups of asylum seekers less than ten times, for instance with regard to Afghanistan, the Democratic Republic of Congo Iraq and Somalia.

## **SECTION A: For Participating EU member states and Switzerland**

### **Legal/procedural framework**

1 In the following specific situations, in the period 2001-2005, how has your country dealt with asylum seekers from:

- a- Afghanistan
- b- the Democratic Republic of Congo
- c- Iraq
- d- Somalia

2 In your legal system, which kind of protection comes closest to the Dutch system of categorized protection as described above?

3 What kind of non-individual protection or group based protection does your legal system have besides the EC Temporary and Subsidiary Protection status (deriving from the EC ‘Temporary protection’ Directive 2001/55, and the EC ‘Qualification’ Directive 2004/83)?

4 What is the legal basis for such a policy? Does this basis have an obligatory or facultative character? Please mention any relevant international, European or national legal instruments.

5 On the basis of what criteria is it decided whether or not such non-individual protection or group based protection is applied to certain groups of asylum seekers? Please compare the criteria (indicators) with those used in the Dutch system (see introduction). More particularly, do you take into account the policies of other European states and if so, what role do those policies play?

- 6 a- What type of procedure is provided for (hearing/interview/written submissions)?
- b- At which stage within your procedure would the granting of a non-individual protection or group based protection take place?
  - c- Is there an appeal/review process?

7 According to Article 15c of the EC ‘Qualification’ Directive, there is a right to subsidiary protection in case of a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflicts’.

a- How does your administration interpret this provision?

b- How is or will this provision be implemented in your legal system?

c- Does Article 15c of the Directive require the introduction/continuation of a Categorized protection policy?

### **Effects of the policy**

1 Do beneficiaries of non-individual/group-based protection in your country receive a residence permit, or are they granted a suspension of deportation or tolerated stay?

2 a- What type of permit?

b- Can the permit be withdrawn (if so, under which circumstances and on which grounds)?

3 Are beneficiaries of non-individual/group-based protection in your country entitled to benefits/services (shelter, grants, welfare, right to employment, integration facilities or courses)?

### **Internal Protection Alternative**

1 Does the existence of a protection alternative (safe zone) in the country of origin constitute a contra-indication or a reason for not granting (categorized) protection to a group of asylum seekers?

2 Are the requirements which must be met for the application of the internal flight alternative (e.g. accessibility of services, minimum standard of living, etc.) also be met for the application of an internal protection alternative to a person who would otherwise qualify for non-individual/group protection?

3 Which requirements must be met with regard to this protection alternative (family ties, availability of food and/or medicine, no humanitarian emergency for displaced persons, possibility to earn a livelihood)?

4 On the basis of which information is the determination of the existence of a protection alternative made?

5 Does an internal protection alternative play a role

- with regard to the decision whether a non-individual/group-based protection regime is established?



- when it comes to applying the protection regime to asylum seekers belonging to the groups concerned?

### **SECTION B: For the European Commission only**

1 According to Article 15c of the EC ‘Qualification’ Directive, there is a right to subsidiary protection in case of a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflicts’.

a- How does the Commission interpret this provision?

b- According to the Commission, does this provision require the introduction/continuation of a categorized protection policy?

### **SECTION C: For ICMPD (not forwarded to recipients)**

1 In the nine EU member states and Switzerland to whom this questionnaire is addressed, what is the relation between the policy of the Dutch categorized protection and the possible policies mentioned in the answers under section A of the questionnaire (tolerated stay/administrative leave to remain/suspension of deportation)?

2 How does the Dutch policy on categorized protection relate to policies in the nine EU member states and Switzerland?

3 Do international (treaty) obligations as well as international customary law (not being EU obligations) exist with regard to the Dutch form of categorized protection?

If yes,

a- What are these obligations?

b- Do the Netherlands comply with these obligations?

4 In general, what is the relation between ‘protection because of group-related persecution’ and ‘categorized protection’?

5 If applicable, how do the EU member states and Switzerland use the term ‘internal protection alternative’ (as explained in the introduction of the questionnaire) in relation to the concept of the ‘internal flight alternative’?

a- Is the application of these concepts based on the law or on policy guidelines?

b- How are these concepts applied (which criteria are used)?

c- If an examination is conducted to establish the existence of an internal flight protection alternative, how is this done (at what stage in the procedure, on the basis of which information/criteria and by whom)?

d- Can an internal flight/protection alternative be applied to groups or only in individual cases (as is the case in the Netherlands)?

e- What requirements exist with regard to an internal flight/protection alternative (family ties, availability of reception conditions such as food, medicine and education, possibility of earning a livelihood)?

ICMPD, November 2005

Please send your answers to:

Mr Jean Lanoue

Acting Director, Information Services

[jean.lanoue@icmpd.org](mailto:jean.lanoue@icmpd.org)

## Overview of the Provided Answers

### SECTION A: For Participating EU member states and Switzerland

#### Legal/procedural framework

*1 In the following specific situations, in the period 2001-2005, how has your country dealt with asylum seekers from:*

*a- Afghanistan*

*b- the Democratic Republic of Congo*

*c- Iraq*

*d- Somalia*

Overall, it appears that the participating states did not apply particular regimes for the above-mentioned countries of origin. As a rule, asylum claims from these nationals were processed on a case-by-case basis. One exception is encountered in Switzerland in respect of people of Tutsi ethnicity from Congo, inasmuch as the ethnic background is proven.

Some countries have suspended either the processing of asylum claims for a certain amount of time, or have not effected returns when the situation in one of these countries of origin did not allow for it.

Without granting a particular status, some failed asylum seekers were granted temporary relief from removals due to the conditions prevailing in their country of origin.

Austria does not effect deportations to either Iraq or Somalia; the recognition rate for the above-mentioned four countries was quite high in the past two years, either through the granting of refugee status or subsidiary protection.

Denmark has applied a special regime in regard to Afghani nationals. The following situations are currently encompassed: 1) families or single persons from Afghanistan who due to their health situation - which by itself would not be enough to be the reason for issuing a residence permit on humanitarian grounds - will be in a particularly vulnerable situation when returning to Afghanistan, 2) families with minor children from certain areas in Afghanistan, where the drought is particularly bad, 3) single women without male family members or social network in Afghanistan, 4) single women with minor children without male family members or social network in Afghanistan, and 5) destitute Afghans with no land who come from areas with drought and a need of food, and who will be in a particularly vulnerable situation when returning.

*2 In your legal system, which kind of protection comes closest to the Dutch system of categorized protection as described above?*

In Switzerland, the law provides for a special status, which is considered somewhat similar to categorized protection: ‘octroi de la protection provisoire et statut de personnes à protéger’ (granting of temporary protection and status of individuals to protect). However, this protection has never been applied so far, as it can only come into effect within the context of a mass influx of asylum seekers from a particular country in Switzerland.

In France, a subsidiary protection regime, resulting in a temporary protection status, applies in case of massive influx. It could eventually result in not executing a removal order.

Denmark does not have a categorized protection regime as such, but administers other programmes which are similar. Pursuant to section 7 of the Aliens Act, a residence permit will be issued to an alien who risks persecution, the death penalty or being subjected to torture or inhuman or degrading treatment or punishment in case of return to his country of origin. In general, there is no group-based protection. As above, humanitarian grounds are assessed individually.

In Austria, the asylum legislation does not provide for categorized protection for asylum seekers from specific countries or persons with certain ethnic origin. However § 29 of the Austrian Aliens Law, respectively § 76 of the new Aliens Law which entered into force on January 1<sup>st</sup>, 2006 refers to the exceptional possibility that a certain group of displaced persons will be allowed to stay on the territory of Austria for a certain period of time. These are so called “de facto refugees”. The provisions of Article 29 were used in the nineties in the case of Bosnia-Herzegovina and Kosovo.

*3 What kind of non-individual protection or group based protection does your legal system have besides the EC Temporary and Subsidiary Protection status?*

Besides the yet to be applied Swiss scheme referred to above, there are no group-based protection regimes in the countries of concern.

Even though not necessarily related to group protection, all states will take into account a variety of international instruments before ultimately implementing a removal: the International Covenant on Civil and Political Rights; the European Human Rights Convention, among others.

*4 What is the legal basis for such a policy? Does this basis have an obligatory or facultative character?*

In Switzerland, the possibility of awarding group protection is based on their Asylum Code, the Asylum Directives and the Foreign Nationals Act. In Austria, Article 29 of the Aliens Act is of facultative character, as there are no obligations to grant group protection.

*5 On the basis of which criteria is it decided whether or not such non-individual protection or group based protection is applied to certain groups of asylum seekers?*

In theory, Switzerland would consider the security and human rights situation in the country of origin before making a determination that group protection is warranted. Furthermore, the Swiss authorities usually consult with their European counterparts in respect to such decision, verifying the practice in place in neighbouring countries. Austria will implement Article 29 in coordination with other European States as well as recommendations of the European Union.

- 6 a) What type of procedure is provided for (hearing/interview/written submissions)?*  
*b) At which stage within your procedure would the granting of a non-individual protection or group based protection take place?*  
*c) Is there an appeal/ review process?*

In Switzerland, the procedure is the same as in the case of an asylum claim, although less comprehensive. It aims at assessing whether a person is eligible for protection or whether reasons for exclusion exist. If temporary protection is granted, the asylum procedure is suspended, unless there are clear indications that an applicant would meet the eligibility criteria for refugee status. Would it be applicable, temporary protection would be granted after the hearing on refugee determination. The only appeal process available is the general one contemplated within the Asylum Code, insofar as it pertains to the refugee determination.

- 7 a) Interpretation of the provision according to Article 15c of the EC 'Qualification' Directive.*  
*b) How is or will this provision be implemented in your legal system?*  
*c) Does Article 15c of the Directive require the introduction/continuation of a categorized protection policy?*

In the case of the United Kingdom, Article 15 of the Qualification Directive is interpreted as requiring an individual threat, so group protection would be excluded.

Austria also excludes group protection in its interpretation, rather seeing this provision as a detailed definition of the application of the refoulement principle. It has taken over Article 15 of the Directive in its Article 8 of the Asylum Law of 2005.

In Switzerland, group protection could be granted, following the assessment of a set of criteria. The provisions of Article 15 have already been incorporated into Swiss law, i.e. Article 44 paragraph 2 of the Asylum Code and Article 14 of the Foreign Nationals Act (currently under revision).

In France, the determination process takes place within the framework of evaluating the asylum claim.

## Effects of the policy

*1 Do beneficiaries of non-individual/group-based protection in your country receive a residence permit, or are they granted a suspension of deportation or tolerated stay?*

Switzerland grants individuals a tolerated stay permit, which leads, after five years to a residence permit, and after ten more years, to permanent residence.

As the United Kingdom does not have such a policy, none of the questions put forth in this section is applicable.

In Austria, de facto refugees receive a temporary residence permit.

*2 a) What type of permit?*

*b) Can the permit be withdrawn? (If so, under which circumstances and on which grounds?)*

In Switzerland, it is a special permit, called the F-permit (for subsidiary protection beneficiaries) or the S-permit (for group based temporary protection beneficiaries).

A withdrawal is justified when the reasons leading to the temporary protection regime no longer exist, and a subsequent declaration that the temporary protection regime has officially been declared as terminated.

*3 Are beneficiaries of non-individual/ group-based protection in your country entitled to benefits/ services?*

Beneficiaries of non-individual/group-based protection hold the same rights (or more, e.g. family unification) as asylum seekers. Shelter and welfare are provided. They have the right to employment and the use of integration facilities.

## Internal Protection Alternative

*1 Does the existence of a protection alternative in the country of origin constitute a contra-indication or a reason for not granting (categorized) protection to a group of asylum seekers?*

In Switzerland, would a safe zone exist, it would be highly unlikely that a temporary protection regime be declared.

In the United Kingdom, they take the pragmatic approach that it would be quasi impossible to make such a determination in reference to a whole group. A protection alternative would necessarily have to be assessed on an individual basis.

Under Austrian law, the internal flight alternative, when applicable, will prevent an applicant from obtaining refugee status. It is assessed on a case-by-case basis, and factors such as age, health, family ties and standard of living are taken into consideration. There is no concept of “safe zones” for a group of people, given that the cases are judged individually.

*2 Are the requirements which must be met for the application of the internal flight alternative also be met for the application of an internal protection alternative to a person who would otherwise qualify for non-individual/ group protection?*

In the Swiss asylum practice, it is imperative to assess the reasonability of an internal protection alternative. The same requirements apply.

As no one would qualify for group protection in the United Kingdom, a comparison cannot be drawn.

*3 Which requirements must be met with regard to this protection alternative?*

In Switzerland, several factors of a general nature are taken into consideration, such as accessibility to medical treatment, age and gender. In case of vulnerable groups (i.e. single mothers, minors), considerations such as family and social ties are factored in.

In the United Kingdom, cases are assessed individually and no general conclusions are predetermined. Each case is judged on its own merit.

In Austria, as stated above, several elements are taken into account in the evaluation of an internal flight alternative (the concept of protection alternative does not exist), but there is no specific checklist of criteria.



*4 On the basis of which information is the determination of the existence of a protection alternative made?*

The Swiss Federal Office for Migration has an analysis department attached to the Asylum Procedure Directorate. It gathers and disseminates information on relevant countries of origin. Country specialists prepare situation reports on the current situation for pertinent countries of origin. These reports form the information basis whether a protection alternative is available. Furthermore, the rulings of the Swiss Asylum Appeal Commission confirm or reject the findings of the Federal Office of Migration. Thus, the grounds for decision making in this matter depend on different factors. The findings of the above-mentioned specialists are, inter alia, grounded on information from Swiss embassies and aligned with the findings of international Organisations, such as UNHCR as well as the practice of the EC.

The UK has an independent Country of Origin Information Service, which gathers information from a wide variety of sources, with reports on the main asylum-seeker producing countries published every 6 months. A Country-Specific Asylum Policy Team produces policy guidance notices in the light of the information contained in those reports. Determinations are made on the basis of the circumstances in each individual case, bearing in mind the policy and the country information.

The Austrian Federal Asylum Office uses several information sources, including country-of-origin reports from NGOs, information requests to their embassies, information from other countries, consultation with national and international experts, etc.

*5 Does an internal protection alternative play a role*

*- in regard to the decision whether a non-individual/group-based protection regime is established?*

*-when it comes to applying the protection regime to asylum seekers belonging to the groups concerned?*

In Switzerland, as mentioned above, if an internal protection alternative exists it is unlikely that a temporary protection regime is put in place. Temporary protection cannot be granted to asylum seekers for whom an internal protection alternative exists.

As the United Kingdom does not run group-based protection regimes, it follows that the possibility of internal relocation only plays a role in the consideration of the individual case.

Group-based protection does not exist under Austrian law.

## SECTION B: For the European Commission only

*1 According to Article 15c of the EC 'Qualification' Directive, there is a right to subsidiary protection in case of a 'serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflicts'.*

*a- How does the Commission interpret this provision?*

*b- According to the Commission, does this provision require the introduction/continuation of a categorized protection policy?*

Unfortunately, the European Commission did not send an answer to the questions posed. However, ICMPD can make some observations on this subject.

Article 15c of the Qualification Directive basically contains new language that cannot be directly traced to other international or European instruments, in contrast with Articles 15 a and b. Indeed, Article a (death penalty) takes over a principle contained in the ECHR and in the second Protocol to the ICCPR. The new EU Charter of Fundamental Rights, if and when it enters in force, does contain similar language in regard to prohibiting member states from returning individuals to a country where that person could face the death penalty. Article 15 b reflects the obligations undertaken not to return someone to a country where that person could face torture.

Article 15c specifically refers to situations of armed conflict, be it international or internal. A comparison can be drawn to other regional instruments, mainly the Cartagena Declaration and the 1969 Organization of the African Union (OAU) in regard to the armed conflict situations. It can be inferred that Article 15c represents the reflection of EU member states practice when dealing with the massive influx of refugees following the break-up and ensuing war in former Yugoslavia. In essence, it also covers situations where the persecution threat may not be individualised, but where protection against refoulement is necessary, even though the beneficiaries may not qualify under the 1951 Geneva Convention.

It is merely impossible, at this stage, to infer whether this provision would require the introduction of a categorized protection policy at EU level. In any event, it could only happen after lengthy debate among member states.

## SECTION C: For ICMPD (not forwarded to recipients)

*1 In the nine EU member states and Switzerland to whom this questionnaire is addressed, what is the relation between the policy of the Dutch categorized protection and the possible policies mentioned in the answers under section A of the questionnaire (tolerated stay/administrative leave to remain/suspension of deportation)?*

*2 How does the Dutch policy on categorized protection relate to policies in the nine EU member states and Switzerland?*

As such, none of the countries which provided answers to the questionnaire have a comparable regime of categorized protection similar to the one in the Netherlands. Group protection may take place in the form of temporary protection, when it is applied. However, this regime would usually come into force after certain circumstances have been met, notably a massive influx of asylum seekers from a particular country of origin.

In general, most EU member states tend to make individual assessments of putative protection needs.

*3 Do international (treaty) obligations as well as international customary law (not being EU obligations) exist with regard to the Dutch form of categorized protection?*

*If yes,*

*a- What are these obligations?*

*b- Do the Netherlands comply with these obligations?*

There are no known international or community instruments approaching the Dutch regime of categorized protection. In addition to the 1951 Geneva Convention and the 1966 Protocol, several international provisions come into play in order to prevent refoulement of individuals deemed in danger in their home country. It is to be noted, however, that these are individual protection schemes, and would usually not encompass a whole group.

Without explicitly mentioning all possible instruments; the major ones which the European states have to comply with are the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (CAT), the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), and the European Convention on Human Rights (ECHR). Finally, the EU Qualification Directive (Council Directive 2004/83 of 29 April 2004) prohibits refoulement of persons at risk of receiving the death penalty, being submitted to torture or unusual and harsh treatment, and serious and individual threat to a civilian's life. Again, it is important to note that it concerns an "individual" threat, and it can be assumed that the EU member states, which must adopt provisions containing these minimum standards, would contemplate case-specific assessments, and not a group one. However, nothing prevents a particular state from adopting more generous legislation, inclusive of group and categorized protection.

Many of the rights and obligations conferred unto states party to these treaties tend to overlap. The burden of proof may also slightly vary from one to another.

It is interesting to note that the EC ‘Qualification’ Directive contemplates that an individual could be excluded from the protection for reasons similar to the ones contained in Article 1f of the Geneva Convention. No mention is made of the exclusion clauses defined in Articles 1d and 1e of the Convention.

*4 In general, what is the relation between ‘protection because of group-related persecution’ and ‘categorized protection’?*

In the course of our research outside the scope of the questionnaire administered to the participants, only one instance could clearly be identified as addressing group protection, and that is the temporary protection regime.

The temporary protection as understood by the EC Directive can only happen after several criteria are met, and after a decision to this effect. The decision remains valid for one year and can be extended. At the origin of a declaration is a massive influx of refugees from one country of origin.

Categorized protection has distinguishing features from the temporary protection regime. Temporary protection would be applied indiscriminately to all persons justifying their nationality to the country concerned; categorised protection can be more targeted and, to a certain extent, “individualised”, inasmuch as a group could be clearly circumscribed and defined, should it be the choice of the state applying this concept. The effects could also be quite different, though it may vary from one state to another. It would be generally accepted that the beneficiaries of such protection would receive certain entitlements and social benefits, which could lead, should the situation in their country of origin not change, to permanent resident status after a number of years (this could also be true for temporary protection beneficiaries should individual EU member states choose to adopt more generous dispositions than the minimum standards enunciated in the Directive).

*5 If applicable, how do the EU member states and Switzerland use the term ‘internal protection alternative’ (as explained in the introduction of the questionnaire) in relation to the concept of the ‘internal flight alternative’?*

- a- Is the application of these concepts based on the law or on policy guidelines?*
- b- How are these concepts applied (which criteria are used)?*
- c- If an examination is conducted to establish the existence of an internal flight protection alternative, how is this done (at what stage in the procedure, on the basis of which information/criteria and by whom)?*
- d- Can an internal flight/protection alternative be applied to groups or only in individual cases (as is the case in the Netherlands)?*

When applicable, the internal protection alternative (as much as the internal flight alternative, is applied on an individual basis. This principle does or would constitute an impediment to granting protection. Many criteria apply, among them the availability of medical treatments, links to family (in the case of unaccompanied minors or vulnerable persons), general security or conditions that could impair one's possibility of earning a livelihood).

## Concluding Observations and Comments

Categorized protection can be included in the broader family of complementary or subsidiary protection. Neither concepts are defined anywhere in international instruments. Another component included in this concept is the temporary protection. These concepts came about with a view to addressing particular situations where individuals, most of the time forming part of a large group, could not necessarily qualify under the Geneva Convention, but remained nevertheless in dire need of protection. In other words, temporary protection was a response to the massive influx of refugees stemming from the war in former Yugoslavia. However, temporary protection usually constitutes a response to an emergency situation. As a whole, complementary/subsidiary protection does not seek to address such situations, in essence.

Even though the lines between these various concepts may not always be clear, and they do tend to overlap, their presence ensures a complete “protection package”. Applied together, they can be said to cover what has been identified in the literature as the “protection gap”.

Given the existence of these concepts, which are being developed and applied in pan-national and national legislative instruments (the EC ‘Qualification’ Directive, enjoining the member states to adopt similar standards being a good example), one may ask whether the categorized protection concept adds a needed element, or assists in better “filling” the protection gap.

A partial answer can be based on the following reasoning: as it stands, the European Court of Human Rights has stood to repair errors, at times, in individuals wrongly denied protection under the Geneva Convention. The argument mostly raised was fear of torture or other harsh treatment. However, the burden of proof remains, at this time, to prove an individualised threat, as opposed to a situation of indiscriminate violence which could impact on a large group of the population in a particular country of origin (the group may not always be homogenous, other than the fact they have their nationality as a common bound). Even though the Court’s jurisprudence could evolve in that direction, i.e. where proof of indiscriminate violence against a group an individual can be identified would suffice, this would never replace the certainty that a legislative instrument does provide. Categorical protection ensures that this hole is patched.

Categorised protection allows, in our view, for more flexibility than the other complementary protection concepts currently at hand. Groups in need of protection could practically be tailor-made to address certain conflict situations, thus providing a necessary protective umbrella. For instance, it could be applied regardless of the subjective situation of the members of a given group, but only in regard to the objective situation prevailing in a given country, or part thereof. In addition, there are no reasons why its application should be restricted to more traditional refugee producing situations

as understood by the Geneva Convention. It could be applied as a response to a natural disaster, for example.

Of course, as it stands now, the categorised protection concept does call for some sort of subjective element when applying the internal protection alternative. At this stage, the specific situation of individuals has to be examined. This could be perceived as a paradox towards the application of the concept: the group approach in regard to the inclusion versus the individual one when the exclusion from protection is concerned. This apparent conflict could be resolved by dropping altogether the internal protection alternative when applying the categorised protection approach.

In regards to its implementation, other issues may arise. For instance, where should it be positioned within the refugee determination process? At the front end, as per the temporary protection, or at the back end? As situations are often volatile in refugee-producing countries, and may evolve favourably or unfavourably, it might better play its role of subsidiary safeguard at the end of the process. Such an approach would also better respect the letter and philosophy of the concept, as developed by the Dutch government, as it serves to address protection gaps for individuals where not deemed worthy of protection under the Geneva Convention. On the other hand, practical considerations, such as economic ones, could constitute valid reasons to implement this scheme at the beginning of the process. In this case, provisions should be clearly stipulated that a person should not be denied access to refugee status, or be processed as such once the reasons for granting categorised protection cease to exist.

One caveat, in implementing this innovative concept, is the possibility of establishing precedents. Careful wording would prevent such an occurrence should it be the choice of the legislators.

In conclusion, it can be said that there are no actual instances where provisions amounting to the categorized protection concept are actually in place within the countries which took part in this study, nor within the European Council. The enactment of this innovate protection scheme, EU-wide or at a national level, would fill a void, providing the specialists with an additional, flexible tool, to deal with the constantly evolving flow of asylum seekers. It would further put in place a pro-active instrument, instead of being dependent on a responsive action to certain emergency situations for which states are not always equipped to deal with.

In closing, we would like to point out to documents that may prove useful within the more general context of complementary protection: the ECRE study of July 2004, titled “Complementary/Subsidiary Forms of Protection in the EU member states,” which is a compilation of the legislative instruments in place within the 25 EU member states; and a UNHCR study (Department of International Protection) titled “Protection Mechanism Outside of the 1951 Convention (“Complementary Protection”)", of June 2005, authored by Ruma Mandal. These documents can prove useful in providing a rather up-to-date overview of this topic.

## Annex I

### Answers as provided by the Participating States

#### Austria

##### Legal/procedural framework

1 In the following specific situations, in the period 2001-2005, how has your country dealt with asylum seekers from:

- a) Afghanistan
- b) the Democratic Republic of Congo
- c) Iraq
- d) Somalia

*First of all please note that there is no general policy how to deal with asylum seekers from the countries mentioned above. Every case is assessed depending on the individual claim. However, due to the situation in the respective countries the recognition rates as well as the figures for subsidiary protection are quite high as you can see from the statistics below.*

Ad a) Afghanistan

	2004	2005
<i>Applications</i>	757	720
<i>Positive decisions</i>	744	427
<i>Negative decisions</i>	110	105
<i>Subsidiary protection granted</i>	158	137



*Over the past years Austria granted refugee status or subsidiary protection for asylum seeker from Afghanistan on a regular basis and so far we do not force refused applicants to return to their country of origin. However, we keep a close eye on the situation in the country and in case the overall situation changes our practise is likely to change.*

Ad b) Democratic Republic of Congo

	2004	2005
<i>Applications</i>	65	61
<i>Positive decisions</i>	46	61
<i>Negative decisions</i>	115	13
<i>Subsidiary protection granted</i>	7	2

*As you can see from the relevant figures above only a few asylum seekers from the Democratic Republic of Congo applied for asylum in Austria. Concerning the question of forced return of citizens from the Democratic Republic of Congo we consider every decision on a case by case basis, depending on the region of origin in the DRC and the personal situation of the applicant.*

Ad c) Iraq

	2004	2005
<i>Applications</i>	232	195
<i>Positive decisions</i>	128	114
<i>Negative decisions</i>	80	41
<i>Subsidiary protection granted</i>	251	46

*Asylum seekers from Iraq usually are granted either refugee status or subsidiary protection. We currently do not consider forced return of Iraqi citizens due to the ongoing security problems in the country.*

Ad d) Somalia

	2004	2005
<i>Applications</i>	45	66
<i>Positive decisions</i>	12	51
<i>Negative decisions</i>	3	4
<i>Subsidiary protection granted</i>	8	4

*As you can see at the moment there are very few asylum seekers from Somalia in Austria. Currently we usually grant asylum status or subsidiary protection depending on the circumstances of the individual case. We currently do not force refused asylum seekers to return to Somalia, simply because of the ongoing instability in the country; not to mention the logistic problems involved with a deportation to Mogadishu or other parts of the country.*

2 In your legal system, which kind of protection comes close to the Dutch system of categorized protection as described above?

*The Austrian asylum legislation doesn't offer categorized protection for asylum seekers from specific countries or persons with certain ethnic origin. The decisions whether to grant asylum status or not are always based on the individual claim. Subsidiary protection is granted in case the alien's forced return would lead to the risk of a violation of Articles 2 or 3 of the ECHR or protocol Nr. 6 or 13.*

*However § 29 of the Austrian Aliens Law, respectively § 76 of the new Aliens Law which will enter into force on January 1<sup>st</sup> 2006 refers to the exceptional possibility that a certain group of displaced persons will be allowed to stay on the territory of Austria for a certain period of time. These are so called "de facto refugees".*

*The mentioned temporary right to stay for effected groups has to be declared by a special regulation issued by the Austrian government, which indicates the terms and conditions under which specific groups of persons are allowed to enter and stay on the territory of Austria temporarily. The [prerequisite](#) for such a protection is an armed conflict or other circumstances threatening the safety of entire population groups.*

*Government regulations according to art 29 Aliens Law were issued in the 1990s for persons from Bosnia-Herzegovina and Kosovo during the Balkan Crisis but not recently.*

3 What kind of non-individual protection or group based protection does your legal system have besides the EC Temporary and Subsidiary Protection Status (deriving from the EC ‘Temporary protection’ Directive 2001/55, and the EC ‘Qualification’ Directive 2004/83)?

*As mentioned above § 29 of the Austrian Aliens Law may provide special protection for specific groups under very exceptional circumstances. Otherwise the Austrian legislation does not provide non-individual or group based protection as our system is based on individual protection.*

4 What is the legal basis for such a policy? Does this basis have an obligatory or facultative character? Please mention any relevant international, European or national legal instrument.

*§ 29 (§ 76 FPG 2005) is of facultative character. The government is in no way obliged to grant group protection/ temporary stay according to § 29 Aliens Law. This already shows the wording of § 29: “In times of armed conflict or other circumstances threatening the safety of entire population groups, the Federal Government **may** by ministerial order grant temporary right of residence in the federal territory to directly affected groups of aliens who can find no protection elsewhere (displaced persons)”*

5 On the basis of what criteria is it decided whether or not such non-individual protection or group based protection is applied to certain groups of asylum seekers? Please compare the criteria (indicators) with those used in the Dutch system (see introduction). More particularly, do you take into account the policies of other European states and if so, what role do those policies play?

*The above mentioned instrument of group protection according to § 29 is usually based on a broader European policy concept such as the protection for refugees during the Balkan war in the past. Therefore the relevant policy is mostly enforced in coordination with other European states as well as recommendations of the European Union.*

6 What type of procedure is provided for hearing/ interview/ written submissions?

*There is a 'procedure' for 'de facto' refugees as described above. The relevant action is only based on a specific regulation issued by the Austrian government which constitutes the group of persons, the duration of the temporary stay as well as other modalities of the measure.*

b) At which stage within your procedure would the granting of a non-individual protection or group based protection take place?

*Referring to the answers above non-individual protection or group based protection is not known in the Austrian asylum procedure.*

c) Is there any appeal /review process?

*See the answers above. No appeal procedure.*

7 According to Article 15c of the EC 'Qualification' Directive, there is a right to subsidiary protection in case of a 'serious and individual threat to a civilian's life or

person by reason of indiscriminate violence in situations of international or internal armed conflicts’.

a) How does your administration interpret this provision?

*The Austrian authority interprets the provision as a more detailed definition of the circumstances in which the refoulement principle is applicable. We particularly do not see art 15c as a provision for group based or other non individual protection measures.*

b) How is or will this provision be implemented in your legal system?

*In the new asylum law the definition of Article 15c of Council Directive 2004/83/EG is implemented in Article 8 of Asylum law 2005, which leads to the granting of subsidiary protection.*

c) Does Article 15c of the Directive require the introduction/continuation of a categorized protection policy?

*The Austrian legal Asylum system is a case-based system and we do not agree that art 15c requires the introduction of a group based protection policy. Our point of view is clearly supported by the wording of the provision. Subsidiary protection should be granted in case “of a serious and **individual** threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.” Therefore the provision only applies in individual cases.*

### **Effects of the policy**

1 Do beneficiaries of non-individual/group based protection in your country receive a residence permit, or are they granted a suspension of deportation or tolerated stay?

*De facto refugees as described above receive a temporary residence permit according to § 29 Aliens Act.*

## **Internal Protection Alternative**

1 Does the existence of a protection alternative (safe zone) in the country of origin constitute a contra-indication or a reason for not granting categorized protection to a group of asylum seekers?

*Austria basically considers the internal flight alternative and § 11 of Asylum law 2005 clearly indicates that refugee status can not be granted in case the assessment of the individual claim leads to the conclusion that an internal flight alternative exists.*

*However an internal flight alternative should be considered in each individual case, as it always depends on the applicant's personal situation (age, health, family ties, standard of living...)*

*In asylum procedures we do not apply the concept of specific "safe zones" for a certain group of people as we decide on a case by case basis.*

2 Are the requirements which must be met for the application of the internal flight alternative (e.g. accessibility of services, minimum standard of living, etc.) also be met for the application of an internal protection alternative to a person who would otherwise qualify for non individual/group protection?

*The question is not applicable as there is no group based protection in the Austrian asylum procedure. (see answers above).*

3 Which requirements must be met with regard to this protection alternative (family ties, availability of food and medicine, no humanitarian emergency for displaced persons, possibility to earn a livelihood)?

*There is nothing like a list of requirements that has to be met for applying an internal flight alternative in the individual case. After an in depth evaluation of the individual claim the Federal Asylum Office Austria decides whether or not an asylum seeker is able to escape alleged persecution in other parts of his/her country of origin. Indications*

*include the overall situation in the country of origin, the family situation of the applicant, the supply with food and medicine, social status and so on...*

4 On the basis of which information is the determination of the existence of a protection alternative made?

*The decision whether or not the internal flight alternative may apply is based on an in depth evaluation of reports of different sources. This includes country of origin information in particular, such as NGO reports or documents issued by state authorities, information requests to the Austrian embassies abroad, enquiries and consultations with national and international experts...*

5 Does an internal protection alternative play a role

- with regard to the decision whether a non-individual/group based protection regime is established?

*No. Once again we would like to refer to the fact that group based protection does not exist in the Austrian asylum procedure.*

- when it comes to applying the protection regime to asylum seekers belonging to the groups concerned?

*As already mentioned there is no group based protection in the Austrian asylum legislation.*

## Denmark

The answer below was reconfirmed as still reflecting Denmark's position. With regard to the processing of asylum claims from Somalis every case is judged on its own merits. Rejected applicants from the North (Somaliland and Puntland) will be deported to the area of origin while applicants from Central and southern parts of Somalia have not been deported so far. Somalis are not prima facie refugees in Denmark and no one is being granted asylum or protection status just because of the belonging to a certain group.

Previous answer from Denmark

Provided by Ms. Tanja Krabbe, e-mail: tkr@inm.dk to the ACVZ

Referring to your request of August 11 2005, please find below information on relevant aspects of Danish asylum and immigration policy. Please do not hesitate to ask supplementary questions if needed.

A notion of protection comparable to the Dutch 'categorical protection' does not exist in Danish policy or practice. However, there are other types of protection similar to or in some ways overlapping some aspects of 'categorical protection'.

According to the Danish Aliens Act, Section 7 (1) a residence permit will be issued to an alien if the alien falls within the provisions of the Convention relating to the Status of Refugees (28 July 1951) (Convention status).

Pursuant to section 7(2) of the Aliens Act, a residence permit will be issued to an alien upon application if the alien risks the death penalty or being subjected to torture, inhuman or degrading treatment or punishment in case of return to his country of origin (protection status).

It follows from section 31 of the Aliens Act that an alien may not be returned to a country where he will be at risk of the death penalty or of being subjected to torture or inhuman or degrading treatment or punishment, or where the alien will not be protected against being sent on to such country. Moreover, an alien may not be returned to a country where he will risk persecution on the grounds set out in Article 1a of the Convention relating to the Status of Refugees (28 July 1951), or where the alien will not be protected against being sent on to such country.

The Danish immigration authorities make their decision on the basis of a specific and individual assessment of each application in the light of the background knowledge of the general situation in the country of origin and any specific matters of importance to the case available to them. Exceptional circumstances in (a part of) the country of origin in case of return of the asylum seeker will be considered in this context.



Section 7(1) of the Aliens Act incorporates Article 1a of the Convention relating to the Status of Refugees into Danish law so that, in principle, refugees are legally entitled to a residence permit.

It follows from the wording of Article 1a (ii) that the applicant must have a well-founded fear of persecution. In principle, this implies that the applicant's fear must be supported by objective facts. However, situations may exist where the subjective fear of persecution is so well-founded that such fear constitutes a sufficient basis for granting asylum. In this connection, it is not decisive whether persecution has, in fact, taken place, or whether there is only a risk of persecution.

An assessment of whether persecution has taken place includes the background and the intensity of the outrages, including whether the outrages are of a systematised and qualified nature. Importance is also attached to any risk of repetition of the outrages, including when the outrages took place.

For the immigration authorities to consider the conditions for a residence permit under section 7(1) of the Aliens Act to be fulfilled, the general criterion is that it may be feared that the person in question will be subjected to specific and individual persecution of some severity or a risk thereof in case of return to his country of origin. For the assessment of whether this criterion has been fulfilled, the authorities take as their basis any particulars on persecution prior to the person's departure from his country of origin. However, the decisive point is how the person's situation must be assumed to be in case of return to his country of origin. In the decision, the authorities consider whether the applicant risks persecution upon the return to his country of origin, also in cases where the authorities find that there was no basis for asylum when the applicant left his country of origin.

Pursuant to section 7(2) of the Aliens Act, a residence permit will also, as stated above, be issued to an alien who risks the death penalty or being subjected to torture or inhuman or degrading treatment or punishment in case of return to his country of origin.

The wording is close to the wording of Article 3 of the European Convention on Human Rights, from which it appears, inter alia, that no person may be subjected to torture or exposed to inhuman treatment or punishment. The Sixth and Thirteenth Additional Protocols to the European Convention on Human Rights also comprise a prohibition against the imposition of the death penalty and execution in peacetime.

It appears from the explanatory notes to section 7(2) that it is presupposed that the immigration authorities will comply with the case law of the European Court of Human Rights in the field when applying the provision.

It furthermore appears from the explanatory notes to section 7(2) that Denmark in addition to the provisions of the European Convention on Human Rights has an obligation to respect a number of other conventions of relevance to the provision.

This applies, inter alia, to Article 3 of the United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (Convention against Torture), whereupon the state parties are prohibited against returning a person to a country where there is a risk that the person will be subjected to torture or inhuman or degrading treatment or punishment.

This applies furthermore to Article 7 of the International Covenant on Civil and Political Rights, of which it appears that state parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment.

The Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty is also of relevance in this respect.

The Danish Immigration Service and the Refugee Board will generally consider the conditions for issuing a residence permit under section 7(2) to be fulfilled when there are specific and individual factors rendering it probable that the applicant will be exposed to a real risk of the death penalty or of being subjected to torture or inhuman or degrading treatment or punishment in case of return to his country of origin.

It derives from the above that if exceptional circumstances in the country of origin involves a real risk that the applicant will be subject to specific and individual persecution or exposed to a real risk of treatment as mentioned in section 7(2) of the Aliens Act in case of return the conditions for issuing a residence permit will generally be considered fulfilled.

If on the other hand the exceptional circumstances in the country of origin are a result of the general situation and do not involve a real risk that the applicant will be subject to specific and individual persecution or treatment as mentioned in section 7(2), asylum cannot be granted.

Thus, it is not possible to issue a residence permit with protection status merely because of chaotic conditions in a particular country, and generally poor conditions in a country, including civil-war-like conditions, or an alien's poor position for social, education or health reasons or the like cannot either motivate protection status.

The exceptional circumstances in the Kosovo province in Serbia and Montenegro in the late 1990's before the interference of the international society in 1999 resulted in a Danish asylum practice where ethnic Albanians from the Kosovo province as a principal rule were granted asylum according to section 7(1) of the Aliens Act. Likewise Somali asylum-seekers belonging to the Benadir-clan and living in Mogadishu were around the same time considered to be in a constant and potential danger of outrages and therefore recognised as refugees according to the Refugee Convention.

It should be emphasized, however, that the decisions were based on a specific and individual assessment of each applicant's grounds for seeking asylum.

These are examples of protection granted in situations close to the situations described as falling under the 'categorical protection'.

According to Section 9 b in the Danish Aliens Act, a residence permit can be issued to an alien who, in cases not falling within section 7(1) and (2) (asylum), is in such a position that essential considerations of a humanitarian nature conclusively make it appropriate to grant the application.

Residence permits on humanitarian grounds are issued by the Minister of Refugee, Immigration and Integration Affairs.

Residence permits on humanitarian grounds are only issued rarely and only upon a specific assessment of the circumstances in the individual case. Residence permits on humanitarian grounds are issued particularly to persons suffering from physical or mental illnesses of a very serious nature. Residence permits on humanitarian grounds may also be issued to persons who would be at risk of getting or experiencing a worsening of a serious disability if they were to return to a country of origin with difficult living conditions. In cases other than those referred to above, residence permits on humanitarian grounds can be issued to families with small children who come from an area with war or war-like conditions, and to single women and families with children from areas with extremely difficult living conditions, for example as a result of famine.

The ministry has a special policy of issuing a residence permit on humanitarian grounds to Afghan citizens. At the moment residence permits on humanitarian grounds are issued to 1) families or single persons from Afghanistan who due to their health situation - which by itself wouldn't be enough to be the reason for issuing a residence permit on humanitarian grounds - will be in a particularly vulnerable situation when returning to Afghanistan, 2) families with minor children from certain areas in Afghanistan, where the drought is particularly bad, 3) single women without male family members or social network in Afghanistan, 4) single women with minor children without male family members or social network in Afghanistan, and 5) destitute Afghans with no land who come from areas with drought and a need of food, and who will be in a particularly vulnerable situation when returning.

Thus, residence permits on humanitarian grounds is also in some situations close to the Dutch categorical protection.

In 1992 the Danish Parliament adopted the Act on Temporary Residence Permits for Certain Persons from Former Yugoslavia, and in 1999 a similar Act was adopted concerning distressed persons from the Kosovo Province.

These Acts established an invitation scheme through which persons from the former Yugoslavia and the Kosovo province could be invited to Denmark by agreement with the UNHCR or another international organisation within quotas laid down by the Minister of the Interior. According to the Acts it was possible to issue a temporary residence permit, if the persons were distressed because of acts of violence or similar unrest in the former

Yugoslavia and the Kosovo Province, and if the persons were presumed to need temporary protection in Denmark.

The Acts were repealed in May 2000 and December 2002 respectively.

In situations where the alien does not fulfill the requirement for obtaining a residence permit, and exceptional circumstances exist in a (part of a) country of origin - for instance the current situation in Iraq - forced return will not be initiated.

Polls show that the majority of Danes support the asylum and immigration policy of the government.

Regarding Directive 2004/83, it may be noted that in accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark did not participate in the adoption of the mentioned directive and is therefore neither bound by it nor subject to its application. However, as it is the policy of the Danish Government to align itself with European Asylum Law, the Danish legislation is in line with the directive.

## Finland

Sirpa Arvonen

9.1.2006

### **1. Does a comparable (categorical protection) policy or practice exist in your country? If so,**

#### **a) what is its legal nature?**

Finland doesn't have a comparable policy or practice. However, our subsidiary protection status (residence permit on the basis of need for protection) is more extensive than the one defined in the qualification directive.

A residence permit on the basis of need for protection may be issued in situations where a person is in need of international protection owing to the situation in his or her home country or owing to infringements of law encountered in the home country. Instructions for the definition of the concept of inhuman treatment and for the assessment of the probability of such treatment can be found in the legal praxis of the supervisory bodies of international human rights conventions, in particular in the decisions of the European Court on Human Rights as regards the prohibition of inhuman treatment provided in Article 3 of the European Convention on Human Rights. The armed conflict mentioned in the section may refer, for example, to a civil war situation or other internal disturbance in the country where people may become victims of undefined armed violence.

Residence permit may also be granted in case of an environmental disaster, for example in cases where an accident caused by a human being, or a catastrophe has happened in the foreigner's home country or country of permanent residence, making the environment unfit for human habitation and dangerous for health.

#### **b) what kind of results is yielded during the last ten years? Major examples**

No exact data available, since the category of those in need of protection is larger than the decision in question.

#### **c) in case of granting a residence permit, what kind of a residence permit?**

Those in need of protection are issued continuous residence permits.

#### **d) what kind of services are being provided? (health, education, access to the labour market)**

Foreign nationals staying in Finland on a permanent basis are in practice provided with the same services and the same social security benefits as Finnish citizens.

**e) what are the political and public opinions at large on this policy or practice?**

## France

Réponse au questionnaire de l'ACVZ:

A titre liminaire, il convient de noter que la France ne pratique pas la protection par catégorie telle que décrite dans le questionnaire.

1. Pour toutes les nationalités listées à la question 1: traitement individuel des demandes d'asile.
2. Protection subsidiaire; protection temporaire en cas d'afflux massif; le cas échéant, abstention de renvoi.
3. Néant.
4. Non applicable
5. Idem.
6. Idem.
7. b) dans le cadre de l'examen individuel de la demande d'asile.  
c) non.

Unofficial translation.

From the start, it is necessary to recall that France does not apply categorized protection as described in the questionnaire.

1. For all nationalities listed in question 1: individual processing of asylum claims.
2. Subsidiary protection; temporary protection in case of massive influx; ultimately, refraining from removal.
3. None.
4. Not applicable.
5. Idem.
6. Idem.
7. b) within the framework of the individual processing of the asylum claim.  
c) no.

# Switzerland

## Section A Legal/ procedural framework

Preliminary note:

In Switzerland a temporary protection regime can be exerted on different legal grounds. The legal basis for the temporary protection regime which is consistent with the Dutch concept of ‘categorized protection’ is outlined in the following. In order to clarify the concepts being applied in status determination proceedings the answers of the posed questions in the questionnaire are composed in such a way as to give insight into both the legal framework as well as the practice of temporary and subsidiary protection. Therefore there is a need to elaborate both the normative grounds as well as the practice of the mentioned concepts. Beforehand, it is to be stated, that a temporary protection regime within the frame of an individualized procedure has been applied. A temporary group based protection regime however, has to date not been exercised although the legal provisions have been introduced to the asylum legislation.

*2 In your legal system, which kind of protection comes closest to the Dutch system of categorized protection?*

The ‘categorized protection’ as outlined in the questionnaire of ICMPD matches the category of ‘temporary protection’ as provided for in the Swiss asylum legislation. The category has been introduced at the end of the legislative procedure of the total revision of the Swiss asylum code, entering into force in June 1998. It is set out in chapter 4, ‘octroi de la protection provisoire et statut de personnes à protéger’ (granting of temporary protection and status of individuals to protect).

Applying a regime of a group based temporary protection lies within the discretionary power of the Federal Council. The aim is to protect collectively persons who are not refugees in the strict sense in accordance with criteria recognized under international law. With the category of ‘temporary protection’ which matches the Dutch concept of ‘categorized protection’, Switzerland endeavours to grant protection to population groups in distress due to the gravity of violations of human rights and humanitarian law in the country of origin. Particularly, Switzerland offers temporary protection within her own borders to people suffering in regions affected by war or disaster.

It is to be stated though that the category as outlined above has so far never been implemented with the provisions as set out in the Swiss asylum code, as it is a provision to be applied in a situation when Switzerland is faced with a mass influx of persons from



a particular region. In practice, it is a provision in the Swiss asylum code which has to date been implemented on the basis of other legal instruments, which will be delineated below. So far it has been exercised on the basis of an individual assessment during asylum proceedings and within the frame of an individualized determination procedure.

In practice, a temporary protection regime is proposed by the department in the Federal Office for Migration being in charge of the lead management of the affected country of origin, of which its nationals, or a designated group of its nationals are considered as potential candidates of being granted temporary protection. The Board of Directors agrees to or rejects the proposals of the department holding the lead management. Once agreed upon, people originating of the defined region are offered temporary protection. The beneficiaries are then given the possibility to stay in Switzerland for the duration of 12 months. As the situation in their country of origin is constantly assessed the temporary protection can either be renewed or withdrawn, depending on the situation in their country of origin.

*3 What kind of non-individual protection or group based protection does your legal system have besides the EC Temporary and Subsidiary Protection status?*

Generally, the group based protection matches in its content the guidelines as developed in the EC Directives. Specifically, the group based protection as outlined in the Swiss asylum code (see above, question 2) grants the beneficiaries the same rights as asylum seekers. The difference in the case of such specified beneficiaries is that the concept of family unity applies to them while it does not apply to the status of asylum seekers. A further aspect is that after 5 years of stay in Switzerland a beneficiary of the temporary protection regime can benefit from being granted permanent stay, although different factors need to be taken into special consideration. Generally, after 10 years of stay in Switzerland any beneficiary of a temporary protection regime can be granted permanent residence.

In practice, as the protection regime outlined above, has until now not been implemented, groups of people which are granted temporary protection on the grounds of an individual assessment cannot unify with their family.

*4 What is the legal basis for such a policy? Does this basis have an obligatory or facultative character?*

[a] The legal basis for the policy of a regime of a group based temporary protection as provided for in the asylum code under chapter 4, ‘octroi de la protection provisoire et statut de personnes à protéger’ is laid down in the following Articles:

- General Provisions of Articles 66 and 67 of the Asylum Code
- Procedural Provisions of Articles 68 – 73 of the Asylum Code

- Provisions of Status in Articles 74 and 75 of the Asylum Code
- Provisions of Revocation of, ending of or refusal to renew refugee status in Articles 76-79 of the Asylum Code

Further specifications are to be found in the regulations concerning the granting of temporary protection in the Asylum Directives 1, chapter 4, Articles 44-52.

The legal basis has a facultative character.

[b] As mentioned above, the provisions listed under [a] have to date not been applied, because these legal instruments are meant to be implemented in a situation of mass influx which until now has not occurred since the introduction of the named provisions to the legislation. However, in practice, within the frame of an individualized determination procedure, the following instruments form the legal basis for granting temporary protection within the individualized determination procedure:

- Article 44 para. 2 of the Asylum Code
- Article 14a-c of the Foreign Nationals Act (presently in revision)
- Article 3 of the European Convention on Human Rights and Fundamental Freedoms

*5 On the basis of which criteria is it decided whether or not such non-individual protection or group based protection is applied to certain groups of asylum seekers?*

As to date a group based temporary protection regime as provided for in the Swiss asylum code has not been exercised there is a lack of material to answer the question regarding the considered factors by the Federal Council. Generally, it is stipulated that if the security and human rights situation is considered to be in a condition justifying a temporary protection regime it can be implemented. The decision lies within the hands of the Federal Council, which comes to such a conclusion through a consultation process. Addressees of such consultations are the cantonal authorities, NGOs and the UNHCR.

In practice, the Federal Office for Migration, as the expert office, brings the situation to the attention of the Federal Council through the Minister and head of the Federal Department for Justice and Police Affairs. As any decision affecting national interests is based on prior consultation, of course, the practice of other European States is considered. Switzerland as member of the Asylum Group of Eight (A8) is constantly in a state of interchange with the members of the named group and is therefore observing the practices followed by the EC, which are permanently evaluated.

*6 a) What type of procedure is provided for (hearing/interview/written submissions)?*

Any person seeking protection in Switzerland enters a clear defined individualized determination procedure in which a hearing takes place. The request of protection and thus of entering the procedure can be made either orally or in written form. As soon as any Swiss authority has taken notice of a request for protection it is obliged to bring this demand to the attention of the Federal Office for Migration whose responsibility it is, inter alia, to carry out the asylum proceedings. In general and in reference to the legal basis as described in 4[a] it can be said that the proceedings as provided for by the law consists of the assessment whether a person is eligible to be granted temporary protection or not. The proceedings are the same as in the case of a request for asylum, although they are less extensive. They aim at assessing whether a person is eligible for protection or whether reasons of exclusion exist. If temporary protection is granted the asylum proceedings are suspended, unless there are clear indications that an applicant would meet the criteria of being eligible for the status of refugee.

In reference to the practice of the Office for Migration on the basis of the legal instruments as set out in question 4[b] of course, there is no suspension of the asylum proceedings, as the temporary protection is granted in an already individualized assessment.

*b) At which stage within your procedure would the granting of a non-individual protection or group based protection take place?*

As the hearing constitutes the necessary legal ground to assess the eligibility of a person seeking temporary protection, the stage of granting a non-individual protection is after the hearing.

*c) Is there an appeal/ review process?*

According to the provisions as set out in the Swiss asylum code (see 4[a]) there is no possibility of appeal. If temporary protection is granted, the asylum proceedings are to be suspended. If the Federal Office for Migration denies an applicant the granting of temporary protection, either the asylum procedure is immediately to be carried out or, re-opened, depending on the circumstances. In case the preconditions of continuing the asylum proceedings are missing, the return to the home country is to be initiated.

In case the asylum proceedings are re-opened, of course, appeal proceedings form part of the rights package.

In practice however (see 4[b]), within the frame of an individualized determination procedure a person can appeal as its status determination occurs within an ordinary asylum procedure, hence a person being granted temporary protection can appeal to the Swiss Asylum Appeal Commission which, naturally, happens very rarely.

*7 a) Interpretation of the provision according to Article 15c of the EC 'Qualification' Directive*

The provision is interpreted in such a way as that any situation of general violence such as war, civil war or situations of general violence or systematic and severe violations of human rights which are considered to being a serious and individual threat to a civilian's life or person, needs to be considered as qualification criterium for subsidiary protection. The subsidiary protection concept has already been delineated above, as its legal framework has to date formed the basis both for group based temporary protection as well as the subsidiary protection.

*b) How is or will this provision be implemented in your legal system?*

The provision is already set out in the Swiss Asylum Code and in the Foreign Nationals Act, (see question 4[b]).

- Article 44 para. 2 of the Asylum Code
- Article 14a-c of the Foreign Nationals Act (presently in revision)

*c) Does Article 15c of the Directive require the introduction/continuation of a categorized protection policy?*

No, it is already introduced.

### **Effects of the policy**

*1 Do beneficiaries of non-individual/ group-based protection in your country receive a residence permit, or are they granted a suspension of deportation or tolerated stay?*

Beneficiaries of a group based protection regime on the basis of Articles 66 - 75 of the Asylum Code (see 4[a]) are granted a tolerated stay, after five years of stay, they can be granted a residence permit, renewable each year by the cantonal authorities and in consultation with the Federal Office for Migration. Permanent residence can be granted after 10 years.

*2 a) What type of permit?*

It is a special permit, called the F-permit (for subsidiary protection beneficiaries) or the S-permit (for group based temporary protection beneficiaries).

*b) Can the permit be withdrawn ? (if so, under which circumstances and on which grounds?)*

Yes, a withdrawal is possible. A withdrawal is justified when the reasons leading to the temporary protection regime have ceased to exist. A withdrawal can only be executed in case a temporary protection regime has officially been declared as terminated.

*3 Are beneficiaries of non-individual/ group-based protection in your country entitled to benefits/ services?*

Yes, beneficiaries of non-individual/ group-based protection hold the same rights (or more, e.g. family unification) as asylum seekers. Shelter and welfare are provided. They have the right to employment and the use of integration facilities.

### **Internal Protection Alternative**

*1 Does the existence of a protection alternative in the country of origin constitute a contra-indication or a reason for not granting (categorized) protection to a group of asylum seekers?*

If a 'safe zone' exists, it is unlikely that a temporary protection regime is implemented.

*2 Are the requirements which must be met for the application of the internal flight alternative also be met for the application of an internal protection alternative to a person who would otherwise qualify for non-individual/ group protection?*

Yes, these are the same requirements. In the Swiss asylum practice it is imperative to assess the reasonability of an internal protection alternative.

*3 Which requirements must be met with regard to this protection alternative?*

Depending on the age and gender of a person, different factors need to be taken into consideration. In case a person belongs to a so called vulnerable group as, e.g. single mothers, minority group, etc. the specific individual situation has to be taken into account. If a person belongs to a vulnerable group, family and social ties need especially to be taken into account. Else, usually criteria of access to medical treatment, food, etc. are relevant factors for determining the reasonability.

*4 On the basis of which information is the determination of the existence of a protection alternative made?*

The Federal Office for Migration runs an analysis department which belongs to the Asylum Procedure Directorate. Its main task is thus to acquire and transmit information on the approximately 120 countries of origin of asylum seekers who have filed a relevant application in Switzerland. Country specialists offer research assistance and provide situation reports on the current situation in asylum seekers' countries of origin. These reports form the basis of information whether a protection alternative is existent. This information are being assessed by the department holding the lead-management of the specific country. Furthermore, the rulings of the Swiss Asylum Appeal Commission confirm or reject the findings of the Federal Office of Migration. Thus, the grounds for decision making in this matter depend on different factors. It is to be mentioned that the findings of the named specialists are, inter alia, grounded on information of Swiss embassies and aligned with the findings of international Organizations, such as UNHCR as well as the practice of the EC.

*5 Does an internal protection alternative play a role  
- in regard to the decision whether a non-individual/group-based protection regime is established?*

Yes, if an internal protection alternative exists it is unlikely that a temporary protection regime is exerted.

*- when it comes to applying the protection regime to asylum seekers belonging to the groups concerned?*

Yes, temporary protection can not be granted to asylum seekers for whom an internal protection alternative exists.

### **Practice of Dealing with Asylum seekers from Afghanistan 2001 - 2005**

Between November 2001 and September 2002 all decisions on asylum requests from Afghan nationals were suspended.

Since then asylum requests from Afghan nationals are subject to an individual examination. In accordance with the practice of the UNHCR, whoever belongs to a risk group is as a rule recognized as a refugee or - if individual execution hindrances exist – is granted temporary admission.

In all other cases the asylum request is rejected and the removal from Switzerland is ordered. As there is no situation of general violence in Afghanistan, returns can basically be ordered to all parts of the country.

### **Practice of Dealing with Asylum seekers from the Democratic Republic of Congo 2001 - 2005**

Suite à l'assassinat de Laurent-Désiré KABILA le 16 janvier 2001, l'office a décidé de suspendre le traitement des demandes d'asile des ressortissants Congolais, ceci durant quatre mois (janvier à avril 2001).

Par ailleurs, l'ODM procède de manière générale à un examen individuel en ce qui concerne les demandes d'asile déposées par les requérants provenant de la RDC. Cependant, une exception à cette règle subsiste pour une catégorie de personnes : les Tutsi – pour autant que l'appartenance ethnique soit avérée – se voient accorder l'admission provisoire pour illicéité du renvoi.

En outre, suite à la jurisprudence de la Commission suisse de recours en matière d'asile (JICRA 2004/33), nous avons été contraints d'adapter notre pratique en matière de renvoi pour les personnes faisant partie des «groupes vulnérables» suivants :

- Les femmes seules;
- Les femmes seules / familles avec enfants en bas âge (moins de 6 ans);
- Les personnes âgées;
- Les personnes malades.

#### ***Unofficial translation***

Following onto the assassination of Laurent-Désiré KABILA on 16 January 2001, the Office made the decision to suspend the treatment of asylum seekers from Congo, for a period of four months (January to April 2001).

Further, the Office usually assesses cases on an individual basis in regard to asylum claims adduced by applicants from DRC. However, there is one exception to this rule for a category of persons: Tutsi – inasmuch as the ethnic origin is proven – are temporarily admitted on the basis that removal would be illicit.

In addition, following onto jurisprudence from the Swiss Appeal Commission for asylum (JICRA 2004/33), the Office had to adapt its practice in cases of removals of persons belonging to following “vulnerable groups”:

- Unaccompanied women;
- Unaccompanied women / families with young children (less than 6 years old);
- Old persons;
- Sick persons.

## **Practice of Dealing with Asylum seekers from Iraq 2001 - 2005**

De manière générale, l'ODM procède à un examen individuel des demandes d'asile déposées par les requérants en provenance de l'Irak.

Le 17 mars 2003, notre office a suspendu le traitement des demandes d'asile des requérants irakiens. A partir du 15 mars 2004, nous avons peu à peu recommencé à traiter cette catégorie de cas, d'abord en examinant les demandes des personnes seules provenant du nord de l'Irak. Les demandes des personnes qui auraient dû être renvoyées dans la région centrale ou au sud de l'Irak n'ont pas encore été examinées. Depuis le 1er décembre 2004, l'ODM a octroyé l'admission provisoire dans certains cas (familles ayant séjourné longtemps en Suisse).

A partir du 1<sup>er</sup> septembre 2005, tous les requérants provenant de l'Irak se voient, en règle générale, octroyer l'admission provisoire pour inexigibilité de l'exécution du renvoi. En sont exclus les requérants délinquants qui ont compromis la sécurité et l'ordre publics ou qui leur ont porté gravement atteinte.

### ***Unofficial translation***

In general, the office individually examines asylum applicants adduced by claimants coming from Iraq.

On 17 March, 2003, the Office suspended the treatment of asylum claims from Iraqis. Since 15 March 2004, the Office has slowly begun once again to examine this category of cases, looking at those cases from individuals coming from northern Iraq. The applications from individuals who should have been removed to the central part or the south of Iraq have not yet been re-examined. Since 1<sup>st</sup> December 2004, the Office has granted temporary admission in certain cases (families having stayed for a long period in Switzerland).

Since 1<sup>st</sup> September, 2005, in general all applicants from Iraq are granted temporary admission since the execution of the removal order cannot be requested. Delinquents who have compromised security and public order, or have seriously breached it are excluded from this measure.

## **Practice of Dealing with Asylum seekers from Somalia 2001 - 2005**

De manière générale, l'ODM procède à un examen individuel en ce qui concerne les demandes d'asile déposées par les requérants provenant de la Somalie.

Les mineurs accompagnés et non accompagnés, les femmes, les couples et les familles se voient accorder l'admission provisoire pour inexigibilité du renvoi.



Les hommes seuls majeurs qui n'ont pas vécu au nord de la Somalie ou qui ne font pas partie d'un clan résidant au nord de la Somalie sont également admis provisoirement en Suisse.

**Unofficial translation**

In general, the Office examines cases individually in regard to asylum claims made by applicants from Somalia.

Accompanied and unaccompanied minors who have not lived in the northern part of Somalia are granted temporary admission in Switzerland.

Single major adult men who have not lived in the northern part of Somalia or who do not belong to a clan residing in the North of Somalia are also admitted on a temporary basis.

## United Kingdom

### Legal/procedural framework

1. In the following specific situations, in the period 2001-2005, how has your country dealt with asylum seekers from:

- a – Afghanistan
- b – the Democratic Republic of Congo
- c – Iraq
- d – Somalia

Since 7 October 2002, the UK has not had policies under which every person of a given nationality is treated in the same way. Rather, each case has been considered on its individual facts. We have granted or refused asylum as appropriate, and in cases where the claimant qualified for permission to stay in the UK on human rights grounds we have granted leave to remain under published policies. These policies relate to general issues (such as whether or not a person should be allowed to stay under Article 8 ECHR) and are not country-specific. We will also consider whether compelling compassionate circumstances exist outside these policies and will allow claimants to stay in those (very few) cases in which we find that they do.

Prior to 7 October 2002 the UK did have policies which applied in general to applicants from a particular country and resulted in Exceptional Leave to Remain (ELR) being generally granted to all individuals from a particular country. ELR was given for a fixed period, then renewed or not as appropriate.

With regard to the countries you ask about:

Afghanistan- January 1995 – 17 April 2002: Four years ELR was generally granted to bona-fide Afghans who were refused asylum. 18 April 2002 – 10 July 2002: The period of ELR granted to Afghan nationals was reduced to 12 months. As from 11 July 2002 the policy of granting ELR to Afghan nationals came to an end and all cases were considered on their individual merits.

Somalia- Until 4 July 2001 Bona-fide Somali nationals who were unsuccessful in their asylum application were granted 4 years ELR.

Iraq-no general policy from 2001 to 2005

DRC-no general policy from 2001 to 2005.

2. In your legal system, which kind of protection comes closest to the Dutch system of categorized protection as described above?

We have no equivalent or near equivalent to the Dutch system. Each case is considered on its individual merits. Those granted asylum under the Refugee Convention are permitted to stay in the UK for 5 years in the first instance, with the possibility of permanent settlement thereafter. Those who can show that they would face in the country of return a serious risk to life or person arising from:

- the death penalty
- unlawful killing
- torture or inhuman or degrading treatment or punishment arising from the deliberate infliction of ill treatment

are granted humanitarian protection with permission to stay in the UK on virtually the same terms as refugees. Those who qualify to remain on other human rights grounds are allowed to stay for 3 years in the first instance, with the possibility of another 3 years thereafter and finally permanent settlement.

3. What kind of non-individual protection or group based protection does your legal system have besides the EC Temporary and Subsidiary Protection status (deriving from the EC 'Temporary protection' Directive 2001/55 and the EC 'Qualification' Directive 2004/83)?

None.

4. What is the legal basis for such a policy? Does this basis have an obligatory or facultative character? Please mention any relevant international, European or national legal instruments.

There is no such non-individual or group based policy.

5. On the basis of what criteria is it decided whether or not such non-individual protection or group based protection is applied to certain groups of asylum seekers? Please compare the criteria (indicators) with those used in the Dutch system (see introduction). More particularly, do you take into account the policies of other European states and if so, what role do those policies play?

We have no such policies.

6. a – What type of procedure is provided for (hearing/interview/written submissions)?  
b – At what stage within your procedure would the granting of non-individual protection or group based protection take place?  
c – Is there an appeal/review process?

There is no policy and therefore no procedure for its implementation.

7. According to Article 15c of the EC ‘Qualification’ Directive, there is a right to subsidiary protection in a case of a ‘serious and individual threat to a civilian’s live or person by reason of indiscriminate violence in situations of international or internal armed conflicts’.

a – How does your administration interpret this provision?

We have not yet formally implemented this provision.

b – How is or will this provision be implemented in your legal system?

That is yet to be decided.

c – Does Article 15c of the Directive require the introduction/continuation of a categorized protection policy?

Article 15c refers to an “individual threat”, so it will still be necessary for a particular individual to show that they are at risk. Of course, in a case where the evidence shows that there is a general risk to all members of the population in a particular country, the difference between our policy and a policy of “categorized protection” may be virtually impossible to detect in practice. Nevertheless, the principle under our system remains that each case is considered on its merits.

### **Effects of the policy**

We have no such policy.

### **Internal Protection Alternative**

1. Does the existence of a protection alternative (safe zone) in the country of origin constitute a contra-indication or a reason for not granting (categorized) protection to a group of asylum seekers?

An internal relocation alternative that would be reasonable to expect an individual claimant to take up would constitute a reason for not granting protection. It would be extremely difficult to judge what would be reasonable in group terms. An alternative that would be reasonable for one individual within the group might not be reasonable for another. Hence the importance of looking at cases on an individual basis.

2. Are the requirements which must be met for the application of the internal flight alternative (e.g. accessibility of services, minimum standard of living, etc.) also be met for the application of an internal protection alternative to a person who would otherwise qualify for non-individual/group protection.

No one in the UK qualifies for non-individual/group protection.

3. Which requirements must be met with regard to this protection alternative (family ties, availability of food and/or medicine, no humanitarian emergency for displaced persons, possibility to earn a livelihood)?

Each individual case is considered on its individual merits. People are individuals and their needs differ.

4. On the basis of which information is the determination of the existence of a protection alternative made?

The UK has an independent Country of Origin Information Service, which gathers information from a wide variety of sources. Its reports on the main asylum-seeker producing countries are published every 6 months. A Country-Specific Asylum Policy Team produces policy guidance notices in the light of the information contained in those reports. Determinations are made on the basis of the circumstances in each individual case, bearing in mind the policy and the country information.

5. Does an internal protection alternative play a role

- with regard to the decision whether a non-individual/group-based protection regime is established?

- when it comes to applying the protection regime to asylum seekers belonging to the groups concerned?

We do not run group-based protection regimes, so the possibility of internal relocation only plays a role in the consideration of the individual case.

## Annex II

### Letters of Introduction Forwarded to the Participating States and the European Commission



Vienna, 24, October, 2005

RE: Study on categorized protection

Dear colleagues,

The International Centre for Migration Policy Development (ICMPD) has been tasked with carrying out a study on behalf of the Dutch Ministry of Justice - Advisory Committee on Aliens Affairs (ACVZ), on the subject of categorized protection. The study comprises of a questionnaire addressed to 10 European countries, and targeting four refugee producing states.

We understand that some of you may have already been approached by the ACVZ a few weeks ago on the same issue. We wish to carry out the same exercise, but with a more detailed questionnaire.

First, we wish to introduce you to the concept of categorized protection, as defined and applied by the Netherlands Ministry of Justice.

#### **The issue**

In asylum cases, exceptional circumstances in the asylum seeker country of origin (or part of it) may be considered: violence caused by (civil) war, clan wars, massive human rights violations, violations of humanitarian law, random and unpredictable violence against civilians resulting in a deterioration of the general security- and human rights

situation. This causes such a particular danger to a group of the population that the mere fact of belonging to that group is considered sufficient ground for granting a form of protection.

This 'scenario' appears to be covered by the recent EC 'Qualification' Directive 2004/83, in which the issue of 'subsidiary protection' has been duly dealt with. However, it may occur that an asylum seeker does not qualify for subsidiary protection because s/he does not risk serious harm as defined in the Directive, while the situation in the country of origin is considered too volatile to assume that return would be without risk. In such a case, it may be warranted to grant protection to persons coming from a particular country of origin even though they cannot qualify as refugees or as persons meriting subsidiary protection.

### **The Dutch approach:**

Anyone who fulfils one of the grounds enumerated in Article 29 par.1 of the Dutch Aliens Act 2000 is granted asylum. In addition to the grounds of a) Article 1 of the Geneva Convention, b) the risk of being subjected to torture, or to inhuman or degrading treatment or punishment (Article 3 ECHR, Article 3 CAT, Article 7 ICCPR), or c) the existence of compelling grounds of a humanitarian nature, another ground d) exists: return to the country of origin would be particularly harsh in view of the prevailing general security and human rights situation. This ground for 'collective' protection is referred to as '*categorized protection*'.

Whenever an asylum seeker does not fulfil the grounds for asylum of the Geneva Convention, refoulement, or humanitarian nature, the categorized protection offers another option. Dutch asylum policy allows for such a categorized protection (usually temporary) to be offered to asylum seekers from countries where the overall security and human rights situation justifies such protection. The categorized protection regime is aimed at all persons from a particular country of origin (or part of that country) or at a specifically designated group of persons (e.g. Tutsis from the Democratic Republic of the Congo or Sudanese from South-Sudan).

Whether a regime of categorized protection is to be applied for a particular country or region is left to the discretionary power of the Dutch Minister on Aliens Affairs and Integration. The decision of the Minister will be based on three so-called 'indicators': 1) the nature of the violence in the country of origin, in particular the gravity of the violations of human rights and humanitarian law, the extent of arbitrariness, the extent to which the violence does occur and how widespread (in geographical terms) the violence is; 2) the activities of international organisations in respect to the country of origin, if and in as far as these are an indicator of the position of the international community regarding the situation in the country of origin; 3) the policies of other EU member states.

When the conflict ceases and the situation allows for return to the country of origin, the categorized protection regime also ceases (unless the beneficiary has been granted a permanent residence permit) and the beneficiary must return.

## Questionnaire

Against this background, we would like to send you a questionnaire in the next few days regarding this form of categorized protection, whether it exists as such, or that you apply a similar concept when processing and assessing safety of returns.

ICMPD would be grateful if you could identify focal point(s) to whom we could direct this questionnaire. We aim to complete the study before the end of the year. We will be contacting you again in the coming days in order to follow up with this request.

We would be grateful if your answers could be collected by Friday, 2nd December, 2005.

Once finalised and approved by the Dutch Ministry of Justice, we will be happy to share the results of this study with you.

Should you need additional information, do not hesitate to contact us.

Sincerely,

Jean Lanoue  
ICMPD  
Acting Director Information Services  
[Jean.lanoue@icmpd.org](mailto:Jean.lanoue@icmpd.org)  
+43 1 504 4677 22



Vienne, le 24 octobre 2005

Sujet: Étude sur la protection par catégorie

Chers collègues,

Le Centre International pour le Développement des Politiques Migratoires (ICMPD) a été mandaté par la Commission Consultative pour l'Immigration (ACVZ) du Ministère de la Justice des Pays-Bas afin de mener une recherche sur la 'protection par catégorie'. Cette recherche consiste en un questionnaire adressé à 10 pays européens, et ciblant quatre pays producteurs de réfugiés.

Nous comprenons que certains d'entre vous ont déjà été approchés à ce sujet par l'ACVZ il y a quelques semaines. Nous désirions approfondir cette recherche à l'aide d'un questionnaire plus détaillé.

Tout d'abord, nous désirons vous présenter le concept de protection par catégorie tel que défini et appliqué par le Ministère de la Justice des Pays-Bas.

**La problématique**

Lors du traitement des demandes d'asile, des circonstances exceptionnelles dans le pays d'origine du demandeur (ou une partie du pays) peuvent être prises en ligne de compte: la violence causée par une guerre (civile), des guerres de clan; des violations à grande échelles des droits de la personne; des violations du droit humanitaire; des actes de violence aléatoires et imprévisibles envers des civils résultant de la détérioration de l'état de sécurité générale et de la situation des droits de la personne. Ceci a pour conséquence de produire un danger spécifique pour un groupe de la population, faisant en sorte que la seule appartenance à ce groupe peut être une raison suffisante d'accorder une certaine forme de protection.

Un tel scénario semble envisagé par la récente directive de la Commission Européenne dite de 'qualification' (Directive 2004/83), par laquelle le cas de la 'protection

subsidaire' a été abordé. Cependant, il peut arriver qu'un demandeur d'asile ne rencontre pas les critères de la protection subsidiaire parce qu'il n'est pas exposé à un danger sérieux tel que défini dans la Directive, bien que la situation dans le pays d'origine puisse être considérée comme trop volatile pour supposer qu'un retour puisse se faire sans risque. Dans de tels cas, il pourrait être approprié d'accorder une certaine forme de protection aux personnes provenant d'un certain pays d'origine même si elles ne rencontrent pas les critères pour être reconnues réfugié ou se voir octroyer une protection subsidiaire.

### **L'approche néerlandaise**

Quiconque remplit un des critères énuméré à l'Article 29 par. 1 de la Loi relative aux étrangers des Pays-Bas 2000 se voit accorder le statut de réfugié. En plus des motifs de a) l'Article 1 de la Convention de Genève, b) la possibilité d'être soumis à la torture, ou à des traitements ou une punition inhumains ou dégradants (Article 3 CEDH, Article 3 CAT, Article 7 ICCPR), ou c) l'existence de motifs sérieux d'une nature humanitaire, une autre raison d) prévaut: le retour dans le pays d'origine serait particulièrement sévère eu égard aux conditions générales de sécurité et à la situation des droits de la personne. Ce motif pour l'octroi d'une protection 'collective' est désigné *protection par catégorie*.

Lorsqu'un demandeur d'asile ne remplit pas les critères énoncés soit dans la Convention de Genève, soit quant à la protection contre le refoulement, soit ceux de nature humanitaire, la protection par catégorie permet une autre option. La politique d'asile néerlandaise permet qu'une telle protection par catégorie (habituellement de nature temporaire) soit conférée aux demandeurs d'asile provenant de pays où la situation générale quant à la sécurité et aux droits de la personne justifie l'octroi de cette protection. Ce régime de protection par catégorie vise toute personne provenant d'un pays d'origine (ou d'une région de ce pays) ou appartenant à un groupe particulier de personnes (par exemple les Tutsis de la République Démocratique du Congo ou les Soudanais du Soudan du Sud).

L'application du régime de protection par catégorie pour un pays ou une région en particulier est laissée à la discrétion du Ministre néerlandais des Affaires des Étrangers et de l'Intégration. La décision du Ministre sera fondée sur trois soi-disant 'indicateurs': 1) la nature de la violence dans le pays d'origine, particulièrement en ce qui concerne la gravité des violations des droits de la personne et du droit humanitaire, le degré du caractère arbitraire des violences, la fréquence avec laquelle les violences surviennent et leur étendue (en terme géographique); 2) les activités des organisations internationales dans le pays d'origine, et, dans la mesure où il puisse s'agir d'un indicateur, la prise de position de la communauté internationale en ce qui a trait à la situation dans ce pays d'origine; 3) les politiques des autres états membres de l'UE.

Lorsque le conflit cesse et que la situation permet de retourner dans le pays, le régime de protection par catégorie cesse aussi (à moins que le bénéficiaire se soit vu octroyer, entre-temps, un permis de résidence) et le bénéficiaire doit retourner.

## Questionnaire

Dans ce contexte, nous désirons vous faire parvenir un questionnaire dans les jours qui suivent ayant trait à cette forme de protection par catégorie, selon qu'elle existe en tant que telle, ou que vous appliquiez un concept équivalent lorsque vous traiter et considérer la sécurité d'éventuels retours.

ICMPD vous serait reconnaissant d'identifier un correspondant à qui nous pourrions adresser ce questionnaire. Nous devons compléter cette recherche d'ici la fin de l'année. À ces fins, nous souhaiterions terminer la collecte des information au plus tard vendredi le 2 décembre 2005. Nous vous contacterons sous peu afin de donner suite à cette lettre.

Une fois terminée et approuvée par le Ministère de la Justice des Pays-Bas, il nous fera plaisir de vous faire parvenir les résultats de la recherche.

N'hésitez pas à nous contacter si vous désirez des informations additionnelles.

Veuillez agréer, Madame, Monsieur, l'expression de mes meilleurs sentiments.

Jean Lanoue  
ICMPD  
Acting Director Information Services  
[Jean.lanoue@icmpd.org](mailto:Jean.lanoue@icmpd.org)  
+43 1 504 4677 22

## Annex III

### Excerpts of Answers from preliminary ACVZ Questionnaire

#### Germany

Prof. Dr. Kay Hailbronner (Odysseus Network)

In reply to your search for information concerning "categorical protection" the following can be said with regard to the German law: under part V of the new Immigration Law (*Aufenthaltsgesetz* as part of the *Zuwanderungsgesetz*), section 24 provides for a humanitarian residence permit on the basis of a political decision of the supreme *Länder* authorities. Article 23 of the *Aufenthaltsgesetz* provides that the supreme Land authority may order a residence permit to be granted to foreigners from specific states or to certain groups of foreigners defined by other means in accordance with international law on humanitarian ground or in order to uphold the political interests of the Federal Republic of Germany.

Section 23 enables the government of the *Länder* to grant a residence permit particularly for those groups that will not qualify as refugees or persons having an individual right to subsidiary protection but can nevertheless not be deported on humanitarian reasons. A similar provision has been in force previously. However, there have always been political difficulties between the governments of the *Länder* to agree on a common proceeding. The order by a *Länder* government needs, according to Section 23 in order to ensure a nation-wide uniform approach, the approval of the Federal Ministry of the Interior. It is discussed within the regular meetings of the interior ministries, but has frequently not been able to function effectively due to political divergences between the *Länder*.

The provision of Section 23 provides in principle for the issuance of a residence permit. However, the particular rights and conditions of individual persons receiving protection under this provision may be provided for in the political decision. In particular, Section 23 provides that the rules on a temporary residence permit in implementation of the Directive 2001/55 may apply also in such cases.

The political and public opinions on this policy or practice have been very divergent. While human rights organizations have always argued that the provision is not used sufficiently in order to meet the demands of persons who cannot be deported for humanitarian reasons, some interior ministries have responded that an extensive use of the provision will increase the difficulties to enforce a strict and clear return policy.

Chapter V contains another provision which enables the authorities to grant a residence permit on humanitarian reasons in individual cases even if the conditions for subsidiary protection or persecution under the Geneva Convention are not fulfilled. Under Section 25 paragraph 4 a residence permit can be granted for a temporary stay of his/her presence on the federal territory is necessary on urgent humanitarian or personal grounds or due to

substantial public interests. Under Section 25 paragraph 5 a foreigner who is subject to a final deportation order may be granted a residence permit if his/her departure is impossible in fact or in law, provided that the foreigner is not responsible for the obstacles to departure.

The Qualification Directive 2004/83 is considered as having been implemented largely by these provisions. For that reason the unofficial (secret) draft of a second bill to amend the *Aufenthaltsgesetz*, which is presently under consideration in the Federal Ministry of Interior, does not provide for substantial changes of the relevant provisions of Chapter V of the *Aufenthaltsgesetz*.

## **Germany**

Heiko Hecht (European Migration Network contact, via Manfred Kohlmeier, BAFL)

1) In Germany we also have legal obstacles to deportation similar to 'categorical protection'

a) Beside the examination of asylum reasons according to Article 16a *Grundgesetz* (constitution) we investigate the conditions of international protection on account of organized threat according to § 60(1) *Aufenthaltsgesetz* (Residence Act) corresponding Article 1 Geneva Convention. Also examined is the prohibition of deportation because of the concrete danger being subjected to torture (§60(2) *Aufenthaltsgesetz*) or the danger of death penalty applies (§60(3) *Aufenthaltsgesetz*) or a substantial concrete danger to life, limb or liberty of the foreigner applies (§60(7) *Aufenthaltsgesetz*). Beside of this we have a temporary suspension of deportation (§60a(1) *Aufenthaltsgesetz*) comparable to your "categorical protection". It is applied for reasons of international law or on humanitarian grounds, if due to the security situation in this state the population or the segment of the population to which the foreigner belongs is exposed to danger. The suspension of deportation is ordered by a supreme Land authority, in the responsibility of the individual *Bundesländer* (federal states), only if the suspension takes longer than half a year the Federal Minister of the Interior is involved in the suspension decision.

b) The obstacles to deportation because of the danger of torture, death penalty or a concrete danger to life, limb or liberty were not registered statistically until 1999. The figures are: 1999: 1,5%; 2000: 1,5%; 2001: 3,2%; 2002: 1,2%; 2003: 1,7%, the first half-year of 2004: 1,8% of the cases. Because the temporary suspension of deportation is ordered by the supreme Land authorities, these cases do not figure specifically. For example we had suspensions for Roma from Kosovo or for Afghans; but no further statistics.

c) If the deportation is prohibited because of specific persecution (§60(2),(3),(7) *Aufenthaltsgesetz*) the foreigner receives a residence permit. In the case of international law or humanitarian grounds the supreme Land authority in a discretionary decision may

order the temporary suspension of deportation, but this is no real residence title to legalize the residence, only a confirmation of the temporary suspension of the deportation.

d) Foreigners with residence permits as well as those with a temporary suspension of deportation receive benefits on account of the Welfare Law for asylum seekers. Benefits are provided both in kind and as financial contributions. The needs of food, heating, clothing, health and body care products as well as household utensils are granted. The provision of medical care service is provided for the treatment of acute illnesses and states of pain. Health insurance certificates are issued by the Social Welfare Office on demand. Children are offered access to the general system of education when staying more than three months in Germany, classes are attended at public schools, sometimes preparatory classes are offered for the children of aliens. In respect of job opportunities the residence permit includes the right to work, until 2004 only with the agreement of the Federal Job Agency. The foreigners with temporary suspension of deportation are not allowed to work, but staying longer than 1 year in Germany with the confirmation of the Federal Job Agency they will get possibilities to work.

e) During the last years the Immigration Act has been widely discussed. Especially the problem with the temporary suspension of deportation demanded an answer. But after an intense public and political discussion the actual regulation has been found. The main reason is that it is not possible to decide immediately about the status of an asylum seeker, if he gets a residence title or he will be deported. Once the Immigration Act (including the *Aufenthaltsgesetz*) came into effect (01.01.2005), the public discussion ceased, also in the actual election campaign it doesn't play a role.

## **Germany**

Ulrike Bender, Bundesministerium des Innern, Referat M I 3

In Germany a policy and practice comparable to the Dutch approach exists: according to § 60a of the Residence Act the supreme Land authority may order a temporary suspension of deportation of foreigners from specific states or of categories of foreigners defined by any other means to specific states for a maximum of six months (so called "Duldung").

A temporary suspension of deportation is not a residence permit; it does not remove the foreigner's obligation to leave the country, but merely postpones its enforcement. Due to the temporary nature of a "Duldung", in principle no subsequent immigration of dependants will be allowed. Foreigners having the status of a "Duldung" are usually not entitled to work.

The Immigration Act (Article 1 of which is the Residence Act) intended to end the practice of issuing successive suspensions of deportation: if the period of a "Duldung" exceeds six months the supreme Land authority may order that a residence permit is granted to the foreigners belonging to the defined group, § 23 *Aufenthaltsgesetz*. This residence permit allows for granting a residence permit to the spouse and minor children only on restricted grounds, eg. reasons of international law, on humanitarian grounds or in order to safeguard political interests.

In any case, a residence permit may be issued after 18 months at the latest, as long as the foreigner is prevented from leaving the country through no fault of his or her own, and as long as the obstacles preventing deportation cannot be expected to disappear. Fault on the part of the foreigner consists in particular of furnishing false information, deceiving the authorities with regard to his or her identity or nationality or failing to meet reasonable demands to eliminate the obstacles to departure.

As set out before the power to order a temporary suspension of deportation does not rest with the federal state or the Ministry of Interior but with the supreme Land authority. As set down in Article 83 of the Basic Law, the German states (Länder) are solely responsible for carrying out the law concerning foreigners. The local foreigners authority, as a state government agency, is responsible for deciding on residence law issues in accordance with the law. In doing so, the foreigners authority is subject only to direction by its supervising state authority.

In practice, the decision regarding the granting of a residence permit according to § 23 *Aufenthaltsgesetz* requires that the majority of the German states agrees to this decision. The Länder meet on a regular basis to decide on issues concerning all (so called "Innenministerkonferenz"). § 23 *Aufenthaltsgesetz* also requires that the German Federal Ministry of Interior agrees to the measure.

The services provided to foreigners who have been granted a temporary suspension of deportation is regulated by the law for asylum seekers and persons applying for recognition as a refugee according to the Geneva Convention ("Asylbewerberleistungsgesetz").

In contrast to the scenario described in the Dutch paper, the use of temporary suspensions of deportations and of issuing residence permits after six months have been used primarily for groups of foreigners who are identified by certain characteristics rather than by a particular country of origin or belonging to a specifically designated group. For example measures have been taken with respect to traumatised foreigners coming from Bosnia-Herzegovina, foreigners from Kosovo who have come to Germany before July 1993 or in general families who are factually integrated in Germany. Regarding measures with respect to certain countries of origin the Länder decided in the past to grant residence permits to foreigners coming from Afghanistan and from the former Republic of Yugoslavia.

Experience during the last ten years has shown that in general public opinion welcomes and supports the decisions by the Länder, probably also due to the restricted use of these measures.

## **Ireland**

Emma Quin, (European Migration Network contact)

[Emma.Quinn@esri.ie](mailto:Emma.Quinn@esri.ie)

At the moment we do not have a subsidiary protection regime. We do have a system whereby failed asylum seekers may apply for leave to remain based on various grounds, including humanitarian grounds. There are of course some cases where applicants qualify neither for refugee status, nor for any leave to remain status, but who cannot be repatriated due to the impossibility of returning them to certain parts of the world. At present, such applicants remain without any legal status. This scenario, among many others, is under consideration in the context of the Immigration and Residence Bill.

## **Sweden**

Krister Isaksson, (European Migration Network contact)

[krister.isaksson@migrationsverket.se](mailto:krister.isaksson@migrationsverket.se)

In the Swedish legislation there are no explicit grounds for what could be called "collective protection". However in the preparation of the legislation a committee (socilförsäkringsutskottet) stated that if the political situation was so volatile and insecure that it would be excessively to send an asylum seeker back to his country of origin then he/she could be granted a residence permit. The formal grounds are humanitarian (political-humanitarian).

The legal practise for a special situation or a special region is usually established by a guiding decision of the appeal instance.

The residence permit could either be permanent or temporary. Examples of application of the practise are positive decisions for Iraqis during the later years of the Saddam regime and more recently temporary permits for Somalis.

## **Sweden** Ministry for Foreign Affairs

1. Does a comparable (categorical protection) policy or practice exist in Sweden?

Yes, the ground mentioned exists in the Swedish asylum and protection regime, although it is not categorised exactly in the same manner as the Dutch.



a) What is its legal nature?

The current Swedish asylum and protection regime

In Sweden asylum is granted to any person who fulfils the conditions enumerated in chapter 3, section 2 of the Swedish Aliens' Act (Article 1 of the Geneva Convention). In addition, a residence permit is granted to any alien in need of protection otherwise [subsidiary protection], as enumerated in chapter 3, section 3, i.e. to an alien who has left his country of nationality because he:

1. Has a well-founded fear of being sentenced to death or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment,
2. Due to an external or internal armed conflict he/she needs protection or, on account of an environmental disaster, he/she cannot return to his country of origin.
3. Because of his/her sex or sexual preference, he/she has a well-grounded fear of persecution.

Besides, a residence permit may be granted to an alien who has strong humanitarian grounds.

The circumstances that may justify a residence permit on humanitarian grounds are not mentioned in the Act. However, they are mentioned in the *travaux préparatoires*, which are, in an international comparison, important sources of Swedish law, and have been developed in practice. When examining the aforementioned circumstances, the overall situation of the applicant should be taken into account. That means that several factors altogether may justify a residence permit, even though each of them separately is not strong enough. Such factors or circumstances fall under two categories, where the first one contains individual related factors and the second contains country related factors. The individual related factors are for example children's vulnerability, grave illness, risk of suicide, adaptation to the Swedish society, humanitarian grounds concerning a relative in Sweden. Examples from the category of country related factors are hard conditions in the applicant's native country, barriers to return, political-humanitarian grounds, and relatives in Sweden in combination with a difficult humanitarian situation in the applicant's native country.

In practice, residence permits on individual related factors have been granted partially with reference to the general security and human rights situation in the applicant's native country. In 1997 the government abandoned the broad principle of political humanitarian grounds. The ambition was to create a more narrow definition of humanitarian grounds, related to individual factors such as health. Instead, as mentioned above, chapter 3,

section 3 of the Swedish Aliens' Act was introduced. In practice, however, residence permits can still be granted on political-humanitarian grounds.

#### The new Swedish asylum and protection regime

A new Aliens' Act will come into force on March 31 2006. In the new Act, asylum is granted to any person who fulfils the conditions enumerated in chapter 4, section 1 (Article 1 of the Geneva Convention). In addition, a residence permit is granted to any alien in need of protection otherwise [subsidiary protection], as enumerated in chapter 4, section 2, i.e. to an alien who has left his country of nationality because he/she

1. Has a well-founded fear of being sentenced to death or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment,
2. Due to an external or internal armed conflict he/she needs protection or, because of severe antagonisms he/she has a well-founded fear of being exposed to serious abuse,
3. On account of an environmental disaster, he/she cannot return to his country of origin,
4. Because of his/her sex or sexual preference, he/she has a well-grounded fear of persecution.

Besides, according to chapter 5, section 6, a residence permit may be granted to an alien if, with respect to the overall situation of the alien, there are such particularly distressing circumstances that he or she should be allowed to stay in Sweden. The judgement shall in particular take into consideration the alien's state of health, adaptation to Sweden and the situation in the native country.

Thus, aliens belonging to the category that you mention may be granted residence permits with reference to "persons in need of protection otherwise", point 2, or in some cases with reference to "particularly distressing circumstances".

#### b) What kind of results is yielded during the last ten years?

Thousands of asylum seekers, e.g. people from Bosnia, Iraq, Somalia and Afghanistan, have been granted residence permits with reference to that ground during the last decade.

#### c) In case of granting a residence permit, what kind of a residence permit?

As a main rule, a person granted a residence permit in Sweden is given a permanent permit. Alternatively, under certain circumstances, Sweden may grant a temporary, fixed-term permit, e.g. when there are evident barriers of return, as was lately the case of Somalia.

d) What kind of services are being provided? (health, education, access to the labour market)

Those who have been granted residence permits – be they permanent or temporary – enjoy the same social rights and services as other residents.

e) What are the political and public opinions at large on this policy or practice?

At present, granting asylum seekers residence permits on these grounds encounters no political opposition, at least not in the Parliament. On the contrary, several political parties advocate a more generous asylum policy. Public opinion – as it appears in the media – seems to be in favour of it as well. However, it is always hard to estimate the presence of a possible “silent opinion”.