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from : Asylum Working Party  
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No. Cion prop. : 13620/01 ASILE 52 - COM(2001) 510 final

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Subject : Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection

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**I**

At its meeting on 8 April 2002, the Asylum Working Party started examining the above proposal.

Delegations will find in section II below the text of Articles 1 to 12, with delegations' comments in the footnotes.

## II

### CHAPTER I General provisions

#### Article 1 Subject matter

The purpose of this Directive is to lay down minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection.

#### Article 2 Definitions

For the purposes of this Directive:<sup>1</sup>

- (a) "International protection" means refugee status and subsidiary protection status;<sup>2</sup>
- (b) "Geneva Convention" means the Convention relating to the status of refugees done at Geneva on 28th July 1951, as supplemented by the New York Protocol of 31 January 1967;
- (c) "Refugee" means a third country national or a stateless person who fulfils the requirements laid down by Article 1(A) of the Geneva Convention<sup>3</sup> and set out in Chapters II-III of this Directive;<sup>4</sup>

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<sup>1</sup> **E** : include other definitions, e.g. of "non-State actors".  
**S** : definitions should be aligned with those contained in other Community instruments regarding asylum and other forms of international protection.

<sup>2</sup> **E and UK**: define the content of the expression "international protection".  
**E** : include a reference to the prohibition of expulsion or return ("non-refoulement" principle, cf. Article 33 of the Geneva Convention).

<sup>3</sup> **D** : refer also to Article 33 of the Geneva Convention ("non-refoulement" principle).

<sup>4</sup> **D** : avoid cross-references to the text of the Directive. "True" definitions must be included.

- (d) "Refugee status" means the status granted by a Member State to a person who is a refugee and is admitted as such to the territory of that Member State and/or permitted to remain and reside there;
- (e) "Person eligible for subsidiary protection"<sup>1</sup> is a person who does not qualify for refugee status but otherwise satisfies the rules regarding international protection set out in Chapters II and IV of this Directive;<sup>2</sup>
- (f) "Subsidiary protection status" means the status granted by a Member State to a third country national or a stateless person who is a person eligible for subsidiary protection and is admitted as such to the territory of that Member State and/or permitted to remain and reside there;<sup>3</sup>
- (g) "Application for international protection" means a request by a third country national or a stateless person for protection from a Member State, which can be understood to be on the grounds that the applicant is either a refugee or a person eligible for subsidiary protection. Any application for international protection is presumed to be an application for asylum save where the applicant explicitly requests another kind of protection that can be applied for separately;<sup>4</sup>
- (h) "Application for asylum" means a request by a third country national or a stateless person for international protection from a Member State, which can be understood to be on the grounds that the applicant is a refugee within the meaning of Article 1(A) of the Geneva Convention;

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<sup>1</sup> **P** : say "beneficiary of subsidiary protection" instead of "person eligible for subsidiary protection".

<sup>2</sup> **D, E and F** : avoid cross-references to the text of the Directive. "True" definitions must be included.

<sup>3</sup> **D and P** : this definition is not necessary, since the subsidiary protection status will be developed in the text of the present Directive.

<sup>4</sup> **D, F, NL and UK** : definitions under g), h) and i) are not necessary.

**NL** : it would be better to have a single definition of the term "application".

**F** : avoid defining an application by referring to the answer given to it.

**A** : cannot accept the automatic nature of the provision contained in the second sentence under g).

**UK** : definitions under g), h) and i) must be coherent with those included in the proposal for a Directive on asylum procedures.

- (i) “Application for subsidiary protection” means a request by a third country national or a stateless person for international protection from a Member State which cannot be understood to be on the grounds that the applicant is a refugee within the meaning of Article 1(A) of the Geneva Convention, or follows rejection of such a request, but can be understood to be on the grounds that the applicant is a person eligible for subsidiary protection;
- (j) “Family members” means:<sup>1</sup>
- (i) the spouse of the applicant or his/her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples;
  - (ii) the children of the couple referred to in point (i) or of the applicant alone, on condition that they are unmarried and dependent and without distinction as to whether they were born in or out of wedlock or adopted;
  - (iii) other close relatives who lived together as part of the family unit at the time of leaving the country of origin, and who were wholly or mainly dependent on the applicant at that time;
- (k) “Accompanying family members” means the family members of the applicant who are present in the same Member State in relation to the application for asylum;<sup>2</sup>

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<sup>1</sup> **D, EL, E, IRL, A and UK** : align this definition with the one in the draft Directive on reception conditions for asylum applicants (Article 2(d)). To this end,

- add under (i) the words "under its law relating to alien",
- refer under (ii) to "minor" children,
- suppress subparagraph (iii).

<sup>2</sup> **EL, E and NL** : these accompanying family members should be of the same nationality as the applicant. Otherwise, the question of which is the State responsible for examining the application should be raised.

**NL** : a time-limit (e.g. three months after the application was lodged) should be introduced for family members to opt for international protection.

**A** : this definition should be coherent with those contained in the draft Directive on asylum procedures.

**FIN and S** : each family member should be subject to an individual examination regarding his qualification for obtaining protection.

- (l) "Unaccompanied minors" means third-country nationals and stateless persons below the age of eighteen, who arrive on the territory of the Member States unaccompanied by an adult responsible for them whether by law or custom, and for as long as they are not effectively taken into the care of such a person; it includes minors who are left unaccompanied after they have entered the territory of the Member States;
- (m) "Residence permit" means any permit or authorisation issued by the authorities of a Member State, in the form provided for under that State's legislation, allowing a third country national or stateless person to reside on its territory;<sup>1</sup>
- (n) "Country of origin" means the country of nationality or<sup>2</sup> former habitual residence.<sup>3</sup>

### Article 3

#### Scope

This Directive shall apply to all third country nationals and stateless persons who make an application for international protection at the border or on the territory of a Member State<sup>4</sup> and to their accompanying family members and to all those who receive such protection.

### Article 4

#### More favourable provisions

Member States may introduce or retain more favourable standards for determining who qualifies as a refugee or as a person in need of subsidiary protection, and in determining the content of international protection, in so far as those standards are compatible with this Directive.<sup>5</sup>

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<sup>1</sup> **E** : this definition should be the same as that contained in the draft Directive on family reunification.

<sup>2</sup> **F and NL** : add "for stateless persons,".

<sup>3</sup> **F** : refer to "the last country of residence" instead of "former habitual residence".

<sup>4</sup> **D, E, F and A** : the place where applicants lodge their applications is a matter for the draft Directive on asylum procedures. Anyway, the scope of the present Directive must be consistent with the one to be established in the aforementioned Directive on procedures.

<sup>5</sup> **D** : delete the words "in so far as those standards are compatible with this Directive".  
**Cion** : was opposed to this D suggestion.

## CHAPTER II

### Qualification for international protection

#### Section I

#### International protection

#### Article 5

#### The elements of international protection

1. Refugee status<sup>1</sup> shall be granted<sup>2</sup> to any third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, and to any stateless person, who, being outside the country of former habitual residence, is unable or, owing to such fear, is unwilling to return to it.
2. Without prejudice to existing constitutional obligations, subsidiary protection shall be granted<sup>3</sup> to any third country national or stateless<sup>4</sup> person who does not qualify as a refugee, according to the criteria set out in Chapter III of this Directive, or whose application for international protection was explicitly made on grounds that did not include the Geneva Convention,<sup>5</sup> and who, owing to a well-founded fear<sup>6</sup> of suffering serious and unjustified harm<sup>7</sup> as described in Article 15,<sup>8</sup> has been forced to flee or to remain outside his or her country of origin and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

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<sup>1</sup> **UK** : reservation on legal grounds concerning the term "status".

<sup>2</sup> **NL and UK** : say "where a Member State is responsible for the examination of a claim, without prejudice to Article 10, it shall ensure that refugee status is granted...".

<sup>3</sup> **NL and UK** : say "where a Member State is responsible for the examination of a claim, without prejudice to Article 15, it shall ensure that subsidiary protection is granted...".

<sup>4</sup> **E** : include the cases set out in the Convention relating to the Status of Stateless Persons of 28 September 1954.

<sup>5</sup> **F** : the possibility should exist for applicants to apply directly for subsidiary protection.

<sup>6</sup> **NL** : the concept of "well founded fear" should be defined taking into account the jurisprudence in this field.

<sup>7</sup> **D, NL, A and P** : define the expression "serious and unjustified harm", since Article 15 does not do it.

<sup>8</sup> **D and A** : avoid cross-reference to Article 15.

3. The applicant's fear of being persecuted or exposed to other serious and unjustified harm in the country of origin shall be assessed in accordance with Section 2.<sup>1</sup>

## Article 6

### Extension of international protection to the accompanying family members

1. Member States shall ensure that accompanying family members<sup>2</sup> are entitled to the same<sup>3</sup> status as the applicant for international protection.<sup>4</sup>
2. The rule laid down in paragraph 1 is not applicable where the accompanying family Member is excluded from refugee and subsidiary protection status pursuant to Chapters III and IV.<sup>5</sup>

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<sup>1</sup> **D** : this paragraph should be clarified.

<sup>2</sup> **E and F** : keep the same notion of "accompanying family members" provided for in the draft Directive on reception conditions of asylum applicants.

**D** : only those family members residing in the same Member State should be entitled to this status, but not automatically.

The Directive should be structured in two parts, one relating to refugee status and the other to subsidiary forms of protection.

**IRL and A** : the accompanying family members should have right to family reunification but not automatically to a status which depends on individual qualification.

<sup>3</sup> **E, NL and A** : the accompanying family members should have the same nationality as the applicant.

**NL** : a time-limit (e.g. 3 months after the application was lodged) should be introduced for the family members to opt for international protection. A separate status should be provided for these family members.

<sup>4</sup> **S** : add "when they do not have their own reasons to seek such a status".

<sup>5</sup> **F** : refer to Articles 14 and 17 instead of to Chapters III and IV.

## Section 2

### Assessment of the applicant's fear of being persecuted or exposed to other serious and unjustified harm

#### Article 7

##### Assessment of applications for international protection

In assessing an applicant's fear of being persecuted or exposed to other serious and unjustified harm, Member States shall take into account, as a minimum, the following matters:

- (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application;<sup>1</sup>
- (b) whether the applicant's fear of being persecuted or exposed to other serious and unjustified harm in the country of origin is objectively established, in that there is a reasonable possibility<sup>2</sup> that the applicant will be persecuted or otherwise subjected to serious harm if returned to the country of origin;<sup>3</sup>
- (c) whether the applicant has already been subject to persecution or other serious and unjustified harm or to direct threats of persecution or other serious and unjustified harm, in that this would strongly indicate a reasonable possibility<sup>4</sup> that the applicant might suffer further persecution or harm in the future;<sup>5</sup>

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<sup>1</sup> **F, NL and P** : subparagraphs (a) and (e) should be merged, since both refer to the same kind of situation.

**NL** : a clear definition of "threat" in the sense of the Geneva Convention should be inserted either here or in Article 15.

<sup>2</sup> **D, IRL and A** : say "reasonable likelihood" instead of "reasonable possibility".

<sup>3</sup> **F** : this subparagraph does not establish an evaluation criterion, but consists of a description of the assessment procedure. It should therefore be deleted.

<sup>4</sup> **D, IRL and A** : say "reasonable likelihood" instead of "reasonable possibility".

<sup>5</sup> **F** : delete the words "in that this would strongly indicate a reasonable possibility that the applicant might suffer further persecution or harm in the future".

- (d) the individual position and personal circumstances of the applicant, including factors such as background, gender,<sup>1</sup> age, health and disabilities so as to assess the seriousness of persecution or harm.<sup>2</sup> Where the form of persecution is gender-specific or child-specific,<sup>3</sup> account shall be taken of the fact that persecution, within the meaning of the Geneva Convention, may be effected through sexual violence or other gender-specific means;
- (e) whether there is credible evidence<sup>4</sup> that laws or regulations are in force and applied in practice in the country of origin which authorise or condone the persecution of the applicant or the infliction upon the applicant of other serious and unjustified harm.<sup>5</sup>

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<sup>1</sup> **NL and P** : correct the translation of the word "gender" in Dutch and Portuguese.

<sup>2</sup> **F and IRL** : delete the words : "including factors such as background, gender, age, health and disabilities so as to assess the seriousness of persecution or harm".

**IRL** : add the second subparagraph under 7(d) as drafted in the explanatory memorandum.

<sup>3</sup> **D** : reference to child-specific persecution should be clarified (i.e. children who are persecuted, not persecution based on the fact that a person is a child).

<sup>4</sup> **D** : the concept of "credible evidence" must be clarified.

<sup>5</sup> **IRL** : wanted a more general wording, on the lines of that of the explanatory memorandum.

## Article 8

### International protection needs arising sur place<sup>1</sup>

1. A well-founded fear of being persecuted or otherwise suffering serious unjustified harm may be based on events which have taken place since the applicant left his country of origin.
2. A well-founded fear of being persecuted or otherwise suffering serious unjustified harm may be based on activities which have been engaged in by the applicant since he left his country of origin, save where it is established that such activities were engaged in for the sole purpose of creating the necessary conditions for making an application for international protection.<sup>2</sup> That is not the case where the activities relied upon constitute the expression and continuation of convictions held in the country of origin, and they are related to the grounds for recognition of the need for international protection.<sup>3</sup>

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<sup>1</sup> **D and EL** : reservations; this article should refer only to refugee status and not to all forms of international protection.

**D** : a specific rule should be established for cases where the situation has changed or the nature of the applicants activities has also changed.

**E** : make an exception for cases where the applicant's activities endanger the host Member State's security.

<sup>2</sup> **UK** : if these "manufactured" activities are credible in the country of origin, this could be grounds for persecution.

<sup>3</sup> **D** : in this point, reproduce the text of Joint Position of 4 March 1996 (96/196/JHA) (O.J. L 63 of 13.3.96, p. 2) on the harmonized application of the definition of the term "refugee".

**EL** : this provision should be better drafted and clarified.

## Article 9

### Sources of harm and protection

1. Member States shall consider that the fear of being persecuted or of otherwise suffering unjustified harm is well-founded whether the threat of persecution or other serious unjustified harm emanates from:
  - (a) the State;
  - (b) parties or organisations controlling the State;<sup>1</sup>
  - (c) non-State actors where the State is unable or unwilling to provide effective protection.<sup>2</sup>
  
2. In evaluating the effectiveness of State protection where the threat of persecution or other serious unjustified harm emanates from non-State actors, Member States shall consider whether the State takes reasonable steps to prevent the persecution or infliction of harm, and whether the applicant has reasonable access to such protection. There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actions which constitute persecution or other serious and unjustified harm.<sup>3</sup> Where effective State protection is available, fear of being persecuted or otherwise suffering serious unjustified harm shall not be considered to be well founded, in which case Member States shall not recognise the need for protection.

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<sup>1</sup> **NL** : add "or a substantial part of it".

<sup>2</sup> **EL and E** : a definition of "non-State actors" should be included in the Directive.

**F** : scrutiny reservation. In principle, no protection should be offered in these cases, unless certain conditions are met (e.g. that these activities of non-State actors are tolerated or encouraged by the public authorities).

**IRL** : modify this text on the lines of paragraph 65 of the UNHCR Handbook on procedures and criteria for determining refugee status : "if they are knowingly tolerated by the authorities or if the authorities refuse, or prove unable, to offer effective protection".

<sup>3</sup> **D and NL** : delete the second sentence of this paragraph.

**IRL** : modify the text in line with the wording of the explanatory memorandum.

3. For the purpose of this Directive, “State” protection may also be provided by international organisations and stable quasi-State authorities who control a clearly defined territory of significant size and stability,<sup>1</sup> and who are able and willing to give effect to rights and to protect an individual from harm in a manner similar to an internationally recognised State.<sup>2</sup>

## Article 10

### Internal protection<sup>3</sup>

1. Once they have established that the fear of being persecuted or of otherwise suffering serious and unjustified harm is well-founded,<sup>4</sup> Member States may examine whether this fear is clearly confined<sup>5</sup> to a specific part of the territory of the country of origin and, if so, whether the applicant could reasonably be returned to another part of the country where there would be no well-founded fear of being persecuted or of otherwise suffering serious and unjustified harm.<sup>6</sup>

In carrying out this examination there shall be a strong presumption<sup>7</sup> against finding internal protection to be a viable alternative to international protection if the agent of persecution is, or is associated with the national government.<sup>8</sup>

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<sup>1</sup> **D** : the concepts of "significant size and stability" of a territory should be defined.

<sup>2</sup> **NL** : this provision should be moved to Article 10.

<sup>3</sup> **F** : scrutiny reservation linked to its reservation to Article 9.

<sup>4</sup> **L**, supported by **D, IRL, A and UK** : suppress the words "Once they have established that the fear of being persecuted or of otherwise suffering serious and unjustified harm is well-founded".

<sup>5</sup> **A** : clarify the expression "this fear is clearly confined".

<sup>6</sup> **D** : this provision should only apply in cases of subsidiary protection.

**D and NL** : in cases involving asylum procedures, more scope for return must be left to Member States.

**D** : specify that a minimum level of subsistence and health care must be possible in that part of the territory of the country of origin.

<sup>7</sup> **D, IRL and NL** : clarify the expression "strong presumption".

<sup>8</sup> **NL** : delete the words "or is associated with the national government".

2. In examining whether an applicant can be reasonably returned to another part of the country in accordance with paragraph 1, Member States shall have regard to the security, political and social circumstances prevailing in that part of the country, including respect for human rights, and to the personal circumstances of the applicant, including age, sex, health, family situation and ethnic, cultural and social links.<sup>1</sup>

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<sup>1</sup> **D, IRL, NL and A** : this list of circumstances (both personal or concerning a part of the country) is too vague and could raise interpretation problems.

**CHAPTER III**  
**Qualification for refugee status**

**Article 11**  
**The nature of persecution**

1. In the determination of whether a well-founded fear of being persecuted has been objectively established, the term persecution shall be considered to cover as a minimum any of the following situations:
  - (a) the infliction of serious and unjustified harm or discrimination<sup>1</sup> on the grounds of race, religion, nationality, political opinion or membership of a particular social group, sufficiently serious by its nature or repetition as to constitute a significant risk to the applicant's life, freedom or security<sup>2</sup> or to preclude the applicant from living in his or her country of origin;<sup>3</sup>
  - (b) legal, administrative, police and/or judicial measures when they are designed or implemented in a discriminatory manner on the grounds of race, religion, nationality, political opinion or membership of a particular social group and if they constitute a significant risk to the applicant's life, freedom or security or preclude the applicant from living in his or her country of origin;<sup>4</sup>

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<sup>1</sup> **D and A** : the concept of discrimination should be clarified and aligned with the provisions of the Geneva Convention.

<sup>2</sup> **D** : instead of "security", refer to "life, freedom and physical integrity".

<sup>3</sup> **D** : the reference to the applicant's preclusion from living in his country of origin should be either deleted or linked to the seriousness of the persecution. The relationship between this provision and Article 5(2) should be clarified.

**E and P** : modify this draft on the lines of the Joint Position of 4 March 1996 (96/196/JHA) on the harmonized application of the definition of the term "refugee".

<sup>4</sup> **D** : this subparagraph should be merged with subparagraph (a) as a list of examples clarifying its content.

- (c) prosecution or punishment for a criminal offence if, on the grounds of race, religion, nationality, political opinion or membership of a particular social group:
- (i) the applicant is either denied means of judicial redress or suffers a disproportionate or discriminatory punishment;<sup>1</sup>
  - (ii) the criminal offence for which the applicant is at risk of being prosecuted or punished, purports to criminalise the exercise of a fundamental right;
- (d) prosecution or punishment for refusal to meet a general obligation to perform military service on the grounds of race, religion, nationality, political opinion or membership of a particular social group:
- (i) if the conditions stated in paragraph (c) (i) apply;
  - (ii) in situations of war or conflict, if the person can establish that performance of military service will require his or her participation in military activities which are irreconcilable with the applicant's deeply held moral, religious or political convictions, or other valid reasons of conscience.<sup>2</sup>

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<sup>1</sup> **D** : the scope for appeals against disproportionate or discriminatory punishment should be considered.

<sup>2</sup> **D, EL, E, P and UK** : this provision should not be based on the subjective opinions or political convictions of the applicant.

**D, EL, E and P** : objective criteria should be established (E : by referring to the laws of war).

**UK** : delete this provision.

**A** : reservation concerning point (ii).

2. The following principles shall, as a minimum, govern the determination of whether a well-founded fear of being persecuted should result in the recognition of an applicant as a refugee :<sup>1</sup>
- (a) it is immaterial whether the persecution stems from the State, parties or organisations controlling the State, or non-State actors where the State is unable or unwilling to provide effective protection;<sup>2</sup>
  - (b) it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecutory action, provided that such a characteristic is attributed to him or her by the agent of persecution;<sup>3</sup>
  - (c) it is immaterial whether the applicant comes from a country in which many or all persons face the risk of generalised oppression.<sup>4</sup>

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<sup>1</sup> **EL** : scrutiny reservation on the negative form in which this provision has been drafted.

**A** : these criteria are too vague and could raise problems of interpretation.

**D and P** : the drafting of this provision should be clarified.

<sup>2</sup> **D** : this situation seems to be already covered by Article 9(1).

<sup>3</sup> **D** : this situation should be inserted in Article 12.

<sup>4</sup> **D** : reservation; the cases of civil war in the country of origin should be specified. Drafting should be similar to Joint Position of 4 March 1996 (96/196/JHA) on the harmonized application of the definition of the term "refugee".

**UK** : specify that an individual claim is always needed and that the simple fact of a civil war situation in the country of origin is not sufficient.

## Article 12

### The reasons for persecution

In determining whether a well founded fear of persecution is based on reasons of race, religion, nationality, political opinion or membership of a particular social group, the following elements shall, as a minimum, be taken in account: <sup>1</sup>

- (a) the concept of race shall include considerations of colour, descent, or membership of a particular ethnic group;
- (b) the concept of religion shall include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public,<sup>2</sup> either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;
- (c) the concept of nationality<sup>3</sup> shall not be confined to citizenship but shall include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;
- (d) the concept of social group shall include a group which may be defined in terms of certain fundamental characteristics, such as sexual orientation,<sup>4</sup> age or gender, as well as groups comprised of persons who share a common background or characteristic that is so fundamental to identity or conscience that those persons should not be forced to renounce their membership. The concept shall also include groups of individuals who are treated as "inferior" in the eyes of the law;<sup>5</sup>

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<sup>1</sup> **D, E and NL** : establish more general criteria. The ones provided for here are too specific and would raise problems of application in the future.

<sup>2</sup> **D** : the Geneva Convention protects the private practice of religion, not the public one.

<sup>3</sup> **D** : avoid defining nationality, which is a well-known concept.

<sup>4</sup> **D and NL** : avoid referring to sexual orientation as an example of a social group.

**S** : was opposed to the D and NL suggestion.

**A** : this concept of "social group" is too large.

<sup>5</sup> **E** : delete the last sentence.

- (e) the concept of political opinion shall include the holding of, or the being conceived of as holding, an opinion on a matter related to the State or its government or its policy, whether or not that opinion has been acted upon by the applicant.
-